

Article

Leaking Boats and Borders: The Virtu of Surveilling Australia's Refugee Population

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Abstract

When refugees displaced to Australia's offshore detention do speak, it is via violations of privacy and surveillance upended through publicity. Weak legal rights to privacy in Australia juxtapose the increasing secrecy under which the Australian state operates its own offshore detention centres (Manus Island and Nauru). Australia's institutional context accelerates concerns of authoritarian surveillance whereby we find an acceleration of prohibitive privacy for government and prohibitive transparency for individuals. Our analysis of such authoritarianism synthesises media-law in practice with theories of the management of visibility (Flyverbom 2016; Brighenti 2010) to decipher the socio-political context and effects of pervasive surveillance and its radical disclosure. Our contribution speaks to applicable privacy concerns for states grappling with invasive data collection and the prohibiting of the private voice of the surveilled, which we see as doubly acute for those left vulnerable in Australia's border zones.

Introduction

As part of Australia's 'Pacific Solution', asylum seekers who arrive in Australia's waters by boat are transported to offshore detention centres in Pacific islands—Manus Island in Papua New Guinea, and the Pacific island nation of Nauru—rather than being allowed to land on the Australian mainland. This 'offshore' solution has been heavily criticised, including for possible violations of international human rights standards (Saul 2012; Henderson 2014). In 2015, the UN Special Rapporteur on Torture found Australia to be in violation of the Convention Against Torture due to the conditions on Manus Island (Mendez 2015). In 2016, the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers in the Manus camp violated the PNG Constitution (Gerber et al. 2016), although it continues to function despite the ruling (Dastyari and O'Sullivan 2016). Apart from the obvious imprisonment, the processes involved in the Pacific Solution are tied to specific modes of authoritarianism that are prosecuted through capturing mundane data on the lives of these imprisoned refugees and restricting the visibility their new interned existence. In this article we conceptualise authoritarianism through how Australia manages the visibility of those left most vulnerable at its borders.

There have been important aspects to Australia's border policies generally, and the Pacific Solution specifically, that require authoritarian surveillance. This has involved the use of various surveillance technologies at the border (Wilson 2007; Wilson and Weber 2008) and in the detention camps (Briskman 2013). Paradoxically, at the same time the Australian government has been averse to information getting

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out of the detention camps and into the public domain through restrictions on detainees' communication, by blocking the access of journalists, lawyers and others to these sites (Briskman 2013), and also by restricting what employees and contractors can reveal about conditions in the detention camps (Brevini 2017). This has in turn led to an asymmetry of information that was ripe for disclosure through public whistleblowing, most notably demonstrated through the reporting of *The Guardian*, Australia (Farrell, Evershed and Davidson 2016).

This contradictory information gathering, information suppression, and radical information decentralisation has spillover effects into the domestic politics and societies of the locations hosting detention camps as well as Australia. For instance, Nauru blocked 'abusive' internet content including services such as Facebook (Olukotun 2015). Nauruan opposition politicians told *The Guardian* newspaper that the restrictions were aimed at stopping the flow of information to Nauruans while also preventing the flow of information from asylum seekers held in Australia's detention centre there (Farrell 2015). These policies might seem to be outliers for Western democracies and indeed, Australia's unique institutional support for such autocratic socio-technical restrictions is worth detailing below. That discussion, however, follows introducing our theoretical frame which shows how Australian Authoritarianism can be understood through processes of visibility management. We follow these two sections with discussion of the potential virtue of whistleblowing in this specific circumstance before concluding.

Theorising The Management of Visibility to Disclose Autocracy

Our discussion of surveillance and leaks in the Australian-offshore context considers the secrecy and radical publicity of offshore detainees' from a socio-legal perspective that understands visibility as a managed social category. This is to say that the notion of visibility management (Flyverbom 2016) considers acts of transparency or secrecy to not reveal or hide truth. Instead, visibility as a tool reconfigures and redefines what is apparent for both normative and operational political realities. The management of visibility shapes courses of action available for both the surveilled and the surveiller. In this case we focus on the management of visibility undertaken by a democracy undertaking an autocratic turn to its refugee population. Through these analytical considerations of visibility, we can 'see' how the developments at Nauru and PNG relate to what sociologist Andrea Brighenti (2010) differentiates as visibilities of control and recognition. Visibilities of *control* offer purposeful and contextual "asymmetrisation [SIC] and hierarchisation of visibilities" (Brighenti 2010: 148). Brighenti's visibilities of control deprive subjects of power via theories of governmentality that are embedded, for instance, in the surveillance of offshore detainees including detainees own compelled testimony of incidents of (self)harm to their administrators or forms of self-government from knowing the extent their actions are recorded and reported on. In agreement with this thinking, Bridges' (2017) recent findings of an extensive poverty of privacy rights for those less fortunate in society correspond to how visibilities of control can illuminate power relations.

Visibilities of *recognition* for Brighenti references empathetic acknowledgement from another human conscious, which bestows emancipatory effect. That is, humans are ratified by others as human and gain an equal dignity (Brighenti 2010: 40). In our case, we argue that visibilities of recognition may have been enacted through radically disclosing the secrets of detainees from within their autocratic regime to a sympathetic public other. These disclosures attempted entice a reciprocal dignity from members of the larger democratic public who were previously not privy to the autocratic realities of the detention centres. Specifically, we argue that making refugees' lives visible through—yet outside of—autocratic institutional processes enable empathetic others in the larger public to recognise humans in hardship. We now turn to the authoritarian context that can show these types of visibility in action.

Unique Institutional Aspects of Australia-Offshore

This section details the unique institutional contexts and policies in Australia that offer an autocratic management of visibility toward refugees. Australia is unique as the only Western-style liberal democracy that does not have a comprehensive set of human rights in its Constitution (like the US) or a legislated Bill of Rights (like neighbouring New Zealand) at the federal level. Here, the law does not offer explicit visibility to hierarchies of control or mutual recognition of rights, instead relying on ongoing case law to shine a defining light on those practices that are visible and (dis)allowed. The state enjoys some strategic darkness for these concerns, but so too do private practices. Of the few rights that do receive constitutional protection in Australia, privacy is not among them, and free expression receives only limited protection via the implied right to political communication (Nicholls 2012; Pearson 2012). While Australia is a signatory to various international human rights conventions, the rights contained within them do not have automatic effect in domestic law unless implemented by domestic legislation. Also, after the Australian High Court's decision in the 'Malaysian Solution' case (Foster 2012), the Australian Government changed the law to ensure that under Australia's domestic law, there was no requirement that countries which hosted Australia's offshore detention camps had to comply with international human rights protections (Triggs 2015).

There is some legislative protection of information privacy in Australia through the federal *Privacy Act* and some state and territory level laws. However, the general state of privacy protection has declined in recent years with the Snowden revelations about Australia's participation in Five Eyes, the enactment of legislation requiring mandatory data retention of all Australians' telecommunications, and a recent Federal Court ruling which may have the effect of restricting the kinds of information protected by the *Privacy Act* (Brevini 2017; Suzor, Pappalardo and McIntosh 2017). In the data retention example we see visibilities of control being crafted by the central authority: where subjects' connect online is known to be known, but unavailable to the public. Likewise, although in a much lower 'technology' solution, in the offshore camps, pervasive surveillance of detainees is carried out by, among other technologies of control, incident reports that catalogue thousands of personal events. These events range from seemingly mundane to those that threaten the lives of the detainees.

At the same time as the intrusive surveillance, the Australian government has increasingly cloaked its own operations in secrecy. Major institutional reform in 2015 sought to merge customs and immigration departments to allow the "optimal structure" to pursue a more effective approach to border protection... [via] activities *both beyond and within the border*' (Barker 2014, emphasis added). This enacted the de facto political framing in Australia of immigration as security and border-protection issues. As Devetak (2004: 107) puts it, 'the government [can] deter and punish asylum-seekers', from a post-cold war frame that understands migration as a security problem, while drawing from Australia's well-worn nationalist history, which views newcomers as attacking a traditional sense of identity. Or, to quote Maylea and Hirsch (2017): 'This secrecy is also a necessary aspect of the process of "othering" asylum seekers'. This institutional context and technological capacity of governing affords autocratic and in some cases draconian policy with regards to surveillance and forced movement for those attempting to cross Australia's borderzones.

Furthermore, services to the offshore detention camps are provided by NGOs and more latterly, private for-profit companies, and the agreements between them and the Australian Government usually include secrecy obligations for employees, including non-disclosure and confidentiality clauses (Maylea and Hirsch 2017). Here, the management of visibility is cast through a corporate lens that relegates human-to-human recognition to corporate speak and trade secrets. To quote Briskman (2016: 25): 'Secrecy is a privatisation principle of for-profit detention providers. Through contractual arrangements with NGOs, similar commercial-in-confidence principles apply ... obfuscating the public's right to know'.

Significant to displaced refugees in Australia's care was the introduction of the *Australian Border Force Act* in 2015. This Act offered criminal prosecution with penalties ranging 2-5 years for disclosing

information that was obtained in the capacity as an employee of the Department of Immigration and Border Protection, while giving no explicit public interest exception for disclosures. Notably, medical professionals were later exempted from this rule, but the chilling effects remain for the vast majority of government workers who come into contact with Australia's offshore refugee population. Visibility is managed in such a way here to ensure that the border-security issue was emphasised while the public was kept in the dark regarding the cost of human displacement. For instance, when the government did shed light on the problem, it would be in terms of boats averted or refugees detained, rather than explicate the circumstances of refugees already in camps. Visibility here re-enforced hierarchies rather than offering mutual understanding of human(s') condition.

As such, a group of medical professionals, Doctors for Refugees, brought litigation against the Australian Government last year claiming that the secrecy provisions of the *Border Force Act* violate the implied right to freedom of political communication under the Australian Constitution. The case is currently pending before the High Court. It remains to be seen whether the Government's changes to the legislation to exempt disclosure from medical professionals—but not from other groups such as social workers and teachers—will frustrate the legal claim (Maylea and Hirsch 2017).

There may well be legitimate debates with regard to democratic expectations of government transparency and the need for state secrets (*arcana imperii*) with regard to issues linked to the border. Our concern in this limited space, however, turns to how such a democratic debate was partially obviated by whistleblowing-leaks that were structurally enabled by the government's own surveillance and authoritarianism. As Fenster (2017) argues, the implausibility of controlling government information in the digital age suggests that the management of visibility will happen through more hands than those of the state.

Managing Visibility through Radical Whistleblowing

Despite the Australian Government's attempts at restricting information coming out of the offshore detention camps, various leaks occurred that offered a new management of visibility. Some involved detainees managing to speak to media, or even writing articles themselves such as Behrouz Boochani (2016). Healthcare professionals and social workers working in the camps have also engaged in limited whistleblowing, in breach of their contractual and legislative obligations (Maylea and Hirsch 2017).

Yet, the major public disclosure of information in the camps exposed the minutiae of everyday life of refugees for over three years as surveilled by camp administrators. The information was heavily reported in national media across Australia and consisted of over 2,000 incident reports written by employees contracted to monitor, care for, and administer services to refugees in the detention centre. This particular form of surveillance was operationalised and administered in a very traditionally bureaucratic way: forms that reported incidents covering a spectrum from the seemingly banal to egregious with the same measured impassion. These reports were anonymously leaked to *The Guardian* newspaper and featured heavily in the graphical presentations. The lead journalists performing investigative work at *The Guardian* seemed to merge traditional investigative norms where facts and the story emerge in search of an external truth (Ettema and Glasser 2005) with epistemologies of 'scientific journalism' where the data could speak for itself while journalists narrativised its importance. This form of data-centric visibility was itself useful as a counter-surveillance that hoped to evoke accountability for the authoritarian structures on Nauru. *The Guardian* reported via a database that interactively visualised the entire corpus of 2,000 leaked incident reports across time and colour coded their incident "risk level" as assessed by authors of each report (Evershed et al. 2016). From this database, feature stories expanded on personal narratives of specific detainees, the seemingly common 'downgrading' of risk assessments by supervisors, political and policy responses to the information, etc.

Taken together, these reports made visible not just incidents, but an authoritarian system in action, rendering the systematic amalgamation of, sometimes mundane, sustained surveillance into people's private-then-secret-now-public life in indefinite detention. It reconfigured the visibility of administering Nauru from one of abstract security concerns of the homeland to one of intricate domestic surveillance that detailed violence, boredom, depression, sexual assault, and self-harm.

Further, the prohibitive transparency of detainees' lives made visible how a leviathan of surveillance enabled authoritarian control. Asylum seekers had no choice but to become visible for their own management within the autocracy. Then, the radical public decentralisation of this corpus gave refugees no choice but to have their experiences disclosed as part of that system in the hopes of correcting it. Publicity reconfigured how the autocracy made humans vulnerable; publishing the incident reports fomented an empathy of recognition from the greater public for the individuals surveilled. Individually, each incident report presents an artefact of bureaucratised surveillance that defined life within the authoritarian confines of the detention centre on Nauru. Past the substance of individual incidents, each report brokered a new 'contextual asymmetrisation' (Brighenti 2010: 148) that rendered the lives of refugees within specific hierarchies of social control that the public were previously unaware of. The radical re-mediation of these forms made struggles visible and constructed visibilities of empathy and recognition for the plight of individual refugees.

These disclosures did not dissuade Australia's campaign on secrecy. While it may look 'bad form' for a liberal democratic state to aggressively pursue both whistleblowers and media outlets handling information leaked in the public interest, this has been the case in Australia. The Federal Police have sought access to Guardian journalist Paul Farrell's telecommunications metadata in order to identify his confidential sources for articles he wrote about Australia's immigration and border policies in a process that is entirely legal (Farrell 2016). More serious has been the raids of NGO Save the Children's premises in Nauru during 2015 by Nauruan police, ostensibly to identify the source of a leak regarding information about the detention camp there (Hasham 2015).

These institutional contexts leave few channels through which the story of Australia's offshore refugee population can be told to the public. In other words, there is a managed hierachisation of visibilities for those at Manus and Nauru that does not afford a mutual recognition of empathy for with members of the public. The correlation between detailed record keeping regarding subjects of rule, their surveillance, and authoritarianism is well documented—as is the assumption of a curtain of secrecy that allows these records to proliferate in authoritarian states without fear of public accountability (Barros 2016). An authoritarian turn in an otherwise open democracy, however, required different sets of configurations of secrecy.

Constellations of Secrecy; Virtu in Leaks?

Potentially unique about managing visibility in Australia's authoritarian-surveillance-disclosure nexus is the sympathies from which subjects were surveilled, the decentralised nodes of secrecy that retard human rights within an otherwise quite liberal democracy, and the ambiguous virtu of radically disclosing this surveillance. First, we must consider that the reports of Nauru were in most cases written by aid workers and other contractors that had no other recourse to catalogue or communicate abuses, maltreatment, and human rights violations as they were witnessed. Any acts of creating visibility for mutual recognition were conjoined with acts of control. The reality of surveillance in Nauru embodying both 'control and care', or 'proscription and protection' (Lyon 1994: 219) remain apt viewed through visibilities of control and recognition.

Secondly, a curtain of secrecy is unworkable in the aggregate of a functioning democracy. Instead, the needed darkness materialised as highly distributed nodes of authoritarianism related to spaces of surveillance drawn from familiar national security narratives. Whether in regard to data retention at home, or against specific 'undesirable' populations in the borderzones, the prohibitive secrecy given to government

operations of surveillance in Australia in this manner is how authoritarian control is maintained in the life courses of those individuals being surveilled.

Thirdly, without the institutional pressure-release valves afforded by public reporting mechanisms, the only redress for those aware of and compiling these records seemed to be radical disclosure. The means of public disclosure concurrently upended rights of privacy of the refugees and secrecy of the state. Thus bubbles of secrecy could be ‘popped’ by whistleblowing-leaks that targeted the autocracy itself if exposing silenced hardship. Together these relations of surveillance, secrecy, and managing their public visibility speak to the power of Brighenti’s (2010: 40) view that what matters are the ‘ways in which, and the processes through which, sites, subjects, events and rhythms come to be visibilised or invisibilised’. Means of gaining empathy for refugees coincided with offering new visibilities of control on state sanctioned authoritarianism.

While privacy concerns for marginalised and vulnerable people at the border are significant, the prohibitive management of visibility that enabled their authoritarian control paradoxically enabled a manner of empathetic emancipation that these people would otherwise not have. This reconfigured the visibility of the autocratic regime itself by contradicting the security framing of migration issues with human stories of struggle. In this light, the political reality of the situation may be shifting. As this article was going to press, the Australian government announced it would settle a civil case brought by detainees paying out 70M AUD (53M USD) to over 200 survivors of Manus and Nauru—instead of relying on the laws of the land.

Conclusion

As we detailed in the introduction, radical disclosure activities that embody recognition over control are not well aided by Australian law. A lack of strong and enforceable human rights protection domestically entails that there are no comparable rights to free expression and free media as the US’s First Amendment, nor are there strong protections for individual privacy, such as in Europe. This results in very few legal restrictions on the Australian Government’s activities in eroding the privacy and free expression of citizens and non-citizens alike, and enveloping its own actions in secrecy.

As such, this paper has explored the nuance of managing the visibility of those non-citizens captured in Australia’s borderzone autocracy. While the recent 70M AUD settlement will bring closure to one aspect of detention in Australia, the current policy enjoys the support of more than 40 per cent of Australians, while even more people support the Government’s linked policy of forcibly turning back boats of asylum seekers to prevent them from seeing either Australian soil or asylum claims (Donoghue, Ford and Blumer 2016). This situation cannot accurately be termed the ‘tyranny of the majority’, but the fact that a significant minority of Australians support such policies highlights the need for enforceable individual human rights—to asylum, free expression, privacy and the rest—for citizens and non-citizens at the borderzone. One reflection on the plight of the non-citizens stuck in privacy-secrecy-publicity flows might build from Tschakert and Tuana’s (2013) understanding of ‘situated resilience’. On the one hand, the resilience of subjects to such authoritarian nodes of surveillance and breaches of privacy acknowledge existing agency. Yet on the other hand, the ways in which these stories breach into the public domain suggest that the marginalised will continue to carry the weight of autocratic surveillance within democracy, even when delivering its exposure.

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