

2017

The Soul's Response to Surveillance: A Foucauldian Investigation Into the Economy of Power Created by Contemporary Surveillance Techniques and the Conditioning of the Post 9/11 Subject

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THE SOUL'S RESPONSE TO SURVEILLANCE:
A FOUCALDIAN INVESTIGATION INTO THE ECONOMY OF POWER CREATED
BY CONTEMPORARY SURVEILLANCE TECHNIQUES AND THE
CONDITIONING OF THE POST 9/11 SUBJECT

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An Independent Study Thesis
submitted to the Department of Political Science
at The College of Wooster
March, 2017
in partial fulfillment of the requirements of I.S. Thesis

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ABSTRACT

This work examines the effects of the contemporary American surveillance apparatus and situates these effects within the classical negative liberal tradition. Using Michele Foucault's analysis of disciplinary power, I demonstrate how surveillance techniques, particularly those established post 9/11, affect American subjects. Further, I situate the mechanisms of power operating as a consequence of contemporary American surveillance within the classical liberal tradition. For this analysis, I draw upon negative notions of liberty such as the harm principle established by John Stuart Mill. This entire work reveals what type of power, in a Foucauldian sense, is presently functioning in America as a consequence of surveillance, in addition to determining whether this new regime of power is consistent with the most fundamental notions of American liberty.

ACKNOWLEDGMENTS

This work was only made possible by the contributions of numerous members of the College of Wooster community.

I would like to first thank my advisor, Desiree Weber. Throughout this year, you have guided me through the most rigorous areas of political thought and encouraged me to continue to explore the boundaries of my academic abilities. However, not only did you make me a better student and make this work possible, you have become far more than a professor and independent study advisor to me (and Moot Court coach!). You have become a mentor and friend who I can always reach out to for reflection, guidance, and motivation. Specifically, your tenacity for justice and truth is nothing short of inspirational to me. I will forever appreciate the lessons you have taught me inside and outside of the classroom.

To Mark Weaver, thank you for completely changing my academic outlook and trajectory. From motivating me in Moot Court, despite my countless stumbles at the podium, to answering my most basic questions about political thought, you have increased my confidence and academic drive. Before I met you, I questioned my place in college, however, after meeting and working with you, I wake up every day wanting to learn. I could not have completed a work of this nature without your guidance.

To my second reader, Professor Moskowitz, thank you for providing me guidance on this expansive work and focusing my inquiry. Your advice was indispensable in making my work stronger.

To Professors Bos, Rudisil, and Van Doorn, you have all shaped my education by expanding my academic abilities and helping me realize my professional potential. In addition to furthering my academic pursuits, our experiences outside of the classroom, whether for the national party conventions or for pre-law dinners, have helped me obtain a truly holistic liberal education.

To Professors Burch, Alkemeyer, Garcia, and Barnard, thank you for your unwavering support throughout my tenure as chair of Campus Council. During the most challenging weeks of my Wooster experience, in which I was also writing this work, you all helped me focus my thoughts and emotions. And more importantly, you all reminded me to continue to fight for truth and justice.

To Sabrina, Eric, Emery, and Fritz, thank you for your constant laughter, encouragement, and friendship during my Wooster experience. Together, we experienced the Jackson Day Dinner, extortion from the ODP, the election of Donald Trump, and the wide-ranging chaos of national/campus politics. I am extremely fortunate to have such vibrant friends who can comfort in times of difficulty, reason in times of challenge, and laugh at every moment.

To Austin, thank you for being my intellectual sparing partner and skeptic in chief. We have discussed the themes of this work in our dorm rooms, over basketball, and during protests with Alex Jones in Public Square. The boundaries of my academic interests would be far narrower if I had not met you. I owe the intellectual success of this work to you challenging me every step of the way. I look forward to our future intellectual battles as law students.

To Jordan, thank you for being my “vice chair” and political confidant. Your friendship has been invaluable to me during my senior year. Throughout the year’s peaks and valleys, you were there for me in every capacity, every step of the way. From my Moot Court argument, to political knowledge, to my Campus Council tenure, and now independent study, I would not be half as successful if you were not around. I cannot wait to bring our political abilities (hopefully together!) to law school.

To my loving, incredible parents, thank you for being my constant supporters through every part of my life. Your love and guidance has made me a happier, stronger, and better man. Every conversation and adventure we have had has shaped who I am today. Your willingness to drop anything to help me has influenced my outlook on family and has been instructive for being a loving son. I hope I can one day be half as loving and supporting as you are to me, I love you both.

And finally, to my partner, best friend, and person I cannot wait to spend my life with, Cami. I had no idea when I met you that my life would forever be impacted. You have made me a stronger student, a better debater, a more caring and carefree person, and a fierce opponent. Your absolute ambition, regardless of set backs, inspires me to continue to better myself every day. Everything I have done the last year, including this work, would not have occurred without you by my side. I am blessed to have a partner in crime who exceeds me in every way. I know the achievements of this school year are merely the beginning of our adventures and accomplishments we will share together.

TABLE OF CONTENTS

Abstract.....	i
Acknowledgements.....	ii
Table of Contents.....	iv
Introduction.....	1
Chapter One: Surveillance, the Soul, and the Gentle Way to Punish.....	7
I. The Historic Evolution of Surveillance and Organization.....	7
II. Sovereign Power and the Spectacle of Execution.....	11
III. The Emergence of Discipline and Regulation of the Soul.....	17
IV. The Plague's Chaos and Organization.....	22
V. Disciplinary Power in its Purest Form.....	24
Chapter Two: FISA, PRISM, and GORGON: The Post 9/11 Technologies of	
Discipline.....	27
I. September 11 th and Old Intelligence.....	27
II. Scientia Est Potentia: The Need for Total Awareness.....	31
III. New Cameras and Normalizing Stares.....	38
IV. The Internet of Perfect Visibility and Hierarchical Observation.....	44
V. Centralization, Classification, and the Examination.....	52
VI. Foucault's Chilling Quantified.....	56
Chapter Three: Life, Liberty, and Privacy: Where does Surveillance Fit?.....	58
I. Foucault's Archaeological Historiography.....	58
II. Foucault's Transition to the Genealogical Method.....	59
III. Creating a Definition for Privacy.....	61

IV.	The American Legal Tradition of Privacy.....	61
V.	The Right to be Left Alone.....	63
VI.	Robins, Samoans, and Social Media: What is Privacy's History?.....	65
VII.	A Workable Definition.....	72
VIII.	Negative and Positive Liberty Envisioned by the Founders.....	74
IX.	How can Surveillance Harm.....	81
X.	Concluding Thoughts and Final Words.....	87
	Bibliography.....	89

INTRODUCTION

My father, Jeff Johanning, was the essence of liberty walking down a bustling Cleveland city sidewalk in 1985. He walked where he pleased, interacted with whomever he felt inclined to, and looked at whatever he desired. Walking down the same sidewalk in 2016, I am the essence of constraint. I walk with purpose, I interact only with persons I deem to be free of “concern,” and I prevent any prolonged gaze. Every motion I make is calculated; each step I take is a subconscious effort to maintain a sense of normalcy.

In this scenario, why does my behavior differ from that of my father's? Why do I experience subconscious restrictions that he did not? The answer lies in the conditions surrounding my stroll that were not present in 1985. When I walk down the street, I am aware that unmanned aerial reconnaissance vehicles can watch my every move overhead. When I walk down the street, with my smartphone in hand, I am aware that numerous state agencies have the ability to access my calls, photos, messages, Internet usage, search history, and application usage. When I walk down the street and notice a police officer, I am aware that her body camera is watching my gaze. When I reach my destination, I am aware that there is a camera right above the door, its tight mechanical gaze directly upon me. None of these conditions surrounded my father's stroll in 1985. He was free, whereas I am constrained. I have been conditioned by these surveillance features to be careful about how I walk, with whom I interact, and what I notice.

Unfortunately, this type of experience is all too common in the United States. In recent years, surveillance has proliferated with technological progress and with the new asymmetrical fighting in the post 9/11 War on Terror. The programs, practices, and techniques that have thrived since then create an entirely new state apparatus; I will refer

to this apparatus as the surveillance apparatus. The effects of this apparatus exist regardless of whether the objects of surveillance are aware they are under scrutiny. Objects of surveillance may not be aware of the state sanctioned surveillance focused upon them at each moment, but each subject is aware of a larger pervasive apparatus. With the knowledge that an observant, uninterrupted gaze is constantly watching, each subject will conduct himself or herself in a different way from how they would have without the surveillance apparatus's stare.

However, there was a time where Americans generally believed they were not the objects of surveillance. When Americans imagined surveillance, it was likely in the context of terrorists or people of interest as the object of state surveillance. However, the contemporary American surveillance apparatus is not simply in place to observe the communications emanating from countries known to be terrorist strongholds. Rather, the United States government is attempting to create a regime of surveillance that obtains knowledge from the largest institutions and companies in the world, to the smallest and most intimate areas of personal experience. Additionally, the United States Government does not discriminate when collecting this information, and previously relevant criteria for probable cause of criminality has all but evaporated because of the new scope of surveillance. This shift largely came to light through Edward Snowden, who illuminated that the United States was not just surveiling particular possible foreign criminals, but instead, the United States turned surveillance inward on all of its own citizens.

The release of over a million documents by Snowden revealed that the National Security Administration (NSA) — an organization that is statutorily constrained in conducting foreign intelligence surveillance — used resources to not only target foreign

persons, but also American citizens.¹ The Snowden documents also revealed that Americans are not targeted on an individual 'case-by-case' basis by NSA surveillance, but rather are indiscriminately surveilled. For example, the NSA's BOUNDLESS INFORMANT program collected and stored information related to 1.7 billion emails, phone calls, and other types of communication from United States citizens every day.² Additionally, a PowerPoint presentation regarding a project codenamed Upstream revealed that the NSA indiscriminately draws communications data directly from fiber cables (used for Internet transmissions across the Pacific and Atlantic Oceans) and communications infrastructure.³ However, arguably the most powerful program from the Snowden leaks is XKEYSCORE, a surveillance program that attempts to collect the greatest scope of information on the greatest number of American citizens. XKEYSCORE collects information about individual American computing sessions including, but not limited to, every email address seen by a user, every file name and extension seen by the user, the IP address of the user, every phone number seen by the user, all chat activities seen by the user, and all websites visited by the user.⁴ Altogether, these programs gather as much information as possible instead of narrowing in on particular users or pieces of information. However, it cannot be over-emphasized that the most frightening fact about the information Snowden leaked was that the American government was surveilling their own citizens without any type of probable, or even reasonable, cause of criminality.

¹ Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*, 2015, 99.

² Ibid.

³ Ibid., 108.

⁴ Ibid., 154.

It is important to note that the current perception of the concept of surveillance in the United States is not the awareness of a particular program, such as XKEYSCORE. The information that Snowden leaked was not significant because of the details, but because it demonstrated to the American people that their government is always watching. This perception of surveillance exists beyond the level of consciousness, and beyond the rational thought of understanding XKEYSCORE's capabilities. This knowledge exists at a sub-conscious level. When I walk down that Cleveland street, I do not think about acting "normal" because of one surveillance technique; I am conditioned to act with an understanding that I am always being watched. State surveillance is now an expectation associated with any personal experience. This expectation of surveillance has altered behavior and radically changed society. This reality carries profound significance; Americans now experience life with the expectation of state surveillance, but they never truly acknowledge how this subconscious expectation has affected their actions, conduct, and perceived norms.

The expectations that create a vigilant subject operate at a level inaccessible to personal discourse and thought. In this work, I explore and observe the nature of these expectations and subconscious norms as well as their effects in different contexts. To properly investigate and reveal what effects the apparatus has on entities, a series of questions must be proposed and answered. First, how do surveillance techniques affect exchanges, operations, and norms of power? Second, how do American-specific surveillance techniques condition the citizenry's behavior? And third, how does this conditioning affect American liberty and privacy?

In the first chapter, I begin by exploring the history of disciplinary power, focusing specifically on the evolution of the 18th century western penal system in *Discipline and Punish*. I will then determine the direct effects of the surveillance apparatus on Americans. Only when the direct effects of the object of scrutiny are assessed can the consequences associated with those effects be investigated. Through the implementation of a Foucauldian analysis, it becomes apparent that a direct effect of the surveillance apparatus is an adjustment in the conditions of power. Power in this work will not be constituted as a coercive, concentrated, repressive force possessed by persons or institutions.⁵ Instead, power will be considered “the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization.”⁶ This conceptualization classifies any relationship between entities in a society as power. Power is frequently associated with something ‘held’ such as ‘congressional power.’ However, power is not held; it is exercised through relations at all levels and areas of a society. Therefore, power is not strictly “negative” in the sense that it “excludes, represses, censors...or conceals.”⁷ Power is fundamentally productive, as it produces the conditions of our experience.⁸ This conception of power allows analysis of the surveillance apparatus beyond repressive consequences. By characterizing power as a productive force, I can analyze not just what is lost through a pervasive surveillance apparatus, but also what is produced. Using Foucault, I find that the disciplinary power of

⁵ Michel Foucault, *The history of sexuality. Vol. 2: The use of pleasure*, Reprinted (London: Penguin Books, 1992), 93.

⁶ Ibid.

⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books ed (New York: Vintage Books, 1995), 194.

⁸ Ibid.

the surveillance apparatus conditions the subject's body to transform from disobedient to docile and the subject's soul to evolve from unique to ordinary.

In the second chapter, I will examine how American specific surveillance techniques condition those subjected in the apparatus. I will first analyze the different techniques of surveillance that comprise the American surveillance apparatus and situate these techniques within particular categories. Then, I will match these categories of surveillance to the different mechanisms of power outlined by Foucault in his account of French disciplinary society. This comparison will demonstrate how the effects of the surveillance apparatus mirror those established through disciplinary power. This new disciplinary surveillance order exists because similar to the French penal system, power was rearranged. The change in power's arrangement within the security apparatus created expectations of comportment in behavior, activities, and information of American citizens.

In the third chapter, I will assess how the conditioning undergone by American citizens in the new economy of power affects the practice of democratic principles and liberties. Specifically, I situate the American surveillance apparatus and its disciplinary effects within the classical negative liberal tradition. The liberal tradition I use to analyze the effects of the surveillance apparatus is the harm principle, established by John Stuart Mill in *On Liberty*. Mill's method is the best framework to use because it reflects the negative liberal tradition of American law. Through his analysis, I end concluding that the contemporary American surveillance apparatus is an illegitimate exercise of governmental power.

CHAPTER ONE

Surveillance, the Soul, and the Gentle Way to Punish

In modern vocabulary, surveillance can range in character from a partygoer observing a stranger across the room to a national security analyst examining the emails of a hostile foreign leader. Although neither observation conflicts with a common dictionary's definition of surveillance, it does not properly capture surveillance as it functions as a technique of societal management by a nation-state.⁹ Due to this shortcoming, this project will define surveillance as “the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction.”¹⁰ This form of surveillance is a primary feature of modernity and forms the framework for contemporary disciplinary power.¹¹ In this chapter, I will describe the nature of disciplinary power using the work of Michele Foucault. In tracing the evolution of disciplinary power, I will also describe the effects disciplinary power has on subjects.

I. The Historic Evolution

Although crucial to the development and maintenance of contemporary state systems, surveillance is an ancient practice. Specifically, the practice of espionage, a form of surveillance, can be traced as the catalyst to the 1274 BCE Battle of Kadesh, near

⁹ *The act of watching a person or a place* “Surveillance,” *Cambridge Academic Content Dictionary* (Cambridge University Press), accessed January 22, 2017, <http://dictionary.cambridge.org/us/dictionary/english/surveillance>.

¹⁰ David Lyon, *Surveillance Studies: An Overview* (Cambridge, UK ; Malden, MA: Polity, 2007), 17.

¹¹ Richard V. Ericson and Kevin D. Haggerty, eds., *The New Politics of Surveillance and Visibility*, Green College Thematic Lecture Series (Toronto: University of Toronto Press, 2006), 4.

the contemporary intersection of Israel and Lebanon.¹² Prior to the battle, Muwatalli, King of the Hittite Empire, sent two spies to obtain information about the military mobilization of the Egyptians.¹³ The spies conducted their operations through focused targeting of Egyptian military mobilization and demobilization. However, this surveillance effort was in vain as Ramses, the leader of the Egyptians, was able to capture the two spies and interrogate them. Upon integration of the spies, Ramses found that his mobilization plans were discovered by enemy surveillance, which resulted in the Battle of Kadesh.¹⁴

Despite the fact that this account possesses neither the technique of surveillance that this project will focus on nor the economy of power dispersed through contemporary surveillance, this instance was the first recorded account of surveillance, which ended up giving birth to countless surveillance practices through dozens of centuries. As the ability to organize and simplify society through observation became evident, many modes of observation arose during the pre-modern era, around the 16th century to the 19th century. Kingdoms and states began maximizing surveillance through practices that led to organization, simplification, and legibility of entire realms. These sovereigns may not have directly intended to create early surveillance apparatuses; however, through the creation of permanent last names, the establishment of population registers, the

¹² Aaron Ralby, "Battle of Kadesh, C. 1274 BCE: Clash of Empires," in *Atlas of Military History: An Illustrated Global Survey of Warfare from Antiquity to the Present Day* (UK: Parragon, 2013), 54–55.

¹³ Ibid.

¹⁴ Terry Crowley, *The Enemy within: A History of Spies, Spymasters and Espionage* (Oxford: Osprey Pub., 2008), 17.

standardization of language, and the design of cities, the pre-modern state began to collect and organize information on their population¹⁵

These newfound developments of administrative technologies and the build-up of social knowledge caused the modern state to develop the ability to “organize an entire society in ways that only the barracks and monetary system had been organized before.”¹⁶ This new regime of legibility could be demonstrated through city development during the modern age. Between 1853 and 1869 French elites reimagined Paris through a new public works program; in which new streets and infrastructure would be established.¹⁷ During this period of rapid construction, the roads of France changed from complicated, curved, and disparate to organized, similar, straight and legible (see Figure 1.1).¹⁸

¹⁵ James C. Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed*, Nachdr., Yale Agrarian Studies (New Haven, Conn.: Yale Univ. Press, 2008), 2.

¹⁶ Ibid., 378n11.

¹⁷ Ibid., 59.

¹⁸ Ibid., 60–61.

Map of Paris, 1870, Showing the Principal New Streets Built Between 1850 and 1870¹⁹

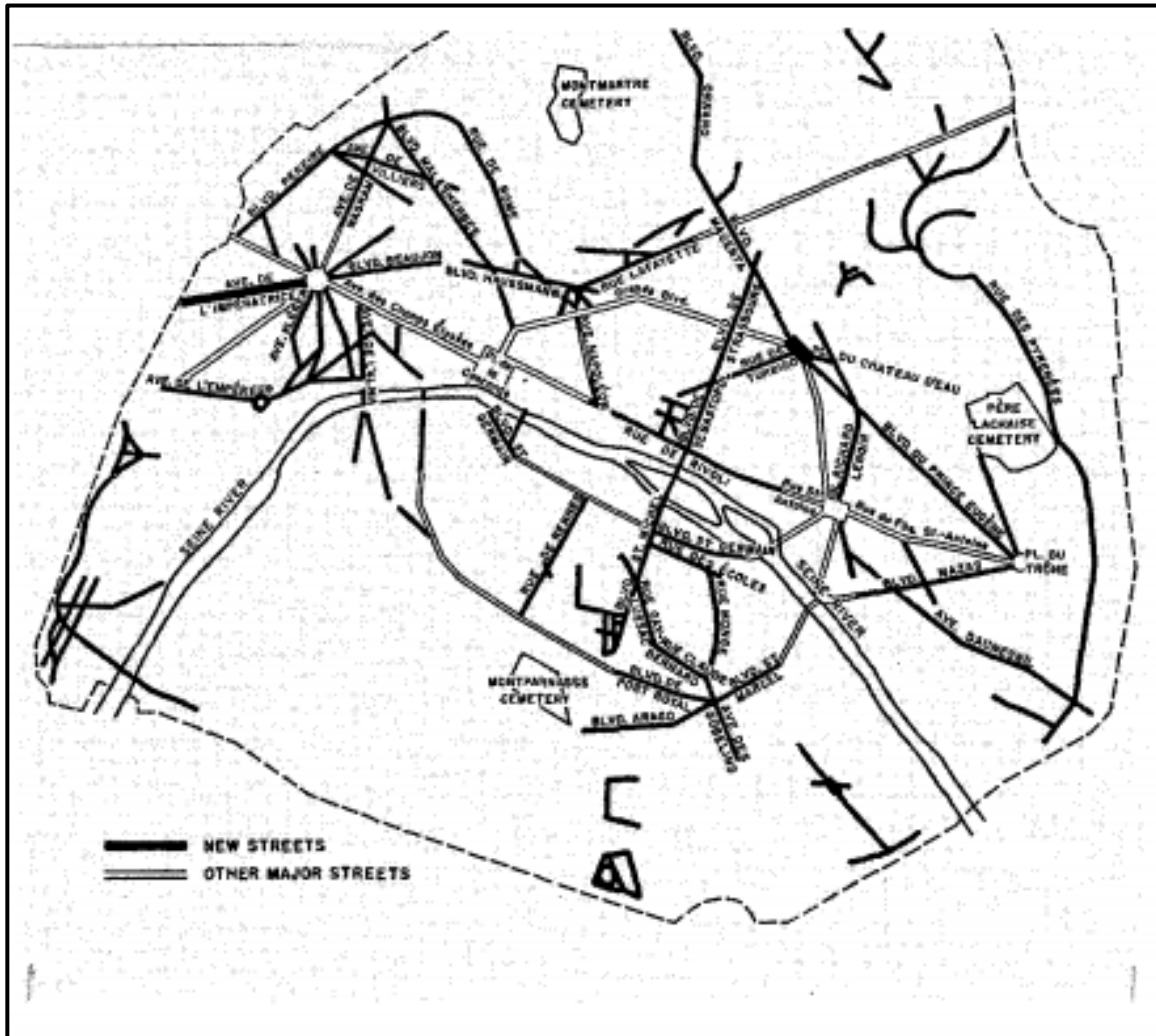


Figure 1.1: The major streets built before the project were largely curved, meandering, and created around the natural bends of Paris' organically developed community. The streets that were built during the new project were linear and organized. This version of community development did not account for the natural lines of the community; it only focused to establish a more legible, organized city.

¹⁹ Ibid., 60.

A new physical order of visibility was created when the map of the city became organized and centralized. The leaders of France gained the ability to observe with greater ease, now needing only a quick gaze to observe entire communities. Greater law enforcement mobility was also enjoyed, which allowed any type of insurgency to face quick and decisive defeat.²⁰ Although this type of organization did not apply to every corner of French life, it was a significant step in creating a legible, non-explicit surveillance society in France and many other states. This form of city planning and architecture spread around the globe and allowed many states to wield greater observational capabilities.²¹

Through city planning, name registries, population registers and other techniques of organization, the state created the legal, societal, and technological groundwork to establish the contemporary surveillance apparatus. Surveillance grew through the modern state; however, no one would predict the explosion of surveillance measures in contemporary states. Growing in step with increased populous expectations of safety only exacerbated this explosion. The reasons for this proliferation are multidimensional and will be explored in chapter 3. However, prior to understanding the justifications for surveillance and the exact techniques employed by contemporary states, it is important to first explore surveillance and its relation to power, as this exploration will reveal the consequences of surveillance on the individual and on society at large.

II. Sovereign Power and the Spectacle of Execution

Surveillance in the modern nation state, and later in contemporary states, functioned as an expression of historical and cultural configurations of power.

²⁰ Ibid., 59–61.

²¹ Ibid., 42, 58, 106, 125.

Notwithstanding administrative, political, and policy shifts within states, there was a near constant hunger from the state to increase its surveillance capacity and efficiency. As surveillance capacities expanded, the state produced and retained more knowledge. This collection of knowledge reconfigured the arrangement of power in these societies. This power should not be thought of as regulations a sovereign can rightfully impose on a citizen, class or institution, but instead as “the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization.”²²

This conception of power has been a primary theme throughout French philosopher and social theorist, Michele Foucault's writings, and serves to separate the antiquated notion of power as a structure that can be possessed or as “a group of institutions that ensures subservience to the state.”²³ In elucidating misconceptions of power, Foucault dramatically expands the scope of what qualifies as power. Under this conception, power constitutes every relationship between two or more entities. Foucault sought to understand the genealogy of power that exists in the world, a genealogy that yielded three forms of power: sovereign power, disciplinary power, and biopower. Both sovereign and disciplinary power were the focus of Foucault's pioneering book on disciplinary power, *Discipline and Punish*. The book studies the development of the French (and thereby the general Western) penal system through the 18th and 19th century. In performing this examination, Foucault's methodology does not encourage a facial examination of the system, as no genealogy should take knowledge of the past as truth. Foucault, through rigorous historical examination of the Western penal system, describes

²² Foucault, *The history of sexuality. Vol. 2*, 92.

²³ Michel Foucault, James D. Faubion, and Michel Foucault, *Power*, Essential Works of Foucault 1954-1984, Michel Foucault ; Vol. 3 (New York: New Press, 2000), 340; Foucault, *The history of sexuality. Vol. 2*, 92.

social and political forces that function in the modern state. The application of these mechanisms extends far outside of the French penal system and can be used to understand other forms of disciplinary power.²⁴

Through dissecting the origins of disciplinary power, Foucault explains how power in both the penal system and larger society is diffuse, non-obvious, and has evolved from simple sovereign power to a regime of societal order that punishes and disciplines the subjects it controls. Although disciplinary power is the form of power presently permeating through society, it is not where power began. To trace the beginning of disciplinary power, Foucault turns to a form of power that preceded disciplinary power — sovereign power. Sovereign power in the era of monarchs, kings, and princes uses techniques of physical punishment to ensure absolute obedience of the law to the central authority figure of a sovereign. This mechanism of power is demonstrated within the opening paragraphs of *Discipline and Punish*. Robert Francois Damiens, a French domestic servant, attempted to assassinate King Louis XV of France in 1757.²⁵ Upon conviction of regicide, Damiens was sentenced to death in the French penal system. The technique used to take Damiens' life demonstrated the unwavering, absolute power of King Louis. Damiens' limbs were chained and pulled apart concurrently in a packed public square, allowing an entire city to view the spectacle of slaughter. After his limbs were severed, only his head and torso lied bare on the ground. Immediately after the limbs were severed, his torso was nailed to a stake and burnt.²⁶ Foucault's gruesome account of Damiens' execution illuminates how juridical power operated during the ages

²⁴ Foucault, *The history of sexuality. Vol. 2*, 92.

²⁵ Ellen Judy Wilson and Peter Hanns Reill, *Encyclopedia of the Enlightenment*, Rev. ed (New York: Facts On File, Inc, 2004), 138.

²⁶ Foucault, *Discipline and Punish*, 3–5.

of monarchs, kings, and princes. The power was top-down, localized to a particular body, and relied upon a public declaration of truth.

The sovereign primarily relied upon a public declaration of truth because it justified and legitimized his or her decision to punish and further enforced their claim as a just ruler. Both execution and torture were public during this period. These ceremonies' primary functions were to establish truth about the criminal. The ceremonial procedure is directed at having the accused "attesting to the truth of what he had been charged with," by using the accused's body as an object.²⁷ Such public spectacles also justified the judicial torture work conducted privately, as such public torture often provoked public confession as the accused sought to drag out their existence before execution. Often times there was a reenactment of the crime that involved situating the torture at the location of the crime or giving the criminal the implement they committed the crime with. Such visuals brought truth and justification to the punishment, only further legitimizing the sovereign.

Foucault does not exclusively constrain the public execution to a judicial technique; he also considers the act a political ritual.²⁸ Situated within a monarchy, execution is used as a "juridical-political function. It is a ceremonial by which the momentarily injured sovereignty is reconstituted."²⁹ A crime against the state inherently challenges the power of a monarch and the order of his state. When a public execution is ordered and performed, it is a symbol to the inhabitants of a sovereign that the integrity of the sovereign has been restored by the monarch. Foucault intentionally describes the

²⁷ Ibid., 43.

²⁸ Ibid., 47.

²⁹ Ibid., 48.

gruesomeness contained within the public execution, as the horror of the executions was deemed necessary to demonstrate the violence of the crime committed by the criminal, another way through which the “truth” of their crime was revealed to the public.

The sovereign's objectives in punishing criminals in public was not fulfilled in the latter half of the 18th century, as the audience of the public spectacles did not behave consistent with the expectations of the monarch. Attitudes about punishment moved from acceptance to rejection because of the audience and their reactions to the demonstration of absolute power. The audience is necessary to fulfill the purpose of the public execution. However, there was little to no instruction as to how the crowd watching the execution ought to conduct itself. Crowds often times attempted to free prisoners, and it became commonplace for crowds to sympathize with the criminal. This sympathy would often come through hearing the criminal's last words, which normally consisted of questioning or rejecting the sovereign's legitimacy to sentence them to death. This critique about the institutions of power in the state ran contrary to the intended purpose of such executions, as it did not demonstrate the sovereign's dominance over subjects. This critique caused the populous to begin to resist the authority of the sovereign. The final words of the condemned went on to further create a literature movement that changed how subjects viewed crime. This movement gave rise to, “popular illegality,” in which crime was glorified as a fine art.³⁰ Instead of focusing on those being tortured or executed, the focus turned to the struggle between the state and the penal system. This

³⁰ Ibid., 68.

clash led to a more sophisticated, intellectual public discussion of the sovereign's power to punish.³¹

This shift in public resentment of vengeful punishments caused the people of France to revolt against torture and executions.³² This attitude transformation was not the result of “positive knowledge ...opposed to the barbarity of public executions.”³³ It was instead a shift in belief over the legitimate exercise of sovereign power. The reformers of the 18th century believed that punishment should not be about exercising power by taking revenge through violence, instead, “criminal justice should simply punish.”³⁴ The reformers sought punishment that served a function for society, not just for the sovereign who wants to demonstrate total authority. Such a shift in the popularity and effectiveness of executions necessitated a new form of punishment.

The reformers believed that man is where state authority should stop, proclaiming punishment must be measured by its “humanity.”³⁵ However, Foucault does not take this assertion at face value and upon inquiring into principles of humanity during the time period, he reveals that such a meaning is absent.³⁶ Therefore, if the type of punishment changed, but the notion of humanity did not, Foucault concludes that other factors must have changed. These factors include who determines the nature of particular punishments and to what end the punishment is attempting to serve. With this set of societal

³¹ Ibid., 69.

³² Ibid., 73.

³³ Ibid., 74.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

conditions, it becomes clear why public executions at the discretion of one man were no longer desired by society.³⁷

III. The Emergence of Disciplinary Power and Regulation of the Soul

Turning to the late 18th century, the new economy and technology of the power to punish had fundamentally changed to rely upon contract and rights claims. Each member of the society, by virtue of belonging to the society, contracts into and thereby accepts to be bound by all laws. Thus, members have autonomy and value in and of themselves. They are not possessed by a sovereign, but rather held accountable by themselves and other society members. It follows that the acceptable punishments are prescribed by the members and enforced by the state. This change in prescriber altered the social optics through which all issues of the state were viewed; as a result, the prevailing notion of criminality was the following: if the criminal breaks one of the contracts they have implicitly accepted by being a member of the society, they become the enemy of that society and its members. This shift in who possesses the right to punish indicates that society moved from vengeance on the part of the sovereign to the general defense of society, more specifically, being what is best for that society.³⁸

In this society, punishment for crimes citizens commit must be determined by what type of effect the violation has on the social order. In doing so, the juridical system does not scrutinize the previous infringement of laws, but instead looks to the future, predicting the likelihood of future disorder and punishing “exactly enough to avoid repetition.”³⁹ However, avoiding repetition of the crime was not the only goal, the new

³⁷ Ibid., 74–75.

³⁸ Ibid., 90.

³⁹ Ibid., 93.

techniques of punishment sought to instruct the entire populous on appropriate conduct, without the brutal spectacle of the scaffold. This new system relied on both having an exhaustive legal code, ensuring the public was aware of those codes and enforcing those laws similarly on all people. What this new legal regime created was a method of punishment in which an observer need not be present at the punishment in order to understand that punishment will occur upon the person breaking a law. If the punishment is administered, all persons in the society will know what punishment follows from a particular crime; therefore, the scaffold and public spectacle of punishment becomes archaic. This new punishment allowed the sovereign to reacquire the power to punish they previously held.

The purpose of this new type of punishment was to provide a disincentive “that robs forever the idea of a crime of any attraction.”⁴⁰ This purpose is the essence of a deterrent; one is aware of the consequences of committing a particular crime and the cost of committing the crime is designed to make abstention the more attractive option, which leads the criminal to not commit the crime. The implementation of this new version of punishment, relying upon an expected, non-public deterrence, marks the point at which state power to punish evolved from sovereign power to disciplinary power. Instead of exacting revenge on the body of the convict, the state now seeks to correct the ‘soul’ of the convict. The convict no longer has their body changed for revenge, instead the convict’s idea and conception of the convict’s self changes to ensure collective order and security in society.

⁴⁰ Ibid., 104.

The first step to changing a convict's soul through discipline is by making the convict's body docile. Foucault states, "A body is docile that may be subjected, used, transformed and improved."⁴¹ The docile body is referred to to provide a sharp contrast to the body of Robert Damiens examined by Foucault. Damiens' body was used for theatrics, to make his crime a public deterrence, to legitimize practice through confession, to reflect the violence of his original crime onto his body, and to have the sovereign take revenge upon his body.⁴² However, now, the body does not hold such a purpose. Foucault identifies this shift in the purpose of use of the body in techniques of punishment. Through discipline, each body is general; however, for sovereign punishment, the body was required to retain its individuality. To accomplish the sovereign's desired purpose for punishing Damiens, his body must be thought of as unique, one that simply did not fit within the sovereign and was eliminated. In shifting from torture to methods of control and coercion on the body, the importance of the convict's body remains relevant for different reasons. The control exerted by the new techniques of discipline included coercive tactics to influence the "movements, gestures, attitudes, rapidity" of the convict.⁴³ The use of new techniques that coerce the convict's body to behave differently than it previously did creates what Foucault considers a docile body. Consequentially, with the body docile, the soul of the convict can be scrutinized and coerced.

⁴¹ Ibid., 136.

⁴² Ibid., 55.

⁴³ Ibid., 137.

The new techniques exacted on convicts demonstrates that power is now applied as “an uninterrupted, constant coercion.”⁴⁴ Instead of scrutiny and punishment being placed on a particular action of the convict, the convict now expects uninterrupted, constant scrutiny on not just a particular action, but of everything leading up to that action and all behavior thereafter. This omnipresent surveillance is established and understood by the convict when he is subjected to precise regulations of time, space and movement. Although the techniques that allow constant coercion are related to the creation and regulation of a docile body, the effects of perpetual surveillance are experienced by the soul.⁴⁵

This disciplinary power operates via three specific functions: hierarchical observation, normalizing judgment, and examination.⁴⁶ First, during the evolution from physical punishment to discipline and punishment in contemporary punitive legal methods, observation as a technique also shifted. Public observation of torture was a mechanism that expected observers to recognize the horror of having committed a crime and change their behavior. Whereas legal sanctions shifted towards discipline, the function of observation changed: public observation of torture was replaced with constant hierarchical observation by other citizens and the state itself. This reformation of observation had the intent to take attention away the body as the site of punishment and rather affect an individual's soul through constant non-physical coercion (after the body is rendered docile). When subjects are completely visible, it allows for constant observation by a multiplicity of people, most importantly state actors. The guarantee of

⁴⁴ Ibid.

⁴⁵ Ibid., 16–21; *ibid.*, 121–27.

⁴⁶ Foucault, *Discipline and Punish*, 170.

visibility ensures compliance from subjects, as any conduct outside the norm will be corrected through punishment.⁴⁷

Normalization is a consequence of creating a disciplinary apparatus. The apparatus measures individuals in quantitative terms against a standard. This consequentially places individuals into a hierarchy, traces individual abnormality, and instructs individuals to match their behavior to an expected norm.⁴⁸ The normalization that occurs from discipline, that relates an individual to other persons, stands in sharp contrast to juridical penalty, which relates each criminal to a corpus of laws.⁴⁹ The categories created when disciplinary tactics function are normal and abnormal, measuring persons by individual differences relative to a standard. Instead of judging actions on the basis of value or merit, actions were measured against other actions, establishing subjects in and out of norms. These norms and expectations of normalizing judgment never disappear; they follow the subject in whatever they do. For example, standardized tests are a formal method for ranking students. This is a method of normalized judgment as students are ranked relative to other students' capabilities. However, the standardized test is not the only normalizing judgment the student's experience because mechanisms of power are constantly surrounding humans. For example, Instagram users gain certain followers and follow certain people in the hope of keeping their number of followers higher than their number of follows, to appear well liked. This expectation establishes categories of normal and abnormal among these users. Similar to hierarchical observations inescapability, the

⁴⁷ Ibid., 172.

⁴⁸ Ibid., 183.

⁴⁹ Ibid.

normalizing judgment forever creates expectations to strive toward and norms to stay within.⁵⁰

Examination is the combination of hierarchical observation and normalizing judgment; it is a normalizing gaze that qualifies, classifies, and punishes: Foucault states, “the examination transformed the economy of visibility into the exercise of power.”⁵¹ Instead of subjects observing power through physical punishment, power is now exercised through invisible discipline. In this new disciplinary system, the subject always knows they are being observed and assessed; Foucault states, “it is the fact of being constantly seen, of being able always to be seen, that maintains the disciplined individual in his subjection.”⁵² This constant surveillance establishes a new disciplinary economy of power by creating new conduct and behavior of convicts, not just limiting behavior. The new economy of power established through examination will subconsciously coerce an individual to change their behavior to meet a perceived expectation on the abnormal/normal spectrum. When there is an understanding of constant examination, a subject will remain disciplined and comport their behavior, attempting to move into the “normal” class. Foucault believes the creation of normal and abnormal classes through “documentation” is designed to fix an individual. As a person becomes more abnormal, the more likely this person becomes classified as an “individual” the state should discipline and punish.

IV. The Plague's Chaos and Organization

⁵⁰ Gary Gutting, *Foucault: A Very Short Introduction*, A Very Short Introduction (Oxford, UK ; New York: Oxford University Press, 2005), 84.

⁵¹ Foucault, *Discipline and Punish*, 184, 187.

⁵² *Ibid.*, 187.

Societal and political practices instituted in response to the plague near the end of the 18th century best reveal the ways in which power operated in a disciplined community. Inspection and observation proliferate, as “prompt obedience of the absolute authority of the magistrates” becomes an expectation.⁵³ To ensure compliance with laws and practices established in response to the outbreak of the plague, the state exercised its power to surveil through visual observation and collection of individual data through registration. This process of registration and constant visual surveillance produces “a continuous hierarchical figure, in which each individual is constantly located, examined and distributed among the living beings, the sick and dead.”⁵⁴ The positioning of each individual on a spectrum of propensity to contract and spread the plague, which created categories of subjects.⁵⁵ Such a creation of categories had productive effects that subconsciously changed the behavior of both those with and without the sickness. When subjects fell outside of norms, they internalized this abnormality and attempted to self-correct towards the median out of fear of punishment. In creating a regime that continuously surveils all persons during this period, the techniques used to surveil necessarily imply a general suspicion of all. Any sense of innocence prior to establishment of truth is disregarded, as there is a threat to the state.

The plague in England and France represented a loss of order, as it “stands for all forms of confusion and disorder.”⁵⁶ The confusion and disorder associated with an illness that sweeps a nation is constant, as there is an uncertainty about who the next victim will

⁵³ Ibid., 196.

⁵⁴ Ibid., 197.

⁵⁵ Everything that may be observed during the course of the visits – deaths, illnesses, complaints, irregularities- is noted down and transmitted to the intendants and magistrates.

⁵⁶ Foucault, *Discipline and Punish*, 199.

be, and thereby future perpetrators, will be. In establishing techniques of surveillance to constantly observe an entire population, the state sought to create order in the face of uncertainty, confusion, and general chaos. Their attempts to create order may have had success, but such techniques demonstrate the “extensive power that bears in a distinct way over all individual bodies.”⁵⁷ The organization of power during this crisis outlines the mechanisms for disciplinary power that have been used through the modern era and into the present.

V. Disciplinary Power in its Purest Form

The purest culmination of these disciplinary measures is the Panopticon. Foucault's model of the Panopticon precisely depicts how modern disciplinary power operates. By merely observing the Panopticon's design, one can visualize the processes of observation and examination that occur in the modern prison (See Figure 1.2).

⁵⁷ Ibid., 198.

An Illinois State Penitentiary designed from the Panopticon⁵⁸

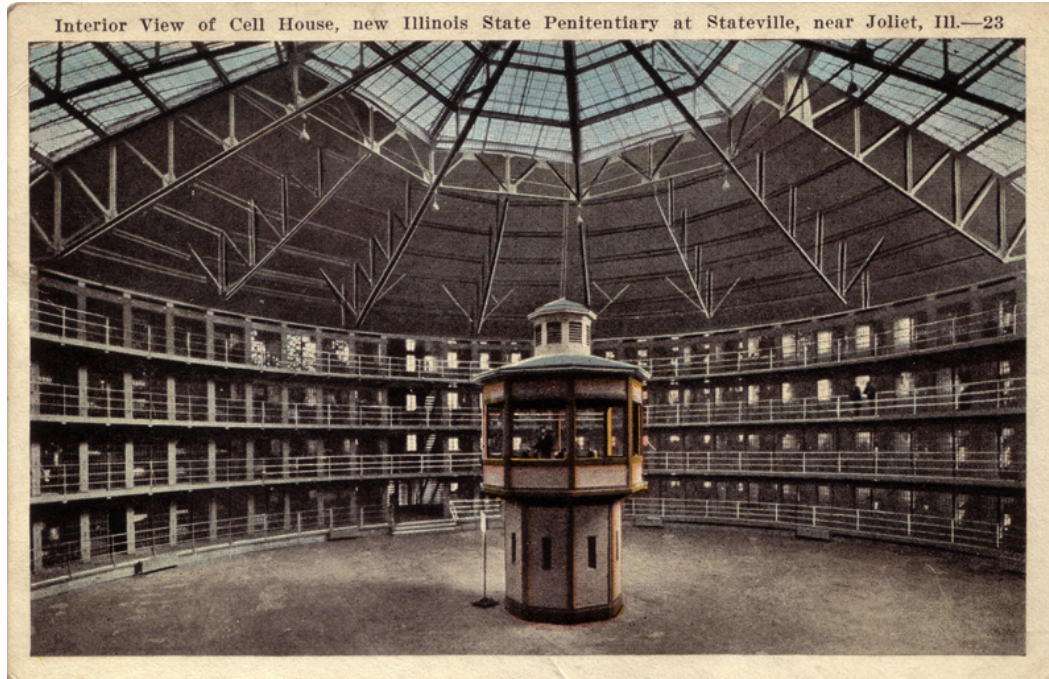


Figure 1.2: This is the design of the Panopticon: the warden tower is circular, allowing for immediate surveillance of any cell instantly. A light above the tower fills the cells with incredibly bright light to ensure that no prisoner knows when a warden is looking into their cell. However, the warden has full visibility of the entirety of each cell. In this design, prisoners face the expectation of constant surveillance.

The major effect of the Panopticon as outlined by Foucault is “to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.”⁵⁹ The automatic functioning of power ensures obedience through discipline. There is absolute obedience because no prisoner in the Panopticon can escape the disciplinary relationship of power. When Jeremy Bentham designed the Panopticon, he had a desire for efficiency.⁶⁰ The Panopticon provides the most efficient economy of power for the state to control its subjects. Because a prisoner cannot observe whether a

⁵⁸ *Panopticon*, n.d., <http://scalar.usc.edu/works/internetandidentity/media/panopticon.jpg>.

⁵⁹ Foucault, *Discipline and Punish*, 201.

⁶⁰ *Ibid.*, 203–7.

warden is watching them from the tower, there is a constant expectation of surveillance, which limits opportunities for disobedience. Furthermore, removing all prisoners from contact with other prisoners maximizes the efficiency of power in the Panopticon. If a prisoner can only observe their own conduct, they internalize the perceived norms expected of the wardens and consequentially align their behavior to fit those expectations out of fear of discipline. This disciplinary architecture ensures not only that wrongful behavior is corrected; it also promotes a constant status quo that limits the possibilities of prisoner conduct.

The sovereign's power to punish through punishment of the body is largely eliminated with the inauguration of the modern prison (with the Panopticon being the most efficient form of a prison). As well as brutality on the body, the crowd is eliminated; both of these features are necessary for the sovereign to exact revenge on a body. Now, the body is coerced, not publicly brutalized, as the Panopticon functions to prevent each individual prisoner from behaving in a way undesirable by the state and also to produce new behavior of the prisoner to meet state expectations. Punitive techniques were previously only mechanisms of punishment, but when the modern prison was born, both the mechanisms of discipline and punishment were integrated to create and reform the souls of subjects.

CHAPTER TWO

FISA, PRISM, and GORGON: The Post 9/11 Technologies of Discipline

The disciplinary power that developed in modern Western states through the 19th and 20th century expanded beyond the prison, extending into nearly every innovation and development within the modern state. Disciplinary power was systematized and exercised through novel techniques that required subjects to adhere to expectations, norms, and customs through tacit coercion. Each interaction a subject has with the state, or with any other entity within the sovereign for that matter, is enmeshed in a relationship of power. In this chapter, I will demonstrate how new relations of power were created by the modern American surveillance apparatus, which are consistent with the mechanisms of power Foucault identified in *Discipline and Punish*.

Although built on freedom, the United States is not immune to the new disciplinary order. Throughout its development into international hegemony post World War II, the United States has established and arranged a collection of disciplinary techniques that operate on the United States citizenry and extends beyond America across the globe. The world has experienced the evolution of disciplinary power through developments in prisons, classrooms, courts, apartments, offices, and entertainment stadiums. However, the disciplinary forces exerted on populations by the aforementioned constructions of power are microscopic in comparison to those that would follow from the profound collision between inconceivable technological advancement and one of America's greatest tragedies.

I. September 11th and Old Intelligence

As Americans began their morning on the mild, sunny day of September 11, 2001, they had no inkling that their lives, and the lives of billions of others, would be forever changed. At 7:45 A.M., Mohamed Atta, Abdul Aziz al Omari, Marwan al Shehhi, Wail al Sheri, and Weleed al Sheri boarded American Airlines Flight 11. Once aboard the flight, Wail al Sheri and Waleed al Sheri stabbed two flight attendants preparing for cabin service. Soon after, they covered the cabin in mace, resulting in confusion, and allowing the five men to assume control of the plane. As passengers in first class scrambled and screamed, two flight attendants conveyed to air traffic control what was happening in the cabin. Amidst the chaos, a passenger's throat was sliced and a flight attendant was put on oxygen, with the rear cabin being generally unaware a hijacking was being executed. The horrible revelation of the terrorists' intent was not realized until flight attendant, Nydia Gonzalez, relayed to air traffic control, "we are fling low. We are flying very, very low... Oh my God we are way too low."¹

At 8:46 AM American Airlines Flight 11 crashed into the World Trade Center's North Tower, immediately killing all those on board the flight and 1402 people in the tower. Nobody in the United States, even top intelligence officials, expected a commercial airliner to be turned into a guided missile. At 9:03 A.M., another airliner, United Flight 175, struck the World Trade Center's South Tower. The impact took the lives of all 60 passengers on board, in addition to over 600 workers in the South Tower. Soon after, American Airlines Flight 77 departed from Washington Dulles airport and immediately after reaching its cruising altitude, was hijacked by 5 men. After wrestling over the controls, the hijackers disengaged autopilot, guided the plane off its flight path to

¹ The National Commission on Terrorist Attacks, "The 9/11 Commission Report," July 26, 2004, 1–10, <http://avalon.law.yale.edu/sept11/911Report.pdf>.

Los Angeles, performed a 330-degree turn, and headed directly towards Washington, DC. At 9:37 A.M., American Airlines Flight 77 barreled down towards the Earth at 530 miles per hour, colliding with the Pentagon. Upon impact, the 64 souls on board perished, in addition to 125 military personnel and contractors inside the Pentagon.² Shortly after the attacks on the Pentagon and the World Trade Center, another plane was hijacked mid-air. United Flight 93 was 20 minutes flying time from the U.S. capital, where the hijackers had the intent to fly the plane into either the Capitol Building or the White House. However, this suicide mission was not successful because of the alert, unarmed, and heroic passengers of Flight 93 who assaulted the cockpit and forced the hijackers to crash land in a field in Shanksville, Pennsylvania.³

In total, on one day, around 3000 innocent, American lives were lost. Such an unexpected, enormous loss created a sense of cohesion in the nation, and an absolute despisement toward the perpetrators. The entity subject to such hatred was Al-Qaeda and Osama Bin Laden, the organization and mastermind behind the carnage in Manhattan, the capital, and Shanksville. Al Qaeda is a loosely bound Islamist terrorist organization spread across the world. The group's simplistic execution of this elaborate attack confounded the American public and American intelligence officials.

This incident proved that the American intelligence apparatus was inadequately equipped to predict and thwart terroristic behavior. Furthermore, United States counterterrorism also failed to administer an ad-hoc response, as no command and control structure was in place for a hijacking that turns a plane into a guided missile. There are only two publicly known intelligence reports prior to 9/11 that suggested an

² Ibid.

³ Ibid., 10–14.

attack was possible: the first is the President's Daily Brief (PDB) on August 6, 2001, and the second is the Phoenix Memo. The PDB is a brief of complied intelligence and national security information from various US intelligence agencies given to the President. These briefs are classified and few have ever been released or leaked to the public. One brief declassified pursuant to the 9/11 Commission's directives was the PDB prepared for President George W. Bush on August, 6, 2011, 36 days prior to 9/11.⁴ This briefing's title is "Bin Laden Determined To Strike in US." The brief proceeds by stating that "FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York."⁵ However, this statement seemed to be less an alert to George W. Bush that an attack was imminent, but rather old intelligence (from 1998) that indicated that a threat potentially existed.⁶

The other official memoranda that provided some vague intelligence about the nature of the 9/11 attacks is the Phoenix Memo, a letter sent to the FBI in July 2001 by FBI special agent Kenneth Williams who was monitoring individuals of 'special interest.' When observing these persons and their conduct, Williams noted that an "inordinate" number of these persons of interest were attending aviation universities and colleges in Arizona. He believed this could lead to Al-Qaeda executing some type of hijacking, but

⁴ Ibid., 254.

⁵ "Bin Laden Determined to Strike in US: PDB from 6 August 2001," August 6, 2001, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB116/pdb8-6-2001.pdf>.

⁶ Malcolm McConnell and Richard Myers, *Eyes on the Horizon: Serving on the Front Lines of National Security* (New York: Pocket Books, 2014), 186, <http://rbdigital.oneclickdigital.com>; Antonia Felix, *Condi: The Condoleezza Rice Story*, New updated ed (New York: Newmarket Press, 2005), 228.

the FBI failed to act on the memo.⁷ When asked about the memorandum after the 9/11 attacks, the director the FBI, Robert Mueller, claimed that failure to act was due to “deficits in the Bureau’s analytical capabilities.”⁸ However, considering the only pieces of intelligence before the attacks were two memos loosely connected Al-Qaeda and hijacking, there was an obvious, enormous gap in United States intelligence infrastructure, capabilities, and execution.

II. Scientia Est Potentia: The Need for Total Awareness

The recognition of this inadequate intelligence and military apparatus ushered in a new global era that would change technology, warfare, geopolitical relations, societal interactions, and the fundamental governing of the United States. George W. Bush announced this era on September 20, 2001 to a joint session of Congress as “our war on terror.”⁹ This new war challenged previous notions of war against foreign adversaries, as the commander in chief instructed us: “It will not end until every terrorist group of global reach has been found, stopped, and defeated.”¹⁰

In order to accomplish this new task, the United States government under George W. Bush searched for new methods, techniques, and technologies to defeat every terrorist group. The new approaches to defeating terrorism were often novel, as new powers were claimed by the Office of the President in addition to the intelligence and justice agencies

⁷ David Johnston and Don Van Natta Jr, “TRACES OF TERROR: THE F.B.I. MEMO; ASHCROFT LEARNED OF AGENT’S ALERT JUST AFTER 9/11,” *The New York Times*, May 21, 2002, <http://www.nytimes.com/2002/05/21/us/traces-of-terror-the-fbi-memo-ashcroft-learned-of-agent-s-alert-just-after-9-11.html>.

⁸ Ibid.

⁹ “President Declares ‘Freedom at War with Fear,’” accessed February 8, 2017, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

¹⁰ Ibid.

under that office.¹¹ This new regime of top-down authority allowed for policies that may have been legally questionable in a pre 9/11 world to be enacted without any vote from Congress or resistance from the Judicial Branch.¹² It is important to note that George W. Bush and his office did not seize unilateral authority through force or coercion. The American people demanding action on terrorism immediately after the attacks provided him with arguably the most obvious mandate in American political history — a 90% approval rating for over a month.¹³ Such approval by the populace opened immense possibilities to counter the intimidating threat terrorism posed.

This new regime of unilateral counter-terrorism legislation inaugurated a new era of surveillance and further proliferated disciplinary techniques and technologies at an uncanny pace. The strategy for stopping terrorism under the post 9/11 Bush administration was to obtain intelligence before an attack to thwart such attempts. In order to deliver on this strategy, Rear Admiral John Poindexter proposed a new intelligence regime to the executive branch, an era of Total Information Awareness (TIA). TIA was a direct response to the flaws in American intelligence present on 9/11, as the purpose of the program was to “detect, classify and identify foreign terrorists – and decipher their plans – and thereby enable the U.S. to take timely action to successfully

¹¹ Jordan J Paust, “Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,” *Notre Dame L. Rev.* 79 (2003): 1335.

¹² *Ibid.*, 11; John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, 1. paperback ed (Chicago, Ill.: Univ. of Chicago Pr, 2006), 211–13; Derek Jinks, “September 11 and the Laws of War,” *Yale Journal of International Law* 28, no. 1 (2003): 3.

¹³ Gallup Inc, “Presidential Approval Ratings -- George W. Bush,” *Gallup.com*, accessed February 22, 2017, <http://www.gallup.com/poll/116500/Presidential-Approval-Ratings-George-Bush.aspx>.

preempt and defeat terrorist acts.”¹⁴ This program networked a number of old and new techniques together, centralizing data about any surveilled person. Even though there was some outcry from the media related to the creation of a surveillance state, the political climate was frenzied after the 9/11 attacks and greater federal authority was exercised.¹⁵ This climate led to the establishment of the TIA project, funded through a new Information Awareness Office (IAO) within the Defense Advanced Research Projects Agency (DARPA).¹⁶

TIA was not a single technique designed to detect, classify, identify, and thwart. Rather, the program was an assembly of both old and new visual surveillance programs, intelligence missions, bio-surveillance programs, data mining techniques, and all other technology that could help locate possible terrorists.¹⁷ The intersection of these techniques was aimed at establishing complete collaboration between American entities that possessed surveillance capabilities. This purpose was not merely to observe terrorism suspects, but to blanket the world in a cloak of state observation and surveillance, best exemplified by the seal of the IAO (see Figure 2.1).

¹⁴ “TIA Systems,” October 3, 2002,

<https://web.archive.org/web/20021003053651/http://www.darpa.mil/iao/tiasystems.htm>.

¹⁵ John Markoff, “Chief Takes Over at Agency To Thwart Attacks on U.S.,” *The New York Times*, February 13, 2002, <http://www.nytimes.com/2002/02/13/us/chief-takes-over-at-agency-to-thwart-attacks-on-us.html>; Paust, “Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,” 11.

¹⁶ John Poindexter, “OVERVIEW OF THE INFORMATION AWARENESS OFFICE” (DARPA Tech 2002 Conference, Anaheim, California, August 2, 2002), <https://fas.org/irp/agency/dod/poindexter.html>.

¹⁷ Ibid.

Information Awareness Office Seal¹⁸

Figure 2.1: The goals of the IAO are reflected in this seal. *Scientia est potentia* is a Latin aphorism that means “knowledge is power.” The IAO saw their new surveillance techniques and practices as an effort to secure vital knowledge. This knowledge is not narrow in scope. By fixating the Eye of Providence on the globe, the IAO is implying that any knowledge obtained about world will provide more power. Under the most benign interpretation of this seal, the IAO wants to obtain knowledge through surveillance, which will create power mechanisms to stop dangerous illegality. However, “knowledge is power” can also imply that the more knowledge obtained by a surveyor, in this case the United States, the greater their power, in both a domestic context and geopolitical context. This seal also indicates that the surveillance undertaken by the United States is inhuman, even divine as the Eye of Providence on top of the pyramid represents the eye of God.¹⁹ This symbol is a signal that global surveillance under the regime of the IAO will be omnipotent; it will be as if God is constantly staring down on every crevice of the globe.

¹⁸ “IAO Seal,” August 2, 2002,

<http://web.archive.org/web/20020802012150/http://www.darpa.mil/iao>.

¹⁹ A.M. Potts, *The World's Eye* (University Press of Kentucky, n.d.), 68–72, <https://books.google.com/books?id=rFvu92GyDQoC>.

The purpose and execution of TIA was different from the traditional concept of predictive policing, which is “the application of analytical techniques to identify targets for police intervention and prevent crime...by making statistical predictions.”²⁰ This form of policing requires *relevant, particularized* information gathering that can assist in making predictions about criminality. However, TIA adopted a different approach. TIA was not searching for relevant or particularized information, but rather attempting to ascertain any information possible.

The TIA program went about intelligence collection by obtaining as much information as possible through a network of observation techniques, tools, programs, agencies, and actors. It was not an effort to develop a singular technique to capture the entirety of information; it was an organized attempt to connect mechanisms and techniques together, establishing an omnipotent, continuous gaze over the Earth. The attempt to construct a constant surveillance system is similar to the ideal coercive, disciplinary apparatus described by Foucault. The environment for discipline is not an autocratic or despotic function; it is a diffuse network of disciplinary relations. TIA itself is not a mechanism of surveillance; it is the goal of networking a multiplicity of American surveillance techniques into a singular system of observation.

TIA's surveillance assemblage attempted to use every old, modern, and novel technique to capture and observe all possible pieces of information concerning people, places, and events. This networking of government surveillance programs sought to create a new disciplinary observatory that could scrutinize every crevice of society, just like the Panopticon. However, this new disciplinary regime is clearly different in

²⁰ Walt L. Perry, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (Santa Monica, CA: RAND, 2013), xiii.

architecture and extension from Foucault's Panopticon and the French disciplinary society. The French disciplinary penal order was designed to observe and consequentially produce truth about subjects. Whereas the new, American disciplinary society is clandestine; the techniques that condition subjects are created and performed in secrecy and justified by national security concerns. Despite the methods and ends being different, they both use the same mechanisms of power through a network of surveillance techniques. The prison has been replaced with cameras, plague registries with terrorism watch lists, hospitals with Internet-content data collection tools, and schools with facial recognition scanners.

In 2003, it appeared that claims of a new disciplinary regime were premature, as TIA no longer existed as a project under DARPA.²¹ Yet the desire for total information persisted within the executive branch of the United States. In fact, many programs developed and executed under TIA were not eliminated; they were instead renamed and moved to other agencies within the executive branch.²² For example, a project codenamed "basketball" sought to link the surveillance programs of all TIA participating agencies, was not eliminated when Congress defunded TIA.²³ It received funding for years after TIA was dissolved, and its current location and usage are unknown. However, due to a document leaked by Edward Snowden that outlined the counterterrorism budget for the United States, the public has become increasingly aware that resources were

²¹ Sharon Weinberger, "Defence Research: Still in the Lead?," *Nature* 451, no. 7177 (January 24, 2008): 390–93, doi:10.1038/451390a.

²² Shane Harris, "TIA Lives On," *The National Journal*, February 23, 2006.

²³ Ibid.

funneled to dozens of executive branch agencies responsible for obtaining information to stop terrorism.²⁴

In executing this organized, although seemingly non-centralized, composition of intelligence, the intelligence agencies, and specifically the NSA, have changed the American approach to information gathering. These new approaches “flip[ed] the traditional way of gathering intelligence.”²⁵ Traditionally, intelligence agencies “collected information about identified people believed to pose threats to US national security or foreign policy interests.”²⁶ However, under the post 9/11 approach, intelligence gathering programs and agencies “[gather] data on large numbers of people in massive amount and [apply] mind-boggling capabilities of the intelligence community to sift through all the data looking for links to terrorism or other threats.”²⁷ Surveillance no longer relies upon a single technique to obtain knowledge about a particular object, under the new regime, every technique is networked together to create a more comprehensive, pervasive apparatus. This new approach required a new apparatus, necessitating new tools like internet data collection programs, unmanned aerial vehicles, closed-circuit television recording, biometric scanning, mobile phone recording, satellite imagery, and thousands of other techniques. These techniques can be divided into three (necessarily) broad categories: visual surveillance, internet-based surveillance, and

²⁴ Barton Gellman and Greg Miller, “‘Black Budget’ Summary Details U.S. Spy Network’s Successes, Failures and Objectives,” *The Washington Post*, August 29, 2013, https://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html?utm_term=.f04d107d64b6.

²⁵ David P. Fidler and Sumit Ganguly, eds., *The Snowden Reader* (Bloomington, Indiana: Indiana University Press, 2015), 46.

²⁶ Ibid.

²⁷ Ibid.

registration-based surveillance. Each of these categories contains hundreds if not thousands of unique surveillance techniques and programs.

III. New Cameras and Normalizing Stares

In this section, I will explore how surveillance techniques and programs have proliferated in the post 9/11 era and explain how they have created a new disciplinary order in the United States. This disciplinary society operates through the same mechanism of power implicated over 100 years ago in France. These mechanisms include normalizing judgment, hierarchical observation, and examination. For a brief reminder, the mechanism of normalizing judgment assesses actions based on averages and scales of normality, not on the value of the action. For example, children are not merely instructed to read, they are instructed to read at the ability of at least the 50% median. Hierarchical observation ensures that control over a subordinate subject can occur through observation at all times through the architecture of the particular observatory. The examination situates subjects within hierarchical categories based on a collection of knowledge obtained about the subject. This examination allows for classification, quantification, and punishment. The three mechanisms of power came to prominence post 9/11, yet utilize different technologies than disciplinary institutions and techniques of Foucault's prisons, hospitals, and plague registries. However, the mechanisms of disciplinary power that operated through these institutions directly mirror the aforementioned categories of surveillance. Under the new American surveillance regime, the normalizing judgment comes from video surveillance and electronic surveillance, which trap the object of surveillance in a system of hierarchical observation, whereas the new forms of registration have replaced the examination.

Visual surveillance, within a contemporary context, is one of the most obvious forms of state observation. This type of observation is typically executed through the technology of a camera. Cameras are outstanding visual surveillance devices as they allow the observer to examine a situation as though they are present. When using a camera, the observer can be far away, allowing the observer to be safer, less obvious, and less intrusive, while being able to observe multiple locations at once. As a result, cameras constitute a great resource, and the increase in memory storage efficiency for visual surveillance allows for greater storage of recordings by state agencies and private entities. An example of these new technologies is the progression of the unmanned aerial vehicles (UAV). Prior to the UAV, pilots manned expensive surveillance aircraft, forcing the United States military to risk American lives each time American intelligence agencies require an aerial view of a location. Considering that this risk can be almost entirely eliminated within a reconnaissance context, UAVs are an extremely attractive option for national security surveillance purposes. Additionally, most UAVs are lightweight: the most common reconnaissance UAV flying over the United States weighs only approximately 1000 pounds, which reduces costs and increases stealth capabilities.²⁸ In fact a UAV developed by the tech company AeroViroment, on contract from DARPA, weighs less than a double-a battery, possesses video recording capability, and “employs biological mimicry” of a hummingbird (see Figure 2.2).

²⁸ “MQ-1B Predator > U.S. Air Force > Fact Sheet Display,” *United States Air Force*, accessed March 25, 2017, <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx>.

AeroViroment Nano Hummingbird Developed on Behalf of DARPA²⁹

Figure 2.2: This UAV can record video and audio while being controlled by an operator. The UAV is designed to convince any objects of surveillance that there is no video or audio recording of their conduct. This particular model is an example of the rapid development and increased sophistication of UAV function and designs. The UAV is no longer just an eight-foot drone with a camera lurking obtrusively in the air. Now, UAVs can take on new forms and functions and with that, new operations.

²⁹ DARPA, *Nano Hummingbird*, n.d., https://lh4.googleusercontent.com/_kIWY2DV0KnE/TV3-KILesOI/AAAAAAAAIro/osutcDWDqJ4/Nano%20Hummingbird.jpg.

Comparison in Video Coverage Capabilities of Contemporary Drones³⁰

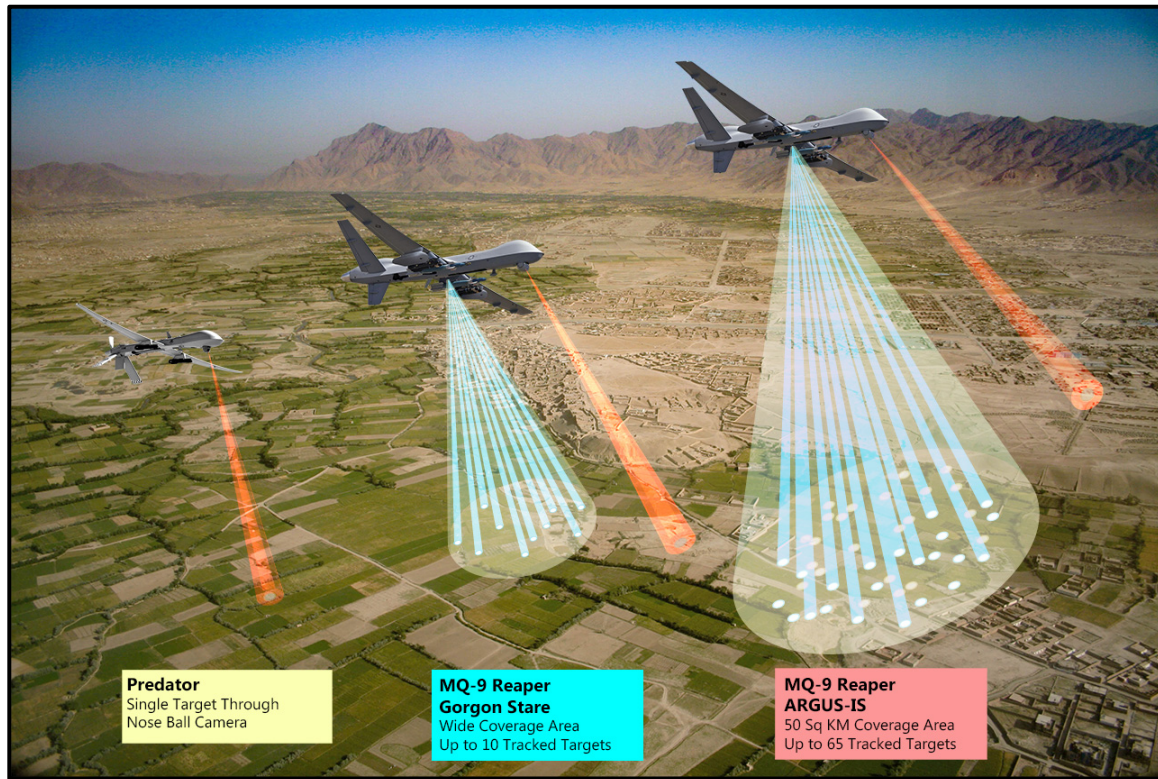


Figure 2.3: This comparison maps the differences in surveillance breadth of different drones. Throughout UAV development, the subject of UAV surveillance has become wider, beginning with a focused camera to a large camera that can observe half of Manhattan. The photos taken by the UAV with greatest breadth of observation, the ARGUS, uses 368 cameras and four lenses to survey an area as wide 19 sq. mi.³¹ The video is large enough to identify a license plate or home address.³² The surveillance is not photos taken in temporally spaced intervals, but rather a continuous video streams.

³⁰ David, "Chassis Plans' COTS Journal Article on Gorgon Stare & ARGUS-IS | Chassis Plans," *Chassis Plans Rugged Computers and LCD Displays*, May 31, 2016, <http://www.chassis-plans.com/cots-journal-gorgon-stare-article/>.

³¹ "Autonomous Real-Time Ground Ubiquitous Surveillance - Infrared (ARGUS-IR)," accessed March 23, 2017, <http://www.darpa.mil/program/autonomous-real-time-ground-ubiquitous-surveillance-infrared>; Arnie Heller, "From Video to Knowledge" (Lawrence Livermore National Laboratory, May 2011), <https://str.llnl.gov/AprMay11/pdfs/4.11.1.pdf>.

³² Jay Stanley, "Drone 'Nightmare Scenario' Now Has A Name: ARGUS" (American Civil Liberties Union, February 21, 2013).

DARPA drones and UAVs are incredible pieces of technology. However, while they span the globe and record directly over American civilian spaces and property with incredible precision (see Figure 2.3), they are not presently considered pervasive in society. The approximately 2.8 million consumer drones that were sold in the USA in 2016 dwarf the quantity of military and national security drones, numbering around only 10,000.³³ Civilians control these drones for many different purposes such as filming recreational activity, inspection of infrastructure, forest fire monitoring, crop surveys, and detection of illegal hunting or poaching.³⁴ Considering these functions, drones can make work easier, locations more accessible, and recreations more memorable. These helpful applications are an amazing technological advancement and should be celebrated as such. This celebration should however, be tempered with an understanding that all video and information obtained by drone can be subpoenaed.³⁵

³³ Nick Wingfield, "A Field Guide to Civilian Drones," *The New York Times*, November 23, 2015, <https://www.nytimes.com/interactive/2015/technology/guide-to-civilian-drones.html>.

³⁴ Brian Fung, "Why Drone Makers Have Declared War on the Word 'drone,'" *Washington Post*, August 16, 2013, <https://www.washingtonpost.com/news/the-switch/wp/2013/08/16/why-drone-makers-have-declared-war-on-the-word-drone/>; Guangjian Yan et al., "Automatic Extraction of Power Lines From Aerial Images," *IEEE Geoscience and Remote Sensing Letters* 4, no. 3 (July 2007): 387–91, doi:10.1109/LGRS.2007.895714; Abdelkader Abdessameud and Abdelhamid Tayebi, *Motion Coordination for VTOL Unmanned Aerial Vehicles: Attitude Synchronisation and Formation Control*, Advances in Industrial Control (London Heidelberg ; New York ; Dordrecht: Springer, 2013); Jill McGivering, "Drones to Protect Nepal's Endangered Species from Poachers," *BBC News*, June 20, 2012, sec. Asia, <http://www.bbc.com/news/science-environment-18527119>; "Drones Join Fight against Badger Cruelty," *BBC News*, accessed February 26, 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-17356921>.

³⁵ Gregory McNeal, "Drones and Aerial Surveillance: Considerations for Legislatures | Brookings Institution" (Brookings Institute, November 13, 2014), <https://www.brookings.edu/research/drones-and-aerial-surveillance-considerations-for-legislatures/>.

UAVs are not the only technique employed by the surveillance apparatus, there are a number of other ways cameras are used in the American surveillance apparatus. Closed Circuit Television (CCTV) is also used as a way to monitor a particular area to both deter criminal behavior and ensure that any illegal activity occurring in that area is recorded. CCTV has the intent of preventing crime by signaling to a potential criminal that they will be observed and brought to justice if they perform a crime in front of the camera. In addition to the deterrent effect, CCTV is helpful for law enforcement, lawyers, and judges, as activity can be easily captured and played-back. Private citizens and businesses, in addition to governmental agencies such as local law enforcement or the Federal Bureau of Investigation (FBI), use CCTV to prevent and remedy crime. These cameras are very helpful for law enforcement, as they can provide a watchful eye for a law officer that cannot be present in a location at all times, in turn allowing for a more efficient allocation of law enforcement resources.

As of 2016, there are 350 million CCTV cameras throughout the world, with 66 million more being predicted to ship in 2017.³⁶ These cameras are no longer discrete feeds for a single shop or a mayor's office. Networking of multiple cameras to form multiple agencies, business, people, and organizations is becoming more prevalent. For example, the city of Chicago integrates local government agency CCTV feeds with those controlled by other governmental agencies and private sector organizations.³⁷ This centralization establishes not only warrantless state surveillance on traffic heavy areas

³⁶ Jon Cropley, "Top Video Surveillance Trends for 2016" (IHS, 2016), <https://technology.ihs.com/api/binary/572252>.

³⁷ "The City of Chicago's OEMC and IBM Launch Advanced Video Surveillance System," CTB10, (September 27, 2007), <http://www-03.ibm.com/press/us/en/pressrelease/22385.wss>.

such as intersections or government offices, but it also extends this warrantless surveillance to every crevice a CCTV camera can peer into.

The disciplinary mechanism of visual surveillance is the normalizing judgment. The camera functions similarly to the surveillance forced upon the convicts bound to the cells of the Panopticon. The convict self-policing his every movement to ensure obedience to the centralized guard tower is now replaced with the gaze from an opaque monitor carefully recording from a camera. The same mechanisms of power are operating in both cases as the object of surveillance is subject to an expectation of surveillance. Wherever the subject is located, they can be punished, either by the prison guards or through an inquiry by a Department of Homeland Security (DHS) agent. In either case, the camera's presence attempts to make the subject align or correct their behavior. Both techniques promote normalized behavior by withholding punishment on those comporting themselves within the norms, while inflicting punishment on the abnormal subject.

IV. The Internet of Perfect Visibility and Hierarchical Observation

Another consequential method of surveillance is internet data collection tools. This broad category encompasses thousands of programs that have been undertaken, abandoned, executed, and continue to operate through United States executive agencies. The public vaguely understood this type of surveillance after 9/11, and was the subject of jokes such as "don't say that, someone's always watching" or "Googling Al-Qaeda will get the FBI knocking on your door." However, the scope and magnitude of the online American surveillance apparatus was never fully understood by the American public until a contractor for the National Security Agency (NSA), Edward Snowden, leaked 9,000-

10,000 classified documents to reporters from The Guardian and The Washington Post.

This leak helped the public understand the breadth and scope of the surveillance operations the NSA and other agencies were operating.

These clandestine programs had capabilities far exceeding any understanding the public previously had for the Internet surveillance apparatus. Programs such as PRISM, which was conducted through United State Foreign Intelligence Surveillance (FISA) court orders, attempted to collect and examine the widest range of content possible.³⁸ Instead of focusing on particular individuals or even types of internet traffic, these programs survey all persons using the internet in the United States and all person's receiving/sending data to the United States. This lack of focus leads to surveillance programs that change the status of innocence. Instead of an assumption of innocence until there is demonstrable evidence that is sufficient for a court to issue a warrant, every Internet user is presumed to possess a possibility of criminality, which allows the United States intelligence community to investigate all information.

This broad approach to data collection is obvious in a FISA Court order that was granted to the FBI for NSA use on April 25, 2013. The FISA Court was initially established through the Foreign Intelligence Surveillance Act of 1978. The Act was

³⁸ Glenn Greenwald, "NSA Collecting Phone Records of Millions of Verizon Customers Daily," *The Guardian*, June 6, 2013, sec. US news, <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>; Glenn Greenwald and Ewen MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others," *The Guardian*, June 7, 2013, sec. US news, <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>; Glenn Greenwald, "XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet,'" *The Guardian*, July 31, 2013, sec. US news, <https://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>; "Verizon Forced to Hand over Telephone Data – Full Court Ruling," *The Guardian*, June 5, 2013, <https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>.

created as “a response to President Nixon’s usage of federal resources to spy on political and activists groups.”³⁹ The law attempted to create judicial and congressional oversight to both domestic and foreign surveillance endeavors.⁴⁰ The primary feature of FISA was the establishment of the FISA Court, which grants warrants to governmental agencies to conduct surveillance operations in secrecy. These warrants are administered in secret to ensure American intelligence capabilities and strategies are not disclosed to American enemies. Additionally, FISA established procedures of surveillance to gather surveillance data both narrowly and in bulk with and without a court order.⁴¹ An example of indiscriminate bulk data collection by the United States is the April 25th FISA Court order allowing the NSA to collect telephone records of all US Verizon customers’ calls within the US and between the US and other countries on an “ongoing, daily basis.”⁴² The telephone records obtained include, but are not limited to, phone calls, text messages, and internet connection to a tower.⁴³ The order did not request to collect the content of the aforementioned telephone usage, however, it does include who was on a call, where a text was sent, the location of the telephone, the duration of each call, and the location where the cell towers were pinged.⁴⁴

³⁹ “FISA Debate Involves More Than Terrorism - Daily Nexus,” January 23, 2009, <https://web.archive.org/web/20090123213757/http://www.dailynexus.com/article.php?a=15892>.

⁴⁰ “The Foreign Intelligence Surveillance Act of 1978,” accessed March 4, 2017, <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286>.

⁴¹ “Foreign Intelligence Surveillance Act of 1978,” Chapter 36 50 U.S. Code §, § 1801 (a)(1),(2),(3), accessed March 4, 2017, <https://www.law.cornell.edu/uscode/text/50/chapter-36>.

⁴² “Verizon Forced to Hand over Telephone Data – Full Court Ruling”; Greenwald, “NSA Collecting Phone Records of Millions of Verizon Customers Daily.”

⁴³ Greenwald, “NSA Collecting Phone Records of Millions of Verizon Customers Daily”; “Verizon Forced to Hand over Telephone Data – Full Court Ruling.”

⁴⁴ Greenwald, “NSA Collecting Phone Records of Millions of Verizon Customers Daily.”

Yet these FISA court orders appear benign in comparison to the clandestine programs of the NSA revealed by Edward Snowden. One of the most shocking programs in size, breadth, and depth is PRISM. The program accounts for 90% of NSA stored bulk data. Unlike the FISA bulk warrants, PRISM does not only collect metadata, it also collects content including search history, email content, file transfers, video and voice chat, videos, photos, and social networking details.⁴⁵ Additionally, this collection is performed with consent from private companies. A number of private businesses participated in opening their customers' content to bulk collection by the United States government without warrant.⁴⁶ These companies include but are not necessarily limited to: Microsoft, Yahoo, Google, Facebook, YouTube, Skype, AOL, and Apple.⁴⁷ The companies involved have provided the NSA with access to company servers to allow collection directly from the source. This submission of servers allowed the government to review the content and metadata of individuals without their consent.

However, this surveillance and other forms of Internet surveillance are not simply limited to government agencies and departments. Businesses frequently monitor both consumer and employee Internet activity. Consumers facing surveillance from a business are monitored whenever they use the businesses' Internet services or products. This monitoring examines trends in product and service usage and allows businesses to better tailor their products and service to a customer through patterns of behavior. This monitoring can be something as benign as metadata indicating you visited a website for women's shoes or something as intrusive as examining the content of your emails. The

⁴⁵ Greenwald and MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others."

⁴⁶ Ibid.

⁴⁷ Ibid.

largest private targeted Internet ad agency in the world, Google, happens to do both and much more.⁴⁸

Internet surveillance functions through hierarchical observation by ensuring that the object of surveillance is always visible. Under the current regime of disciplinary power, the blueprint for hierarchical observation within Internet data collection mirrors Foucault's account of French military camps. The military camps' architecture allowed for an ordered, hierarchical system of observation. Architectural features were closely spaced, so as to allow for higher ranking surveillance figures to scrutinize the lower ranking figures, ensuring there was a constant gaze set upon their every move. However, the gaze of one person of authority is not constant, and different figures of authority will observe and ensure obedience for different functions of the camp. This complicated web of surveillance, although not stemming from a singular source, creates a system of constant surveillance on subjects.

The assemblage of surveillance in the prison camps is mirrored on a new scale through Internet data collection tools. The constant surveillance was previously isolated to institutions and locations, however, the observation now follows you wherever your phone, computer, or car goes. The new subject of coercive observation is everyone. The techniques of the state are so far reaching, they implicate all who enter or reside in its

⁴⁸ "As We Sweat Government Surveillance, Companies like Google Collect Our Data," *The Guardian*, April 18, 2014, sec. Opinion, <https://www.theguardian.com/commentisfree/2014/apr/18/corporations-google-should-not-sell-customer-data>; "Google Terms of Service – Privacy & Terms – Google," accessed March 25, 2017, <https://www.google.com/intl/en/policies/terms/archive/20131111-20140414/>; "Notice of Apparent Liability for Forfeiture In the Matter of Google Inc. Before the Federal Communications Commission," § Federal Communications Commission (2012), <http://transition.fcc.gov/DA-12-592A1.pdf>.

country. The new disciplinary observatory is not spatially restricted; the observatory follows your every move. There is no longer a spatial architecture of new observatories; it merely resides in all surveillance capabilities of the state. The prevalence of surveillance has made all of society visible, no longer does architecture need to be designed to promote visibility; electronic surveillance techniques will follow the subject regardless of visual obstructions. This ensures a new order of visibility, there is no escape from observation as technology has created a completely visible society.

An example of being metaphorically trapped in an observatory is through phone metadata collection. The signal of your phone pinging a cell tower is nearly constant and reveals your location at any time. A German politician, Malte Spitz, became concerned with the capabilities of government and private businesses ability to monitor individuals (specifically citizens) and sued his cell phone provider for metadata records. He placed the data online, and created a tool that maps his cellphone metadata to his location. It became obvious what the politician's daily patterns were.⁴⁹ His typical route to a coffee shop, his home, his most frequented lunch spots, and his place of his work were all easily observed through his metadata. To make my point as simple and relevant as possible, I created a simple version of what this metadata tracking presumably looks like on my phone.

⁴⁹ ZEIT ONLINE GmbH Germany Hamburg, "Http://Opendata.zeit.de/Widgets/Dataretention/," *ZEIT ONLINE*, accessed March 23, 2017, <http://www.zeit.de/datenschutz/malte-spitz-data-retention>.

Presumable Metadata Collected Weekly by Jack Johanning Phone Usage from approximately 9:50 AM-10:10 AM

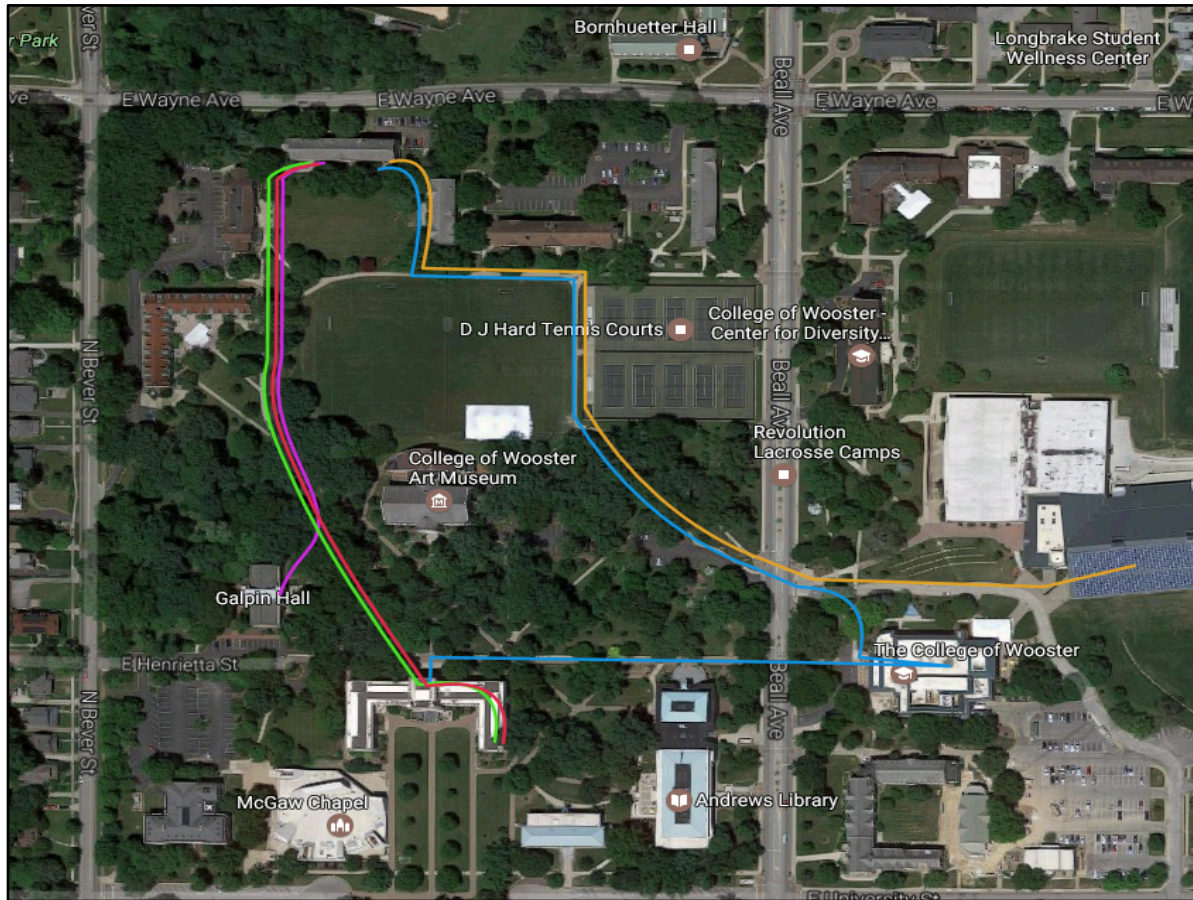


Figure 2.4: This map reflects my weekly travel patterns that can likely be obtained through metadata similar to that of Malte Spitz. The green line represents Monday, the blue line represents Tuesday, the red line represents Wednesday, the yellow line represents Thursday, and the pink line represents Friday. I will outline what can reasonably be concluded from my geo-location metadata. Observing the green line (Monday), I walked from my dorm, Armington Hall, to Kauke Hall, presumably to attend class. Observing the blue line (Tuesday), I walk from Armington Hall to Lowry, presumably to grab something to eat; then I go to Kauke, either to attend class or study. Observing the red line (Wednesday), I follow the same course of action as the green line, walking from Armington to Kauke. Observing the yellow line (Thursday), I walk from Armington to the Scot Center, presumably to attend Campus Council. Observing the pink line (Friday), I walk from Armington to Galpin Hall, presumably to attend a meeting. This pattern of locomotion is regimented, every week I have the same events, and therefore follow a similar pattern that is tracked via metadata.

Metadata collected from Jack Johanning's phone usage from approximately 9:50 AM-10:10 AM during a week he went to his doctor's office.

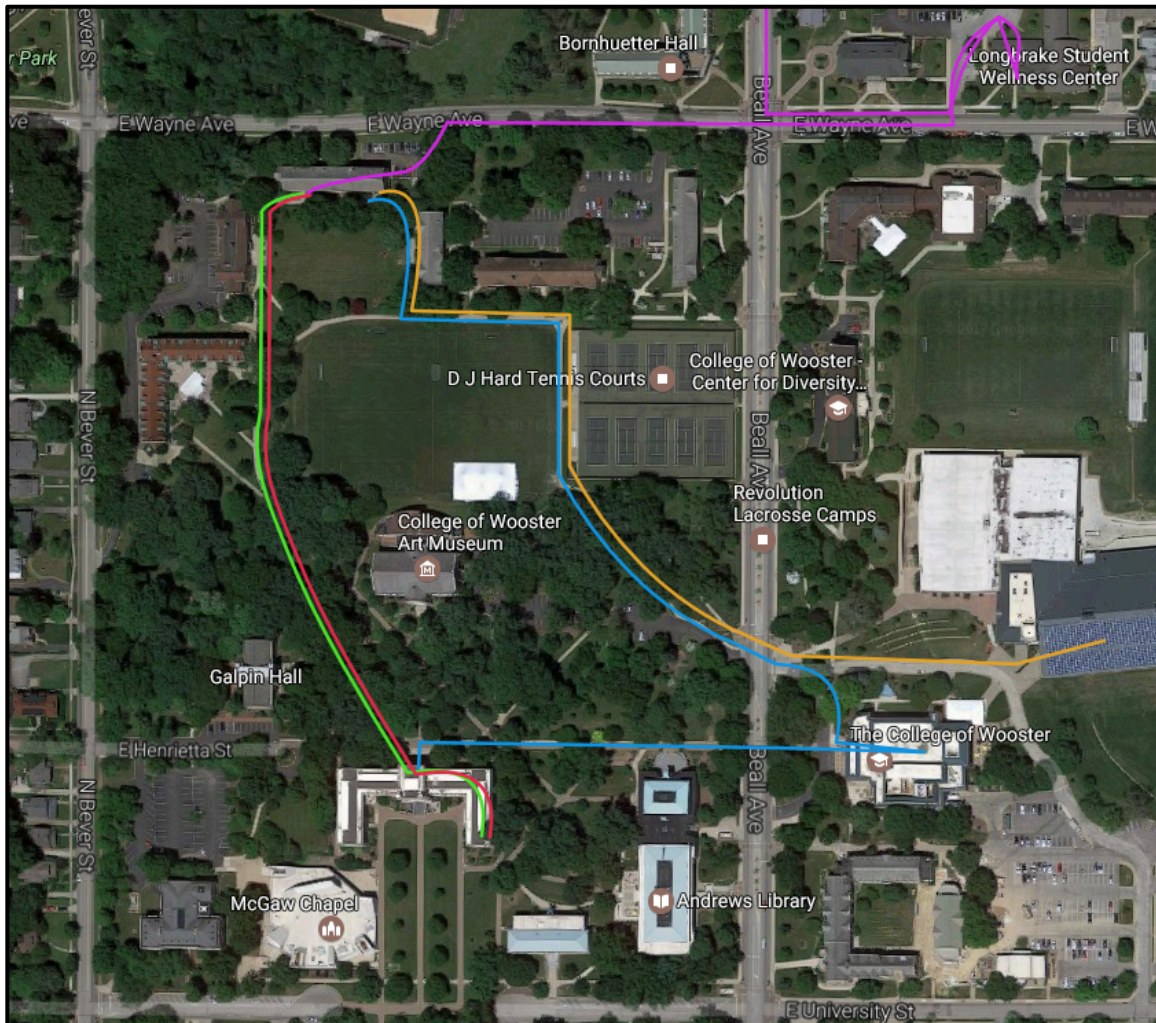


Figure 2.5: Notice how the metadata can track my change in behavior from a typical Friday. When I travel away from campus, towards my doctor, I am breaking the norm I have established through weeks of walking to Galpin Hall every Friday. This abnormality is traced, recognized, quantified, and stored in my metadata. This recognition of abnormality is only possible because of the surveillance continuity that exists through metadata tracking. The phone is not simply recognizing I am at my dorm and then at my doctor's office, it is tracking my movements in a near continuous manner. Abnormalities are what state agents look for when attempting to find instances of criminality. Although my drive to the doctor was fully legal and completely benign, it is far more suspect than any of my other weeks because it was outside the norm.

This observation of my movements becomes even more focused and detailed when different pieces of information, for example metadata and Facebook events, are brought together. Even more powerful is the tracing of metadata with a camera like the ARGUS. Not only can a person be tracked with their phone metadata, photos from ARGUS can also track that same person. When combined, the surveillance techniques employed by the United States do not allow an individual to remove him or herself from the surveillance apparatus.

This intersection of data, assembled from multiple surveillance techniques, is the final mode of surveillance that creates a state of total information awareness, which is referred to as registration technologies. Registration technologies encompass any kind of surveillance techniques designated to aggregate, classify, and/or quantify records about people to understand a person or population. When viewed singularly, the techniques of surveillance I have previously discussed appear relatively insignificant. The NSA can view your emails, but you say nothing bad in them. Google tracks your Internet shopping habits, but there is nothing nefarious there. A camera observes you walking to your job on the same path each day, but you make no questionable moves. The FBI collect each time your phone connects to Verizon's satellites and towers, yet you are making no calls out of the ordinary. But what happens when these factors are taken in totality?

V. Centralization, Classification, and the Examination

When these techniques of surveillance are centralized and combined, they make a completely unique profile about a person. To the United States intelligence community I am no longer just Jack Johanning who lives in Wooster, Ohio, I am Jack Johanning, who likes to look at watches online, who orders and reads books about American law, who

sends constant emails about Campus Council, who has no siblings, who posts liberal political messages on Facebook, who walks past Kenarden Hall on Tuesdays and Thursday but past Babcock hall on Mondays, Wednesday, and Fridays, and who drives a Subaru. I am an absolutely unique profile to whoever is watching. The surveillance techniques that surround our society do not create a disciplinary society in isolation; it is the combination and intersection of these techniques that fabricates a society that conditions its subjects to act a certain way.

This type of society combines Internet surveillance's hierarchical observation with visual observation's normalizing judgment. Out of this union of disciplinary power emerges a new mechanism of power: the registry — or as Foucault calls it, the examination. The examination is the combination of normalizing judgment and hierarchical observation. This combination is used to produce knowledge about a subject that in turn produces truth about the subjects.⁵⁰ This examination ultimately leads to objectification.⁵¹ The effect of which Foucault describes as “the technique by which power instead of emitting the signs of potency...holds them [subjects] in a mechanism of objectification.”⁵² This objectification allows the state to withhold coercive, physical force, yet still exact discipline on subjects. This power exercised can only be exacted because the examination produces knowledge about a subject, specifically; it formalizes

⁵⁰ Leslie Paul Thiele, “Foucault's Triple Murder and the Modern Development of Power,” *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 19, no. 2 (1986): 245.

⁵¹ Foucault, *Discipline and Punish*, 187.

⁵² Ibid.

“all of our individualities into a power structure.”⁵³ Each of these individualities is no longer a subject to a state but an object of observation and cataloguing.⁵⁴ Each of these objects were created from a desire of the state to extract knowledge about the populous that is detailed at an individual level, not in large abstract levels as has previously been done.⁵⁵ Prior to the modern state, only the “noble were individualized in chronicles and fables.”⁵⁶ Yet the individuations of the entire population are largely what brought states into modernity, creating truth about large swaths of singular objects.

Through the current surveillance apparatus, every dossier created for each person in the United States furthers the objectification of an entire society. The creation of these profiles that differentiate people from one another is what creates a new regime of knowledge. This new knowledge changes how subjects internally develop themselves and how the government conceptualizes subjects. Using the new surveillance apparatus, there is an enormous amount of information that allows individualization and differentiation between subjects; the number and depth of techniques ensures that no two subjects can be the same. This process is relevant as it “assures the great disciplinary functions of distribution and classification, maximum extraction of forces and time, continuous genetic accumulation, optimum combination of aptitudes and, thereby, the fabrication of cellular, organic and combinatory individuality.”⁵⁷ The combination of disciplinary mechanisms comes not from one institution, but the intersection of truth

⁵³ George P. Kyprianides, “In What Ways Does the ‘Examination’ Referred to by Foucault Serve to Construct Modern Society?,” *SSRN Electronic Journal*, 2014, 2, doi:10.2139/ssrn.2439551.

⁵⁴ Foucault, *Discipline and Punish*, 187.

⁵⁵ Barry Smart, *Michel Foucault*, Rev. ed, Key Sociologists (London: Routledge, 2002), 87.

⁵⁶ Thiele, “Foucault’s Triple Murder and the Modern Development of Power,” 87.

⁵⁷ Foucault, *Discipline and Punish*, 192.

produced by many institutions. Yet the new examination extends beyond Foucault's description, infiltrating beyond former regimes of power and extending into every available piece of data that can be uploaded to a network about a particular subject.⁵⁸

Skeptics may remark that this reality is only applicable to those that are regulated and transformed by the disciplinary techniques. Yet the force relations and systemization of disciplinary mechanisms and techniques form the modern state and the set of conditions every person must operate within. Take the most extreme example: the Amish. The Amish generally attempt to live in a simplistic society. For example, they do not use electronics. Critics may argue that they do not face electronic surveillance scrutiny, and as a result, the techniques do not affect them coercively or normatively. Yet this argument does not recognize that disciplinary systems and mechanisms do not affect just those exposed to their techniques; the norms, customs, and knowledge created by the surveillance apparatus affect the entirety of society, including the Amish. The forces of disciplinary power that permeate society are not localized, they create new functions of power and knowledge, requiring the entire society to now operate within the new system of power. When expectations about what is truth are created through disciplinary mechanisms, the entire society must adapt to this new truth, allowing the new knowledge to change long-standing economies of power. The disciplinary techniques, like surveillance, used on particular subjects does not just coerce those subjects into acting a particular way, the surveillance informs and affects knowledge and decisions throughout society. There is no practical way to trace the entirety of the spread of the disciplinary mechanisms throughout contemporary society, yet the pervasive force relations that

⁵⁸ Kyprianides, "In What Ways Does the 'Examination' Referred to by Foucault Serve to Construct Modern Society?," 5.

produce discipline and truth affect all institutions, people, groups, policy, and norms. As a consequence, even though the American surveillance apparatus may not directly observe all people at all times, it still affects the way in which society is organized and operated, which in turn affects all Americans.

VI. Foucault's Chilling Quantified

Foucault is occasionally criticized for lacking evidence to demonstrate that surveillance can truly change an individual's behavior. However, there is evidence, albeit imperfect, that demonstrates that surveillance can chill an individual's conduct, i.e. making that person do something they otherwise would not do if the surveillance were not present. Jon Penney analyzed whether such a phenomenon exists by observing Wikipedia page traffic related to terrorism before the Edward Snowden leaks and after. Penny finds evidence supporting his hypothesis that the revelations of government surveillance reduced Wikipedia article views on terrorism related topics such as 'al Qaeda' 'car bomb' or 'Taliban.' Penney found that there was a 20% decline in page terrorism related Wikipedia pages following the Edward Snowden revelations.⁵⁹ This finding demonstrates that when an individual believes they are subject to surveillance, they will change their behavior. This result directly supports Foucault's theory that surveillance creates subconscious self-policing.

Another study conducted by Alex Marthews and Catherine Tucker analyzes Google search frequency of particular privacy sensitive phrases before and after the Edward Snowden leaks. Marthews and Tucker look at a range of privacy sensitive phrases and their frequency of use in Google searches in the United States and its 40

⁵⁹ Jon Penney, "Chilling Effects: Online Surveillance and Wikipedia Use," 2016.

largest trading partners. The analysis conducted reveals that after the Edward Snowden leaks, Google search queries that are rated more private were searched less often.⁶⁰ This supports the results of Penney and of Foucault, that behavior changes as a result of surveillance.

These results can be mere correlation without any true causation. However, there was some type of change in behavior after the Edward Snowden documents were leaked, and the behavior change that would result from that background knowledge pales in comparison to knowing that you are being particularly surveyed. This change in behavior can extend beyond Wikipedia pages and Google searches. The surveillance effects observed by Penney and Marthews and Tucker are the effects that Foucault identified when a subject is surveyed in the Panopticon, in a schoolhouse, or in a military camp. Whether in their locomotion, writing, or Internet usage, individuals will alter their behavior when they become aware they are being observed.

⁶⁰ Alex Marthews and Catherine E Tucker, "Government Surveillance and Internet Search Behavior," 2015.

CHAPTER THREE

Life, Liberty and Privacy: Where does Surveillance Fit?

“Many will malign me for failing to engage in national relativism, to look away from my society’s problems toward distant external evils for which we hold neither authority nor responsibility, but citizenship carries with it a duty to first police one’s own government before seeking to correct others.”

– Edward Snowden

I. Foucault’s Archaeological Historiography

The archeological method of historiography that Foucault utilizes serves the purpose of scrutinizing history in order to better understand features of the present. Foucault practiced the archeological method in his first four books: *Madness and Civilization*, *The Order of Things*, *The Birth of the Clinic*, and *The Archaeology of Knowledge*. This archeological historiography consists of evaluating, “discursive practices through which statements are formed and produced.”¹ For example, *Madness and Civilization* provides an investigation into discursive practices, specifically into the practices surrounding human sciences. Foucault deems the human sciences as where “the human being is the given object.”² This includes a field such as psychology. Specifically in psychology, clinicians in psychiatric wards conduct tests and establish truth about particular subjects. As a result, clinicians are establishing the norms around mental illness and madness.³ Specifically in *Madness and Civilization*, Foucault traced the norm of

¹ Gibson Burrell, “Modernism, Post Modernism and Organizational Analysis 2: The Contribution of Michel Foucault,” *Organization Studies* 9, no. 2 (1988): 223, doi:10.1177/017084068800900205.

² Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, Vintage books edition (New York NY: Vintage Books, 1994), 354.

³ Barry Smart and Michel Foucault, eds., *Michel Foucault: Critical Assessments* (London: Routledge, 1994), 119–20.

sanity in psychiatric knowledge.⁴ Through this analysis, Foucault is attempting to understand how during particular periods, “systems of thought and knowledge are governed by rules...that operate beneath the consciousness of the individual subjects and define a system of conceptual possibilities that determines the boundaries of thought in a given domain and period.”⁵ To Foucault, changes in the boundaries of subject-discourse should be assessed by period and then compared. Comparison will reveal not only how particular discursive formulations were conceptualized and utilized, but will also allow for identification of a development of thought about a subject. This comparison of discourses was not limited to particular subjects or scientific and academic foci. In fact, Foucault searched for common features among different discourses to understand whether their differences or similarities could lead to an underlying structure to discursive practices.⁶ He believed this process could expose perceived randomness in society and then identify the underlying order of society's structure. However, the shortcoming of this analysis is that it cannot identify what caused a way of thinking to transition from one period to the next, it only makes clear that the undercurrents exist.

II. Foucault's Transition to the Genealogical Method

To overcome this deficiency, Foucault utilized the genealogical method. This change of practice allowed for Foucault to broaden his historical exploration. By broadening his approach, the object of his focus changed from discourse to power,

⁴ Michel Foucault and Paul Rabinow, *The Foucault Reader*, 1st ed (New York: Pantheon Books, 1984), 48–49; Smart and Foucault, *Michel Foucault*, 119–20.

⁵ John Rajchman, *Michel Foucault: The Freedom of Philosophy* (New York: Columbia University Press, 1985), 11.

⁶ Burrell, “Modernism, Post Modernism and Organizational Analysis 2: The Contribution of Michel Foucault,” 224.

knowledge, and the body.⁷ This new approach was implemented in *Discipline and Punish* and *The History of Sexuality Volume I and II*. In these works, Foucault used present day conditions to scrutinize the past. However, it is important to note that genealogy is not mapping history and attempting to find similarities like in archaeology, but rather it is a reassessment of what humans take as given.⁸ This reevaluation should cause reconsideration of norms, constraints, and structures that shape institutions, practices, language, ideas, and truth.⁹ At their heart, Foucault's genealogical investigations were an attempt to truly understand the boundaries of society. By ascertaining why one era considered something a piece of knowledge, while another era did not, Foucault was able to reveal the power and knowledge that subtly operated during those particular time periods. Foucault believed that tracing configurations of power and knowledge, specifically focusing on the function of the body during different time periods, would reveal the functioning of the present. The undercurrents Foucault attempted to trace in these works were not structuralist or universalist but rather concepts that related to every specific interaction, relationship, and institution that can be surveyed during a given time period.

Unfortunately, Foucault never supplied his readers with a series of instructions on how to rearrange power in society once its operation was revealed. Therefore, the framework Foucault laid out aided me in so far as I could analyze the operation of power that surveillance functions within, but it did not provide me with a method to critique that operation of power. Thus, other theorists must be utilized to critique the knowledge

⁷ Ibid.

⁸ Rob Kitchin and N. J. Thrift, eds., "Genealogy, Method," in *International Encyclopedia of Human Geography*, First edition (Amsterdam: Elsevier, 2009), 3.

⁹ Ibid., 4.

obtained through the genealogical method. However, prior to applying a theory of critique to the mechanisms of power that arise from surveillance, it is important to first define the word “privacy,” just as I did in chapter one, where I defined surveillance. Similarly, it is important to define and understand the conception of privacy, since the primary critique of surveillance is its infringement on privacy.

III. Creating a Definition for Privacy

In this latter portion of my work, I will utilize John Stuart Mill’s conception of the harm principle in order to critique the American surveillance apparatus. However, before I utilize a theory of critique, I must first establish a concrete conception of privacy. This conception is imperative as components of the disciplinary regime established by surveillance technologies can be recognized as violating conceptions of privacy. Therefore, in order to assess if the surveillance apparatus has violated conceptions of privacy, I must first define and explore what privacy entails. After establishing the meaning of privacy, I will utilize Mill’s harm principle to explore the idea that the American surveillance apparatus is an illegitimate use of government authority because it harms the rights of life, liberty, and property by infringing upon privacy claims.

To define privacy, I need not inquire into all conceptions of privacy, but rather I must inquire into those conceptions that cover all versions of privacy. Additionally, the conception of privacy I will use must incorporate into the classically liberal harm principal. To accomplish both of these goals, I will begin my investigation into the definition of privacy by exploring the American legal perception of privacy.

IV. The American Legal Tradition of Privacy

The idea of privacy is fundamental to American democracy. Legal scholar Elvin Tim maintains that, “privacy is the centerpiece of modern liberal constitutional thought in the United States.”¹⁰ The Framers intentionally incorporated conceptions of privacy throughout the Constitution in order to ensure it was protected from rogue majority legislatures that had the intent of imposing draconian laws on individuals or minority groups.¹¹ Additionally, the Founders were disturbed by a lack of *true* separated powers in England, which proved capable of invading privacy arbitrarily.¹² This cautious and progressive spirit of the Founders has been demonstrated in American jurisprudence throughout history. In one of the most famous dissents in American jurisprudence, *Olmsted v. United States*, Justice Brandeis wrote that privacy is “the most comprehensive of rights and the right most valued by civili[z]ed men.”¹³ However, because the Framers only implicitly secured privacy in the Constitution, the precise meaning and scope of what privacy entails (in a legal sense) has stumped philosophers, academics, and lawyers for centuries. Privacy experts believe the concept is exasperatingly vague, evanescent, and chaotic.¹⁴ It is apparent that a legal definition of the conception of privacy is not sufficient to define privacy. Therefore, I will first turn to a law journal article that

¹⁰ Tim Elvin, “THE FEDERALIST PROVENANCE OF THE PRINCIPLE OF PRIVACY,” *Maryland Law Review* 75, no. 1 (2015): 415.

¹¹ *Ibid.*, 415–16.

¹² *Ibid.*

¹³ *Olmstead v. United States* (Supreme Court 1928).

¹⁴ Daniel J. Solove, *Understanding Privacy*, First Harvard University Press paperback edition (Cambridge, Massachusetts London, England: Harvard University Press, 2009), 1; Arthur R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers*, *Berichte Der Universitaet von Michigan* (Ann Arbor: Univ. of Michigan Press, 1971), 25; Julie C. Inness, *Privacy, Intimacy, and Isolation*, 1. issued (New York: Oxford Univ. Press, 1996), 3.

captured not a legal conception of privacy, but rather coined privacy as “the right to be left alone.”

V. The Right to be Left Alone

The idea of privacy became concrete with Samuel Warren and Louis Brandeis's law review article, “The Right to Privacy.”¹⁵ In this article, Warren and Brandeis offer a simple, succinct definition of privacy: “a right to be left alone.”¹⁶ Warren and Brandeis begin the article by outlining the multiple recognized rights that are contained within their conception of privacy. These common law rights include the right to un-arbitrary physical interference of property, the right to personal bodily integrity, the right to live free from nuisance, the right to be free from slander, and the right to be free of interference from familial relations.¹⁷ Yet Warren and Brandeis found that the rights within their conception of privacy were insufficient in securing privacy because of new innovations such as instantaneous photographs and widespread circulation of newspapers.¹⁸ They predicted that new technologies in the 20th century could allow, “what is whispered in the closet...[to] be proclaimed from the housetops”¹⁹ Such a prediction retains profound similarities to the worries of contemporary privacy activists. To this day, the right to be left alone is compromised by online activities, such as cyber-stalking, cyber-hacking, private Internet surveillance, and state Internet surveillance. As Warren and Brandeis predicted, the future will continue to spread information about people at ever-faster paces.

¹⁵ Richard A Posner, “The Right of Privacy,” *Ga. L. Rev.* 12 (1977): 405.

¹⁶ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4, no. 5 (December 15, 1890): 193, doi:10.2307/1321160.

¹⁷ *Ibid.*, 193–95.

¹⁸ *Ibid.*, 195.

¹⁹ *Ibid.*

In relation to legal formulations of privacy, the conception of privacy constructed by Warren and Brandeis has dramatically influenced American privacy law for over a century.²⁰ When Brandeis later penned his dissent in *Olmstead v. United States*, he invoked his law review article to claim a right to privacy found within the Fourth Amendment of the United States Constitution. Despite the fact that Brandeis could not establish the right to privacy in *Olmsted*, his dissent was foundational in the case that overturned *Olmsted*, *Katz v. United States*.²¹ In *Katz*, the Court ruled that wiretapping phones without a search warrant was in violation of the Fourth Amendment's protection against unreasonable search and seizures.²² *Katz* coined what is now called the "reasonable expectation of privacy test" for Fourth Amendment claims.²³ This reasonable expectation doctrine emanated from the understanding of privacy that began with Warren and Brandeis's article, chiefly the idea that each citizen has "the right to be left alone."²⁴

However, this approach to privacy is not without flaw. The definition coined by Warren and Brandeis is too broad for any practical use, as it does not set concrete parameters on what being "left alone" truly means. Under the article's definition, the right to be left alone can be invoked in almost any context of interaction. For example, if I walk down a street and someone glances at me, I can certainly claim that my right to be "left alone" has been infringed upon. This ambiguity is the fundamental problem with

²⁰ Posner, "The Right of Privacy," 405.

²¹ RS Julie, "High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age," *The American Criminal Law Review* 37, no. 1 (2000): 129.

²² *Katz v. United States* (Supreme Court 1967).

²³ John C. Busby, "Expectation of Privacy," *LII / Legal Information Institute*, September 17, 2009, https://www.law.cornell.edu/wex/expectation_of_privacy.

²⁴ Marta Otto, *The Right to Privacy in Employment: A Comparative Analysis* (Oxford, UK ; Portland, Oregon: Hart Publishing, 2016), 62.

allowing rights to be defined by the possessor of the rights. Without concrete legal parameters or determined societal norms, the right itself loses value because it can be invoked haphazardly and arbitrarily. This is not an uncommon critique of Warren and Brandeis's definition; Ferdinand Schoenman observes that Warren and Brandeis "defend [privacy's] importance, [but] never define what privacy is."²⁵ Their inability to secure a definition and instead "connect [privacy] with various other values," is what makes the right to be left alone an inadequate conception of privacy.²⁶

VI. Robins, Samoans, and Social Media: What is Privacy's History?

It is clear that a concrete conception of privacy cannot be sufficiently reached through the American legal tradition or through claims of abstract rights. It is imperative now to turn to a different method. Similar to the method Alan Westin used in *Privacy and Freedom*, I will track privacy through a historical analysis. Westin traces the development of the modern conception of privacy starting with man's animal origins, through primitive and ancient societies, and up to the establishment of modern, democratic nation-states.²⁷ In the hopes of arriving at a concrete definition similar to Westin, I will outline and follow his traces of the historical evolution of privacy.

Westin's inquiry begins with studying the behavior of animals in their natural environment. This starting point helps reveal whether a desire for privacy originated with the beginning of living things or whether it began with the existence of humans. This question is a helpful starting point because if the desire for privacy began with humans, it is a unique trait to humans. However, Westin quickly realized that animals crave privacy

²⁵ Ferdinand David Schoeman, ed., *Philosophical Dimensions of Privacy: An Anthology* (Cambridge [Cambridgeshire] ; New York: Cambridge University Press, 1984), 14.

²⁶ Ibid.

²⁷ Alan Westin, *Privacy and Freedom* (New York: IG Publishing, 2015), 5.

similarly to the way humans crave privacy.²⁸ The desire for seclusion or intimacy is apparent through a wide range of species. For example, American dairy cattle, in addition to antelopes, space themselves in a way that establishes individual territory.²⁹ Additionally, monkey shrieks and robin songs may be “defiant cr[ies] for privacy.”³⁰ In-depth studies have been done on the spatial separation of birds on telephone wires, which have been found to be “personal distance[s].”³¹ Together, these birds agree upon a distance in which personally claimed territory begins and ends.³² However, distances between birds will differ depending on the relationship between the birds.³³ For example, a father bird allows a smaller distance between himself and his offspring compared to the space he allows between himself and an unknown bird. This specific type of behavior is demonstrated in a wide range of animals and relies upon the basic desire to establish boundaries. Analyzing this, Westin concluded that animals’ determination to establish boundaries for the purpose of privacy and intimacy shares similarities with humans desire for privacy.

Specifically for humans, behavior that recognizes territorial separation between individuals is the primary focus of proxemics. Proxemics is the study of “interrelated observations and theories of man’s use of space as a specialized elaboration of culture.”³⁴

²⁸ Ibid.

²⁹ Robert Ardrey, *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations*, Kodansha Globe (New York: Kodansha International, 1997), 178–83.

³⁰ Ibid., 95.

³¹ Edward T. Hall, *The Hidden Dimension* (New York: Anchor Books, 1990), 15; Margaret Morse Nice, “The Role of Territory in Bird Life,” *The American Midland Naturalist* 26, no. 3 (1941): 441–87, doi:10.2307/2420732.

³² Nice, “The Role of Territory in Bird Life,” 441–49.

³³ Ibid.

³⁴ Hall, *The Hidden Dimension*, 1.

Humans as a species have had sophisticated processes by which physical, mental, and psychological boundaries are established.³⁵ Each of these boundaries has the intent to create some measure of privacy between an individual and other individuals. This intent is precisely what Westin outlined in his definition of privacy, which is to control “to what extent information about them[selves] is communicated to others.”³⁶ The type of information communicated depends on the spatial proximity to a person. Anthropologists have identified types of social situations that indicate the amount of privacy a person seeks.³⁷ For example, speaking softly to someone in a “personal space” indicates that the participants want greater privacy than participants who are speaking loudly to one another in “public space.” In each of these situations, there is a clear claim as to what the individual wants communicated to those surrounding them.

Despite the fact that human territorial claims are far more complicated and nuanced than that of animals, the sophisticated system of boundaries finds its origin in animals.³⁸ This similarity in behavior indicates that animals have a fundamental desire for measures of privacy.³⁹ This finding allows for the conception of privacy to be assessed beyond interactions unique to humans, expanding into “biological and social processes of all life.”⁴⁰

³⁵ Timothy Porter-O’Grady and Kathy Malloch, *Quantum Leadership: Advancing Innovation, Transforming Health Care*, 3rd ed (Sudbury, MA: Jones & Bartlett Learning, 2011), 135.

³⁶ Westin, *Privacy and Freedom*, 5.

³⁷ Nina W. Brown, *Coping with Infuriating, Mean, Critical People: The Destructive Narcissistic Pattern* (Westport, Conn: Praeger, 2006).

³⁸ Robert David Sack, *Human Territoriality: Its Theory and History*, Cambridge Studies in Historical Geography 7 (Cambridge [Cambridgeshire] ; New York: Cambridge University Press, 1986), 1–4.

³⁹ *Ibid.*, 1–2.

⁴⁰ Westin, *Privacy and Freedom*, 10.

Even though the desire for privacy existed far before humans, the specific social norms that result in contemporary expectations of privacy are mostly absent until the modern age.⁴¹ In order to investigate this phenomenon, Westin departs from exclusively studying animals and moves to explore pre-modern human societies. To begin, Westin finds that most primitive societies were largely built on social values and functions, rather than the modern conception of individual value.⁴² With this, he concludes that because of a focus on community rather than individuals, members of the community were expected to share information with one another about themselves. For example, the Samoans wore almost no clothing in day-to-day activity and none when bathing in public sight.⁴³ There were no established walls in houses that would provide for privacy between quarters of different family members.⁴⁴ The processes of birth and death happened publically, with no moment for intimacy.⁴⁵ Members of the community were free to walk in and out of any of the houses in the community, regardless of the activities taking place in the house.⁴⁶ Margaret Mead commented that in Samoan life, “there is no privacy and no sense of shame.”⁴⁷ This communal orientation towards information sharing was present among many other primitive societies.⁴⁸

⁴¹ Ibid., 12.

⁴² Richard Lee, “Demystifying Primitive Communism,” in *Dialectical Anthropology: Essays in Honor of Stanley Diamond*, ed. Stanley Diamond and Christine Ward Gailey (Gainesville: University Press of Florida, 1992), 73–94.

⁴³ Margaret Mead, *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation*, 1st Perennial Classics ed (New York: Perennial Classics, 2001), 82–85.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid., 85.

⁴⁸ Westin, *Privacy and Freedom*, 12.

Yet there were outliers, such as the Siriono Indians of eastern Bolivia and the Iban of Boreno. Both societies began to exhibit privacy norms similar to those in contemporary society. For example, the Iban of Boreno placed restrictions on entry into residences.⁴⁹ This norm of noninterference is not only enmeshed in contemporary society's expectations of privacy, it is also a fundamental pillar modern liberal values.⁵⁰ This finding further demonstrates that claims of privacy are not a feature of modernity, they are a part of our most basic human organization and function.

An expectation of privacy that ranges society-to-society and era to era, is the privacy expected during intercourse. The Sirionon Indians of eastern Bolivia, although packed closely together as comminutes in large houses, sought privacy during intercourse.⁵¹ Couples would abandon the cramped communal residencies to copulate in areas without other society members present.⁵² This expectation became a near universal norm throughout ancient societies such as China, a society that considered intercourse sacred.⁵³ Through the development of communities becoming states, privacy was still sought by couples copulating, but became difficult to obtain due to architectural constraints and crowded living conditions.⁵⁴ This tradition has been normalized in

⁴⁹ D. Freeman, *The Family System of the Iban of Borneo*, The Developmental Cycle in Domestic Groups. [Offprint] (Department of Anthropology and Sociology, Australian National University, 1957), 52.

⁵⁰ Felix S Cohen, "Dialogue on Private Property" (Yale Law School, 1954), 361–87.

⁵¹ Clellan S Ford and Frank A Beach, *Patterns of Sexual Behavior* (New York: Harper & Row, 1972), 78.

⁵² *Ibid.*, 77–80.

⁵³ Barrington Moore, *Privacy: Studies in Social and Cultural History* (Armonk, N.Y. : New York: M.E. Sharpe ; Distributed by Pantheon Books, 1984), 256.

⁵⁴ Lewis Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects*, A Harvest Book (San Diego New York London: Harcourt, 1989), 286; Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London*, Oxford Studies in Social History (Oxford: Clarendon Press, 1998), 163.

contemporary societies and recognized as law in Untied States, with many states outlawing indecent exposure and recognizing a right of privacy in sexual relations.⁵⁵ Through this historical progression, it becomes apparent that privacy norms have always existed, but continue to transform in response to societal norms.

Through his investigation and analysis, Westin realized that even though prototypical claims to privacy began with animals and developed through pre-modern societies, it was not until the creation of the modern, democratic state that claims of privacy transitioned from a communal necessity to a socio-political form of freedom.⁵⁶ However, it is important to note that not all states recognize privacy as requisite for freedom. For example, many totalitarian states attempt to ensure absolute privacy for political regimes while also attempting to limit privacy for the citizen.⁵⁷ For example, the Chinese government has created laws that allow ISPs and other “enterprises that collect and use personal electronic information” to collect all and any Internet data from Chinese citizens.⁵⁸

Further, the Chinese government has created a social credit system intended to rate each citizen's trustworthiness.⁵⁹ Participation in the system is not optional. By 2020, everyone in China will be enrolled. The system works by calculating each individual's

⁵⁵ *People v. Earle*, 172 Cal. App. 4th 372 (Court of Appeal, 6th Appellate Dist. 2009); *In re Lynch*, 503 P. 2d 921 (Supreme Court 1972); *Lucido v. Superior Court*, 795 P. 2d 1223 (Supreme Court 1990); *In re Smith*, 497 P. 2d 807 (Supreme Court No. Crim. 15986); Deana Pollard Sacks, “INTENTIONAL SEX TORTS,” *Fordham L. Rev.* 77 (2008): 1066–85; *Neal v. Neal*, 873 P. 2d 871 (Supreme Court 20770).

⁵⁶ Westin, *Privacy and Freedom*, 21–22.

⁵⁷ *Ibid.*, 25.

⁵⁸ “Decision of the National People's Congress on Strengthening the network information protection” (2012), http://www.gov.cn/jrzq/2012-12/28/content_2301231.htm.

⁵⁹ Celia Hatton, “China ‘Social Credit’: Beijing Sets up Huge System,” *BBC News*, October 26, 2015, sec. China, <http://www.bbc.com/news/world-asia-china-34592186>.

behavior from analyzing his or her electronic history. This system means that any activity or interaction that can be inputted into an electronic interface will now be under constant scrutiny and projected to every other Chinese citizen. This program dramatically reduces the privacy a person has in their life, as purchases, geographical movement, Internet usage, academic records, and even prescriptions for birth control will now enter the public sphere for judgment.⁶⁰ The consequences for low scorers will not be limited to social stigma, as the law also indicates that legal sanctions will be imposed if a score is low. Specifically, the law states a low scorer will: lose their access to social security and welfare benefits, lose the ability to attend high-starred hotels and restaurants, and lose access to beds in overnight trains.⁶¹ Further, low scorers will not be considered for public office and will be frisked more thoroughly when passing through Chinese customs.⁶²

The differences in Chinese rights and claims to privacy affect public perception of privacy. This difference in conception is largely captured by a study conducted by Wang et. al. In the study, Wang et. al surveyed American citizens and Chinese citizens to determine what information they were comfortable sharing on a social media site. The results demonstrated that Chinese citizens are much less likely to feel concerns about

⁶⁰ Ibid.; "China Invents the Digital Totalitarian State," *The Economist*, December 17, 2016, <http://www.economist.com/news/briefing/21711902-worrying-implications-its-social-credit-project-china-invents-digital-totalitarian>.

⁶¹ "Opinions Concerning Accelerating the Construction of Credit Supervision, Warning and Punishment Mechanisms for Persons Subject to Enforcement for Trust-Breaking," *China Copyright and Media*, September 25, 2016, <https://chinacopyrightandmedia.wordpress.com/2016/09/25/opinions-concerning-accelerating-the-construction-of-credit-supervision-warning-and-punishment-mechanisms-for-persons-subject-to-enforcement-for-trust-breaking/>.

⁶² Ibid.

their information being public.⁶³ These results indicate that Chinese claims to privacy are much smaller and narrower than their American counterparts. There are a number of societal factors that caused this phenomenon, however, the most consequential difference between the two is the difference in political system.

VII. A Workable Definition

Through careful, historical investigation and analysis, Westin broadly defines privacy as: “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”⁶⁴ He finds that regardless of what information is being communicated, the claim to privacy is protecting information about oneself. This leads him to the conclusion that particular conceptions of privacy are created by the societal norms of the time.⁶⁵ Therefore, with the broad definition of privacy determined, recognition of American societal norms will assist in understanding the country's conceptions of privacy.

The United States tradition of ensuring some measure of privacy is based in a number of democratic qualities. A key feature of democracy is that life is not completely politicized by the state.⁶⁶ This lack of politicization emanates from liberal democratic theory assuming “that a good life for the individual must have substantial areas of interest apart from political participation.”⁶⁷ The different activities and interests pursued,

⁶³ Yang Wang, Gregory Norcie, and Lorrie Faith-Cranor, “Who Is Concerned about What? A Study of American, Chinese and Indian Users' Privacy Concerns on Social Network Sites (Short Paper)” (Carnegie Mellon University, U.S.A.: School of Computer Science Carnegie Mellon University, U.S.A.), 5–7, accessed March 25, 2017, <http://www.cs.cmu.edu/~yangwan1/papers/TRUST2011-%C2%AD-AuthorCopy.pdf>.

⁶⁴ Westin, *Privacy and Freedom*, 5.

⁶⁵ *Ibid.*, 5–10.

⁶⁶ *Ibid.*, 26.

⁶⁷ *Ibid.*

separate from political life, in a democracy normally require seclusion, isolation, and/or some measure of privacy. For example, for someone to truly paint unrestrained, there cannot be a watchful observer gazing at the canvas. However, privacy is not only appreciated for recreational life. Privacy also helps provide advancements in science, scholarship, and political thought, all foundational pillars of a democratic society. Despite the fact that these areas frequently critique contemporary societies, the most basic feature of classical liberal thought is protection for individuals that may be perceived to adversely impact the state with their beliefs or knowledge.⁶⁸ This feature of democratic theory is not only applicable to individuals, it also applies to associations, “From this liberty follows...freedom to unite, for any purpose not involving harm to others.”⁶⁹ This associational feature ensured that individuals could express themselves in solidarity and through consensual associations. This extension entails rights to privacy, holding that privacy is indispensable to the “preservation of freedom of association.”⁷⁰ This indispensability ranges from political organizations, to familial units, to church groups.

In order to understand the considerable tradition of protecting of privacy in liberal democratic societies, the origin of these traditions should be dissected. Locating the origins and development of these traditions will provide the groundwork for exploring privacy within the framework of liberal theory. Ultimately, putting privacy into the framework of the liberal tradition will allow me to apply principles of liberalism to the

⁶⁸ Wojciech Sadurski, “Joseph Raz on Liberal Neutrality and the Harm Principle,” *Oxford Journal of Legal Studies* 10, no. 1 (1990): 122.

⁶⁹ John Stuart Mill, *On Liberty ; with The Subjection of Women ; and Chapters on Socialism*, ed. Stefan Collini, Cambridge Texts in the History of Political Thought (Cambridge [England] ; New York: Cambridge University Press, 1989), 17.

⁷⁰ *NaACP v. Alabama Ex Rel. Patterson*, 357 US 449 (Supreme Court 91); *United States v. Rumely*, 345 US 41 (Supreme Court 87).

contemporary American surveillance apparatus to ascertain apparatus violates the liberal tradition.

VIII. Negative and Positive Liberty Envisioned by the Founders

To assess privacy in the liberal tradition, I must first assess the theory of liberalism itself. The most fundamental value of classical liberal theory, and the value that will be utilized to examine privacy in this work, is the concept of liberty. Yet the concept of liberty is not universal, as liberty can function as either positive liberty or negative liberty.⁷¹ It is important to distinguish between these two conceptions of liberty as it will affect whether the American surveillance apparatus violates Mill's harm principle.

Positive liberty in its most basic form is the "freedom to lead one prescribed form of life."⁷² This concept exemplifies the idea of one 'being their own master.' This version of liberty is secured when one feels unrestrained in their ability to act upon their own free will.⁷³ In a political application, positive liberty is largely considered the ability to participate in political decisions.⁷⁴ Jean-Jacques Rousseau was one of the first thinkers to apply this conception of freedom. He held that individual freedom is achieved through the equal ability to participate in a collective political system.⁷⁵ Rousseau believed that when an entire community established laws together, the community itself was exerting

⁷¹ Isaiah Berlin, *Four Essays on Liberty*, Oxford Paperbacks, 116 (London, New York [etc.]: Oxford U.P., 1969), 121–22.

⁷² *Ibid.*, 131.

⁷³ David Dyzenhaus, Sophia Reibetanz Moreau, and Arthur Ripstein, eds., "What's Wrong with Negative Liberty," in *Law and Morality: Readings in Legal Philosophy*, 3rd ed, Toronto Studies in Philosophy (Toronto ; Buffalo: University of Toronto Press, 2007), 359–68.

⁷⁴ Berlin, *Four Essays on Liberty*, 131–34.

⁷⁵ *Ibid.*, 135.

its collective political belief. This phenomenon was coined by Rousseau as the “general will.”⁷⁶ Rousseau believed the freedom to equally participate in political decisions is what allows a community to possess positive liberty. Additionally, Rousseau believed that the general will of the community is what established individual freedoms, the “freedom to.”

However, this notion of liberty is problematic because of one well-known flaw. Take for example a minority group in a democratic society. This group has full access to political participation; however, because they do not constitute the majority, every initiative they vote for falls short. According to positive freedom, this group is in every sense “free” because they have the “freedom to” make political decisions about their own community. However, anyone can appreciate that this group is chained in one of the most meaningful ways, as their votes will never truly lead them to ‘freedom to.’⁷⁷ Therefore, positive liberty is a lacking conception of liberty because it does not take into account that one can possess liberty in a positive sense but be restrained in their existence from a political majority.

Negative liberty overcomes this fatal flaw, and has thus been the principle on which liberalism in the United States has been structured.⁷⁸ This conception of liberty holds that liberty is “the areas within which a man can act unobstructed by others.”⁷⁹ This simple definition articulates that if an individual is prevented from doing something they

⁷⁶ James Swenson, *On Jean-Jacques Rousseau: Considered as One of the First Authors of the Revolution*, Atopia (Stanford, Calif: Stanford University Press, 2000), 163.

⁷⁷ Berlin, *Four Essays on Liberty*, 132–33.

⁷⁸ Karl Britton, “Review: On Liberty and Liberalism: The Case of John Stuart Mill by Gertrude Himmelfarb,” ed. Gertrude Himmelfarb, *Philosophy* 51, no. 197 (1976): 365–67; Andrzej Rapaczynski, “Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke, and Rousseau,” 1987.

⁷⁹ Berlin, *Four Essays on Liberty*, 3.

otherwise would, their freedom is being obstructed.⁸⁰ John Stuart Mill utilized this conception of liberty to establish foundational principles of government in *On Liberty*, with his most fundamental axiom on government intervention advocating for negative liberty.⁸¹

This proposition against government intervention is the famous harm principle. Articulated in *On Liberty*, the harm principle is still widely applied to contemporary problems, ranging from parental interference in child medical treatment to free riders in the Affordable Care Act.⁸² The harm principle is as follows: “the only purpose for which power can be rightfully exercised over any member of a civili[z]ed community, against his will, is to prevent harm to others.”⁸³ Through this principle, Mill is attempting to set the boundaries for legitimate interference into one's liberty. More importantly, under this principle, coercive laws can only be enacted if it will prevent harm to a person *from*

⁸⁰ Ibid.

⁸¹ Don A. Habibi, “The Positive / Negative Liberty Distinction and J.S. Mill's Theory of Liberty,” *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 81, no. 3 (1995): 347–68; Stefan Collini, “Hobhouse, Bosanquet and the State: Philosophical Idealism and Political Argument in England 1880-1918,” *Past & Present*, no. 72 (1976): 141–45; Charles E. Larmore, *Patterns of Moral Complexity* (Cambridge ; New York: Cambridge University Press, 1987), 45; H. J. McCloskey, “A Critique of the Ideals of Liberty,” *Mind* 74, no. 296 (1965): 486; J.C. Rees, *Mill and His Early Critics* (University College, 1956), 14, 35, <https://books.google.com/books?id=6g0PAQAAIAAJ>; Bruce Mazlish, *James and John Stuart Mill: Father and Son in the Nineteenth Century* (New Brunswick, USA: Transaction Books, 1988), 384–85.

⁸² Douglas Diekema, “Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention,” *Theoretical Medicine and Bioethics* 25, no. 4 (2004): 243–64; Richard Vernon, “John Stuart Mill and Pornography: Beyond the Harm Principle,” *Ethics* 106, no. 3 (April 1996): 621–32, doi:10.1086/233650; Jedediah Purdy and Neil S Siegel, “The Liberty of Free Riders: The Minimum Coverage Provision, Mill's Harm Principles, and American Social Morality,” *Am. JL & Med.* 38 (2012): 374.

⁸³ John Stuart Mill, *On Liberty ; with The Subjection of Women ; and Chapters on Socialism*, ed. Stefan Collini, Cambridge Texts in the History of Political Thought (Cambridge [England] ; New York: Cambridge University Press, 1989), 13.

another person. However, this conception of liberty leaves us with an ambiguous term, harm. Harm is not given an obvious, clear definition in *On Liberty*, however, Mill does generally consider harm to be those actions that interrupt a particular individual interest or are injurious.⁸⁴

The ambiguous definition of harm is later given clarification by fellow philosophers, and even more importantly, by the Founding Fathers.⁸⁵ To these thinkers, harm is when an individual threatens to harm or does harm to another individual's life, liberty, or property (LLP). The idea of restricting the purpose of government to simply protecting these areas was not only dominant in political philosophy, but was also written about at great length in the *Federalist Papers*.⁸⁶ In *Federalist no. 45*, James Madison explained that the only power of the government is to enhance and protect LLP. He states, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people."⁸⁷ This passage indicates that the only legitimate exercise of legal power by government is in relation to the LLP of the citizenry. This belief was not only held by Madison and other federalists, it was also held by Alexander Hamilton, John Hancock,

⁸⁴ Ibid., 15-16-78.

⁸⁵ Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* (New Haven, CT: Yale University Press, 2006), 43–48.

⁸⁶ Ibid., 15.

⁸⁷ James Madison, "The Federalist No. 45," 1788, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-45>.

Elbridge Gerry, and Thomas Jefferson.⁸⁸ Jefferson was an even more devoted adherent to the harm principle than the federalists, arguing during his inaugural address, “a wise and frugal government which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement... This is the sum of good government.”⁸⁹ Jefferson in this passage advocates for a government that only prevents harm, not one that attempts to give advantages to any individual citizens. Therefore, during this period, the federalists and anti-federalists agreed that a harm principle (not Mill’s specifically as *On Liberty* was published in 1859), correctly defined the boundaries of legitimate government action. Considering this, it is indisputable that the generalized ideas of the harm principle set the groundwork for liberalism in the United States Constitution and Bill of Rights.

With an explanation of where the boundaries of the harm principle extend presented, I must now define what constitutes as “harm” within these boundaries. To do so, I will utilize Elizabeth Foley’s *Liberty For All*, as it provides definitions of harm in relation to LLP. Foley begins by defining what harm to another person’s life can constitute. She finds that in order to define “harm to life”, she must first explore English common law, as it is the foundation for individual “right[s] of personal security.”⁹⁰ This right to personal security was not precisely defined; however, English conceptions of personal security include injury to the body. The Founders likely had a similar conception of personal security, as the American legal system has adopted laws the prevent harm to

⁸⁸ Foley, *Liberty for All*, 47.

⁸⁹ Thomas Jefferson, “Thomas Jefferson, First Inaugural Address,” in *The Political Writings of Thomas Jefferson*, ed. Merrill D. Peterson, Monticello Monograph Series (Charlottesville, Va.: Thomas Jefferson Memorial Foundation, 1993), 43–44.

⁹⁰ William Blackstone, *Commentaries on the Laws of England*, ed. Thomas M Cooley (Buffalo, N.Y.: William S. Hein & Co, 1992., 1992), 125–30.

the body, such as prohibitions on assault, battery, rape, and murder.⁹¹ Therefore, she begins by defining harm as harm to personal security.

In further defining what constitutes as harm to liberty, Foley relies upon the position of Thomas Jefferson. Jefferson stated that, any action that denies a citizen's right "to move and use [his body] at his own will," is an infringement on that individual's liberty.⁹² This position takes the aforementioned idea of personal security a step further, as Foley explains that your personal liberty can be violated if you are made to move or use your body against your will. This conception of harm can easily include being free from all hierarchical architectural constraints (such as a jail), because these constraints make one operate their body against their will. Additionally, it is important to note that as technology advances, society's understanding of what can alter, prevent, or control locomotion has evolved. Until Foucault, it was generally not known that locomotion of the body can change as a consequence of surveillance.⁹³ Therefore, it is important to continuously revise our understanding of locomotion and related concepts. The Founders certainly could not have envisioned that a camera gazing down a crowded street could change individual locomotion. However, due to Foucault, we now know it can. As a consequence, the deprivation of liberty within the context of LLP should be expanded to include coercive and corrective disciplinary mechanisms of surveillance that inhibit locomotion.

⁹¹ Foley, *Liberty for All*, 49.

⁹² Thomas Jefferson, "Legal Argument," in *The Political Writings of Thomas Jefferson*, ed. Merrill D. Peterson, Monticello Monograph Series (Charlottesville, Va.: Thomas Jefferson Memorial Foundation, 1993), 376.

⁹³ Michalis Lianos, "Social Control after Foucault," *Surveillance and Society*, no. 1 (2003): 3.

The final category of harm identified by the Founders and clarified by Foley is that of harm to property. The Founders viewed harm to property as “when an act causes or reasonably threatens to cause a loss of value, possession, or peaceful enjoyment to the owner of ... property.”⁹⁴ It is clear that the Founders had a deep concern for the possibility of undue harm to property as evidenced by the number of clauses in the Constitution that ensure property is legally protected.⁹⁵ However, the Founders considered several entities to be property, entities that ranged from items of intellectual property to real property to reputational property.⁹⁶ Therefore, the respect for a wide variety of properties indicates that the idea of property is a developing idea in our society. To best reflect the wide and ongoing topic, it is important to revise the concept of property within LLP. LLP should now include property claims related to internet content sent over the cloud, electronic metadata, academic grades, plant seeds, and credit scores.⁹⁷ In recognizing new forms of property, it becomes easier to assess if governmental intervention, in the form of surveillance, is a form of harm to property.

Before proceeding, it is important to note that any violation of liberty by these conceptions of harm require the government to provide due process of law. English common law, and later the Fifth and Fourteenth Amendments of the United States Constitution, require that any deprivation of liberty to be administered only with due

⁹⁴ Foley, *Liberty for All*, 50.

⁹⁵ “U.S. Constitution Amend. III” (n.d.); “U.S. Constitution Amend. IV” (n.d.); “U.S. Constitution Amend. V Cl. 3, 4” (n.d.).

⁹⁶ Foley, *Liberty for All*, 50.

⁹⁷ Shucheng Yu et al., “Achieving Secure, Scalable, and Fine-Grained Data Access Control in Cloud Computing” (Infocom, 2010 proceedings IEEE, Ieee, 2010), 1–9; *Lake v. City of Phoenix* (Ariz: Supreme Court 2009); *Board of Curators of Univ. of Mo. v. Horowitz* (Supreme Court 1978); Jay P Kesan, *Agricultural Biotechnology and Intellectual Property: Seeds of Change* (CABI, 2007); *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201 (Supreme Court 2007).

process of law.⁹⁸ Any restriction on liberty without due process is considered an invalid exercise of government regulatory authority. This regulation ensures that a process exists for restricting liberty if needed but only if the decision is reached non-arbitrarily. American law has developed from this conception of harm by including prohibitions against kidnapping, false arrest, and habeas corpus.⁹⁹

With Foley's three claims about harm explicated and with the notion of due process in mind, it becomes clear what harm entails when it is being used in the context of LLP. For the remainder of this chapter, I will use this conception of harm to determine when undue government authority is exercised. Not only does this version of harm enforce the American liberal tradition, it is also the approach that best describes the fundamental boundaries of government intervention for negative liberties. Therefore, I find this approach to be the most convincing when assessing the boundaries of authority in the American surveillance apparatus. As a consequence, the next section will be devoted to applying the American surveillance apparatus and its disciplinary functions to the harm principle in order to deduce if the apparatus violates it.

IX. How can Surveillance Harm?

As I outlined in chapter two, the American surveillance apparatus functions through mechanisms of disciplinary power. Using the harm principle, I will now determine whether these disciplinary functions of power fall within the legitimate exercise of state power. The specific mechanisms of power I will be analyzing are normalizing judgment, hierarchical observation, and examination.

⁹⁸ Blackstone, *Commentaries on the Laws of England*, 130–34; Foley, *Liberty for All*, 50; *Miranda v. Arizona* (Supreme Court 1966); *Gideon v. Wainwright* (Supreme Court 1963); *Katz v. United States*, 389.

⁹⁹ Foley, *Liberty for All*, 49.

The first instance of normalizing judgment I referenced was the prisoners of the Panopticon correcting their behavior to fit the expectations of the warden. This mechanism of power disciplined the subject of surveillance until their behavior was within the acceptable norm. In the case of the prison, the harm principle, as formulated by Mill and the Founders, would not be violated. Despite the fact that prisoners' liberty, that is their locomotion and conduct, is being altered by the design and function of the Panopticon, the prisoner has (presumably) been provided due process of law before being imprisoned. Therefore, because the prisoner has received due process of law and has been sentenced to prison by that due process of law, there has not been an illegitimate use of government power under the harm principle.

Notwithstanding the government is within its legitimate authority under the harm principle in the aforementioned situation, it is apparent that when due process is not provided, the actions of the state become an obvious illegitimate use of power. Currently, through camera monitoring by CCTV, UAVs, and personal electronic devices, the liberty of American citizens is influenced and "corrected" every day. The government exercises disciplinary authority constantly to change the movement of all of its citizens is an illegitimate use of government power, even if the implementation of its technologies was not intended to affect citizens' liberty. Under the harm principle I have constructed, regardless of government intent, if there is a change in movement or locomotion by a citizen because of the government without due process, it is an illegitimate use of governmental authority.

If due process has been guaranteed in these instances, specifically through search warrants approved by impartial arbitrators, then the use of these surveillance techniques

would be an illegitimate use of state authority. In the cases of CCTV, UAVs, and other monitoring devices, specific warrants have been granted to obtain knowledge about a particular person. As such, due process of law has been properly administered. However, mass surveillance, which is routinely used by the United States government, lacks any semblance of due process and lacks any particularized threat identification that would harm other citizens. This specific threat of harm or criminality is referred to as probable cause. The Supreme Court has clarified the meaning of this definition in relation to search warrants, finding that probable cause is “where the facts and circumstances within the officers knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable causation that a crime is being committed.”¹⁰⁰ The Supreme Court has interpreted this standard to mean a preponderance of evidence is necessary to administer a search warrant. However, in the case of mass surveillance, there is no evidence that can indicate that all the subjects of mass surveillance (typically groups of millions of people including U.S. citizens), are more likely than not to engage in a particularized form of criminality. As such, when these visual surveillance techniques are used to survey en-mas, they violate the harm principle by changing citizen locomotion in absence of due process, thus proving mass visual surveillance techniques are operating through normalized judgment, an illegitimate use of state authority.

The next mechanism of power I identified in chapter two is hierarchical observation. I draw from Foucault's example of military barracks, where each soldier was constantly visible to allow gazes from higher authorities. This arrangement of power

¹⁰⁰ *Brinegar v. United States* (Supreme Court 1949).

forces the soldier to behave in a way that they would not have otherwise behaved, affecting their liberty. However, under this instance of observation, there is no violation of the harm principle, even though locomotion is altered by expectations resulting from surveillance. There is no violation in Foucault's example because of the nature of the military. Armed service members do not per-se lose particular rights when in the military, their rights are instead altered to ensure their conduct does not interfere with overriding demands of "discipline and duty."¹⁰¹ As a result, due process has been administered in Foucault's military camp as the threshold for reaching due process of law is different for military personnel.¹⁰² As the threshold for due process has been met, this instance would not constitute harm within the definition I have provided.

However, again, it becomes apparent that actions taken by the United States government in relation to modern surveillance are not a legitimate use of state power. The Internet surveillance of all citizens is dramatically different from the constant visibility in a military barracks. The mass collection of data by Internet data collection tools is oriented towards the entire global population, including citizens of the United States. In these circumstances, due process has not been provided because there is no possible evidence that indicates that all citizens of the United are engaging in particularized illegal behavior. However, the harm incurred in this case departs from that of the harm that occurs because of a camera. Internet data collection tools do not violate individual locomotive liberty, but rather these tools violate property. Metadata and the

¹⁰¹ Parker v. Levy (Supreme Court 1974); "CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL," § SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY (1963), https://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-mil-pers.pdf.

¹⁰² CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL.

content of electronic device usage are both pieces of property, and without obtaining a search warrant to search and seize that property, due process is being violated in every sense. There is debate about who owns metadata and content of user data, and presuming that companies own all content and metadata of users, under the PRISM program, there would be no unjustified government action as the companies seizing the information consented to the release of the information. However, in a program such as bulk data collection through FISA, due process is not being administered as the surveillance is taking place without knowledge of the property owner.¹⁰³ I consider this instance a violation of due process because there is no probable cause that all people surveyed (the entire United States internet using population in some cases) are more likely than not committing a crime. The lack of specificity is what makes the program lack proper administration of due process, wrongfully infringing on the property of individuals in violation of the harm principle .

However, these programs have continued to operate because Congress and the courts have both agreed that cyber surveillance is a unique area of property, and as such the rules are different surrounding due process. For example, Congress passed the PATRIOT Act, which stated that law enforcement can collect any communications records, credit cards, bank numbers, and stored emails held by a third party without probable cause.¹⁰⁴ In order to access the information, law enforcement officials do not

¹⁰³ "UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT: RULES OF PROCEDURE," November 1, 2010, <http://www.fisc.uscourts.gov/sites/default/files/FISC%20Rules%20of%20Procedure.pdf>.

¹⁰⁴ "USA PATRIOT Act (U.S. H.R. 3162, Public Law 107-56), Title V, Sec 505. Amended 18 U.S.C. § 2709(b) - Counterintelligence Access to Telephone Toll and Transactional Records," 18 U.S. Code § 2709 § (n.d.), <https://www.law.cornell.edu/uscode/text/18/2709>.

need probable cause certified by a neutral arbiter; they only need reasonable suspicion (a lower standard).¹⁰⁵ Further, no notification is given to the person whose data is collected and/or accessed by law enforcement.¹⁰⁶ This system has been upheld by court rulings and continues to remain in effect today.¹⁰⁷

The merits of Congress and the courts legally and morally justifying the lack of probable cause in surveillance with important interests is a debate worth having; however, in relation to the conception of harm and due process I have defined, the operation of mass surveillance is in absence of probable cause, which makes this exercise of government power illegitimate. The United States government is not ensuring due process for all persons who are being surveyed before searching and/or seizing their property (internet usage and metadata). The only time this property should be invaded is if there is a harm to another citizen's life, liberty, or property. The government provides no justification for their searching and seizing of property under FISA, the PATRIOT Act, and likely other clandestine programs of which legal procedures are classified (such as XKEYSCORE), a search and/or seizure constitutes a violation of the harm principle and as such is an illegitimate use of state power.

The final mechanism of power operating through the contemporary American surveillance apparatus is the examination. As I have formulated in chapter one and two, the examination is the combination of surveillance, classification, and punishment. This mechanism functions by classifying, quantifying, and measuring the behavior of individual subjects. After performing these functions, the data is centralized, stored, and

¹⁰⁵ Charles Doyle, "The USA PATRIOT Act: A Legal Analysis" (DTIC Document, 2002).

¹⁰⁶ Ibid.

¹⁰⁷ IN RE DIRECTIVES PURSUANT TO SEC. 105B (Court of Appeals 2008).

scaled. These dossiers of information are created from the different techniques of surveillance networking data together. This type of classification leads to unjustified harm because of violations of liberty.

Although liberty is not harmed in a physical sense, it is certainly harmed in an intellectual sense. Individuals knowing that there are dossiers on them and others, as Foucault correctly identifies, changes the conduct and behavior of that individual. This difference in conduct is sufficient to establish that liberty is violated through the harm principle's application when dossiers are established on persons without any probable cause for their creation.

Further, a person's claim to himself or herself and their own privacy is a form of property. By the United States obtaining that information without the consent of that person, they are seizing property of individuals. This seizure of property is constantly occurring due to the organization of information collected through all the surveillance techniques of the United States. Property, as defined as information about an individual, is being seized without due process of law, the organization, classification, and quantification of an individual's data is an illegitimate exercise of state authority under the harm principle.

X. Concluding Thoughts and Final Words

Each of the mechanisms of power I identified, and a number of specific programs within those mechanisms, violates the harm principle I have constructed. Therefore, my ultimate conclusion is that the American surveillance apparatus, through a number of its disciplinary functions, is an illegitimate exercise of state authority under the harm principle. This analysis demonstrates that in a democracy, where privacy is a value long

recognized and respected, the government should exercise restraint in attempting to collect information about the entire population without any reasonable consent or probable cause of unlawful action. The dissemination of information throughout the government about a particular individual should only occur when there is a reasonable expectation another person will be harmed because of that person's information. Under the present surveillance society established by the United States, the government is nearly unrestrained in its ability to collect this information. This significant change in the operation of privacy is a reality Americans live in. If Americans want to reclaim their privacy, they must resist this form of harm.

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