

DRIVEN INTO SOCIETY: PHILOSOPHIES OF SURVEILLANCE TAKE TO THE STREETS OF NEW YORK

*Amita L. Allen**

How can a society engaged in technology-aided surveillance of public spaces show due respect for privacy? Is protecting privacy in public a meaningful and important concern for 21st century government? These are distinctly contemporary questions, asked all over the developed world. Could answers lay partly in the past?

The 17th century British philosopher John Locke began Chapter VII of his famous ‘Second Treatise on Government’ with an intriguing notion of human solitude. We are not meant to live alone. Solitude, he asserts, is contrary to benevolent divine intent: “God having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.”¹ Did Locke mean to imply that humans are not designed for privacy, that the social contract can be expected to leave us exposed, transparent, accountable to the individuals and institutions of which civil society is constituted?

Perhaps we are not made for strict solitude, but nor are we made for unrestrained surveillance. Ironically, the first U.S. state court to recognise a common law right to privacy (the Georgia Supreme Court, in *Pavesich v New England Life Insurance Company* in 1905) appealed to a Lockean notion of the social contract and the laws of nature, arguing that freedom to choose seclusion from the watchful eye of society is a natural right we enter the social contract to secure. If we are to be watched and made public, it must be by our free choice that we are watched and made public.

The 18th century French philosopher Jean Jacques Rousseau’s contractarian imaginings best illuminate a central, 21st century contradiction of the West: the urgency of privacy and the necessity of surveillance.

Jean-Jacques Rousseau’s creation myth of civil society paints an antagonistic portrait of humankind’s relationship to the society into which Locke said we are driven. According to Rousseau, the original human inclination was to live mostly alone. Society and mutual dependence were the death of human happiness: “from the moment one man began to stand in need of the help of

* Deputy Dean for Academic Affairs and Henry R. Silverman Professor Law and Philosophy, University of Pennsylvania, U.S.A., <http://www.law.upenn.edu/cf/faculty/aallen/>.

¹ John Locke, *Second Treatise on Government* (1690), Chapter VII, of Political or Civil Society, <http://www.constitution.org/jl/2ndtr07.htm>.

another; and the moment it appeared advantageous to any one man to have enough provision for two, equality disappeared, property was introduced, work became indispensable, and vast forests became smiling fields, which man had to water with the sweat of his brow, and where slavery and misery we soon [germinated with] the crops.”²

In Part 1 of the *Discourse on the Origin of Inequality*, Rousseau describes man in his natural state as a solitary, unselfconscious animal, “a free being, whose heart is at ease and whose body is in health” sustained by gathering the fruits of the forest.³ Humans began as creatures of solitude in a blissful state of nature but devolved into the reluctant sociality of a civil society ruled by morality and eventually by law.

The point of privacy, so hard for many to grasp in fearful surveillance societies, emerges if we linger with Rousseau, continuing on with his evolutionary tale of human origins.

The natural solitude of man did not last. Rousseau explained in Part 2 that natural men built themselves huts to fight exposure. The convenience of living together efficiently to satisfy sexual urges and cope with environmental hardship gradually became clear to solitary man and womankind. The crowding of the earth – not the love of community – led to neighbourhoods of hut dwellers. Eventually: “in consequence of seeing each other often, they could not do without seeing each other constantly.”⁴ The community lifestyle destroyed the taste for solitude. Intimacy, language, culture and morality were born.

Yet the community lifestyle created the inner need for sanctuary, secrecy and control. Living in close proximity to one another, humans developed a propensity to compare one person to another and prefer the better ranked. They developed a propensity to care that they be ranked favourably, as lovers, procreators, singers, dancers, hunters, gatherers, and hut builders. Each man wanted to be esteemed by the others, to be compared favourably. Men and women developed self-esteem, so much so that a physical injury was experienced both as an offense to the body and as personal contempt.

Once reputation is relevant, privacy, and the capacity to conceal facts and behaviours concerning which one does not wish to be judged, become a commodity. The lack of solitude spawns the need for privacy. But the quest for privacy – for reputation, for repose from continual judgment, and esteem – can get out of hand when coupled with a desire for accumulating property

² Jean Jacques Rousseau, *Discourse on the Origin of Inequality* Parts 1 and 2 (1754, trans. by G.D.H.Cole), <http://www.constitution.org/jjr/ineq.htm>.

³ One might suppose that women and children, at least, were drawn together in a natural, harmonious companionship for life. But Rousseau imagined that mothers compassionately care for tiny infants, but leave young children to fend for themselves. If not ‘strong and robust’, they perish. Rousseau, Part 1, http://www.constitution.org/jjr/ineq_04.htm.

⁴ Rousseau, Part 2, http://www.constitution.org/jjr/ineq_04.htm.

or power over others. As the civilisation Rousseau fantasised matured, infected with *amour-propre* it “became the interest of men to appear what they really were not.” To conceal secret jealousy, ambition and competition humankind put on “the mask of benevolence”.⁵

Privacy could be an Aristotelian virtue: modesty, humility. It does not have to be a Machivellian asset, enabling manipulation, seduction, assassination and coup. But, of course, it can be. Surveillance mechanisms address the evils that privacy can facilitate. But ideal regimes of surveillance will not eliminate the legitimacy of privacy as a requirement of freedom – freedom from judgment, freedom to don masks, freedom to build reputations, freedom of the intimacy of the hut. Ideal state surveillance will understand its own risk. Plato’s fable of Gyges, the shepherd from Book II of the Republic, cautions against unaccountable secrecy and unaccountable uses of technology for surveillance as well. Gyges used his ability to see without being, to steal another’s wealth and power.

I write from a U.S. perspective and the question we must ponder is the extent to which surveillance regimes put in place in the U.S. neglect the value of privacy, whether it be the constitutional regime of the Fourth Amendment regime or the federal statutory regimes of the Electronic Communications Privacy Act.

The problem of terrorism has heightened the need for national security – for homeland security. The need for improved security has led officials at all levels of government to consider, and to implement, surveillance programs. For example, in 2002, the New York City Police Department (NYPD) created a Counterterrorism Bureau. The Bureau’s surveillance programs include a major one that has been controversial – the Lower Manhattan Security Initiative of networked surveillance. It has been called a ‘Ring of Steel’, a ‘Cloak of Surveillance’. From the NYPD’s Lower Manhattan Security Coordination Center, uniformed members of the Counterterrorism Bureau are using networked technology to protect New York’s financial district. The program originally focused on the 1.7 square mile financial sector south of Canal Street. But plans were announced in the spring of 2009 to expand the project’s increased police presence and technology-based surveillance into mid-town if funds are made available.

The NYPD Bureau and unnamed ‘stakeholders’ and private ‘partners’ are monitoring, in effect, any person, park bench, sandwich, newsstand, baby stroller and automobile they please. This ‘domain awareness’ consortium is keeping track of public life and package delivery using thousands of human-monitored closed circuit televisions, license plate readers, and unspecified ‘chemical, biological, radiological, and nuclear detectors’. The details of the program are secret, including the full range of devices that are or may be

⁵ Rousseau, Part 2, http://www.constitution.org/jjr/ineq_04.htm.

used, along with the sorts of activities counter terrorism officials deem suspicious.

Civil Libertarians and privacy advocates have raised concerns about what has been termed a 'Cloak of Surveillance' and a 'Ring of Steel'. What is the fate of privacy with the massive use of surveillance cameras and other monitoring technology in America's premier city? In response to concerns about the program, in February 2009, the NYPD issued proposed voluntary Public Security Privacy Guidelines to govern the work of the Security Coordination Center. The Guidelines were weak on genuine privacy protection restrictions, revealing that the NYPD is not about to let vocal civil libertarians rein in one of the biggest municipal data grabs in history.⁶ They were an inadequate instantiation of the 'fair information practice' ideals reflected in U.S. federal privacy statutes, in the data protection laws of Canada and the EU.⁷ There were three main areas of deficiency in the Guidelines.

First, there were inadequate notice practices and disclosure limits. The NYPD program involves the collection of vast amounts of data about individuals. The Guidelines recognised that there should be limits on disclosures of data to third parties and limits on data retention. Yet the public was afforded no right to know precisely what sort of data is being collected and stored, and with whom it is being shared.

Second, there were inadequate limits on data retention and data security. The Guidelines did not set forward principles that determine when and whether data, (including meta-data about data) will be retained, and how it will be kept secure from inessential and unauthorised access or use. There was no publicly disclosed technical security standard for retained data, even though accidental and intentional data breaches are notoriously common in government, business and health care. One breach of the NYPD system has already occurred.

Third, the Guidelines provided for inadequate mechanisms of accountability. A Deputy Commissioner on Counter Terrorism and a Deputy Commissioner for Legal Matters were assigned sole discretion to authorise more data retention. The guidelines also anticipate sharing of data, and while some data sharing is to be expected, in this case the public accountability is minimal. If the Guidelines are violated, 'appropriate' disciplinary actions will be taken. But what does that mean? Who can be punished, in what ways, and by whom? The public is asked simply to trust the police regarding these matters.

⁶ Al Baker, "Group Sues for Details on Security Downtown," *New York Times*, 9/8/2008, <http://www.nytimes.com/2008/09/09/nyregion/09steel.html>, accessed on 15 August 2009.

⁷ Cf. Canadian OPC Guidelines for the Use of Video Surveillance of Public Places by Police and Law Enforcement Authorities, March 2006, at http://www.privcom.gc.ca/information/guide/vs_060301_e.asp, accessed on 15 August 2009.

The NYPD says its closed circuit television cameras are only capturing images of people and activities in public places. No violations of what Fourth Amendment lawyers call ‘reasonable expectation of privacy’ are occurring. Few events struck greater horror in the minds and hearts of Americans than seeing the World Trade Center towers collapse. If authorities cannot engage in surveillance of public places, what can they do to thwart and deter terrorism? In light of disturbing events such as 9/11, authorities insist that surveillance of public places is necessary to thwart and deter terrorism.

The NYPD makes much of the often-asserted claim that there is no right to privacy in public places. This claim is a virtual ideology and makes the police insensitive to privacy concerns raised by some of their practices. But American scholars and the law itself suggests a more subtle reading of privacy in public places, and asserts that there can be a right to it.

In the 1960s the Supreme Court held in *Katz v. United States*⁸ that the expectation of privacy is not limited solely to the home, and may extend to at least some publicly visible and accessible areas like phone booths on city streets. The 1974 federal Privacy Act prohibits the federal government from making a record of the exercise of First Amendment rights of free speech. There are signs recent American courts and policymakers accept the notion of privacy in public.⁹ A recent federal law prohibits some forms of potentially embarrassing picture-taking, as this has become more of a problem with the creation of increasingly advanced mobile telephones.

If the NYPD is going to operate on the basis of privacy Guidelines, it needs guidelines that articulate for the police themselves and for the affected public why privacy in public places matters. The starting point could be Rousseau’s notion that pervasive surveillance opens the door to the misery of perpetual judgment. Not everything the NYPD says it is doing seriously affects privacy interests, but those interests need to be specifically understood, and intrusive policies need to be justified beyond the broad assertion that there is no expectation of privacy in public places and non-intimate activities. New York could be a model for other municipalities on how to seriously address privacy issues when observation imposes the Roussevian burdens and security seems essential.

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⁸ *Katz v. United States*, 389 U.S. 347 (1967)

⁹ See *Vermont v. Costin*, 720 A.2d 866, 168 Vt. 175, 180 (S. Ct. Vt. 1998). See also, DHS Privacy Office Public Workshop CCTV: Developing Privacy Best Practices, “Legal and Policy Perspectives Panel,” at 3-6, http://www.dhs.gov/xlibrary/assets/privacy/privacy_workshop_cctv_Transcript_Legal_and_Policy_Perspectives_Panel.pdf, accessed on 15 August 2009.

