

MANAGING BOUNDARY MANAGEMENT: A REPLY TO PROFESSOR KAMINSKI

Ryan Calo*

Professor Margot Kaminski's article *Regulating Real-World Surveillance* represents an important contribution to the literature.¹ As Kaminski indicates, the legal academy has yet to apply Irvin Altman's theory of boundary management to the area of privacy law where its utility is perhaps greatest: privacy in physical spaces.² Kaminski's analysis of this question is rigorous, thoughtful, and, in a sense, straightforward. I encourage everyone to read the piece (and I will assume you have done so for purposes of this short response).

Reading the article nevertheless raised a number of questions for me, as any interesting paper should. The main question I had is why Kaminski focuses so specifically on "government interests."³ I tend to associate this term with a threshold question in constitutional law. For example, is the government trying to advance a sufficiently "compelling interest"?⁴ And if so, are the means the government is employing well enough tailored to those interests?⁵

Kaminski appears to have something else in mind. She cannot mean that boundary management itself is literally the government's interest. Presumably Kaminski does not believe officials are reading social theory and trying to respect the citizen's "dyadic boundary."⁶ Rather, she sees government as attempting to advance two goals related to Altman's project. These goals are: (1) preventing boundary miscalculations by citizens and (2) fixing or preserving boundaries to avoid the necessity of

* Assistant Professor of Law, University of Washington School of Law. Faculty Director, University of Washington Tech Policy Lab. Affiliate Scholar, Stanford Law School Center for Internet and Society.

1. Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113 (2015).

2. *Id.* at 1114, 1132–35.

3. *Id.* at 1135.

4. *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

5. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

6. Kaminski, *supra* note 1, at 1134 (citing Valerian J. Derlega & Alan L. Chaikin, *Privacy and Self-Disclosure in Social Relationships*, 33 J. SOC. ISSUES 102, 104 (1977)).

behavioral change.⁷ Indeed, as Kaminski shows, laws governing privacy in the physical world tend to emphasize notice of observation, which helps citizens understand the surveillance context they are entering.⁸ And so-called “up-skirt laws” help avoid the necessity of responding to surveillance through new behaviors by preserving skirts as an option over pants.⁹

We might still wonder whether officials understand themselves to be doing any of this. Consider Orin Kerr’s Fourth Amendment theory of equilibrium adjustment: for Kerr, what courts are, or should be, doing is responding to changes in the balance between the ability of police to observe and citizens to hide from observation.¹⁰ Courts sometimes claim outright that they are interpreting the Constitution differently in light of new technological affordances.¹¹ But even if one were to explain the basic principles of boundary management to a lawmaker and ask if that was what she was doing, I suspect the lawmaker would instead claim she was meeting a specific constituent need—making sure people do not spy on celebrities with a drone, for instance, or just punishing creeps.

Perhaps all Kaminski means by government interest is that the concept of boundary management goes furthest to *justify* the inevitable incursion on liberty that privacy laws generate. This view positions boundary management as a normatively precious resource, perhaps best capable of counterbalancing, or complementing, other values such as free speech.

Or we could read boundary management as a measure by which to *evaluate* privacy laws concerning physical space. Kaminski talks this way when, for instance, she critiques certain drone and privacy laws for failing to advance boundary management and expressly offers the concept as a yardstick for future regulation.¹²

But if the claim around boundary management is normative in this way, why place such great emphasis on descriptive accuracy? What seems to be driving the article in many ways is the strong correlation between existing laws and Altman’s theory.¹³

7. *Id.* at 1135.

8. *Id.* at 1145.

9. *Id.* at 1158.

10. Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011). As with law and economics, discussed *infra* note 15, it is not entirely clear whether Kerr’s project is descriptive or prescriptive.

11. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (“The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”).

12. Kaminski, *supra* note 1, at 1159.

13. *See id.* at 1116–17.

Several things could be going on. Kaminski could be implying that she conceives of statutory privacy law the same way Ronald Dworkin thinks about judicial interpretation—i.e., that the “right” rule is the one that both fits past practice and simultaneously advances the best overall political interpretation of the function of law.¹⁴ Or she may be following in the tradition of law and economics, which is famously ambivalent on the question of whether judges are obligated to foster efficiency or whether they just happen to.¹⁵ Either way, I would like to know.

Why I am being so nitpicky? Mostly it is because I agree with the article and think the arguments are interesting and strong. So, I am left to nitpick.

But there is another reason. In privacy law and elsewhere, it is relatively commonplace for a scholar to select and draw from a particular approach or theory—like boundary management—to examine a specific situation. The author may never use or refer to the theory again.¹⁶ In a sense, and in strong contrast to most other disciplines, methods in legal scholarship tend toward the disposable. The result is that we do not necessarily see how robust the method or theory might be in approaching new spaces. Additionally, the author neither gains a series of deeper understandings of the method nor refines the approach for use by others.¹⁷

I suspect Kaminski represents the exception here; she intends to leverage the concept of boundary management again and again, especially as she continues in her fascinating project to reconcile privacy with free speech.¹⁸ If so, I especially encourage Kaminski to commit to the precise sense in which she wishes to apply Altman’s theories to the many contexts boundary management might advance.

14. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

15. See generally BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* (6th ed. 2012).

16. See, e.g., Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005) (applying social network theory to the question of privacy damages). I use this example not to denigrate it; this is one of my favorite privacy papers in the canon. But Strahilevitz does not appear to address the rich, more generally applicable literature of social network theory again.

17. There are exceptions. Indeed, scholars in law and economics, empirical legal studies, critical race theory, and so on, tend to have greater impact due to their commitment to developing and refining a method.

18. See, e.g., Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 483–93 (2015); Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CAL. L. REV. CIR. 57, 58 (2013); Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815 (2013).