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### Abstract

Despite recent growth in surveillance capabilities there has been little discussion regarding the ethics of surveillance. Much of the research that has been carried out has tended to lack a coherent structure or fails to address key concerns. I argue that the just war tradition should be used as an ethical framework which is applicable to surveillance, providing the questions which should be asked of any surveillance operation. In this manner, when considering whether to employ surveillance, one should take into account the reason for the surveillance, the authority of the surveillant, whether or not there has been a declaration of intent, whether surveillance is an act of last resort, what is the likelihood of success of the operation and whether surveillance is a proportionate response. Once underway, the methods of surveillance should be proportionate to the occasion and seek to target appropriate people while limiting surveillance of those deemed inappropriate. By drawing on the just war tradition, ethical questions regarding surveillance can draw on a long and considered discourse while gaining a framework which, I argue, raises all the key concerns and misses none.

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### Introduction

There has been a marked increase in the use of surveillance in democratic countries such as the UK and USA in recent years. This is due in part to the development of technology enabling surveillance to be undertaken more easily, cheaply and widely than before, and in part to the greater threat to society perceived in the wake of 9/11 and 7/7. Despite this increase there have been few attempts to develop a systematic normative ethics of surveillance. This paper sets out to do that, drawing on the just war tradition as a model. Through employing this model I will provide a framework by which the application of surveillance may be assessed and, in such cases as is necessary, limited or refined.

The papers that do tackle the need to establish an ethic of surveillance can suffer from a lack of structure or overall coherence. For example Gary Marx, in his *Ethics for the New Surveillance*, lists 29 principles for consideration (Marx 1998). Aside from the fact that this makes for an unwieldy checklist, Marx mentions the comment of a reviewer that these include a mix of first principles and empirical consequences, and that the paper lacks any formal normative argument offering justification for those principles. Marx responds that such an argument would be a Rosetta stone to philosophers working in this area.

While Marx's principles are helpful, I believe that they are captured in the principles laid out by the just war tradition, which also provides the normative structure that Marx's approach lacks. Moreover, by appealing to the just war tradition, we are able to ground the ethics of surveillance in a rich philosophical

tradition. Many of the ethical questions that arise in this field have received centuries of attention insofar as they apply to war. If they can be successfully transferred to the arena of surveillance then we stand to benefit enormously from the insights of these considerations as well as their failings.

My aim in this paper is twofold. First, to convince the reader that the just war tradition provides an adequate framework for the evaluation of surveillance from a normative ethical perspective, capturing all of the concerns raised by others in the field and missing none out.<sup>1</sup> Second, I argue that the tradition provides a rich discourse from which one can draw in order to inform the debate surrounding ethical surveillance. There are many considerations such as discrimination and proportionality which are explored throughout the just war tradition both historically and in the contemporary context. By appealing to the writings in this tradition I am able to draw on this thinking to inform the debate without needing to reinvent the wheel. Hence the principle of proportionality as it pertains to surveillance, I argue, can benefit from a consideration of how the principle of proportionality pertains to warfare.

The just war tradition does not claim to say everything that can be said about justification in war. Some questions are not philosophical but rather empirical and hence better treated by psychology or sociology. The tradition offers a framework for ethical discussion rather than the data which populate that discussion. It does not, for instance, tell us that landmines blow childrens' legs off, but rather that something which harms children in warfare is wrong. Similarly if chemical weapons were discriminating they might still be argued to be morally unacceptable. The just war tradition will not always say outright why this is the case, but it will provide a framework (possibly under the principle of means *mala in se*) with which to discuss it.

The same is true in employing the just war tradition as a framework in the analysis of the ethics of surveillance. What I propose as a framework will not provide a solution to the question as to which harms are occasioned by particular forms of surveillance. What it will do is enable an analysis of the ethics of using those forms given the harms which are identified and established by empirical research. Similarly if acts of surveillance are suspected to be ethically dubious it will provide a structure which can be employed to analyse whether and why those acts are unethical.

The core position for which I shall argue is that the majority of the principles discussed are necessary for surveillance to be justified. The one principle which may not be necessary is that of authority, which is desirable but not necessary. Otherwise I hold that there must be a justified cause, supported by a correct intention, that the surveillance must be necessary and have a chance of success, and that it be both proportional and subject to formal declaration. In terms of the means employed, acts of surveillance should again be proportionate in the harm that they occasion and they should seek to discriminate as much as possible between legitimate and illegitimate targets. Each of these shall be discussed in greater detail below.

Individually, the principles do not amount to sufficient justification for surveillance. Taken together, though, they do provide sufficient justification. That is, if an act of surveillance can be shown to meet the requirements of the nine principles listed above then that act will be justified. Indeed, this is a central feature of my argument: that taken together the nine principles of just surveillance provide the necessary *and* sufficient conditions to justify an act of surveillance.

Marx is not the only person to comment in this field. David Lyon suggests a possible grounding for surveillance ethics in the notion of personhood, drawing from the work of Levinas and Bauman (Lyon 2001). His use of personhood rather than privacy stems from sociological concerns regarding the manner

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<sup>1</sup> In stressing the normative I am seeking to distinguish this from the more discursive approach which is also used in analysing the ethics of surveillance (e.g. Stoddart 2011, 2012).

in which the term privacy is or has been used. In this regard Lyon's work is similar to that of Graham Sewell and James Barker, who concern themselves primarily with privacy in the workplace (Sewell and Barker 2001). They employ Foucauldian terms of power/knowledge and 'rules of right', an establishment of rights that are granted in different contexts. In both of these cases the authors first seek to establish what is wrong with surveillance and then go on to suggest a basic ethical framework against which surveillance may be assessed.

Anita Allen takes a different approach to the question without suggesting the need for a framework as such (Allen 2008). Establishing first that surveillance is not inherently unethical she looks at a series of scenarios, starting with the smallest scale (self-interest and parental monitoring) and ending at the largest (state security). Throughout she draws on real world scenarios to make her point and appeals to an intuitive response. While this grounds the argument in reality, it risks the reader withholding judgement due to paucity of information in the particular cases, or simply disagreeing. She also raises or alludes to a number of questions which she fails to develop, such as the ethical significance of who is carrying out the surveillance, why are they performing this action, and whether the surveillance is necessary. Furthermore, while Allen highlights the distinction between justifying the decision to employ surveillance and the method of surveillance used, she does not develop this. I will argue that this distinction is important. Allen also fails to address several further concerns, such as proportionality and surveillance of inappropriate people.

In this last area Allen is not alone. Few of the commentators considered above take into account the ethical issue that arises when inappropriate people are made the objects of surveillance. Rather, and operating with the benefit of hindsight in legal cases, for Allen it seems as if guilt (and thereby appropriateness) is assumed. However, surveillance is often undertaken with the aim of *establishing* guilt. In these cases the decision to employ surveillance must be based on suspicion rather than firm evidence, and so we need to ascertain the warrant for that suspicion and the distinction between legitimate and illegitimate targets in these cases.

There is also the question of different kinds of surveillance, which is often overlooked. There is clearly a difference between standing on tip-toe outside someone's bedroom window and operating a multi-billion dollar signals intelligence organisation such as the National Security Agency. Furthermore, these different kinds of surveillance will yield different levels of information, from a single blurry photograph, inadmissible in court due to its lack of clarity, to full video and audio capture of a person's life over a period of time.

A further concern arises from the questions of what information is gathered, and to what extent that information is relevant to the justifying cause. In the case of surveillance, extraneous information will be gathered alongside that which is relevant to the case at hand. To what extent should this be a concern, and what lengths should be undertaken to minimise the collection of such extraneous information? Additionally, how should any information collected through surveillance be used, stored and protected?

These questions regarding justification, proportionality and a perceived need for discrimination will turn out to be well answered by an application of the just war tradition. Before turning to this, though, it is worth pausing to summarise the principles of ethical assessment offered by those authors discussed above.

Lyon lists three principles: participation, personhood and purpose (Lyon 2001). By participation I take him to mean those involved in the decision-making process: is it democratic and accountable. This touches on questions of the authority of the surveillant to carry out the surveillance. Personhood looks at how the surveillance affects the individual or group surveilled, a subject which Lyon has pioneered through recognition of the social sorting effect of surveillance (Lyon 2002). I see this as the harm visited by surveillance on those it affects, and the need for any such harm to be held in proportion to the justifying

cause. Finally, Lyon's consideration of purpose analyses the justifying cause for the surveillance: why is surveillance being undertaken in the first place.

Sewell and Barker similarly recognise authority and justifying cause as issues in surveillance, but do not look at proportionality as a separate principle (Sewell and Barker 2001). Rather they focus on necessity: is the act of surveillance really necessary or could a less intrusive measure be employed? This does touch on proportionality and harm, but contains significant differences. An act may be proportionate but not necessary, or it may be deemed necessary to achieve a desired end but not be proportionate to that end.

The UK's Regulation of Investigatory Powers Act (RIPA 2000) recognises this distinction in that it employs the notions of proportionality (shared with Lyon) and of necessity (shared with Sewell and Barker) as separate issues (e.g. RIPA 2000: 29(2)). The Code of Practice regarding surveillance stemming from RIPA introduces a third consideration of discrimination: that surveillance should focus on the intended target as much as possible and seek to limit the monitoring of unintended targets (Home Office 2010: 3.8-3.11). RIPA also recognises the need for the surveillance it oversees to be undertaken by a designated authority and for a specified cause (RIPA 2000: 29(4,5)).

John Kleinig has produced what to me is the most comprehensive purely normative list to date (Kleinig 2009). He lists cause, necessity and proportionality, separating the latter into the areas of proportionality of ends and proportionality of means. He also discusses the need for there to be a reasonable chance of success and a prohibition on means *mala in se*. That is, means which are evil in themselves and should thus never be used. In conventional warfare such means have been seen to include certain chemical and biological weapons, and increasingly anti-personnel landmines. In this Kleinig comes extremely close to my own position. Given that he was writing with practitioners in mind, and particularly the police, Kleinig takes authority as a given. However, his position fails to take into account discrimination which, as seen above, is included in the ethical principles of others as well as being one of the most established principles in the just war tradition.

Finally, Gary Marx has, as noted, offered a list of 29 principles combining normative and empirical considerations (Marx 1998). I believe that these principles recognise the following concerns: authority, intention, cause, necessity, declaration of intent, reasonable chance of success, and proportionality of both ends and means. Significantly, though, Marx fails to deal with the issue of discrimination, which I hold to be a key concern.

In summary, each of the above authors holds a part of the jigsaw, but none is able to complete the picture. A cursory glance at the list of principles discussed will show that some principles come up for several authors, while others appear only in the work of one (Table 1). There would not be this discrepancy had these authors appealed to the just war tradition. This contains all of the principles listed and misses none of them out. Furthermore, the just war tradition does not introduce any irrelevant considerations as regards surveillance, once the principles it offers have been applied correctly. Yet an appeal to the just war tradition goes further than this. The tradition has generated considerable philosophical discourse over the last 2,000 years (Reichberg et al. 2006). This rich seam of debate can be mined for considerable benefit in the discussion surrounding the ethics of surveillance.

Consideration	Lyon	Sewell & Barker	RIPA	Kleinig	Marx	Allen	Just War Tradition
Cause	✓	✓	✓	✓	✓	✓	✓
Authority	✓	✓	✓		✓	✓	✓
Intention					✓		✓
Necessity		✓	✓	✓	✓	✓	✓
Chance of Success				✓	✓		✓
Declaration of Intent					✓		✓
Proportionality	✓		✓	✓	✓		✓
Discrimination			✓				✓
No means <i>mala in se</i>				✓			✓
Treatment of prisoners							✓

Table 1: Summary of Principles of Ethical Surveillance in Academic Literature

## Objections

Some might object to making comparisons between war and surveillance. In war people die or are maimed, not to mention raped, starved, displaced, etc. In the case of surveillance the associated harms, while they may be real enough, are not as severe. This is not the only disanalogy but it is a key consideration. To that end it is important to stress at the outset that I am *not* attempting to draw a parallel between war and surveillance. I accept that there are obvious disanalogies: to be subject to surveillance is unquestionably different from being subject to warfare.

By contrast, what I am saying is that there is an analogy between the *ethics* of war and the *ethics* of surveillance. The analogy is not perfect. One cannot just take the principles as applied to warfare and, like a cookie-cutter, apply them to surveillance. However, it is possible to reshape those principles so that they provide an effective framework for analysis of acts of surveillance. Through considering the principles pertinent to the ethics of war it will be possible to develop a robust methodology for assessing the ethics of surveillance.

A second possible disanalogy concerns consent. War is rarely the result of a free choice made by two parties. Surveillance, on the other hand, may be more likely to result from such a free choice. If a person consents to surveillance, or even requests it (imagine here contestants in the televised game show *Big Brother*), then is there harm in that surveillance? Questions of consent, including consent to be harmed, and the possibilities of exploitation and coercion are considerably larger than the scope of this paper. As a result I will focus here on non-consensual surveillance, which I take always to be *pro tanto* harmful. The questions raised in this paper will seek to ascertain whether and when these *pro tanto* harms can be outweighed.

Hence there are disanalogies between surveillance and war. As noted, though, I am not arguing for an analogy between war and surveillance but between the ethics of war and the ethics of surveillance. Given

these disanalogies, though, why is it that the principles of the ethics of war transfer so neatly to the ethics of surveillance? It may be that the principles of the just war tradition are effective at limiting all kinds of harm. Normally we would seek to avoid harm, but most accept that there may be times in which causing harm could be justified. In these cases assessment needs to rest on the questions of who, what, why, where and when (Toner 2010) but beyond these, the just war tradition provides direction in seeking the normative answers to these questions—who *should* be carrying out surveillance, why *should* it be carried out, how and where *should* it be employed and so on. In particular it recognises and encourages limits on harmful actions such as necessity, proportionality and limitation of negative effects on bystanders. However, the core argument presented here is the picture itself, which is both plausible and more complete than the alternatives in that it captures all the salient concerns and does not miss key issues such as discrimination.

Having established that it is at least *prima facie* plausible that the just war tradition be employed as a tool for understanding the ethics of surveillance, I turn first to the question of *jus ad bellum*, the justification of going to war, or in this case *jus ad speculandum*, the justification of employing surveillance.

## Just War and Surveillance

### *Jus ad Speculandum—Justifying the decision to carry out surveillance*

The just war tradition traditionally includes seven principles under *jus ad bellum*: just cause, correct intention, proper authority, last resort, formal declaration, chance of success and proportionality. If we take these in turn and apply them to the issue of surveillance, the first issue that arises is one of just cause: the reason for the declaration of war and the importance that this be justifiable, usually in terms of defence (either of land or of people and their rights). As with war, and although it might seem obvious to state it, surveillance similarly should not be undertaken for salacious, trivial or ignoble causes (such as protection of pride or of individuals in government, etc.).

Allen discusses just cause in referring to the case of Glenn Michael, who monitored the behaviour of his ex-wife and her suspected lesbian lover in order to gain evidence of her homosexuality which he believed would compromise her custody of their child (Allen 2008). When brought before a court, the judge agreed with Michael's claim that the child's interests would be better served through being raised by a single heterosexual man rather than two homosexual women. Whatever one thinks of the judge's decision, let us assume that Michael's purpose for carrying out surveillance on his ex-wife was in order to challenge the custody of the child rather than for his own titillation. If the latter then he should have been prosecuted as a peeping Tom. It is presumably because the judge believed that Michael had legitimate cause (whatever we may feel regarding that cause) to be carrying out the surveillance that he was not so prosecuted.

So what would count as a just cause for surveillance? Considering the duty of the state to protect its citizens then such activity for the genuine defence of the lives of those citizens would seem to meet this condition. However, states have also found uses for surveillance other than public security, such as identifying political dissidents, which many would not consider justifiable.

At the level of the family, Allen suggests that parental surveillance of children is justified. She quotes the examples of the parents of the killers at Columbine High School knowing nothing about their children's maintaining arms caches in their homes, and of monitoring the behaviour of children who may become seriously overweight. Yet in these cases Allen overlooks the questions of appropriate targeting and warranted suspicion. She thus appears to suggest that *all* parents should be monitoring their children *ceaselessly* lest they too become serial killers at school, which seems to be extreme. This raises questions of necessity which shall be considered in due course, but for the purposes of adherence to the principle of just cause, the question is: *are there reasonable grounds for suspicion?* If yes, then it would appear as if a

parent would have just cause to closely monitor their child's behaviour. Further to the need for grounds for suspicion is a sense of proportionality to the suspected problem, which I shall also consider shortly.

Between the macro end of the scale, e.g. the state acting to protect the lives of its citizens, and the micro end, e.g. parents acting to protect their children from going astray, lie a series of different scenarios requiring clarification. Allen looks at the case of Hewlett Packard monitoring the phone conversations of its employees in order to discover a leak. Is corporate surveillance of employees in the event of a leak a justifying cause? Certainly it is in the interests of the *company* to maintain confidentiality and prevent leaks. Providing that those leaks are of purely commercial interests (that is, they are not the work of a whistle-blower regarding malpractice) then it would seem as if the company does have *some* justification, insofar as just cause is concerned, in acting to protect that confidentiality through monitoring its employees. However, to what extent the company is justified in carrying out surveillance is a thornier issue. This is especially so when one considers the harms involved in monitoring the conversations of a large number of innocent people, including personal calls to physicians, banks, spouses, etc. in order to apprehend the one guilty employee.

Here a further value of the just war tradition as model in its application to the ethics of surveillance becomes apparent: just because an act may be justified in one respect (in this case, justifying cause), that does not render the act as justified *in toto*. The further considerations of necessity, proportionality, likelihood of success, etc. must also be taken into account. While Hewlett Packard may have had a justified cause to conduct surveillance in order to discover a commercial leak, if it had placed its entire workforce under surveillance then this may have been a disproportionate response and so the overall act of surveillance may still not be justified.

The second principle in the just war tradition is correct intention. The intention behind declaring war should be the same as the cause given for going to war, hence preventing ulterior motives from becoming the motivating factor for that war. Intuitively it seems right that intention should be a consideration in assessing surveillance. Firstly if a just cause is to be insisted upon then for the surveillant to pursue an ulterior motive undermines the value of the just cause, which is arguably provided as a smokescreen for the 'real' motive. Secondly there is a strong reaction in most people to the difference between, say, a CCTV operator who watches people in the public square to identify known or potential terrorists, and one who watches the same people to identify attractive members of the opposite sex for his own titillation.

The third principle of the just war tradition involves the issue of who is doing the surveillance, and on behalf of whom are they doing it. The just war tradition has tended to hold that the only authority ethically justified in declaring war is the sovereign. Similarly, in the context of genuine national security, the state might be seen to be the proper authority to carry out surveillance on behalf of its citizens. Whether or not the sovereign itself is a legitimate entity, though, is another question. Certainly, if a sovereign loses the moral authority to govern then any potential legitimacy as surveillant *qua* sovereign may also be lost. However I am not attempting here to extend the analogy to endorse *the same answer* as provided by just war tradition, still less attempting to suggest that the state is the *only* body justified in carrying out surveillance. My point is rather that the question of the moral legitimacy of the surveillant is an issue of major importance that needs to be addressed when considering the ethics of surveillance.

There are numerous bodies which might claim, or seek to claim, the moral right to conduct surveillance. These include the state, but also the press, corporations, private investigators and individuals. As noted above, one might be hesitant to grant legitimacy of authority to the state purely on the grounds of its being the state, for this overlooks questions of the state's own legitimacy as sovereign. In cases where the governing party has assumed totalitarian control it may see surveillance as a tool for its own survival and so use it against its citizens to discover political dissidents. This might contravene just cause (there is no threat to the state *per se*), but the scenario is such that the authority of the state should also be brought into

question. That said, if anyone is to have the moral authority to countenance surveillance, the claims of the state are, under usual circumstances, considerable: the duty of the state to protect its citizens is enshrined in most constitutions, and surveillance may be an effective way to contribute to public security. Furthermore, the mere fear of corruption or totalitarianism should not be allowed to override the need to protect the public. Hence the question of the moral legitimacy of the state to conduct surveillance should be related to the question of the moral legitimacy of the state itself, coupled with the likelihood and extent of possible corruption within a morally legitimate state.

Beyond the state, the legitimacy of non-state actors should also be questioned. If and when the state is a morally legitimate authority in this area, can that legitimacy be conferred onto others such as private surveillance companies carrying out the state's mandate? Are there other entities such as the free press which can claim moral legitimacy independent of the state? In the latter instance, the moral legitimacy of the press might be seen to increase as that of the state decreases in order to provide accountability. Once again, though, the other principles of the tradition should be brought to bear: what is the purpose of the surveillance, is it proportionate, etc.? It would be too easy to confer automatic legitimacy insofar as authority is concerned to the press and in the process place the *paparazzi* on a moral plane with investigative political journalism.

At the individual level there is again the example of Glenn Michael. While this is a controversial case it should be borne in mind that, whatever one's response to the motivation and judgement, in this instance our concern is in relation to the question of legitimate authority. Michael was carrying out the surveillance on behalf of himself (or, arguably, the child). Was he a legitimate authority? Merely being an interested party should not automatically give one the authority to carry out surveillance. Aside from questions of competence, it would be extreme to allow everyone to claim the authority to spy on anyone else in whom they had an interest. Regardless of specific concerns in the Michael case, then, the legitimacy of the surveillant needs to be addressed.

Alternatively, Michael might have gone to a private investigator. If such businesses are legitimate within (and regulated by) a morally legitimate state then it is conceivable that the authority of the state to carry out surveillance may be transferred in particular instances to such entities. Hence non-state actors might be legitimate surveillants if legitimacy is conferred by a recognised authority.

An obvious concern with surveillants is whether they are ethically trustworthy in how they gather, store and use their information (both relevant and extraneous). Such concerns can be tempered by state regulation, but in the absence of any regulation then the authority of the surveillant must be called into question, whether legitimated by the state or not.

A fourth principle of *jus ad bellum* is last resort, or necessity: that the decision to go to war must come after all other options have been exhausted. Precisely what is meant by last resort in this case is debatable: at which point has a state reached 'the final straw' (see, for example, Walzer 2004: 53–54, 88; Lango 2006)? Is it when the Nazis remilitarise the Rhineland, when they annex Austria, when they invade Czechoslovakia, when they invade Poland, when they invade the UK, or when their allies invade the US? Furthermore, if the demarche of an ambassador is all that precedes a war then the war might be felt to be hasty, but if one has to wait until enemy boots are on home soil then this might be leaving it somewhat late. Yet the more one escalates diplomatic and economic sanctions, the more the 'enemy' is going to suspect that military sanctions will at some stage follow, and so prepare for defence. Such preparations could lead to a more drawn out and bloody conflict than might otherwise have been the case.


If the question of last resort is debated in relation to going to war, it is similarly unclear in the case of surveillance. Allen takes it as a given that surveillance should have been a last resort in the cases of Michael and Hewlett Packard, and takes it for granted that on neither occasion was this the case. In both



instances there were alternatives that should have been attempted. Not knowing the full details of each situation makes it hard to comment directly on Allen's claim, but in the case of covert surveillance with the aim of gathering information the nature of the operation as essentially secretive must surely be relevant. If the surveillance weren't secretive then it would risk altering the behaviour of the surveilled. This is, after all, the motivation behind deterrence. Had Michael asked his ex-wife whether she had taken a lesbian lover, and suggested the sanction that if she had he would challenge her custody of their child, then she might have been more careful about closing the curtains at night and so prevented him gaining the necessary evidence for his case. Similar things may be said about the Hewlett Packard case.

Hence if surveillance were truly a final resort it would in many cases be rendered ineffective through losing the aspect of secrecy. In these circumstances it is unlikely to be justifiable as a matter of first resort as there will probably be less harmful methods which could be attempted (Lango 2006). When these have been tried and failed, and they will be different in different scenarios, then the surveillance meets this condition. However, we should also acknowledge that there are some methods which, although less intrusive, could compromise the later option of covert surveillance.

The question of prejudicing results arises again with the fifth principle regarding a formal declaration of war, which I take in this instance to be a declaration of intent to carry out surveillance. Clearly a formal declaration to carry out surveillance may be inappropriate in the case of covert surveillance, lest it alter the behaviour of the surveilled and serve to counter any benefits which might otherwise result from the surveillance. By contrast, in cases of surveillance for deterrence, this would be a good thing, such as indicating the positioning of speed cameras and painting them yellow so that people are aware of them at accident hot spots. The significance of formal declaration might therefore be a problem for justifying particular covert surveillance operations, although possibly less so for the existence of the organisations which conduct those operations. The existence of such organisations can provide a deterrent without giving details of their methods and so compromising actual operations.

The sixth principle is that the war must have a reasonable chance of success, which draws again on the purpose of the surveillance. If surveillance for information is unlikely to return the desired information then that operation is unlikely to be justified. Any information gained will be extraneous, potentially salacious, and bring into question the just cause of the operation. Similarly, if surveillance is justified by reference to deterring crime, and yet actually fails to deter crime, as figures suggest is the case  the UK (Hope 2009, 2010), then the justification for its application must once more be brought into question.

The seventh and final principle of *jus ad speculandum* has been referred to several times, namely that the projected damage must be proportionate to the occasioning cause. That is, the foreseeable damage that surveillance could incur must be in proportion to the reason by which the surveillance is justified. However, what is meant by proportionality is not always clear. Intuitively many recognise acts as being disproportionate, but determining which considerations should be weighed in the balance in arriving at a conclusion regarding the proportionality of an act is not straightforward.

#### *Jus in Speculando—Justifying the means of surveillance*

The above principles characterise the traditional approach to *jus ad bellum*. If we turn now to *jus in bello* there are between two and four principles. Most authors agree that proportionality and the principle of discrimination are essential features of *jus in bello*. However, a case is sometimes made for including the further principles of no means *mala in se* and the benevolent treatment of prisoners (Orend 2005). Owing to this distinction, I shall concentrate in this paper on the principles of proportionality and discrimination. However, it is at least interesting to reflect on possible comparisons between the two further considerations and the ethics of surveillance. Are there, for example as Kleinig suggests, acts of surveillance which would class as being *mala in se*, which should never be used (Kleinig 2009)? Without delving too far into science fiction, could mind reading be considered in this category? As to the treatment

of prisoners, it could be asked whether those deserving to be subject to surveillance thereby lose all rights to privacy and similar considerations.

The principle of proportionality, as with its counterpart in *jus ad bellum*, seeks for a response that is proportionate to the occasion. For *jus in bello* application this is less a question of the act of war as proportionate, as of individual actions. Hence the use of tactical nuclear weapons would most likely be judged disproportionate in response to an opponent armed only with rifles, but not an enemy similarly equipped. Applied to surveillance this principle makes reference to different kinds of surveillance and the idea that the less extreme the occasion, the less invasive and pervasive the surveillance should be. CCTV cameras in areas where cars are frequently stolen is more proportionate than bugging the telephones of everyone in the city in which the cars are being stolen. Hacking into an e-mail account to catch an employee suspected of stealing paper clips seems less justified than doing the same to catch a foreign spy. The principle is thus helpful in assessing which means of surveillance may be employed *in situ*, and so forms a crucial aspect of the ethical framework that must be considered in deploying surveillance. Films such as *Enemy of the State* (Scott 1998) play off this concern when the protagonist finds the full might of US state surveillance turned on just one person, the disproportionality of the situation (the use of technology designed to monitor the activities of enemy states being used on a single, and in the event, innocent person) feeding the audience's support for the hero.

The second *in speculando* principle is that of discrimination: the idea that, in the just war tradition, non-combatants are immune from attack. Clearly there are no strict combatants (in the sense of uniformed individuals carrying weapons) in most cases of surveillance, unless one is talking about surveillance of enemy troops during times of war, but this principle is nonetheless significant, albeit with some modification. Michael Walzer argues that in everyday life we have a right to life which includes the right not to be attacked (Walzer 2006: 144–45). In the act of donning a uniform and picking up a gun one forfeits that right at the same time as gaining others, such as the manner of treatment if captured. Hence there is an important distinction between those actively involved in the prosecution of the war (combatants) and those not actively involved (non-combatants). As such, one is justified in targeting combatants, who have forfeited their right to immunity, but not non-combatants who retain that right.

If this principle is taken to concern not combatants and non-combatants but legitimate and illegitimate targets, the principle's applicability to surveillance becomes clearer. In the context of security and responding to crime appropriate targets would be those guilty of threatening security or of criminal acts, and inappropriate targets those who are innocent of such acts. A first thought here might be that surveillance should be targeted towards the guilty and away from the innocent as much as possible. However, there is an obvious difficulty. Surveillance is often carried out in order to *determine* innocence or guilt, and so the status of the surveilled prior to the act of surveillance is frequently unknown. This is a major oversight of Allen, who appears to hold that criminals waive some if not all of their privacy rights by virtue of having committed a crime (Allen 2008). Yet someone who is wrongly suspected of committing a crime has not waived any rights and so should not be considered a legitimate target for surveillance. This introduces the dilemma that the legitimacy of an act of surveillance may only be found subsequent to, and dependent on, that surveillance. Prior to the surveillance operation, as far as the surveillant is concerned, the person to be surveilled may or may not be a legitimate target. If they are legitimate then the surveillance is justified, but if they are illegitimate then it is not. As their legitimacy as a target is unknown, the matter of justification appears to be broadly a matter of luck.

In suggesting the possibility of luck, though, one must be careful not to overlook the issue of pre-existent evidence. It has already been established that the decision to carry out the surveillance should not be capricious but resultant on weighing up the likelihood of its success. The justification might come down to the evidence available to the surveillant prior to the decision being made to initiate the operation. The justification for the decision whether to carry out surveillance would then be based on the evidence

available rather than the outcome of the surveillance (Lawlor 2006). As such, if the surveilled subject turns out not to have been guilty, but the evidence that they were guilty prior to the surveillance was strong, then there would have been no miscarriage of justice. On the other hand, if there were no evidence for a person's guilt but surveillance was undertaken anyway then this would appear to be a clear breach of the principle of discrimination, regardless of the result.

## Conclusion

The just war tradition can provide a powerful framework to help in establishing the rights and wrongs of surveillance. In most cases there is a clear analogy between the justification of war and the justification of surveillance, which enables the confident use of the just war tradition as a theoretical framework by which to assess the ethics of surveillance. The decision to carry out the surveillance is clearly distinct from the methods employed, and each has its own ethical criteria. In deciding whether or not surveillance is justifiable we need to consider who is conducting the operation, what justifications have they given for doing it and whether they have any ulterior motives; whether other, less harmful measures are a plausible alternative; if the surveillance has been declared; whether the operation is likely to be successful; and whether surveillance is proportionate to the occasioning cause. Beyond these are the further issues in the methodology of the surveillance: are the methods employed proportionate to the goal desired, and has the surveillant acted to limit the surveillance of illegitimate targets.

These nine principles form an ethical framework for surveillance, grounded in a rich philosophical tradition. As we have seen, they encompass the desired ethical principles of Lyon, Sewell and Barker, Allen, and Marx but do so in a more coherent and/or comprehensive manner than any of these authors has so far suggested. It also ensures that ethical concerns are not overlooked. This was noted in the way in which Allen does not consider the possibility that a person under surveillance may be innocent and hence not have waived any privacy rights. Similarly, Lyon, Sewell and Barker only suggest tentative principles, none of which consider intention, declaration, chance of success or discrimination. Neither do they take into account the justification of methodology (*jus in speculando*) as distinct from the decision to employ surveillance (*jus ad speculandum*). Marx is different here as his 29 principles are thorough, although they too do not refer to the principle of discrimination. However this list lacks a coherence which can be achieved through appeal to the just war tradition, at the same time tapping into the heritage in moral discourse offered by that tradition. This discourse holds a huge literature of value to this debate, much of which will prove to be directly applicable.

Hence the just war tradition can indeed be used to assess justifications for surveillance operations. Furthermore it should be used in that it adequately captures the concerns of others writing in this field and helps us to take into consideration legitimate concerns which are often missed by others.

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