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FOREWORD:

SOMEBODY'S WATCHING ME: SURVEILLANCE AND PRIVACY IN AN AGE OF NATIONAL INSECURITY

Robert N. Strassfeld^{} & Cheryl Ough[†]*

I. INTRODUCTION

The evidence of surveillance is readily available as we make our way through our daily life. Cameras monitor our compliance with the traffic laws. Other cameras track our comings and goings on city streets, at the entrances of government buildings, banks and office buildings, and in shopping malls. In Shoreditch, one of London's crime-stricken boroughs, residents may view live Closed Circuit Television (CCTV) happening right outside the front door.¹ Supporters of the service cite crime prevention and community involvement for starting the project.²

Shoreditch is only one example of the government monitoring public streets with cameras for crime prevention. In the U.S., city governments in Chicago, New York City, and Washington, D.C, monitor citizens through surveillance cameras on street corners.³ But surveillance in the U.S. goes far beyond cameras. Cell phone calls, data left behind from emails, text messages, and "tweets" provide personal information for monitoring.⁴ The Pa-

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¹ Digital Bridge Television Service IP TV Channels, <http://www.digitalbridge.co.uk/popup-iptv-channels.html> (last visited Apr. 19, 2010).

² Liam Allen, *Is 'Reality CCTV' a Step Too Far?*, BBC, May 8, 2006, http://news.bbc.co.uk/2/hi/uk_news/4752167.stm; Renee Montagne, *Police Camera Feeds Shared with London Public*, NAT'L PUB. RADIO, May 16, 2006, <http://www.npr.org/templates/story/story.php?storyId=5407566>.

³ See, e.g., William M. Bulkeley, *Chicago's Camera Network Is Everywhere*, WALL ST. J., Nov. 17, 2009, at B7; Manav Tanneeru, *'Ring of Steel' Coming to New York*, CNN, Aug. 3, 2007, <http://www.cnn.com/2007/TECH/08/01/nyc.surveillance/index.html>; Allison Klein, *Police Go Live Monitoring D.C. Crime Cameras*, WASH. POST, Feb. 11, 2008, at A1.

⁴ Jessica Yellin, *Government Monitoring About 200 Million Americans' Calls*, ABC GOOD MORNING AM., May 11, 2006, <http://abcnews.go.com/GMA/story?id=1948927&page=1>.

riot Act⁵ and the FISA Amendments Act of 2008⁶ have increased government access to realms that many people assume to be private, often with limited judicial oversight. Surveillance is not the province of the government alone. Employers monitor their employees in the workplace, and sometimes beyond. The preferences of online shoppers are observed and sorted by online merchants for purposes of future solicitations or for sale. Moreover, the government works increasingly in tandem with private industry in its data collection and surveillance, as recent experience with the telecommunications industry cooperation with the National Security Agency under the George W. Bush Administration to engage in eavesdropping on telephone conversations outside of the strictures of the Foreign Intelligence Surveillance Act of 1978 (FISA)⁷ demonstrates.⁸ Privacy is elusive and imperiled from multiple sources.

To examine some of the issues posed by our increasing capacity to engage in surveillance and eroding barriers to both government and private intrusion into our privacy, the Institute for Global Security Law and Policy at Case Western Reserve University held a symposium on October 22–23, 2009. This publication contains essays contributed to the symposium: “Somebody’s Watching Me: Surveillance and Privacy in an Age of National Insecurity.”

The symposium began with a screening of *The Lives of Others* (*Das Leben der Anderen*), a German film directed by Florian Henckel von Donnersmarck and the winner of the 2007 Academy Award for Best Foreign Language Film.⁹ The film focuses on the impact of pervasive surveillance by the Stasi, the East German intelligence service, on the lives of both the objects of surveillance and on those who do the watching. In particular, it looks at surveillance of the East German arts community. Though he is reliably loyal and connected to the upper reaches of the East German government, playwright Georg Dreyman and his lover, actress Christa-Maria Sieland, become the objects of Stasi surveillance. As the story unfolds, Dreyman and Sieland hurdle toward tragedy, while the Stasi officer who oversees their surveillance, Captain Gerd Wiesler, is partly redeemed by his surreptitious contact with their lives and with art. The film does not begin,

⁵ USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

⁶ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

⁷ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

⁸ Scott Shane, *Attention in N.S.A. Debate Turns to Telecom Industry*, N.Y. TIMES, Feb. 11, 2006, at A11.

⁹ THE LIVES OF OTHERS (DAS LEBEN DER ANDEREN) (Wiedemann & Berg Filmproduktion 2006).

however, with depictions of surveillance. Rather, it opens in an East German prison where, using “enhanced interrogation techniques,” Wiesler is questioning a man suspected of helping his neighbor to escape to West Germany. The scene is intercut with a scene in which Wiesler uses the tape of the interrogation to instruct a class of Stasi trainees in interrogation methods.

The connection between surveillance and torture is not limited to *The Lives of Others*. In the U.S., the CIA was tasked not only with foreign intelligence gathering, but with the interrogation of “high value detainees” by notorious techniques such as waterboarding. In her book, *My Life as a Traitor*, Zarah Ghahramani recounts her experience as a prisoner of the Iranian government after she became involved in student dissident politics.¹⁰ Tortured and humiliated in Tehran’s notorious Evin prison, she is horrified and enraged to learn during one interrogation session that Iranian security officials had taken a series of photographs of her and her friends in a variety of venues.¹¹ Torture and surveillance come together as Zara is beaten until she is willing to annotate the photographs with descriptions of the persons and activities captured by them.

Why does a film that focuses on surveillance begin with scenes of torture? Why is the connection unremarkable? What is the connection between the two? One of Wiesler’s students appears to have his own concerns about the connection. As the interrogation tape reveals the disintegration of the prisoner, he questions the need for repetitive questioning and sleep deprivation.¹²

One connection is simply bureaucratic efficiency and convenience. While in the national surveillance state no single agency has a monopoly on intelligence gathering and surveillance, there may be reason not to engage in overspecialization.¹³ Interrogation and surveillance are both intelligence gathering techniques, and it may be efficient to unite those functions in a single agency. There are other links, however, which seem not to be lost on von Donnersmarck or Ghahramani.

Elaine Scarry has described how torture turns the body into an enemy and betrayer of the torture victim.¹⁴ Though it accomplishes the feat without the infliction of severe pain, surveillance also renders the object of

¹⁰ ZARAH GHAHRAMANI & ROBERT HILLMAN, *MY LIFE AS A TRAITOR* (2008).

¹¹ *Id.* at 36–44.

¹² Of course, since Stasi watches its own as well as others who might be enemies of the state, Wiesler immediately notes this troubling tendency to question on his seating chart.

¹³ For a discussion of the idea of the national surveillance state, see Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008); Orin S. Kerr, *The National Surveillance State: A Response to Balkin*, 93 MINN. L. REV. 2179 (2009).

¹⁴ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 46–50 (1985).

surveillance into a self-betrayer. One's recorded words and images are the agents of one's own accusation. This usurpation of the self for purposes of self-indictment expresses the power of the torturer or watcher and the helplessness and lack of autonomy of the victim.

Power and relative helplessness are the other connections between torture and surveillance. In both, the interrogator exercises power without regard for the victim's consent. The effect can be feelings of humiliation that come from the recognition that the interrogator or eavesdropper may have power that is beyond the victim's ability to thwart. To link surveillance with torture suggests that it is an unmitigated bad. To link it with power offers a necessary corrective. It is the context for the exercise of power and the manner in which it is used that gives positive or negative normative weight to an act or program of surveillance.

In describing the national surveillance state in which the government "uses surveillance, data collection, collation, and analysis," to perform various government functions, Professor Jack Balkin has emphasized both the inevitability of the national surveillance state and its potential to promote the public good as well as the risks it poses to personal freedom and civil liberties.¹⁵ Balkin writes, "[t]he question is not whether we will have a surveillance state in the years to come, but what sort of surveillance state we will have."¹⁶

Surveillance, properly conducted, is a necessary and useful part of police work and the provision of the national defense. As Professor Balkin notes, however, the ever-expanding hold of the surveillance state owes more to the demands of the welfare state than to the requirements of national security. Government knowledge about the needs and whereabouts of individuals is necessary if the social safety net is to work for those people. At times, the system of surveillance that accompanies the protections of the safety net is an intrusive and demeaning instrument of social control. Political scientist John Gilliom has described such a system in his study of women receiving welfare in Appalachian Ohio.¹⁷ Nevertheless, the objects of these demeaning practices of surveillance can be resourceful in finding means of resistance.

Indeed, practices that may often have one import can take on very different meanings as people find creative ways either to turn the tables on the watchers or to transform the meaning of the tokens of surveillance. Anthropologist Ilana Feldman, for instance, has examined how Palestinian refugees in Gaza have made use of various identity documents to insist on

¹⁵ Balkin, *supra* note 13, at 3–4.

¹⁶ *Id.*

¹⁷ JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* (2001).

their visibility and to assert their national claims.¹⁸ The point is that we must consider more than the technologies of surveillance and the challenges that those technologies pose. We must look to how and by whom surveillance is used and to the mechanisms for making the watchers accountable. The participants in this symposium examine these questions from various disciplines and a wide array of approaches. Repeatedly, however, they return to this question of the relationship between surveillance and power.

II. SOMEBODY'S WATCHING ME: A PREVIEW OF THE ISSUE

The issue begins with articles from the symposium's first panel: Surveillance in Public Places and Closed Circuit Television. Accompanying the explosion of surveillance in public and private places is the expanding array of media that may capture and transmit personal matters. This is especially true of surveillance in the public sphere, which may be recorded in digital audio, video, and multi-media files. Jacqueline Lipton, Professor and Associate Dean for Faculty Development and Research at Case Western Reserve University School of Law, addresses the adequacy of exiting privacy protections in the face of these technologies in *Digital Multi-Media and the Limits of Privacy Law*. Professor Lipton discusses an individual's ability to seek legal redress for infringements to privacy from unauthorized use of audio, video, and multi-media content by analyzing the European Union Data Protection Directive, which is "one of the most comprehensive digital age legal reforms to address information privacy."¹⁹ Next, in *Washington and CCTV: It's 2010, Not Nineteen Eighty-Four*, Aileen B. Xenakis, Senior Law and Policy Analyst at the University of Maryland Center for Health and Homeland Security, considers both the process by which Washington, D.C. designed its CCTV program and the substantive design of that program. She argues that the Washington, D.C. experience can serve as a model for cities that wish to create a CCTV program that ensures a safe community without destroying government transparency and civil liberties.²⁰ Micheal Vonn, Policy Director for the British Columbia Civil Liberties Association, contributes *CCTV and the 2010 Vancouver Games: Spatial Tactics and Political Strategies*, which completes this first set of papers.²¹ This article focuses on the impact that CCTV has on public demonstrations within

¹⁸ Ilana Feldman, *Refusing Invisibility: Documentation and Memorialization in Palestinian Refugee Claims*, 21 J. REFUGEE STUD. 498, 510–13 (2008).

¹⁹ Jacqueline D. Lipton, *Digital Multi-Media and the Limits of Privacy Law*, 42 CASE W. RES. J. INT'L L. 551 (2010).

²⁰ Aileen B. Xenakis, *Washington and CCTV: It's 2010, Not Nineteen Eighty-Four*, 42 CASE W. RES. J. INT'L L. 573 (2010).

²¹ Micheal Vonn, *CCTV and the 2010 Vancouver Games: Spatial Tactics and Political Strategies*, 42 CASE W. RES. J. INT'L L. 595 (2010).

the context of the 2010 Winter Olympic Games in Vancouver.²² Ms. Vonn explores the use of CCTV and the creation of political-speech free “Clean Venues” as “spatial tactics” employed for purposes of political and social control. Finally, she explains how the Olympics create the occasion for Vancouver to avoid the political and economic costs of the decision to implement CCTV surveillance.

The second panel is dedicated to the topic Globalization of Surveillance. David Lyon, Professor of Sociology and Director of the Queen’s Surveillance Project at Queen’s University, describes in *National IDs in a Global World: Surveillance, Security, and Citizenship* how IDs and the storage of ID data blend into surveillance, security, and citizenship.²³ In *Privacy and Counter-Terrorism: The Pervasiveness of Data*, Paul Rosenzweig, Principal of Red Branch Consulting PLLC and former Deputy Assistant Secretary for Policy in the Department of Homeland Security, describes the powerful potential of data mining or “dataveillance” as a tool to prevent terrorist acts. Nevertheless, he notes that the ability to pick up a person’s electronic trail in cyberspace can lead to violations of privacy and civil liberties.²⁴ Arguing that law has not kept pace with technology, he advocates revision of existing data privacy laws.²⁵

The third panel examines the Foreign Intelligence Surveillance Act (FISA) and FISA Reform. In *Unlimited Power: Why the President’s (Warrantless) Surveillance Program is Unconstitutional*, Raymond Shih Ray Ku, Professor at Case Western Reserve University School of Law, renews his argument that the constitutionality of government surveillance is better analyzed through the lens of power than through the “reasonable expectation of privacy.”²⁶ Applying this analysis, he criticizes the arguments offered by the Bush Administration’s Office of Legal Counsel to justify the Presidential Surveillance Program (“PSP”). Professor Ku concludes that the PSP was unconstitutional and that the program’s constitutionality remains doubtful even after the 2008 FISA Amendments.²⁷ Finally, Lee Tien, Senior Staff Attorney for the Electronic Frontier Foundation, describes in *Litigating the State Secrets Privilege* the litigation obstacles facing anyone who seeks to

²² *Id.*

²³ David Lyon, *National IDs in a Global World: Surveillance, Security, and Citizenship*, 42 CASE W. RES. J. INT’L L. 607 (2010).

²⁴ Paul Rosenzweig, *Privacy and Counter-Terrorism: The Pervasiveness of Data*, 42 CASE W. RES. J. INT’L L. 625 (2010).

²⁵ *Id.*

²⁶ Professor Ku first articulated this argument in Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002).

²⁷ Raymond Shih Ray Ku, *Unlimited Power: Why the President’s (Warrantless) Surveillance Program Is Unconstitutional*, 42 CASE W. RES. J. INT’L L. 647 (2010).

challenge the government's surveillance.²⁸ In particular, he examines the difficulties faced by the Islamic charity Al-Haramain due to the state secrets doctrine in its claim that the Office of Foreign Assets Control relied on warrantless electronic surveillance conducted by the National Security Agency in its decision to freeze the charity's assets. He describes how the state secrets doctrine has been employed to frustrate the protections that are supposedly afforded to persons aggrieved by FISA violations.

The final panel focused on the topic of Resistance to Surveillance. In *A Social Movement for Privacy/Against Surveillance? Some Difficulties in Engendering Mass Resistance in a Land of Twitter and Tweets*, Laura Huey, Assistant Professor of Sociology at the University of Western Ontario, describes three factors she believes contribute to the lack of a pro-privacy/anti-surveillance social movement in North America.²⁹ With a modicum of hopefulness, Professor Huey then offers solutions to these impediments to creating this social movement.³⁰

The issue continues with a Special Addendum to the 2009 Aggression Issue for the 2010 ICC Review Conference in Kampala, Uganda. Oscar Solera, Human Rights Officer at the U.N. Office of the High Commissioner for Human Rights, describes in *The Definition of the Crime of Aggression: Lessons Not-Learned* how the current discussions about a crime of aggression definition fail to consider lessons from the past.³¹ He points out weaknesses within the proposed definition for discussion at the ICC 2010 Review Conference and provides a revised definition for discussion.³²

Finally, the journal is honored to publish book reviews by Dr. Johannes van Aggelen, former official of the U.N. Office of High Commissioner for Human Rights, of the books *Secretary or General?: The U.N. Secretary-General in World Politics*, and *Law and Practice of the United Nations, Documents and Commentary*.³³

We are grateful to all the participants in the "Somebody's Watching Me" symposium, and to the student editors who prepared this issue for publication. We are also grateful to the U.S. District Court for the Northern District of Ohio for its generous support of the symposium.

²⁸ Lee Tien, *Litigating the State Secrets Privilege*, 42 CASE W. RES. J. INT'L L. 675 (2010).

²⁹ Laura Huey, *A Social Movement for Privacy/Against Surveillance? Some Difficulties in Engendering Mass Resistance in a Land of Twitter and Tweets*, 42 CASE W. RES. J. INT'L L. 699 (2010).

³⁰ *Id.*

³¹ Oscar Solera, *The Definition of the Crime of Aggression: Lessons Not-Learned*, 42 CASE W. RES. J. INT'L L. 801 (2010).

³² *Id.*

³³ Johannes van Aggelen, *Book Reviews: Secretary or General?: The U.N. Secretary-General in World Politics & Law and Practice of the United Nations, Documents and Commentary*, 42 CASE W. RES. J. INT'L L. 825 (2010).