The Virtuous Spy: Privacy as an Ethical Limit

Introduction

You suspect something amiss is going on behind your back. Or maybe you know something is going on, but you are not sure of all the details. You want the full story, and you know one way to get it. You could spy. Is there any reason not to spy on other people as necessary to get the facts straight, especially if you can put the facts you uncover to good use?

To "spy" is secretly to monitor or investigate another's beliefs, intentions, actions, omissions, or capacities, especially as revealed in otherwise concealed or confidential conduct, communications and documents. By definition, spying involves secret, covert activity, though not necessarily lies, fraud or dishonesty. Nor does spying necessarily involve the use of special equipment, such as a tape recorder or high-powered binoculars. Use of a third party agent, such as a "private eye" or Central Intelligence Agency operative is not necessary for surveillance to count as spying.

By "spying" I mean something different from unwanted open surveillance of people who know they are being observed or investigated; and I mean something different from openly prying into others' affairs by plying them with meddlesome questions. Like spying, open surveillance and prying raise moral concerns. Notably, all three—spying, open surveillance and prying, potentially interfere with expectations of privacy. People want to be let alone. But spying is morally troublesome both because it violates privacy norms and because it relies on secrecy and, perhaps, nefarious deception.

Contemporary technologies of data collection make secret, privacy-invading surveillance easy and nearly irresistible. For every technology of confidential personal communication—telephone, mobile phone, computer email —there are one or more counter-technologies of eavesdropping.

"The Virtuous Spy: Privacy as an Ethical Limit" by Anita L. Allen,
The Monist, vol. 91, no. 1, pp. 3–22.

But covert surveillance conducted by amateur and professional spies still includes old-fashioned techniques of stealth, trickery and deception known a half century ago: shadowing by car, peeking at letters and diaries, donning disguises, breaking-and-entering, taking photographs, and tape recording conversations. The ethical examination of spying cannot be reduced to a conversation about reigning in the mischief potential of twenty-first century technology. We do need to concern ourselves with what tomorrow's spies will do with nanotechnology, but plenty of spying is possible with the time-tested techniques of the Baby Boomers, or even, for that matter, the Victorians.[1]

The philosophical problem I wish to consider here is the ethical limits of spying on others, when the reasons for spying are good. I want to explore the plausibility of three interrelated ideas. The first idea is one I will call the anti-spying principle: spying on other adults is *prima facie* unethical. Spying ought always to be approached with caution and circumspection. Regardless of its motive, spying carries an ethical cloud. Spying is like cheating. It exploits confidence in the rules of the game. Spying inherently involves taking advantage of those who place their confidence in the social norms that shape a cooperative communal life. Spying should be presumed wrong because it often uses secrecy to unfair advantage and interferes with the enjoyment of beneficial modes of personal privacy that individuals expect others to respect. The second idea is an exception to the anti-spying principle: spying on others is ethically permissible, even mandatory, in certain situations, where the ends are good. In the situations I have in mind, spying is prompted by genuine obligations of caretaking, defense of others or self-defense. Having to spy can make a person uneasy. Yet spying can be a good way to take care of your children, yourself and the people for whom you are professionally responsible. As I have argued elsewhere, privacy is extremely important, but it is not everything.[2] The third and final idea is a constraint on exceptions to the anti-spying principle: where spying is ethically permitted or required, there are ethical limits on the methods of spying. The virtuous spy will violate privacy and transparency norms, of course; but he or she will, to the extent possible, continue to act with respect for the moral autonomy and for the moral and legal interests of the investigative target.

Surveillance professionals confront the complex ethics of spying all the time. Yet the ethics of spying is not a subject matter solely for sur-

veillance professionals, who surely ought to think hard through questions of right and wrong tied to their work.[3] All of us are potential spies—every parent, lover, neighbor or employer. The questions "when is it ethical to spy on other people?" and "what is the ethical way to spy, when spying needs to be done?" are of general interest and importance. So, I address them here.

1. Spying for selfish self-interest

Plato broached the ethics of spying in Book II of the *Republic*. In conversation with Socrates, Glaucon relates the fable of Gyges, a poor shepherd in the service of a king. Glaucon uses Gyges' tale expecting to score points against Socrates. He challenges Socrates to deny that the so-called just man would behave unjustly if his wrong-doing were undetectable.

The fable went like this.[4] A violent storm left a gapping chasm in the earth. Gyges abandoned his flock, venturing down into the wide chasm. There he discovered a large brazen horse, outfitted with a door. Gyges opened the door and resting inside found a naked corpse with a ring of gold on its finger. Gyges took the ring and put it on. Later, when he and the king's other shepherds had gathered to prepare their upcoming report, Gyges discovered sitting there that, with a simple turn around his finger, the ring made him invisible. He began to play with the ring, beaming himself in and out of visibility. Ambition set in. Gyges used the power of invisibility to spy on fellow shepherds. Gyges repeatedly employed the information gleaned through the power to make himself invisible to his advantage. First, he manipulated his peers to get himself appointed an envoy to the king. Next he seduced the king's wife under his nose, killed the king, and grabbed the royal powers and purse.

Glaucon urges by fable that the apparently "just" man would use powers of invisibility opportunistically to spy on others and then to commit immoralities and crimes. So-called just men and women will set aside moral ideals if they can do so without detection. Everyday experience suggests that Glaucon was a keenly accurate psychologist. Philosophers disapprove dishonesty, unfairness and murder. But Glaucon understood that like sex and influence, knowledge of others is something humans naturally crave. It is ordinary to wonder: what do they say and do when I am not in the room?

Wonderment does not entail a right to know or harm. The psychological inclination to spy should be constrained by ethical discipline. At first Gyges was a recreational spy. Like all spying, recreational spying carries an ethical cloud. It has a point, though—it satisfies idle, even prurient curiosity. When they get caught, recreational spies may incite the fury of their victims. The expression "curiosity killed the cat" rings false to contemporary ears, though. Keep it to yourself and recreational spying can be as safe as it is easy. The voyeurs who purchase the night-vision gear at their local retailer are hardly taking their lives into their own hands.

In time, Gyges was not content to be a recreational voyeur. Selfish greed set in, and with it unjust dreams and plots. Increasingly his spying became a tool of immorality and crime. Gyges tale potentially sours moralists to the whole idea of spying. But surely there is a defensible role for rings of Gyges. Sometimes, for limited purposes, responsible moral agents should be willing to make themselves the invisible monitors of others.

2. Protecting your children

In 1971, the British philosopher H. J. McCloskey discussed the ethics of spying as part of his effort to assess the sense in which privacy can be coherently understood as a political ideal.[5] McCloskey defended spying on one's children for their own good. Specifically, he defended spying on young daughters to protect them from older male seducers. His example may look quaint today, but McCloskey correctly identified a category of exception to the anti-spying principle: justified parental paternalism.

A. Spying on your children

Trying to find out what is going on behind one's back is potentially unethical, and, depending upon the means used, potentially illegal. But one context of often permissible spying is parenthood. McCloskey mounted a defense of paternalistic spying on one's own children that I can build on.

Children typically lack the understanding needed to protect their own long-term interests. They can be illogical and poorly informed. They commonly give priority to short-term desires and peer approval. They lack judgment. They are easily victimized. Adult caretakers therefore play a vital role in the protection of children. Parents are justified in finding out whether their children are engaging in seriously unsafe behavior. The use

of subterfuge, if needed, is warranted. Invading privacy to find out what one needs to know can be a matter of responsible parenting.

It was stunning to discover a number of years back that the parents of the teens involved in the infamous Columbine High School massacre had no idea their sons maintained weapons caches in their well-kept middle class homes.[6] Many parents view their teens' possessions and bedrooms as off-limits private space. Columbine and similar incidents around the country point to why parents are justified in inspecting teenagers' rooms for signs of trouble, though. Serious risks of suicide, violence against others, substance abuse, mental illness or sex abuse are grounds for intensely monitoring one's children.[7]

Even poor eating habits can be grounds for monitoring some children. According to researchers, childhood obesity has reached epidemic proportions in the United States.[8] The number of obese and morbidly obese children has risen dramatically in the past ten years. It happens that in some American school districts, parents can log onto a website called "myschool.account.com" and find out exactly what their children have purchased for lunch. Every food item a pupil purchases from funds parents deposit in a lunch account is entered onto an electronic log by type, time and date. Parents can request that their children not be permitted to make cash purchases, thereby forcing children to buy only through their monitored lunch accounts. At some schools, young children are not permitted to share food because of allergy concerns. So the food they buy is pretty much the food they eat.

Monitoring someone's personal behavior, even a child's, can feel uncomfortable. But becoming Big Brother of the lunch room can help a parent appropriately adjust meals eaten at home to reduce caloric intake while respecting the nutritional pyramid, thereby improving health. A parent with a seriously overweight child is justified in closely monitoring food choices, and secretly so if necessary. I would go further: the parent of a child with a weight problem that has reached medical proportions should take advantage of technology to get a grip on the situation and take charge of it. A better Gyges would have used his ring to invisibly ease his children's suffering.

Weight gain in the freshman year of college is a documented phenomenon, but parents are morally less responsible for their adult children and less entitled to monitor.[9] And even if hubby is chubby, his spouse should

find other ways to encourage better food selections. If the technology were in place to allow for spying on spouses as they worked or traveled, non-consenting adults are generally off limits for the paternalism I am defending.

A moral bias against paternalistically spying on adults follows from widely shared premises of adult moral autonomy. I can imagine two situations, though, when spying on other adults would be warranted. One is when spying has been solicited—that is, the spying is consensual. For example, your intimate friend says: here is a key to my apartment; come by unannounced and go through my things whenever you can to make sure there's no sign I am backsliding on my commitment to give up substance abuse. Another example is when a helpless adult for whom you are responsible suffers from a mental illness or a disorder like Alzheimer's and needs to be monitored for their own safety and good. Spying to make sure the bills are getting paid, and the doors are getting locked is an act of love and affection.

The example McCloskey used three decades ago to defend his belief that spying on minors is acceptable reflects the moral preoccupations of another, patriarchal era: the sexual seduction of young daughters by older men. Reconsidering the example exposes the normative complexity of the case for parental spying, and indeed all spying aimed at protecting persons from harm. We want our safety and well-being. However, what constitutes safety and well-being is highly contestable and evolves over time. And what extremes of spying behavior are deemed ethically acceptable to achieve protective goals is also contestable and subject to evolving standards.

McCloskey argued that minors can be protected from their own immature acts. Using the same example, he argued that legal wrongdoers, including seducers, are not entitled to freedom from spying eyes—lawbreakers have no genuine right to privacy:

> People are thought to have a right to privacy in respect of the affaires [sic] they have. . . . Yet I suggest that if the girl involved in the affaire [sic] is a minor, a father who spied on the pair could not be charged with an improper invasion of their privacy; and if the man involved knew she was a minor, he could not complain that he had suffered a loss of privacy as a result of the father's spying, because by his actions he had put that area of his life outside the area of privacy.[10]

The wrongness of "seduction" gives neither the minor daughter nor the seducer legitimate moral grounds for complaint against fatherly spying, McCloskey contended.

It is not clear whether McCloskey's concern was that the seducer is liable for tortuous "alienation of affection" or for criminal statutory rape. The alienation of affection tort which once allowed British and American men to recover monetary damages when another man won the sexual affections of his wife or daughter is virtually dead.[11] Were McCloskey writing today, he would surely reframe the father's right to interfere through spying more distinctly around the legitimate parental concern in stopping statutory rape and child abuse. There is no privacy right to exploit, abuse or rape children.

A man having an affair with an underage girl needs to be caught and stopped. But how far can a suspecting parent go to protect their child? Confronting the possible offender is fine, along with reporting suspicions to the police. Going to the offender's home to interrupt a tryst seems reasonable, too. But what about breaking into the offender's house when no one is there to collect his diaries and journals, thinking they might detail the affair? Or bugging the office of the offender's psychotherapist hoping to hear and tape an admission? Is journal theft and bugging permissible spying because the offender *qua* offender has no legitimate expectation of privacy?

Contrary to McCloskey, I would assert that wrongdoers do have some legitimate expectations of privacy, the clearest being the confidentiality of the wrongdoers' relationships with their therapists and lawyers. (A separate question is whether the psychotherapist or lawyer will have a legal and moral duty to report confessed child abuse.[12]) It does not follow from the offender's having no privacy rights and expectations in the affair, that break-in and bugging by a suspecting father are ethically warranted. The protecting-persons exceptions to the anti-spying principle are not "by any means necessary" rules. Just because someone has robbed millions from a bank, it does not follow that any effective means of extracting proof will be warranted—torture, for example, would be unethical. There are limits on the spying that is permissible when spying is ethically permitted or mandated to protect a child.

B. Spying on others

In McCloskey's example, spying on one's child entailed spying on the intimate affairs of an adult wrongdoer. This led McCloskey to address the issue of whether spying on the private sexual affairs of adults is ever warranted. Yes, spying is warranted, he concluded, because sexual wrongdoers have no genuine privacy interests in their intimate behavior. I think

a better view is that the sexual offender has legitimate privacy expectations and interests, but that not all of them would be wrongly breached by spying. Wrongdoers are entitled to their confidence in the rules of the game, like everyone else.

Now imagine an example in which a zealous parent sought to protect his child by spying on the intimate affairs of an adult whose conduct is not a direct threat to the child, or a threat at all. Spying on third parties to protect one's child can be difficult to justify if it is not clear that the child's safety and well-being are significantly at risk. And the right or obligation to spy does not justify "by any means necessary" spying. I offer a real example, from Mississippi in the late 1990's to get at the issues.

Glenn Michael filed for custody of his six-year-old daughter, who lived with his ex-wife and her friend, Rita Plaxico.[13] Mr. Michael came to believe living with him was in the girl's best interest after he heard that his ex-wife was having a lesbian affair with her roommate. He surmised that the family court would view a heterosexual father as the better parent if he could produce strong evidence of his ex-wife's homosexual affair. One night Michael drove to the home shared by his ex-wife and Plaxico, sneaked up to a bedroom window, and observed the two women unclothed and having sex. Pleased by his good luck, Michael grabbed a camera from his car and snapped some semi-nude images. After presenting the photographs to the court, Michael won custody of his daughter. Ms. Plaxico, who had not been a party to the child custody matter, sued Mr. Michael for invasion of her privacy, but lost. Wrongly, in my view, the court concluded that, under the circumstances of parental concern about an "illict" relationship, spying was not unlawful, but "privileged." On appeal, a second court agreed that Plaxico had no case, arguing that the spying was lawful because it was neither "highly offensive to the ordinary, reasonable man" nor "bad faith . . . utterly reckless prying."[14] Two of the appellate judges thought the majority got the law wrong and dissented.

Had Mr. Michael simply been a recreational peeping-tom, content to peer and move on, he never would have made the law books. But for Michael spying amounted to much more than an idle amusement. He perceived spying as a practical way to protect his child. He spied, he documented his findings, and he shared them with his attorney, the people he spied on, and with the family court.

Spying is commonly called for by responsible caretaking, as Michael intuited. But Michael acted unethically. Like Michael, many people are

prompted to spy to protect dependent children. Such motives alone do not categorically justify spying, or all methods of spying. The adult lovers Michael spied on had an expectation of sexual privacy in their own home. He violated that expectation and the boundaries of property and manners that normally protect it. He cheated. He broke the rules of the game.

The problem of contested and evolving values was at work implicitly in Michael's case. Americans disagree about whether having a gay parent is a threat to a child's well-being. Some Catholic agencies refuse adoptive services to gay couples. Would an interest in heterosexual parenting warrant spying on a mother's intimate life in ways that otherwise grotesquely violate privacy norms? Even assuming, *arguendo*, that Michael would have made the better parent, whether because of his sexual orientation or for some less bigoted reason, he should have tried to protect his daughter from the perceived risk of harm through fairer, less secretive, and less invasive means.

Getting to fundamentals, Michael's case illuminates the good sense of an anti-spying principle in a liberal democratic society. We are committed to tolerance and self-determination. We agree that privacy is important, and know that individuals disagree about what should go on in private life. To spy readily or aggressively in order to expose people engaging in controversial intimate conduct undercuts the very idea of a private life embodied in the social norm of domestic privacy. Perhaps to an extent Michael believed his ex-wife was entitled to her private life, as long as it did not involve their minor daughter. After all, he did not call the police looking to get his ex-wife prosecuted for sodomy.[15] At the time Mississippi law criminalized consensual sodomy, laws struck down in 2003 by *Lawrence* v. *Texas*.[16]

In some instances, prying and open surveillance are ethically less offensive alternatives to spying. Suppose that instead of spying, Michael had resorted to prying and moral suasion. In fact, he might have asked his ex-wife about her reported lesbian sex life and tried in good faith to persuade her that, as a heterosexual, he would be the better custodial parent. I suspect many ultra-liberals would judge Michael badly for meddling in that way. But moralists of any stripe should judge him badly for becoming a trespasser, peeping Tom and surreptitious photographer of sexual intimacy. Michael's conduct would have been especially offensive if it was hypocritical—if he didn't have a problem with his ex-wife's sexuality at all, but sought to exploit the social conservatism of the Mississippi courts to gain control over his daughter.

3. Protecting yourself

Covert activity aimed at protecting yourself from others' wrongdoing is often both lawful and ethical. Threats and extortion may justify surveillance tactics.[17]

Several decades ago, in McCloskey's time, men worried about playboy seducers of married women and daughters. Men also were on guard against undeserving women "with a past" trying to snare unsuspecting mates. McCloskey argued that spying is justified to protect oneself from dishonest lovers. Again, his examples are dated, but his core principle is sound.

A respectable man is interested in marrying a woman, but suspects she may have an out-of-wedlock child stashed away somewhere. According to McCloskey such a man can with "no invasion of her privacy" check up on her behind her back.[18] Similarly a Catholic man interested in marrying a woman who may be concealing the fact that she has been previously married and divorced, would not be invading her privacy if secretly he made the relevant inquiries. For McCloskey "the test here would seem to consist in whether the person has a right to know."[19] But this is only his initial conclusion. He eventually concludes that love itself is why a man may investigate a beloved who loves him back. There is no privacy in love.

The moral right to know, can conflict with the moral right to privacy. McCloskey did not fully consider the possibility that there could be a right to know, but that ethics would limit how far one can go to acquire knowledge. But he shifted quickly, in any case, from a justification for spying based on a right to know, to another interim justification, based on consent. The woman on whom the man spies has freely engaged in some activity that amounts to ethically valid waiver of the moral privacy rights. Shifting again, McCloskey suggests that voluntary intimate interpersonal relationships are constituted by mutual accountability. And love, he urges, demands the most accountability of all. Against her man, a woman in love and seeking marriage has no privacy interests. Deep mutual knowledge is her interest. The target's loving relationship with the spy, and the accountability it assumes, is what ethically justifies the spy's secret and intrusive inquiries about her past:

> Yet love, and like it respect for persons, may dictate invasions of privacy. The lover, because of his love, wants to know all about his loved one, because he

> loves her, and wants to know her more fully as the person she is. . . . Love, and equally respect for persons, may dictate the seeking of knowledge against the wishes of the person concerned. The lover . . . may suspect that she has a serious disease and is afraid to have it diagnosed and treated, and know that if it is . . . it will not be fatal.[20]

I have defended accountability norms elsewhere, arguing that relationships of mutual dependence, which include love affairs, can give rise to strong obligations of accountability.[21] Lovers can indeed be accountable to one another. Accountability demands a performance, and what performance is demanded is highly context dependent. The generic categories of performances include the providing of information, explanations, and justifications, as well as submitting to sanctions and transparency.[22]

A woman's having an accountability obligation to a man grounded in a mutually reciprocal interdependent romantic relationship entitles the man to accountability performances from the woman, and *vice versa*. In the case of a couple engaged to be married, that might mean that the partners are entitled to information and explanations about their pasts, and a reassuring degree of transparency about their present life and future plans. However, we need an argument to conclude that a lover has a right to sneak around and spy if his partner fails to perform or credibly perform the required accountability practices. By analogy: a worker is entitled to an annual wage statement; but if her employer fails to provide one by the date it is due, she is not entitled to break into the employer's files to snatch information or documents. She is entitled to demand the statement and ask for an explanation for why it has not been issued, when it will be provided and whether systems are in place to make sure the same problem does not arise next year.

Of special concern in the context of intimate relationships is a role for trust. A possibility worth considering is that lovers are supposed to tell all, and then have the tales they tell be believed. But if spying between lovers is justified by accountability, we still need some notion of what limits on spying might apply to the situation. Are only "discrete" inquiries permitted? Do theft of diaries and bugging go too far? What about tracking down your beloved's elderly aunt in a nursing home and grilling her about your beloved's past? Things could get dangerously out of hand.

McCloskey's suggestion that an ethic of love inherently entails an entitlement to spy is intriguing. What seems clearer to me is that protect-

ing oneself from harm can warrant spying, and that unfortunately the people able to do us the most harm are sometimes our own lovers or spouses. Contemporary couples in intimate relationships have unromantic, practical grounds for spying. Spying on a spouse or lover may be a demand of responsible self-protection. The people with whom you share intimacy have unique capacities to bring you down, giving rise to rights of ethical spying. You may turn the ring of Gyges to protect your children, but also to protect yourself from undeserved humiliation and ruin.

This point is well-illustrated by the strange case of Jeanine Pirro and her husband Albert Pirro. The Pirros were once one of New York's most infamously dysfunctional married couples.[23] Albert Pirro was not a very nice man when it came to his wife of many years, Jeanine. He was a classic louse. He was guilty of dating-while-married. He was unfaithful and sued for paternity. A zoning lawyer and real estate hot shot, he cheated on the family taxes, tricking his wife into signing fraudulent tax forms. He got caught and was convicted of a felony. Having an unethical felon for a husband was doubtlessly embarrassing to Ms. Pirro, a smart, witty, attractive lawyer. Ms. Pirro was well known in Westchester County, New York, where she served three terms as the District Attorney.

Ms. Pirro became a Republican candidate for the Attorney General of New York in 2006. She believed she had a shot at becoming the first woman in history to hold the post. A couple of months before the election Pirro revealed under pressure that she had tried to hire someone to spy on her husband. Pirro felt she had had to consider spying to find out if her husband was having an extramarital affair with one her friends. She knew Al was dishonest about such things and that she could not trust his denials. Her hope was to make any such affair public before someone else did, catching her unawares on the eve of Election Day, ruining her chances for victory. Something similar had happened once before. Pre-election news reports that her husband had mob ties thwarted her bid to become lieutenant governor. She had had to pull out of the race.

On these facts, Ms. Pirro seemed justified in spying on her husband. I offer the Pirro case as an example of a situation in which donning and spinning the Ring of Gyges may pass moral muster on grounds of self-protection. But Ms. Pirro made some mistakes commonly made by people who set out to spy.

First, she picked the wrong spy. Ms. Pirro approached a man of doubtful character to help her. Since there are ethical (and legal) limitations on spying, choosing a person of doubtful character to do your spying is itself ethically blameworthy. Ms. Pirro admitted to exploring bugging her husband's private yacht with Bernie Kerik, a security consultant who was a disgraced former New York police commissioner. Spying is "shady" because it is covert, but it should not be "shady" in the sense that it is conducted by unethical professionals using unethical techniques.

Second, Ms. Pirro picked the wrong technique of spying, relative to her information need. It is not clear that "bugging" would have violated state or federal law. The laws against wiretapping and eavesdropping, include intrafamilial and other potentially relevant exceptions.[24] Still, there are ethical concerns about the methods she considered. She needed to establish the fact of an affair, but the method of spying she fixed upon would have extensively exposed the personal conversations of anyone visiting the yacht. Bugging the boat would have resulted in a common problem with spying, namely, an over-collection of personal information. Collecting more personal information than needed makes spying more invasive of privacy than it has to be.

4. Protecting the company

The anti-spying principle is called for by the love of openness and privacy, and the large number of ways in which, when pursued in a world of fallible judgment and culture wars, spying can go wrong. The anti-prying principle is best understood as a principle with narrow and limited exceptions. Executing the exceptions for the protection of children, oneself and others can get out of hand. They can get out of hand in corporate life, no less than personal life.

In a widely reported case, the San Francisco based Hewlett-Packard Company (HP) hired private investigators to do some spying. Investigators in three states were authorized to spy on past and present employees of the firm, several board members, and numerous journalists. In September 2006, HP Board Chairwoman Patricia Dunn was quoted in a company press release explaining that the ill-fated spying "was required after the board sought to resolve the persistent disclosure of confidential information from within its ranks" which could "affect not only the stock

price of HP but also that of other publicly traded companies." The investigators went too far and Vincent Nye, a company insider, blew the whistle.

The investigators used "pretexting" to find out who was leaking confidential information to the press. "Pretexting" is impersonating someone else to fraudulently obtain that person's confidential records and perhaps transact business in that person's name, typically online or over the phone. In a well-publicized case, a homicidal stalker used information obtained from Docusearch through pretexting to track down the work address of a woman whom he followed home and murdered.[25]

HP spies used Social Security numbers and other personal information to set up phony accounts and obtained telephone records under assumed identities. Identity theft and pretexting have emerged as major worries now that businesses, government and education routinely collect and store electronically volumes of sensitive personal data.[26] The scale of the problem may explain why the HP debacle quickly caught the attention of criminal prosecutors in California, the U.S. Securities and Exchange Commission, and the U.S. Congress.[27]

HP spying target George Keyworth II admitted that he had made harmless leaks to CNET Networks Inc. and resigned from the Board, complaining that HP's invasions of his privacy and others' were "ill-conceived and inconsistent with HP's values." In a nod to corporate ethics, Dunn admitted that the investigation included "inappropriate techniques," but said the investigators' methods "went beyond what we understood them to be." To help quell controversy, Dunn and other company officials resigned after the scandal broke. Ann Baskins had been general counsel and corporate secretary. She resigned over her role as one of those who knew about and approved the spying. Ethics officer Kevin Hunsaker resigned—he had also known about and approved the spying. He had taken part in remarkable conversations exploring whether methods of intercepting text messages existed since one of the targets on whom HP wanted to spy preferred text messaging to oral cell phone use.

Like parents and spouses, corporations may in principle be justified in spying to meet caretaking responsibilities. There is no inherent ethical objection to business managers ordering fraud and deception investigations that protect investors' bottom lines.[28] But like parents and spouses, corporations can use methods of spying that go too far. HP cast a wide net of fraud and deception. Its mistake was not spying *per se*, but the tech-

niques and extent of spying. The victims of the HP investigation were adults with legitimate expectations of privacy in their communications, although suspected of disfavored conduct. Even the government typically must get a warrant or court order before tapping phones to collect the phone records sought by HP's pretexting private detectives. Much as Mr. Michael crossed ethical boundaries by resorting to invading a stranger's home and bedroom to obtain personal information, HP crossed ethical boundaries through complicity in pretexting to obtain personal data. Michael might have won custody without invading anyone's privacy. HP might have been able to plug its leaks without invading privacy, too. Frank conversations, personnel changes and ethics training might have done the trick. Or, maybe just threatening to cut board directors' salaries until the leaks stopped would have worked.

5. Protecting the nation

In the United States, official spying is valued as a means of information gathering for both law enforcement and national security purposes. Domestic and foreign surveillance is common, and laws have been enacted to regulate the practice of spying. Along with the Fourth Amendment, these laws honor the spirit of an anti-spying ethic but create a host of realistic and necessary exceptions to it. The exceptions can seem to gobble up the principle.

But some in government are not content with the generous regime of exceptions won through the political process. In 2006, U.S. President George W. Bush was widely criticized by politicians, pundits and civil libertarians for making *ad hoc* exceptions of his own to Congressionally-created anti-spying rules. These rules recognize the need for spying in the interest of protecting national security and the need for safeguards for privacy. Pursuing exceptions to anti-spying principles can get out of hand in the national arena, much as exception-making gets out of hand in arenas of corporate and intimate life. Restraint is called for all around.

The Foreign Intelligence Surveillance Act of 1978 (FISA) was enacted by Congress to permit, but regulates covert federal intelligence gathering operations.[29] The Act created a special top-secret court to review government requests to engage in foreign intelligence-related spying of the sorts that would otherwise violate legal rights of privacy.[30] Even without probable cause to believe a crime has been committed, a FISA court judge

is permitted to grant authority to spy where there is probable cause that the target of spying is a foreign power or agent of a foreign power. However, where the target of spying is a U.S. person, a finding of probable cause of involvement in unlawful espionage must be made.

The FISA requires the government to reveal plans to enter someone's home, and to declare the intended duration of surveillance. Moreover, the FISA statute contains a requirement to deal with an inherent risk of spying that I identified earlier: over-collection. Approved FISA surveillance must be conducted so as to minimize the collection, retention and dissemination of information about Americans.[31] "Minimization" requirements found in the FISA are also embodied in the body of law known as Title III.[32] When police have a wiretap warrant they are required to discontinue listening to conversations that do not relate to the subject-matter or target of inquiry. The minimization requirement protects privacy in the context of surveillance.

The FISA was amended by the USA PATRIOT ACT after September 11, 2001 terrorist attacks to loosen the requirements of the statute. In 2005, the FISA court received 2,072 foreign spy requests and all were granted. Spying goes on in the United States under other legal regimes. Under exceptions to federal financial and communications privacy laws, spying on consumers can be authorized pursuant to an administrative subpoena, known as a National Security Letter. The USA PATRIOT ACT, enacted by Congress in October 2001 and reauthorized in 2006, permits the FBI and other agencies to issue National Security Letters requesting personal information about persons not suspected of a crime and without a warrant.[33] The recipient of a National Security Letter, such as a library or internet service provider holding customer data, is forbidden by the PATRIOT ACT to disclose the receipt of a letter. According to Justice Department officials, 9,254 of these concerning more than 3,000 individuals were issued by the Justice Department in 2005.[34] *Washington Post* sources indicate that since September 11, 2001, as many as 30,000 National Security Letters are being issued each year by the FBI, "extending the bureau's reach as never before into the telephone calls, correspondence and financial lives of ordinary Americans."[35] Late in 2005 it came to light through a *New York Times* article that even more super-secret spying was going on than officially reported. President George Bush was side-stepping the FISA Court. The President authorized the National

Security Agency (NSA) to secretly listen to conversations between U.S. citizens and persons overseas without first obtaining approval of a FISA court judge, as required by law.

To his many critics, Mr. Bush appeared to flout—in the name of protecting national security—the deeply felt anti-spying ethic reflected in the Fourth Amendment, federal communications privacy laws and the FISA. Mr. Bush and his lawyers insisted that the unapproved secret surveillance of U.S. citizens was a lawful extension of his inherent powers as chief executive and commander-in-chief. The President also claimed that when Congress authorized "the war on terrorism" through the 2001 Authorization of the Use of Military Force, it implicitly authorized aggressive covert tactics.

The President lost the political battle.[36] In January 2007, Mr. Bush agreed to cooperate with the FISA court, under an agreement that promised that the court would handle anti-terrorism surveillance requests expeditiously.[37] But the FISA courts always afforded expedited procedures for urgent requests and total secrecy. The President's secret domestic spying program had not been justified by the war on terror and an urgent need to protect the country from a dangerous new enemy. Merely citing the protecting-national-security rationale did not and should not quiet concerns about unfairly jeopardized privacy.

Conclusion

I have provided examples of spying and examined them from the perspective of a set of ideas that included an anti-spying principle, a set of exceptions, and a rule of restraint. Government surveillance and spying are everyday matters, yet private individuals typically hesitate to spy. U.S. law seeks to honor the anti-spying ethic through a voluminous body of state and federal privacy law, but permits more and more spying in the name of national security. Hesitation is the ethically proper modality for all who would spy. Respect for privacy is the particular virtue of a spy, an ethical limit on both whether and how to act for good.

Secret advantage-taking and privacy-norm violation are part and parcel of spying, pointing to the need for an anti-spying principle in ethics. However, ethical protection can demand or permit ethical spying. This makes the case for exceptions. Spying is useful for protecting children or others in our care who cannot protect themselves; protecting ourselves from wrongdoers; protecting the company and the investing public; and

protecting the nation. To avert a school massacre, address a child's dangerous obesity, or detect wrongs committed by a persistently insensitive and untrustworthy spouse, spying is justified.

But ethical protection does not justify exceptions to the anti-spying principle where less harmful interventions are available and can achieve the same good. Nor is spying "by any means necessary" the ethical rule, when spying is necessary. "The ends don't justify the means," as the maxim goes. Before spying, the efficacy of other, ethically less tainted and risky methods of obtaining the desired information should be ruled out. Even wrongdoers' expectations of privacy matter *prima facie* when selecting the means of information gathering, shaped as they are by the rules of the social game. The unfaithful partner deserves to be politely confronted concerning the details of the alleged infidelity before, or instead, of being spied on.

It appears that Mr. Michael, the man who spied on his ex-wife and her partner, did not seek to have a frank conversation with the women before he resorted to peeping through their bedroom window. And Mr. Michael, like Hewlett-Packard and President Bush, jumped at invasive, legally dubious methods of spying. A surgeon who enters the belly is not too free with her knife. A spy's approach to information-gathering should be surgical, approached conservatively, and bent on restrained efficacy. Moral authority to spy comes without general authority to run rough-shod over legal rights, social expectations, and human feelings.

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NOTES

1. Barnaby J. Feder, "Teeny-Weeny Rules for Itty-Bitty Atom Clusters," *The New York Times*, January 14, 2007, Section 4; Column1, p. 5.
2. Anita L. Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Responsibility* (Lanham, MD: Rowman and Littlefield, 2003).
3. Jan Goldman, *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham, MD: Scarecrow Press, 2006).
4. http://plato.thefreelibrary.com/Republic/2-12

5. H. J. McCloskey, "the Political Ideal of Privacy," *The Philosophical Quarterly*, **21**, 85 (October, 1971), pp. 303–14.

6. Eileen McNamara, "Parents Must Have Known," *Boston Globe*, April 25, 1999, B1.

7. Cf. Newcomb *v.* Ingle, 944 F.2d 1534 (10th Cir. 1991). Using an extension phone, a woman and her father secretly recorded a phone call between the woman's minor son and his father. Father and son discussed the burning down of the woman's house. After being criminally charged with setting a fire, the son alleged in a civil suit against his mother that recording the call violated his privacy rights under the federal Wiretap Act. The court held that use of an extension phone in a private home to tape-record a minor's conversations does not permit the minor to make claim under federal wiretap laws. The court read an exception into the law.

8. Thomas N. Robinson, "The Epidemic of Pediatric Obesity," *West J. Med.* **173**, 4 (2000) pp. 220–21.

9. Natasha Singer, "5 Pounds: Part of the Freshman Meal Plan?" *The New York Times*, Sec. G; Col. 1; August 31, 2006, p. G1.

10. McCloskey, cited in n. 5 above, p. 308.

11. Lawsuits for alienation of affection can still be brought in about half-a-dozen states, by wronged women as well as by wronged men. However, most states have abolished the tort by statute or judicial decision.

12. The general rule is that psychotherapists, physicians, and social workers are required by law to report knowledge of serious child abuse and neglect even if obtained in otherwise confidential relationships with patients.

13. Plaxico *v.* Michael, 735 So. 2d 1036 (Miss., 1999).

14. Citing precedent, the court stated that in Mississippi: "to recover for an invasion of privacy, a plaintiff must meet a heavy burden of showing a substantial interference with his seclusion of a kind that 'would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object'. . . . Further, the plaintiff must show some bad faith or utterly reckless prying to recover on an invasion of privacy cause of action." See Plaxico at 1039.

15. Mr. Michael may have viewed acts such as oral-genital contact that Mississippi defined as sodomy. However, the photographs he submitted in court merely showed Rita Plaxico sitting on a bed, naked from the waist down.

16. The Supreme Court's decision in Lawrence *v.* Texas, 539 U.S. 558 (2003) struck down all state laws criminalizing homosexual sex acts between consenting adults, including sodomy laws.

17. Cf. Moore *v.* Telfon Communications, 589 F.2d 959 (9th Cir. 1978). A man who secretly tape-recorded telephone conversations with a business associate who was attempting to cheat him was not liable under laws otherwise prohibiting non-consensual recording.

18. McCloskey (cited in n. 5 above), p. 308.

19. *Ibid.*

20. *Ibid.*, p. 313.

21. Allen (cited in n. 2 above), p. 33.

22. *Ibid.*, pp. 16–20.

23. Leslie Eaton and Mike McIntyre, "Pirro & Pirro: A partnership of Love, Power and Distrust," *The New York Times*, Sec. A, Col. 1, September 29, 2006; Leslie Eaton *et al.* "In the Murky World of Marital Spying, Legal Pitfalls Await Those Who Tape a Spouse," *The New York Times*, Sec. B, Col. 1, September 28, 2006.

24. See Simpson *v.* Simpson, 490 F2d 803 (5th Cir. 1974), holding that there is a domestic exception to the Wiretap Act. But see U.S. *v.* Jones, 542 F.2d 661 (6th Cir. 1976), holding that there is no domestic exception to the Wiretap Act.

25. See Remsburg *v.* Docusearch, Inc., 149 N.H. 148, 816 A.2d 1001 (N.H. 2003). An internet-based company did the pretexting on behalf of a stalker who committed suicide after murdering a woman named Amy Boyer.

26. Under the Identity Theft and Assumption Deterrence Act of 1998, it is a federal crime to take another's means of identity with intent to commit a federal violation or state or local felony. See the website of the Federal Trade Commission, http://www.ftc.gov/bcp/conline/pubs/credit/pretext.htm.

27. The U.S. House of Representatives' Committee on Energy and Commerce commenced hearings on the HP debacle on September 28, 2006. California attorney general Bill Lockyer filed felony charges against HP officials and their investigators for identity theft, use of fraud to obtain public records, unauthorized access to computers, and conspiracy. Colorado private investigator, Bryan Wagner, was the first to plead guilty. See Associated Press, "H.P. Investigator Pleads Guilty to Identity Theft and Conspiracy," *The New York Times*, January 13, 2007, Sec. C, Col. 1. Charges against Ms. Dunn were dropped.

28. I have in mind routine consumer insurance fraud investigations. See I.C.U. Investigations *v.* Jones, 780 So.2d 685 (Ala. 2000). A harder ethical case was presented by Danai *v.* Canal Square Associates, 862 A.2d 395 (D.C. 2004). The defendant company went through the trash of the president of another company to whom it leased space. The search uncovered "smoking gun" evidence that the president of the tenant firm had knowingly misrepresented her understanding of the terms of a five-year renewable lease agreement.

29. Foreign Intelligence Surveillance Act of 1978, 50 USC 1801.

30. The jurisdiction of the FISA Court is succinctly laid out in In Re All Matters, submitted to the FISA Court, 218 F. Supp. 2d 611 (D.D.C. 2002).

31. The precise demands of "minimization" under FISA have been a subject of litigation in the FISA Court. The USA PATRIOT ACT removed a "minimization" requirement previously imposed by the FISA Court. The "wall" minimization requirement forbade information-sharing between domestic law enforcement and foreign intelligence-gather operations. See In Re Sealed Case No. 01-001, 319 F.3d 717 (D.C.Cir., 2002).

32. Electronic Communications Privacy Act of 1986, 18 USC 2510, *et seq.*

33. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107–56).

34. For these figures and related analysis see generally EPIC.org, the comprehensive website of the Electronic Privacy Information Center, a legal advocacy group based in Washington, DC.

35. Barton Gellman, "The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans," *Washington Post*, November 6, 2005, p. A01.

36. Scott Shane, "White House Retreats Under Pressure," *The New York Times*, January 18, 2007, Sec. A; Col. 4, p. 22.

37. Eric Lictblau and David Johnson, "Court to Oversee U.S. Wiretapping in Terror Cases," *The New York Times*, January 18, 2007. Sec. A, Col. 6, p. 1.