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**FACULTY OF GRADUATE AND
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M.A. (Public Ethics)

GRADE / DEGRÉE

Faculty of Philosophy

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Surveillance, Policing and Privacy in the Community of Rights

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**Surveillance, Policing and Privacy
in the Community of Rights**

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**Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the MA degree in Public Ethics**

**Faculty of Philosophy
Saint Paul University**



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Canada

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Abbreviations

ADVISE	Analysis, Dissemination, Visualization, Insight and Semantic Enhancement
CPIC	Canadian Police Information Centre
CCTV	Closed Circuit Video Surveillance
MDT	Mobile Data Terminal
MFIPPA	Municipal Freedom of Information and Protection of Privacy Act
MATRIX	Multistate Anti-terrorism Information Exchange System
NPS	National Police Services
OPP	Ontario Provincial Police
OSIU	Ontario Special Investigations Unit
OPS	Ottawa Police Services
PGC	Principle of Generic Consistency
RCMP	Royal Canadian Mounted Police
UK	United Kingdom

I would like to sincerely thank Professor Gregory Walters,
for his invaluable guidance, feedback and encouragement
during the development of this thesis.

I would also like to thank Nikita Batalov and Tony Boettger,
for their many hours of discussion and encouragement that helped to shape my ideas,
and Kathy Boettger for her proof-reading assistance.

Introduction

Surveillance technology for policing has become increasingly sophisticated and extensively employed worldwide.¹ The rapidly advancing capabilities of surveillance technology combined with their increasing affordability and a general anxiety among the public about security and safety have resulted in an increase to constant, general public surveillance and data collection programs. The enhanced availability and capability of new information technologies has led to a cultural shift in policing that is increasingly focused on proactive information gathering and analysis. Information based technological surveillance programs, understood as organized or structured surveillance programs with the purpose of watching and acquiring information, operated by law enforcement agencies are in no way a new phenomenon as police have engaged in various types of surveillance operations for many years. What *has* changed drastically over the past decade is the technological nature and wide scope of police surveillance. Police culture understood as the attitudes, values and principles that define the day-to-day practices of police operations² has evolved with the introduction of new technologies. The results of the introduction of new surveillance technologies has been the development of a heavily surveillance based culture in policing.

The practice of policing has become markedly more proactive. The ability to gather data using accessible and efficient information technology has created a culture of intelligence-led policing that demands as much information as possible. As a result, recent years have seen, “a

¹ Mark R. Keeler, *Nothing to Hide: Privacy in the 21st Century*, Toronto: L'universe, 2006.

Gregory J. Walters, *Human Rights in an Information Age: A Philosophical Analysis*, (Toronto: University of Toronto Press, 2002), 41.

² Robert Reiner, “Police Research in the United Kingdom: A Critical Review,” *Modern Policing* 15(1992) pp. 435-508.

Roger Lane, “Urban Police and Crime in Nineteenth-Century America,” *Crime and Justice*, 15(1992) pp. 1-50.

shift in policing vocabulary with the introduction of new terms such as 'strategic' and 'pro-active', together with 'intelligence-led policing,'³ that speak to a greater shift within the general mindset of the policing profession. Surveillance monitoring operations have been confined previously to the task of seeking out specific suspects or criminals in reaction to a crime.

Increasingly, law enforcement agencies, politicians and even the public are supporting expanded general public surveillance programs that are not targeted at particular criminals or suspects but rather capture, sort and store data on all citizens with no further justification than a mandate of safety and security.⁴ These less focused public surveillance operations gather large amounts of general data that is accessed and used at the discretion of law enforcement officials.

Closed caption video surveillance (CCTV) programs have become both more common and more powerful.⁵ CCTV programs can vary in operation but generally function in the following manner; "cameras collect images, which are transferred to a monitor- recording device of some sort, where they are available to be watched, reviewed and/or stored."⁶ Significant development in the sophistication of information and surveillance technology has produced incredibly powerful new CCTV tools for policing. CCTV cameras have come a long way from blurred and fuzzy early incarnations and have become powerful analytical devices.⁷ Surveillance cameras of the 21st century not only passively record a great deal of detail but are also able to actively, "detect, track and classify objects within the video."⁸ The new generation of 'intelligent video' CCTV cameras presents a whole new range of capabilities for law enforcement. Face

³ James Sheptycki, "High Policing in the Security Control Society," *Policing* 1.1(2007): 70-79, 71.

⁴ Keeler, *Privacy in the 21st Century*.

⁵ Brad Reed, "Big Brother's New Software," *Business Advantage through Technology*, 28 June 2008. <http://www.itbusiness.ca/it/client/n/home/DetailNewsPrint.asp?id=49346> (accessed July 2008).

⁶ United Kingdom, Home Office, "Assessing the Impact of CCTV," 2005, *Research Study* 292, 17, <http://www.homeoffice.gov.uk/rds/pdfs05/hors292.pdf> (accessed November 2008).

⁷ Darryl McAllister, "Law Enforcement Turns to Face-Recognition Technology," *Information Today* 24.5 (2007): 50-51.

⁸ Reed, "Big Brother's New Software."

recognition software, which can identify specific individuals in a crowd recorded through CCTV, is but one of the latest intelligent video tools added to law enforcement's growing surveillance technology arsenal.

Database technology has also benefited from significant progression. Electronic databases and databanks have become vast in both size and capacity. Electronic information storage systems are able to store increasingly massive amounts of information. Additionally, increasingly advanced data mining programs now possess the ability to link and analyze information from a variety of sources and formats. Recent years have seen data mining programs better funded and more proactively employed.⁹ Data mining, which can be broadly defined as a, "technique for extracting knowledge from large volumes of data," generally involves, "the application of database technology and techniques—such as statistical analysis and modeling—to uncover hidden patterns and subtle relationships in data and to infer rules that allow for the prediction of future results."¹⁰ Advanced data mining programs are designed, "to troll a vast sea of information, including audio and visual, and extract suspicious people, places and other elements based on their links and behavioral patterns."¹¹ Data mining programs are highly flexible and can be designed to search and link data based on specific criteria as determined by the particular policing agency operating the program. The new generation of data mining and data aggregation programs offer the ability to link large amounts of otherwise innocuous information and create intrusively detailed profiles of specific individuals.

⁹ "Canadian Police Information Centre," *Royal Canadian Mounted Police*, http://www.rcmp-grc.gc.ca/factsheets/fact_cplic_e.htm (accessed May 5, 2008).

¹⁰ Ibid.

¹¹ Ellen Nakashima and Alec Klein, "New Profiling Program Raises Privacy Concerns," *Washington Post*, 28 February 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022701542> (accessed January 2008).

Internationally, the use of surveillance technology for security and policing has significantly intensified, particularly in the United Kingdom and United States of America. The UK has been at the forefront of surveillance based policing for many years and residents of the UK are often referred to as the ‘most watched’ citizens in the world. In the UK, “the initial CCTV initiative was set up under the Home Office Crime Reduction Programme announced in 1998, and £170 million was made available for funding of a total of 684 CCTV projects.”¹² Since that time, the program has continued to sprawl throughout the UK and CCTV cameras monitor increasingly widespread areas. In 2004, there were over 4 million government cameras in 500 towns in England alone.¹³ The proliferation of general surveillance technology in the UK demonstrates the alarming level to which general public surveillance can quickly expand.

In the United States, proactive use of information technology for policing has also dramatically increased over the past decade, particularly in the years since 9/11. United States policing has employed an increasingly intelligence based approach. A 2004 US government audit found over 199 active data mining programs in government departments.¹⁴ Among these programs are intense data-mining programs such as the Multistate Anti-terrorism Information Exchange System (MATRIX) that was developed by the US Department of Defense following the terrorist attacks of September 11. The MATRIX gathers, stores, analyzes and shares a vast variety of information between state police agencies including, “criminal history records, driver’s license data, vehicle registration records, incarceration records, and digitized

¹² United Kingdom Home Office, “Assessing the Impact of CCTV,” 17.

¹³ Mark Rice-Oxley, “Big Brother in Britain: Does more surveillance work?,” *Christian Science Monitor*, February 2004, <http://www.csmonitor.com/2004/0206/p07s02-woeu.html> (accessed December 2007).

¹⁴ United States, United States General Accounting Office, “Report to the Ranking Minority Member Subcommittee on Financial Management, the Budget, and International Security,” GAO-04-548, May 2004, <http://www.gao.gov/new.items/d04548.pdf>, (accessed October 2008).

photographs.”¹⁵ Additionally, the United States’ Department of Homeland Security recently proposed an extensive data mining program by the name of Analysis, Dissemination, Visualization, Insight and Semantic Enhancement (ADVISE) that raised a great deal of concern among privacy advocates.¹⁶

Across Canada a variety of general surveillance programs have been and continue to be implemented.¹⁷ The implementation of general CCTV surveillance programs by police departments has become more common despite concerns raised by civil rights advocates. General CCTV surveillance programs are operational in many Canadian cities, both small and large, including London, Montreal, Sudbury, and St. Catherines. Other major Canadian cities are exploring or have recently approved implementation of CCTV programs. Recently the City of Toronto received two million dollars from the Provincial government to create a CCTV test pilot program in the downtown area and now operates 13 cameras in three neighbourhoods identified as high-risk.¹⁸ A one million dollar test pilot program was also recently approved to be operated in Vancouver, Surrey and Kelowna.¹⁹ The Canadian Police Information Centre (CPIC), a massive database operated by the RCMP and National Police Service, has also been upgraded and expanded significantly in the past decade.

The active use of various surveillance programs raises the question: Has the increasingly advanced ability to monitor, store and link data resulted in an overly proactive, invasive and

¹⁵ General Accounting Office, “Financial Management, the Budget, International Security,” 10.

¹⁶ Nakashima, “New Profiling Program.”

¹⁷ Keeler, *Privacy in the 21st Century*.

Canada, Canadian Police College: Police Sciences School. Technical Report: *Canadian Police Information Technologies: Current Overview*, September 2000.

Denis Cooley, *Re-imagining Policing in Canada*, Toronto: University of Toronto Press, 2005.

¹⁸ Andrew Seymour, “Cameras would help cut crime in Ottawa, chief says.” *Ottawa Citizen* August 10, 2007 <http://www.canada.com/ottawacitizen/news/story.html?id=37dcd6f5-7900-49be-ba65-b96963235601> (accessed November 2007).

¹⁹ Suzanne Fournier, “Public surveillance cameras to be tested in Vancouver, Surrey, Kelowna,” *Vancouver Province* October 27, 2008 <http://www.canada.com/victoriatimescolonist/news/story.html?id=7d160856-8709-470d-adaf-f879840d0c64> (accessed December 2008).

human rights-infringing culture of policing? Surveillance states, where police actively gather information on citizens for general security purposes, have become a reality internationally in places such as the United Kingdom and the United States. The technology to actively monitor citizens is available and actively in use in many countries, including increasingly in Canada. Mark R. Keeler notes in his exploration of surveillance technology in Canada that, “the odds of a surveillance state are no longer a question of ability; they are a question of social change and political will.”²⁰

It is evident through the continuous implementation and expansion of general surveillance programs in Canada that the political will is present and bringing about a social change in the nature of policing in Canada. However, whether the use of such technologies is *morally justifiable* is questionable and any use would most certainly need to be subject to some form of formal accountability.

An analysis of the *justification* for invasive surveillance technologies and scrutiny of policy surrounding their implementation provides a necessary component of accountability in the use of surveillance technology for policing. Often, discussion on the subject of emerging surveillance and data collection technology use by law enforcement agencies falls on one side of a dichotomy; either depicting human rights concerns as hysterical and unfounded and technology as a magic bullet for public safety and crime; or alternatively, demonizing new technologies and disregarding their potential contributions to public safety. A rational assessment of the concerns raised by general surveillance programs is needed. In *Reason and Morality and the Community*

²⁰ Keeler, *Nothing to Hide*, 143.

of *Rights*, Alan Gewirth provides a rational grounding for human rights that can be applied to the questions raised.²¹

In this thesis Alan Gewirth's theory of human rights framework, as drawn from these works, as well as his analysis of professional ethics in the article "Professional Ethics: The Separatist Thesis,"²² will be applied to the issues surrounding surveillance technology for policing with specific examples for analysis drawn from programs and policies in Ottawa. The thesis seeks to contribute to a better philosophical understanding of the moral justification and specification of ethical norms governing the use of surveillance technologies for policing in Ottawa and Canada.

This thesis consists of a critical discussion to the use of surveillance technology for policing through the application of a Gewirthian human rights perspective to policies concerning the collection, storage and access components of surveillance technology for policing. In grounding privacy as a basic good of the generic right to well-being in Gewirth's hierarchy of basic, nonsubtractive, and additive goods, this thesis will provide a stronger position for privacy and counter the traditional and prevalent attitude in police culture that "security trumps all." The application of Gewirth's theory of human rights will provide a broader social democratic framework for examining the justification of the various surveillance programs from a human rights perspective. Moreover, the thesis appropriates the concerns raised by other authors²³ concerning the uses of surveillance technology, and further explores them from a rational human

²¹ Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1981); *idem*, *The Community of Rights* (Chicago: University of Chicago Press, 1996).

²² Alan Gewirth, "Professional Ethics: The Separation Thesis," *Ethics* 96.2 (1986): 282-300.

²³ Helen Nissenbaum, "Protecting Privacy in an Information Age: The Problem of Privacy in Public," *Law and Philosophy* 17 (1998): 559-596.

Jason W. Patton, "Protecting privacy in public? Surveillance technologies and the value of public places," *Ethics and Information Technology* 2(2000): 181-187, 185.

Daniel Solove, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy," *San Diego Law Review* 44(2007): 745-768,

rights perspective; it also acknowledges the benefits and justifiability of surveillance technology in some instances.

This thesis argues that Alan Gewirth's human rights theory and ethical rationalism is an applicable framework for the moral and philosophical evaluation of the growing presence of general surveillance technology programs for policing in Ottawa, as well as a strong justificatory basis for the human right to privacy as fundamental to the generic rights to freedom and, especially, well-being. Moreover, the thesis argues that Gewirth's critique of the so-called "separatist thesis" provides us with an interpretive framework for critically evaluating police ethics and practices in light of the principle of mutuality that is operative in the community of rights.

The thesis is structured in the following manner. Chapter One begins with a brief background of the current surveillance situation both internationally and in Canada. While the focus of the thesis will be programs in Ottawa, it will be situated in context of the worldwide trend towards the use of proactive surveillance technologies for policing. This background includes a detailed description of some of the active surveillance programs in Ottawa including both camera and database technology. The background of current surveillance technology programs used for policing in Ottawa is followed by an introductory discussion of some of the issues and debates surrounding the use of such programs. This discussion introduces some of the topics that are discussed in greater detail in subsequent chapters, such as the conflict between privacy and security, the nature and value of privacy in public, the legitimacy of privacy as a right, the power granted to police officers in pursuit of their duties and the moral justification for this privilege.

Chapter Two describes Alan Gewirth's theory of human rights, the philosophical framework to be used in the analysis and later discussion of the issues and debates raised by surveillance technology for policing.²⁴ Key elements from Alan Gewirth's ethical rationalism and theory of human rights are identified that are relevant to the debates on surveillance technology for policing. Among these elements are Gewirth's understanding of human action as the justificatory basis for human rights, the Principle of Generic Consistency (PGC) and its direct and indirect applications, the duties and benefits of the community of rights, and the moral criteria for critical evaluation of human rights *infringements* versus human rights *violations*.

Chapter Three examines privacy as a human right. Drawing on Alan Gewirth's human rights framework, as discussed in Chapter Two, Chapter Three demonstrates that privacy has been weighted incorrectly in the privacy versus security debate; privacy must be considered as a human right and socio-cultural good, whose core element is crucially tied to the generic human right to well-being, especially what Gewirth calls "basic" well-being. Chapter Three studies the impact of privacy violations on the individual, as well as the community, and privacy's importance to psychological, social and political capacities. Various conceptualizations of privacy as a human right are discussed in this chapter, including Alan Westin's states of privacy, Helen Nissenbaum's concept of the 'norms of contextual integrity' of privacy in public, Charles Fried's view of privacy as relevant to trust and intimacy, as well as Daniel Solove's discussion of the social implications of privacy. The chapter identifies some of the diverse models of privacy present in past literature, and draws upon definitions and concrete studies of privacy to argue privacy's value as a human right.

²⁴ Gewirth, *Reason and Morality*
Gewirth, *The Community of Rights*.
Gewirth, "Professional Ethics: The Separation Thesis."

Chapter Four entails a Gewirthian critique of the current surveillance programs active in Ottawa. This is accomplished through an analysis of the active surveillance programs described in Chapter One from the perspective of Gewirth's human rights framework, as outlined in Chapter Two. This critical analysis delves more deeply into the issues and debates introduced in Chapter One using the concrete examples provided by Ottawa's active surveillance programs. The programs that will be specifically discussed include intersection traffic cameras, taxi cameras, park cameras, the proposed expansion of general CCTV, the use of the data captured by CCTV and mobile data terminals. The critical analysis reveals that there are both justifiable and unjustifiable surveillance programs for policing in Ottawa.

Chapter Five examines, in greater detail, issues of power, mutuality and responsibility in relation to the policing profession. The discussion again draws on Alan Gewirth's theory of human rights, but with a greater focus on Gewirth's arguments in his article, "Professional Ethics: The Separatist Thesis." Here we will focus not on particular programs, but on the policing profession more broadly, as well as provide an analysis of Gewirth's critique of the Separatist Thesis to the profession of policing and the role of mutuality in policing practices within the community of rights.

1. Capital Surveillance?

Ottawa, Canada's capital city, is an example of a major city moving in a trend towards becoming a "surveillance city," where residents are pro-actively monitored by law enforcement agencies on an on-going basis. In Ottawa, the Royal Canadian Mounted Police (RCMP), Ontario Provincial Police (OPP) and Ottawa Police Service (OPS) currently employ a number of programs that collect and store data about private citizens for the purposes of law enforcement. Between these three agencies, many law enforcement surveillance programs are currently operational in Ottawa; and yet, when considered against the level of technology-based police surveillance employed across the country as well as internationally, there remains significant room for expansion. This chapter provides background information on the currently operational general surveillance programs used for policing in Ottawa and some initial discussion on the rights issues and debates raised by these programs. The first section provides background information on current CCTV programs in Ottawa and the second section provides background on mobile data terminals and database programs. The third section provides an introductory discussion of the issues and debates surrounding surveillance technology and police ethics that are revisited in Chapters Four and Five. Chapter Five analyzes the human rights implications of the programs introduced below in greater detail. Due to the overlap of some of the programs employed by the RCMP and OPP these programs are also identified below; however, the discussion and analysis throughout the thesis focuses on the general surveillance programs for policing as used locally in Ottawa by the officers of the OPS.

The RCMP, OPP and OPS have several operational public surveillance programs and have indicated an intention to extend their current surveillance programs further. Expansion of

electronic surveillance is a major component of RCMP, OPP and OPS forecast. The Ottawa Police Service's 2008 Budget noted several major expansions including a 1.75 million dollar expansion to the mobile data terminal (MDT) program and an additional 1.34 million dollar information technology (IT) infrastructure.¹ Additionally, the OPP notes that IT expansion is a goal of its current business plan.² The general surveillance technology programs currently operational for policing in Ottawa can be broken down into three components; data capture (such as CCTV), data access (such as MDT) and data storage. Depending on the jurisdiction of the technology various regulations govern the operation of each program and the accessibility of images captured. These regulations include the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)³, the City of Ottawa CCTV Policy and the Ontario Provincial Highway Traffic Act.⁴ For the purpose of discussion, the police surveillance programs that are active in Ottawa are broken down into the categories of CCTV data gathering and MDT database access.

1.1 General Public Area CCTV Surveillance for Policing

Data capturing surveillance technology in the form of general public area CCTV has found strong support among police and politicians in Ottawa. Both the OPP and the City of Ottawa employ general CCTV surveillance in public areas. Local politicians and law enforcement have indicated support for extending surveillance programs. The OPS notes that "enhancing the use of technology to support front-line policing"⁵ is a key objective of its current

¹ Police Services Board, "Ottawa Police Service 2008 Budget Tabling, November 14," 2007 http://www.ottawapolice.ca/en/resources/publications/pdf/2008%20Budget%20Tabling%20Nov%2014%2007%20v3_FINAL.pdf (accessed October 2008).

² Ontario Provincial Police "2006 Business Plan," http://www.opp.ca/Intranetdev/groups/public/documents/finance/opp_001638.pdf (accessed December 2008).

³ Municipal Freedom of Information and Protection of Privacy Act, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m56_e.htm (accessed January 2009).

⁴ Provincial Highway Traffic Act, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h08_e.htm (accessed January 2009).

⁵ Ottawa, Ottawa Police Service, "2007-2009 Business Plan" (Ottawa: Canada, 2007).

business plan. City of Ottawa Chief of Police, Vern White, has indicated the desire to expand Ottawa's current general public CCTV surveillance program stating that, "video cameras set up to record 'problem' locations could have a noticeable effect on drug dealing, prostitution and petty crime as an evidence and intelligence-gathering tool."⁶ Additionally, Chief White argued in support of CCTV public surveillance at a public Ottawa Crime Prevention Network debate in November 2007.⁷ Recently Chief White requested a large increase in budgetary allowance for the OPS with a substantial portion allocated to IT services. Although at this time the CCTV surveillance programs employed in Ottawa are limited compared to other cities discussed previously, the stated support of City Council and Police Chief Vernon White indicate an acceptance of surveillance for security and the presence of the political will to make heavy surveillance use a reality.

It is, therefore, relevant to examine the *human rights* implications of the current level of general CCTV surveillance in public areas in Ottawa and the potential moral *justification* or non-justification, as cases may entail, for extending such programs. There are several general public CCTV surveillance programs and one mandated private CCTV surveillance program currently operating in Ottawa.

The City of Ottawa has 84 active traffic cameras installed at 65 busy intersections across the city. A recent upgrade from previous traffic monitoring systems that displayed only animated simulation of car traffic through computer "blips," these cameras capture and stream colour high definition feed of activity at these intersections on an ongoing basis live across the Internet. Any individual with access to the Internet can access this stream from any computer. In addition to the

⁶ Seymour, "Cameras would help cut crime in Ottawa."

⁷ Anca Gurzu, "Surveillance cameras don't cut crime, says expert," *Centretown News* (December 2007) http://centretownnewsline.ca/index.php?Itemid=94&id=261&option=com_content&task=view (accessed December 2008).

live feed, images captured by these cameras are recorded and stored for a period of 30 days. These stored images are available by request to the OPS, OPP and RCMP, as well as general members of the public. The stated purpose of the traffic cameras is to view traffic patterns and make improvements to traffic operations through adjustments to light signals.⁸ The cameras are operated under the City of Ottawa CCTV policy. Images captured by the cameras are accessible under the MFIPPA guidelines.

The OPP additionally maintain 11 highway traffic cameras that are installed along Highway 417 in Ottawa. These cameras are accessible over the web and show updated images captured every three to five minutes. The cameras are placed a distance from the highways and show little detail of actual vehicles and because of the three to five minute video delay, show little in the way of consistent movement. They operate to demonstrate general flow of traffic on the 417. In addition to the general traffic cameras, the City of Ottawa has 3 red light cameras that are rotated through 19 intersections in the city. These cameras are installed for the purpose of identifying individuals who run red lights. When a vehicle is detected as passing through an intersection after a red light has been registered, the cameras are activated and take three photos. The owner of the vehicle is identified by the image of the license plate and a ticket is sent to the address of the registered owner. These cameras are operated under the *Provincial Highway Traffic Act*.⁹

The City of Ottawa also employs several general public surveillance cameras. There are currently several operating cameras in city parks in the City of Ottawa. These cameras are operated under the regulation of the City of Ottawa CCTV policy. The cameras in city parks are motion sensitive and record only when movement is sensed in the park outside of hours of

⁸ City of Ottawa, June 21, 2007. *Closed Circuit Television Surveillance Program Policy*.

⁹ Highway Traffic Act, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h08_e.htm (accessed December 2008).

operation. These cameras are operated to enforce City Bylaw No. 2004 – 276 which states that no one is to “remain or enter into any park between the hours of 11:00 o’clock in the afternoon (p.m.) and 5:00 o’clock in the forenoon (a.m.).”¹⁰ The cameras also serve as a surveillance tool for the OPS in regards to criminal activity that can occur in parks after hours including drug dealing, drug use and prostitution. Chief White has proposed the expansion of this type of program downtown with a system of rotating cameras similar to the multimillion dollar program recently implemented in downtown Toronto.¹¹

In 2006 City of Ottawa Council passed Bylaw No. 2005-481 requiring all taxicabs to have operational security cameras installed. These cameras were selected by city staff and funded by the fares collected by taxicabs through a Council-approved rate hike on taxi fares. Door movement activates the recording device within the cab that captures the majority of the interior. The taxicab industry is under the control of the municipality; however the vehicles remain privately owned and operated. The images captured by the cameras can be “downloaded by authorized representatives of the OPS and used by them for the purposes of law enforcement where there are reasonable grounds to believe that a Criminal Code offence has or will take place in or about a taxicab.”¹² Recorded images or information “may be disclosed by the OPS to the City of Ottawa’s Chief License Inspector, where the disclosure is required in compelling circumstances affecting the health and safety of the taxicab operator or of a member of the public.”¹³

¹⁰ “Bylaws,” *City of Ottawa*, http://www.ottawa.ca/residents/bylaw/a_z/parks_facilities_en.html, (accessed October 24, 2008).

¹¹ Toronto Police Service, “Toronto Police Service Closed Circuit Television” Mission Statement, <http://www.torontopolice.on.ca/> (accessed November 2007).

¹² “Taxicab Security Cameras,” *City of Ottawa*, http://ottawa.ca/residents/permits/taxi/taxi_cameras_en.html, (accessed Oct. 24, 2008).

¹³ *Ibid.*

1.2 Mobile Database Terminal Access for Policing

The Canadian Police Information Centre (CPIC) is a massive computerized information system that enables storage and retrieval of information for law enforcement agencies. The CPIC database is operated by the RCMP under the National Police Services (NPS) program out of the RCMP headquarters in Ottawa. Initiated in 1966 and operational since 1972, CPIC recently underwent a massive updating that was completed in 2005 and continues to receive regular tech upgrades in order to improve its efficiency and usability. This upgrade was allocated \$114.7 million dollars in the 1999 Budget and continues to require constant updating.¹⁴ This national database contains an enormous amount of information that is shared among all police organizations in the country. It is accessible by over 80,000 law enforcement professionals nationwide and averages 130 million information transactions annually.¹⁵

Although CPIC is physically located in RCMP headquarters in Ottawa, the CPIC database is accessible remotely through on-site MDT. Every police cruiser in Ottawa is equipped with a mobile data terminal. These remote computer terminals enable officers to access real-time information from police databases. MDTs allow officers to link into the CPIC database and view all files tied to any particular individual based on a variety of search criteria. This includes the ability to search based on license plate information while driving or parked near a vehicle without notifying the occupant.

¹⁴ Canada, Integrated Planning Team, Canada Customs and Revenue Agency "NCJI Release Integrated Project Proposal" (August 19, 2002).

¹⁵ "Canadian Police Information Centre," *Royal Canadian Mounted Police*, http://www.rcmp-grc.gc.ca/factsheets/fact_cplic_e.htm (accessed May 5, 2008).

Although the CPIC website describes its database as containing information on “crime and criminals,”¹⁶ there is a vast variety of information contained in the CPIC database that is not directly linked to crime. The CPIC database information is divided into four divisions: Investigative, Identification, Intelligence and Ancillary.¹⁷ These databanks include information relating to missing or wanted persons, restraining orders, stolen property, dental identification information, the Canadian Firearms Registry, criminal records, the wandering persons registry, and details on CPIC surveillance intelligence. The Ancillary database is defined as simply, “containing information not found in the other categories.”¹⁸ Local records, such as records of calls to the local police service, and bylaw offences are also available and accessible to law enforcement professionals both inside and outside Canada.

1.3 Issues and Debates

The continued spread of general public surveillance programs for policing in Ottawa raises many human rights concerns. Police professionals view physical safety and security of the community they protect as the most important component of their profession. As a result, police professionals are inclined to demand the most advanced technologies available to aid them in this task and the continual granting of increased resources devoted to surveillance technology for policing indicates that they are receiving them. However, the proliferation of surveillance technology in public areas in support of police work raises privacy concerns. This leads to two key questions: Does the need for security necessarily trump privacy rights in all cases? If not, what can be considered a “reasonable” privacy infringement in support of security?

¹⁶ “Introduction,” *Canadian Police Information Centre*, <http://www.cpic-cipc.ca/English/index.cfm> (accessed May 2008).

¹⁷ “Canadian Police Information Centre,” *Royal Canadian Mounted Police*, http://www.rcmp-grc.gc.ca/factsheets/fact_cpic_e.htm (accessed May 5, 2008).

¹⁸ *Ibid.*

While security is undoubtedly an important factor when evaluating the need and justification for public surveillance programs, it must also be considered whether other human rights, such as privacy, are being adequately considered in the pursuit of safe and secure communities. Surveillance advocates often argue that security is the only relevant concern and dismiss privacy concerns. OPS Chief of Police Vern White highlighted the essence of the debate surrounding general public surveillance cameras when he asserted that CCTV “isn’t invading the privacy of law-abiding citizens. It is trying to protect our community.”¹⁹ In fact, the major conflict that presents itself in the debate surrounding surveillance technology for policing is that of security versus privacy. The reality is that the surveillance technology debate is about *both* privacy *and* security and therefore both issues require consideration for their ties to freedom and well-being.

In the case of general surveillance cameras operated in Ottawa, both in the data capturing and information sharing stages, the potential for a negative impact on privacy rights lies in the incremental disintegration of the norms of *contextual integrity* and its impact on freedom of movement.²⁰ Helen Nissenbaum describes the concept of ‘contextual integrity’ as that of allowing for an individual to decide the appropriate context for revealing certain information or aspects about them. In order to be meaningful, contextual integrity must be maintained and information shared in one context should not be transmitted to another. It is certainly the case that general public surveillance programs enable information to shift contexts easily. There is increasingly an inability for any individual to have accurate knowledge regarding when and by whom CCTV data is accessed. It is therefore increasingly impossible for an individual to accurately assess the consequences of his or her actions in public and make an informed decision

¹⁹ Seymour, “Cameras would help cut crime in Ottawa.”

²⁰ Nissenbaum, “Privacy in Public,” 559-596.

about his or her actions. Nissenbaum writes that “public surveillance practices regularly violate norms of contextual integrity when information readily revealed in one context, and public with respect to it, is transmitted to, and revealed in, another.”²¹ On the other side it is often argued that privacy in public is not an important concern or even a legitimate right.²² This leads to debate over whether there is legitimate cause for concern that the norms of contextual integrity are being disintegrated by the proliferation of general public surveillance and whether privacy in public can be considered a right entitled to corresponding protection.

The ability of large databanks to aggregate data and create intrusively intricate portraits of individuals is a major concern as surveillance programs spread. In many cases general surveillance programs are defended with the argument that the data collected is minimally intrusive and relatively bland.²³ However, data aggregation has altered the nature of general surveillance and data collection. Data aggregation is dangerous, as Daniel Solove notes: “By combining pieces of information we might not care to conceal, the government can glean information about us that we might really want to conceal.”²⁴ There is potential for two forms of harm through data aggregation as discussed here. Law enforcement officials may be able to combine information about us to create intrusively accurate portraits of private individuals and therefore invade their privacy; or alternatively inaccurate and potentially damaging inferences can be made based on combined pieces of information about individuals.

Surveillance advocates argue that one does not have a right to control the use of information collected about them in the public realm. Privacy advocates argue that there is a need to protect the right to privacy in public, particularly with the increasingly sophisticated storage and sorting

²¹ Nissenbaum, “Privacy in Public,” 559-596, 586.

²² Solove, “I’ve Got Nothing to Hide’ ” 745-768.

²³ Ibid.

²⁴ Ibid, 765.

abilities of databanks. Police officers are able to access a great deal of information about private citizens from remote access in their own cruiser. How much information access do police officers require on the job? What moral criteria ought to be in place regarding police access?

The proactive technological shift in policing culture raises many human rights concerns regarding the power and privilege granted to police officers. The power imbalance created by the possession of powerful surveillance technology tools by police professionals creates concern over the rights-invading leeway policing and security professionals can be granted in support of their work. Law enforcement professionals are often granted rights privileges that extend beyond those of ordinary citizens; however, most would agree that there must be some limit to the privileges granted to police professionals.

Pressing ethical questions arise: How much moral leeway should be granted to police professionals? Does the professional role of a police officer entitle them to access information about private citizens that would otherwise be considered private? What moral justification is given to policing agencies in the name of service and protecting citizens and taxpayers? These questions will all be addressed in the chapters that follow.

2. The Philosophical Framework: Alan Gewirth's Human Rights Theory

A sound human rights framework is needed to provide rational insight into, and critical assessment of, police ethics and general police surveillance programs and practices in Ottawa. The philosophical method and theory appropriated for this purpose is Alan Gewirth's theory of human rights and ethical rationalism.¹ This chapter provides a summary of the key elements of Gewirth's human rights theory that will be applied, in Chapters Four and Five, to the ethical assessment of police ethics and general surveillance programs used for policing in Ottawa and Canada generally.

This chapter begins (2.1) with a discussion of Gewirth's rational grounding of human rights with human action as the justifying basis. The discussion is then followed by an exploration of the content and nature of human rights. Section 2.2 provides background on Gewirth's dialectically necessary method that provides the rational grounding for his theory of human rights. This discussion is then followed by an explanation of the (2.3) Principle of Generic Consistency (PGC) and its various applications, the concept of the Community of Rights, and (2.5) The Vital Importance of Civil, Political and Economic Rights in the Support State.

2.1 Human Action as the Basis of Human Rights

Gewirth writes that the challenge of establishing human rights is to reconcile the individual with the concept of a community of rights. It must be shown as logically necessary that self-interested individuals acknowledge and accept the concept of human

¹ Gewirth, *Reason and Morality*; Gewirth., *The Community of Rights*; Gewirth, "Professional Ethics: The Separatist Thesis," 282-300.

rights and reciprocal duties. Gewirth notes that accomplishing this requires the establishment of two theses, first that, “every agent logically must accept that he or she has rights to freedom and well-being,”² and secondly that, “all other agents also have these rights equally with his or her own.”³ In order for human rights to be established rationally and universally in this logically inescapable way they must be justified on a firm foundation, an unavoidable or necessary component of all persons by virtue of their agency needs. The justification for human rights must therefore be grounded in something that is “necessary or inescapable for all humans as actual or prospective agents.”⁴ Human rights established in this way address the conflict between the individual and the community because “on the basis of his having to accept that he has the generic rights, every agent logically must accept that all other actual or prospective agents have these rights equally with his own.”⁵ If an agent accepts that he or she has generic rights based on a criterion that is also possessed by other agents, he or she is logically forced to recognize the rights-claims made by others or risk denying his or her own rights-claims.

Gewirth identifies the generic features of action as the necessary justifying base of human rights. Action is an unavoidable and universal component of humanity for all individuals. He writes that “all moral precepts, regardless of their further contents, deal directly or indirectly with how persons ought to act.”⁶ All humans are considered actual, prospective or potential agents with a need to act freely and pursue purposive ends necessary for their well-being. All agents make the judgment that the purpose they seek

² Gewirth, *The Community of Rights*, 17.

³ Ibid, 17.

⁴ Ibid, 13.

⁵ Ibid, 18.

⁶ Gewirth, *Reason and Morality*, 25.

to achieve through their action is good in the sense of having value as a goal and is considered worthwhile in this context; therefore, “no human can evade the context of action.”⁷ Action is a necessary component of humanity that is inescapable by any agent; even taking one’s own life in an attempt to avoid action requires that action be taken. All agents must therefore admit that they require the ability to act in certain ways. Agents must further admit that the potential of successful action is the necessary condition of seeing goals, as actual, prospective or potential agents, achieved. Additionally, Gewirth notes that moral precepts deal with informing the rightness and wrongness of actions. Gewirth demonstrates that even inaction contains an element of choice not to act making the context of action unavoidable. A decision not to act remains in the context of action. Action is an unavoidable component of humanity. It is because of this unavoidability of human action in morality and humanity that it serves as the justifying basis of a human claim-right.

2.1.1 The Generic Rights to Freedom and Well-Being

In order for any action to be taken and evaluated morally, the generic features of action must be available to agents. “As action provides the necessary content of all morality,” notes Gewirth, “so the generic features provide the content of all action.”⁸ Gewirth identifies freedom and well-being as the content of generic features of action to which each agent has a claim because they are “essential prerequisites”⁹ of any successful action taken by any agent. The prospect of generally successful action is the basis of

⁷ Gewirth, *Community of Rights*, 13.

⁸ Gewirth, *Reason and Morality*, 25.

⁹ Gewirth, *Reason and Morality*, 77.

agency. The rights to freedom and well-being are therefore essential as “no agent could waive them or be deprived of them and still remain an agent.”¹⁰

Freedom is defined by Gewirth as “controlling one’s behavior by one’s unforced choice while having knowledge of relevant circumstances.”¹¹ It can be understood as the ability to act freely and without coercion in the pursuit of one’s own purposive action.

Well-being is defined as “having the various general conditions and abilities that persons must have if they are to act and act successfully for the fulfillment of their purposes.”¹²

Freedom provides the ability to determine and act upon one’s chosen course of purposive action, whereas well-being contributes to the ability and condition for this action to be successfully achieved. A certain degree of freedom and well-being are necessary, not as conditions of a particular action, but as the necessary conditions of any and all action generally.

2.1.2 Basic, Nonsubtractive and Additive Well-Being

Gewirth further breaks down the generic right to well-being into three categories. The first class of well-being is basic well-being. This is defined as “having the *essential preconditions* of action such as life, physical integrity, mental equilibrium.”¹³ In a conflict of rights, rights supporting basic well-being will have first priority due to their fundamental support of the basic elements of well-being. Basic well-being consists of all rights that are essential to generally successful action and maintaining fundamental well-being. Gewirth notes that basic well-being goes beyond the simple provision of life. “It also involves such necessary goods as the maintenance of health, which requires adequate

¹⁰ Ibid, 77.

¹¹ Gewirth, “Professional Ethics,” 283-300, 287.

¹² Ibid, 288.

¹³ Gewirth, *Community of Rights*, 15, italics added.

levels of food, clothing, shelter, and other necessities including a physically healthful environment.”¹⁴

When evaluating the balance of conflicting rights that are both active supports of basic well-being, careful consideration must be given to the need for a particular support of basic well-being in a particular circumstance. No support of basic well-being can be infringed upon too significantly and so a careful balance must be struck in such circumstances.

Secondary to basic well-being are those rights associated with nonsubtractive well-being. Gewirth defines nonsubtractive well-being as “having the general abilities and conditions needed for *maintaining undiminished* one’s general level of purpose-fulfillment and one’s capabilities for particular actions.”¹⁵ Nonsubtractive rights are negative in nature and require that the goods one has not be damaged or removed entirely. Respecting nonsubtractive rights requires not taking any action to interfere with the freedom and well-being of others. Actions that would be included in this category are freedom-impeding offences such as being stolen from or told a lie. Although not directly threatening the basic well-being of life, they compromise freedom and well-being to a significant degree through interference.

At a third level is additive well-being. This is defined as “having the general abilities and conditions needed for *increasing* one’s level of purpose-fulfillment and one’s capabilities for particular actions.”¹⁶ Goods associated with additive well-being enable increased fulfillment and well-being, but are not as crucial to well-being in the sense of a base level of survival. The goods that support additive well-being remain

¹⁴ Ibid, 42.

¹⁵ Ibid, 15, italics added.

¹⁶ Ibid, 14, italics added.

necessary components of a fulfilled and productive agent. Additive well-being includes goods such as “education, self-esteem, and opportunities for acquiring wealth and income.”¹⁷ These goods are often obtained through one’s own productive agency when the necessary conditions for successful action are provided. Although such goods have a positive effect on the well-being of an individual and are necessary for some elements of well-being, they are not as crucial to basic well-being and may be morally infringed in support of more fundamental goods of well-being when necessary.

2.1.3 Criterion of the Degrees of Needfulness for Action

Gewirth provides three criteria for determining whether or not an action is an infringement or a violation. The first condition Gewirth submits is that an action contravening a right can be classified as an infringement and therefore justifiable when it is taken in the goal of preventing another rights violation or correcting a rights inconsistency. Actions that would otherwise run contrary to the PGC can be justified if they are taken “for prevention or correction of antecedent basic harm.”¹⁸

Gewirth argues that a right can be justifiably infringed in order to prevent another rights infringement; however, this is only the case with an important qualification. Gewirth states that “a moral right may be justifiably infringed, at least within certain limits, if this is the only way to prevent the violation of the same or another right.”¹⁹ For example, assault against an individual would be permitted if that individual intended to kill another individual but a serious assault would not be permitted to prevent theft. In order to justify a rights infringement there must also be an actual present threat of harm. For evaluation purposes Gewirth defines harm as “removing or threatening the basic,

¹⁷ Ibid, 14.

¹⁸ Ibid, 342.

¹⁹ Gewirth, “Professional Ethics,” 283-300, 289.

nonsubtractive, or additive goods to which all person have equal rights of well-being.”²⁰ When harm is threatened, then justifiable rights infringing can occur. However, Gewirth specifically notes that infringing on a right to prevent the infringement of another right should only be considered if it is the only reasonable course of action under the circumstances, specifically stating that there should be “no other way”²¹ to prevent the rights violation. Additionally, the action taken to prevent a rights violation or correct a rights inconsistency must be taken on scale with the violation. For instance, Gewirth would not likely approve of permanently and seriously harming someone in order to prevent theft of a minor material item, but would likely approve of taking action to restrain an individual who was attempting to steal an item from another vulnerable individual.

The second and more elaborate of Gewirth’s evaluation protocol is a set of balancing criteria to be applied to individual instances of competing rights to resolve the question of reasonable infringement. Gewirth’s concept of the *criterion of degrees of needfulness for action* acts as the formula in this determination. Gewirth’s criterion of degrees of needfulness for action provides the necessary logical grounding for determining which actions constitute justified rights infringements and which actions constitute rights violations. The criterion is only applied in cases regarding preventing violations of rights and is not concerned with increasing goods or additive well-being.²² Using the criterion, the rights in conflict must be considered against one another to determine which right will take precedence in a particular circumstance. The criterion of

²⁰ Gewirth, *Community of Rights*, 47.

²¹ Gewirth, “Professional Ethics,” 283-300, 289.

²² Gewirth, *Reason and Morality*, 344.

degrees of needfulness for action states that “a right whose object is less needed for action may be overridden by a right whose object is more needed for action.”²³

In varying circumstances one right will be more necessary for basic freedom and well-being than another. Therefore the “right takes precedence over another in cases of conflict if the object of the former right is more necessary for action than is the object of the latter.”²⁴ Given that “freedom and well-being are the proximate necessary conditions and generic features of action and of generally successful action,”²⁵ evaluating conflicting rights requires evaluating the impact on freedom and well-being. Therefore, when two rights compete, the degree to which each competing right is required for action in a particular circumstance is weighed against the other and a determination is made based on this criterion. Further clarification on how to evaluate complex rights conflicts in a community of rights is found in Gewirth’s breakdown of the definition of well-being into the three subcategories of descending good related to the necessity for action discussed in section 2.1.2; basic, nonsubtractive and additive well-being. Gewirth notes that the criterion is primarily useful in evaluating rights on different levels of this hierarchy.

Freedom, as the other main component of generic action, is also taken into account when evaluating rights conflicts. Freedom is given significant weight as the *procedural* condition of action. However, freedom as a concept requires clarification in order to be properly understood when evaluating rights conflicts. Gewirth qualifies the right to freedom stating that, “there cannot be universal or completely unrestricted freedom because the freedom of potential interferers with freedom must be restricted if

²³ Gewirth, *Community of Rights*, 78.

²⁴ Gewirth, “Professional Ethics,” 283-300, 289.

²⁵ Gewirth, *Community of Rights*, 14.

the freedom of non-interferers is to be preserved.”²⁶ One does not have unlimited access to freedom, specifically the freedom to harm another. Gewirth provides the example of traffic laws. Traffic laws impede freedom of movement in a justifiable way as they ensure the safety of everyone on the road. Although, in a sense, the freedom of a driver who wishes to travel the wrong way down a one-way street or run red lights is impeded, the right to freedom from harm for all other drivers obeying the rules is of greater value to general freedom and well-being. Here Gewirth makes an important distinction between forms of freedom. Gewirth writes that “a distinction must be drawn between the freedoms that are essential for action in general and those that pertain to particular actions whose performance or non performance does not affect the general necessary conditions of action.”²⁷ The well-being of any individual does not depend on the ability to drive erratically; however, the freedom and well-being of others depends on the ability to travel from one place to another in relative safety. When evaluating the impact of a rights-infringement on freedom, it is the freedom that is necessary for successful purposive action that is relevant rather than that which is nonessential.

The criterion of degrees of needfulness for action can be used to determine reasonable infringements supporting the basic goods of vulnerable agents. For example, one’s right to private property may be infringed by reasonable taxation in order to ensure that all members of the community of rights have equal access to the basic necessities of life. Basic life necessities such as food and shelter are more needed for action than the comparatively minimal violation of property rights incurred by taxation. It is important to note that in balancing rights and the need for action, although one right may take

²⁶ Ibid, 47.

²⁷ Ibid, 49.

precedence over another, a basic level of freedom and well-being must be maintained for all individuals. “The aim is not to cripple some persons’ actions in order to facilitate the actions of others,” notes Gewirth, “but rather to make the necessary conditions of action available to all prospective agents.”²⁸ Evaluating rights conflicts requires a sense of balance and reasonableness on all sides of the equation. Even when one right is more necessary than another in a particular circumstance, this does not mean that the other right is entirely disregarded.

Correcting rights-imbalances must be done sensibly and reasonably. Gewirth provides the example of removing the eye of one perfectly sighted individual to allow a blind person sight in one eye as well. Although equal in number, the community of rights does not permit such dramatic infringements on the basic freedom and well-being of others to correct rights-imbalances. Similarly, an extremely wealthy individual would not be taxed to the point where they were on equal economic standing as the poor. However, in order to provide provisions for the poor to enhance their productive agency it would be reasonable to tax an extremely wealthy individual at a higher rate of taxation. The rights corrections made using the criterion must be within reason. Acknowledging the necessity of rights infringing, Gewirth also states that there must be balance in the extent to which any right is invaded and a rational means of determining the justifiability of rights infringements.

The final means of resolving rights-conflicts as identified by Gewirth is that of institutional requirements. Social rules serve to give predictability and order in societal interactions. For example, the laws of the supportive state, when properly reflecting the PGC, are designed to control rights conflicts and address rights inconsistencies. As

²⁸ Ibid, 51.

discussed above, taxation of wealthy individuals to support those without access to basic well-being is one example of such action. State imposed taxation reflects the balance of the criterion of degrees of needfulness for action because “taxational coercions and harms imposed are slight by comparison with the harm they remove.”²⁹ The laws imposed by the supportive state serve to protect from coercion and harm and do not infringe on freedom and well-being further than is necessary for this to be accomplished.

2.2 Gewirth’s Dialectically Necessary Method

Gewirth writes that in order to circumvent the objections leveled against other theories of human rights “the justification of rights requires the delineation of a basis from which rights can be logically generated.”³⁰ The basis of Gewirth’s theory of human rights is the generic features of action as derived from the logically sound progression of the dialectically necessary method. Gewirth notes that the method he employs is dialectical in that it begins “not from statements made by the writer or speaker himself but rather from statements presented as being made or accepted by a purposive agent, and it examines what they logically imply,”³¹ and that the method is necessary because, “the statements in question logically must be made or accepted by every agent because they derive from the generic features of purposive action.”³² The dialectical method’s necessity provides the necessary jump for the generic features of action from mere ability to a categorical grounding of rights while the dialectical nature of the argument method enables the argument to avoid the logical problems that arise in other rights theories.

²⁹ Gewirth, *Reason and Morality*, 344.

³⁰ Gewirth, *Community of Rights*, 13.

³¹ *Ibid.*, 16.

³² *Ibid.*

The dialectically necessary method proceeds through a sequence of argument that functions to rationally ground the generic features of action as the logically justifying base of human rights. Gewirth has set forth an exceedingly concise formulation of his deductive argument to the principle of generic consistency in his book *The Community of Rights*:

Since the agent has at least a minimum of self-awareness, when he acts for some purpose there can be attributed to him a statement of the form (1) "I do X for end or purpose E." This is a statement form that logically must be accepted by every agent for himself, so that it serves to ground the categoricalness of the rights-principle generated by the argument. From (1), the agent logically must accept (2) "E is good." For while the goodness in question need not be moral, and the ascription of goodness need not be definitive, it involves the agent's acceptance that the purpose for which he acts has for him at least some value sufficient to merit his trying to attain it. Now since freedom and well-being are the proximate necessary conditions of the agent's acting to attain any of his purposes and any goods, the agent, on the basis of his accepting (2), must also accept (3) "My freedom and well-being are necessary goods." Hence he must also accept (4) "I must have freedom and well-being," where this 'must' is also practical-prescriptive in that it signifies the agent's advocacy or endorsement of his having the conditions he needs to have in order to act and to act successfully in general.³³

The next step, which moves from (4) to (5), is crucial to the first stage of Gewirth's argument. This step, as Derek Beyleveld argues, is one that has been criticized by other philosophers.³⁴ The step from (4) to (5) introduces the concept of rights to the agent's thinking. Gewirth argues that by accepting (4), the agent must accept (5) "I have

³³ Ibid.

³⁴ See Deryk Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (Chicago: University of Chicago Press, 1991). Beyleveld has defended Gewirth's argument with slight modification.

rights to freedom and well-being.”³⁵ Gewirth demonstrates the importance and necessity of this leap as follows:

Suppose he rejects (5). Then, because of the correlativity of claim-rights and strict ‘oughts,’ he also has to reject (6) “All other persons ought at least to refrain from removing or interfering with my freedom and well-being.” By rejecting (6), he has also to accept (7) “Other persons may (i.e., It is permissible that other persons) remove or interfere with my freedom and well-being.” And by accepting (7), he also has to accept (8) “I may not (i.e., It is permissible that I not) have freedom and well-being.” But (8) contradicts (4). Since every agent must accept (4), he must reject (8). And since (8) follows from the denial of (5), every agent must reject that denial, so that he must accept (5) “I have rights to freedom and well-being.

From there Gewirth moves to his second main theses where he demonstrates that self-interested individuals must accept the principle of human rights based on the logic that, “if some predicate P belongs to some subject S because S has a certain quality Q (where the ‘because’ is that of sufficient condition), then P logically must belong to all other subjects S_1 to S_n that also have Q.”³⁶ Self-interested individuals must therefore accept the rights-claims of others if they are to make their own or otherwise logically contradict themselves. This argument proceeds such that “every agent logically must accept (9) “I have rights to freedom and well-being because I am a prospective purposive agent.”³⁷ Gewirth argues that:

From this it follows that every agent logically must acknowledge that, simply by virtue of being a prospective purposive agent, he has generic rights so that he also logically must accept (10) “All prospective purposive agents have rights to freedom and well-being.” At this point the rights in question become moral rights, because the agent is now committed to taking favorable account of the interests of other persons as well as himself. The argument has thus shown that it is no longer rational for any agent to be exclusively self-interested, where ‘rational’ signifies conformity to the principle of noncontradiction as the fundamental principle of reason.

³⁵ Gewirth, *Community of Rights*, 16.

³⁶ *Ibid*, 19.

³⁷ *Ibid*, 18.

It is through the rational nature of the dialectically-necessary process that the PGC emerges as, “categorically obligatory and as having a strictly rational justification.”³⁸ The PGC as determined through the dialectically necessary method is self-justifying because, “the agent necessarily applies this content to himself, and since his failure to apply it to his *recipients* results in self-contradiction, the agent cannot rationally or justifiably extricate himself from the PGC’s requirements.”³⁹

2.3 The Principle of Generic Consistency (PGC)

The core of Gewirth’s theory of human rights is found in the PGC which he describes as the supreme principle of morality. The PGC is the underpinning of the ethical specifications prescribed by Gewirth’s theory of human rights, and states that one ought to “*act in accord with the generic rights of your recipients as well as yourself.*”⁴⁰ Gewirth states that in order to establish a supreme moral principle it must be demonstrated that it can address the central questions of moral philosophy in such a way that, “cannot rationally be challenged by any of their competitors and that it is categorically obligatory for all persons to act in accord.”⁴¹ Gewirth’s use of the dialectically necessary method satisfies this requirement and the PGC therefore rests on the logically sound principle that if one acknowledges that one is entitled to certain rights-claims based on the premise that they are a prospective purposive agent whose actions have merit, then they must acknowledge that other prospective purposive agents ought to be granted those same rights. A prospective agent who accepts that he “must have and claim these rights because their objects are needed for the very possibility of

³⁸ Gewirth, *Reason and Morality*, 47.

³⁹ *Ibid*, 204.

⁴⁰ Gewirth, *Community of Rights*, 19.

⁴¹ Gewirth, *Reason and Morality*, 21.

action and generally successful action,”⁴² must further accept that all other agents are also entitled to the same conditions of successful action. To deny the rights-claims of other prospective purposive agents on the same basis would be to contradict oneself and consequently deny one’s own rights-claim. When rights are grounded in the basic necessary conditions of action, all humans are recognized as potential prospective agents and thus have equal demand on the rights provided by the PGC, which are therefore properly classified as human rights.

The PGC as the supreme moral principle of Gewirth’s theory of human rights argues that each prospective purposive agent has logically justified human rights claims. Gewirth defines a right as “an individual’s interest that ought to be respected and protected.”⁴³ Gewirth breaks down the structure of a claim-right as, “A has a right to X against B by virtue of Y.”⁴⁴ Human rights understood in these terms mean that the subject of a right (A), has a claim to a right (X) against the respondent of a right (B) by virtue of the justifying basis (Y). Gewirth notes that in the case of human rights, “both the subjects and the respondents comprise all human beings equally,”⁴⁵ and therefore the justifying basis of a human right must be unavoidably applicable to all rational agents equally.

2.3.1 Direct and Indirect Applications of the PGC

The PGC has both direct and indirect applications. In the case of direct applications “the PGC’s requirements are imposed upon the interpersonal actions of

⁴² Gewirth, *Community of Rights*, 16.

⁴³ *Ibid*, 9.

⁴⁴ *Ibid*, 8.

⁴⁵ *Ibid*, 9.

individual persons.”⁴⁶ Individual actions, in the direct application of the PGC, “are morally right and the agents fulfill their moral duties when they act in accordance with the generic rights of their recipients as well as themselves.”⁴⁷ With direct applications, the PGC is applied in an immediate and literal way to specific actions between subject and respondent. Indirect applications apply to institutions and social rules that are considered morally right, “and the persons acting in accordance with them fulfill their moral duties when the rules and institutions express or serve to protect or foster the equal freedom and well-being of the persons subject to them.”⁴⁸ In the case of indirect applications of the PGC it is required that the rules of an institution “conform to the PGC either procedurally or instrumentally. The rules are then in turn applied to particular actions.”⁴⁹ Indirect application of the PGC sees the essence of the PGC as translated into the laws of an institution, which in some cases may result in rules and regulations that are quite different than the direct applications of the PGC. Although indirect applications of the PGC may appear to contradict the PGC, they are justified when they serve to provide and protect the rights to freedom and well-being within the institution. Indirect applications of the PGC must still serve to uphold the freedom and well-being of all other agents.

Application of the PGC to rights responsibilities in the supportive state is further classified as either positive or negative. Negative rights entail that “respondents, whether individuals or the state, have duties to refrain from interference,”⁵⁰ whereas in the case of

⁴⁶ Gewirth, *Reason and Morality*, 200.

⁴⁷ Walters, *Human Rights in an Information Age*, 41.

⁴⁸ *Ibid*, 41.

⁴⁹ Gewirth, “Professional Ethics,” 283-300, 291.

⁵⁰ Walters, *Human Rights in an Information Age*, 45.

positive rights “respondents have duties to provide active assistance.”⁵¹ It is important that human rights be understood not only as negative but also positive in nature. If we consider human rights as solely negative it “may lead to a view of society as consisting of atomized, mutually disregarding, alienated individuals with no positive consideration for cooperation in helping to fulfill one another’s needs or interests or for rectifying the extreme inequalities of wealth and power.”⁵² When human rights are understood as both positive and negative it is entailed that not only must individuals refrain from interfering or removing another’s rights, but that they must also actively seek to remedy wealth and power inequities. Such an understanding of human rights, both negative and positive, results in the mutuality that is fundamental to Gewirth’s theory of human rights.

2.4 The Community of Rights

The mutuality entailed by the PGC creates what Gewirth calls the community of rights or the supportive state. The community of rights requires that every agent acknowledge that all agents have claim to the generic features of action and successful action derived from their status as a prospective purposive agent. Gewirth writes that, “every actual or prospective agent has equal rights to these necessary conditions of action and successful action in general.”⁵³ Since every rational agent is entitled to these rights they must be both provided for and respected equally by all members in the community. This creates the condition of mutuality in the community of rights that demands that, “each person both respect the freedom and well-being of all other persons and have her freedom and well-being respected by all other persons.”⁵⁴ It is therefore the case that in

⁵¹ Ibid, 45.

⁵² Gewirth, *Community of Rights*, 32.

⁵³ Gewirth, “Professional Ethics”, 283-300, 288.

⁵⁴ Gewirth, *Community of Rights*, 18.

the community of rights that, “A has rights against B and B has rights against A,”⁵⁵ by virtue of the justifying basis of human action possessed by all prospective purposive agents. Each agent therefore has corresponding, though not necessarily identical rights, against others, grounded entirely in their own identity as a purposive agent and thus all other rational beings also have corresponding rights against them.

In the community of rights it will be the case that “some person’s current abilities to act or to protect their freedom and well-being from interference may be drastically inferior to those of others.”⁵⁶ These potential agents require assistance in order to obtain a basic level of freedom and well-being. The nature of corresponding rights and mutuality entails that a supportive state, when properly functioning, not only respects and maintains the basic human rights of its members based on a principle of mutuality, but also ensures that the most vulnerable members of the community are provided with basic elements of freedom and well-being. Access to the benefits of rights entails the burden of a duty to provide for and respect the rights of others. The principle that “each human must respect the rights of all the others while having his rights respected by all the others, so that there must be a mutual sharing of the benefits of rights and the burdens of duties,”⁵⁷ necessitates a duty to provide access to basic freedom and well-being to less fortunate or vulnerable potential agents.

The community of human rights seeks to uphold the freedom and well-being of all individuals with a certain degree of equality. Gewirth states that “*when rights are properly understood, they entail a communitarian conception of human relations,*

⁵⁵ Ibid. 76.

⁵⁶ Gewirth, *Reason and Morality*, 208.

⁵⁷ Ibid, 6.

relations of mutual assistance, social solidarity, and important kinds of equality.”⁵⁸ This does not necessarily imply that all rights are identical in all senses on all occasions. Gewirth notes that “although claim-rights and duties are correlative, this does not mean that they are identical.”⁵⁹ Although a level of freedom and basic well-being must be maintained for all members of the community of rights, the form these goods take is not necessarily the same. For example, members of the community of rights who have the ability to afford higher education may not be required to provide an equal level of education for more vulnerable members; however, providing the ability to obtain a minimum education level in order to obtain employment and become self-sustaining would be required. Not every person in a community of rights is entitled to hold an executive level position; however, each member of the community of rights is entitled to the opportunity to fulfill his or her productive agency through some type of employment. The mutuality and equality of the supportive state does not imply that all are entitled to or required to provide a certain right on a certain occasion. This concept should be understood more generally as, “everyone’s always having, as a matter of principle, the right to be treated in the appropriate way when he has the need, and the duty to act in accord with the right when the circumstances arise that require such action and when he has the ability to do so.”⁶⁰ Although there is an obligation to respect the PGC and correct rights imbalances, the specific manifestation of such actions varies with the circumstance and the ability of a given individual to assist. Gewirth notes that in direct applications of the PGC the focus is on the specific case circumstances between recipient and respondent. Although “at some points the general tendencies and social contexts of

⁵⁸ Ibid, 6. (italics added)

⁵⁹ Ibid, 9.

⁶⁰ Ibid, 317.

actions must be considered,” Gewirth writes, “this is only to bring out more clearly their moral import for the particular recipients in each case.”⁶¹

The mutuality of rights entailed by the PGC and the classification of human rights as positive as well as negative creates what Gewirth labels *the community of rights* or the formal institution of *the supportive state*. Gewirth notes that the supportive state should be the primary respondent of human rights, noting that “the positive moral rights to basic well-being should also be positive legal rights, to be enforced by the state.”⁶² Legalizing rights-claims with the state as respondent ensures that the basic well-being is protected consistently and equitably, and that all members of the community of rights contribute to responding to rights-claims. When left to charitable donation or act, a sufficient response to rights claims cannot be guaranteed. State regulation ensures that sufficient funds or goods are collected in order to protect the basic well-being of the vulnerable. Additionally, using mandatory taxation ensures an equal response from all members of the community with the ability to help others. The rules and regulations of the supportive state are justified in that they provide consistent application of the PGC and “a general context of order that serves to protect and extend well-being.”⁶³ Protection of rights through the structure of the supportive state avoids overloading agents with responsibility to make sacrifices in support of the rights of others and instead leads to “a more finite set of institutional policies that are based on an analysis of the specific static and dynamic steps that can fulfill the positive rights in questions.”⁶⁴ Encasing the duties of the community of rights in the institution of the supportive state ensures they are fulfilled.

⁶¹ Ibid, 201.

⁶² Gewirth, *Community of Rights*, 59.

⁶³ Gewirth, *Reason and Morality*, 305.

⁶⁴ Gewirth, *Community of Rights*, 59.

Gewirth writes that the association of an agent to the supportive state is “*necessary-procedural*” in nature. Gewirth defines an “*optional-procedural*” association as, “morally optional in that it is left to the free or voluntary consent of individuals to determine both whether there is to be some particular association with its rules and who is to belong to it and be bound by its rules.”⁶⁵ Optional-procedural association to the supportive state would undercut the very purpose of its existence. However in the case of the necessary-procedural justification there is a, “political association or state having legal rules or laws, obedience to which is obligatory for all members of society.”⁶⁶ The supportive state is a necessary-procedural association to which obedience is mandatory in order to uphold the requirements of the PGC. The mandatory social rules of the minimal supportive state are justified in that they contribute “to the existence or reinforcement of a social order in which the PGC is more fully observed.”⁶⁷ Gewirth notes that the freedom-infringing forced nature of consent to the rules and regulations of the supportive state are justified as they operate to uphold freedom more broadly. The social rules of the supportive state “serve to restore or protect freedom, and in this way to operate as causal conditions of freedom.”⁶⁸

2.4.1 The Right to Productive Agency

The goal of the burden of the responsibility to provide the benefits of rights to all prospective purposive agents goes beyond simply providing a base level of well-being. It is to ensure that vulnerable members of the supportive, democratic state are not simply provided for, but are also given the opportunity to develop their own productive agency

⁶⁵ Gewirth, *Reason and Morality*, 283.

⁶⁶ *Ibid*, 283.

⁶⁷ *Ibid*, 293.

⁶⁸ *Ibid*, 292.

and become more independent. Each agent must be provided, “the generic rights of action, so that each person should be a rationally autonomous, self developing agent who can relate to other persons on a basis of mutual respect and cooperation.”⁶⁹ This translates into a duty to provide the necessary conditions of successful action that enable a potential productive agent to fulfill their own productive agency. Productive agency is understood as “the agent’s ability to achieve the outcome he desires or intends.”⁷⁰ In order to be a productive agent one must have the conditions to successfully pursue one’s own purposive action in support of increasing one’s own freedom and well-being. Gewirth defines productive agency as including “skills and abilities that have economic value”⁷¹ and can be used by a purposive agent to both become self-sustaining in the provision of basic goods, as well as provide the ability to attain additive goods related to other levels of purpose fulfillment. In this way productive agency is more than an economic good. Productive agency possesses the “range of skills and aptitudes that help persons to attain other values, moral, intellectual, aesthetic, and prudential that reflect the wide range of purposes pursued by actual and prospective agents.”⁷²

Self-esteem is an important additive good attained from productive agency. Developing productive agency through the ability to work and contribute to the community of rights is a component of developing self-esteem. Gewirth notes that education is the key provision necessary for development of productive agency as it results in the development of skills that will enable “general levels of purpose-fulfillment

⁶⁹ Gewirth, “Professional Ethics,” 283-300, 288.

⁷⁰ Walters, *Human Rights in an Information Age*, 81.

⁷¹ Gewirth, *Community of Rights*, 136.

⁷² *Ibid*, 137.

and, more specifically, for performing income-generating work.”⁷³ In addition it promotes a sense of personal responsibility within the supportive state such that individuals “have knowledge of their and another persons’ human rights.”⁷⁴ Therefore the development of productive agency further supports the mutuality of the community of rights since it is through the development of productive agency that potential productive agents will “be the agents or respondents as well as the recipients or subjects of human rights.”⁷⁵ By developing productive agency, agents are both able to understand the obligation to respect and fulfill others’ rights and develop the economic means to follow through on this duty.

2.5 The Vital Importance of Civil, Political and Economic Rights in the Supportive State

Gewirth notes that while some rights imbalances, such as the moral wrongness of permitting starvation when one has abundance are obvious, it is less often so in the case of other less tangible rights such as civil liberties. Civil liberties are often undervalued in comparison to necessities of life such as food and shelter. However, Gewirth notes that it is important to consider that “violations of political and civil rights are at least as destructive of the proximate conditions of agency as is starvation.”⁷⁶ Although of a seemingly less immediate and crucial nature than the need for goods such as food and shelter, civil and political rights are of great value in the community of rights. “To be a fully human agent requires not only possession of economic and social goods but the

⁷³ Ibid, 149.

⁷⁴ Ibid, 150.

⁷⁵ Ibid, 121.

⁷⁶ Gewirth, *Community of Rights*, 53.

various political and civil rights and liberties that are indispensable for human security and dignity.”⁷⁷

It is important to consider the impact civil and political liberties can have on other aspects of freedom and well-being when evaluating rights imbalances. Gewirth notes that civil liberties are primarily considered negative and therefore nonsubtractive rights; however, it must be noted that the absence of respected civil liberties can lead to other rights violations and directly impact basic freedom and well-being. Gewirth notes that civil liberties are an important component of the method of consent to the mandatory rules of the supportive state. “Possession of the civil liberties,” Gewirth writes, “together with the effective capacity for participating in the method of consent is required for the dignity and rational autonomy of every prospective purposive agent.”⁷⁸

Economic rights are also of vital importance. Economic rights have a significant bearing on freedom and well-being. Through their right to productive agency, agents have a right to earn and accumulate private property in some form. Gewirth notes further that economic democracy protects agent’s freedom in their role as productive agents in the workplace. He notes that economic democracy, “removes the asymmetry of power and freedom”⁷⁹ from the capitalist working structure and enables workers to choose freely their working conditions and have control over their working relationships in exercising their right to productive agency and private property. Economic rights impact basic well-being in their contribution to productive agency and attaining the basic necessities of life. Agent’s have the right to freely choose their working profession and have it be one of meaning that provides a reasonable degree of worker satisfaction while

⁷⁷ Ibid, 69.

⁷⁸ Gewirth, *Reason and Morality*, 310.

⁷⁹ Gewirth, *Community of Rights*, 268.

also earning a reasonable wage. The right to amass wealth and private property is also tied to basic levels of well-being and freedom. The ability to earn a decent wage that allows the purchase of a home supports civil liberties such as privacy and freedom of speech by creating a space free from intrusion. Economic rights also allow greater freedom in pursuit of additive goods such as education as they allow an agent to direct the course of their life in a fulfilling way. In its contribution both to productive agency and, therefore, self-esteem, as well as material provisions, economic rights impact well-being both psychologically and economically.

As noted above, the seemingly straightforward criterion of degrees of needfulness for action becomes more complicated when weighing rights that are both of undeniably great consequence to the freedom and basic well-being of the individual and the community. As will be seen in the analysis of Ottawa's surveillance programs, this is the situation when balancing the use of intrusive law enforcement techniques for the purpose of crime prevention and resolution against the privacy rights of the individual. Safety and security are undeniably important to the individual and the community; however, privacy rights also play a key role in freedom and basic well-being. A delicate balance must be struck when balancing the right to a safe and secure community against the civil liberties of the individuals within that community. Although often undervalued as a right, privacy plays an essential role in freedom and well-being. The importance of privacy to freedom and well-being will be discussed further in the next chapter.

3. The Human Right to Privacy and Surveillance Programs

In order to accurately assess the balance of rights present in general surveillance programs, privacy must first be firmly grounded in the Gewirthian hierarchy of rights as not only a subtractive good, but a crucial component of basic freedom and well-being. It is demonstrated here that privacy, when properly understood and taking into account a number of its definitions and protections, should be viewed as an essential component of freedom and basic well-being within Gewirth's hierarchy. Although briefly touched on in his discussion of civil liberties, Gewirth did not discuss privacy rights in great detail. He did not specifically locate privacy as a component of basic well-being, where it will be argued here that it belongs. This argument is necessary in order to properly discuss the ramifications of surveillance technologies on human rights. Privacy is essential to basic well-being from psychological, social development and freedom perspectives, both to individuals and in the context of the community as a whole.

This chapter begins with a discussion of privacy's importance and current standing in rights evaluations. This is followed by an exploration of several definitions and conceptualizations of privacy. The impact of privacy on the various aspects of freedom and well-being are then explored in greater detail, making the case for privacy as a crucial right.

3.1 Privacy: Vital to Freedom and Basic Well-Being

Privacy is too often downplayed by critics as a privilege or even further dismissed as having no bearing on well-being at all. Oftentimes the implication that privacy is of little relevance for anyone but those who have something to hide or whose actions are

somehow questionable overshadows the substantial role privacy plays in the basic freedom and well-being of all individuals. In the context of security and safety, privacy is often downgraded due to the difficulty of proving its impact on freedom and basic well-being. Rights to physical security or food and shelter are perceived as far more concrete and therefore more important to basic well-being. As a result, critics often argue that tangible rights such as food and shelter should receive greater weight when balancing rights and goods. The lack of straightforward, physical gauges of harm in privacy violations presents a barrier to demonstrating its value and the potential impact of violations. As a result privacy violations are often downplayed or dismissed. Describing the tangibility problem associated with privacy violations Daniel Solove writes that “most privacy problems and harms lack dead bodies.”¹ The abstract nature of privacy rights and violations regularly leads to the willing surrender of privacy in support of more concrete rights.

The erroneous weighting of privacy colours rights-judgements with the false sense that privacy is expendable and can simply be revoked in support of other basic components of well-being, particularly security, in all circumstances. It becomes easy to justify any type of intrusive surveillance measure in the name of security when privacy is dismissed as unessential or of value only to those with suspect activities. The failure to take into account the important contribution of privacy to freedom and well-being results in a failure to properly assess the negative effect surveillance technologies can have on well-being of individuals and the community. It is commonly the case that “privacy

¹ Solove, “Nothing to Hide” 745-768, 767.

interest is generally minimal to trivial, thus making the balance against security concerns a foreordained victory for security.”²

When privacy is rightly recognized as a vital facet of freedom and basic well-being, it becomes a priority in the hierarchy of human rights and a greater onus is placed on proving that security programs that infringe on privacy are necessary and justified. The conditions of a justified privacy infringement also become correspondingly more stringent when privacy is properly distinguished as a component of basic freedom and well-being. True protection of basic freedom and well-being requires that privacy rights be granted consideration as an important component in their support when balancing rights in the community of rights. Although physical components of basic well-being such as food, shelter and physical security are more firmly accepted as basic goods and components of freedom and well-being, Gewirth also notes that civil liberties such as privacy are nonetheless “indispensable for human security and dignity.”³ Gewirth classifies civil liberties as primarily negative rights or rights of non-interference, which leads to a classification of privacy as a nonsubtractive and secondary component of well-being. However, lack of interference with the civil liberty of privacy is essential to preserve the integrity of freedom and basic well-being. When properly understood it must be recognized that it also has value intrinsically as it is integral to liberty and freedom, the most basic rights. When properly classified, privacy rights are understood as a, “species of the generic rights to freedom and well-being, which are the objects of human rights.”⁴ Privacy rights, in their support of the objects of human rights are of value to the individual as well as the greater rights of the community.

² Solove, “Nothing to Hide,” 745-768, 749.

³ Gewirth, *Community of Rights*, 69.

⁴ Walters, *Human Rights*, 165.

3.2 Definitions and Conceptualizations of Privacy as a Human Right

Privacy as a concept is often understood in a variety of manners including as a claim or right, control of access or limited access. Definitions of privacy that identify it as a claim or a right often fail to distinguish what it is about privacy that makes it important or special. Judith Jarvis Thomson classifies privacy as a right that protects a cluster of rights but fails to distinguish its independence as a good separate from other rights it supports.⁵ Warren and Brandeis, among others, have argued that privacy is primarily a right to be left alone.⁶ Although the ability to achieve solitude is an aspect of privacy, the definition of privacy as solitude fails to capture the essence of the concept. Solove notes that solitude, while an aspect of privacy, fails as a definition to “provide much guidance about how privacy should be valued vis-a-vis other interests, such as free speech, effective law enforcement, and other important values.”⁷ Privacy is then understood from a variety of limited access and information control definitions. Fried notes that limited access theories of privacy come closer to understanding that “privacy is not simply the absence of information about us by others, but is our own control over the information about ourselves.”⁸ The term privacy is sometimes used as an umbrella term synonymous with other goods and components of well-being that it supports such as trust, respect, autonomy and dignity. Trust, respect, autonomy and dignity are all supported by privacy and negatively impacted by its absence.

Drawing on previous definitions and explorations of privacy Alan Westin identifies four states of privacy that play an important role for both the individual and the

⁵ Judith Jarvis Thomson, “The Right to Privacy,” *Philosophy and Public Affairs* 4.4 (1975): 295-314, 301.

⁶ Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 193 (1890).

⁷ Daniel Solove, “Conceptualizing Privacy,” *California Law Review* 90.4(2002): 1087-1155, 1103.

⁸ Walters, *Human Rights*, 162.

general social good. These include solitude where the “individual is separated from the group and freed from observation by other persons.”⁹ This state being equivalent to the right to be let alone where an individual is literally solitary and free from interference. Secondly, intimacy where, “the individual is acting as part of a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve that special close, relaxed, and frank relationship between two or more individuals.”¹⁰ Thirdly, anonymity entails where, “the individual is in public places or doing public things but still seeks, and finds, freedom from identification and surveillance.”¹¹ Also understood as the ability to express views and move unnoticed or undocumented while in public.

The final state of privacy identified by Alan Westin is that of the social respect state of reserve, “when the individual's need to limit communication about himself is protected by the willing discretion of those surrounding him.”¹² Reserve demonstrates the social norm of privacy protection and respect that is generally granted in liberal states. In the variety of perspectives from which it is viewed, privacy is relevant to freedom as well as the psychological, social and moral well-being of individuals.

A concept further developed by Helen Nissenbaum who discusses the need for privacy protection in the public arena as one of preserving contextual integrity. Nissenbaum argues that contextual integrity enables individuals to make an informed decision about the appropriateness of revealing information in a particular context in the public sphere based on an understanding of the viewers and uses of such information in that specific context. She argues that the notion of the violation of norms of contextual

⁹ Alan Westin, “Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy,” *Columbia Law Review* 66.6(1966): 1003-1050, 1021.

¹⁰ Westin, “Science, Privacy and Freedom,” 1003-1050, 1023.

¹¹ *Ibid*, 1023.

¹² *Ibid*, 1024.

integrity which she describes as, “the practice of shifting information from one context to another—usually from the context in which it was collected, to another context,”¹³ is dangerous to privacy and freedom as it erodes the ability of the individual to make informed choices about actions.

Gewirth specifically classifies mental equilibrium as an essential component of basic well-being¹⁴; privacy plays an essential role in support of mental and emotional well-being. Privacy has been found to be of vital value to psychological well-being and general life satisfaction.¹⁵ It has been demonstrated through numerous studies that privacy is crucial to the integrity of mental equilibrium and that lack of privacy can have severe impact on psychological well-being.

The modern workplace utilizes a variety of surveillance techniques to monitor the performance of employees. These techniques include CCTV surveillance of work areas, electronic passes that monitor movement within the work facility, internet use reports, key stroke reports and telephone tapping. Through these various electronic means, many modern workplaces have become monitored. Many studies have been conducted on the morale and productivity of employees in workplaces where ongoing surveillance takes place.¹⁶ The impact of ongoing general surveillance in the majority of these cases has been highly detrimental to the emotional and psychological well-being of individuals working in such environments. In most studies, employees who suffered from a lack of privacy due to ongoing surveillance reported, “a higher degree of stress, such as anxiety,

¹³ Nissenbaum, “Privacy in Public,” 559-596, 577.

¹⁴ Gewirth, *Community of Rights*, 15.

¹⁵ Joe F. Pittman and Sally A. Lloyd, “Quality of Family Life, Social Support, and Stress,” *Journal of Marriage and the Family* 50.1 (February 1988): 53-67.

¹⁶ “Electronic Performance Monitoring and Social Context: Impact on Productivity and Stress,” *Journal of Applied Psychology* 80 (1995): 339-353.

Samanth Lee and Brian H. Kleiner, “Electronic Surveillance in the Workplace.” *Management Research News* 26 (2003): 72-81

depression, and anger.”¹⁷ Additionally it has been found that, “monitoring systems produce fear, resentment, and elevate stress levels.”¹⁸ In some cases employees were found to avoid areas known to employ surveillance equipment and actively attempt to circumvent other types of surveillance.¹⁹ It has also been found that when employees perceive a veil of privacy both through visual layout of a workspace and control over their environment, they are generally more satisfied and productive.²⁰

Although, due to the nature of the subject, there are limited studies on individuals who have resided in police states, there has been evidence to support the hypothesis that the lack of privacy endured in these circumstances created severe psychological distress. It must be taken into account that in such cases, misinterpretation of one’s actions observed through police surveillance included extreme consequences such as imprisonment and death. Nevertheless, the evidence supports the premise that fear of misinterpretation of one’s actions and constant lack of privacy does create psychological distress. The scale of impact would simply increase or decrease in accordance with the type of surveillance and the anticipated outcomes of surveillance.

Privacy is additionally essential for the development of human relationships, which we “would hardly be human if we had to do without -the relationships of love, friendship and trust.”²¹ The level of privacy we protect or reduce in relation to others defines our interpersonal relationships. In categorizing personal interactions, “trust is a key factor that determines the depth and quality of the relationship: a relationship without

¹⁷ Lee, "Electronic Surveillance in the Workplace.", 78.

¹⁸ Adam D. Moore, "Employee Monitoring and Computer Technology: Evaluative Surveillance v. Privacy," *Business Ethics Quarterly* 10.3(2000): 697-709, 706.

¹⁹ K. Nussbaum & V. du Rivage, "Computer monitoring: Mismanagement by remote control," *Business and Society Review* 56 (1986): 16–20.

²⁰ Suining Ding, "Users' privacy preferences in open plan offices," *Facilities* 26(2008): 401-417.

²¹ Charles Fried, "Privacy," *The Yale Law Journal* 77.3 (1968):475-493, 486.

trust isn't a relationship."²² Fried describes intimacy as, "the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone."²³ Interpersonal relationships come in a variety of levels of intimacy from those of casual acquaintances to our inner circle of family and friends. The level of trust between two individuals determines the intimacy of a relationship. Trust is developed through our decision to reveal increasingly intimate details about ourselves to others with the general progression that, "the deeper the relation, the more intimate the disclosures."²⁴ Increased trust with one's personal information leads to increased intimacy. The context of a particular relationship often defines the revelations that are considered appropriate. For example it is commonly understood that, "things that would never be appropriate to disclose with casual co-workers may be welcomed in a deeper friendship."²⁵ On the flip side, we expect a certain amount of intimate disclosure from individuals who we categorize as our significant others, best friends or family members and feel the relationship is unfulfilled if this is not forthcoming.

In order to have the ability to reveal specific personal information to specific individuals to develop trust and intimacy, one must have the corresponding ability to restrict information from others. Therefore, to define personal relationships with others it is necessary to have control over one's own personal information. Freedom of access to information about an individual means that, "privacy is not simply the absence of information about us by others, but it is our own control over the information about

²² Keeler, *Privacy 21st Century*, 32.

²³ Fried, "Privacy," 475-493, 486.

²⁴ Keeler, *Privacy 21st Century*, 40.

²⁵ *Ibid*, 40.

ourselves.”²⁶ Privacy, from a limited access perspective, provides the freedom for an individual to choose, “the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others.”²⁷ This type of information control is integral in the development of relationships that are a key component of human fulfillment and an important component of basic well-being. The ability to restrict information about oneself in a variety of contexts is necessary in the process of developing a sense of one’s identity and in defining important relationships. It further contributes to the essential freedom of an individual to select the individuals with whom they wish to develop intimate relationships. Lack of control over information leaves one unable to define and develop intimate relationships with some and avoid intimacy with others based on the condition of limited access. Without the ability to determine when and to whom certain information is revealed, an individual is unable to determine the level of intimacy and friendship they wish to cultivate with other individuals. Fried notes that, “privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.”²⁸ Interpersonal relationships are a key facet of the humanity of an agent. As a result, “threats to privacy therefore are threats to our very integrity as persons among other persons,”²⁹ and damage the potential to develop as a well-rounded social being.

Privacy, when understood as limited access and the right to be let alone, also acts as an important social coping mechanism related to identity development and mental

²⁶ Walters, *Human Rights in an Informaton Age*, 162.

²⁷ Oscar Ruebhausen and Orville G. Brim, Jr., “Privacy and Behavioral Research,” *Columbia Law Review* 65.7 (1965) 1184-1211, 1189.

²⁸ Fried, “Privacy,” 475-493, 477.

²⁹ Walters, *Human Rights in an Information Age*, 162.

equilibrium. Basic freedom and well-being are impaired when an adult individual is unable to voluntarily remove themselves from observation. Living in a community in close proximity to others creates constant friction and stress. In order to live comfortably among others we require the ability to remove ourselves from intrusion when necessary and privacy enables the individual to limit access to their physical and mental self. Individuals require, for mental equilibrium access to a state of privacy where they are left alone in order to mentally decompress and process emotions and thoughts in the absence of interruption or judgment. Solove writes that due to the constant contact involved in living among others, “a society without privacy protection would be suffocating, and it might not be a place in which most would want to live.”³⁰

There is value in privacy even from those with whom relationships are shared. Individuals move through a variety of “roles” in each relationship they cultivate. They require the physical and psychological space to remove themselves from these pressures and be their core self, that is the most personal self removed from the expectations of social roles. Relationships are often accompanied by expectations of thoughts or behaviours that require energy and conscious thought. Whether we operate in our role as a co-worker, significant other, friend, customer, child, caretaker or sibling, our relationships, in all their varying levels of intimacy, make demands upon our actions. Westin notes that this is an extreme source of stress and that, “to be “on” always would destroy the human organism.”³¹ It is an important psychological and social coping mechanism for every individual to remove themselves from these roles and their corresponding expectations for periods of time and freely exist as ‘themselves’. It has

³⁰ Solove, “Nothing to Hide,” 745-768, 762.

³¹ Westin, “Science, Privacy and Freedom,” 1003-1050, 1027.

been demonstrated in marital coping experiments that the ability to obtain privacy at home had a positive correlative effect with lasting marriages and was of significant value to stress release.³² Among adult family members cohabiting, all members cited lack of privacy as the major drawback of such living arrangements.³³ Mental equilibrium and the development of positive interpersonal relationships require the ability to remove oneself and be left alone.

It is likely that the value placed on privacy by individuals in close proximity has to do with the ability to differentiate and develop one's own personality and values independently. The value and components of privacy "are universal and are related to societal role conflict and differentiation."³⁴ The ability to remove oneself from scrutiny plays a role in psychological well-being and is important in order to develop ideas and identity. Only in the absence of scrutiny and judgment is an individual free to develop their identity. In this sense, privacy supports "the liberty of each person to define and pursue values free from unwanted infringement."³⁵ Unusual or risk-taking behaviour associated with developing one's individual identity and personality are also likely to suffer when inhibited by a lack of privacy.

Westin notes the common reference to individual relationships as zones progressing from the most intimate to the least intimate. At the center of these relationships is that of the individual with himself, a sacred zone where an individual protects "aspects of himself that the individual does not fully understand but is slowly

³² Pittman, "Quality of Family Life," 53-67.

³³ Barbara A. Mitchell, "Too Close for Comfort? Parental Assessments of 'Boomerang Kid' Living Arrangements," *Canadian Journal of Sociology* 23.1(1998): 21-46.

³⁴ Walters, *Human Rights*, 158.

³⁵ *Ibid*, 162.

exploring and shaping as he develops.”³⁶ In order to study and develop these aspects, an individual requires privacy from judgment and scrutiny. This also involves the notion of privacy as anonymity. When surrounded by those with whom we have developed personal relationships we are held to the roles and expectations we have cultivated. Privacy as anonymity allows for the development of one’s identity free from the intrusion of our self as perceived by our intimate friends. Westin notes that anonymity among strangers is an important component of this personal development. He writes when anonymous, “the individual can express himself freely because he knows the stranger will not continue in his life and that, although the stranger may give an objective response to the questions put to him, he is able to exert no authority or restraint over the individual.”³⁷ The ability to ‘try on’ different opinions and personalities without scrutiny allows the individual to fully explore the aspects of themselves about which they are unsure. For example, often those who travel alone, or leave their hometown to study elsewhere note that they have ‘found themselves’ during the course of their time away from home. It is through the privacy granted by the anonymity of such travel that individuals can freely explore the most intimate aspects of their personality without exposure or scrutiny.

Therefore, lack of privacy in regards to anonymity, limited access and solitude has the potential to limit the options of behaviour and beliefs that one feels are open to them for fear of failure or judgment. In the course of developing one’s personality and ideas an individual, “may wish to do or say things not forbidden by the restraints of

³⁶ Westin, “Science, Privacy and Freedom,” 1003-1050, 1025.

³⁷ Ibid, 1023.

morality, but which are nevertheless unpopular or unconventional.”³⁸ Privacy allows individuals to pursue potentially unpopular thoughts and ideas without the fear of judgment. It is likely that “pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream,”³⁹ as individuals feel less free to explore and develop different views and habits.

Privacy understood as freedom from observation also plays a role in moral development. Although interaction with others is a necessary component for moral development; constant supervision encourages law or rule abiding behaviours motivated by external pressure rather than internal recognition of the intrinsic value of such action. As noted by Kohlberg, moral development relies on the progressive ability to make decisions independently and for increasingly moral reasons. At the lowest end of the moral development spectrum individuals make decisions based on fear of reprimand. In stage one of the Preconventional Level, “avoidance of punishment and unquestioning deference to power are valued in their own right, not in terms of respect for an underlying moral order.”⁴⁰ As one progresses to the advanced stages of moral development, “right is defined by the decision of conscience.”⁴¹ Moral development is enhanced by the opportunity to make decisions on how to act free from observation. Constant supervision limits the ability to develop moral behaviour that is internally motivated, rather than motivated by the fear of punishment. Many tout constant surveillance as a preventative measure for criminal acts; however lack of privacy as a means of preventing crime addresses the issue only at a superficial level where lawful actions are taken simply to

³⁸ Fried, “Privacy,” 475-493, 485.

³⁹ Ruebhausen, “Privacy and Behavioral Research,” 1184-1211.

⁴⁰ Lawrence Kohlberg and Richard H. Hersh, “Moral Development: A Review of the Theory,” *Theory Into Practice* 16.2 (2001) 53-59, 55.

⁴¹ Kohlberg, “Moral Development,” 53-59, 55.

avoid punishment. This can have the negative impact of stunting the moral accountability and development of members of the community more generally.

3.3 The “Chilling” and “Observer” Effects

Privacy is additionally necessary for freedom of action and speech. An imbalance of power that limits the ability for an individual to act freely and without intrusive surveillance by government agencies or law enforcement is a violation of basic freedom. Privacy supports the right to proceed in one’s actions without intrusion and interference. This type of privacy is essential to freedom because “the right to freedom includes having a sphere of personal autonomy and privacy whereby one is left alone by others unless he or she unforcedly consents to undergo the actions of others.”⁴² The awareness of scrutiny that accompanies a lack of privacy impacts the ability of an individual to act naturally and without restraint. The issue of what is commonly referred to as ‘the chilling effect’ is a serious threat to basic freedom. The ‘chilling effect’ in reference to an atmosphere where free speech and free action are censored by the presence of external pressure is an inevitable consequence of constant surveillance. The unrestrained behaviour one exhibits when alone in the privacy of one’s home is evidence of how the presence of an observer inhibits or alters freedom at a fundamental level. Most individuals would acknowledge that when another person is around they are less likely to take unrestrained actions such as singing or dancing to a song on the radio; or, alternatively, are more likely to take actions such as increased consideration of their clothing and general appearance. It has been demonstrated that the mere knowledge that one’s actions are being observed has the ability to cause one to alter or restrain behaviour and speech, thus impacting basic

⁴² Walters, *Human Rights*, 165.

freedom of movement and action.⁴³ The examples described above are not examples of violations of privacy, but rather demonstrate the ability of the presence of others to impact our behaviour. These minor changes are motivated by social rules, however, when the observer present has the authority to punish or reprimand the individual for their behaviour, they changes are made out of fear and may affect the freedom to act at a more fundamental, serious and negative level.

Often referred to as the 'observer effect', change in behaviour due to observation has been found to occur even when individuals are not guilty of any particular crime or misdeed.⁴⁴ One need only consider their own reaction when a police car is spotted nearby while driving for evidence of the psychological impact of observation, particularly by an authority. Or alternatively consider the immediate change in behaviour among students when a teacher enters the room. Although in neither case are any rules being broken prior to the presence of an authority figure, simple changes in behaviour such as slowing in speed (even if one was not actually speeding), appearing more concentrated and serious or straightening in one's seat are common when in the presence of an observer, particularly an authority figure. In these unconscious ways, our actions are controlled by the knowledge of observation.

In the examples above, the observer effect is the result of the identifiable presence of an authority figure. Freedom can also be negatively impacted by the presence of an unseen observer. Knowledge or fear of potential observation by an 'unobservable observer' limits the ability for an individual to reasonably predict the consequences of

⁴³ Chris Livesey, "Theory and Methods- Participant Observation," <http://www.sociology.org.uk/methpo.pdf> (accessed December 2007).

⁴⁴ Livesey, "Theory and Methods –Participant Observation."

their actions.⁴⁵ The potential presence of the unknown or unobservable observer leaves one unable to make informed decisions about how information about them is revealed. As discussed by Helen Nissenbaum in the current surveillance state we can no longer reasonably predict the outcome of any action taken in public or any information revealed in a particular context. The consistent violation of the norms of contextual integrity and the knowledge that could potentially be monitored at almost any time has a negative impact on basic freedom. “When we think that our every word and deed will be made public,” she writes, “then we are inhibited from acting in certain ways.”⁴⁶ When the consequences of an action are unpredictable to an agent, it becomes likely that the agent will then avoid any action they fear could potentially be misinterpreted or misconstrued. Lack of privacy has the potential to impact basic freedom because even when surveillance programs are responsibly administered and although it may likely be that data is “never used, its very existence would certainly change the way we act in public.”⁴⁷ The fear of having one’s actions misinterpreted can lead to a “chilling effect” where one restricts their actions such as avoiding certain areas of a city or conversations in their work environment or exercising extreme caution in revealing personal information. Basic freedom is corrupted anytime one restrains or reconsiders a course of action because of the potential for misinterpretation by a third party. When constantly aware that every action one takes may be “observed, scrutinized, cross-referenced, judged, maybe

⁴⁵ Andrew Von Hirsh, “The Ethics of Television Surveillance,” *Ethics and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000).

⁴⁶ Walters, *Human Rights*, 162.

⁴⁷ Nissenbaum, “Privacy in Public” 559-596, 585.

misinterpreted and used against you by persons unknown, by authorities of the state - if you have to go through life like that, you are not truly free.”⁴⁸

3.4 Privacy as Vitrally Necessary to Civil Liberties and the Democratic Process

Privacy is a necessary component of the democratic process that is necessary in the democratic, supportive state. Protecting individual privacy contributes to the overall good of society more generally by encouraging free speech and full participation in the democratic process. Daniel Solove notes that inhibiting individuals from free action and speech can have a detrimental impact on democratic and political rights. He writes that “chilling effects harm society because, among other things, they reduce the range of viewpoints being expressed and the degree of freedom with which to engage in political activity.”⁴⁹ Liberal states have taken measures to protect privacy in the democratic process itself recognizing that political choice requires protection from scrutiny. This has been accomplished by “providing a secret ballot to protect the voting process and by forbidding governmental inquiries into a citizen's past voting record.”⁵⁰ Jason W. Patton argues further that privacy in public space is of value as an informal gathering place that allows for exchange of ideas that are important in the democratic political process. Lack of privacy in public in general would diminish the value of public space and foster, “an atmosphere of distrust, fear, and suspicion.”⁵¹

Lack of freedom in public space, as well as negative emotions of distrust and suspicion, impact the basic freedom of society at a very fundamental level. Impaired

⁴⁸ George Radwanski, "Watching You: Privacy Rights and Video Surveillance," BC Branch of the Canadian bar Association, Vancouver, BC, February 7, 2002.

⁴⁹ Solove, "Nothing to Hide," 745-768, 764.

⁵⁰ Westin, "Science, Privacy and Freedom," 1003-1050, 1021.

⁵¹ Patton, "Protecting privacy in public?" 181-187.

freedom due to lack of privacy can have an extremely detrimental impact on societal goods such as “chilling free speech, free association, and other First Amendment rights essential for democracy.”⁵² The ability to express an opinion with a degree of anonymity and protection from retaliation is imperative for true freedom of speech. Westin argues that privacy as a degree of anonymity in public supports free speech by removing the chilling fear of the consequence of potentially unpopular opinions. He writes that it is common that, “the individual wants to present some idea publicly to the community or to a segment of it but does not want everyone to identify him at once as the author.”⁵³

Privacy is necessary in order to encourage this type of free speech. Public space that lacks any sense of privacy has the potential to limit free association and freedom of speech through fear and the resulting chilling effect. The free expression and exchange of ideas benefits the general evolution of the community. John Dewey notes that society upholds the rights of the individual and protects “space for the individual because of the social benefits this space provides.”⁵⁴ It is to the advantage of society generally to, “hold back in order to receive the benefits of creating the kinds of free zone’s for individuals to flourish.”⁵⁵ Allowing free discussion of concerns and issues in public provides a forum for discovering solutions and new viewpoints. The ability to restrict access to one’s person, thoughts and ideas while in development is therefore an important social value of privacy. Developing, “robust and varied debate on matters of public concern requires the opportunity to experiment with self-definition in private.”⁵⁶ To this end it is generally

⁵² Solove, “Nothing to Hide,” 745-768, 764.

⁵³ Westin, “Science, Privacy and Freedom,” 1003-1050, 1023.

⁵⁴ Solove, “Nothing to Hide,” 745-763, 761.

⁵⁵ *Ibid.*, 761.

⁵⁶ Julie Cohen, “Examined Lives: Informational Privacy and the Subject as Object.” *Stanford Law Review* 52.5(2000): 1373-1438, 1426.

found that the liberal state “recognizes the special needs of scholars and scientists to be free of constant community and government examination so that paths to truth and discovery can be pursued even in directions that offend dominant opinion.”⁵⁷ The right to free speech is actively protected in liberal society. The generally accepted social norm of respecting others privacy indicates “society’s willingness to accept constraints on the pursuit of valid and vital state interests in order to acknowledge the right of privacy.”⁵⁸ Cross-cultural studies have found that privacy is respected as a social norm in a variety of manners.⁵⁹ This indicates that privacy is not simply a social construction but a need on a more basic level.

3.5 The Important Role of Privacy in the Community of Rights

The impact of an absence of individual privacy protections has consequences not only for the individual but also for the freedom and well-being of the society more generally. Gewirth notes that civil liberties have a dual relation to the state and can be considered both passive and active rights and must therefore be protected as such. He writes that, “they are ‘passive’ in that they must be protected by the state as rights of persons,”⁶⁰ yet that they are also, “‘active’ in that the actions that are their objects function in the political process.”⁶¹ The integrity of the democratic supportive state therefore requires protection of privacy. It must be noted that “no society with a reputation for providing liberty has failed to limit the surveillance powers of various authorities.”⁶² The social norms of such states have generally encouraged the protection

⁵⁷ Westin, “Science, Privacy and Freedom,” 1003-1050, 1021.

⁵⁸ Walters, *Human Rights in an Information Age*, 164.

⁵⁹ *Ibid*, 164.

⁶⁰ Gewirth, *Reason and Morality*, 308.

⁶¹ *Ibid*, 308.

⁶² Walters, *Human Rights in an Information Age*, 160.

of some measure of privacy. On the opposite side, oppressive states often categorize privacy as dangerous and wrong. Westin notes that "both fascist and communist literature have attacked the idea of privacy as "immoral," "antisocial," and "part of the cult of individualism."⁶³ In the liberal state, "qualities of independent thought, diversity of views, and nonconformity are considered desirable traits for individuals."⁶⁴ And the protections granted to privacy in such states demonstrate its necessity in the development of these traits.

Privacy's value to the freedom and basic well-being of individuals as well as the broader community as a whole requires its protection. The role privacy plays in the psychological, moral and social development of the individual require its classification as an essential component of basic well-being. The implication lack of privacy can have on these numerous facets of freedom and basic well-being must be taken into account when examining rights conflicts in the police surveillance programs. Privacy rights must be protected for their importance "as a species of the generic rights to freedom and well-being, which are the objects of human rights."⁶⁵

⁶³ Westin, "Science, Privacy and Freedom," 1003-1050, 1020.

⁶⁴ Ibid, 1026.

⁶⁵ Walters, *Human Rights in an Information Age*, 165.

4. Rethinking Capital Surveillance Programs: A Philosophical Critique

Alan Gewirth's theory of human rights as outlined in the previous chapters provides a strong framework for rationally exploring and evaluating the rights concerns present in police ethics and police use of surveillance technology. In this chapter the issues and debates surrounding policing and surveillance technology raised in chapter one are reconsidered in the context of a Gewirthian human rights critique. The policy implications of a Gewirthian approach to policing and the use of general surveillance technology are also explored.

This chapter begins with an exploration of the various forms of CCTV surveillance present in Ottawa including intersection traffic cameras, taxi cameras, park cameras and the proposed expansion of these programs as well as their current use by police. These discussions are followed by an analysis of the MDT access to the CPIC database and other files currently provided to police cruisers in Ottawa. This chapter concludes with a discussion of the policy implications of the analysis.

4.1 Public Area CCTV

Closed circuit television surveillance for policing is currently present in a variety of formats in Ottawa. The quality and number of these cameras has expanded significantly in recent years. Each program has slightly different operation and jurisdiction and will be examined separately.

4.1.1 Intersection Traffic Cameras

The most numerous of Ottawa's current general public area CCTV cameras are found in the form of intersection traffic cameras located at major intersections throughout

the city. These intersection cameras present an example of a program that would not be considered acceptable when evaluated against Gewirth's human rights criteria. It is argued that intersection cameras capture only public areas and therefore do not present a threat to privacy right; however, privacy in public, as was demonstrated in Chapter 3, is an important component of privacy. Lack of privacy has a negative impact on freedom and basic well-being and privacy in public therefore requires consideration as a right. The traffic camera program threatens to disintegrate privacy in public and the concept of contextual integrity in Ottawa and therefore has a direct impact on freedom of movement.

Gewirth defines freedom as unforced choice with full knowledge of relevant circumstances.¹ In order to make an informed and unforced choice about actions taken in public an individual must have adequate knowledge of how information they reveal in a specific public context may be transmitted and used in another context. The expansion of the traffic camera program means that having one's actions and movements captured by CCTV is becoming less of an unforced choice in Ottawa. The presence of 84 cameras recording continuously at 65 major and often unavoidable intersections in Ottawa removes a great deal of choice from this particular surveillance equation. Intersection traffic cameras are under the operation of the City of Ottawa Traffic Department. Their feed is viewable through the City of Ottawa website where it is noted that their purpose is for traffic operations.² Despite this stated purpose, these images and data are accessed on a regular basis by all levels of police in Ottawa for law enforcement purposes. That this information is not included in the description of the program available to the public further raises the concern that the average individual is not made explicitly aware of how

¹ Gewirth, "Professional Ethics," 283-300, 287.

² "Live Traffic Video," *City of Ottawa*, http://webcam.city.ottawa.on.ca/trafficvideo/video_en.htm (accessed, February 2009).

their image will be used when they venture out in public and further impacts unforced choice and freedom.

Previous versions of intersection monitoring programs in Ottawa showed cars as animated blobs indicating the volume and movement of traffic at an intersection. The current City of Ottawa traffic cameras now stream live high definition colour video across the Internet viewable to anyone with Internet access. Intersection surveillance additionally captures not only car traffic but also pedestrian movement. The former incarnation of these programs supported the premise of a usage that was strictly traffic oriented. If the purpose of traffic cameras is indeed to provide assistance to City of Ottawa traffic staff in regulating the timing and control of intersections, it is unclear why actual video is necessary. The data provided by the “blobs” previously available, combined with the ongoing intersection counts regularly taken by summer students, provide the same data for traffic regulation. It seems both unnecessary and privacy invasive for the live video feed of the newer version of traffic cameras to be broadcast on the Internet and accessible to the general public. It is an obvious imbalance of rights to rank the ability to choose a quick route home from work over the right to privacy in public. Given that the original form of the program provided the same information in a much less privacy infringing manner there is little justification for the new form’s existence in support of purely traffic oriented aims.

The issue of consent is also raised when cameras cover general public areas on a continuous basis, as is the case with traffic cameras. Express, or explicit, consent is required in the case of sensitive information. Explicit consent is therefore not often considered necessary in the case of the seemingly unimportant information captured by

CCTV cameras. For example, the shirt one wore while walking down Carling Avenue at 5:15pm on a Monday night is not generally considered private information. Law enforcement therefore appears to operate general CCTV surveillance on the basis of the “implied consent” derived from that fact that an individual has appeared in public and made no explicit effort not to be captured on camera. However, when images are captured, stored and mined for a variety of unknown purposes it would seem that implied consent to capture and store one’s image might not be sufficient.

The locations and scope of the traffic cameras additionally raise concerns about freedom as unforced choice relative to CCTV cameras. It is important to note that traffic cameras capture more than just car movement on the roadway. In some cases, the cameras are positioned in such a way that they additionally capture front or back yards of private homes, sidewalks and store entrances and other locations near to the particular intersection being monitored. This is assumedly an accidental inclusion and not an intentional aspect of the program. Whether accidental or purposeful it illustrates the point that CCTV, even when installed for seemingly harmless purposes with assumedly good intentions, can still present a threat to privacy rights. The cameras currently employed in Ottawa also show high definition images which can provide a great deal of detail. Ottawa’s program is in a relatively early stage; however, it has continued to expand over the years. It is worth noting that in areas where CCTV is used regularly, abuse by officers with access to the data has been a common problem. For example, in the United Kingdom there have been several cases of “peeping Tom” CCTV abuse. In one case it

was found that three officers “used a street camera to spy on a woman in her home.”³

When public CCTV cameras capture, even accidentally, private areas such as backyards or the front windows of homes the potential for voyeurism and other types of abuse by individual officers operating the cameras must be considered. The capture of private areas by traffic cameras in Ottawa presents a major privacy invasion. The lack of clear notification of the presence of intersection cameras as well as complete disclosure of the potential use of the images captured by these cameras presents a major privacy invasion concern.

4.1.2 Public Area CCTV - Taxi Cameras

City of Ottawa Bylaw No. 2005-481 is the most extreme example of an overzealous and rights violating surveillance program currently active in Ottawa. Bylaw No. 2005-481 mandates that all taxi cabs operating in Ottawa be equipped with surveillance cameras that record on an ongoing basis. Implemented despite the vehement opposition of the Taxi Cab Union and without a clearly defined access policy at the time of approval, this case demonstrates the alarming ease with which rights infringing surveillance technology programs can be implemented in our current surveillance-friendly climate. Mandating constant surveillance on private property outside the control of the business owner is a questionable step in police controlled surveillance programs and when evaluated against Gewirth’s human rights framework this program would be considered a violation of rights.

³ “CCTV ‘peeping Tom’ trial begins,” *BBC News Online* (5 December 2005), http://news.bbc.co.uk/2/hi/uk_news/england/merseyside/4500890.stm (accessed December 2007).

A major concern with the implementation of Bylaw No. 2005-481 was that it was approved against the will of the Taxi Drivers Union.⁴ Forcing individuals to submit their private business to ongoing constant surveillance is a violation of human rights. If the purpose of this program is to allow for taxi drivers to protect themselves against theft or assault, then the owner of the cab should have the ability to decide whether a camera is installed and active or not. As noted previously, it has been found that constant surveillance of employees in the workplace can have severe psychological impact. In this way the taxicab camera policy violates the freedom and basic well-being of the drivers. It has been shown that taxi cameras are actually effective at curbing criminal action taken against taxi drivers and their passengers. However, the displacement theory must be considered in relation to these results. Blocking one source of victims for theft and assault is unlikely to prevent theft and assault more generally but rather simply direct the target of these crimes elsewhere.

Taxi drivers are currently unable to make an unforced choice regarding whether their entire workday is caught on camera and may appear in the newspaper. It is not reasonable to suggest that they simply find an alternate source of employment should they disagree with the new regulations. Other types of private business owners are not mandated to film their premises. As taxis are private businesses as well, the option of surveillance should be left to the owner or driver of the vehicle. The control of when the camera operates is also not at the discretion of the driver. Unlike other private business operations that choose to operate video surveillance on their property, taxi drivers are

⁴Jake Rupert and Jessey Bird, "Ensure cameras aren't used to 'spy' on us or we're walking off the job, cab drivers say," *Ottawa Citizen* (February 15, 2008), City Section. <http://www.canada.com/components/print.aspx?id=2bd162e6-9d7b-49fb-b367-c5c08f0> (accessed March 2008).

unable to turn off the cameras in their privately owned vehicles. During Council debate many taxi drivers argued that the vehicle they drove as a taxicab driver was also used as their family vehicle. The operation of surveillance out of their control in their private family car represents an intolerable and unjustified rights violation.

It must also be noted that mandating surveillance of taxicabs forces passengers to submit their presence, company and behaviour within a cab to a semi-permanent record. Taxicabs function as a means of transportation for those who are unable to drive either due to disability, lack of private vehicle or intoxication. When public transportation is unavailable to these individuals either due to time of day or location of destination, taxicabs become the only alternative for transportation. When the potential public uses of the data gathered by taxicab security cameras are considered, as will be discussed further below, many individuals would likely feel uncomfortable with this privacy invasion.

4.1.3 Park Cameras

Not all CCTV programs operated for policing in Ottawa present cases of rights violations. Gewirth's standards would find that the current operation and policy of City of Ottawa park cameras as reasonable and an example of justified right-infringement. City of Ottawa Park surveillance cameras do not operate during the daytime hours and are only triggered by motion during the late night hours when all City of Ottawa parks are out of operation and closed to the public. As noted previously, City Bylaw No. 2004 - 276 states that no one is to, "remain or enter into any park between the hours of 11:00 o'clock in the afternoon (p.m.) and 5:00 o'clock in the forenoon (a.m.)."⁵ Therefore, to enter a City Park after hours is to knowingly violate a bylaw. Parks that contain after

⁵ "Bylaws," *City of Ottawa*, http://www.ottawa.ca/residents/bylaw/a_z/parks_facilities_en.html, (accessed October 24, 2008).

hours CCTV cameras have signs indicating their presence as well as posted signage indicating regulations regarding park hours. An individual entering a City of Ottawa Park after posted hours does so with adequate warning and knowledge that they are violating a bylaw, of the presence of CCTV and the likelihood that their image will be captured, stored and reviewed by OPS officers. To enter a City of Ottawa park after dark is to make a decision through unforced choice to contravene a bylaw and therefore by doing so one willfully and knowingly chooses to violate the laws of the organization of the City of Ottawa to which they are necessarily justified to follow and risk the privacy related consequences.

Gewirth notes that rules and regulations are a necessary component of maintaining order within a state or organization. Bylaw No. 2004 – 276 is a freedom-impeding bylaw that restricts access to certain areas of the city; however, it functions to support safety and security in the community in a minimally rights-infringing manner. Considered as an indirect application of the PGC this regulation would be considered justified by Gewirth, as it is a minimal infringement on freedom and does not impact freedom or well-being in a fundamental or crucial manner. Cameras are installed in parks in order to deter the prostitution, drug dealing, drug use and other illegal activities that frequently occur in these locations after dark. These types of activities can have significant impact on the overall safety of a neighborhood as well as the overall well-being of the community. Discouraging these activities by limiting park access after dark is a benefit to safety and security and CCTV as enforcement of this regulation is justified in this case. It is worth noting that it has been demonstrated that CCTV cameras have been found to have minimal impact on a great deal of crime and increased lighting has

been equally, and often more effective at deterring criminal activity in public areas such as parks after dark.⁶ However, cameras have had some impact in curbing some types of crime in isolated areas such as parks and given the steps taken to ensure that only those who knowingly break the law are captured on film and are warned that this will occur; there is little human rights concern with this particular program.⁷ Therefore, the impact to freedom and privacy present in the City of Ottawa Park camera program is negligible in support of the goals of safety and eradicating the often illegal and dangerous activities that occur in Ottawa parks after hours.

4.1.4 Proposed Expansion of Current CCTV Programs

While the current operation of the City of Ottawa park camera program presents few privacy concerns, the proposed expansion of this type of CCTV surveillance to public street corners on an ongoing basis would not fulfill Gewirth's human rights balance and must be considered a human rights violation. Chief White has stated that he supports the expansion of Ottawa's current general public CCTV surveillance program to record "problem areas" downtown with a system of rotating cameras similar to the multimillion dollar program set up in downtown Toronto following the shooting of high school student Jane Creba.⁸ He has indicated that cameras rotating throughout problem areas in the city could be equipped with speakers that allowed officers to communicate to individuals remotely from stations monitoring the cameras. This type of constant interactive surveillance would have a very damaging impact on the freedom of movement and speech in public places and would be intolerable according to Gewirth's scale. As

⁶ Seymour, "Cameras would help cut crime in Ottawa."

⁷ United Kingdom, Home Office, "Crime Prevention effects of closed circuit television: a systematic review," *Research Study*, 252 (August 2002), <http://www.homeoffice.gov.uk/rds/pdfs2/hors252.pdf> (accessed November 2008).

⁸ Seymour, "Cameras would help cut crime in Ottawa."

discussed previously, constant surveillance can have severe impacts on the psychological and social well-being of individuals and society more broadly. When under constant surveillance freedom of movement and speech can be impaired by the “chilling effect.” Individuals may avoid certain legal actions or public areas for fear of misinterpretation or unknown repercussions. Individuals may also further feel stressed by the unknown consequences of actions in public. The level of surveillance proposed by Chief White would therefore be so detrimental to freedom and well-being as to be considered unjustifiable by Gewirth’s standards. In contrast to the CCTV cameras in City parks that are targeted to specific time frames when illegal activities occur and do not record continuously or at all during times when other individuals may be present, this type of general surveillance program would present a serious threat to the integrity of privacy in public areas.

Moving cameras from off-limits areas such as city parks after dark to public streets in downtown areas again impacts basic well-being, freedom of movement and unforced choice. It has been discussed above how the presence of cameras in public areas can impact freedom of movement and basic well-being in the form of mental equilibrium. Were there evidence to suggest that there was an immediate threat to the physical security of individuals in Ottawa then some type of surveillance technology on a short-term basis might be considered justified by Gewirth. However, there is insufficient evidence to suggest that Ottawa crime rates would require this type of surveillance, even on a short-term basis, let alone on a constant rotational basis as suggested by Chief White.

In Ottawa, crimes threatening the safety and physical integrity and basic well-being of individuals have been consistently low and actually declining in recent years.

The *2006 Crime, Police and Traffic Statistics Report* notes that, “Crimes of violence have declined for the past three consecutive years – by 5 percent in 2006,”⁹ further noting that assaults, which account for 80 percent of crimes of violence, “have decreased by 7 percent from 2005 to a rate of 480 crimes per 100,000 residents.”¹⁰ It is clear that the risk of physical harm to Ottawa residents is low, with statistics of only, “5,091 incidents and a rate of 580 crimes per 100,000 residents.”¹¹ In fact the report notes that of all crimes committed in Ottawa, property crimes accounting for over 50 percent of all Criminal Code Offences.¹² The low level of crime threatening physical well-being of individuals in Ottawa, makes it difficult to argue that basic well-being and freedom as provided by safety are at a greater daily risk than basic freedom and well-being would be if the city were to be under constant surveillance and scrutiny. Residents of Ottawa are far from living in fear for the safety of their physical person on a regular basis. However, to install a more widespread public surveillance system would result in residents living in constant awareness of scrutiny by persons of authority. Given the low crime rates in Ottawa, and the impact to freedom and well-being resulting from this type of general constant surveillance on street corners, this type of program cannot be justified and would therefore constitute an actual violation of rights.

There has been no evidence to suggest that the presence of CCTV surveillance technology has any deterrent effect on crime. The most intensive studies on the impact of CCTV on criminal activity to date have found that it is generally ineffective at curbing criminal activity. A 2005 UK Home Office study evaluating the impact of CCTV on

⁹ City of Ottawa, Ottawa Police Service Corporate Planning, “Crime, Police and Traffic Statistics Report,” (July 7, 2007).

¹⁰ Ottawa Police Service, “Crime Police and Traffic Statistics,” 4.

¹¹ Ibid, 2.

¹² Ibid, 7.

crime in 13 cities it was found generally that CCTV had little to no impact on criminal activity. The report found that overall there is, “little evidence that CCTV reduces any of the relevant individual types of crime, at least judging by police data.”¹³ A key discovery of the Home Office study was that crimes against individuals experienced no reduction that could be tied to the implementation of CCTV cameras. They note that their study, as well as previous reviews, has found that, “CCTV had no effect on crimes of violence.”¹⁴ It was further discovered that, “Impulsive crimes (e.g. alcohol-related crimes) were less likely to be reduced than premeditated crime (e.g. theft of motor vehicles)”¹⁵ These findings have been consistent across many other studies conducted on the use of CCTV to deter criminal activity. Impulsive crimes are simply not impacted by the presence of CCTV. Based on the results of studies indicating that premeditated crime simply relocates to different areas of a city when the presence of CCTV surveillance is known,, it can be extrapolated that as more cameras were installed to address the new areas of concern; the proliferation of cameras that would be necessary in order to obliterate all crime would be so severe as to create an intolerable surveillance state.

Ottawa Chief of Police Vern White stated that CCTV access is useful for, “petty crime as an evidence and intelligence-gathering tool.”¹⁶ Although CCTV has been found to be ineffective at curbing crime threatening security of the person, study data has shown that property crime, particularly vehicle theft, did see some reduction following the installation of CCTV.¹⁷ In light of the comments by the Chief of Police, and the demonstrated effectiveness of CCTV cameras in preventing property crime, the clash of

¹³ Home Office, “Assessing the Impact of CCTV,” 51.

¹⁴ Ibid, 19.

¹⁵ Ibid, 9.

¹⁶ Seymour, “Cameras would help cut crime in Ottawa.”

¹⁷ Home Office, “Assessing the Impact of CCTV,” 50.

rights shifts from simply “security of the person vs. privacy of the person” to the more specific “security of property vs. privacy rights of the individual and community.”

Although some evidence of property crime prevention has been noted in studies on the use of CCTV, data has strongly indicated that CCTV cameras have provided only a mild protection of personal property and that in those cases the results could have been attributed to a variety of factors including increased lighting. There has been no evidence found that the presence of CCTV cameras prevents harm to the physical security of individuals. As discussed above, privacy is of crucial importance to basic freedom and well-being. The safety of vehicles and personal property from theft or vandalism would be classified as a nonsubtractive good on Gewirth’s scale and therefore would be of secondary importance to the basic freedom and mental well-being provided by privacy. Therefore, crimes of property vandalism and theft cannot justify the violation of the component of basic well-being of privacy and the expansion of the current CCTV program in Ottawa could not be justified as a result.

Chief White has indicated that cameras can have value as an evidence gathering tool. Recent OPS studies have indicated, however, that there is little need for extreme measures such as privacy invasive CCTV cameras as, “solvency rates for crimes of violence remain high, with over 80 percent of the homicides solved in 2006, and the majority of attempted murders (73%) and assaults (71%) being solved.”¹⁸ Additionally, once the infrastructure for this type of citywide public area CCTV is installed, it becomes easy to further violate privacy through overzealous policing related to minor crimes. Although the overactive use of CCTV by officers dealing with very minor crimes seems

¹⁸ Ottawa, Corporate Planning, Ottawa Police Service, *Crime, Police and Traffic Statistics Report* (July 7, 2007).

unrealistic, it must be noted that extreme overuse of CCTV is already a reality in other cities where CCTV programs have been active for longer periods of time. For example, “pedestrians in Middlesborough, England, are watched continuously and scolded from loudspeakers for infractions as minor as dropping a piece of paper on the sidewalk.”¹⁹ Given the low volume of serious crime in Ottawa, it seems that such overzealous and proactive policing would be more likely as the presence of technological tools encourages their use.

Chief White estimated the cost for the initial set up of a public area CCTV program at a minimum of \$800,000.²⁰ The implementation of a public CCTV surveillance technology program operated by the OPS would be funded from the Police Services Budget which is made up from the property tax dollars of all residents in Ottawa. As such, the implementation of these measures would require infringing on property rights of all individuals in the community. The lack of success of surveillance technology in protecting personal security leaves little justification for this infringement. From a financial perspective the cost of the cameras compared against the high success of the police department without their use makes their purchase difficult to justify. In Ottawa, the public elects a Council to determine the expenditures of tax dollars, however, the details of the OPS budget are also beyond the control of Councillors chosen by the public to provide oversight to the bylaws and programs protecting their rights. Leaving the decision to implement privacy invasive programs to the discretion of unelected officials results in an absence of method of consent which Gewirth notes as a key aspect of state relations.

¹⁹ Jerome E. Dobson and Peter F. Fisher, “The Panopticon’s Changing Geography” *Geographical Review* 97 (2007) 307-320, 310.

²⁰ Seymour, “Cameras would help cut crime in Ottawa.”

4.1.5 Public Police Use of CCTV Images

The result of the addition of more and more spot surveillance programs is the creation of an increasingly continuous chain of surveillance in Ottawa. Public and private transportation surveillance, linked to store and condominium surveillance systems linked then to intersection surveillance and the potential for street surveillance cameras would result in a near seamless link of movement of Ottawa residents. For example, this combination of surveillance technology programs enables police to track an individual leaving a restaurant or bar downtown, view who they entered a taxicab with and their behaviour in the taxicab, track the route they travel and potentially see their end address. The establishment of a continuous chain of surveillance in Ottawa raises the concern over how images captured by CCTV are used by the police. The way that the images accessed for policing purposes are handled threatens to violate the balance of rights. The publication of images from private CCTV as well as public CCTV cameras has become a prominent component of police investigations in recent years. There have been several recent incidents where the OPS has accessed and published in the newspaper images captured by private surveillance cameras. Police often state that public video surveillance would be kept private and reviewed only by limited officers in the case of criminal activity, however, in the past few years the OPS has demonstrated questionable judgment relative to the exposure of information gathered by video surveillance.

In 2006, *The Ottawa Citizen* published surveillance footage showing the faces of all individuals who visited a convenience store in the vicinity of murdered teen Jennifer Teague within a 12-hour period of the murder on their front-page at the request of OPS.²¹ Further, these photos remain accessible on the OPS website over a year after the

²¹ Kelly Egan, "The Search for Jennifer Teague's Killer," *The Ottawa Citizen*, May 26 2006, City Section.

apprehension of a suspect, indicating less than strict guidelines on the use of these types of images.²² It is worth noting that a request for contact by individuals who had visited the store during this same period was not made on the front page prior to this publication, nor was any other form of warning issued in connection with this action. The OPS therefore took this action without pursuing all other less privacy invasive options. The OPS has taken similar action several times since, including an incident in 2007 where surveillance images showing the faces of 14 *Home Depot* shoppers who attended the store at a similar time as a murder suspect a month prior to a homicide appeared in the *Ottawa Citizen* in connection with the crime seeking information.²³ This type of heavy-handed public use of public and private CCTV data for police purposes raises again the issue of unforced choice and the norms of contextual integrity.

It is becoming increasingly difficult to suggest that individuals should simply avoid areas known to use CCTV cameras. Nearly every store, high-rise complex, mall or other private/public area operates security cameras in some manner. The combination of these private CCTV cameras and the ongoing expansion of public CCTV camera programs threaten Ottawa residents with near constant surveillance. It has become a forced choice of living in a modern major city that an individual will have his or her image captured on camera while going about his or her daily activities. It has become common understanding that one's daily activities could be viewed by police officers in the course of an investigation that requires accessing CCTV data. However, the trend by

²² Ottawa Police Services, "Homicide – Jennifer Teague," http://www.ottawapolice.ca/en/serving_ottawa/major_crime/homicide_teague.cfm, (accessed March 21 2008).

²³ Andrew Seymour, "Police release surveillance photos in hopes to provide information in the Paul Simard murder," *The Ottawa Citizen* (August 2, 2007), City Section, <http://www.canada.com/ottawacitizen/news/story.html?id=5419d8db-3680-4e35-90a8-6b1f74c068c5&k=27025> (accessed November 2008).

the OPS to publicize images from private CCTV cameras that loosely relate to criminal incidents in support of their investigations impacts privacy in a profound way. Recent cases, such as those listed above have seen the publication of not only the image of a suspect, but also images of innocent bystanders who happened to be in the wrong place at the wrong time without any warning. Individuals who happen to shop at *Home Depot* have no expectation that their activities would be published in connection with a crime committed nearly a month later. In this way this type of action by the OPS disintegrates the predictability of how one's image will be viewed and used. When this type of use occurs regularly it has the ability to severely impact freedom of movement and basic well-being. While many individuals would not have a major concern with their activities being discovered and revealed to a limited number of officers in the course of an investigation, the possibility of have one's activities revealed to the countless readers of the local newspaper may cause individuals to rethink the stores or other locations they visit. In this way the ability to know when and how one's activities will be made public has a profound impact on the norms of contextual integrity and a chilling effect on freedom of movement.

As noted above, the solvency rate for crimes related to the physical safety of individuals in Ottawa is extremely high and particularly crimes impacting the physical safety of individuals are actually on the decline. These types of statistics indicate that there is no justification for this intrusive use of surveillance technology based on threat to safety and security of persons. This type of policy represents an example of use of technology for policing and security interests, while disregarding the subtler impacts to freedom and basic well-being. Being captured on camera when one goes to shops or

other public/private facilities has become a reality, however, how these images are used for policing has the potential to seriously impact privacy in public and freedom of movement. The frequency with which these types of images are appearing in the news has the potential to undermine freedom of movement and cause a chilling effect on behaviour in public. Peaceful protests are often under CCTV surveillance while officers themselves infiltrate the crowd and attempt to obtain the identities of protestors. Participation in this type of legal political activity is hampered when it is known that identities of participants are recorded and stored for unknown future purposes.

The public power of video surveillance is often one-sided. Following the death of Robert Dziekanski by RCMP taser use, the RCMP confiscated a video recording taken by a member of the public, Paul Pritchard.²⁴ Mr. Pritchard had recorded the incident on his cell phone and disputed the number of times RCMP officers had struck Mr. Dziekanski as well as their claims that they had attempted to calm Mr. Dziekanski, who did not speak English, prior to the assault. The proof of his version of events was recorded in his confiscated cell phone, which RCMP officials refused to return until they received a court order, at the request of Mr. Pritchard, to do so. Cases such as this demonstrate that the power of surveillance technology rests very much in the hands of law enforcement professionals. This power imbalance creates a huge potential for violations of rights through misuse of surveillance technology. The Dziekanski case also raises questions regarding the use of surveillance technology to protect the safety and security of vulnerable individuals. There appears to be a double standard present that supports the

²⁴ "Police say they won't return witness's video of airport Taser incident," *CBC Online* (October 30, 2007) <http://www.cbc.ca/canada/british-columbia/story/2007/10/30/bc-taservideo.html> (accessed December 2008).

use of surveillance technology as an evidence gathering tool for police, provided that the police are not under suspicion.

4.2 Mobile Data Terminal Access to CPIC Database

As noted in the discussion of general CCTV surveillance, data aggregation and data mining present a huge concern to the freedom afforded by a measure of privacy in public and the norms of contextual integrity. The sheer enormity of the CPIC database leaves endless possibilities for data mining and the intricacies of its operation will not be delved into here. However, in discussing the issue of mobile data terminal access it must be noted that there has been evidence to suggest that the information contained in the CPIC database can be of an extremely sensitive nature. Specific areas of the CPIC database called 'exempt databanks' have been established for the purpose of guarding highly confidential information related to vital security interests and are beyond the access of any private citizen. A 2007 audit of the CPIC database by Privacy Commissioner Jennifer Stoddart found that information contained in exempt banks extends far beyond their mandate and is being stored indefinitely.²⁵ The existence of a massive database such as that of the Canadian Police Information Centre that contains highly sensitive information about individuals poses a number of privacy concerns relative to access. The privilege of access to such a database is a necessary informational component of police officer's work. Where and why police officers access information contained in the CPIC database presents another set of human rights and duties that turn on the indirect applications of the PGC.

²⁵ Canada, Office of the Privacy Commissioner, "Audit Report: Examination of RCMP Exempt Data Banks," (February 2008), www.privcom.gc.ca (accessed September 2008).

Police officers in Ottawa regularly conduct random MDT scans on license plates while driving behind vehicles or when parked at intersections. MDT access by officers while driving in the absence of any other evidence of suspicious behaviour raises some privacy concerns. Every time an officer accesses the record of an individual an entry is added noting the date, time and location of this action. Although in and of itself this information is relatively unimportant and seemingly impersonal, the potential uses of this information by data mining technology are unpredictable and potentially far-reaching. Conducting spot-checks on the background of citizens who have done nothing further beyond venture out in public and thereby creating electronic records of their movement presents an unjustifiable violation of rights. This represents an example of proactive policing in Ottawa where action private information about citizens is accessed without the knowledge of the citizen or the justification of provocation or cause. Officers also have the ability to record license plates of individuals while off-duty and look into them when on-duty. An individual could find their records accessed for something as simple as a disagreement in a parking lot with an off-duty and unidentified officer.

There is also concern that information contained in the database can be inaccurate or inaccurately interpreted. Officers can add their own personal notes to files accessed by other officers, which raises concerns over the integrity of the information contained in this type of program. Individuals are not notified that notes are added to their files by officers when they are pulled over or even just driving and therefore are unable to review and correct this information as is the case when a police report is filed following an incident. Although guidelines have been established to govern MDT access to the CPIC database, individual officers do not always respect these guidelines. There is evidence

indicating that officers frequently disregard access protocols and use the privilege of access to the CPIC database for personal use such as searches on friends, local celebrities, neighbours or ex-spouses.²⁶

Examples of this type of abuse of power further demonstrate why professional ethics can be problematic. The privilege of access to sensitive information granted to police officers in support of their work can quickly become rights violations when misused and abused. The strict guidelines in place and the punishment of officers who violate these regulations is an indication that this type of abuse is not tolerated within the policing profession. However, ensuring that abuse of access to private information does not occur requires constant supervision and review.

Active use of MDTs while operating a vehicle raises some physical security concerns. Significant research suggests that the use of cell phone's or conducting other activities while driving can distract the driver from the road and increase the likelihood of an accident. Studies conducted specifically on the use of MDTs by police officers while driving have found that such use can pose a potentially dangerous distraction.²⁷ G.S. Anderson also provides further research insight into the use of MDTs and police activity. This study found that the use of MDTs while driving was common and resulted in potentially dangerous distraction. Another study conducted into the function of MDTs came to a similar conclusion.²⁸ In Canada, the province of Quebec has already enacted

²⁶ Andrew Seymour, "Two police officers face discipline for accessing personal information," *Ottawa Citizen* (December 13, 2007), City Section, <http://www.canada.com/ottawacitizen/news/story.html?id=141b8840-efe-4528-98fc-8fc60c6a2fbb> (accessed November 2008).

²⁷ G.S. Anderson and A. Courtney, D. Plecas, "Multi-tasking Behaviours of General Duty Police Officers," *Police Practice and Research* 6.1(2005): 39-48.

²⁸ Paul Hampton and Martin Langham, "A contextual study of police car telematics: the future of in-car information systems," *Ergonomics*. 48.2 (2005): 109-118.

legislation prohibiting the use of cell phone's while driving. Regulations of this nature are a growing trend across the country and internationally based on the potential for physical harm resulting from driver distraction. There is therefore reason to be concerned about the potential physical harm of police officers using their MDT terminals while driving. Given the potential for physical harm caused by operation of MDTs while driving Gewirth's criteria would not approve of this aspect of the program. Given the above noted crime statistics in Ottawa, there is little reason to believe that the security of the average individual is sufficiently at risk on a daily and ongoing basis. There is therefore no justification for the active use of MDT spot checks while driving. Given the low number of outstanding violent crimes in Ottawa and the high volume of records produced by scans conducted on an ongoing, daily basis, this practice is unlikely to yield a favourable ratio of licenses scanned belonging to innocent individuals vs. individuals with outstanding warrants for violent crime. It is easy to argue that officer time would be much better spent actually actively tracking individuals with outstanding warrants for violent crimes rather than on general "needle in the haystack" license scans.

Despite the rights concerns raised above, it cannot be disregarded that access to the CPIC database by officers on the ground provides an invaluable resource for apprehending criminals as well as aiding vulnerable individuals. When used in a responsible rights-conscious manner, MDT access to CPIC records can provide an effective means of supporting and protecting rights in the community. On many occasions officers are able to identify stolen vehicles, fugitive criminals or persons of interest while pulled over for other minor traffic offences. Were guidelines established and followed such that police officers could only use MDT and CPIC access when an

individual has been pulled over for a traffic or other offense, MDT access to the CPIC database and other police files can have a significant impact on the safety of the community with minimal privacy invasion. Permitting police officer access to criminal records and outstanding warrants upon being apprehended for another type of offence does not present a threat to privacy rights. Access to the wandering persons database additionally helps police officers identify vulnerable individuals suffering from mental illness or disability who may require assistance being returned to their home. Access to information about the past criminal history of an individual can alter how an officer approaches an interaction and enhance his or her own safety. When accessed only following an offence or other reasonable suspicion when pulled over, MDT access to CPIC records support the safety and security of individuals in the community with minimal and tolerable rights-infringements.

Only when officers use their MDT access to the CPIC database in a proactive and irresponsible manner does this program raise rights concerns. Even with the implementation of more stringent guidelines for operation, there remains a concern with the ability for individuals to have assurance that officers comply. It is more than likely that many violations take place on a regular basis and go either undetected or unreported. There is further cause for concern that even when detected and reported, these transgressions are lightly punished, if punished at all. While there have been a handful of publicized cases in which officers have been punished for violations of protocol that are explicit and repeated, the punishment for such offences is often minimal. For example, OPS Sergeant Brian MacMahon was docked only five days pay for repeatedly using CPIC access to identify the owners of cars parked outside his ex-girlfriend's home and

harassing her based on the information he obtained.²⁹ Serious action must be taken against officers who violate CPIC access protocols and use their privilege for personal use.

4.3 Policy Implications

The major component lacking from surveillance technology policy in Ottawa in the context of a Gewirthian human rights analysis is a misplaced burden of proof. There needs to be a cultural shift in how privacy rights are viewed compared to security rights. Police culture has little respect for the privacy rights of the ordinary citizen. A prevalent attitude among officers is that of default suspicion where any individual is to be treated as a potential criminal. This type of mentality leads to the casual and thoughtless approval of privacy invasive technologies. The ease and speed with which Ottawa has become increasingly monitored in recent years is evidence of a growing trend away from respecting privacy rights. The subtle impacts on privacy are downplayed next to the concrete security demands. Gewirth notes that to violate rights in prevention of the violation of other rights requires some evidence that there is an immediate threat to a right. However, as evidenced in the crime statistics, the need for increased physical safety and security of individuals in the city of Ottawa is much less significant than depicted by the OPS when requesting public funding for such programs.

Gewirth notes also that rights-violating actions taken to prevent other rights violating actions must only be taken in the case that they are the only options available. Given that good lighting and police officer presence in problem areas have been shown to have the same, if not a greater impact on crime statistics, there is little justification for

²⁹ "Cop docked 5 days pay for harassing city woman," *Brockville Recorder and Times* (November 3, 2007), <http://www.ethicsinpolicing.com/article.asp?id=3660> (accessed December 2008).

employing surveillance technology on a continuous basis in public areas. When information is needed from innocent individuals who happened to be in a particular area at a particular time in support of an ongoing investigation, a notice in the paper requesting such assistance is a rights-respecting way of obtaining this information.

The analysis of the general public surveillance programs present in Ottawa illustrates that it is possible for surveillance technologies to be used in a rights-respecting manner for policing. Gewirth notes that it is acceptable for indirect applications of the PGC to allow actions that contradict the direct application of the PGC when in support of protecting the integrity of the PGC in the state. Privacy infringements by police officers are an example of a type of action that, with appropriate standards in place, can serve to indirectly uphold the PGC in the community. Access of private property for investigative purposes currently requires a warrant with strict judicial criteria. Given the potentially sensitive nature of information that is captured on CCTV cameras on private property, it seems reasonable to require similar protocol for its access and use by law enforcement agencies. It is important that intrusive surveillance technologies avoid becoming the go-to means of case resolution. This type of accountability would aid in ensuring that surveillance technology is not used as a primary investigative tool. Adding this legal barrier to accessing CCTV surveillance data would assist in ensuring that privacy invasions are taken, as Gewirth would support.

Programs such as the MDT access to the CPIC database can also be an invaluable resource to on the ground policing. However, as with the use of CCTV technologies for policing there must be strict guidelines surrounding the use of this technology and actual concrete follow up to instances of misuse. Access to this type of information must be

limited to cases of “reasonable suspicion” of criminal activity, or risk to vulnerable individuals and not used for random spot checks of assumed innocent individuals. When operated in this way, privacy infringing programs and actions taken by police officers can be justified. However the issue of officer compliance with policy surrounding the use of powerful surveillance technology drives home why police officers cannot be granted privileges that allow them to violate the human rights of the community they serve.

5. Rethinking Capital Surveillance:

The Separatist Thesis, Power and Responsibility in the Community of Rights

Should police officers be granted, in order to perform their duties, the privilege to invade rights to a degree that would be considered unjustifiable by an ordinary member of the state? Can police officers be justified in taking action that goes beyond the balance of rights in pursuit of their professional goals? These questions are central to the balance of rights in public surveillance programs operated by law enforcement agencies. Many contend, through an argument known as “the separatist thesis” that organizations and their professionals are both entitled to and justified in taking actions in support of their service that would be deemed rights violations in other contexts.

This chapter examines the argument put forward in the separatist thesis and its critique by Alan Gewirth.¹ This chapter will begin with the argument of the separatist thesis followed by its critique by Alan Gewirth. The critique is followed by an analysis of the implications of the separatist thesis argument and its critique on police ethics more generally.

5.1 The Separatist Thesis Defined

The separatist thesis contends that individuals in some professions require and should receive special moral rights infringing privileges in support of their work. The thesis maintains that “professionals, by virtue of their expertise and their consequent roles, have rights and duties that are unique to themselves.”² Due to their specialized

¹ Alan Gewirth, “Professional Ethics: The Separatist Thesis,” *Ethics* 96.2 (1986): 282-300.”

² Gewirth, “Professional Ethics,” 282.

training and valued roles, professionals therefore gain the right to make decisions that go outside of generally accepted morality. The separatist thesis argues that professionals are entitled to some moral leeway in support of performing the specific duties of their professions. The range of this leeway is broad to the extent that actions taken by professionals can be not only, “different from, but even contrary to, the rights and duties that are found in other segments of morality.”³ The moral license granted by the separatist thesis would allow professionals the right to undertake actions that would otherwise be considered rights violations.

Professionals are considered by the separatist thesis as respected experts who perform a valued service to their community. The separatist thesis admits that some actions required by professionals in order to carry out their services, “taken by themselves, would be morally wrong because they lack a necessary condition of moral justification – namely, that they do not violate anyone’s moral rights.”⁴ However, the thesis argues that such actions can be justified because certain professions are dependent on this moral leeway and that, “without these special moral conditions, it may not be possible to perform the valued services in questions.”⁵ It is because the service professionals provide to their community is so valuable that, “the actions are held to be justified because they are effective means to the admittedly desirable ends of the respective professional activities and roles.”⁶ Therefore the separatist thesis argues that the negative impact of allowing rights infringement is justified and outweighed by the value added by the performance of a professional service.

³ Ibid, 282.

⁴ Ibid, 284.

⁵ Ibid, 282.

⁶ Ibid, 283.

Although arguing that professional services require some moral leeway, the separatist thesis does not provide carte-blanche moral freedom to professionals. It proposes that, “each profession is to be defined in terms of its own aims and procedures, and each therefore has its own criteria of value and its own inherent moral justification.”⁷ Different professionals are permitted different rights infringing privileges. The separatist thesis assumes that the actions taken by professionals within an institution will necessarily be morally justified.

The special moral privileges granted by the separatist thesis would not be extended into the professional’s private life. Under the regulation of the separatist thesis the infringements a professional is permitted in support of performing their service would be considered violations when taken outside the context of their specific profession. The professional thesis states that it is also necessary that there be voluntary consent by both parties entering into a professional service arrangement where rights violations will take place.

5.2 Critique of the Separatist Thesis

Gewirth considers the concepts of power and responsibility for professionals in the community of rights. He demonstrates that professionals should not be granted special privileges to violate the PGC and the rights of freedom and well-being of members of the community in support of the services they provide. Although they are deserving of special privileges, professionals within the supportive state must respect human rights as established by the PGC to the same degree as all other members of the supportive state. Gewirth ultimately finds the separatist thesis lacking and determines

⁷ Ibid, 284.

that when a morally justified institution, “operates as it should, its specific mode of operation conforms at every point to the requirements of the PGC.”⁸

The mutuality of the community of rights entails that a just distribution of rights must be upheld and that rights be infringed only in reasonable ways and only under necessary circumstances. Gewirth acknowledges that it will be necessary that rights be infringed at times in support of maintaining order in a properly functioning minimal state; however, if a rights-infringement is not justified, it becomes an invasion, which is not tolerated within the community of rights. As Gewirth explains, “the world “violation” means, by definition, an *unjustified* infringement of something.”⁹ Gewirth recognizes the inevitability that there will be instances where rights will conflict in a community of rights. He notes that because the PGC seeks to protect the rights to freedom and well-being equally for all prospective agents there are bound to be conflicts and no agent is entitled to unlimited freedom. The protection of some rights will therefore naturally require some infringement or compromise of other rights. No human rights can be considered absolute “in the sense of not being justifiably infringed on under any circumstances.”¹⁰ A properly functioning community of rights will require mutual rights sacrifices by all members.

Gewirth provides insight on the distinction between rights infringement versus rights violation. Providing for and respecting the rights-claims of the subject of a right requires a necessary sacrifice on the part of the respondent. These sacrifices vary with the circumstance and see all agents acting as both subjects and respondents of rights. Additionally, simply living in a community creates constant circumstances where rights

⁸ Ibid, 295.

⁹ Ibid, 285.

¹⁰ Walters, *Human Rights in an Information Age*, 166.

and freedoms conflict. Gewirth notes that “the PGC faces the problem of the inherent consistency of these combinations.”¹¹ The nature of the PGC is specific and therefore each particular conflict requires separate analysis relevant to its particular circumstances. Action taken by an agent must be considered specifically against the recipient himself rather than in a broader, societal context. The guidelines provided by Gewirth assist in determining the ethical specification of the PGC in each specific circumstance for each subject and respondent of a right.

The rational grounding of human rights and the hierarchy of competing rights proposed by Gewirth provide a logical means of assessing the unavoidable rights conflicts present in the community of rights. Gewirth notes that in all cases, the PGC’s requirement of respect and equality of freedom and well-being for all prospective purposive agents must be followed. Departures from the PGC can only be justified when they are “required to prevent or rectify antecedent departures, or to avoid greater departures, or to comply with social rules that themselves reflect such respect.”¹² Careful case by case evaluation is necessary in order to determine when and how rights infringements can be reasonably justified.

Gewirth defines an institution as “a relatively stable, standardized arrangement for pursuing or participating in some purposive function or activity that is socially approved on the ground (whether justified or unjustified) of its value for a society.”¹³ Gewirth acknowledges that rules and regulations, which may involve some rights restrictions, are a necessary component of any functional organization. Rights restrictions or infringements in the form of social rules or rules in institutions are permitted and in some

¹¹ Gewirth, *Reason and Morality*, 199.

¹² *Ibid*, 345.

¹³ *Ibid*, 274.

cases required in order to preserve the integrity of an institution. For an institution to function some sort of regulation and penalty system must be in place to preserve order and these may necessarily involve rights-infringements. Gewirth writes that “if there were no requirements, the associations would not fulfill their purposes; if there were no sanctions for violating the requirements, the later would be ineffectual and the associations would cease to exist.”¹⁴ Social rules fulfill the need for regulation, order and predictability within an institution and in human interactions in the supportive state. Social rules are necessary in order to resolve the conflicts that can arise between numerous agents. In many cases conflicts arise not simply between an agent and a recipient but rather are the result of numerous interactions by a variety of agents. Social rules are, “a means of regulating such conflicts as well as other aspects of the interactions.”¹⁵ As a result, there will be cases where coercion or other impacts on the freedom of an agent will be necessary as part of the social rules of various institutions and states.

Gewirth differentiates between voluntary associations and the necessary institution of the minimal state. In both cases social rules apply that control the activity within that institution; however, the choice of the agent’s submission to these rules is different. In the case of voluntary associations, individuals have the option to determine whether or not they will consent to be part of the institution and its rules. Gewirth gives the example of baseball players accepting the rules and regulations of the game and their league, which can involve punishment, coercion and other restrictions of freedom, in order to play the game. Association with a baseball league is voluntary and consensual. An agent willingly accepts the rules and regulations prescribed by a league as part of

¹⁴ Ibid, 272.

¹⁵ Gewirth, *Reason and Morality*, 273.

belonging to that institution. Further, these rules are necessary in order for the game to function properly and predictably.

In the case of the minimal state individuals do not have the option to consent to either the existence of a minimal state or its subsequent laws, but rather “each rational person gives his rational consent to these, because such consent is rationally necessitated by their instrumental relation to the PGC.”¹⁶ The minimal state prescribes freedom-impeding regulations such as traffic or criminal laws. These are designed to minimize and regulate conflict and order within a community as well as protect the freedom and well-being of all members overall. Laws of the minimal state are necessarily obligatory because allowing for optional consent would, “remove the uniformity and predictability that are among the main justifications for having laws.”¹⁷ Gewirth notes that although an agent is free to leave a particular supportive state, he would likely be unable to go anywhere where one did not exist and therefore adherence to the laws of some state is mandatory to every agent.

While the social rules associated with the institutions discussed may be justified, this is not necessarily always the case in all institutions. Gewirth argues that the fact that a rule is derived from an institution is not sufficient grounds to justify rights transgressions because some institutions or professions may be morally wrong. He references “slavery, suttee and the Inquisition,”¹⁸ as examples of morally wrong institutions. If the rules of the institution are morally wrong then the institution is in violation of the PGC and its actions cannot be justified on the simple basis that it is an institution. Gewirth argues that it is therefore the case that “a right is held to be justified

¹⁶ Ibid, 304.

¹⁷ Ibid, 305.

¹⁸ Gewirth, “Professional Ethics,” 283-300, 290.

because it derives not simply from the rules of some institution but rather from the rules of a morally justified institution.”¹⁹ Although the institution in which a professional operates may be morally justified, their actions do not necessarily conform to the PGC’s requirements. The valued aim and moral justification of a profession does not guarantee that the actions of those within that profession are automatically moral. “The fact that a professional or other institution is in general morally justified,” Gewirth writes, “does not entail that every action performed in accordance with the institution’s rules is morally justified.”²⁰ In the case of a morally justified institution the separatist thesis argues that, “an indirect application of the PGC, based on a morally justified institution, may infringe a right based on a direct application of the PGC.”²¹ Gewirth acknowledges that, “when actions are based on morally justified institutions, they may justifiably infringe other rationally grounded moral rights.”²² However, Gewirth still maintains that the separatist thesis fails to fulfill the necessary *moral justification* for the legal rights violations it seeks to uphold.

In order to be relevant as the supreme moral principle Gewirth notes that, “the PGC must serve to justify not only the rules that are obviously in accord with it (such as prohibition of murder or assault) but also those rules that, while they are morally justified, appear to conflict with the PGC.”²³ The PGC provides this justification in its indirect, institutional application. The indirect application focuses on the application of the PGC to institutions and their rules. In the case of indirect applications of the PGC, the social rules derived from an institution govern the activities of those within the institution. In indirect applications of the PGC, “the principle is applied in the first

¹⁹ Ibid, 290.

²⁰ Ibid, 299.

²¹ Ibid, 291.

²² Ibid, 291.

²³ Gewirth. *Reason and Morality*, 281.

instance to the rules of institutions,”²⁴ and then “rules are then in turn applied to particular actions.”²⁵ It is then the case that “actions that would be wrong in the direct applications of the PGC because they wrongly infringe certain moral rights may be right or justified in the indirect application.”²⁶ In the context of an institution the indirect application of the PGC regulates specific action and behaviour within that institution and indirect applications of the PGC can vary greatly from what a direct application would prescribe. Social rules or indirect applications of the PGC overrule direct applications of the PGC when evaluated in the context of social institutions. Social rules are designed to deal with specific interactions that result from the structure of an organization or institution that are not considered in direct applications of the PGC. For this reason, provided that they fulfill the necessary requirements of the PGC, indirect applications of the PGC, “take precedence in the relevant social context over the PGC’s direct applications.”²⁷ The PGC therefore, through its indirect applications serves to justify moral actions and rules in a variety of indirect applications where they might appear to contradict the PGC such as in the case of punishment of criminals. In this sense Gewirth acknowledges that the separatist thesis is correct in three of its four claims. He notes that it is the case that professionals must subscribe to the rules of their particular institution, that these rules are voluntarily accepted and morally justified by the PGC in service of the well-being of clients and that the PGC informed moral rules of an institution serve to justify rights and activities within each profession.

It is in the fourth claim that states that, “because the professional rules and rights are morally justified in these ways, the professional rights may justifiably infringe the

²⁴ Gewirth, “Professional Ethics,” 292.

²⁵ Ibid.

²⁶ Gewirth, “Professional Ethics,” 292.

²⁷ Gewirth, *Reason and Morality*, 277.

rationality grounded moral rights upheld in the direct applications of the PGC,”²⁸ that Gewirth finds the separatist thesis fails. Gewirth states that allowing for professional exemption from rights considerations goes against the nature of the principle of generic consistency that is an essential for moral justification of any action. He argues that, “the PGC, applies to all human actions and institutions, and its applications are for the most part determinate in that they do not permit, let alone require, mutually opposed courses of action.”²⁹ It is not sufficient for the rules of an institution to be morally justified. It is necessary that the indirect application of the PGC through the actions justified by institutional rules be satisfied. Gewirth writes that not only must the overall aim of an institution respect the PGC but that, “the specific mode of the institution’s operation must itself also conform to the rights conditions of the PGC.”³⁰ A professional service that violates the rights of the individual in order to support a specific service does not serve to uphold the principle of the PGC. The separatist thesis argues that what is considered, “wrong in ordinary ethics, because it lacks a necessary condition of ordinary ethical justification, may nevertheless be right in professional ethics.”³¹ The nature of the PGC requires that it be respected in all actions in all institutions and therefore, according to Gewirth actions supported by the separatist thesis are, “only externally, not internally, instrumental to the PGC in that they do not themselves embody the equality of generic rights and, hence, the aspects of equal freedom, dignity, and well-being, that the general principle of rational morality makes basic to moral justification.”³² Professional ethics cannot allow basic moral rights such as freedom to be violated in support of their service. Although institutions form their own social rules that govern action internal to their

²⁸ Gewirth, “Professional Ethics,” 293.

²⁹ Ibid, 300.

³⁰ Ibid, 294.

³¹ Ibid, 286.

³² Ibid, 297.

organization, the PGC must still be respected in each instance. Gewirth writes that, “the PGC is not merely an institution among others; it is rather that which provides rationally justified evaluations of the rightness of all other institutions as well as of all their actions.”³³

In the case of the minimal state, its laws are necessary in order to resolve conflicts and preserve order and can only be disobeyed should they violate the PGC. The rights-infringement by laws and social rules in the supportive state are “instrumentally justified by the PGC in that they provide a general context of order that serves to protect and extend well-being.”³⁴ It is justified that some rights-infringement takes place by the law of the supportive state when, and only when, these laws serve to uphold the PGC. These permitted infringements and the necessary obedience to social rules and laws in the supportive state make it therefore important that all members of the state have the ability to provide democratic input on either the content of the laws or determining the designated officials who will determine the laws of a state. It is furthermore important that the content of the laws determined by officials in the supportive state have restrictions. Gewirth writes that there must be a “limit on the legitimate powers of the state: it must not interfere with the freedom of the individual except to prevent his coercing or harming others.”³⁵ The state is not permitted to violate the freedom, basic well-being or civil liberties of its members. Only necessary infringements that preserve order and support the integrity of the PGC in the state are permitted.

While social rules govern action and behaviour in institutions it remains necessary that they conform to the supreme principle of the PGC. This is because social or

³³ Gewirth, *Reason and Morality*, 281.

³⁴ *Ibid*, 305.

³⁵ *Ibid*, 308.

institutional rules “are addressed as agents whose conduct is characterized by the generic features of action, whatever justification the rules may have must ultimately derive from the generic moral rules that follow those features.”³⁶ As acknowledged by Gewirth, certain actions taken in the context of a direct application of the PGC would be considered unjustified; however, in an indirect application they become justified. In the case of criminal law, the deprivation of freedom of a criminal by a sentencing judge, taken as a direct application of the PGC would be considered a violation, however in the indirect application context of the institution of criminal law, this infringement is considered justified. Gewirth notes that in the case of criminal law, the rights infringements laid against criminal agents are justified because they support the end of upholding the PGC in the community. If an institution is to be morally justified, “the other aspects of its specific modes of operation must also conform to the PGC’s requirements.”³⁷ In the case of criminal law, he notes that, “the punishment prescribed by the criminal law is justified as a way of restoring the equality by redressing the previously disturbed balance.”³⁸ The institution is only justified in taking action to punish criminals provided that this action conform to the PGC in ways such as, “impartiality in applying the law to particular cases and refraining from cruel and unusual punishment.”³⁹ The legal system and its professionals are granted the privilege of determining and executing the punishment of criminals; however, the rights infringing punishment action taken by must still conform to the qualifications of the PGC.

³⁶ Ibid, 281.

³⁷ Gewirth, “Professional Ethics,” 300.

³⁸ Ibid, 296.

³⁹ Ibid, 296.

5.3 Police Ethics: Power and Responsibility in the Community of Rights

Gewirth's analysis of the separatist thesis applies directly to police departments and their officers and demonstrates why police officers must be held to the same moral rules as private citizens. The institution of law enforcement has a mandate of enforcing the rights of the residents in its jurisdiction and the separatist thesis argues that in support of this valuable service provided by the institution of law enforcement and the fact that it is a morally justified institution that seeks to uphold PGC mandated rights, its professionals should be permitted to take actions against members of the community that would otherwise be considered rights violations. However, Gewirth would argue that the goal of law enforcement is to uphold the rights and freedoms of all members of the community and that to permit police officers to violate the very rights they are seeking to protect through their professional work is not only counter-intuitive but in fact contradicts the PGC. Gewirth acknowledges that, "the prevention of the violation of a right is not itself the violation of a right."⁴⁰ This supports police officers in taking some special actions; however this statement implies the immediate threat of the violation of a right which is not always present in proactive policing. The actions of police professionals must be evaluated on a case-by-case basis to ensure that rights-infringing action taken to prevent rights violations is justified. Police officers cannot operate under the premise that any action taken in support of their profession that serves to prevent rights violations is automatically justified. Evidence of an immediate threat to a right must support any *rights infringing* action taken by a police officer or policing program or else such an action becomes a *rights violation*.

⁴⁰ Ibid, 286.

The laws of the minimal state are unavoidable and involuntary. In order to preserve the order of the minimal state, regulations that necessarily entail punishment when violated are essential. Police officers serve an essential role in the order and regulation of the minimal state. However, the involuntary nature of the relationship between law enforcement and individual agents in the minimal state creates a power imbalance that requires rights protection measures. Although agents can choose to leave a particular municipality or country, almost anywhere they could go they would still find themselves subject to the authority of laws and regulations and so although the particular laws of a particular area may be voluntary the interaction of an agent with law enforcement as an institution and profession is not.

The unavoidable nature of the institution of law enforcement creates an inherent power in its professional practice. This power makes it especially imperative that the actions taken by its individual members be subject to rights accountability. Accountability in the context of police ethics can be understood as holding police professionals answerable, “for how they treat individual citizens, particularly with regard to the use of force, equal treatment of all groups, and respect for the dignity of individuals.”⁴¹ It must be made necessary that “agents of law enforcement by reason of their specific responsibilities are bound to a more exacting code than any other public servant.”⁴² However, it is more often the case that police ethics are left to the discretion of the internal department rather than public accountability. It is generally found that “rules and regulations of most police departments relate more to specific techniques and

⁴¹ Samuel Walker, *The New World of Police Accountability* (Thousand Oaks, CA: Sage Publications, 2005).

⁴² Don L. Kooen, “Ethics in Police Service,” *Journal of Criminal Law and Criminology* (1931-1951), Vol. 38, No. 1 (May - Jun., 1947), pp. 61-74, 62.

procedures than to the official conduct of officers in their public relationships.”⁴³ The Ottawa Police Service’s sparse attention to the issue of accountability on its website demonstrates the lack of concrete attention paid to the issues of accountability and ethics.⁴⁴ The OPS site that is extensive in detailed content regarding its programs and operations contains only one picture-filled page as its acknowledgement of the issue of accountability. The ability for individuals to file complaints against the conduct of police officers provides another form of this necessary accountability. The ability for citizens to follow up on the conduct of officers who violate human rights and have them held accountable against a standard of human rights that is universal and balances the power that officers are granted in pursuit of the goals of their profession.

Gewirth notes that in the case of a necessary-procedural justification of social rules, such as those enforced by police professionals, a method of consent must in place that preserves the freedom of the agents subject to the authority of the rules. The method of consent can manifest itself in ways such as ensuring that agents have choice in selecting who makes the rules by which they must abide. This type of consent and accountability provides a limit to the power granted to the authorities of the minimal state. Gewirth writes that, “when a government derives its authority through the method of consent, there are, as we have seen, sharp limits on the restrictions it can rightly impose on individual freedom.”⁴⁵ These limits exist in order to temper the ability of those governing the minimal state to infringe or violate freedom. Gewirth notes that the limits placed on the government, “control not only such actions relevant to political participation as speech and assembly, but also all other actions to the extent to which

⁴³ Kooken, “Ethics in Police Service,” 61-74, 63.

⁴⁴ “Openness and Accountability,” *Ottawa Police Service* http://www.ottawapolice.ca/en/about_ops/vision_mission_values/accountability.pdf (accessed December 2007).

⁴⁵ Gewirth, *Reason and Morality*, 311.

restriction on them are not justifiable through the PGC.”⁴⁶ He notes that if laws created by the state violate the requirements of the PGC, then these laws do not meet the criteria demanded by the method of consent.

In indirect applications of the PGC, “the morally justified requirements the actions must fulfill are not directly those of the PGC but rather those of the social rules that govern the activities and institutions.”⁴⁷ The PGC justifies the institution and the rules of the institution are developed to preserve the integrity and order of that institution, even sometimes in ways that seem to oppose direct applications of the PGC. However it is important to note that even in such cases, “the PGC still remains the supreme moral principle: it serves directly or indirectly as the criterion of all morally right actions and institutions,”⁴⁸ and therefore, the individual actions taken within an organization must still conform to the PGC even in indirect applications. Police officers are granted a great deal of power to protect the rights of the members of their community. The indirect applications of the PGC in the context of the institution of law enforcement at times may appear to contradict the PGC. For example, police officers are granted the ability to restrain, search and in some cases lie to suspects during questioning. However, these indirect applications do not violate the nature of the PGC, despite their apparent contradiction. These types of rights infringements are necessary in order to enforce the rules and regulations of the state. However, actions that violate moral rights in a way that would not be supported by the PGC are not justified indirect applications.

Gewirth acknowledges that professionals are entitled to perform certain activities that are not permitted for ordinary individuals on the merit of their expertise, however,

⁴⁶ Ibid, 311.

⁴⁷ Ibid, 272.

⁴⁸ Ibid, 272.

“those activities may not transgress the requirements that are set by the general principle of morality.”⁴⁹ Although police officers do need certain privileges and certain powers not granted to everyday citizens in order to accomplish their work, evaluating the specific actions of the organization against the PGC provides a sense of accountability and rights protection that balances the power of the position. Permitting rights violations at the discretion of the officers in support of the goals of the organization eradicates an important facet of accountability to the community. Although special privileges may be granted to officers, and certainly would be necessary in many cases, in order to protect the rights of the general community, it is important that any privilege granted still conform to the principle of generic consistency. Police officers should not be granted the right to infringe on the human rights of innocent civilians with no other justification beyond their professional designation. Professionals are entitled to rights transgressions based on the same criteria as other agents, but the separatist thesis argues that, “a professional has the right to infringe someone else’s rationally grounded moral rights,”⁵⁰ which Gewirth does not support. For example, allowing an officer the privilege to infringe the freedom of a suspect by physically restraining, though not seriously harming, he or she and bringing them into custody for questioning is a reasonable rights transgression that upholds the integrity of the community of rights. Conducting private property or person searches against individuals who have not committed a crime or given reasonable cause for suspicion would be a violation. Actions taken by those within the organization of law enforcement, although in some cases contradicting direct applications of the PGC, must still support the PGC indirectly. If the rules of law enforcement do not support the freedom and well-being of agents in the community at every instance of

⁴⁹ Gewirth, “Professional Ethics,” 300.

⁵⁰ Ibid, 286.

application, then the integrity of the profession is not upheld. Gewirth notes that “to uphold violations of the PGC at any level is to contradict oneself.”⁵¹

Many police departments have devised their own codes of ethics or behaviour protocol for officers. However, it must be noted that it has been well documented that police officers frequently contravene the rules and regulations of their own codes of ethics and therefore do not uphold the indirect application of the PGC relative to their profession. Investigations into police officer wrongdoing are frequently compromised by lack of cooperation from officers in a police culture that treats officer transgressions as less serious than civilian transgressions. Ontario Ombudsman Andre Marin’s 2008 report on the Ontario Special Investigations Unit (OSIU) found that the OSIU is negligent in its mandate to thoroughly investigate complaints against officers. Marin criticized the OSIU culture as being influenced by the large number of former police officers on its staff. Marin noted that the OSIU has, “bought into the fallacious argument that OSIU investigations aren’t like other criminal cases, and that it is acceptable to treat police witnesses differently from civilians.”⁵² The trend within the policing institution of dismissing officer misconduct and criminal behaviour as minor relative to crimes committed by civilians has created a lack of serious accountability within the police profession.

Transgressions by police officers against the regulations of their own institution, as well as incidents of actual criminal behaviour, demonstrate that a professional designation does not guarantee morally adequate behaviour. Elements of the separatist thesis appear to be in operation among current practices of many police departments. The

⁵¹ Gewirth, *Reason and Morality*, 201.

⁵² “Timid’ police watchdog needs teeth: Ontario ombudsman,” *CBC Online* (September 30, 2008), www.cbc.ca/canada/ottawa/story/2008/09/30/ot-ombudsman-0 (accessed October 2008).

idea that an officer, in support of the morally justified aims of the institution of law enforcement, can take action contrary to the PGC such as lying, coercion and unprovoked physical aggression is upheld by many officers within the institution. In order for police surveillance to be considered rights infringing rather than rights violating, the justification and scope of the programs must be evaluated against Gewirth's PGC and not a separate professional code of ethics. Judging police action against the PGC ensures that the power granted to police officers is not abused in support of the goals of the organization and further provides criteria for evaluating abuses when they occur.

There is a great deal of power inherent in the law enforcement profession and minimal structure to its accountability. For this reason, the addition of any new technological powers must be evaluated carefully and cautiously. Extensive general public surveillance requires an in-depth review to determine the degree to which rights would be infringed by police surveillance and the threat, or potential threat to rights that could justify surveillance in the first place. In the case of surveillance and information technology, it would certainly need to be the case that police officers be granted special privilege to access data and files from public surveillance programs. Further this privilege of access to surveillance data would have to be limited to police professionals in many instances. In order to protect important civil liberties, surveillance data requires stringent access protection policies and as professionals, police officers would often require privilege of access to files that may not be available to the general public. However, Gewirth's critique of the separatist thesis finds that despite these special privileges, police institutions should not be granted the ability to undertake surveillance that would not indirectly conform to the principle of the PGC. This qualification serves to ensure that only reasonable rights infringements and not violations are undertaken.

Conclusion

This thesis has brought a rational human rights perspective to some key issues surrounding the use of surveillance programs for policing and police ethics more generally. Examination of the surveillance programs present in Ottawa through a Gewirthian human rights framework has revealed that some current programs are being operated with little rights infringement; however, other programs are operating with a disconcerting level of rights infringement and also rights violations. It is necessary that all surveillance programs be subject to a rational analysis acknowledging that security is not always the only issue to be considered.

Information technology has become an integral component of policing in Canada and internationally. It would be impossible to extricate surveillance technology from policing at this point and there is no need to do so. Surveillance technology has many undeniable benefits for efficient policing. Undoubtedly police agencies and officers are entitled to and justified in their use of some surveillance technology to assist in accomplishing their mandate. Surveillance technology for policing, when used in a responsible and human rights conscious manner can have a huge positive impact to efficiency in crime prevention and resolution. When extensive surveillance collection and storage operations are undertaken, citizens have a justified expectation that law enforcement agencies doing so will abide by privacy legislation and accountability policy to the highest degree.

It is clear that the increasingly powerful capabilities of modern surveillance technologies as well as their increasing affordability have made it nearly effortless for

police agencies to violate civil liberties. The surge in the use of surveillance technology for law enforcement has created an extreme power imbalance between the individual and the police department that necessitates a corresponding surge in responsibility and accountability. The power inherent in access to surveillance technologies for policing requires strict rights protections. It is therefore necessary that any use of surveillance technology for policing be subject to a rational human rights analysis.

It was found that the underlying problem with the implementation of surveillance programs for policing in Ottawa is the misunderstanding and erroneous categorization of privacy rights. This relates to the concern that at a broader level police culture does not sufficiently address ethics and human rights issues. At issue in the conflict between privacy and security is the notion that privacy is expendable and bears no impact on basic well-being. The notion of privacy in public and the importance of preserving the 'norms of contextual integrity' are rarely factored heavily in the discussion surrounding extensive general public surveillance. As a result, security consistently trumps privacy and general public surveillance programs for policing that fail to respect privacy rights are approved. In order for the conflict between privacy and security to be properly addressed, it must be proven and understood that privacy is a right worthy of protection. It has been demonstrated in this thesis that privacy rights, for their impact on psychological, developmental and social well-being, are vital to these human rights. Despite their less quantitatively measurable impact on freedom and basic well-being, privacy rights remain crucial to the necessary conditions of action and require weighted consideration in the surveillance technology debate. The very difficulty of assessing privacy impacts necessitates extra care in the implementation of privacy invasive surveillance programs.

Gewirth states that prevention of a violation of a right can justify the violation of another right. However, he pointedly notes further that the violations ought only be employed in cases where no other option exists and the potential rights violation is serious enough to balance the action taken. In the majority of the cases of Ottawa's programs this is simply not the current situation. The desire for expanded general public surveillance in Ottawa without evidence of a high level of criminal activity demonstrates that privacy is given minimal weight in the privacy versus security conflict, in the context of surveillance technology programs for policing. Low rates of violent crime and high rates of resolution for those that do occur leave little justification for proactive general public surveillance programs. These programs become even less justifiable when considered against data suggesting that not only are other options such as increased lighting available, but actually more effective.

A further concern that was discovered was that the conflict present in the implementation of general surveillance programs for policing is not always necessarily that of privacy versus personal security. In many cases it was found that the privacy violating programs were approved to protect interests besides personal security. The City of Ottawa's traffic camera program demonstrated that active programs currently allow minor issues such as traffic control to trump the right to privacy. Other types of offences such as property crimes, which do not impact the safety, and security of the person cannot reasonably be ranked above the right to privacy when evaluating general surveillance programs. The lack of need for a clear and present threat to safety and security or a reasonable suspicion of criminal activity in order to justify the use of general public surveillance technologies is a major concern discovered in the operational surveillance technology programs in Ottawa.

What is needed is a shift in the culture of policing and its view with respect to the privacy vs. security conflict. General, ongoing public surveillance without specific targets and warning and explicit consent violates the human right of privacy. Use of surveillance technology requires the burden of proof for justification to rest with the police. Police officers must demonstrate the particular need for each use of surveillance technology rather than operate under the general heading of protecting safety and security. It must be demonstrated that there are actual present security concerns that cannot be addressed through other means. To justify the implementation of general public surveillance programs it must be established that the conflict that exists is truly between privacy and personal security and not other less basic goods such as property security.

The power inherent in the operation of intrusive surveillance programs is too great to be without this type of accountability. As technological capability continues to advance and push new surveillance programs, there will be an ongoing need to rationally evaluate the justification for each and every proposed use of general surveillance technology programs where data is gathered on individuals. All newly proposed surveillance technologies ought to be subject to the requirements of international and Canadian human rights law. Only then, may we find a new idea of “community policing,” and an authentic “mutuality” between citizens and our guardians. The upholding of the community of rights remains an imperative challenge. The question of who is guarding the guardians whose means of power and procedural control are unparalleled in current capital surveillance must be addressed.

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