

From Citizen to Subject: The Perils of Privacy

On May 1, 2006 Charles Grapski was arrested, hand-cuffed, and taken to jail where he was charged with a felony. His crime had taken place a few days earlier during an interview with Alachua City Manager Clovis Watson. Grapski had been meeting with Watson in order to request public records related to a lawsuit challenging the results of a recent election. According to Grapski, his cell phone recorder was in plain sight and, at one point in the conversation, Watson directly asked if he was being recorded. After confirming he was, the conversation continued. When Grapski returned the following Monday to retrieve the requested documents, he was met by the Alachua police chief.¹

Grapski was charged under a Florida statute that requires consent when tape-recording conversations. This statute is considerably more stringent than the federal statute, which requires one-party rather than two-party consent. Grapski argued that he was not violating the Florida statute because his recording device was in plain view, and continuing a conversation that was obviously being recorded constituted consent. Second, he claimed that a conversation with a public official about public business could not possibly be construed as private.

The local newspaper, the *Gainesville Sun* weighed in the following day, pointing out that the arrest could easily be construed as a government official punishing a citizen for political activity, in this case the lawsuit challenging the absentee ballots in the recent election. Grapski may be annoying, the paper concluded, but to arrest and hand-cuff him for taping the conversation, secretly or not, was excessive.² Most people following the case were probably surprised to learn that recording a conversation was illegal in the first place. Raised on crime dramas where the break comes when an informant is willing to “wear a wire” or, vaguely recalling Linda Tripp’s clandestine recording of conversations

¹ Amy Reinick, “House Candidate Accused of Illegally Taping Meeting,” *Gainesville Sun*, May 2, 2006.

² “Alachua ‘Gotcha’,” *Gainesville Sun*, May 3, 2006.

with Monica Lewinsky, most citizens do not realize that law enforcement officials are the only ones exempted from the requirement of two-party consent.

The overwhelming majority of the extensive literature on surveillance and privacy frames the issue in terms of the threat of Big Brother.³ The dystopian images of surveillance and thought-control in George Orwell's book *1984* still resonate with the indigenous anti-statist tradition in the United States. The literature on surveillance typically emphasizes the need to erect safeguards to prevent the government from instituting national ID cards, wiretapping, tracking citizens through consolidated mega-databases, using CCTV and GIS to record our activities in public space, and infrared technologies to peer into the home.⁴ But the Grapski case raises an equally important but less prominent concern. Do rules against audio and video surveillance disempower citizens by making government officials less accountable? Can privacy be used to protect government bureaucracies and corporations from oversight by shielding their actions from the scrutiny by citizens and interest groups? In this paper I challenge the way that the theoretical literature on privacy and surveillance has tended to treat privacy acontextually, treating it as a universal, abstract good instead of emphasizing the relationship between politics, power and privacy. Specifically, I argue that the ubiquitous surveillance made possible by new technologies becomes dangerous when it increases the power of the state without a concomitant increase in the power of citizens to ensure the accountability and transparency of government. Drawing upon a wide-range of sources including court cases, political philosophy and contemporary cinema, I suggest that

³ Gary T. Marx, "Seeing Hazily (But Not Darkly) Through the Lens: Some Recent Empirical Studies of Surveillance Technologies" *Law and Social Inquiry* (Spring 2005). See also issues of the journal *Surveillance and Society* <http://www.surveillance-and-society.org/>

⁴ Christian Parenti, *The Soft Cage: Surveillance in America from Slavery to the War on Terror* (New York: Basic Books, 2003); Mark Monmonier, *Spying with Maps: Surveillance Technologies and the Future of Privacy* (Chicago: University of Chicago Press, 2004). Jeffrey Rosen, *The Naked Crowd: Reclaiming Security in an Anxious Age* (New York: Random House, 2005).

privacy can also serve as an instrument of power. Inspired by Michel Foucault's brilliant discussion of the panopticon, scholars are very attentive to the way that visibility is productive of docile and disciplined bodies. Equally troubling and less familiar, is the way that privacy had been mobilized to create docile citizens.

I: The case for privacy

The insidious nature of surveillance was portrayed dramatically in Michel Foucault's path breaking *Discipline and Punish*.⁵ But for all of its brilliance documenting the micropolitics of disciplinary power, the book's critique relies on implicit but under-theorized normative assumptions. Foucault's approach implies that surveillance is objectionable because it is a means of producing docile bodies, but he doesn't explain what is wrong with docility; furthermore, the political implications are ambiguous because his well-known critique of humanism and the illusion of the sovereign subject casts doubt on the possibility of an authentic domain of human dignity, individuality, and freedom. Foucault's approach leaves the following questions unanswered: does the critique surveillance necessarily imply something like a right to privacy or, to put it in slightly less controversial language, a politics of privacy that protects individual autonomy as a strategy for challenging dominant modes of social control? If the problem with surveillance is the way that it constitutes the self as a product of power, then what is the alternative? Is there a domain of freedom that facilitates the self-creation of the self?

In my search for answers to these questions, I came across an interesting essay by the political theorist George Kateb, "On Being Watched and Known."⁶ The core argument of the essay is that the individual's personhood and dignity are harmed by surveillance because the person is treated as an object of social control and manipulation. In "On Being Watched and Known" Kateb makes several arguments to support his claim that a harm accrues from the use of video surveillance and data bases. The harm results

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1995).

⁶ George Kateb, In "On Being Watched and Known," *Social Research* 68: 1 (Spring 2001): 269-298).

from a violation of the right to privacy. According to Kateb, one's sense of dignity is damaged because these techniques foreclose "all possibility of innocence." (33) At first this argument seems implausible because it runs counter to the frequent claim that the innocent have nothing to fear from CCTV and other forms of video surveillance. Just like the automatic traffic camera that snaps pictures of cars that run red lights, law-breakers are carefully separated from law-abiders. For Kateb, however, the very fact of continuous surveillance is an insult. It turns the individual into a "pathological specimen to be observed." It forces us to live without the possibility of anonymity. Databases, in particular, constitute an "unauthorized biography" that narrate the self but in a way that we cannot control. Kateb's argument is similar to the point made by Jeffrey Rosen in *The Unwanted Gaze : The Destruction of Privacy in America*.⁷ The problem with the collection, storage, and circulation of detailed information about our financial records, consumer habits, and others actions is that it creates a stable profile that is very difficult to change. Furthermore, it functions synecdochally. A part of ourselves comes to stand for the whole. Technology initially seems to be a change in degree, a more efficient way of storing information that was previously passed by word-of-mouth from neighbors to local shopkeepers and employers. But in fact, it becomes a change in kind. Neighbors might notice the controversial magazines that we subscribe to but would evaluate this in the context of other actions – how we treat our children, maintain our lawn, and obey social norms. Without this context, the unauthorized biography narrated by databases becomes an ill-fitting identity that is experienced as an oppressive imposition from the outside.

The harm of video surveillance, however, is even more difficult to articulate. Unlike databases that track a series of behaviors to create a problematic virtual self, video surveillance is supposed to identify the perpetrators of criminal activity. Kateb acknowledges that it is very difficult to explain the harm of surveillance because it is a painless form of oppression. But an unperceived insult, Kateb claims, is an insult nonetheless. He outlines four ways in which surveillance can cause subtle but ultimately

⁷ Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Vintage, 2001).

insidious forms of harm. First, he notes the involuntary nature of surveillance, which potentially opens up all aspects of one's life to scrutiny by the state. Although Kateb does not use the word privacy, seems to be relying on an approach similar to that of the philosopher Sissela Bok, who defined privacy as "the condition of being protected from unwanted access by others - either physical access, personal information, or attention." The issue is not so much the intrinsic harm of being watched by others but rather the inability to control others' access to the self.

Kateb is also troubled by the fact that modern surveillance often relies on "hidden camera" techniques that are not readily apparent to the object of observation. This is another variation on the implicit principle that the individual should be able to control access to his or her person. Of course, people who enter in public space or shared environments have always, in a sense, opened themselves up to observation by others. Again, new technologies appear to be a change of degree but mask the fact that a fundamentally new relationship emerges. Observation that relies on the "naked eye" usually involves the possibility of reciprocity. The person being watched could plausibly also catch a glimpse of the voyeur. If the object of surveillance becomes aware that s/he is being watched, she can employ strategies of evasion: change her path or duck inside a building in order to disappear from view. When surveillance is achieved through GPS tracking devices, infrared, and high-resolution hidden cameras, the possibility of engaging in strategies of disruption, of rendering one's own action opaque, becomes more remote.

The third consideration highlighted by Kateb is the "overall inequality or asymmetry" between those who watch and those who are watched. The knowledge that is gathered through surveillance may be used to further refine other techniques of social control. Although he doesn't provide examples, I take him to mean that the police could decide to use surveillance not simply to identify lawbreakers but also to assess general patterns of behavior in order to deter crime. The police would have the tools to become social scientists adept at manipulating lighting, music, architecture, and signs in order to encourage certain types of behavior in public space. For Kateb, this turns human beings into laboratory animals, who are observed so that they can be more effectively

manipulated into behaving in socially acceptable ways. Instead of citizens controlling their government, these tools make it possible for the government to control its citizens.

Although Kateb outlines four harms, it is really the last one that is the linchpin of his argument. The involuntary, inscrutable, and asymmetrical characteristics of surveillance are only problematic in so far as surveillance itself is harmful. The ultimate reason the Kateb rejects the proliferation of new ways of watching and knowing is that they may lead to “a fundamental revision in a person’s self-conception.” (35) At first this characterization of the core harm caused by surveillance does not seem particularly convincing. The self is constantly being revised based on his or her experiences. There are many positive things that lead to a fundamental revision of the self, foremost among them is education. But Kateb seems to think that the type of revision that takes place under the pressure of surveillance is qualitatively different. Surveillance, he explains, treat adults as if they were children. This paternalism is antithetical to basic liberal values of autonomy and individualism. Furthermore, Kateb notes that liberal-democracies are the societies that rely most extensively on benign forms of social control, yet this paternalism runs counter to the democratic idea that the state should be accountable to citizens rather than the converse. For Kateb, these political consequences are the result of a deeply problematic approach to the relationship between the individual and society, one that sacrifices individual autonomy in the name of an under-theorized collectivity. Surveillance is not a neutral technique employed to identify crime but rather a tactic of social control. This is troubling because it treats individuals as if they were a means to an end, rather than ends in themselves. In Kantian sounding language, Kateb describes the human being as an autonomous, inviolable, end-in-itself. Despite a Foucaultian sounding critique of power/knowledge, ultimately Kateb relies on a very different, distinctly humanist conception of the self.

In *The Inner Ocean*, a book-length defense of the culture of individualism, Kateb explains that the theoretical sources of his account of democratic individualism are Emerson, Thoreau, and Whitman rather than Kant.⁸ He argues that the Kantian tradition

⁸ George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, NY: Cornell University Press, 1994), 78.

is seriously flawed from a democratic point of view. Although he doesn't engage in a detailed discussion of Kant, he concludes that "the Kantian notion of autonomy as legislation cannot be extended into the political sphere."⁹ The problem is that Kant explains why the rational individual must legislate moral law for the self but does not provide a theory explaining why citizens should collectively govern themselves. For Kateb this is a critical flaw because he believes that liberal democracy provides the ideal conditions for fostering creative individuality and, conversely individuals nurtured in such an environment are best able to reflect on the common good. In fact, I think Kant is probably closer to democratic individualism than Kateb acknowledges. Despite writing under conditions of censorship and absolutism, Kant defended a core democratic value when he argued that critical public debate was the best way to achieve progress towards better government.¹⁰ But even leaving aside Kant's somewhat contradictory political theory, the Kantian defense of human dignity is the most thorough philosophical exposition of this concept and most subsequent individualists rely on it implicitly.

Do surveillance and data gathering in fact treat individuals as a means to an end rather than ends in themselves? To give a satisfying answer to this question would require an overview of Kant's ethics, which is beyond the scope of this essay. Nevertheless, I do think that from a Kantian perspective, the proliferation of panoptic techniques as a strategy for increasing social control is problematic. Unlike Aristotle who argued in favor of the inculcation of ethical dispositions through habit and inclination, Kant insisted that individuals act in accordance with universal moral laws that they recognize through reason. From an Aristotelean perspective, the panoptic constitution of the ethical self is unproblematic because it is an application of the idea that individuals can and should be socialized to act ethically. For Kant, however, it is counterproductive to rely on techniques of social control that encourage individuals to engage in socially acceptable behavior without developing their ability to choose rationally to be moral. Kant's view -

⁹ Ibid. 39.

¹⁰ Elisabeth Ellis, *Kant's Politics : Provisional Theory for an Uncertain World* (New Haven: Yale University Press, 2005); Immanuel Kant, *Political Writings*, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991).

and Kateb's - places autonomy - the capacity to legislate for the self - at the heart of morality.

Although this position may seem excessively individualistic, Kant concluded that this autonomy would not hinder collective life. The capacity and opportunity for rational reflection and deliberation are the pre-conditions for good government and societal advance. Kateb draws out the democratic political implications of a theoretical approach that is usually seen as individualistic. He argues that collective projects must be freely chosen by citizens who work together for common aims. From this perspective, autonomy is not the opposite of community but one of the most promising ways of achieving community. The panoptic mode of governmentality is based on the assumption that collective aims can be achieved only by using some members instrumentally for the purposes of others. These individuals must be socialized to prevent them from resisting collective aims. The democratic mode, on the other hand, is made up of citizens who use deliberation to persuade others to join together voluntarily to pursue shared values or interests.

A critic might respond that this concept of democratic autonomy rests on a highly idealized understanding of democratic governance. Even deliberative and participatory democracies cannot always achieve total unanimity, therefore any collective decisions will rely on some forms of coercion and hegemony. Furthermore, as Jane Mansbridge demonstrated in her study *Beyond Adversarial Democracy*, rational deliberation can itself be a form of social control.¹¹ In her ethnography of a Vermont town meeting, she showed that public deliberation tended to augment the power of individuals who were used to exercising authority: members of the professional classes and men. Finally, Kateb's objections to social control also raise the free-rider problem - the dilemma of how to deal with the reality that individuals tend to exempt themselves from conforming to general rules, even those that are beneficial for everyone. The accusation of paternalism is a fair one, because the practice of surveillance is based on the assumption that we all act like children sometimes, and therefore the state has to employ techniques that encourage

¹¹ Jane Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1983).

socially useful habits in order to mold instinctual behavior into conformity with collective ideals. The regime of surveillance treats individuals as selfish, child-like subjects with limited self-control rather than as rational citizens who recognize and dutifully act in the interest of the public good.

The accusation of paternalism, however, rests on the assumption that autonomous personhood is a plausible source of identity and meaning. But what if the self is not autonomous but rather, as Foucault suggests, a site that marks the nexus between the individual body and social forces? If the self is always constituted by power/discourse/history, then it doesn't make sense theoretically to treat the self as autonomous.¹² This is where Foucault and Kateb differ. Both are extremely critical of modern forms of discipline and surveillance and for similar reasons. In fact, Kateb uses Foucault's term "docility" to articulate his objection to the type of passive, conformist subject created by the modern disciplinary state. But Foucault insists that individualism is not an alternative to modern discipline but rather a refined technique employed to create docile subjects. Kateb cites the following passage from Foucault in order to highlight their difference:

Consciousness does not really belong to man's individual existence but rather to his social or herd nature; that, as follows from this, it has developed subtlety only insofar as this is required by social or herd utility. Consequently, given the best will in the world to understand ourselves as individually as possible, "to know ourselves," each of us will always

¹² Foucault is not the originator of the claim that individuality is a historically contingent and socially useful ideology. From a Marxist perspective, the autonomy of the self is a distinctively modern concept that reflects the bourgeois conditions of production and market economy. Other cultures still associate the term privacy with its original meaning of deprivation, the experience of someone who is less human because s/he is not visible in public. My point is simply that the "dignity of personhood" is not a universally valid basis for criticizing surveillance.

succeed in becoming conscious only of what is not individual but
“average.”¹³

Foucault is saying that one outgrowth of a culture of individualism is a desire to express oneself. This self-expression, however is also a form of self-creation, a process that unwittingly follows a carefully defined script. It is precisely this desire to discover some psychic depth or truth that constitutes the self as a subject of the therapeutic state. The process of self-discovery is actually a process of self-creation regulated by discourse.

In *The Inner Ocean*, Kateb appreciates this critique and acknowledges that a great deal of what the individual struggles to express is not original but rather a reflection of cultural practices. He recognizes that “spontaneity often is unconscious mimesis.”¹⁴ Nevertheless, Kateb is a passionate defender of the ideal of authentic individuality. He makes two arguments in response to Foucault’s critique. First, he distinguishes between “the expressive self” and “the cultivated inward self.”¹⁵ The expressive self seems to be a more performative self that cultivates distinctiveness in order to impress others. Its orientation towards an audience makes it reliant upon shared cultural meanings and legibility by the intended audience. The alternative, “the cultivated inward self” is not developed in any detail, but Kateb draws on our intuition that “human depth is not always *trompe l’oeil*.”¹⁶ He reminds us that “the capacity to feign or be double; the capacity to talk to oneself; the capacity to draw things out by thinking them over; and above all the capacity to surprise oneself and others in speech and writing as well as in one’s action – all these things testify to depth, to depth of soul.” (236) Although I share his hope that my sense of individuality, creativity, and critical capacity are not ideological illusions, this intuition is not by itself a convincing refutation of studies from thinkers as diverse as Marx and Foucault that have cast doubt upon the universal validity and normativity of bourgeois individualism.

¹³ Cited in Kateb, *Inner Ocean*, p. 234

¹⁴ *Ibid.* 235.

¹⁵ *Ibid.* 236.

¹⁶ *Ibid.*

Kateb's second argument is more compelling. He points out that in spite of the way that individualism may create docile subjects, a more serious threat is posed by political ideologies that expressly attack individualism: fascism, religious fanaticism, exclusive group identity and state socialism.¹⁷ The only way to challenge these ideologies, he argues, is to defend democratic individualism, while simultaneously remaining aware of its limitations in order to inoculate oneself from its perverse effects. Kateb concludes that "fabricated individuality" is preferable to collective tyranny because it at least allows the possibility of creativity, experiments in self-creation, and individual and collective forms of dissent. This retreat from a robust philosophical individualism to a more political and pragmatic variant is compelling because it is less likely to be invoked as a new model for correct behavior.

In "On Being Watched and Known" Kateb employs a similar rhetorical strategy, moving from a theoretical to a pragmatic critique of surveillance. He recognizes that not everyone will share his conviction that "personhood or human status is damaged" by surveillance. He therefore supplements his de-ontological argument with a more utilitarian claim that seemingly benign surveillance will lead to political repression and tyranny. This claim relies on the logic of the slippery slope. He argues that even if routine CCTV is not so troubling, it is the first step toward "totalist tyranny." (49) Technological developments are not neutral instruments as their proponents claim. Instead, following Heidegger, he suggests that technology is itself an ideology. This ideology places the values of order, regimentation, oversight, and conformity over freedom and autonomy. Techniques that initially are employed to separate the innocent from the guilty or to reinforce other binaries such as sane/insane, sick/healthy, legal/illegal easily become part of the apparatus of generalized suspicion. This is what the Italian philosopher Giorgio Agamben objected to when he refused to conform to United States immigration procedures in order to accept a visiting post at New York University.¹⁸ He noted that techniques like finger printing that were developed to identify criminals are now

¹⁷ *Ibid.* 238.

¹⁸ Karen W. Arenson, "In Protest, Professor Cancels Visit to U.S." *New York Times*, January 17m 2004, Section B, Page 4, Column 1.

routinely used to track everyone entering the US. Writing before 9-11 Kateb, worried that all it would take was some sort of real or imagined crisis for new technologies of surveillance to become part of an inescapable net of social control.

The strength of Kateb's essay is the way that it takes into account the political as well as the legal and psychological dimensions of privacy. The weakness is that the essay is not always clear whether human dignity is always violated by surveillance or whether the potentially tyrannical power of the state is the source of concern. For example, in the concluding paragraph Kateb writes, "We are entitled to make much of the fact that officials in a constitutional democracy can be so alienated from the spirit of the laws as to treat any person with such calculated disregard of the human status." (50) I take this to mean that systematic surveillance violates the Lockean idea that a limited state should only settle disputes between citizens and punish transgressors. Kateb is correct that we should be very careful about accepting procedures that give more power to the state while decreasing accountability to citizens. This position, however, does not logically require a general claim that surveillance is intrinsically a violation of human dignity.

Surveillance is problematic when it increases the power of government or corporations without simultaneously increasing transparency and accountability to citizens and interest groups. At times, however, surveillance can be an important tool for citizens to use in monitoring abuses of those in power. As we will see in the next section, the political consequences of surveillance are very different when citizen-activists or journalists use hidden cameras to expose corruption or other abuses, therefore the "right to privacy" should be weighed against other facets of the public interest. Civil libertarians who object to this type of balancing worry that privacy will be sacrificed in the name of national security, but we should not overlook the possibility that privacy could also be used to hide government secrets.

II: The Public Good and the Right to Privacy

Did Charles Grapski's decision to tape his conversation with Alachua City Manager Clovis Watson harm Watson's human dignity? I suspect that even Kateb would not answer in the affirmative. First of all, this scenario runs contrary to Kateb's concern about the asymmetrical nature of power relations that are reinforced by modern regimes

of surveillance. In his book *The Inner Ocean: Individualism and Democratic Culture*, Kateb notes that the concept of rights presumes the modern state.¹⁹ The theory of individual rights emerges in order to justify a limitation on the power of government. Kateb is very explicit about this political dimension of rights, but rights talk relies on abstract, universal formulations that can obscure this underlying political purpose. Through the alchemy of rights, a right to privacy meant to protect individuals from the state comes to protect state officials from citizen scrutiny. In order to justify the right to privacy, civil libertarians claim that it is essential to personhood or human dignity; from this universalistic perspective, any attempt to limit its application threatens to undermine the usefulness of rights as a check on power. Yet it seems strange to say that the human dignity of a government official is damaged when a citizen wants to record a conversation in order to document what promises are made and ensure that they are fulfilled. The context and thus the power relations are different. What about the worry that the ubiquity of surveillance could lead to a fundamental reconceptualization of the self? This objection draws attention to Kateb's concern that excessive conformity and docility would undermine the willingness to take risks, challenge authority, and enjoy freedom. But these inhibitions might not be so troubling when applied to the interactions between citizens and government officials. Perhaps we want our bureaucrats to conform if by conformity we mean following existing laws rather than acting with excessive discretion. Similarly, state officials already have a great deal of authority and therefore a regime of citizen-surveillance that acts to check authoritarianism might be useful.

The example of an aggrieved citizen recording a government official forces us to rethink the issue of privacy. Grapski recorded Watson in order to hold him accountable to fulfill promises to provide documents that citizens are legally allowed to access under Florida Sunshine Laws. This scenario pits the norm of privacy against the value of publicity. Following philosopher Sissela Bok, I define privacy as the condition of being protected from unwanted access by others²⁰ and publicity as "of, concerning, or affecting

¹⁹ Kateb, *The Inner Ocean*, 1.

²⁰ Sissela Bok, *Secrets* (New York: Pantheon, 1983). Daniel Solove is right in pointing out that no single definition of privacy can encompass all the ways in which we use the

the community or the people.” When a public official is engaged in public business, he or she is, in a certain sense, is no longer an individual but a representative of the state. The right to privacy is waived because the nature of the position requires accountability to citizens. It would still be wrong to follow the City Manager and photograph him dining with someone other than his wife, but it is not a similar violation of privacy to tape record him discussing whether to make absentee ballots available for scrutiny.

This case of a public official discussing public business is a particularly straightforward case of advancing the public interest, but investigative journalism has raised a host of more complicated issues that have forced judges to decide whether the public interest should trump the privacy rights of companies and individuals. Journalists have long played an important role in investigating and exposing deplorable conditions that are invisible to most Americans. Historically, the information gathered by muckraking reporters has mobilized public opinion behind government regulation; the leading exemplar of this tradition is Upton Sinclair’s account of the meatpacking industry, which led to the implementation of the Pure Food and Drug Act in 1906.²¹ Other notable examples of undercover reporting include Nellie Bly’s expose of New York’s Blackwells Island Insane Asylum (1887), John Howard Griffin’s study of Southern racism *Black Like Me*, and, most recently, Barbara Ehrenreich’s look at life on the minimum wage in *Nickle and Dimed*.²²

New audio and especially video recording technology, however, has heightened the tension between privacy concerns and the public interest. When journalists go undercover in order to investigate corporate malfeasance or fraud, they often use hidden cameras. This clandestine surveillance exposes wrong-doers as well as other employees

term. Following Wittgenstein, he offers the compelling concept of “family resemblance” to describe the relationship between a variety of different uses of the term. See Daniel Solove, “Conceptualizing Privacy,” *California Law Review* 90 (2002).

²¹ Upton Sinclair, *The Jungle* (New York: Bantam Classics, 1981).

²² John Howard Griffin, *Black Like Me* (New York: Signet, 1996); Barbara Ehrenreich, *Nickle and Dimed: On (Not) Getting By in America* (New York: Owl Books, 2001);

to unwanted publicity. In one well-known case *Food Lion Inc. v. Capital Cities/ABC*²³ two journalists applied to work at Food Lion supermarkets in order to investigate accusations of unhygienic practices in the meat department. Using hidden cameras and microphones, they gathered footage that showed employees repackaging meat and fish for sale after their expiration. They also recorded employees discussing even more egregious violations of health and safety laws. After the exposé was aired on PrimeTime Live, Food Lion filed a civil suit against ABC for damages. The outcome of the case is complex because it involved a number of allegations, including fraud, breach of loyalty and trespass, and unfair trade practices. The case was appealed to the Fourth Circuit Court of Appeals, which upheld the lower court's decision that the reporters were guilty of a breach of loyalty and trespass but not fraud and unfair trade practices. Much of the decision deals with technical issues about how to assess damages in a tort violation of the duty of loyalty and therefore does not concern us here. The final section of the opinion, however, briefly addresses the issue of whether the First Amendment provides extra protection to newsgathering organizations. Citing the Supreme Court precedent *Cohen v. Cowles Media Co.*, the Fourth Circuit concluded that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."²⁴ In other words, the press has no special immunity from criminal or civil penalties when it goes undercover to expose wrong-doing.

The Food Lion decision only indirectly addressed the issues that we are concerned with in this paper. Given that North and South Carolina do not require two-party consent for audio and video recording, no criminal violation was involved. Since the reporters lied on their job applications, the company focused on the fraud and trespass that resulted from this deception. Nevertheless, the case is a key reference point in debates about the use of hidden cameras, because it has had a chilling effect on undercover investigations. Faced with the possibility of paying punitive damages for undercover investigations that culminated in the publication of true and publicly relevant information, new

²³ 194 F.3d 505; 1999 U.S. App.

²⁴ 501 U.S. 663, 669, 115 L. Ed

organizations have become extremely cautious. Although the appeals court ultimately dismissed the punitive damages when it overturned the lower court's finding about fraud, the logic of the decision made it clear that hefty damages could be awarded for similar undercover investigations. The courts unwillingness to balance the public interest in knowledge of unsanitary practices versus the harm to Food Lion from duplicitous employees left journalists open to potentially ruinous damage awards.

The courts, however, have not been totally unsympathetic to the claim that there is a public interest in the publication of political information, even when it is obtained in a clandestine manner.²⁵ In *Bartnicki v. Vopper*, the outcome was very different because the relevant information was not gathered through deceptive practices by reporters but instead was obtained by an anonymous third-party source. This case deals with the unauthorized recording of a cell phone conversation between Gloria Bartnicki, a Pennsylvania teachers' union negotiator, and Anthony Kane, president of the union local. The conversation concerned negotiations regarding a possible teachers' strike and called for "a dramatic response to the board's intransigence." In the most controversial part of the recording, Kane said, "If they're not gonna move for three percent, we're gonna have to go to their, their homes... To blow off their front porches, we'll have to do some work on some of those guys."²⁶ The tape was played by Frederick Vopper, a radio commentator and the information was subsequently repeated in the newspapers and television news shows. In the suit, the plaintiffs alleged that Vopper "knew or had reason to know" that the tape had been made illegally; they sued under state and federal law that banned the disclosure of illegally intercepted recordings. Here the facts are very different than the Food Lion case. In *Bartnicki*, no party consented to the recording so the tape itself was clearly illegal. The question was simply whether the law forbidding the

²⁵ See Eric B. Easton, "Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering," *Ohio State Law Journal* 58: 1135-1148.

²⁶ Eric B. Easton, Public Importance: Balancing Proprietary Interests and the Right to Know, *Cardozo Arts & Entertainment Law Journal* 139 (Winter/Spring 2003).

disclosure of an illegal recording was a violation of the First Amendment right to freedom of the press.

In a 6-3 decision the Supreme Court majority decided that the negotiations were a matter of public interest and “privacy concerns gave way when balanced against the interest in publishing matters of public importance.”²⁷ In the decision, the Court distinguished between the *act* of illegal interception, which was not protected by the First Amendment, and the *disclosure* of the recording, which was “pure speech” and therefore presumptively protected by the First Amendment. The Court then had to decide whether there was a significant government interest that trumped the rights of free speech and the press. The Court recognized that sanctioning the publication of illegally obtained information did provide an incentive to engage in illegal behavior, which the state had an interest in preventing; nevertheless, it concluded that the public interest in accessing relevant information was more important. In a concurring opinion, however, Justice Breyer explained why the decision in *Bartnicki* should not be construed to imply a general immunity of the press. He emphasized the importance of safeguarding the privacy of conversations. In the absence of such protections, people may not engage in frank discussions about important issues. If conversations were not safe from increasingly sophisticated forms of interception, then people might not express critical or controversial viewpoints and greater anomie or conformity would be the result. Nevertheless, Breyer concluded that in the specific case of *Bartnicki*, the public interest in publication outweighed the general privacy concerns. He placed particular emphasis on the fact that the conversation contained a threat of violence, and thus raised the issue of public safety.

In contrast to the majority, Rehnquist concluded that the court provided no guidance to help journalists or judges know how to balance the amorphous “public interest” against statutory protections of individual privacy. In his dissent, Justice

²⁷ *Bartnicki et al. v. Vopper, aka Williams, et al.* 532 U.S. 514; 121 S. Ct. 1753.

Rehnquist emphasized the far-reaching consequences of the majority decision, which he believed eviscerated thirty years of state and federal law protecting private conversations from unauthorized interception. He insisted that the laws protecting the confidentiality of conversations actually foster free speech; only when people believe that their conversations will remain private will they express their more intimate, controversial, or experimental views. He cited Samuel Warren and Louis Brandeis's famous argument that privacy is essential because it protects the individual from the overwhelming complexity and intensity of modern civilization.²⁸

Rehnquist argued that there is no legitimate public interest in private conversations; he suggested that recording such conversations is different than recording and broadcasting statements made by the same union officials during a public forum or bargaining session. This distinction reveals a problem with the simple working definition for "public" offered above. A potentially broad range of topics could plausibly concern the community at large. When we use the term public we do not only refer to the topic of conversation but also the audience or forum that is addressed. If any statements by public figures are intrinsically of public interest, then they would not be able to engage in private, provisional, exploratory conversations with friends or close advisors for fear that these conversations could be broadcast. Rehnquist is right that people might avoid talking about politics if any statements about those topics could be intercepted and circulated out of context.

Despite these convincing objections, I believe that the Court was right to recognize the need to balance free speech and the right to privacy. Perhaps they did not reach the right decision for the facts of this particular case, but they did begin the difficult process of articulating legal standards that balance the right to privacy and the public interest in disclosure of relevant information on issues of general concern. In her article "The Unwanted Gaze, Protecting Privacy and Free Speech in Cyberspace," ACLU President Nadine Strossen outlined criteria that should be employed in balancing these two important priorities: 1) the expectations of privacy about the information involved; 2)

²⁸ Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890).

the degree of public interest in the information; and 3) the existence of less intrusive alternatives that would impinge on privacy less.²⁹

The first standard speaks to Rehnquist's concerns. An authorized recording of a telephone conversation between two private citizens should have the presumption of privacy in a way that a statement at a rally or a conversation with government officials should not. The second standard is inevitably a bit amorphous but it reminds journalists that publishing intimate details meant to embarrass public figures will not receive the same protection as policy statements. Finally, the "less intrusive alternative" standard is crucial and it is already widely employed, for example news organizations typically blur the distinguishing facial features of individuals recorded in "hidden camera" investigations. This is an example of using what Jeffrey Rosen calls the "blob machine" rather than the "naked machine," technologies that balance privacy concerns and security needs. The terms refer to a screening device used at airports that sees through passengers' clothes – unless it is programmed to obscure irrelevant physical details and highlight contraband. Rosen uses the terms to illustrate the feasibility of developing technologies that can gather relevant information while obscuring identifying details that jeopardize our privacy.³⁰ The courts are right to insist that hidden camera investigations employ "blob machine" technology to avoid exposing individuals to unwanted and intrusive visibility. This technological solution is appealing because it holds out that hope that it is possible to have it all, security and privacy, protection from the risks posed by others without intrusion into the hidden dimensions of the self.

III: Surveillance and the Pysche

The core claim of this paper is that we should be very cautious about surveillance, especially when it reinforces a rigid hierarchy between an unaccountable state and a docile citizenry; but simultaneously we should be vigilant about the way that privacy too can reinforce existing distributions of power. In order to illustrate this point, I have tried

²⁹ Nadine Strossen, "The Unwanted Gaze: Protecting Privacy and Free Speech in Cyberspace," *Georgetown Law Journal*, June 2001. 89 Geo. L.J. 2103.

³⁰ Rosen, *The Naked Crowd*.

to draw out the theoretical implications of a series of narrative, including the story of Charles Grapski, the story of the reporters at the Food Lion. The final illustration is drawn from cinema. Film is an ideal medium for exploring the issue of surveillance because the gaze of the camera is itself an act of voyeurism and one that invites the audience's complicity. *Caché*, a recent film by Michael Haneke, is one of a number of films that explore the psychology of being watched and known. The film opens with a long shot of a conventional urban scene. As the audience watches an extended shot of a street with parked cars and houses, there is a growing sense of foreboding. More time passes and nothing eventful happens on the street; the audience feels unease and discomfort because the scene violates the basic cinematic convention that something is supposed to happen. Then, when the scene is rewound, it becomes apparent that the audience has been watching a video along with the film's protagonists, Georges (Daniel Auteuil) and Anne (Juliette Binoche). The scene was part of a surveillance video taken in front of their house and left on their doorstep. Despite the fact that they are never directly threatened, the surveillance of their house gives them a sense of menace and eventually terror that begins to tear apart their relationship and their bourgeois lives.

The film's title – *Caché* – has several meanings. It points towards the hidden surveillance camera that records the exterior of their house. Later in the film, another hidden camera records the fateful confrontation between Georges and the Algerian man who Georges betrayed in his youth. But the title also encourages us to think about what is hidden from people like Georges and Anne who live lives of material ease, sheltered from exposure to people from the poorer parts of town. Georges and Anne are not typical parodies of the vulgar, materialistic bourgeoisie. Georges is the host of an intellectual television program about books and Anne is a literary editor. In fact, they are figures who probably resemble the audience of Haneke's controversial art-house films, members of the urban, intellectual upper-middle classes. What is hidden from them is also hidden from us.

Under the pressure of the videos and child-like drawings depicting a scene of violence, Georges is forced to confront a repressed childhood memory. While growing up in the French countryside, his parents employed a pair of Algerian farm workers who had a young boy named Majid. The parents went to Paris in order to participate in a peaceful

demonstration in favor of Algerian independence. They never returned. Although the French government covered up the massacre, which was never reported in the press, contemporary experts have concluded that the French authorities massacred hundreds of Algerians, disposing of their bodies in the Seine. Georges' parents had intended to adopt the orphaned Majid, but they changed their minds because of false accusations made by Georges. Majid was sent to an orphanage and disappeared from Georges' life until the surveillance tapes and drawings forced him to confront his repressed memories. The confrontation is sparked by a videotape that literally leads Georges to a decrepit apartment on the other side of town. Georges follows the clues and the door is opened by Majid.

Even leaving aside for a moment the way that Haneke is obviously pointing towards the complicity of the film-viewing public in a voyeuristic spectacle, *Caché's* treatment of surveillance differs markedly from the perspective of civil libertarians who defend the right to privacy. In a typically Freudian fashion, Haneke suggests that secrets and betrayals that remain hidden have a pathological effect on both the individual and on social relationships. Visibility and transparency, even a visibility that is violently thrust upon someone who strenuously tries to avoid it, seems preferable to repression and deception. This doesn't mean that the confrontation between Majid and Georges is healing or redemptive. On the contrary, the confrontation is the antecedent to the one act of violence in the movie, when Majid slits his own throat. Even this act, however, does not motivate Georges to feel any pity or responsibility or shame. Instead, he feels enraged that he has been thrust into a drama that forces him to deal with violence and suffering. He hides the incident from his wife, who learns about it when another videotape of Georges threatening Majid arrives at their doorstep. But since Majid himself was obviously unaware that they were being videotaped, it seems as if his son might be responsible for the surveillance.

Although *Caché* includes elements of Hitchcockian suspense, it is less a thriller than a psychological investigation with political implications. Under the pressure of surveillance, Georges resists examining himself and it becomes apparent that his long-repressed act of cruelty has permanently scarred his character. Forced to confront his past, the fear and rage that lie just below the surface of Georges' civilized appearance

become apparent. Similarly the French government has repressed the history of its brutality in Algeria and even its echoes in the heart of Paris. The political implications of this are only hinted at in the film when television images of violence at home and abroad play in the background.

Caché's haunting exploration of power, history, and surveillance is worth reflecting upon, even though the legal and normative implications are unclear. The film illustrates two points that I have tried to make in this paper. First, it points to the way that visibility and invisibility reflect and reproduce power relations. Surveillance may be a form of social control but it can also be a guerilla attack on privilege that functions as part of the struggle to hold those in power accountable for abuses. *Caché* exposes the fact that the French government covered up the massacre of Algerian protestors in Paris in 1961. The film foregrounds the psychic dimension of this act of working through the past through the figure of Georges, who is portrayed as extremely privileged and whose individual act echoes the larger national drama of racial exclusion, fear, and marginalization. The film also suggests that the right to privacy is not absolute because it can be used to cover over actions that have implications for other people. Earlier we defined privacy as protection of the self from unwanted access by others. According to this definition, Georges's privacy was clearly violated by the surveillance of his house. But his actions did not only concern himself. They had impacted other people, most obviously the man he betrayed but also his family members who unknowingly lived with the consequences. Restricting access to the self also involves restricting access to relationships and the parts of ourselves that we share with others. Throughout the film Georges's wife Anne insists on this point but fails to convince him. He believes that his past only concerns himself but Anne is adamant that his continued deception jeopardizes their ability to live together. If we read *Caché* in part as a political allegory, then it seems that the French and the French-Algerians cannot live together as long as the history of the massacre is hidden, and its repressed violence determines the terms of coexistence.

Conclusion

Under the influence of Foucault we are used to seeing surveillance in terms of discipline and social control. Even though Foucault was careful to remind us that this

modern form of power is not exercised exclusively by the state but rather by various agents acting to further diffuse interests, there is still a sense that the multiple axes of power point in the same direction. Undoubtedly, the most important part of the story is the one told by Foucault in *Discipline and Punish* and updated by public intellectuals like Christian Parenti, whose illuminating book *The Soft Cage* looked at the use of surveillance by government and property owners to control slaves, immigrants, union organizers and political dissenters. But on the margins of that narrative is another one that tells of the struggles of political activists, muckrakers, and marginalized people who use surveillance in order to document abuses of power and hold officials accountable. Wielded in this fashion, the hidden camera is not a tool for creating docile subjects but a mirror that reflects existing power relations in the hope that it will transform them.