The Ethical Perils of Knowledge Acquisition

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Introduction

At first blush, there would seem to be few ethical problems with knowledge acquisition in a law enforcement context. For that context is one of public safety and criminal justice, both worthy ends, and both more likely to be achieved the better our knowledge base. Furthermore, if our managerial philosophy for knowledge acquisition is intelligence-led, then knowledge acquisition will be a critical element in the efficient prevention, investigation, prosecution, and reduction of crime. The importance of such knowledge acquisition is necessitated and indeed reinforced by the fact that those who threaten public safety or perpetrate acts of injustice are likely to have reasons to conceal significant elements of what they plan or do.

However, the case for knowledge acquisition is not as plain sailing as it may initially appear. First, there is the fact that knowledge acquisition is often made considerably more complex and ethically problematic by the fact that it is focused on activities that usually rely on concealment. And so, unlike regular modes of knowledge acquisition, those who are engaged in law enforcement may need to use extraordinary measures if needed information is to be acquired. Furthermore, some of the techniques employed to gain the requisite knowledge may also threaten other important social values. Wiretapping, for example, threatens privacy rights, interrogatory techniques may compromise the basic requisites for our humane treatment of others, and certain efforts to gain appropriate knowledge may even jeopardize public safety. That is the specter of the surveillance society.

Intelligence-led policing, moreover, is premised on the value of efficiency, and though the normative

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importance of administrative efficiency and value for money should not be dismissed, executive virtues such as efficiency and economy need to be coupled with the values of fairness, respect, and the consideration of others’ legitimate interests if they are not to be corrupted in significant ways.

In addition, intelligence-led policing can easily become embedded in a performance-oriented culture whose dedication to measurement, outcomes, and fiscal parsimony can eviscerate the human dimension of policing that, at least in liberal democratic communities, should be a pivotal consideration. Our interest in crime should not be seen simply as concern about the violation of mandated rules, but centrally as a commitment to dealing with crime understood as a violation of the conditions for our human flourishing. It should be a concern with victims rather than with mere transgressions. Ultimately, it is a concern for human well-being that should condition the social and political order within which we operate. I grant that this appeal to “the conditions for our human flourishing” expresses a vague and even contested end of social life, and needs to be brought to earth through a variety of social rules and aspirations. It needs its own discussion. Nevertheless, something that satisfies this description should characterize the larger context of our social order and the various institutions through which we express it.

To many minds, transnational crime and, especially, one of its contemporary manifestations—terrorism—have exacerbated some of the issues to which I have been referring. This is because of the kind of threat that terrorism and its cognates is claimed to pose. Unlike regular crime, which tends to be individually or institutionally confined, terrorism is often used as a weapon of political destabilization. By operating through the creation of widespread fear in a populace, it can be socially and politically disruptive in a way that does not usually occur in the case of crime’s standard expressions. And so great pressure is placed on those engaged in public safety and law enforcement to allay public concern and to achieve results when public order has been threatened or violated by terrorism.2

What I propose to do in this essay is say something about both the background values at issue in knowledge acquisition and the strategies for knowledge acquisition that have been ethically problematic. The background values that I want to talk about are security, privacy, and human dignity. What are they? Why are they important? And how important are they? The strategies on which I intend to comment relate to surveillance and interrogation: how far may we go? Obviously my observations will be less than exhaustive, though I hope that they do a bit more than scratch the surface.

Before I enter into those substantive discussions, however, I need to talk about the general structure that arguments for knowledge acquisition have—that of means-end reasoning—and the ethical perils to which that structure points.
Means-End Reasoning

Within a public safety or law enforcement context, our interest in knowledge acquisition is not an interest in knowledge as such. It is an interest in the kinds of knowledge that will enable us to achieve certain ends. Knowledge is a means to an end. And that of course confronts us with the old question whether the ends justify the means that we employ to achieve them and, if so, under what conditions. The two extreme positions—both of which happen to be well represented in the extant literature—will not do. That is, it will not do to say either that the ends never justify the means or that they always justify them. My own view is that if we are—as we usually are in public safety or law enforcement contexts—seeking to employ certain means (here, knowledge acquisition) to achieve our ends, we must satisfactorily address six linked but distinct questions.

Are the ends good or good enough?

Although it may seem otiose to ask this question where the ends we have in view are the countering of crime and terrorism, the matter is more complicated than it first appears. For one thing, the path between the use of a specific means and the achievement of a supposedly justifying end is often marked by a series of means-end connections. That is, the means we most immediately employ may have as their proximate end something that itself will be a means to a further end and that end will then function as a means to yet another end. The prosecution of crime may be some way down the track, and even then may be a problematic end. For not every end may be valuable in itself, and even those that are may not be valuable enough to sustain the means. Wielding a hammer may be a means to driving in a nail, but the end of driving in the nail has no particular value unless what is nailed is a means—somewhere along the way—to an end that has intrinsic value. Generally, the ends that will serve to justify means will be those that are not merely (if at all) directed to further ends but are valuable-in-themselves—that is, valuable for their own sake and not just because they serve some other end. This chain of means and ends will be no stronger than its weakest link.

But even ends that are valuable-in-themselves need to be valuable enough (both in themselves and because of any additional values they serve) to support the use of some particular means. Suppose a police officer aims at securing the legal conviction of someone he strongly believes to be guilty of a crime and decides, as officers sometimes do, that he will cut some evidentiary corners to ensure that the suspect will be convicted. Securing that conviction cannot be a final and therefore justificatory end unless the person believed to be guilty really is guilty (and even then it would not follow that any means—such as cutting
corners—will do). Furthermore, the conduct of which the person is believed to be guilty must be conduct that is legitimately criminalized (within, say, a liberal democracy). If, for example, one believes that the personal use of marijuana should not be criminalized, then one might think that obtaining the legal conviction of a person guilty of using the drug is not an end that would justify what it takes to bring about that conviction—though of course that may not be a matter for an individual police officer to determine. But even if the offense is one that should be criminalized, it might still be questioned whether the offense is important enough to justify the use of the particular means used to bring about conviction for that offense. For the resources required to ensure a conviction might be more usefully employed elsewhere. Thus we might question whether police should be giving out summonses for jaywalking if it means neglecting more serious problems on the streets. Even though public safety and law enforcement are generally worthy ends, we should still carefully consider how much moral work they can legitimately be asked to do.

Are the means proportionate to the end?

Although we could effectively prevent illegal parking by confiscating cars, it is clear that using such a draconian means would constitute a disproportionate response to the offense. Disproportionality has a number of dimensions to it. Sometimes means are disproportionate simply because there are simpler and less costly ways of achieving the same end. But an equally important dimension of proportionality appeals to the idea of fairness. It is unfair to confiscate a car simply because it is illegally parked, or to use wiretaps to catch petty thieves, and in our response to terrorism it may be unfair to their users if phone companies or financial messaging services are pressured for records of every call or transaction made.

Judgments of proportionality are not always easy to make, and that can be a problem, for they may then be exploited—as I think they have been in the United States—to justify measures that are almost certainly disproportionate to the threats they are invoked to address. I believe that vague appeals to national security and the war on terror, though cloaked in the language of proportionality, are frequently misused when employed to justify warrantless wiretapping, enhanced interrogation techniques, or extraordinary renditions.

Can the ends be secured in a less invasive manner?

In liberal democratic theory, individual freedom is given high status and we place a premium on minimizing the extent to which that freedom—and particularly the freedom constitutive of our civil liberties—is compromised. We may often achieve ends in more than one way, with one possible means being less costly (socially and individually) than others. What we sometimes refer to as the principle of the least restrictive alternative holds that, other things being roughly equal, we should try to secure our valued ends in the least restrictive way, even if some alternative way would not be disproportionate to the ends being secured. Suppose that a large demonstration
is being planned and the police are concerned that it will get out of hand. They could turn out in great force, with riot gear, in an effort to prevent or curtail trouble fomented by elements within the demonstration. And this might succeed. Alternatively, they could meet beforehand with the organizers of the demonstration with a view to working out a *modus vivendi:* the demonstrators want to make their point and the police must ensure an orderly gathering and secure the ability of others to do what they have a legal right to do. The police and organizers might be able to come to an agreement about how the protest will be structured—whether arrests are desired, how they will be handled, and so on.7 The strategy of prior consultation may be less restrictive and therefore constitute more acceptable public order maintenance.8 Or, to use an example more apposite to the present context, government agents may pressure a financial messaging service to hand over records of all its transactions, but it might be just as effective—and more fair—to request only those records pertaining to pre-identified targets.9

**Will the means secure the ends?**

Although this may seem obvious, it is amazing how often people fail to reflect on the possibility or even probability that some means will not secure the end or ends sought (or at least proffered) either because the means are inappropriate to the end(s), or because they are incompetently implemented, or because what will secure one end will subvert another. As an example of this problem, I have more than a suspicion that the use of some so-called counter-resistance interrogation techniques has not been well grounded.10 If painful coercion is used, will it yield reliable information, and if it does yield reliable and inculpatory information, will it be able to be used against those from whom it is extracted?

It would be too much to require certainty that a supposedly justifying end would be achieved before using the means under consideration. Our interest is in knowing whether we would be *justified in going ahead* with some strategy (and not merely with whether what we did was *justified*), and this requires that we make a judgment of probabilities prior to our proceeding and therefore prior to our being certain as to the outcome. We should, however, be wary about proceeding when there is not a significant and demonstrable likelihood that the proposed end will be achieved.11

It will of course sometimes be difficult to determine in advance what the probabilities of success will be. In addition, depending on the importance of the ends, it may be appropriate that we moderate the degree of probability that ought to be required. The more important our ends, the better we may be justified in proceeding with means that are less than certain to achieve those ends. But such judgments can be easily corrupted and, I suspect, often are.

The corruption of judgment may come about as a result of a variety of factors. One is the tendency to magnify probabilities in the case of valued or disvalued outcomes. In the case of terrorism, fear may be politically exploited to justify more invasive governmental action than the available facts support. There may also be the bureaucratic tendency to cover...
one’s rear, an understandable attitude in some contexts, but particularly problematic where it impinges invasively on innocent lives. This can then be exacerbated by prejudice against or the demonization of those who suffer the consequences of our bureaucratic self-protection.

**Is there something intrinsically problematic about the means?**

Sometimes means may be chosen that, even if effective in accomplishing good ends, would be morally unacceptable in themselves. Consider the case of an undercover police officer who, to gain information about an underworld figure, becomes intimate with a woman who has close connections with someone being investigated. The officer leads her to believe that he is in love with her and, in the course of the relationship, impregnates her. However, once he has exploited the relationship for whatever information he can get, he vanishes. I think most of us would argue that this kind of exploitation of intimate relations (quite apart from its longer term costs), represents an intrinsically unacceptable means to achieve the end of information gathering.\(\text{12}\) Closer to our current topic, I think that government agents who torture or otherwise treat inhumanely (or “extraordinarily render”) those whom they believe to have terrorist connections in order to gain information related to “the war on terrorism” use means that are inherently unacceptable. The same applies to government agents who subject citizens secretly and without court warrant to comprehensive surveillance in order to obtain information that might be useful to their investigations.\(\text{13}\) Because torture and warrantless surveillance are incompatible with our endorsement of the moral values of a liberal society, we will generally consider these means to be morally condemnable. However, such evaluations often become complicated, or compromised, and I will examine them in more detail later in this essay.

The point to note here is that, generally speaking, means are not “morally neutral”—that is, they are not given whatever value they have only by the ends to which they are directed. They frequently have a value in and of themselves, and in using them to secure some end we must take into account any intrinsic disvalue they have. The tendency to treat means as morally neutral has been a common failure in much political debate, where particular tactics (terror tactics) are seen as unacceptable if “they” use them, since they are pursuing evil ends, but are acceptable if “we” use them (as counter-terror tactics) because we are pursuing good ends.\(\text{14}\) This is also a pervasive challenge in policing, where deceptive and coercive means are frequently employed. For example, may police, in order to catch drug distributors, illegally import drugs on behalf of a distributor they are trying to apprehend?\(\text{15}\)

In addition to the question whether or not some means—because of their intrinsic disvalue—are of a kind that need particularly important ends to justify their use, there is a further question whether some means are completely beyond the pale, that is, may never be used, no matter what the ends. Are some means absolutely and unconditionally wrong and not merely defeasibly so (that is, wrong but able to be overridden in certain
cases)? That, too, is an issue to which I will return when I look more closely at interrogation.

What I have been discussing here—the use of morally problematic means to achieve what are recognizably valuable ends—is often referred to as the issue of “dirty hands” (so called because the achievement of some good state of affairs can be accomplished only by morally dirtying one’s hands). It is an issue that often arises for those who hold public office and who, it is said, can fulfill the public expectations of their office (and so do what is in the public interest) only if they sometimes act in ways that transgress ordinary moral expectations.

It is not always clear what we should say—or, indeed, how we should think—about dirty hands. Some who discuss the issue have claimed that such cases are cases in which it is “right to do wrong.” This paradoxical way of putting the point often reflects a deep division between so-called consequentialist considerations that point to the importance of maximizing social good and minimizing evil and those considerations that constitute certain kinds of acts as inherently wrong, that is, condemnable apart from any consequences they may have. Such conflicts of ethical considerations have no simple resolution. However, the most serious problem created by the dirty hands debate, and particularly with formulating it as consequentially justified, is that it tends to open the door to political or other opportunism and disincline us to give due weight to the moral principles that should govern our conduct. Rather than assuming, as many authors do, that dirtying one’s hands in the public interest is justified, it may be best to acknowledge that human decision making sometimes leaves one compromised. No doubt this is unfortunate but, as part of our human condition, the most we may be able to hope for—when it seems as though we cannot but get our hands dirty in the process of trying to do what is best—is to make a good decision about how the stain on our hands is best dealt with.

Will the means have deleterious consequences that would make their use inappropriate?

An effective and otherwise acceptable means might run into difficulties if it has unintended and undesirable consequences. Racial profiling provides a salient example. If a particular ethnic or religious group is more heavily involved than others in, say, drug running or terrorism, it might seem a prudent use of resources to surveil and investigate members of that group more intensively and disruptively just because they are members of the group predominantly involved in that activity. But doing so may have serious deleterious side effects. Because only a small proportion of members of the targeted group is likely to be involved in drug running or terrorism, it is highly probable that a significant number of those investigated will be innocent of any involvement. If we add—as we often can—that the group in question has been historically subject to social discrimination, and/or that the targeting activities are especially intrusive or disruptive (that is, violative of their civil liberties), then the profiling will tend to exacerbate their social condition and deepen their alienation.

In sum, any argument that the end of knowledge acquisition justifies the
means used must make a number of assumptions about both the ends and the means if it is to pass ethical muster. Although the view that the ends never justify the means may underrate the significance that socially important knowledge acquisition, may have for the justifiable use of particular means, the practical danger in the world of criminal justice (as in the world generally) is that ends will too easily be taken to justify whatever means are deemed necessary (and sometimes only especially convenient) for bringing about those desired ends.

So much then for the so-called framing questions and associated perils that knowledge acquisition must address. Let us look now—albeit too cursorily—at some of the values to be realized with knowledge acquisition and the types of techniques employed to realize them.

Security

The importance of personal security—at least within societies structured by liberal democratic values—needs little to be said on its behalf. If we are to flourish in our various ways, especially if, as for almost all of us, that flourishing is to take place in some cooperative or communal relation to others, we must be secure from impositions and interferences that would undermine or constrain our capacity for flourishing. These days, we most often express that need for security in terms of the acquisition and protection of certain human rights—of rights to life and liberty, rights to freedom of association, thought, and conscience, and usually some basic welfare rights without which these other rights would be impossible to exercise. One could obviously expand on this, though I will not attempt that here.18

Personal security is itself a basic executive right. In classical political theory, it is the need to secure conditions for the exercise of our substantive human rights that underpins the agreement to enter into and remain within civil society. In its early formulations, civil society was seen as little more than the guarantor of our individual human rights and our obligations to it were said to be exhausted by its capacity to secure our rights. Although I think there are serious challenges for that account, it nevertheless brings into sharp relief the tendency of a great deal of contemporary discussion, including discussions of public safety and law enforcement, to focus not on personal security but on national or some other form of collective security. But such refocusing brings with it a number of problems. Some problems concern the nature of this collective security, some concern the relation between collective and individual security, and some concern the question of priority. Let me say a little about each of these.

At one time collective security was thought of in fairly direct terms. It consisted primarily in securing a country or jurisdiction from invasion by others—usually from military attacks. More locally, it involved securing the tranquility of a particular social environment against the destruction wrought by mobs, organized crime, or other social predators. But
among the effects of internationalization and globalization has been an expansion of the alleged threats to collective security. These days, discussions of national security are as likely to include reference to industrial pollution, global warming, avian flu or other pandemics, illegal immigration, suicide bombers, and economic downturns in other countries, as they are to refer to armies massed on borders or others’ possession of weapons of mass destruction. In itself, this may not be inappropriate. But it creates considerable space for amorphous appeals to national security. Indeed, one common worry is that what is touted as a national security concern should sometimes be seen instead as a veiled concern for regime security—that is, a concern to secure the powers-that-be from certain kinds of political challenge. It is important, then, that when national security is invoked, we insist on specificity and evidence, not only with regard to the particular national security interests that are involved but also with regard to the level of threat or risk that is involved.

There is a further and critical reason for this. In contemporary political and legal debates, appeals to national security tend to be accorded an almost overriding importance. Question the appeal to national security and either you will not be taken seriously or you will be viewed as unpatriotic and dangerous. National security is treated as a sacrosanct concern that brooks no skeptical doubts. Indeed, in the event that its claims are seriously challenged, it tends to appeal to itself as a reason for not allowing its claims to be challenged. And so, although in classical theory national security is seen as an adjunct to personal security, it has now become the tail that wags the dog. In the name of national security we can jeopardize individual security: our individual liberties must give way before it.

My point here is not to question the relevance or even to some degree the value of national security, but only to note how the classic concern for personal security has been overtaken by a concern for collective (and particularly national) security. It is easy to overlook this, for the simple reason that collective and even national security concerns may themselves be quite important for individual security. That is because we do not develop and flourish as individuals in isolation from others. We are not like seeds that, given only nutrients, sun, and water, will naturally grow into what they are meant to be. Our flourishing as humans is a social achievement, requiring not only the input of others and interaction with them, but also a larger social environment that is culturally rich and relatively stable. Even so, there is no straight line from the social environment that we require for our individual security and what often passes for national security. As we know from what happens in certain regimes, what is purported to be necessary for national security may jeopardize the individual security of many. Although this is something Zimbabweans and Burmese have experienced acutely, elements of the same confusion can be found in more benign regimes.

So the first lesson to be drawn from the very legitimate concern with security is to keep our eye on the right ball—individual security—and to ensure that our concern with national or collective security does
not upend what gives it its justification. That of course becomes clear once we turn to the other values I mentioned, namely privacy and dignity, both of which are individual values even if, like security, they are socially sustained.

Before I move to those other values, however, let me first draw attention to some of the instruments of contemporary security, methods of knowledge acquisition that may create significant challenges for these other values. They include various forms of surveillance, such as CCTV cameras, the monitoring of phone records and conversations, the tracking of financial transactions, data mining operations on some of these to isolate targets or develop profiles, and the use of various interrogatory strategies, some of which may use trickery and other forms of deception but others of which may involve significant physical or psychological coercion. The point of all of them is to elicit information that will assist security, either by enabling forward planning or by ensuring that the guilty will be either punished or prevented from continuing the threat they pose to others.

Let me now review some of the ethical challenges presented by these forms of knowledge acquisition via a discussion of privacy and human dignity.

Privacy

Although the language of privacy did not feature greatly in public discourse until the latter part of the nineteenth century, the underlying concerns for which privacy has become the collective name go back much earlier. The old offense of eavesdropping has Anglo-Saxon origins, as does the derogatory notion of a “peeping Tom.” Nevertheless, privacy has proven a very tricky concept, complicated by the fact that in the last half century U.S. and European traditions of privacy and privacy protection have diverged. For one thing, the European concern with the privacy of personal data is not paralleled in the United States, where commercial organizations are permitted to amass, collate, and retain enormous quantities of personal data (which are often then available for purchase by others). Privacy constraints on personal data in the U.S. focus mainly on governmental data gathering. The irony of this is that governmental agencies are some of the main customers of private information-gathering companies such as LexisNexis, ChoicePoint, and Acxiom. What such agencies are not permitted to gather themselves they get via the back door. Added to this, the American concern with privacy tends to focus more resolutely on private places—particularly the home—than on personal data. This was nicely exemplified by a Supreme Court case several years ago in which drug investigators suspected that cannabis was being grown in an apartment, but needed a warrant to search it. So they used a heat sensor on the outer walls to determine whether one room of the residence was warmer than others, consistent with the use of heat lamps to grow the plant. The warrant that they obtained was then thrown out by
the Court on fourth amendment grounds, even though all the sensor could do was detect variations in temperature.22 By contrast, the U.S. recognizes only a very limited privacy within public space, and information that is given to private vendors—such as phone call data—is easily accessed by governmental agencies.

Despite these differences between Europe and the U.S., I want to offer an account of privacy that I think is general enough to capture its moral importance across the Atlantic but also detailed enough to show what is at stake in the use of various surveillance strategies.

When trying to understand the nature and significance of privacy within a broadly liberal tradition, the core notion—one that will re-emerge in our discussion of human dignity—is that of moral agency, that is, of human beings viewed as moral agents. Distinctive of mature human beings is their capacity to make and ordinarily be inclined to make their own decisions about how to live their lives in relation to others, their making those decisions with reference to normative or moral considerations, and their being accountable for those decisions. It is partly in virtue of that dispositional capacity and the responsibility that attends it that they are accorded a certain dignity and thus warrant others’ respect.

A person’s privacy interests provide what we can characterize as a normative safety zone for moral agency. We can illustrate several points very simply by considering the case of two people who are sitting on a park bench having the kind of conversation that two people who know each other well might have. Each freely communicates with the other against a background of mutual understanding. Some things are said explicitly as part of their conversation, whereas other things are not said but simply understood by each of them. Suppose now that a stranger comes and sits beside them and it becomes clear that the stranger is deliberately listening to their conversation. This will ordinarily transform the situation and constrict their agency. Each interlocutor will realize that the presumptions underlying their communication have been subverted by the stranger’s behavior. If they are to continue the conversation as it was, they may feel compelled to move or (more problematically, given that it is public space) ask the person to go somewhere else. They may simply cease their conversation. If they continue it where they are, they may change the subject to something less personal or private; or they may continue to discuss what they were talking about, but alter the way in which they say what they want to say to each other. However they deal with it, they have lost some of their freedom to control the terms of their conversation or, at best, they have secured it at some extra cost. Their privacy will have been violated. Their agency has been constrained.

Of course, it would be possible to listen into the park bench conversation without the two people knowing it. A tiny bug could be placed under the bench or a parabolic microphone could be set up several hundred feet away. They would carry on as they wished (despite the invasion of their privacy). Well, they might. If we lived in a society in which such audio surveillance was common or not discouraged, it would make us much more conscious that any conversation
we had with others could be overheard or listened to, and we would be faced with various constraining and costly options: we could check out our surroundings before engaging in conversation; we could seek out some place where it would be unlikely that others would be able to overhear us; we could limit the topics of our conversation or adjust their presentation to accommodate the possibility of being overheard.

This very simple illustration of the park bench only scratches the surface. For the expectation of privacy does not go only to what might be called control over information sharing but also to a range of other human capacities that are important to moral agency—to the matter of emotional expression, to our capacity and willingness to be creative, to our capacity to form, express, and foster the kinds of relationships with others that we would like, and so forth. 23

Moreover, in illustrating how integral privacy is to moral agency, the example picks up on only one—albeit the most fundamental—rationale for privacy. Privacy also has a protective role: it secures us against the misuse or oppressive use of information in our possession. The two people on the park bench may well include in their conversation items that others could use against them, information that could be used to kidnap, blackmail, or steal an identity. The two people can share such information with each other because there is a bond of trust between them. Others, however, may have nefarious purposes in listening to their conversation.

In other words, there are, in the language of philosophers, consequentialist as well as deontological reasons for protecting privacy. I have a sense that Americans tend to be inordinately concerned about governmental misuse of personal information, as illustrated by the focus on governmental access to personal information and relative unconcern regarding its access by commercial interests. Whereas government agents might use information to increase their power and act oppressively, commercial data gatherers are thought to have more benign interests, such as the effective targeting of consumers. Europeans, on the other hand, tend to see privacy as a right of personality, and are therefore more exercised by the loss of control over personal data, no matter how it occurs.

But let me now draw attention to one other feature of the park bench case, one that has proven particularly controversial. The two on the park bench have their privacy violated in public. In the United States, it is commonly asserted that people have “no reasonable expectation of privacy in public spaces.” The park bench suggests otherwise, and I think that it is increasingly being recognized that we do in fact have a reasonable expectation of privacy in public. Much of our public life is conducted under a presumption of anonymity. 24 That is, a considerable part of what we allow ourselves to do in public we allow because it is only fleeting and, so far as strangers are concerned, anonymous. The park bench incident is a fairly graphic illustration of the violation of private conduct in a public place. But public privacy can be violated in many more mundane ways—by staring at someone else’s legs on the underground, by taking a lot of interest in what is in another person’s shopping
basket at the checkout counter, by pausing and watching as a couple on the street express their affection for each other. Consider what the effect would be were we to be aware that every part of our life in public would be recorded and then viewed by others frame by frame.

We have of course moved some way down that track. In large cities such as New York and London, CCTV cameras are now ubiquitous and, in the case of London, largely coordinated and centralized. A considerable amount of our public behavior is now available to be viewed and reviewed frame by frame. There is a significant cost to that, or at least there would be were we to have reason to think that our public behavior was not merely being recorded but also being stored and closely monitored. The significant cost would include both the chilling factor of having information concerning our activities in public available to others’ close scrutiny and possibly having that information used in inappropriate ways. The presumption of anonymity is critical to our public persona.

In order to provide a normative framework for the notion of privacy in public, Helen Nissenbaum has developed the notion of “contextual integrity.” The basic idea is that when we convey information to others we ordinarily give it to them for a limited number or range of purposes, and if that information is then used for purposes beyond that, it violates the privacy of the person whose information it is. Suppose that the recorded conversation between the couple on the park bench is then posted on YouTube, or if the supermarket cashier projects the contents of my shopping basket onto a large screen for all to see. Information under my control and shared for a limited purpose to a limited audience is taken out of my control and I am violated even though the initial sharing occurred in public. One need not have anything to hide—as though only those with something to hide care about their privacy. It’s about control over one’s self-presentation, about autonomy, about being seen as and being treated as an agent who should have some rights with respect to how one relates to others. This is a concern for autonomy and one’s presentation in public no less than one’s presentation in private.

Underlying the idea of contextual integrity is a recognition that our lives are—in part—constituted by various arenas or spheres of activity, each of which is governed by certain norms of appropriateness, including, especially, norms that relate to information acquisition and flow. These spheres of activity might include family, workplace, religious community, financial institutions, friendships, medical care, and so on. There may be, of course, overlaps among and even differentiation within the spheres. There are things that go on between parents that are not shared with children, and things that are shared with some in the workplace but not with others. It is not a matter of secrecy—of hiding something from others—but of the appropriateness of sharing with different others. So, more generally, what is appropriately shared in one context might be inappropriate if it is communicated to and within another domain. What is told to one’s priest should not then be passed on to one’s employer. What is shared with one’s doctor should not be passed on to one’s banker. And so on. No doubt there is some room for

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movement and revision here, but in a stable society there will be some reasonable clarity about what contextual integrity requires.

Furthermore, contextual integrity can function in the public sphere as well as the private one. I do not wish to have an image of the contents of my supermarket shopping cart or of my scratching myself preserved and then circulated to my students. What is somewhat problematic even in celebrity circles is completely inappropriate when applied to our everyday activities in public.

Contextual integrity lies at the heart of an ongoing dispute between the European Union and the United States concerning the use of Passenger Name Record (PNR) data. This dispute is about a range of personal information that is gathered when passengers book or change their tickets—data that are stored in large commercial databases and then shared with other airlines, as appropriate. The personal information includes, besides name and address, one’s date of birth, credit card information, frequent flyer numbers, billing and approval codes, and maybe less formal information concerning dietary and sleeping preferences, ethnicity, and religion. Arguing that such data are important to counterterrorism intelligence post-9/11, the U.S. demanded that all passengers to the United States supply the data as a condition of their being permitted to enter the country. An interim agreement between the E.U. and the U.S. was reached soon after 9/11, but broke down a few years later because the European Union has tighter privacy controls than the U.S. A further attempt to reach agreement by mid-2007 met overwhelming criticism from the European Parliament. Then, following the car bombings in London and Glasgow, the European Commission put forward an almost identical proposal of its own to require PNR data. These debates are ongoing, and may be drawing to a close, but one of the salient factors in the dispute between the E.U. and the U.S. has been differing constraints on the use and retention of personal data. Although the U.S. states that it will not use the data to counter tax fraud and drug trafficking, it does not entirely close off these options. This goes to the point about contextual integrity: whether data provided for one purpose (which is deemed important enough to justify its collection) might then be used for other purposes (that might not justify such sharing). In addition, U.S. officials are willing to demand more sensitive personal data, retain such data for much longer periods, engage in more extensive profiling, and so on. As I mentioned, this dispute is an ongoing one, and it has been handled in the interim by having airline personnel check the PNR data against government “selectee” and “no-fly” watch lists that have been compiled from other sources.

No one suggests that privacy is so important that it cannot be invaded. The man who rapes his wife in the family bedroom cannot complain if his private space is invaded. And although I think it is often in the interests of governing authorities to milk the threat of terrorism for political advantage, I have little doubt that the likelihood of a terrorist attack offers a powerful reason for overriding the claims of privacy. Yet just because an important interest such as privacy must sometimes be
compromised in the course of combating it, a trade-off is involved and a significant onus falls on those who wish to encroach on our privacy not merely to assert but also to establish their claim. Initiatives to invade privacy must satisfactorily address the six framing questions that I posed at the beginning of this address. Simply put, it is not enough to invoke the specter or even the probability of terrorism. We need to establish that the means are proportionate to our ends, that the means we employ are likely to accomplish their purposes, and that they are not likely to have countervailing consequences that will undermine their legitimacy. Moreover, there need to be understandings about limitations on the use to which collected data will be put, time limits on retention, access and security measures relating to data so obtained, and so forth.

Dignity

I mentioned earlier that an underlying presumption of morality—at least as it is conceived of in liberal democratic communities—is that individuals are to be viewed as agents. Whatever may be said about the moral responsibility of larger groupings to which we belong, we also hold centrally to the view that we remain authors of our own conduct and thus individually responsible for what we do. This authorial role—based on our capacity for self-reflection, deliberation, evaluation, and decision making—has in modern times come to be expressed in the idea that we all possess a certain dignity as human beings.

The idea of dignity has a long history, and for much of that history it—dignitas—was associated with the idea of social status and rank. Dignity belonged exclusively to those of a particular class and thus eluded the common man. It was not really until the Renaissance that the idea of dignity began to be generalized to all.32 A major eighteenth-century contributor to this development was Immanuel Kant, though even he sometimes used dignity in the older sense of nobility of rank. For the most part, though, Kant spoke of a general human dignity, which he located in our shared capacity to be directed by moral considerations.33 He argued that the dignity attaching to humans consists not simply in our possession of some bare rational capacity, but in our possessing the capacity to determine our affairs by reference to moral considerations. Since then, and particularly following the shame of the Holocaust, the idea of human dignity has become fundamental to documents attempting to establish an international social order. In 1948, the UN Universal Declaration of Human Rights spoke of the “inherent dignity ... of all members of the human family” and of “all human beings” being “born free and equal in dignity and rights.”34 The later UN Convention Against Torture (1987) affirmed in its preamble that “the equal and inalienable rights of all members of the human family ... derive from the inherent dignity of the human person.”35 What is significant about these international documents is that they see in human dignity the foundations of a social
order that is governed by human rights—human rights are grounded in human dignity. It behoves us, then, to explore that idea here.

Those who write about human dignity often distinguish two variants, though I prefer to see them as two dimensions of a unified account. One variant refers to our capacity to be guided not only by reason but also by moral considerations. That is, one of our distinctive human abilities is to see the world not simply as posing challenges to be met by whatever means we can use, but to view it through a lens that distinguishes acceptable from unacceptable ways to achieve our ends. Our capacity to make decisions on the basis of normative appraisals is central to our idea of human dignity. The other variant—or, as I would see it, aspect—of the idea of human dignity is constituted by our actually living that out, that is, by exercising our capacity for moral discernment in the way in which we go about our lives. Dignity is shown in the manner in which we conduct our lives. Degradation or degrading treatment is a derogation from human dignity that we can bring about by treating others in ways that subvert or cause them to surrender the constituents of their dignity.

As the UN Convention Against Torture makes clear, the recognition of and appeal to human dignity is particularly salient so far as interrogation techniques are concerned. Although the serious, if disturbing, debate about the permissibility of torture that has occurred since 9/11 is obviously of relevance here, of even greater significance is the remainder of the Convention’s title—its resolute (even if not absolute) opposition to all “cruel, inhuman or degrading treatment.” Whatever view we take on the constitutive features of torture, and on the question of whether torture is ever justified, there is no doubt that in the wake of 9/11, U.S. counterterrorism intelligence has relied significantly on information that was extracted by techniques that have been “cruel, inhuman or degrading” and thus violative of human dignity. As is well known, there was strenuous White House opposition to the so-called McCain Amendment to the 2006 Defense Appropriations Bill. This was an amendment to outlaw the use of “cruel, inhuman or degrading treatment” against detainees in the so-called war on terror. Indeed, it was not until it became clear that the bill would pass with an overwhelming majority (eventually it passed with a 90-9 vote) that White House pressure subsided. But then the amendment’s teeth were pulled when President Bush used one of his notorious “signing statements” to indicate that he would interpret its provisions in a way that he considered compatible with his role as Commander in Chief and his need to protect the U.S. against terrorist attacks.

As is the case with other means-end measures, interrogation techniques must respond satisfactorily to the six-point test that I outlined above. One particularly critical issue concerns the effectiveness of harsh interrogation tactics compared with alternative interrogation strategies. Those who are subjected to them are as likely as not to falsify information as they are to add to the body of genuine knowledge concerning terrorism. Unfortunately, we possess
extremely little knowledge concerning the informational value of “counter-resistance measures.” Those who support their use tend to speak in generalities, insisting on their importance but providing precious few details. The point, though, is not whether real intelligence is ever gained using such methods—I am sure that it sometimes is—but whether these methods give more and better information than alternative methods that do not violate the constraints of human dignity. Skilled interrogators are themselves divided over the issue.38

Even if it could be established that more information would be obtained using harsh methods, there would still be questions about whether we should use them. One issue concerns targeting. When the Israeli High Court determined in 1999 that the use of what was officially referred to as “moderate physical pressure” transgressed the boundaries of acceptable interrogation, it nevertheless left the door ajar for so-called “ticking bomb” cases.39 That is, if you have ample reason to believe that someone has information concerning an imminent suicide terrorist attack, harsh measures might be permitted. But practically all that that small opening succeeded in doing was to diminish the number of harsh treatments from thousands to hundreds. Where false positives are likely to greatly outnumber true positives and even false negatives, there are strong policy reasons for fully closing the door rather than leaving it slightly ajar.40

But there is a much deeper problem than this. It is not just that an agency that uses such measures will tend to undermine its moral standing, locally and internationally, though this will almost certainly be an undesirable consequence. Nor is the problem only that using such tactics will invite reciprocations by others, though that may indeed be a concern. Nor is the problem that resorting to harsh interrogation measures will tend toward institutional brutalization, though that often seems to occur. The deepest problem, I believe, is that if our techniques of interrogation have the effect of reducing others to a condition that undermines their ability to manifest the deliberative powers that are constitutive of their dignity, we will have effectively crossed a critical ethical boundary by abandoning the moral norms that should serve to justify what we do. Morality is constituted by observing a basic regard for others that prohibits treating them in ways that are subversive of their agency. Once we overstep that boundary we operate outside the bounds of what is moral. In theory, there is no longer any limit on what we may do to secure our ends.

So why, then, do contemporary citizens of liberal democracies—and in the U.S., much of the public—continue to countenance torturous techniques? One reason of course is simply that it reflects the deeply dehumanizing way in which we view those we regard as enemies. But I think there is also a more general psychological explanation—namely, that it provides an assurance that something—enough—is being done to assuage our fears. This has little to do with knowledge acquisition, but it is a politically powerful motive for supporting enhanced or ethically unconstrained techniques against those who may or have threatened us.
Conclusion

It is time to bring this essay to a close. The bottom line is that the knowledge acquisition that is critical to intelligence-led policing is almost never a morally neutral project. It is not morally neutral because a great deal of knowledge acquisition impinges in some way on the lives of others, and such engagements are always undergirded by certain moral expectations. Assessments of those engagements—whether they are ethically sustainable or not—cannot ordinarily be cranked out by means of simple algorithms. These need to be genuine matters of judgment in which various considerations are brought into relief and then juxtaposed, taking into account a variety of criteria as well as multiple perspectives and sensibilities. Although—in organizations such as policing—there may ultimately need to be a single public voice on decisions of policy as well as in relation to particular incidents and strategies, the classical model of a jury offers a useful way of thinking about such decision making. According to that model, the task of the jury is not to reflect majoritarian views—a balance of power—but deliberative unity or consensus, reached after the various understandings and perspectives relevant to an issue have been brought into direct engagement and worked through to reach a unanimous understanding of the truth of some matter. Although particular individuals—such as judges—may and perhaps ought to try to develop the skills that will enable them to engage in such deliberative determinations on their own, it is of the very nature of ethical decision making that it should have a collaborative dimension. Ethics, after all, represents the fundamental glue of human interaction whether it takes place at the individual, institutional, or collective level, and, at least within the larger framework of a liberal democratic society, each member has some claim to have his or her take on the conditions of our engagement treated seriously. What I have outlined in this paper as the framing questions and some of the primary concepts—security, privacy, and dignity—are simply the beginning of that conversation, not its end.

Notes

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2 I focus here on subnational group terrorism (whether or not supported by national groups). My comments do not necessarily bear on state terrorism.

3 I have developed these at greater length in *Ethics in Criminal Justice: An Introduction* (Cambridge, UK: Cambridge University Press, 2008), chap. 3.


6 An interesting recent case in England is *R. (On the Application of Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office*, [2008] UKHL 60, where the House of Lords ruled that the rule of law should be sacrificed to national security interests, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner-1.htm (accessed August 26, 2009).


8 The difference between (2) and (3) can be illustrated by means of the following hypothetical: I am being pursued by a gunman who wants to kill me. On the one hand, I would be justified in shooting him in self-defense (proportionality); on the other hand, I could slip through a doorway and could prevent him from following me (a less invasive means). I should pursue the latter option.


10 See Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008); Intelligence Science Board, ed., *Educuing Information. Interrogation: Science and Art* (Washington, D.C.: National Defense Intelligence College, 2006), http://www.fas.org/irp/dni/educing.pdf (accessed August 26, 2009). Consider also: (1) the fact that some misinformation coercively extracted from alleged terrorists was used as part of the justification for the Iraq war; and (2) that some of the materials used to train Guantánamo interrogators were originally developed to extract false confessions from detainees. I sometimes suspect that the use of such techniques—and their public condonation—is as much connected to the psycho-political goal of assuring a fearful public that “something is being done” as it is expressive of an expectation that useful intelligence will be gained. In addition, as I note later, their use may also evidence the bureaucratic desire to cover one’s rear, coupled with a general dehumanization or at least condescension toward those who are so treated.

11 It might be argued that sometimes, even if we know (or have good reason to believe) that we will not be able to achieve what we are after, we are nonetheless justified in proceeding with our attempts. Where a small country is attacked by a larger one, and fighting back is unlikely to be successful, it may be that fighting back is still called for: rather than cave in (even to a hopeless situation), which would be degrading, it
may be a matter of moral dignity to stand and fight a battle even if one knows one cannot win it. Or consider a case in which the search for a killer will consume vast resources with little likelihood of success: one might argue that out of respect for the victim and victim’s family one should do whatever one can to try to find the killer, even if little is likely to be yielded by one’s efforts to do so.

12 We might think the same about a prostitution sting that for evidentiary reasons permitted officers to have sexual relations with their targets before arresting them. See Gary Marx, “Under-the-Covers Undercover Investigations: Some Reflections on the State’s Use of Sex and Deception in Law Enforcement,” Criminal Justice Ethics 11, no. 1 (1992): 13–24.


14 This was one of the points at issue in the famous exchange of John Dewey with Leon Trotsky. See Trotsky, Their Morals and Ours, 5th ed. (New York: Pathfinder Press, 1973).

15 This was a problem in an Australian case, Ridgeway v. The Queen (1995) 184 C.L.R. 19. The legislature subsequently responded by making an exception of government agents in sting operations.


17 In a liberal democracy there is an additional dimension to these problems when those we have elected to office “dirty their hands” on our behalf. In judging them, we must also judge ourselves. No doubt this is one of the reasons why, when we think they have gotten their hands filthy, and not merely dirty, we do not feel only angry at the way they have violated what we stand for but also feel guilty and ashamed at what has been perpetrated on our behalf.


22 See Kyllo v. U.S., 533 U.S. 27 (2001). It is interesting to compare this case with Illinois v. Caballes, 543 U.S. 405 (2005), in which police used a sniffer dog to check for drugs in the trunk of the defendant’s car. It was argued that because the dog was trained to
detect only that to which Caballes had no right, no violation of his Fourth Amendment rights was involved. It is also instructive to compare these cases with *Florida v. Riley*, 488 U.S. 445 (1989), in which marijuana plants growing in a greenhouse in Riley’s backyard were spotted using a surveillance aircraft. Here it was argued inter alia that overflying aircraft had become commonplace, and that Riley had no reasonable expectation of privacy with respect to that location.


31 A process that has been fraught by problems of accuracy, correctability, lack of transparency and oversight, and questionable effectiveness.

32 In his celebrated *Oration on the Dignity of Man* (1486), the Italian Renaissance philosopher Giovanni Pico della Mirandola located human dignity in the human power of self-transformation, the capacity of humans to be whatever they wish. This was innovative in more than one way. It accorded powers to humans that many theologians considered to have been radically lost when Adam and Eve rebelled against their Maker. In addition, significantly, it universalized the idea of dignity. Mirandola, *Oration on the Dignity of Man*, trans. A. Robert Caponigri (Chicago: Gateway, 1956). See further, Richard C. Dales, “A Medieval View of Human Dignity,” *Journal of the History of Ideas* 38, no. 4 (1979): 557–72.


37 See Erin Louise Palmer, “Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law,” available at http://www.wcl.american.edu/hrbrief/14/1palmer.pdf?rd=1 (accessed August 26, 2009). I have discussed the U.S. situation (during the Bush administration) in more detail in *Have We Become Too Fixated on Torture?* This essay, published by the Association for Services to Torture and Trauma Survivors (ASeTTS), was first composed as a lecture given on the occasion of the UN International Day for the Support of Victims of Torture, June 26, 2008. Available
(accessed August 26, 2009).


