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The Ethics of Surveillance in Times of Emergency

Edited by
KEVIN MACNISH AND ADAM HENSCHKE
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Acknowledgement

This work is part of the research programme Ethics of Socially Disruptive Technologies, which is funded through the Gravitation programme of the Dutch Ministry of Education, Culture, and Science and the Netherlands Organization for Scientific Research (NWO grant number 024.004.031)
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Introduction

Kevin Macnish and Adam Henschke

The appearance of Covid-19, and the declaration by the WHO of its status as a pandemic, led to the most widespread institution of states of emergency around the globe in history (Adhanom 2020; Greene 2020). Most governments instituted some form of lockdown, suspending businesses and all but essential travel. As the lockdowns lifted, with a view to restarting the global economy, states engaged in large-scale surveillance to track and trace the spread of the virus (Tsang 2020; Gershgorn 2020). These efforts predominantly focused on technological solutions, usually in the form of applications to be hosted on citizens’ smart phones. The advantage with such solutions being that they could cope with the large volumes of people involved, crunch the data quickly and effectively to keep abreast of the spread of the virus in country, and alert users to the possibility that they had contracted the virus.

Whatever the efficacy of such applications, and this has been questioned (Soltani, Calo, and Bergstrom 2020), the proposal and institution of such widespread surveillance raises serious ethical issues. This is particularly true for liberal democracies, in which individual freedoms, including the human right of non-absolute privacy, are particularly important. Within this liberal democratic context, the ethical analysis of surveillance has generally focused, for obvious reasons, on state and corporate surveillance of individuals and groups in society (surveillance as control). This has for the most part been critical, with an emphasis placed on resistance to exercises of power (Bakir 2015; Giliom 2001; Marx 2003). Despite this focus, some have considered the ethics of surveillance as care (Lyon 2007; Stoddart 2012), while others have attempted to seek balance in state and corporate acts of surveillance over the more critical approaches (Macnish 2014; Marx 1998; A. L. Allen 2008; Henschke 2017).

The appearance and rapid global transmission of Covid-19 in 2019–20 therefore led to a shift of emphasis, for some at least, from surveillance as control to surveillance as care. The obvious healthcare implications of a virus which threatened to overwhelm national health systems and killed over a million people were such that surveillance became seen as more acceptable, or even a duty of governments when it came to protecting their citizens.
At the heart of these issues is the question of the relationship between the individual and the state in a liberal democracy during states of emergency (Agamben 2005). During wartime, it is often accepted that certain civil liberties (and even some human rights) should be put on hold for the duration of the war to aid the state in protecting its citizens (Walzer 2015; Bellamy 2008). However, and despite the political rhetoric in some quarters, while a response to a virus may in some ways resemble a war, there are significant differences between fighting people and ‘fighting’ a virus. People have intentions while viruses do not; people, unlike viruses, respond to rumour and intelligence; and the distribution and nature of the harms of war, particularly when fought on or over domestic soil, are distinct from those of a virus. This raises questions about legitimate levels of secrecy and transparency when it comes to state responses to the occasioning crisis.

This is not to say that states of emergency are not appropriate in response to pandemics. Rather, it is to add nuance to the temptation to engage extreme and unjustified responses. It is overly simplistic to draw on historical wartime analogies to see what is appropriate. Furthermore, the history of citizens’ relationship with their governments has changed since any large-scale states of emergency were declared, at least in the global North (Waldron 2003; Sagar 2007). Trust in government has declined significantly since 1945, for instance, and particularly so in the wake of the MPs expense scandal in the UK, the polarization of politics in the US, and 9/11 and the subsequent Snowden revelations. Function creep of government powers is a related, widely recognized problem, with special powers given to the US government in the wake of 9/11 remaining in place despite the demise of the original enemy against whom they were instituted (Philips 1984; Rijt 2011).

Furthermore, even in states of emergency, liberal democracies have sought to distance themselves from authoritarian states by stressing the voluntary nature of the proposed surveillance. Yet the proposed track and trace applications were originally estimated to require adoption by 60 per cent of the population to be successful (Clarke 2020). Given that, it is not clear how such an adoption rate can be guaranteed in the absence of coercion, especially given the decline in trust of governments. Without this level of adoption, should the technology be abandoned or continue to monitor the activities of a few virtuous adoptees even while it has no chance of success, at least according to its original terms? Alternatively, should liberal democratic governments abandon the principle of consent in this issue and follow authoritarian regimes in coercing adoption?

It may be that privacy is a minor value to sacrifice in the aim of saving lives. Furthermore, the track and trace technology will not (always) collect information relating to conversations, or even (necessarily) location data, hence protecting users’ privacy to some degree. Nonetheless, locational privacy remains a concern, and many of the proposed applications could be used to identify gatherings of
individuals (and potentially identify those individuals) which would be of interest to governments for other reasons, such as tracking activists or groups of ‘undesirables’. Locational privacy is in the public interest as well as the health of the nation and needs to be balanced against public health concerns more carefully than through mere appeals to ‘if you have done nothing wrong, you will have nothing to hide’ (Macnish 2018; Solove 2007).

It may also be that digital divides in society deepen because of the technology used. Access to smart phones is not universal, with some struggling to afford these phones and others lacking the mental competence or dexterity to use them (Himma 2007; Abbey and Hyde 2009). In such cases, further technical solutions have been proposed, such as smart cards or wearables, that would still monitor the person’s whereabouts without requiring a smart phone. Even here, though, the Collingridge dilemma holds, whereby we cannot know all the societal impacts of new technologies until those technologies have been implemented, and by then it is often too late to reverse those impacts (Collingridge 1982). Such impacts could include public–private lock-in, whereby governments using technologies designed by corporations become reliant on those technologies, and hence those corporations; and normalization of surveillance in society such that most will accept heightened levels of surveillance continuing after the emergency has receded.

These are by no means all the ethical issues raised by the current appeal to technological responses to the Covid-19 pandemic, but they are sufficient to establish the importance of ethical reflection. Beyond this, many of these issues will apply for other states of emergency, be they caused by viruses, humans, or natural disasters. The Covid-19 pandemic, and the proposed response, therefore provides a powerful impetus to ask when, and to what extent, surveillance can be justified during states of emergency.

This book hence draws from the use of surveillance technologies introduced during the Covid-19 pandemic to explore a set of issues and challenges facing decision makers and designers in times of emergency: how do we respond to emergencies in ways that are both consistent with democratic and community principles, and that are ethically justifiable? Emergencies like public health pandemics not only place stress on existing infrastructure and communities but put significant pressure on our decision-making. While an unsophisticated consequentialism will simply suggest that we choose the option that saves the most lives or favours some other large-scale good outcome, the political, ethical, and practical realities are, as already noted, far more complex and require much greater nuance. The use of surveillance technologies during public health crises is a vital frame to explore the challenge of acting in times of emergency. Moreover, as an exercise in reflective applied ethics, the chapters do not just seek to apply a given theory or principle to the problem of surveillance in times of emergency but use the challenges facing us to critically engage with, reflect upon, and develop those theories and principles.
The book’s authors recognize this challenge—is it possible to respond to exceptional conditions in ways that preserve our core values, or must these core values be subsumed under the need to respond to the particular emergency? On the one hand, the pluralism that is threaded through liberal democracies, and even many modern non-liberal democratic nations, holds that we take multiple values seriously. On the other hand, as we have seen with the Covid-19 pandemic, to fulfil their responsibility to keep people safe, governments everywhere have engaged in a range of policies, practices, and applications of existing technologies that would have been impermissible in normal circumstances. The book offers responses to this challenge by looking at three interrelated ways that that challenge can manifest: first, the democratic challenges; second, the ethical challenges; and third the design challenges faced in developing ethical solutions.

**Democracy in Times of Emergency**

Part I looks at the ways that democratic values are placed under stress in times of emergency. Liberal democracies generally hold to a set of values that see the individual as having priority in how decisions ought to be made, but when there are large numbers of lives at stake, and time is limited, decision makers must find ways to protect the lives and liberties of their people, whilst retaining that which makes liberal democracies what they are. This first section of the book places the global pandemic in a context of political responsibility: what must decision makers do, and how does this square with their commitment to liberal democratic values? Surveillance is a useful way to frame these core political challenges as it places the need for the state to have oversight of what is happening, in tension with basic principles like privacy and free movement. As is so often the case, such extreme conditions that call for increased surveillance can shed significant light on democratic ideals, theories, and practices.

Tom Sorrell’s chapter sets the scene by looking at how emergencies and surveillance threaten basic notions of liberty and freedom in democracies but argues that such threats may be justified. He holds that pandemic surveillance should not be seen as one *more* instance of centralized state surveillance of populations, as if it were an intensification of a single trend started with bulk collection by the NSA and GCHQ for counter-terrorist purposes. On the contrary, he claims, in some of its intense forms it is strongly disanalogous morally to bulk collection and its associated data analytics for preventing terrorist attacks. Rather, pandemic surveillance is open to a strong moral justification, tied to the status of virology and epidemiology as sciences, and the strong independent justifiability of public health measures, including those that temporarily restrict liberty. Isolation and electronic surveillance for contact tracing may arguably save many more lives
and prevent much more harm than network analysis by the intelligence services, as the quick flattening of death rates in high-surveillance jurisdictions shows when compared to exponential rises in other countries, and when surveillance effects along these lines are compared with credible estimates of numbers of lives saved by counter-terrorism. Hence the ethics of surveillance during pandemics is not primarily to be judged by privacy considerations, but by its connections to sufficiently inclusive, properly timed, and accurate tests of the presence of the virus. When a testing regime is inadequate, the intrusiveness or privacy protection of the associated electronic surveillance is of secondary importance morally.

Patrick Taylor Smith uses a neo-republican approach to argue that in times of emergency, such as a pandemic, democracies might be permitted to enter a form of limited dictatorship. His chapter makes three related points. First, he offers an account of emergency that is normatively relevant: an emergency occurs when there is a rapid shift in the relative risks of private and public domination that disrupts an existing institutional equilibrium. Second, he argues that—contrary to standard views—we should understand that institutions cannot change instantly and that emergencies should not be understood as justifying a permissively consequentialist political morality. Rather, using the Roman concept of ‘dictator’ as example, he holds that neo-republicans should create regulated spaces for controlled emergency reasoning. That is, like special prosecutors or inspectors general, the idea is to create institutions that make it possible for nimble policy reactions that are nonetheless constrained in scope, duration, and resources. This creates a set of checks on those actors. Finally, he applies this account to the question of surveillance in the case of serious global health emergencies.

Seumas Miller and Marcus Smith look at the collective responsibility for citizens to engage in surveillance processes like track and trace. As already noted, strategies for combating Covid-19 involve a complex set of often competing, and sometimes interconnected (e.g., some privacy rights, such as control over personal data, are themselves aspects of autonomy) moral considerations, and so hard choices must be made. However, the idea of a collective responsibility on the part of individuals to jointly suffer some costs, e.g., loss of privacy rights, in favour of a collective good (eliminating or containing the spread of Covid-19) lies at the heart of all such effective strategies. This idea provides the theoretical framework for their chapter. Accordingly, they provide an analysis of the appropriate notion of collective responsibility. This theoretical framework is applied to a variety of surveillance tools, including phone metadata tracking, used to combat Covid-19. However, in doing so the wider context of the so-called ‘surveillance society’ is considered, as are a range of potentially competing collective goods, i.e., not merely aggregate loss of life because of the pandemic.

Haleh Asgarinia takes a different angle in considering the placing of groups under surveillance. She notes that, to control outbreaks of disease, quarantine decisions may be taken based on tracking the transmission of the disease on the
group level. However, targeting groups as potential carriers of a disease, rather than addressing individuals as patients, gives rise to questions regarding the privacy of groups. In such cases, the cluster-type groupings designed by data analytics are sources of information for making policy decisions without focusing on individual identifiability. Since privacy concerns on the individual level arise when individuals are made identifiable, groups designed by algorithms or models may expose the crowd to privacy harms which they would not otherwise experience. At the same time, obligations or regulations developed to protect individuals from the misuse of their data are not helpful at the level of the group. Furthermore, data protection rules cannot protect groups against possible privacy harms because many of the uses of data that involve algorithmic groupings are used for the purpose of scientific research and improving public health. These suggest that while there are rules and obligations for privacy and data protection at the level of the individual, there is a growing need to protect groups as entities. This requires a deeper examination of group privacy and how the privacy of the group is considered in the context of data protection.

In a similar manner, Katrina Hutchison and Jane Johnson argue in their chapter that the type of knowledge aimed at by surveillance may differ from that derived from other kinds of knowledge. Hence people diagnosed with Covid-19 give contact tracers a different kind of knowledge from technologically derived data such as that from a phone’s GPS or more socially mandated and technologically mediated data generated from a phone app’s sign-in data. Having outlined these differences, they look at some of the ethical dimensions that arise from the ways that this knowledge is generated and used, particularly looking at the risks of epistemic injustice.

**Ethics in Times of Emergency**

Part II looks at particular ethical challenges faced in times of emergency. The use of surveillance technologies, and their impact on basic freedoms, are not only of political importance but speak to deeper ethical discussions around the very nature of what one can and should do in emergencies. By looking at the ways that different surveillance technologies have been used to respond to Covid-19, we are forced to consider whom we hold responsible, for how long, and what rights can be justifiably limited?

Kasper Lippert-Rasmussen and Kira Vrist Rønn open Part II by drawing from recent discussions in the just war tradition to explore the relations between the liability for risks that an individual poses to others in times of pandemics with the notion of informed consent and surveillance. They note that, in the case of pandemics at least, there is no human aggressor and thus the antagonistic relationship between the surveillant and the surveilled, which is commonly assumed to
obtain in much of the literature on surveillance ethics, does not exist in this context. Yet many scholars have drawn on distinctions from just war theory to develop a framework for surveillance ethics which focus on considerations regarding the liability of the surveilled and how it affects the moral permissibility of surveillance. In their chapter they address the question of whether and in what form liability should play a role in surveillance ethics in the context of pandemics. Here they identify the dilemma between the developers and health authorities in many countries, emphasizing that voluntariness on the side of the users of these apps are key attributes and the need for widespread use of the app to obtain the desired effect. However, such levels of usage are unlikely to be achieved if voluntariness is respected. This provides an opportunity to explore the role of voluntariness in non-antagonistic surveillance ethics.

Sahar Latheef also considers voluntariness through the lens of informed consent, and how public surveillance may lead to trade-offs in this context. She assesses the salient features of track and trace apps to determine whether these introduce novel concerns regarding informed consent and individual rights, particularly in the case of features which allow apps to identify and communicate with other proximate devices. In this case, she holds, an individual is consenting to allow access to their information and, to some extent at least, to the access of information of other people within a specific proximity. This leads to a consideration of inter-agency data sharing and how the data collected could be used for purposes other than contact tracing (for example in criminal investigations). As such, the chapter provides an understanding of the necessary trade-offs made with regards to individual rights to informed consent to achieve a vital public health goal.

Katerina Hadjimatheou considers how surveillance should be used to police protest during emergencies. Following announcements by police in England and Wales to intensify surveillance, using informants and undercover police, against groups protesting climate change, Hadjimatheou uses this relationship as her case study. As with Asgarinia, she notes that the nature of these groups mean that they cannot be reduced to aggregate exercises of individuals’ rights, and so such a study must look at the impact of surveillance on the groups themselves. In this, she considers two angles: the first is the impact of covert human surveillance (aka undercover policing), while the second is the conceptualization of that impact through developing the notion of ‘chill’. While chilling effects are often referenced (Macnish 2015; Columbia Law Review 1969; Kaminski and Witnov 2015) they are rarely evidenced, with some notable exceptions (PEN International 2014). This chapter addresses that lack. Based on this evidence, she argues that the impact of chilling effects needs to be understood at the group level as well as the individual. As such, chilling effects arising from surveillance can be detrimental to those under surveillance, particularly protestors, and those who may benefit from their protests in a democratic environment.
Adam Henschke then looks at the need to ensure that ethical norms return to pre-emergency conditions. He argues that situations such as public health emergencies rely on a dynamic ethics and, as such, consideration must be given on how to reverse social norms that arise during these emergencies. First, on a dynamic view, emergencies, and the exceptional justifications arising through such emergencies, do come to an end. While a great deal of ethical discussion looks at the conditions about when an ‘emergency ethics’ becomes operational, much less has been said about the end period. Second, picking up from the importance of what happens when an emergency ends, while certain policies and practices might be justifiable in response to the Covid-19 pandemic, he holds there is a need to ensure that such policies are reversed once the emergency has receded, and that the social norms around particular surveillance practices and policies return to pre-emergency state. This is especially the case when considering the surveillance policies and technologies that were introduced during the Covid-19 pandemic. While many other emergency policies are obviously and persistently intrusive, many of the surveillance policies and technologies that were introduced during the Covid-19 emergency were subtle, invisible, and pervasive. This means that the social norms around surveillance are less likely to return to pre-emergency norms and as such, the surveillance practices during the emergency have a significant capacity not only to persist once the emergency ends but to influence and drive other social norms around surveillance. Given these points, he argues that the surveillance policies and technologies introduced during the Covid-19 pandemic show that emergency surveillance ought to be considered as justifiable but abnormal and he gives suggestions on how to ensure that the surveillance justified by public health ethics remains abnormal.

Ethics by Design in Surveillance Programmes

The final part of the book closes off by looking at the ways that ethical principles can help design surveillance programmes, and aid in decision-making in times of emergency more generally. A foundational ethical principle, proportionality, is frequently drawn upon to justify particular responses. At its simplest, proportionality is a very useful and intuitive principle—in seeking to respond to an emergency, how significant are the impacts of the emergency, and what are the effects of different responses. Again, with regard to surveillance technologies and practices, we can see the pivotal role that proportionality plays in emergency situations. Moreover, the contributions in this section use surveillance technologies to shed light on the concept of proportionality, and the ways that this principle is designed into technologies.

Lundgren begins this final part of the book with an exploration of the practicality of questions that have been proposed to ensure well designed pandemic
surveillance programmes, and that such a programme should be rolled out globally, while also providing a set of ethical guidelines for contact tracing apps. Like Henschke, he argues that emergency surveillance must be temporary. Yet temporary laws can become permanent, even with so-called sunset clauses. Moreover, temporary measures that are widely adapted can change norms, such as the speed with which social media has changed many people’s norms of information distribution. Thus, even temporary usage of emergency surveillance can have permanent effects. It is also important to ask what effects increased surveillance in a democratic society will have on surveillance in non-democratic societies. For example, President Trump’s behaviour and rhetoric about ‘false news’ have been used by oppressive regimes and there is, similarly, a risk that emergency surveillance in liberal democracies can influence the ability of oppressive regimes to use and abuse surveillance free from challenge.

Frej Klem Thomsen looks at the role that the principle of proportionality plays in morally permissible surveillance. He argues that the only difference between states of emergency and ordinary circumstances is that the stakes are greater in a state of emergency. This entails that an account of morally permissible surveillance should be unexceptional: there is no clear-cut separation between ordinary circumstances and emergencies, but rather a spectrum between them (Statman 2012). He then sketches an unexceptional theory of permissible surveillance in exceptional circumstances, offering definitions of key principles and discussing certain features of particular interest. He too recognizes that an important risk for the use of surveillance to support the containment of pandemics is the danger of function creep or normalization of the exception, where practices of surveillance that are permissible during the emergency are sustained after the return to ordinary circumstances. In response, he argues that the situation with respect to this risk is likely tragic: the situations in which there is a genuine risk are also those situations in which state agents are most likely to pursue surveillance regardless of the risk.

Finally, Kevin Macnish sheds light on further challenges around proportionality by asking if we are too focussed on technological fixes to things like pandemics, overlooking non-technological options in our proportionality calculations. Consistent with this part of the book, he begins with a discussion of proportionality, which demonstrates that there are different ways of understanding and using the term, which in turn leads to confusion in the public debate. He then examines how the technology used in emergency surveillance, in trying to square the liberal democratic circles of privacy and surveillance as well as voluntariness and a need for high adoption, may lead to false positive and false negatives. These come together to demonstrate that technology may be seen as proportionate in the light of one approach and yet disproportionate in the light of alternative approaches. He suggests that these alternatives are often not presented to the public debate owing to a tendency towards techno-fetishism, a default assumption in favour of
technical fixes over non-technical alternatives. He concludes that the form of surveillance undertaken by many such technical fixes, careful as they may be, may nonetheless be disproportionate responses to the crises they seek to address.

References


PART I

DEMOCRACY IN TIMES OF EMERGENCY