



Tracking people: legal and ethical debates

Report of event two, 6 April 2017

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Programme

9.30-10.00 Refreshments

10.00-10.30 Welcome and introduction

10.30-11.15 Tracking people: an introduction to legal and ethical debates
Kevin Macnish (University of Leeds)

11.15-12.30 Tracking people: legal issues
Mike Nellis (University of Strathclyde)
Hilary Cragg (Nash and Co. Solicitors)

12.30-13.15 Lunch

13.15-14.45 Tracking people- ethical debates
Chair: Kevin Macnish (University of Leeds)
Michael Nagenborg (University of Twente)

14.45-15.00 Refreshments

15.00-16.15 Tracking vulnerable people: legal and ethical debates
Eleanor Bantry White (University College, Cork, Ireland)
Jim Hopkinson (Deputy Director Children's Social Care, Bradford City Council)

16.15-16.30 Closing remarks

Introduction

The second of four Arts and Humanities Research Council (AHRC) funded events for the network of academics and practitioners 'Tracking people' was held at the University of Leeds on 6 April 2017. This event focused on legal and ethical debates regarding wearable tracking devices and was attended by 45 practitioners and academics.

Overview

Kevin Macnish began the day by providing an introduction to the ethical and legal issues surrounding the topic of wearable tracking technology. The first section of his presentation focused on ethical concerns, highlighting issues with informed consent, measuring success and potential impacts on privacy, social stigmatisation and the development and maintenance of interpersonal relationships. The presentation moved onto legal issues where attention was paid to the international human rights framework, the EU context and the US context. Macnish closed with reflections on areas for further research.

The discussion which followed focused on locational privacy, one of the central challenges to wearable tracking devices. It was noted that most individuals have already surrendered their locational privacy through the use of mobile phones, credit cards etc. and that this would soon be supplemented by new technologies such as facial recognition on CCTV. Yet, it was also recognised that individuals had a choice about whether to use mobile phones or credit cards but that this 'choice' is not (or might not be) always available to wearers of tracking devices. Furthermore, individuals are able to easily separate themselves from devices if they so choose. By contrast, tracking devices are designed not to be removed and whilst it remains possible to remove them, it is more difficult. As a result, they lead to a greater loss of locational privacy. It was acknowledged that the value of locational privacy had been eroded because it had been so readily surrendered but that debates regarding individual and group privacy should continue. These issues were brought into stark relief by a delegate who had been followed by a drone without his consent and without knowing who controlled it or the data it produced.

The discussion then moved to look at the dangers attendant upon the use of tracking technologies. Marginalised and minority groups might find themselves increasingly underprivileged as a result of the use of technologies. Concerns were raised about the potential harms which could be caused by the misuse of tracking devices, for example by abusive partners. Warnings were also sounded about allowing the general debate to degenerate into an overly simplistic 'dystopian hell' versus a 'technological dream'. Who was collecting the personal data was also viewed as significant – distinctions were made between governments and corporate entities. The David Eggers book *The Circle* was referenced as an illustration of concerns about corporate Big Brother and the accountability and intentions of corporate surveillance entities were questioned.

Legal issues

The focus of the second session was on legal issues. Unfortunately, Dominik Lehner was unable to attend but Mike Nellis took his place because he has also been involved with producing the Council of Europe Recommendation on the electronic monitoring of offenders. Nellis focused on the 'penitentiary principles' which govern penal practice and which are derived from human rights frameworks and which the Recommendation sought to apply to the electronic monitoring of offenders. Nellis concluded that while electronic

monitoring has its risks, it also creates opportunities and possibilities for imaginative means of both reducing prison populations and protecting victims. Although it *can* be used for negative purposes, looking only at human rights is too reductive an ethical framework for the regulation of electronic monitoring.

Hilary Cragg shared her experiences of working as a solicitor with clients with dementia and Parkinson's disease. She highlighted the importance of semantics - the concepts of 'tracking' and 'tagging' are increasingly linked to individuals who are considered to pose a threat to society – offenders and terrorists – and as a result individuals with dementia and other medical conditions are often uncomfortable with these terms.

The discussion surrounding the legal issues began with a return to the concerns raised earlier about informed consent. The philosophical debate regarding the source and value of informed consent was again raised and questioned. Is informed consent valuable because it respects the autonomy individuals whose consent is being sought, or because it allows that individuals to control what would otherwise be rights violations being visited upon them? In the case of individuals with dementia, the importance of autonomy and limiting harm was highlighted both in terms of providing freedom to live as freely as possible but also in locating individuals who go missing and may be at risk of harm. Concerns were raised about 'nudges' in relation to the extent to which autonomy and choice are truly available to offenders or individuals with dementia.

Data derived from tracking devices was the second area of discussion - particularly how they are collected and who collects them. While different countries have different practices, in the UK most data are collected and stored by private companies, leading to questions about the ownership of data and access to it. This debate is very much live and unresolved currently but from a legal perspective it was noted that ultimate responsibility for monitoring individuals with dementia rests with carers and that private companies providing support (unless they are under contract to offer care) do not have a duty of care.

Ethical Issues

Michael Nagenborg focused on moral issues arising from novel technologies. He distinguished between ontological perspectives (describing the nature of objects) and hermeneutic perspectives (describing the meaning of objects). While the former may be constant, the latter changes in different contexts, with the implication that ethical norms which apply in one context may not carry over into other contexts. He further argued that it is necessary to know the practices and experiences of individuals 'on the ground', and not just those of academics, in order to inform a 'bottom-up ethics' which takes into account both existing domain-specific norms as well as abstract academic thinking. The fundamental challenge is not tracking *per se*, but how we would like to interact and support individuals with mental health challenges, like dementia.

During the discussion it was clarified that in philosophical terms no distinction is typically drawn between ethical and moral issues. However, for many issues, such as privacy, there may be both universal aspects (such as the valuing of privacy) and contextual aspects (how privacy is experienced across contexts). The latter aspect raised questions about the interplay between politics and ethics. As individuals disagree in practice, and as meaning leaks between contexts, there is a risk that those who are more empowered will effectively impose their understanding of an artefact's meaning on those who are less empowered. Examples of such leaking included drones whose original purpose was military but which

are now available to all. This has a clear bearing when discussing offenders and people with dementia. There were further concerns about the motivations for monitoring individuals and what might and might not be proportionate.

The respective values of 'bottom-up' and 'top-down' approaches to ethical analysis were also discussed. Some concerns were aired that the 'bottom-up' approach might engender an overly conservative approach which lacked an understanding of what the ideal may be. However, this was balanced by the retention of universal values which provide an underpinning rationale for the use of tracking devices. It was agreed that at the heart of the ethical debate is a three-way option: do not use technologies, use the technologies well or use the technologies badly. The challenge for moral deliberation is to determine what the bad uses would be.

Vulnerable people

The day concluded with a panel of three: Eleanor Bantry White, Jim Hopkinson, and a joint presentation by Steve Wouldhave and Jen Donnachie. The focus of White's presentation was dementia and social care, warning that those with dementia may come to be seen as someone 'less than human' given that dementia may be viewed by some as a 'fate worse than death'. This gives rise to a concern that those with dementia may experience a diminution of rights and particularly dignity. She suggested that a greater awareness of the risks of technological solutionism is required, including its reliability, its tendency to promote social isolation and data protection issues.

Hopkinson discussed the use of tracking methods and devices in child protection. He provided examples of how tracking technologies are currently used in these cases. Typical reasons for using tracking devices (or tracking technology more broadly) in child protection cases included children at risk of abduction (typically parents wanted to take their children abroad to Syria) and children who go missing from care homes and/or where there are safeguarding issues. In the first case devices are worn by parents not the children. In the latter case, children who run away are currently traced using mobile phone data. Ethical concerns were raised about children being unaware of the methods used to find them but it was argued that it was justified given the safeguarding issues. The benefits of tracking young offenders were also discussed including the enhanced potential to resist peer pressure and break bad habits due to devices serving as an external authority which cannot be countered, allowing young people to refuse to engage in activities which might lead to breach.

Wouldhave and Donnachie reflected on a pilot of the use of proximity or bi-lateral tracking in cases of domestic abuse in Northumbria. They suggested during discussion that tracking technologies could be widely deployed in policing contexts as a safeguarding measure and to provide reassurance to courts and the public and alibis to suspects. In terms of domestic abuse, it was noted that problems with tracking can arise because many couples 'choose' to stay together despite being in abusive relationships. Concerns were also raised about victims being given responsibility for their own safety and whether timely backup from the authorities would be forthcoming.

Questions for further consideration

Several themes developed throughout the day. These included:

- I. The role and value of informed consent in the process of wearing and 'coercing' others to wear tracking devices;
- II. Differences between choosing and being required to give up locational privacy;
- III. The nature, intentions and motivations of parties collecting, storing and using data derived from tracking devices;
- IV. The contextualised nature of many ethical debates; and
- V. Balancing the challenges to personal autonomy and dignity against the benefits of wearing that tracking devices.

The next event will be held on 15 June 2017 at the University of Leeds and will focus on the technical challenges of wearable tracking technologies.

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