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Freedom of Speech in an Age of Computer Hacktivism

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Introduction

In his recent book, *Natural Human Rights: A Theory*, Michael Boylan defends a theory of natural human rights built upon an agency-based approach to ethics that he has developed over much of his career. Unlike other agency accounts, Boylan's own presents us with a hierarchy of goods that is captured by his 'table of embeddedness'. According to Boylan, we must always prioritize more-embedded to less-embedded goods. The good that I would like to focus upon in this essay is the level-two basic good of freedom of speech. I am particularly interested in how Boylan would deal with cases in which there is a tension between level-one basic goods, such as protection from unwanted bodily harm, and the level-two basic good of freedom of speech. Given Boylan's interpretation of the table of embeddedness, it might seem that the latter should always give way to the former. But familiarity with Boylan's political and ethical outlook as a whole leads me to think that this initial reading of his theory is probably not the best one. In what follows, I will put forward a strategy for thinking about difficult freedom of speech cases that is in keeping with Boylan's ethical framework. I will show that we can accept Boylan's theory of natural human rights even if we deny that threats to national security always justify violations of freedom of speech.

In exploring this issue, I will focus upon whistleblowing and the recent revelations by Edward Snowden. I want to focus upon this case because it has captured the attention of the international community and has prompted most people to take a stance on the debate. It also exemplifies the apparent conflict between freedom of speech and basic goods that is of interest to me in this essay. I will first (§2) consider whether or not whistleblowing is a legally recognized form of freedom of speech, and then (§3), working within Boylan's conceptual framework, consider whether or not it *ought* to be.

Is Whistle-Blowing a Legally Recognized Form Of Free Speech?

Edward Snowden leaked classified documents to the *Guardian* and *Washington Post* that exposed the National Security Agency's (or the NSA's) top-secret surveillance program directed at innocent Americans. Snowden revealed that the government had been collecting metadata associated with innocent Americans and using it to construct 'patterns of life,' or detailed pictures of targets and those associated with them (Dance and Macaskill). The NSA tapped directly into nine Internet firms (including Facebook, Google, and Microsoft) and had direct access to Verizon's phone records ("Edward Snowden: Leaks"). After the publication of these documents, the United States government charged Snowden with "espionage, theft, and conversion of government property" ("US Files Criminal Charges").

As I write this essay, Snowden resides in Russia where he has been granted temporary political asylum (Myers and Kramer). Snowden's revelations have sparked an intense debate on whistleblowing, freedom of speech, and national security. Supporters of Snowden take him to be a national hero who has revealed an immoral and illegal espionage campaign against innocent Americans. According to John Cassidy (of the *New Yorker*), Snowden has "performed a great public service that more than outweighs any breach of trust he may have committed" (Cassidy). But critics regard Snowden as a traitor who has betrayed the United States and put its national interests and citizens at risk. Jeffrey Toobin (also of the *New Yorker*) has described Snowden as a "grandiose narcissist who deserves to be in prison" (Toobin).

One of the questions that this debate raises is whether or not whistle-blowing is a form of freedom of speech. Now this general question may be interpreted in more than one way: (A) We can ask whether or not whistleblowing by an NSA employee is a legally protected form of speech in the United States. But we can also ask (B) whether whistleblowing by an NSA employee *ought* to be a legally protected form of speech in the United States. We must not conflate these questions when formulating any kind of judgment about the Snowden case and others like it. In this section, I take up the first

question (A).

There is some disagreement about how we should answer question (A). But the consensus seems to be that there is no legal protection for whistleblowers in the United States who, like Snowden, are intelligence workers. The Whistleblower Protection Act provides government employees with protection from management retaliation. However, the Supreme Court has ruled that this protection does not apply to intelligence workers who are privy to sensitive and confidential information about the United States. There is a different act, the Intelligence Community Whistleblower Protection Act (of 1998), that does apply to intelligence workers, but its effectiveness has been broadly challenged. An intelligence worker who is concerned about a policy or injustice would file a report that stays within the intelligence community. The act would not provide the worker with legal protection and would ask that the worker ignore the policy or injustice if the intelligence community decided against the worker (German). No further action outside the intelligence community can be taken.

Some supporters of Snowden, including Wikileaks lawyer, Michael Ratner, have claimed that Snowden should be granted political asylum under the Refugee Convention. Ratner claims that the United States itself grants political asylum to whistleblowers from other countries. As he sees it, the United States is making an exception for itself and thereby violating international standards:

[U]nder the U.S. statute, under the Refugee Convention, under what has been recognized by countries all over the world, whistleblowing is a form of free speech, a form of political opinion that is protected by the Refugee Convention. It's very clear it is. The United States has itself recognized the right to be protected as whistleblower. When they get people from other countries who come into the United States after exposing corruption or criminality in China or some countries in Africa, the U.S. immigration and U.S. courts have recognized that ("Is Whistleblowing Free Speech?").

Ratner supports Snowden's efforts and believes that—as a whistleblower—he should be granted political asylum under international law.

As we can see, there are different ways of interpreting the legal protection that ought to be offered to Snowden in light of his revelations. It will be interesting to see how this case unfolds in the years to come in light of recent national security threats to the United States. But, regardless of how the case is decided, it is important that we also think about how it *ought* to be decided. In the

event that Snowden is not protected under US law, we can ask (B) whether or not he ought to be. Is the current law unjust? In Section §3, we will use Boylan's table of embeddedness in trying to answer this question.

Ought Whistle-Blowing be a Legally Recognized Form of Free Speech?

The table of embeddedness is a theoretical construct that Boylan has developed to help us understand and prioritize natural human rights. It provides us with a kind of ranking system of goods that are necessary for human action. In Boylan's view, some goods are more basic or 'embedded' than others:

Everything on my table is driven by what it means to be able to execute voluntary action. I see this as a gradated process following from the most minimal levels of purposive action to more fully realized circumstances. I call these gradations "embeddedness." Some good is more embedded than another if it is more proximate to the most minimal conditions for human agency – that is, every human's right according to the argument for the moral status of basic goods. (185)

The basic insight here is that not all goods are equally important for action. Thus, when making decisions of public policy, we must prioritize more-embedded goods over less-embedded goods.

The most embedded goods, level-one basic goods (those which are "absolutely necessary for human action") must be prioritized above all others. After all, as Boylan puts it, "If we are dead we cannot act. If we are dead we cannot move toward our vision of the good" (185). It follows from this that the level-one basic good of 'protection from unwanted bodily harm,' or bodily integrity, trumps the level-two basic good of 'basic human liberties,' where this includes freedom of speech.

The NSA has defended its mass surveillance program by appealing to a system of values that resembles what we find in Boylan's table of embeddedness. The NSA has in effect argued that considerations of national security (protection from unwanted bodily harm) trump considerations of individual liberty. According to the NSA, in today's world of global terrorism, we must be willing to accept some limitations upon our individual liberties; it is implausible to think that the NSA can do its job and keep us safe while keeping our civil liberties completely intact. And, for similar reasons, it argues that we must prohibit intelligence workers from leaking information about our national security strategies to the public. The worry is that our enemies will be in an

enhanced position to overcome our national security strategies if they have detailed information about them. But is this right? Should we be prepared to abandon our civil liberties whenever a threat to national security arises? This argument seems too simple and permissive; in its current form, it provides the government with a *carte blanche* for civil liberties violations.

One of the challenges that we face when thinking about this problem concerns our inability to foresee the future and evaluate threats to national security. It would be all too easy for a government to justify the broad surveillance of its citizens by claiming that such a program is necessary for reasons of national security. And this government could, for the same reasons, forbid intelligence workers from divulging this information to the public. After all, a government could always claim that an intelligence worker would put innocent lives at risk by exposing a campaign of mass surveillance. All countries have their enemies and face serious threats to national security. If bodily integrity trumps basic liberties, then it would seem that governments are always justified in implementing mass surveillance campaigns and punishing intelligence workers who leak them to the public. But this can't be right.

In responding to this worry, some critics might challenge Boylan's prioritizing of basic goods over basic liberties. To this end, it might be argued that Boylan should revise the table of embeddedness and prioritize basic liberties. Marcus Düwell has expressed this concern and argues that some human rights are in fact level-one basic goods (74). If such a revision were in order, then we would have grounds for risking unwanted bodily harm for the sake of freedom of speech. A second strategy, and the one defended here, does not ask us to revise the table of embeddedness and prioritization of protection from unwanted bodily harm; rather, it assumes the table of embeddedness but asks us to consider and evaluate a variety of considerations before deciding whether or not any particular civil liberties breach is in order. In applying this strategy to the case of Snowden, it will be helpful to take a closer look at the kind of threat that prompted the NSA to implement its program of mass surveillance.

The events that transpired on September 11, 2001 irrevocably changed the way that most of us view the world. Among other things, they made it clear that groups of individuals, not just states, can act together in highly organized and unanticipated ways to cause vast death and destruction. It is nearly certain that there will be other acts of terrorism perpetrated in the United States and around the world in years to come. The NSA has appealed to this new wave of national security threats when attempting to justify its system of mass surveillance. President Obama has also argued that some restrictions upon our civil liberties are in order in lieu of

the new national security threats that our country faces. During his speech on the NSA's surveillance program, he offers an argument of this kind:

The horror of September 11th brought all these issues to the fore. Across the political spectrum, Americans recognized that we had to adapt to a world in which a bomb could be built in a basement, and our electric grid could be shut down by operators an ocean away. We were shaken by the signs we had missed leading up to the attacks -- how the hijackers had made phone calls to known extremists and traveled to suspicious places. So we demanded that our intelligence community improve its capabilities, and that law enforcement change practices to focus more on preventing attacks before they happen than prosecuting terrorists after an attack. ("Speech on NSA").

According to President Obama, the intelligence community can only keep us safe by enhancing its capabilities, where this involves monitoring trackable forms of communication at home and abroad. Without these capabilities, the intelligence community cannot preempt future attacks and function effectively in today's world. The NSA has similarly argued that preventing future terrorist attacks is like trying to find the needle in a haystack. In order to find the needle, you need to have access to the whole haystack. Without this information, the NSA cannot do its job and keep Americans safe (Dance and Macaskill).

Not everyone finds this line of justification convincing. Critics of the mass surveillance program have urged that -- even if such measures are in order -- they should be discussed openly and not ushered in without our consent. Indeed, supporters of Snowden applaud his revelations, in part, because of the light that he hoped to shed upon the government's covert operations. But the NSA would argue that we cannot reasonably expect complete transparency regarding its programs. Complete transparency would render its programs ineffective by enabling potential targets to evade them. As Candice Delmas observes, "The government asks the public to trust it when it comes to delineating [the scope of state secrecy], on the grounds that an open debate about what should and should not be kept hidden from the public would itself endanger national security (90). When it comes to national security, a certain level of secrecy is necessary for the effectiveness of the policies themselves.

There is, then, a case to be made in support of the NSA's surveillance program and the secrecy surrounding it. But, before we can fully assess it, we need to consider the potential harms to which the program might give rise. Critics of the program fear that its consequences

could be catastrophic. Peter Ludlow, who has written in support of Snowden, fears that such a program may pave the way to the kind of dystopian future envisioned by George Orwell (“Systematic Evil”). He argues that the fear ignited by 9/11 has prompted us to trade hard won freedoms for the illusion of national security (“Fears”). We should be weary of so willingly abandoning these freedoms because doing so could in the long-run lead to disastrous consequences, including the abandonment of core democratic principles:

Whatever their motivation, by using fear to induce the rollback of individual rights, politicians, judges and lawmakers are working against the hard-won democratic principles and ideals that we and other democracies have defended for almost 250 years. They are manipulating our fears to undo centuries of democratic reform. And it doesn’t matter if the empowered leader is called a king or a prime minister or a president; the end result is that fear has been used to place us back under the yoke of Hobbes’s sovereign and Machiavelli’s prince.

As Ludlow warns, when we abandon our hard-won democratic principles, we empower the government and thereby make ourselves vulnerable to potential abuse. We should not allow the government, or its agencies, to manipulate us into doing this on the basis of fear. A related worry concerns the legitimacy and effectiveness of a government that eagerly violates its citizens’ basic liberties. Arguably, governments that infringe upon the basic liberties of their citizens often fail them in other respects as well. As Boylan has pointed out (in conversation), China is notorious for both (A) violating the civil liberties of its citizens, and (B) failing to provide them with level one basic goods. If this is right, then we have may increase our vulnerability to failures of level one basic goods when we allow the government to violate our basic liberties.

In evaluating the NSA’s mass surveillance program, it is important that we consider possible alternatives. After all, we would have a difficult time demonstrating the need for such a system if a less extreme but equally effective alternative were available. To this end, it is sometimes argued that a system of mass surveillance is unnecessary, or at least not worth the great sacrifice to our personal liberties. While there are bound to be some national security threats that slip through the cracks, the government can use (and has used) more limited forms of espionage to gather information about possible enemies and impending attacks. On this view, a system of mass surveillance is simply unnecessary. It is difficult to evaluate this claim without having access to classified information about the government’s track record at preventing attacks before and after the

Patriot Act. As we might expect, the NSA has insisted that the new surveillance strategies are necessary and could have prevented 9/11 (Dance and Macaskill). But detractors have argued that we could have prevented 9/11 even without the enhanced surveillance capabilities that are now available to the NSA. We do not need more surveillance, the argument runs; rather, we need to make better use of the information that we gather and share in response to this surveillance. There is even less agreement about how many *other* terrorist attacks the government has prevented by utilizing the bulk collection of US metadata (Dance and Macaskill).

Let us now return to Boylan’s theory of human rights and the table of embeddedness.

As we have seen, Boylan believes that level-one basic goods, such as protection from unwanted bodily harm, trump civil liberties, such as freedom of speech. But it does not follow from this that any purported threat to our physical well being or national security justifies a violation of our civil liberties. As I have tried to show, we cannot evaluate the legitimacy of a civil liberties breach without considering a host of important considerations, including the likelihood that the threat will be actualized, the long-term consequences of the civil liberties breach, and whether or not there are alternative ways of handling the threat. The basic insight of Boylan’s table of embeddedness is that not all goods are of equal importance to action; some are more basic than others. It is undeniable that, as he has pointed out, we cannot act at all if we are dead. Nevertheless, we must exercise caution when translating this insight into action or policy. It follows from this that we can accept Boylan’s theory of human rights without condemning Edward Snowden for leaking confidential information regarding the NSA’s mass surveillance program.

The more general moral of the story is that the table of embeddedness does not provide us with a simple and straightforward solution to all of the difficult policy decisions that we might face. But this is at it should be. Boylan’s theory of natural human rights leaves us with space to intervene as moral agents and policy makers. While it is true that more-embedded goods trump less-embedded goods, the path to the more-embedded goods is not as obvious as it might *prima facie* seem. In some cases, abandoning the less-embedded good will cause us to fare worse relative to the more-embedded good in the long run.

Conclusion

Protection against unwanted bodily harm is an especially challenging good to think about because we know that governments appeal to it all of the time while trying to usher in new policies, some of which involve

violations of our basic liberties. By accepting this kind of justification at face value, we may be allowing a government to centralize its power and chip away at democratic ideals—and also, in the long run, make the government less effective (because less well supervised). Fortunately, we can support Boylan's hierarchy of goods while maintaining a healthy skepticism about a government's efforts to interfere the basic liberties of its citizens. An initial reading of Boylan's theory of human rights may seem to entail that considerations of national security always justify violations of basic liberties. But, if I am correct, this initial reading is not the best one. We cannot fully assess a policy that curtails basic liberties without considering its immediate and long-term consequences. A policy that seeks to protect us in the immediate future may do much damage in the long run.

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