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In further defence of privacy ...

Colin J. Bennett

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## Reply | In further defence of privacy...

**Colin J. Bennett**

University of Victoria, Canada. [cjb@uvic.ca](mailto:cjb@uvic.ca)

I would like to thank David Murakami Wood for placing my 'defence of privacy' as the centrepiece of this issue of *Surveillance & Society*. I am also extremely grateful to Professors Gilliom, Regan, boyd and Stalder for their insightful responses. I have a high regard for their work and take very seriously their considered views on these important topics. I do not have the space to engage with their various arguments in sufficient depth and detail, but their responses allow me to crystallize my views more sharply and to clarify what I am, and am not, arguing with respect to the framing of the larger response to the troubling levels of surveillance in the world.

Gilliom is correct. Our views tend to be shaped by what we study. I have spent my professional career within the policy community of regulators, advocates, officials, and corporate and governmental privacy officers. That experience has certainly influenced my perspectives and judgments. No doubt, if I had researched and written an ethnographic study of poor women in Appalachia, I too would harbour a far more sceptical view of the value of the concept and regime of privacy protection. *Overseers of the Poor* is one of the best studies on the politics of privacy that I know, and is essential reading for any student of surveillance. As of course, is Regan's book *Legislating Privacy*, on the social, collective and public values of privacy protection, ideas that have continually influenced my work, and indeed underpin much of the reasoning within my essay.

Like Regan, however, I do consider myself one of the few scholars in this field who has consistently bridged the academic world of Surveillance Studies with an active and admittedly sympathetic concern for the work of the community engaged in the broad 'governance of privacy'. That experience has led me to observe something of a 'separate tables' phenomenon. As in the restaurant in Terence Rattigan's 1955 play of the same name, the participants sit at separate tables, have different interpretations of the menu, are vaguely familiar with the conversations of the other diners, but rarely actively engage in the same conversation. Each table is somewhat protective of its methods and discourses. I believe that phenomenon is observed within the privacy community, within the Surveillance Studies community, and certainly between the two. My essay is intended as one modest attempt to improve the conversation.

Or maybe these are separate vessels. boyd seems quite content in the 'privacy ship' though concedes that it needs some much needed repair to bring it into the era of social-networking. Regan likewise wants some repair, but she would also steer it towards the collective problems of surveillance, rather than the individualized problem of privacy. Stalder would continue to man the pumps, but at the same time examine the condition of the leaking vessel. And Gilliom perhaps wants to sink it and build a completely new craft. I suppose that my point is that the privacy ship (or ships) left port a long time ago and are laden down with a variety of weaponry that is only being used by a few brave advocates, and under-resourced regulators. I just want more people to 'man the pumps' by filing complaints with organizations and regulators, promoting the use of 'privacy by design', supporting educational campaigns, engaging in the

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complex debates over laws, guidelines, codes, standards, privacy-enhancing technologies and so on—essentially using all the instruments in the ‘privacy toolbox’.

Enough of metaphors, let me engage more directly with the respondents. Gilliom’s excellent portrayal of my conceptual, realist and pragmatist defence of privacy captures my central point that privacy, as a concept and a regime, is more intellectually relevant and politically powerful than it gets credit for in the Surveillance Studies literature. But I am not contending that we should ‘turn back to the privacy regime’ as if the older formulations in the Warren and Brandeis and Westin ‘rights of control’ traditions have been correct all along. What I am saying is that a large proportion of the community of advocates and regulators have already woken up, ‘smelt the coffee’ and generally get the point about the need for broader conceptions of privacy that are sensitive to the larger social issues, and less obsessed with individual invasion and self-determination. Unlike Stalder, therefore, I see plenty of evidence at the governance level that the discourse has moved beyond privacy’s ‘individualistic core’. At a conceptual level, I would probably concede his point about the continued dominance of the liberal tradition and that ‘when people value privacy, they value personal and political self-determination’. I would only add that the liberal tradition is broad and diverse, and rests upon various ontologies of freedom, liberty, and self-determination, which can mean different things for the protection of privacy in different contexts.

Gilliom is also concerned that privacy enjoys a ‘position of intellectual and political monopoly’ that is the ‘organizing matrix for the field’. I think he is perhaps using the word *regime* in a different sense from myself, as a broader intellectual framework that frames the discourse, rather than just a set of governance arrangements; Stalder also supports this distinction. At the wider level, privacy is surely a very broad, fluid, vague, messy and dynamic paradigm that produces many discourses. I agree with boyd when she contends that messiness has its strengths. I have difficulty seeing that such a concept can produce such a hegemonic framework, however. It is also worth reinforcing the point that surveillance is a global problem that requires a concerted response. The problem gets defined in subtly different ways depending on particular historical experiences and cultural traditions. The North American conceptions of privacy do not, I would contend, barge their way into different national debates without some refinement and resistance. ‘La vie privée’ in France, ‘integritet’ in Sweden, ‘datenschutz’ in Germany, ‘privacidad’ in Spain, and so on, tend to frame the discourse in those languages and can mean subtly and contextually different things in relation to equally tricky concepts relating to society and community.

Nevertheless, I have argued that there has been an international convergence of ideas on what privacy (information privacy) means at a governance level, which has produced a common and powerful understanding about what it means for a public or private organization to process personal data responsibly. I am not contending that the privacy regime that has developed over the last thirty years can solve all the individual and collective problems associated with the capture, processing and dissemination of personally identifiable information (PII)—whatever PII is these days. There are, as Gilliom argues and I concede, certain power dynamics and dimensions that simply do not fit within this privacy framework. And I am certainly not contending that it has been broadly effective. I would just reinforce Stalder’s argument that there is no ‘clearly articulated and implementable alternative’. The regime needs to be made to work. I simply do not know what Gilliom means when he concludes, ‘we may be obliged to kill it!’

Both boyd and Stalder address social networking as an illustration of the transformation of privacy. boyd’s important ethnographic work on the activities, behaviours and attitudes of social networking users has effectively countered the contentions of those who claim that people do not care about privacy, and that we are therefore entering a new era of social transparency. Her response and her work focus on agency and context rather than structural power. While I am fascinated by evolving social attitudes towards privacy, and how they might vary across a host of social and cultural variables, as a political scientist, I am naturally more interested in structural rather than situational power and therefore in what social networking organizations are actually doing with personal information at the ‘back-end’ in Stalder’s

terms. *Facebook* and other social networking sites are manipulating the personal information of their users in order to make money. And that is where the privacy regime comes into the equation. For all Mark Zuckerberg's superficial and self-serving generalizations about evolving social attitudes towards privacy, it is indeed that regime, through European and Canadian regulators, and US privacy advocates that has forced *Facebook* to think carefully about the norms of transparency, consent, notification and so on. Of course, companies like *Facebook* and *Google* are watched; most are not. Perhaps if more of us watched more organizations and subjected them to the same rules, there might just be less surveillance in the world.

boyd misreads my argument, however, when she states that I believe that 'privacy, in its slippery state, fails to serve as an antidote to surveillance' and that 'one of the greatest weaknesses of discourse about privacy is that it's individual-centric'. Rather, my purpose was to interrogate the critique of privacy, rather than to add my voice to the chorus of voices arguing that we are drifting towards a surveillance society, and that the privacy regime is incapable of doing much about it. I do not disagree with Gilliom's broader point that there are invariably many other values at stake when personal information is captured, controlled, manipulated, disseminated, profiled etc. without the individual's knowledge or consent. I just think that privacy protection can be instrumental in promoting those other values. The difficulty, as many have noted, is that most people tend not to interpret the denial of other rights and services in privacy terms, because often that processing of personal information is invisible. But that is why we need privacy regimes to render the surveillance more transparent. Thus, when Gilliom points out that his subjects in *Overseers of the Poor* would never contemplate filing a lawsuit or complaining to Privacy International I would suggest that this is, at some level, a bit of an American problem. In every other advanced industrial state, there would be recourse through a privacy or data protection commissioner, which can and do respond to complaints from welfare recipients, and try to regulate the conditions under which welfare files may be shared.

In conclusion, if not privacy, then what? A broad politics of anti-surveillance, perhaps? I read Regan's response as contending that the social problem should be defined in terms of surveillance because it more accurately frames the breadth and complexity of the social and political challenges. But privacy frames the risk because it is the most 'robust and concise understanding of the reason we are, and should be, concerned'. I think this formulation counters Gilliom's contention that 'surveillance is not, in fact, the ontological antithesis of privacy'. That argument is also implicit in my contention that privacy was never meant to be the 'antidote to surveillance'.

I would add a further reason as to why privacy continues to resonate very powerfully, and why surveillance may not be the better way to frame the social problem. One of the features of privacy advocacy is its broad ideological base. For example, recent campaigns in the US have drawn support from the libertarian right, Christian groups as well as those from the public interest and civil liberties traditions. If one were to try to reframe the discourse in terms of a politics of 'anti-surveillance' and to situate it within broader social antagonisms and struggles, these issues would tend to become associated with a politics of the left. One can challenge an ID card, or a video-surveillance system, or a genetic database, or a health identifier, or a host of other surveillance measures, without engaging in a broader social 'struggle'. Perhaps one of the strengths of the contemporary privacy advocacy network is that resistance can, and does, spring from a multitude of ideological sources at unpredictable moments.

A myriad of under-resourced privacy advocacy organizations are attempting to challenge the spread of surveillance. In October 2009, the Public Voice Coalition of privacy advocates launched the *Madrid Privacy Declaration* at the international conference of Privacy and Data Commissioners. It has been translated into ten different languages and has been endorsed to date by over 100 organizations, and around 200 international experts, from many countries including several in the developing world. Among other things, the declaration reaffirms support for the 'global framework of fair information practices', the

data protection authorities, privacy-enhancing technologies and calls for a 'new international framework for privacy protection'. More controversially, the Declaration calls for a 'moratorium on the development or implementation of new systems of mass surveillance, including facial recognition, whole body imaging, biometric identifiers, and embedded RFID tags, subject to a full and transparent evaluation by independent authorities and democratic debate'.<sup>1</sup> Over forty official privacy and data protection agencies are receiving complaints, conducting investigations and audits, consulting with organizations, educating the public, and imposing sanctions. Increasingly they are trying to work in a concerted fashion. In 2009, for instance, ten commissioners sent a joint public letter to Google CEO, Eric Schmidt, expressing their strong concern that 'the privacy rights of the world's citizens are being forgotten as Google rolls out new technological applications'.<sup>2</sup> Some of these activities are effective; others less so. But I have difficulty seeing them as 'background noise'. Far from being a 'stultifying intellectual crutch', privacy *can* serve to engage, coalesce and resonate with many individuals and groups around the world.

The critique of privacy at conceptual and governance levels will and should continue. But that critique is diverse and sometimes contradictory, and I have tried in my essay to disentangle the various strands. At the same time, if that critique continues without reference to what regulators and advocates actually think and do in the name of privacy protection, then I fear that it will be misplaced and ultimately ineffective.

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<sup>1</sup> Madrid Privacy Declaration at: <http://thepublicvoice.org/madrid-declaration/>

<sup>2</sup> Letter from privacy commissioners to Google CEO, Eric Schmidt at: [http://www.priv.gc.ca/media/nr-c/2010/let\\_100420\\_e.cfm](http://www.priv.gc.ca/media/nr-c/2010/let_100420_e.cfm)