

SNOWDEN NEEDS A BETTER PUBLIC INTEREST DEFENSE, PART I: BILDUNGSROMAN

If I were Zachary Terwilliger, the US Attorney for Eastern District of Virginia, where Edward Snowden was indicted, I'd call up Snowden's lawyer, Ben Wizner, and say, "Bring it on."

Since Snowden first went public, he has claimed he'd return to the US for trial if he could mount a public interest defense where he could explain why he did what he did and demonstrate how his leaks benefited society. With his book, *Permanent Record*, Snowden did just that, albeit in a narrative targeted at the general population, not prosecutors and a jury. And yet, the book falls far short of the kind of argument Snowden would need to make to mount such a legal defense. If Terwilliger were to make an exception to EDVA's precedents that prohibit defendants from mounting a public interest defense (he won't, of course), then, this "permanent record" would be available for prosecutors to use to pick apart any public interest defense Snowden tried to make.

Let me be clear, I think Snowden *can* make such a case – I've addressed some of the issues here. I also am well aware of the tremendous debt both domestic and international surveillance activism, to say nothing of my own journalism, owes to Snowden. While I'm agnostic about his true motives and implementation (I've got more questions after reading the book than before), he is undeniably a courageous person who sacrificed his comfort and safety to do what he did. Whether he can mount a hypothetical public interest defense or not is not necessarily tied to the lasting value of his releases, something I'll address in a follow-up. And the book serves

other purposes as well, such as alerting non-experts to the privacy dangers of Silicon Valley's unquenchable thirst for their data.

But the book fails to do adequately what Snowden has been claiming he wanted to do all along, and as such, I found it profoundly disappointing. I've been struggling to write up how and why, so will need to break up my reasons into three parts.

I'm an expert on surveillance. But I also happen to have a PhD in literature. And it was the narrative structure of the book that first triggered my frustration with it.

The book—which Snowden wrote with novelist Joshua Cohen—is a classic *Bildungsroman*, a narrative that portrays the maturation of its protagonist as he (usually it's a he) struggles with the conventions of the world. Snowden was pretty much stuck writing his memoir as a *Bildungsroman*, because he needs to explain why, after enthusiastically pursuing jobs at the center of the Deep State—something he's now bitterly critical of—he then turned on the Deep State and exposed it. He attributes his prior enthusiasm, bitterly, to naiveté, and the narrative does portray young Snowden as emotionally immature and kind of annoying. People would only voluntarily work in the Deep State because they're naive, this narrative approach insinuates.

For the general public, writing a *Bildungsroman* is a really effective genre because (for the same reason we get assigned *Bildungsroman* to read in high school), it helps the public vicariously travel the same path of maturation. For lay readers, the genre may help them develop a more mature view on technology and privacy.

For a guy with legal problems, though, writing one is fraught with danger. That's because any public interest defense will depend on Snowden arguing about his state of mind and motives for leaking, and in writing this book, he committed to a chronology that maps that out. So the

serial moments that, in *Bildungsroman* you read in high school, are just means to reaching an ethical adulthood, here serve as roadmaps to measure whether, at key moments when Snowden engaged in certain actions related to his leaking (taking a particular job, seeking out certain files), he had the state of mind that might sustain a public interest defense. The genre provides a way to measure whether he had the maturity and pure motive to make the decisions he did at each stage of the process.

From an ethical perspective, if the moment he becomes mature comes too late in the story, then it means he was not mature enough to make the decisions he did to take NSA's documents, and we should question the judgment he exercised, particularly given how painfully immature he portrays himself at the beginning. From a legal perspective, if that moment comes too early in the story, it means he started the process of taking the documents before he got what he claims (unconvincingly) was a full understanding of what he was taking, so he must have taken them for some other reason than a measured assessment of the problems with the NSA's programs.

As a reader (with, admittedly, far more training in narrative than virtually all of Snowden's imagined readers), I found it hard to determine when, in Snowden's own mind, he graduated from being the emotionally immature and naive person he disdainfully describes himself as at the beginning of his development to being the sophisticated person who could make sound decisions about what is good for humanity he claims to be when he takes the NSA documents. He makes it clear there were several such moments: when he realized how our spying is like China's, when he read the draft NSA IG Report on Stellar Wind, when he saw the kid of a target and realized it could have been him. The process was iterative. But every one of those moments presents problems for either his ethical or legal claims.

It doesn't help that there were key gaps in this story. The most discussed one involves what has happened to him since he got to Russia. That gap feels all the more obvious given how much time (3 hours out of 11 in the Audible version of the book) he spends describing his youth.

What Snowden has done since he got to Russia obviously can't change the events that happened years ago, while dissident Snowden was being formed and as he carried out his exfiltration of NSA's documents. But whatever has happened to him in Russia may change the perspective through which Snowden, the narrator, views his own actions.

Just by way of illustration, much of Snowden's discussion of the law and privacy in the book bears the marks of years of intellectual exchange with Wizner and Glenn Greenwald – both of whom he invokes in his acknowledgments. If Ben and Glenn are a tangible part of the focal point through which Snowden views his own story – and as someone who knows them both, they are – then so must be exile in Russia (as well as his relationship with Lindsey, though he foregrounds that lens throughout the book). The narrator of this book is sitting in exile in Russia, and as such Snowden's silence about what that means is jarring.

The other gaps, however, are more problematic for this *Bildungsroman* of public interest.

A minor example: Snowden doesn't address how he got sent home from Geneva, an episode that, per HPSCI's report on Snowden, involved a disciplinary dispute. From the Intelligence Community's perspective, that's the moment where Snowden turned on the Deep State, and for petty emotional reasons, not ethical ones. So his silence on the point is notable.

Far more significantly, one of the episodes that Snowden treats as a key developmental moment, a moment where he shifted from repressing the problem of being a key participant in a dragnet to wanting to defeat it, came when, during

convalescence after his first bout of epilepsy, he set up a Tor bridge to support Iranian protesters during the Arab Spring.

I wanted to help, but I didn't know how. I'd had enough of feeling helpless, of being just an asshole in flannel lying around on a shabby couch eating Cool Ranch Doritos and drinking Diet Coke while the world went up in flames.

[snip]

Ever since I'd been introduced to the Tor Project in Geneva, I'd used its browser and run my own Tor server, wanting to do my professional work from home and my personal Web browsing unmonitored. Now, I shook off my despair, propelled myself off the couch, and staggered over to my home office to set up a bridge relay that would bypass the Iranian Internet blockades. I then distributed its encrypted configuration identity to the Tor core developers.

This was the least I could do. If there was just the slightest chance that even one young kid from Iran who hadn't been able to get online could now bypass the imposed filters and restrictions and connect to me—connect through me—protected by the Tor system and my server's anonymity, then it was certainly worth my minimal effort.

[snip]

The guy who started the Arab Spring was almost exactly my age. He was a produce peddler in Tunisia, selling fruits and vegetables out of a cart. In protest against repeated harassment and extortion by the authorities, he stood in the square and set fire to his life, dying a martyr. If burning himself to death was the last free act he could manage in defiance of an illegitimate regime, I could certainly get up off the

couch and press a few buttons.

Four paragraphs later, Snowden describes realizing (once on his new job in Hawaii, on his birthday) that his life would take a new direction.

One day that summer—actually, it was my birthday—as I passed through the security checks and proceeded down the tunnel, it struck me: this, in front of me, was my future. I’m not saying that I made any decisions at that instant. The most important decisions in life are never made that way. They’re made subconsciously and only express themselves consciously once fully formed—once you’re finally strong enough to admit to yourself that this is what your conscience has already chosen for you, this is the course that your beliefs have decreed. That was my twenty-ninth birthday present to myself: the awareness that I had entered a tunnel that would narrow my life down toward a single, still-indistinct indistinct act.

As described, this is a dramatic moment, that instant where the protagonist becomes a mature actor. But it’s also (as all story-telling is) narrative manipulation, the narrator’s decision to place the key moment in a tunnel in Hawaii, after he already has the job, and not weeks earlier on a couch in Maryland before he starts looking for a new job. Nevertheless, the proximity narratively links his response to the Arab Spring inseparably to his decision to become a dissident.

Immediately after his response to the Arab Spring, then, he moved to the pineapple field in Hawaii, yet another new job at NSA helping run the dragnet. Immediately upon arriving, he set up a script to obtain certain kinds of documents, Heartbeat. He insists that he first

set up the script only to *read* the files to learn what the NSA was really doing and also claims that that script is where most of the documents he shared with journalists came from (the latter claim would be one of the first things prosecutors would rip to shreds, because the exceptions are important ones).

Before I go any further, I want to emphasize this: my active searching out of NSA abuses began not with the copying of documents, but with the reading of them. My initial intention was just to confirm the suspicions that I'd first had back in 2009 in Tokyo.

[snip]

Nearly all of the documents that I later disclosed to journalists came to me through Heartbeat. It showed me not just the aims but the abilities of the IC's mass surveillance system. This is something I want to emphasize: in mid-2012, I was just trying to get a handle on how mass surveillance actually worked.

That's a crucial step for the public interest defense, because unless he had some basis to determine the NSA was doing stuff egregiously wrong, stealing the documents to expose them would not be based on the public interest. That he could learn more in the six months to a year he spent doing that covertly, part time, than the handful of journalists who've spent the better part of five years doing nothing but that is questionable (though Snowden rightly claims he has a better understanding of the technology and infrastructure than most of the journalists who have reported on the files).

But the way the epilepsy narrative immediately precedes his move to Kunia hurts his public interest defense, because it means he had already started thinking in terms of action at the time he sought out a job where he'd have

reason to scrape the NSA's files in bulk.

That's all the more true given that it would be unlikely he'd be sharing information about Tor bridges during the Arab Spring with core Tor developers and not interact with Jake Appelbaum. I know the Snowden story pretty well, but this is the first that I heard of the possibility that he was interacting with Jake – who already was a fierce critic of the US government and had close ties to WikiLeaks at the time – before he went to Kunia. And if the process by which he became a dissident involved interacting with Jake, then it makes his decision to start a new job at NSA rather than just quit and apply his skills to building privacy tools, far, far more damning. It also makes Snowden's explanation of why he leaked to Laura Poitras and Glenn (his explanation for the latter of which is already thoroughly unconvincing in the book) far more problematic. To be clear, I don't know if he did interact with Jake, but Jake had a very central and public role in using Tor to facilitate the Arab Spring, so the gap raises more questions than answers.

There are other, similar gaps in the narrative. I won't lay them out because the FBI sucks ass at narrative, and there's no reason for me to help them. Suffice it to say, though, that Snowden's own story about when and how he became an ethical dissident hurts his legal story far more than it helps.