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# Through a PRISM Darkly: Surveillance and Speech Suppression in the Post-Democracy Electronic State"

David Barnhizer



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# **Through a PRISM Darkly: Surveillance and Speech Suppression in the “Post-Democracy Electronic State”**

**David Barnhizer\***

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\* Professor of Law *Emeritus*, Cleveland State University.

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### **Introduction: The “Post-Democracy Electronic State”**

There is no longer an American democracy. It has “morphed” into shifting and competing fragments operating within the physical territory defined as the United States and tenuously holding on to some of the basic creeds that represent what we long considered an exceptional political experiment.<sup>1</sup> To the casual view a reasonably democratic system still exists. Realistically, it is changing by the moment into a new political form, the “Post-Democratic Electronic State”.

That post-Democratic form of political order paradoxically consists of the combination of fragmented special interests that punish anyone daring enough to challenge their desires and a central government that is consolidating its power to monitor, control and intimidate its citizens. It also includes an insatiable set of information gathering businesses that are functioning as “enablers” by amassing an inconceivable amount of data on Americans and everyone else for that matter.

None of us can claim the quality of original insight achieved by Alexis de Tocqueville in his early 19th Century classic *Democracy in America* in his observation that the “soft” repression of democracy was unlike that in any other political form. He explained:

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<sup>1</sup> See PETER DRUCKER, *THE NEW REALITIES* 76 (1989). “The new pluralism ... focuses on power. It is a pluralism of single-cause, single-interest groups—the “mass movements” of small but highly disciplined minorities. Each of them tries to obtain through power what it could not obtain through numbers or through persuasion. Each is exclusively *political*.”.

“[T]he supreme power [of government] then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided. . . . Such a power does not destroy. . . but it enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.”<sup>2</sup> It is impossible to deny that we in the US, the United Kingdom and Western Europe are experiencing just such a “gentle” drift of the kind that Tocqueville describes, losing our democratic integrity amid an increasingly “pretend” democracy.

Adolf Berle warned that gaining control of institutions is the only way people can extend their power beyond the limited reach of their fists or guns.<sup>3</sup> But though Berle’s proposition about acquiring power seems legitimate in the abstract there are degrees of control and co-optation of institutions that go too far and shift the political form from legitimate to illegitimate. That is what I see happening with the faded democracies of America and Western Europe, particularly in the United States and the United Kingdom.<sup>4</sup>

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<sup>2</sup> In pre-democratic societies, Tocqueville noted, despotism tyrannized. In modern democracies, it infantilizes. Democratic despotism is both “more extensive and more mild” than its precursors: it “degrades men without tormenting them.” In this sense, Tocqueville continued, “the species of oppression by which democratic nations are menaced is unlike anything that ever before existed in the world.” Tocqueville’s analysis, although written in the 1830s, seems remarkably contemporary. Let me quote a few sentences. “The force of democratic despotism,” Tocqueville wrote, “would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. . . . [I]t every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself.” Alexis de Tocqueville, *Democracy in America*, . None of us can claim such quality of original insight but it is impossible to deny that we are experiencing just such a “gentle” drift toward the loss of integrity amid what is increasingly a “pretend” democracy.

<sup>3</sup> See Adolf A. Berle, *Power* 92 (1967).

<sup>4</sup> John Naughton, “Twitter and the transformation of democracy”, [The Observer](#), Saturday 14 September 2013. “The social networking service has the power to control the expression of public opinion in political debate. . . . What is astonishing about Twitter is that in the seven years since it was founded as a side project to share messages among a group of friends, it has become the de facto newswire for the planet. And, unlike the recognised newswires (Reuters, AP etc), it is available to everyone, which is why even governments sometimes now use it to release news before they give it to mainstream media. But Twitter also has the capacity to turn “ordinary” people into broadcasters, a development whose implications we are only just beginning to digest. The hapless folks who retweeted false allegations about [Lord McAlpine](#), for example, did not realise that they were in the broadcasting business. And the tweetstorms of bile and aggression directed against women in recent months have led to vociferous demands for the company to regulate what passes through its servers. Which brings us to politics. One of the most striking aspects of the epoch-making [Commons debate on Syria](#) was the way many MPs cited the emailed opposition of their constituents to armed intervention as a reason for voting against the proposed action. In the United States, members of Congress told much the same story. It’s impossible to know whether MPs and congressmen were using constituents’ hostility as a way of legitimising their own, private, views, but their protestations gave a dramatic new twist to an old conundrum: are parliamentarians representatives (legislators who make up their own minds) or mere delegates (people who vote as instructed by their constituents)?”

Part of the process involves the deliberate reconstruction of language and values, some of which is legitimate but much of what is occurring is a cynical power grab by special interest groups intent on molding others to their way of thinking or simply shutting up anyone who does not agree with them. The ability to reconstruct our language and values is being facilitated almost beyond imagination by the communicative, connective and coercive powers granted by the Internet accompanied by information acquisition and management technology.<sup>5</sup> But rather than illuminating in the highest sense as we naively hoped would result from those technological developments they have been turned into weapons. The ability to monitor, spy and intimidate is unprecedented in a democratic society.<sup>6</sup>

### **Adaptations of the Democratic Form**

Of course we never have had anything matching a “pure” democracy. James Madison, for example, described democracy as being “a society consisting of a small number of citizens, who assemble and administer the government in person.”<sup>7</sup> Aristotle warned in the context of the Athenian city-state: “There is a limit to the size of a city just as there is to everything else.... [adding] For if any one of these is either too small or too large in

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<sup>5</sup> Spencer Ackerman, “US should re-evaluate surveillance laws, ex-NSA chief acknowledges”, The Guardian, Friday 30 August 2013. <http://www.theguardian.com/world/2013/aug/30/nsa-surveillance-framework-nsa-chief>. “Bobby Ray Inman defends the NSA's bulk surveillance but says the nature of communications has changed – and that the US must revisit laws in the private sector as well. The US should conduct a holistic reappraisal of its laws and authorizations to balance privacy, civil liberties and surveillance across the public and private sectors, former National Security Agency director Bobby Ray Inman has told the Guardian.”

<sup>6</sup> To obtain a sense of what is going on see, Ellen Nakashima, “Obama administration had restrictions on NSA reversed in 2011”, September 7, 2013; [http://www.washingtonpost.com/world/national-security/obama-administration-had-restrictions-on-nsa-reversed-in-2011/2013/09/07/c26ef658-0fe5-11e3-85b6-d27422650fd5\\_story.html](http://www.washingtonpost.com/world/national-security/obama-administration-had-restrictions-on-nsa-reversed-in-2011/2013/09/07/c26ef658-0fe5-11e3-85b6-d27422650fd5_story.html). Nakashima reports: “The Obama administration secretly won permission from a surveillance court in 2011 to reverse restrictions on the National Security Agency’s use of intercepted phone calls and e-mails, permitting the agency to search deliberately for Americans’ communications in its massive databases.... Together the permission to search and to keep data longer expanded the NSA’s authority in significant ways without public debate or any specific authority from Congress. The administration’s assurances rely on legalistic definitions of the term “target” that can be at odds with ordinary English usage. The enlarged authority is part of a fundamental shift in the government’s approach to surveillance: collecting first, and protecting Americans’ privacy later. The [FISA] court decision allowed the NSA “to query the vast majority” of its e-mail and phone call databases using the e-mail addresses and phone numbers of Americans and legal residents without a warrant, according to Bates’s opinion.” ... But in 2011, to more rapidly and effectively identify relevant foreign intelligence communications, “we did ask the court” to lift the ban, [ODNI general counsel Robert S. Litt](#) said in an interview. “We wanted to be able to do it,” he said, referring to the searching of Americans’ communications without a warrant.” ... The NSA intercepts more than 250 million Internet communications each year under Section 702. Ninety-one percent are from U.S. Internet companies such as Google and Yahoo.”

<sup>7</sup> Selected Quotes of James Madison, [http://www.constitution.org/jm/jm\\_quotes.htm](http://www.constitution.org/jm/jm_quotes.htm).

size, it will not have the power that belongs to it but will sometimes wholly forfeit its nature and sometimes be in a base condition.”<sup>8</sup> Aristotle nonetheless considered democracy the best form in the real world because he felt it had the greatest likelihood to serve the common good of all citizens while the other forms all tended toward the interests of specific classes. An obvious problem, however, is that in ultra-homogenous Athens voting did not include women, barbarians, aliens or slaves, making the classes of a relatively limited character when set against the diversity of our present world.<sup>9</sup>

Aristotle concluded the size and composition of a city-state are important because: “A city’s acts are those of its rulers and of its ruled subjects, and the work of the ruler is to command and pass judgment. But with respect to passing judgment on matters of justice and distributing offices according to merit, the citizens must know what each other is like, for where it happens that they do not, these matters of judgment and offices must be in a base condition.”<sup>10</sup>

He adds: “For it is not just to decide them in an offhand way, but that is manifestly what happens where there are many people. Further, foreigners and resident aliens could easily get a share in the regime because, given the excessive numbers, escaping detection will not be hard.”<sup>11</sup> Anonymity and secrecy in extremely large and diverse political systems obstruct our ability to know the merits of the special interests urging particular actions and also allow for highly surreptitious political maneuvering. Simply put, welcome to America, the land of surveillance, secrecy and massive data gathering by government and business on the activities of its citizens.

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<sup>8</sup> Aristotle, *The Politics*, Bk. 4, c. 4, 1326a35, at 123. See, THE POLITICS OF ARISTOTLE, Translated and introduced by Peter L. Phillips Simpson. (North Carolina 1997). He concluded that even with its numerous flaws, democracy was the best real world option. Aristotle’s three true forms of government were kingly rule, aristocracy, and constitutional government. The three corrupted forms were tyranny, oligarchy, and democracy.

<sup>9</sup> See, Naughton, *supra*, n. 3. “Edmund Burke famously raised the question [in a speech](#) to the electors of Bristol on 3 November 1774. “Government and legislation,” he said, “are matters of reason and judgment, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?” In Burke’s time, when Bristol was two days’ ride from London, the idea that constituents might determine the votes of their MP in Westminster in anything resembling real time was moot. So deliberative democracy was the only option available. MPs’ recent rationalisations of their votes suggest that some of our politicians have embarked down a slippery slope. Technologies such as Twitter, which offer real-time tracking of [public opinion](#), do make Burke’s nightmare realisable. Which means that a company that can regulate expressions of that opinion might be very powerful indeed. And that should make us nervous.”

<sup>10</sup> Aristotle, *Politics*, Bk. II, c. 8, *supra* n. 7. *Politics*, *id.* Bk. 4, c. 4, 1326b7, at 124.

<sup>11</sup> Aristotle, *Politics*, *id.*

We are not only far beyond Aristotle's Athenian context but have increasingly lost the considerably more tenuous connection between community, law and power in American society. Our social environment has reached a degree of transitoriness of its residents to the point that we tend to know little or nothing about each other. A result is that there is little awareness of the individual merit of those with whom we deal or a sense of bonding community outside of small fragments of interest and relationship. This has destroyed any common sense of being a tight knit community. We now reside in a context of "thinned" relationships and even anonymity that alters our behavior in ways we are still trying to grasp.<sup>12</sup>

The fact that we have far transcended the nature of the "pure" democratic form of Aristotle's Athens and instituted variations of representative democracy in which members of the community are in theory forced to trust their elected representatives to act in the community's best interests has been necessitated by the sheer scale of the nation. The population size and the nation's far-flung distances, along with communications difficulties and the need to balance the increasingly complex diversity of interests have demanded different approaches.

Yet the modifications to the democratic ideal that were needed to deal with those considerations never resulted in an illegitimate architecture of government as opposed to adaptations occurring over time and operating within political and technological necessity. We are now caught up in a whirlwind of change and diverse demands and still haven't figured out how to cope. In any event, we are aiming at a rapidly moving target when we try to understand what has occurred and how to take advantage of its opportunities while limiting its excesses and abuses.

### **The Internet as "Social Tsunami"**

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<sup>12</sup> See Lord Devlin, *Morals and the Criminal Law*, in *THE PHILOSOPHY OF LAW* 74 (Ronald Dworkin ed., 1977). Devlin concluded, "For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price." See also CHARLES TAYLOR, *A SECULAR AGE* 1-2 (2007) (arguing that the supposed tolerant morality of current culture is parasitic upon the morality and institutions developed by the Western and Judeo-Christian culture and morality).

The technological power of the Internet, using that term as shorthand for the host of information and communication capabilities that have developed over the past 15 to 20 years, has come on national and global society with such overwhelming speed that it is as if an “social tsunami” has swept through our society in ways that have devastated existing institutions and traditional order. The changes being generated by this incredible “event” are phenomena we are struggling to understand and cope with. We have shifted virtually overnight from a world in which government and communications moved at relatively slow speeds and controlled access to the ability to present our views broadly to one in which billions of voices resound in an uncontrolled cacophony. The impact on governments and other traditional institutions is profound and continuing to develop.

One impact is that once a system moves beyond an easily manageable and relatively small-scale common culture in which there are shared values and a governing ethos in which the sources of authority are respected and laws are jointly understood, even if not reduced to written form, the political marketplace not only becomes much more competitive but superficial.<sup>13</sup> It is a marketplace, but of power and influence, not ideas. The pseudo-discourse that results is always outcome-directed and power is always the goal because that is how one’s group’s agenda becomes embedded in the system. This was occurring before the Internet exploded within our societies.

### **The Exhaustion of Our Social Capital**

Robert Putnam has exhaustively documented the fact that American “social capital”—the social ties that make our communal lives more productive—has been disastrously depleted over the last forty years.<sup>14</sup> As Putnam observes, Americans no longer participate in community or civic institutions at anywhere near the levels of the early to mid-twentieth century, and we are becoming a nation of insular families and

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<sup>13</sup> John Gardner captured an important aspect of the situation in his comment that: “[o]ur tradition tells us that we should be individuals, initiators, and creators, free and responsible.... But [he adds] the trend ... [instead] transforms individualists into specialist-links in larger systems, locked into their roles, increasingly incapable of autonomous functioning....” John W. Gardner, *The Recovery of Confidence* at 44-45 (1971).

<sup>14</sup> For a chilling description of the potential dangers of not acting to preserve the larger community, see generally ROBERT D. PUTNAM, *BOWLING ALONE* (2000). *Id.* at 19.



individualists who no longer vote in significant numbers, no longer participate in civic organizations, have declining participation in religious organizations, and we volunteer less than we used to.<sup>15</sup>

As a result, we are losing the mortar that makes community possible—we are now less trusting, less giving, and less honest as a society.<sup>16</sup> Putnam, unfortunately, closes his study of community disintegration with nothing more than a plaintive call to action, a request that Americans begin joining community groups again and building social capital.<sup>17</sup> The problem that we see with this approach is that it is no approach, no solution, at all—the underlying damage to American society has already been done, and Humpty Dumpty does not go back together just because we’d like it to be so.

Putnam almost admits that the solution should come from some external event— “[Creating social capital] would be eased by a palpable national crisis, like war or depression or natural disaster....”<sup>18</sup> But even here, although the 9/11 attack seemed to bring us together again for a brief period and although we continue in the middle of an ongoing recession and economic restructuring as well as a seemingly endless conflict with Islamic guerrillas who seek our destruction, the competing elements of our domestic polity are still focused on the various interest groups getting what they can and protecting their own agendas and privileges. Americans may have managed to deconstruct their national identity and community to the point of extinction.<sup>19</sup>

What is now occurring is a change in the nature of the society. There is a shift in the form of government from a hybrid form of complex democracy that at least sought to be

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<sup>15</sup> Putnam, *Id.* at 31-133.

<sup>16</sup> Putnam, *Id.* at 134-147.

<sup>17</sup> Putnam, *Id.* at 402-414.

<sup>18</sup> Putnam, *Id.* at 402.

<sup>19</sup> James Madison recognized the need to balance competing interests in his analysis of factious groups. In *Federalist No. 10*, Madison sets out the idea of faction in the following words. “By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Federalist # 10* (November 22, 1787) *The Federalist*, Edited and introduced by Jacob E. Cooke (1961), at 56. Madison goes on to describe two “cures” for faction. One is to “destroy the liberty” that allows it to bloom, the other is to give “to every citizen the same opinions, the same passions, and the same interests.” *Federalist # 10*, *id.* at 58. We appear to opting to do each “cure” simultaneously through intimidation and the imposition of overt and covert language codes.

reasonably representative to a strange mixture of George Orwell's *1984* and *Animal Farm* along with William Golding's *Lord of the Flies*.<sup>20</sup> Perhaps one of the oddest and most ironic features is that as the Internet-based communications systems have come into use over the past two decades they have greatly enhanced the ability for widespread communication among a nation's citizens.<sup>21</sup> For the first time in our history we have overcome physical distance and separation to the degree that it is possible to realize the ideal of face-to-face interchanges of the kind we always assumed were central to true democracy.

Unfortunately, as is discussed here at some length, the ability to communicate has been overwhelmed by numerous competing factors, including the discovery that we are a somewhat less than admirable species when provided a "voice". These factors include an embarrassingly level of ignorance, and the degradation of our educational systems and loss of any sense of what has been described as "civic virtue" or duty to sacrifice and compromise in the common interests of the community.<sup>22</sup> And of course we don't compromise in the interests of the larger common community because there no longer is one.

To the failure of education and loss of community can be added the anonymity of our communications made worse by the malice underlying much of the commentary and the sensationalism and desire for "fifteen minutes of fame" that characterizes our messages and media.<sup>23</sup> Along with these go the abuses of power, illicit uses of the technology to

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<sup>20</sup> A fascinating fact is offered by the Huffington Post. See, Dominique Mosbergen, "George Orwell's '1984' Book Sales Skyrocket In Wake Of NSA Surveillance Scandal", The Huffington Post, June 11, 2013.

<sup>21</sup> The *Universal Declaration of Human Rights* (UDHR) provides for freedom of belief and expression in Articles 18 and 19. Article 18 states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Article 19 provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

<sup>22</sup> The process has been in motion for more than a generation but has intensified with the onset of the Internet as communications and surveillance weapon. But as Albert Schweitzer argued: "no historical analogy can tell us much. The past has, no doubt, seen the struggle of the free-thinking individual against the fettered spirit of a whole society, but the problem has never presented itself on the scale on which it does to-day, because the fettering of the collective spirit ... by modern organizations, [by] modern unreflectiveness, and [by] modern popular passions, is a phenomenon without precedent in history." Quoted in Erich Fromm, *The Sane Society* 201, 202 (1955).

<sup>23</sup> Jacques Ellul argues that: "modern man is beset by anxiety and a feeling of insecurity. He tries to adapt to changes he cannot comprehend. The conflict of propaganda takes the place of the debate of ideas." JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* vii (1964).

harm, and the inability of governments to know how to draw limits on their desire for information.<sup>24</sup>

At this point we do not have the slightest clue about how to deal with the interacting forces of the new and still evolving forms of government and accompanying social order. One thing that seems clear, however, is that much of it is not a positive evolution. The system has turned malicious and selfish while losing its lingering sense of community, its essential “soul”.<sup>25</sup> The paradox is that the emerging system is in the process of becoming massively repressive at the same time it has expanded into a profoundly fragmented society.<sup>26</sup> Each piece, whether representing an economic interest or one of political activism, is committed to relentlessly pursuing its particular agenda.

### **The Death of Compromise**

The lack of a common voice and the social fragmentation that has taken place arguably is one of the central factors in governmental and business actors being able to conduct the

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<sup>24</sup> Associated Press, “Judge almost shut down surveillance program, documents show”, September 10, 2013. The reports states: “A federal judge who oversaw a secret U.S. spy court almost shut down the government's domestic surveillance program designed to fight terrorism after he 'lost confidence' in officials' ability to operate it, documents released Tuesday show.” [The Court concluded] “government officials had been accessing domestic phone records for nearly three years without 'reasonable, articulate suspicion' that they were connected to terrorism.”

<sup>25</sup> See Ernest Becker, *The Birth and Death of Meaning* 139 (2d ed. 1971). “The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man.... Man's freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.” *Id.*

<sup>26</sup> The Chinese government is taking aggressive steps to rein in the Internet. See, e.g., Reuters, “Charles Xue tells Chinese media he spread irresponsible online posts: Detained Chinese-American venture capitalist says 'freedom of speech cannot override the law'”, [theguardian.com](http://www.theguardian.com), Sunday 15 September 2013. <http://www.theguardian.com/world/2013/sep/15/charles-xue-admits-irresponsible-internet-posts>. “One of China's best known online commentators appeared in state media on Sunday to admit to spreading irresponsible [internet](#) posts after China adopted [tough measures to crack down on online rumours](#). People will be charged with defamation if posts that contain rumours are visited by 5,000 internet users or reposted more than 500 times, according to a judicial interpretation issued this month by China's top court and prosecutor. The rule, which could lead to three years in jail, is part of a recent government effort to rein in [social media](#), increasingly used by Chinese people to discuss politics, despite stringent censorship. Detained Chinese-American venture capitalist Charles Xue, known for making controversial remarks on social and political issues, told state broadcaster CCTV and the official Xinhua news agency that “freedom of speech cannot override the law”. “My irresponsibility in spreading information online was a vent of negative mood, and was a neglect of the social mainstream,” Xue said.” See also, [Tania Branigan](#), “Chinese Communist party intensifies online crackdown: Authorities target 'wanton defamation' by social media critics by bringing in even stricter controls”, [theguardian.com](http://www.theguardian.com), Tuesday 17 September 2013. <http://www.theguardian.com/world/2013/sep/17/chinese-communist-party-online-crackdown>. “An influential Communist party journal has compared online rumours to Cultural Revolution-style denunciations and warned of the need to curb “wanton defamation” of authority, as [China](#) intensifies its campaign to control [social media](#). It came as the Chinese state broadcaster aired video footage of the handcuffed businessman Xue Manzi, also known as Charles Xue, confessing that he had irresponsibly spread rumours because his 12 million microblog followers [made him feel like an emperor](#).”

kinds of privacy invasions and intimidations that have taken place. The absence of a generally shared ethos or creed of the kind that has sustained the system in the past creates a divisiveness and social weakness in which agreement cannot be reached on any issue of consequence. The stridency and “me-first” selfishness of the fragmented interest groups means that they can always be turned against one another.

“Compromise” has become an epithet rather than a political virtue. This may well be because we have become so intellectually inadequate that all we really have are superficial slogans and propaganda without any understanding or substance beneath the rhetoric. Jacques Ellul argues that: “modern man is beset by anxiety and a feeling of insecurity. He tries to adapt to changes he cannot comprehend. The conflict of propaganda takes the place of the debate of ideas.”<sup>27</sup> As we travel deeper into the world of propaganda and banality we can no longer engage in real debate and interactive problem-solving. This is because we lack the content, experience and methods that would allow otherwise reasonable people to seek realistic solutions in “the art of the possible” as politics has been described.

Ironically, even though diversity and tolerance are proclaimed as leading values by some of the most aggressive elements of this transition to a “new society”, dominant activist political groups are following a strategy designed to impose their language and values on everyone. Because they are totally convinced of the rightness of their cause it becomes automatic to consider anyone who opposes them or simply fails to agree as a bigot guilty of what has come to be thought of as “phobic” behavior. “Phobias” and similar accusations and characterizations have become the new weapons of “framing”, propaganda and “spin”. In far too many instances they are the tools of political interest groups that often are unfair and damaging while being impossible to rebut because doing so essentially requires the victim to “prove a negative”, i.e., “I’m not phobic” or “I’m not a bigot”.

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<sup>27</sup> JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* vii (1964).

Although it is unlikely to be seen as a popular position, I consider the recent invention of “hate speech” and “hate crime” labels and categories to be a prime example of the pervasive fanaticism that afflicts American and European societies. The labels of “hate” speech and “hate” crimes are powerful tools for shaping behavior, as they are intended to do. So are the much too casually applied strategies of “phobias”, “racism” and sexism.<sup>28</sup> This is not a defense of discriminatory or “creepy” attitudes and beliefs. It is, however, resistance against empowering special interest groups with the virtually unilateral authority to define what “offends” or “insults” them.<sup>29</sup> The concept of “insult” of government and its leaders, or of religious and other groups is a powerful means of suppressing speech. We see a host of such strategies in China, in Mohamed Morsi’s Egypt when he was in power, in the United Kingdom and even in tiny Grenada.<sup>30</sup> Loose and subjective laws that can be liberally interpreted by interests in authority to their own advantage and used against others are much like the well-known strategy of “Crimes against the State” approach of totalitarian regimes.<sup>31</sup>

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<sup>28</sup> On this theme see, Diane Ravitch, *The Language Police: How Pressure Groups Restrict What Students Learn* (New York, Alfred A. Knopf 2003); and David E. Bernstein, *You Can’t Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington, Cato Institute 2003). See also, Dawn C. Nunziato, “The Death of the Public Forum in Cyberspace,” 20 *Berkeley Technology L. J.* 1115 (2005).

<sup>29</sup> See, e.g., Simon Jenkins, Comment & Debate, “Britain is slithering down the road towards a police state,” *The Guardian*, Feb. 6, 2008, at 29. See, Tony Blair, “The prime minister’s statement on anti-terror measures,” *The Guardian*, Aug. 5, 2005, available at <http://www.guardian.co.uk/politics/2005/aug/05/uksecurity.terrorism1>. The new rules of the game are radically different. See *id.* In the wake of the 2005 London terrorist attacks, Prime Minister Blair proposed an array of reforms, including greater latitude for state officials making deportation decisions, increasing legal sanctions for activities associated with terrorism (including advocating or supporting terrorist activities), a ban on asylum for individuals engaging in or supporting terrorist activities, increasing the state’s power to strip citizenship from individuals engaged in “extremist” activities, streamlining extradition and court procedures, and increasing the grounds justifying imprisonment of British citizens who would not be eligible for deportation. See *id.*

<sup>30</sup> In the midst of the insanity of fanatic religiosity and an example of why such strategies must be resisted, see the blasphemy case set in Greece reported by Kryisia Diver, “Cartoonist faces Greek jail for blasphemy,” *The Guardian* [online], Wednesday March 23, 2005. The report relates: “He meant it as a piece of religious satire, a playful look at the life of Jesus. But Gerhard Haderer’s depiction of Christ as a binge-drinking friend of Jimi Hendrix and naked surfer high on cannabis has caused a furore that could potentially land the cartoonist in jail. Haderer did not even know that his book, *The Life of Jesus*, had been published in Greece until he received a summons to appear in court in Athens in January charged with blasphemy. He was given a six-month suspended sentence in absentia, but if he loses his appeal next month his sentence could be increased to two years. Haderer’s book is the first to be banned in Greece for more than 20 years, and he is the first artist to fall prey of the European arrest warrant system since it was introduced in June 2002. .... ‘It is unbelievable that a person can write a book in his home country and be condemned and threatened with imprisonment by another,’ said Nikki Conrad, a human rights expert...” See also, See, Kristen Chick, “Egypt pursues blasphemy cases as Morsi defends ban at UN”, *Christian Science Monitor*, September 27, 2012. <http://www.csmonitor.com/World/Middle-East/2012/0927/Egypt-pursues-blasphemy-cases-as-Morsi-defends-ban-at-UN>.

<sup>31</sup> Paul Craig Roberts, “Role Reversal: How the US Became the USSR”, [July 23, 2013](http://www.paulcraigroberts.org/2013/07/23/role-reversal-how-the-us-became-the-ussr-paul-craig-roberts/), Institute for Political Economy, writes: <http://www.paulcraigroberts.org/2013/07/23/role-reversal-how-the-us-became-the-ussr-paul-craig-roberts/>. “The Obama Regime is the most oppressive regime ever in its prosecution of protected whistleblowers. Whistleblowers are protected by law, but the Obama Regime insists that whistleblowers are not really whistleblowers.

We are now surrounded by single-issue interest groups on both the Right and the Left. This makes real communication virtually impossible. Gabriel Marcel places what is occurring in a context of fanaticism, reminding us of the improbability of effective discourse. Marcel writes: "The first ... observation to be made is that the fanatic never sees himself *as* a fanatic; it is only the non-fanatic who can recognize him as a fanatic; so that when this judgment, or this accusation, is made the fanatic can always say that he is misunderstood and slandered."<sup>32</sup>

### **The Erosion of the Individual**

The ideal of human development in the West has long been characterized by a philosophic and systemic commitment to the fullest possible development of each person. Even though this ideal focused on the individual it was not fundamentally selfish. The idea was that it was through the contributions of individuals who were seeking to understand the world and community in depth that the greatest contribution to the whole would be made.<sup>33</sup> Instead we have become a collection of clones and followers who submerge our identities in a mass and are committed to the interests of the identity group that provides our sense of meaning.<sup>34</sup> The intriguing thing about what has occurred is that

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Instead, the Obama Regime defines whistleblowers as spies, traitors, and foreign agents. Congress, the media, and the faux judiciary echo the executive branch propaganda that whistleblowers are a threat to America. It is not the government that is violating and raping the US Constitution that is a threat. It is the whistleblowers who inform us of the rape who are the threat.

The Obama Regime has destroyed press freedom. A lackey federal appeals court has ruled that NY Times reporter James Risen must testify in the trial of a CIA officer charged with providing Risen with information about CIA plots against Iran. The ruling of this fascist court destroys confidentiality and is intended to end all leaks of the government's crimes to media. What Americans have learned in the 21st century is that the US government lies about everything and breaks every law. Without whistleblowers, Americans will remain in the dark as "their" government enserfs them, destroying every liberty, and impoverishes them with endless wars for Washington's and Wall Street's hegemony. Snowden harmed no one except the liars and traitors in the US government. Contrast Washington's animosity against Snowden with the pardon that Bush gave to Dick Cheney aide, Libby, who took the fall for his boss for blowing the cover, a felony, on a covert CIA operative, the spouse of a former government official who exposed the Bush/Cheney/neocon lies about Iraqi weapons of mass destruction. Whatever serves the tiny clique that rules america [sic] is legal; whatever exposes the criminals is illegal."

<sup>32</sup> GABRIEL MARCEL, *MAN AGAINST MASS SOCIETY* (1969) at 136, 137.

<sup>33</sup> Ritt Goldstein, "US planning to recruit one in 24 Americans as citizen spies," SMH.com.au, 7/15/02 John Thorne, "High-tech tracked London suspects: Using closed-circuit cameras and tracing cellphone calls, Britain and Italian police capture 7/21 bombing suspects," *Christian Science Monitor*, 8/1/05 Louise Christian, "Stay calm, the government says, in a mad panic itself: Proposed new anti-terrorist laws will be counterproductive," *Guardian*, 7/30/05.

<sup>34</sup> John Hooper, Gwladys Fouca, Jon Henley, Ian Traynor, Krysia Diver, Giles Tremlett and Nicholas Watt, "Fearful Europe steps up security: Vulnerable countries act quickly to bring in new powers," *Guardian*, 7/28/05; Caleb

the ability to communicate, connect and act in concert has not brought us together but has generated an increasingly fractured and antagonistic populace.<sup>35</sup> This will only get worse.

Along with civility and courtesy, the element that is disappearing with amazing rapidity is the authentic individual “voice” that at least seeks wisdom, insight and shared discussion on a level of substance that acknowledges our flaws and imperfections while trying to advance our humanity in the most positive ways possible. This paradox in the face of the emergence of the voices of billions of people through the Internet is that our ignorance and superficiality means that by-and-large we are saying much the same thing or nothing of consequence. We are filled with “sound and fury” without substance. This does not mean that there are not numerous insightful voices, but they are drowned out by the “noise” of the Internet and the unforgiving and manipulative strategies of special interest groups on all fronts.

### **“Quasi-Governments” and the “Public/Private Surveillance Complex”**

It is not only the government that has co-opted the new power of the Internet and communications ability. The private sector now possesses amazingly pervasive and sophisticated data mining and information collection, storage and shaping capabilities. There should be little wonder that a profitable partnership has arisen between “Big Data” and governments.<sup>36</sup> The simple fact is that no matter how obvious a target the National

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Carr, “Why They Attack US: The Smell of Fear,” WSJ.com Opinion Journal, 7/28/05. Paul Strand, “Radical-Left Campuses: ‘Politically Correct’ Anti-Semitism,” Christian Broadcasting Network, 5/24/05, [cbn.com/cbnnews/news/050523a.asp](http://cbn.com/cbnnews/news/050523a.asp); Paul Mooney, “China Wages a New War on Academic Dissent: Aided by the Internet and the market economy, intellectuals are speaking out and paying a price,” Chronicle of Higher Education, 6/17/05.

<sup>35</sup> Peter Preston, “There is no such thing as community: The idea that society comprises homogenous groups is deluded,” Guardian, 7/18/05.

<sup>36</sup> See, Ackerman, “US should re-evaluate surveillance laws, ex-NSA chief acknowledges”, *supra*, n. 4. He argues: “Inman questioned the willingness of Americans to give large quantities of data to telecoms firms, internet companies and other corporations, but not to the government. ‘I asked my students: if you don’t worry about [your data] being held in commercial databases, why do you worry about the government having it?’ ‘It touched off a very heated debate among them, and they finally came back to me and said: well, if there’s a valid need, they don’t mind if the government has it; they just don’t want their parents to know what they accessed, and where they went on the internet.’ [One commentator] noted that many civil libertarians find corporate data troves to be similarly problematic. ‘Before Edward Snowden reared his ugly head, it was and remains an issue about how much information companies like Google, Microsoft and Yahoo and every other corporation in America retains about us: our credit card numbers, our URLs,’ he said.” “It is scary how much data is available in the hands of corporations. It’s not a new debate but it’s an issue I think we should as a nation should consider as part of this overall debate about NSA surveillance powers over all.”

Security Agency and CIA may be, companies such as Google, Yahoo and Facebook are far superior at data acquisition, management and interpretation.<sup>37</sup>

Private businesses have designed software and monitoring systems that surreptitiously observe what we look at on the Internet by recording our searches, key strokes and installing Cookies to record our consumer decisions. They construct detailed profiles for their competitive use, insert tracking chips into our cell phones (at our government's request), and build locators into our motor vehicles so that they know where we drive and even the speeds at which we drive. These are only a tiny fraction of the monitoring activities of business as they create detailed profiles on virtually everything we do. The extent of the tracking, data collection and storage, monitoring and the like by government and business is immense and growing in both scale and sophistication. The ability to monitor, investigate, develop and retain detailed files on individuals and groups has reached the point that our historical commitment to "privacy" has become an illusion. And we are only at the beginning of the process.<sup>38</sup>

This has profound implications for how our governments operate. But in addition to what we have thought of as "government" there has emerged what can only be called an intrusive "quasi-government" that may well be far worse a "privacy violator" than the NSA. This is because such quasi-governments are subject to few or none of the traditional prohibitions against "spying" on us that at least in theory apply to our formal

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<sup>37</sup> [James Ball](#), [Julian Borger](#) and [Glenn Greenwald](#), [Guardian Weekly](#), Thursday 5 September 2013, "Revealed: how US and UK spy agencies defeat internet privacy and security", with the subtitles of "NSA and GCHQ unlock encryption used to protect emails, banking and medical records" "\$250m-a-year US program works covertly with tech companies to insert weaknesses into products"; Georgina Prodhan, "Internet firms co-opted for surveillance: experts", *Reuters*, Fri Sept. 30, 2011.

<sup>38</sup> Steven Aftergood, "Snowden Leak Prompted "Considerable Public Interest," Says FISA Court", *Secrecy News*, September 13, 2013. The report indicates: "The leak by Edward Snowden of a classified order issued by the Foreign Intelligence Surveillance Court (FISC) helped to arouse significant public interest, said the Court itself in [an opinion](#) issued today. Further disclosures are now justified, the Court indicated. "The unauthorized disclosure in June 2013 of [a Section 215 order](#), and government statements in response to that disclosure, have engendered considerable public interest and debate about Section 215," wrote FISC Judge F. Dennis Saylor IV in [an opinion](#) today regarding an ACLU motion for release of prior Court opinions concerning Section 215 of the USA Patriot Act. Judge Saylor directed that any opinions not already subject to litigation under the Freedom of Information Act should now be reviewed for declassification. "[Further] Publication of FISC opinions relating to this provision would contribute to an informed debate," [Judge Saylor added](#), "Publication would also assure citizens of the integrity of this Court's proceedings." Yesterday, Director of National Intelligence James Clapper also acknowledged that the leaks, while damaging, had triggered an important debate. "I think it's clear that some of the conversations this has generated, some of the debate, actually needed to happen," DNI Clapper said. "If there's a good side to this, maybe that's it." <http://blogs.fas.org/secrecy/2013/09/snowden-fisc/>.



institutions of government.<sup>39</sup> This “quasi-governmental” dimension is represented by large-scale corporations not only in their traditional domains of purveyors of goods and services but in the form of newly emerging collaborations between governments and massive private sector businesses such as Google, Yahoo, Facebook and LinkedIn.<sup>40</sup>

These sources of Big Data are working with governmental agencies not only in the US but Europe, the United Kingdom, Saudi Arabia, China and Russia. The scale of such private-sector institutions, along with their total systemic penetration into “private” society, makes them agents of government to the point that we need to invent a term similar to the “Military-Industrial Complex” to describe the relationship between “Big Data” companies and governments.<sup>41</sup> A label such as the “Public/Private Surveillance Complex” might help us understand what is occurring.<sup>42</sup>

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<sup>39</sup> Ackerman, “US should re-evaluate surveillance laws, ex-NSA chief acknowledges”, *supra* n. 4.

<sup>40</sup> Brian Bergstein, “In this data-mining society, privacy advocates shudder,” *Seattle Post-Intelligencer*, January 2, 2004; Kim Zetter, “GAO: Fed Data Mining Extensive,” *Wired News*, May 27, 2004; “Large Volume of F.B.I. Files Alarms U.S. Activist Groups,” *NYT* July 18, 2005; John Markoff, “Marrying Maps to Data for a New Web Service,” *NYT* July 18, 2005; Jeremiah Marquez, “LAPD Recruits Computer to Stop Rogue Cops,” *AP* July 24, 2005. Carole Vaporian, “NY cop fired for ‘Rant’ site, says rights violated,” *Reuters*, 7/13/05; Alan Travis, “Clarke presses for EU fingerprint plan: European citizens face tighter identification measures,” *Guardian*, 7/13/05; “Email spying ‘could have stopped killers’,” *The Observer*, Sunday, July 10, 2005; Ritt Goldstein, “US planning to recruit one in 24 Americans as citizen spies,” *SMH.com.au*, 7/15/02; John Thorne, “High-tech tracked London suspects: Using closed-circuit cameras and tracing cellphone calls, Britain and Italian police capture 7/21 bombing suspects,” *Christian Science Monitor*, 8/1/05. Matt Bai, “The Framing Wars,” *NYT*, July 17, 2005.

<sup>41</sup> Dominic Rushe, “Yahoo CEO Mayer: we faced jail if we revealed NSA surveillance secrets: Mark Zuckerberg joins Mayer in hitting back at critics of tech companies, saying US government did ‘bad job’ of balancing people’s privacy and duty to protect”, *Thursday 12 September 2013*, <http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance>. “During an interview at the Techcrunch Disrupt conference in San Francisco, Mayer was asked why tech companies had not simply decided to tell the public more about what the US surveillance industry was up to. “Releasing classified information is treason and you are incarcerated,” she said. Mayer said she was “proud to be part of an organisation that from the beginning, in 2007, has been sceptical of – and has been scrutinizing – those requests [from the NSA].” Yahoo has previously unsuccessfully sued the foreign intelligence surveillance (Fisa) court, which provides the legal framework for NSA surveillance. In 2007 it asked to be allowed to publish details of requests it receives from the spy agency. “When you lose and you don’t comply, it’s treason,” said Mayer. “We think it make more sense to work within the system,” she said.”

<sup>42</sup> Ewen MacAskill, “NSA paid millions to cover Prism compliance costs for tech companies”, *The Guardian*, Friday 23 August 2013, <http://www.theguardian.com/world/2013/aug/23/nsa-prism-costs-tech-companies-paid>. The report states: “Special Source Operations, described by [Edward] Snowden as the “crown jewel” of the NSA, handles all surveillance programs, such as Prism, that rely on “corporate partnerships” with telecoms and internet providers to access communications data. The disclosure that taxpayers’ money was used to cover the companies’ compliance costs raises new questions over the relationship between Silicon Valley and the NSA. Since the existence of the program was first revealed by the Guardian and the Washington Post on June 6, the companies have repeatedly denied all knowledge of it and insisted they only hand over user data in response to specific legal requests from the authorities. An earlier newsletter, which is undated, states that the Prism providers were all given new certifications within days of the Fisa court ruling. “All Prism providers, except Yahoo and Google, were successfully transitioned to the new certifications. We expect Yahoo and Google to complete transitioning by Friday 6 October.”

Although most of this is not a new phenomenon it is a vastly intensified one. There has been, for example, what Dwight Eisenhower described as a “Military-Industrial Complex” for generations. But there is also an “Agri-business Complex”, a “Big Oil Complex”, a “Too Big to Fail” banking complex, a “Health Care” complex, a “Real Estate” complex, an “Immigration Reform” complex, an “Auto Industry” complex, an “Education Complex”, a “Securities Complex”, a “National Security” complex and so many other “complexes” that the system is invariably corrupt and unmanageable from a reform perspective. These include the “Gay and Lesbian” complex, the “African-American” complex, the “Tea Party” complex, the “Immigration” complexes pro and con, and many special interests that see their personal orientation as so vital that it trumps all other interests. With these forces in play it would be naïve to think we can recapture any true semblance of democracy.

### **“True Believers” and Fanatics**

The “triple threat” goes beyond government and business. The Internet and its associated technologies have “enabled” an incredible array of abusers of its communications capabilities. These include true believers and fanatical sects as well as malicious and seriously troubled people who otherwise would hide in their personal darkness.<sup>43</sup> Over the past ten years we have opened Pandora’s Box and released evil and corruption into the world. Through the Internet some very twisted people have been freed to find others of their own persuasion and to intimidate from behind masks of anonymity.<sup>44</sup>

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<sup>43</sup> Susan S. Lang, *Extremist Groups in America* (Franklin Watts 1990). Lang discusses racism, the Ku Klux Klan, the “Identity Movement,” the Far Right religious groups, Neo-Nazis and Skinheads, Lewis Farrakhan and the Far Left. Compare the enraged Muslim youth of Britain with Lang’s description of the UK’s skinheads in the 1980s. “Like many adolescents, skins are bored kids who feel estranged from their parents and school. Feeling downtrodden, picked on, and misunderstood, they hang around waiting for something to do, somewhere to belong. Hungry for an identity to cling to and desperate for peer approval, they defiantly join a gang of tough kids, and thus teenage hatemongers are born. As they learn to be meaner and tougher, they start to feel important. According to the *Detroit Free Press* (November 19, 1987): “It gives them a target for their anger: Jews, blacks and other minorities, who they believe have robbed them of their rightful, dominant place in the world. It pumps them up with a sense of power they lack. They are transformed from cast-offs into heroes, ready to defend the country from “intruders.” “92, 93.

<sup>44</sup> Grenada just passed a law aimed at some of the worst of the behavior. Like other laws of this nature it is much too vague and allows sweeping interpretations of what is offensive to the point that a society should not tolerate it. See, Roy Greenslade, [theguardian.com](http://www.theguardian.com/media/greenslade/2013/sep/10/press-freedom-grenada); September 10, 2013; <http://www.theguardian.com/media/greenslade/2013/sep/10/press-freedom-grenada>. Greenslade reports: “Grenada’s parliament has enacted a law that press freedom bodies believe will have a chilling effect on free speech. People who send emails and tweets or make comments on social networking and media websites that are deemed to be “offensive” face a potential punishment of a year in jail. The electronic crimes act also outlaws the posting of information that is

This “oligarchic feudalism” of the new social form is characterized by a “virtual” balkanization of political power. I say “virtual” because the driving force behind the changes is the technological power of the Internet, computers and the host of information capture, coordination and instantaneous communication provided by the technological developments of the past twenty years. The capabilities of those systems are not only spread among governments and large business but are possessed by clusters of political actors and organizations focused completely on advancing their agendas “no matter what” and punishing any who dare get in their way. To a significant extent the Internet systems created the actors because otherwise they would not have been able to communicate and coordinate. To this context can be added Internet bloggers, posters and what have come to be described as “trolls” who from spite or for pay as “cyber skills” praise or attack without conscience or remorse.<sup>45</sup>

We have divided into factions and fragments comprised of baronies and feudal realms in which those with financial power or a preferred special interest attack anyone who is seen as an obstacle to their desires being achieved or are a threat to their position and power.<sup>46</sup> As suggested a moment ago, these include banks, oil companies, large corporations, religious sects, political parties and individual political candidates, advocates of particular gender preferences, and racial subgroups—including, one suspects, the emergence of a “white” subgroup created in part by the fact that whites are feeling themselves an increasingly disempowered and threatened group. The driving force is likely to be that

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known to be false but is reproduced in order to cause “annoyance... insult... and ill will.”

<sup>45</sup> On the issue of the mask of anonymity leading to malicious postings see, Roy Greenslade, “Huffington Post ends commenter anonymity”, Thursday, 22 August 2013; [theguardian.com, http://www.theguardian.com/media/greenslade/2013/aug/22/huffington-post-ariannahuffington](http://www.theguardian.com/media/greenslade/2013/aug/22/huffington-post-ariannahuffington). *Contra*, see, Joanna Geary, “The Huffington Post’s move to combat abusive comments is misguided – pseudonyms add to the richness of online debate”, Thursday 22 August 2013, [theguardian.com; http://www.theguardian.com/commentisfree/2013/aug/22/commenters-real-names-huffington-post](http://www.theguardian.com/commentisfree/2013/aug/22/commenters-real-names-huffington-post). I think Geary misses the point that there is very little online “debate” as opposed to stone throwing.

<sup>46</sup> On the divisions and how they are changing the very concept of individualized democracy to something that has been called “cultural” democracy see, John Fonte “Upstream,” *National Review*, February 6, 1995. Fonte argues: “In contrast to the philosophy of liberal democracy, which promotes equality of opportunity for individuals irrespective of race, ethnicity, and sex, the ideology of cultural democracy defines justice as achieving a particular result: proportional representation of cultural minorities and women in all sectors of society. To be sure, liberal democrats also oppose racism and sexism, but they define these terms differently and consequently propose different solutions to the problems resulting from bigotry. Traditionally liberal democrats reject racial and sexual prejudice that prevents individuals from achieving the same goals that other individuals are entitled to achieve. The U.S. Civil Rights Act of 1964 in its original form is a classic example of liberal-democratic thinking, whereas subsequent judicial and bureaucratic interpretations of the bill that established group rights represent cultural-democratic thinking.”

since everyone else is defining themselves as having a unique “identity” then “ethnic survival” mandates a protective response.

The “White Privilege” interpretation in which opportunity for all whites appears to be culturally institutionalized as an advantage above all blacks is almost certainly close to the last straw for many people. I refuse to think of myself as “white” as opposed to human and have spent my entire career involved in civil rights and similar activities. But if some of the rhetoric now being used (“white privilege”, the conclusion that only whites can be racist, linguistic double standards relating to “phobias”, etc.) is beginning to irk me I can understand how such self-satisfied hypocrisies must be impacting on those who haven’t spent their lives immersed in issues of social and racial justice.<sup>47</sup>

There are many forms and contexts in which discrimination arises and I detest it in all its forms. For me, racism is a sort of emotional disease. It is undeniable that in some instances and for some people being white is an advantage over other minorities. But it does not operate across the board. There are many forms of pro-minority discrimination that function as “anti-white” discrimination even beyond what is generally referred to as reverse discrimination. I supported the need for affirmative action and still do to a reasonable extent. But at some point we have to face up to the inevitable resentments that such a system produces for people who are in fact discriminated against for historical conditions for which they bear no responsibility other than the collective guilt based on the color of their skin. The “system” may have the responsibility to try to compensate for historical wrongs but it is idiocy to think that innocent people who in no way contributed to those issues do not resent the sacrifice the rules dictate for them simply because they happened to be born into the ethnic group defined as “white”.

We can come up with an endless series of rhetorical ploys to soften the effects of reverse discrimination against people who never discriminated. But justifying the necessity (which I accept) does not alter the reality of what we are doing. In such a context we

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<sup>47</sup> See TANNEN, *THE ARGUMENT CULTURE*, *supra* note **Error! Bookmark not defined.**, at 14 (1998). Tannen suggests that the language of cultural battles and conflicts “invisibly molds our way of thinking about people, actions, and the world around us.” *Id.*

should not be surprised if many people become tired of rhetoric and arguments that indicate they have the responsibility to bear the burden of others' actions and have no "voice" or right to present their points of view.

It is a form of discrimination painted with far too broad a brush in which "*all whites*" or "*all white men*" have responsibility for *all* things done by people with those characteristics in history. Ploys and strategies such as "white privilege", "institutional racism or sexism", "homophobia", "Islamophobia" and numerous other "phobias" are not honest answers to anything.<sup>48</sup> They are divisive methods of imposing guilt, not as a legitimate insight or true responsibility but as a leverage strategy aimed at gaining power. As a result we should not be surprised if there is a backlash against their uses and users.

Seeking to suppress speech because it "insults", is "insensitive", "makes someone feel bad" and so forth offends the very purpose of the ideal of freedom of expression in a democracy. Following the riots and threats that accompanied a Danish newspaper's publication of a cartoon that offended many in the Muslim world *The Economist* wrote: "Freedom of expression, including the freedom to poke fun at religion, is not just a hard-won human right but the defining freedom of liberal societies. When such a freedom comes under threat of violence, the job of governments should be to defend it without reservation."<sup>49</sup>

Rather than condemning the riots and death threats or defending the right to freedom of speech the U.S. State Department pronounced that it "was 'unacceptable' to incite religious hatred by publishing such pictures" and "Britain's foreign secretary, called their

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<sup>48</sup> See *Catch the Fire Ministries, Inc. v. Islamic Council of Victoria*, 15 V.R. 207 (2006) (reversing judgment of Victorian Civil and Administrative Tribunal against Catch the Fire Ministries for alleged vilification of Islam and remitting action to tribunal for further proceedings); see also "Case over 'vilifying' Islam settled," WORLD NET DAILY, July 21, 2007, <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=42680> (reporting settlement of vilification case and that "the [accused] pastors have spent more than \$500,000 over the years defending their right to present their views and insights about Islam."); Jeff Turnbull, "Church and Islamic council bury hatchet," THE AUSTRALIAN, June 25, 2007, <http://www.theaustralian.news.com.au/story/0,20867,21963547-1702,00.html> (reporting on settlement of vilification case). Although Amir Butler initially hailed the law he experienced an epiphany when he recognized "as long as religions articulate a sense of what is right, they cannot avoid also defining - whether explicitly or implicitly - what is wrong." "Why I've Changed My Mind On Victoria's Anti-Vilification Laws," Amir Butler <http://www.onlineopinion.com.au/view.asp?article=2274>, visited 7/11/05, [http://www.moriel.org/articles/discernment/islam/changed\\_my\\_mind\\_on\\_anti\\_vilification\\_laws.htm](http://www.moriel.org/articles/discernment/islam/changed_my_mind_on_anti_vilification_laws.htm).

<sup>49</sup> "Cartoon wars," *The Economist*, *supra* n. , at 9.

publication unnecessary, insensitive, disrespectful and wrong.”<sup>50</sup> Oddly, free speech has traditionally been understood as sometimes being unnecessary, insensitive, disrespectful and wrong. That is not praise for such speech, simply acknowledgement of its nature. Otherwise our speech must only be “free” when it is “necessary”, “sensitive”, “respectful”, and “right”. I think it would be lovely if that were the case. But that really isn’t the challenge. The problem is that such interpretations of what run afoul of the “nice” and “true” meter are in many instances being left to the highly subjective eyes of those who see themselves as being criticized as opposed to some objective standards. If we are forced to meet such criteria of “playing nice” we would probably not be able to say much of anything without offending, insulting or “dissing” someone.

That’s how degrading and degraded I think our culture has become. The baronies and activist sects (they are actually much closer to being cults because the members are largely brainwashed into a specific and unalterable set of beliefs as to good and bad) also include education lobbies, immigration advocates and opponents, defense industry beneficiaries, and so much more. It takes a special computer application just to figure out the players, their connections and allies, who they view as primary threats to achieving their aims, and the ways in which they seek and preserve power.

### **“Truth” and the Death of Discourse**

“Truth” is not as obvious an event as some assume.<sup>51</sup> It would be naïve to suggest that political (and even some scientific “truths”) do not conceal biases, both witting and unwitting. That is after all the nature of being human and an inevitable part of the search for certainty in an uncertain world. Even if we cannot attain true certainty we have

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<sup>50</sup> “Cartoon wars,” *id.*

<sup>51</sup> See David Barnhizer and Daniel Barnhizer, *Hypocrisy & Myth: The Hidden Order of the Rule of Law* (2009). Anthony Diekema observed that for postmodernists, “truth” is entirely relative and disconnected from reality: “Truth, among postmodernists, is whatever you can get away with saying in whatever specific context you find yourself. Power lies in the context (the prevailing mentality) and, thus, power becomes truth.” ANTHONY J. DIEKEMA, ACADEMIC FREEDOM & CHRISTIAN SCHOLARSHIP 2-3 & n.1 (2000). Likewise, George Lipsitz observes the postmodern tactic of critiquing and deconstructing any linguistic construct to demonstrate that the construct has an indeterminate meaning, multiple meanings, or no meaning at all. “Deconstruction, as articulated by Jacques Derrida, challenged the very fiber of criticism and interpretation by revealing the metaphysical priority given to language within Western thought. This “logocentrism” presumes that careful naming can uncover fixed meanings about the world, but deconstruction’s interrogation of language reveals the provisional, contingent, and unstable nature of naming.” GEORGE LIPSITZ, AMERICAN STUDIES IN A MOMENT OF DANGER 98 (2001).

disturbing tendencies to invent it and deceive ourselves as to the lack of proof. Nonetheless, strategies that center on suppression of “inconvenient truths” in order to advance or preserve one’s political, religious or economic agendas have come to dominate the infantilized pabulum that passes for modern discourse.<sup>52</sup> “Framing”, propaganda, lying, distortion and attack dominate our public interactions—many of which are dedicated to suppressing, intimidating and punishing communications that are contrary to or simply inconsistent with our positions.<sup>53</sup>

Although our intellectual and democratic mythology appears to honor the independent philosopher who seeks to gain true knowledge and offer truth to the world, our political reality is quite different. We are selfish and bigoted “lemmings”—herd or hive creatures who not only do not want to bother thinking for ourselves but consider those who seek to do so as threats to our own narrow conceptions and beliefs.<sup>54</sup> Camus lamented the consequences faced by anyone who seeks to engage in honest communication, explaining: “If you merely make an effort to understand without preconceptions, if you merely talk of objectivity, you will be accused of sophistry and criticized for having pretensions....”<sup>55</sup>

What Camus warned against is happening—accusations of sophistry and the like—far beyond what anyone might have anticipated. Suppression and intimidation of speech are growing exponentially as our ability to use modern communication and information

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<sup>52</sup> See, e.g., Jesse McKinley, “Marriage ban donors feel exposed by list,” NEW YORK TIMES, Jan. 19, 2009, at A12. McKinley notes that gay activists used campaign donor lists to publicize supporters’ home and business addresses, and that some Prop. 8 supporters had suffered “death threats, acts of domestic terrorism, physical violence, threats of physical violence, vandalism of personal property, harassing phone calls, harassing e-mails, blacklisting and boycotts.” *Id.* (quoting James Bopp, legal counsel for the group “Protect Marriage”, a leading supporter of Prop. 8).

<sup>53</sup> For an illuminating analysis see, Matt Bai, “The Framing Wars” July 17, 2005, New York Times.

<sup>54</sup> ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE* (1972), explains our dilemma. “We experience the despair of being unable to communicate to others what we feel and what we think, and the even greater despair of being unable to distinguish for ourselves what we feel and are. Underlying this loss of identity is the loss of cogency of the symbols and myths upon which identity and language are based.” *Id.* at 68.

<sup>55</sup> Camus, “Defense of Intelligence,” in Albert Camus, *Resistance, Rebellion, and Death* 14 (New York, Alfred A. Knopf, 1961) translated from the French and Introduced by Justin O’Brien. Justice Rehnquist, dissenting in *Furman v. Georgia*, quoted from John Stuart Mill’s, *On Liberty*: “The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.” *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting) See, J.S. Mill, *On Liberty* 28 (1885). THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961). Madison argues that the “latent causes of faction are ... sown in the nature of man, according to the different circumstances of civil society.” *Id.* at 58.

technologies to detect “enemies” speech and project our own propaganda increases.<sup>56</sup> The abilities to repress and sanction have become an irresistible force that is most likely irreversible.

This has dire implications for the degradation of any honest democratic discourse.<sup>57</sup> I find it difficult to conceive of any honest political discussion if the tools we rely on to conduct that dialogue have no real form or agreed on method. Rationality has been assailed by some as a means by which men have controlled women. The claim that there is some actual “truth” to be determined by discourse is part of that disclaimer. Of course the fact that in many areas there is no absolute truth to situations in the sense that there is no clear single answer does not mean that we can ignore coming as close as is relevant to a sort of relational or cultural truth that guides us in a direction with the most positive outcomes or that avoids disaster. Falling back onto exchanges based on “feelings” and individual preferences as if they resolve much of anything is to become trapped in an infinitely variable set of exchanges in which as soon as one point is more or less refuted people simply shift to another in an empty set of interactions.

I stated at the beginning that there is no longer what we traditionally considered to be the American version of democracy. It is being replaced by a new political form best described as a diffuse mixture of large-scale institutional oligarchies shared by both governmental and private sector interests and intensely focused special interest fiefdoms among activist actors committed to the advancement of a narrow agenda.<sup>58</sup>

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<sup>56</sup> See, Amelia Hill and Anushka Asthana, “Nigeria cartoon riots kill 16: Churches burned in widespread violence as Danish cartoonist defends publication,” *The Observer*, 2/19/06.

<sup>57</sup> In commenting on the positions taken by some radical scholars, Martha Nussbaum suggests that: “Socratic argument is suspected ... of being arrogant and elitist.... [T]he elitism is seen as that of a dominant Western intellectual tradition that has persistently marginalized outsiders. The very pretense that one is engaged in the disinterested pursuit of truth can be a handy screen for prejudice.” Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* 19 (Harvard University Press, 1997).

<sup>58</sup> Martin Buber offers a sense of the difference between honest discourse and propaganda.

Genuine conversation, and therefore every actual fulfilment [sic] of relation between men, means acceptance of otherness. .... The strictness and depth of human individuation, the elemental otherness of the other, is ... not merely noted as the necessary starting point, but is affirmed from the one being to the other. The desire to influence the other then does not mean the effort to change the other, to inject one’s ‘rightness’ into him; but it means the effort to let that which is recognized as right, as just, as true ... through one’s influence take seed



## The Irresistible Momentum of Technology

While we are today focused on the revelations made by Edward Snowden and the NSA's PRISM program, the US National Security Agency (NSA) has long worked through a global surveillance system called Echelon. When Echelon was first created Senator Frank Church warned that it posed a fundamental threat to America's democratic system and the relationship between citizens and governmental control. An admirably prescient Senator Church stated: "[T]hat capability at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide."<sup>59</sup>

The momentum of technology is irresistible. The problem is that technology creates its own imperatives and will come to be used in whatever ways possible. The same can be said for the creation of government regulatory policies impacting in virtually any sphere of activity. After all, who can quarrel with the idea that governmental actors—legislators, bureaucrats, executive branch leaders, judges, police, security personnel, military leaders etc.—should possess the most accurate, comprehensive and detailed data possible related to their areas of activity? This is only logical, right? The problem is that the logic of obtaining perfect or near perfect data for decision and action has no internal limits.<sup>60</sup> It

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and grow in the form suited to individuation. Opposed to this effort is the lust to make use of men by which the manipulator of 'propaganda' and 'suggestion' is possessed....

MARTIN BUBER, *THE KNOWLEDGE OF MAN* 69 (Maurice Friedman & Ronald Gregor Smith trans., 1965) (1962).

<sup>59</sup> See, remarks of Senator Frank Church, quoted in: [ECHELON: America's Secret Global Surveillance Network](#). "If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology..." "I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return." Cryptosystem ME5, "The NSA's ECHELON System," <http://www.hermetic.ch/crypto/echelon/echelon.htm> (visited 8/11/05).

<sup>60</sup> Dan Roberts, "NSA analysts deliberately broke rules to spy on Americans, agency reveals", Friday 23 August 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/world/2013/aug/23/nsa-analysts-broke-rules-spy>. "Inspector general's admission undermines fresh insistences from president that breaches of privacy rules were inadvertent." Roberts reports: "US intelligence analysts have deliberately broken rules designed to prevent them from

will expand into the universe of possibility unless there are strong and clearly understood principles by which limits are set and consequences imposed if those limits are exceeded.

At the moment we are attempting to deal with what appears to be a prime example of a secretive part of government operating according to the imperative of gaining total knowledge through technological innovations while doing so under the driving force of national security and detecting terroristic activities. Over the past few months we have been witness to the profoundly intrusive behavior of the NSA, the revelations of Edward Snowden, the apparent “rubber stamping” of any surveillance request put to it by the judges of the clandestine FISA Court, the NSA’s ultimate admission that it violated the rules on thousands of occasions including following the activities of NSA employees’ “love interests”, and admitted lying to Congress by James Clapper the head of the US national intelligence system.<sup>61</sup> Yet the NSA’s all-encompassing PRISM program is simply the latest manifestation of the inevitable use of surveillance technology and the absolute inability of government to “Just Say No” to its own inevitable abuse of whatever power it possesses.<sup>62</sup>

We can go back a decade to the debate over John Ashcroft’s proposed Terrorism Information and Assessment System (TIPS). This reveals the inexorable tendency of government to use whatever technologies are available to achieve its ends and to unfailingly overreach for what always seem to be the best of reasons. The TIPS program was intended to be initiated in ten cities as a pilot program and to enlist 1 million “informers” to report on others’ activities. It was abandoned before it started but the

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spying on Americans, according to an admission by the National Security Agency that undermines fresh insistences from Barack Obama on Friday that all breaches were inadvertent.”

<sup>61</sup> See, “Daniel Ellsberg: US Verges on Becoming Police State Under Obama”, Thursday, August 22, 2013, Newsmax.com. “Daniel Ellsberg, the man who leaked the Pentagon Papers in 1971, says the United States is on the verge of becoming a police state as evidenced by the National Security Agency’s data collection programs and the treatment of secret document leakers Edward Snowden and Bradley Manning. “We have not only the capability of a police state, but certain beginnings of it right now,” Ellsberg told The Huffington Post.”

<sup>62</sup> The debate over John Ashcroft’s proposed Terrorism Information and Assessment System (TIPS) reveals the inexorable tendency of government to use whatever technologies are available to achieve its ends and to unfailingly overreach for what seem to be the best of reasons. See, e.g., Jane Black, “Some TIPS for John Ashcroft: Mr. Attorney General, forget your plan for a system to promote Americans spying on Americans. It won’t work -- and is un-American,” *BusinessWeek Online*, July 25, 2002. [http://www.businessweek.com/bwdaily/dnflash/jul2002/nf20020725\\_8083.htm](http://www.businessweek.com/bwdaily/dnflash/jul2002/nf20020725_8083.htm) [visited 8/1/05]. The TIPS program was intended to be initiated in ten cities as a pilot program and to enlist 1 million “informers” to report on others’ activities. It was abandoned before it started but the capability remains. Admiral John Poindexter was initially authorized to create the Information Awareness Office in the Pentagon that mirrored much of what Ashcroft sought.

capability remains. Admiral John Poindexter was initially authorized to create the Information Awareness Office in the Pentagon that mirrored much of what Ashcroft sought.<sup>63</sup>

### **The Internet as a “Psychological Warfare” Weapon**

Much of what is occurring has to do with the incredible expansion of our communications linkages and technologies over the past twenty years. As the capabilities of the Internet have expanded and penetrated our society the volume of “instant accusations” and criticisms has exploded. But the Internet is not simply a communications and information acquisition system. The Internet has been converted into a weapon for psychological warfare and propaganda (not to mention actual criminal activity).<sup>64</sup>

The Internet-as-weapon has been refined into a tool for surveillance, persuasion and intimidation by government, private business and political interests.<sup>65</sup> Everything anyone says electronically is now captured and permanently stored--ready to be dredged up years later when it provides useful ammunition against an opponent.<sup>66</sup> With blogs, e-mails,

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<sup>63</sup> Jane Black, “Some TIPS for John Ashcroft: Mr. Attorney General, forget your plan for a system to promote Americans spying on Americans. It won't work -- and is un-American,” *id.* The *Guardian* reports that: “the IAO has begun work on a global computer surveillance network which will allow unfettered access to personal details currently held in government and commercial databases around the world. The TIPS program was intended to be initiated in ten cities as a pilot program and to enlist 1 million “informers” to report on others’ activities. It was abandoned before it started but the capability remains. Admiral John Poindexter was initially authorized to create the Information Awareness Office in the Pentagon that mirrored much of what Ashcroft sought.

Contracts worth millions of dollars have been awarded to companies to develop technology which will enable the Pentagon to store billions of pieces of electronic personal information - from records of internet use to travel documentation, lending library records and bank transactions - and then access this information without a search warrant. The system would also use video technology to identify people at a distance. ‘Total Information Awareness,’ or TIA, was proposed to the Pentagon by Admiral John Poindexter after the terrorist attacks of September 2001. A former official in the Reagan administration who was convicted for his leading role in the Iran-Contra scandal, Poindexter was appointed head of the IAO in February.” Lawrence Donegan, “Pentagon creates a Big Brother so Uncle Sam can keep his eye on us,” Sunday, November 17, 2002, *The Observer* [online] (visited 8/1/05). <http://observer.guardian.co.uk/international/story/0,6903,841731,00.html>.

<sup>64</sup> See also LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* vii (1999) (discussing the rise of “identity wars and identity politics”).

<sup>65</sup> See LifeSiteNews.com, “France Introduces Legislation That Would Criminalize “Sexist and Homophobic Remarks,” <http://www.lifesitenews.com/ldn/2004/jun/04062407.html> (last visited Feb. 9, 2009).

<sup>66</sup> Serge Trifkovic writes that: “Twenty years ago, there were voices in the West – even eminently enlightened, anti-racist, post-nationalist, liberal voices – raising concerns and wondering what sense is there in respecting those [conservative Muslims] who don’t respect us, what sense is there in defending their culture when they scorn ours. The reaction back then was the same as today. When Italian writer Oriana Fallaci declared ‘I want to defend ours and I am informing you that I prefer Dante to Omar Khayyam,’ the sky came crashing down. They crucified her: ‘Racist! Racist!’ And she was a color-blind, ultra-tolerant, diversity-conscious Leftist! Lesser brave souls naturally preferred to remain silent.” Trifkovic, “Islam’s Immigrant Invasion of Europe,” *FrontPageMagazine.com*,

“tweets”, Facebook postings and the like anything can suddenly “go viral” and be distributed to millions of people with no controls over truth, accuracy, context or fairness. Such messages take on a permanent life and prove the classic observation that you “can’t put the genie back in the bottle” (or toothpaste into the tube). Deliberate distortions, lies and half-truths have become important elements of political strategy used by people for whom the ends do justify the means, including many of our top political leaders.<sup>67</sup>

### The “Oppressive Yoke” of Uniformity

Former Library of Congress director Daniel Boorstin once asked: “Have we been doomed to make our dreams into illusions?”<sup>68</sup> He adds: “An illusion ... is an image we have mistaken for reality.... [W]e cannot see it is not fact.”<sup>69</sup> As our form of reasonably honest democracy rapidly gives way to the imperatives of the Electronic State we still are having a difficult time accepting the extent and speed of the loss of our basic liberties. Max Lerner wrote: “[John Stuart] Mill was a pioneer in seeing, with the growth of social egalitarianism and mass culture, the shadow of “an oppressive yoke of uniformity in opinion and practice.”<sup>70</sup> This is consistent with Jung’s point that: “the gift of reason and critical reflection is not one of man’s outstanding peculiarities, and even where it exists it proves to be wavering and inconstant, the more so, as a rule, the bigger the political groups are. The mass crushes out the insight and reflection that are still possible with the individual, and this necessarily leads to doctrinaire and authoritarian tyranny....”<sup>71</sup>

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January 6, 2003, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=5239> (visited 9/7/05).

<sup>67</sup> On such themes, see Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (1991); Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (1998); see also Diane Ravitch, *The Language Police: How Pressure Groups Restrict What Students Learn* (2003); David E. Bernstein, *You Can’t Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003). See also, Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115 (2005).

<sup>68</sup> Daniel Boorstin, *The Image: A Guide to Pseudo-Events in America* 60 (1961). He adds: “The making of the illusions which flood our experience has become the business of America, some of its most honest and most necessary and respectable business. I am thinking not only of advertising and public relations and political rhetoric, but of all the activities which purport to inform and comfort and improve and educate and elevate us: the work of our best journalists, our most enterprising book publishers, our most energetic manufacturers and merchandisers, our most successful entertainers, our best guides to world travel, and our most influential leaders in foreign relations.” *Id.*

<sup>69</sup> Boorstin, *The Image*, *id.* George Gilder offers an interesting twist on the manipulative function of ideals. He argues: “Idealists ... always much abominate what they call hypocrisy. But hypocrisy—the insincere expression of unfulfilled ideals—is the means by which the influence of ideals is extended beyond the small circle of true believers.” George Gilder, *Wealth and Poverty* 107 (Bantam ed. 1982).

<sup>70</sup> Max Lerner ed., *Essential Works of John Stuart Mill* 250 (Bantam 1961).

<sup>71</sup> “Rational argument can be conducted with some prospect of success only so long as the emotionality of a given situation does not exceed a certain critical degree. If the affective temperature rises above this level, the

Erich Fromm describes our search for some semblance of identity in a faceless state as one in which: “the individual ceases to be himself; he adopts entirely the kind of personality offered to him by cultural patterns; and he therefore becomes exactly as all others are and as they expect him to be. The discrepancy between “I” and the world disappears and with it the conscious fear of aloneness and powerlessness.”<sup>72</sup> He continues: “The person who gives up his individual self and becomes an automaton, identical with millions of other automatons around him, need not feel alone and anxious any more. But the price he pays, however, is high; it is the loss of his self.”<sup>73</sup>

The age in which we share true common bonds is forever gone. Everyone at this point is either “with us or against us”, a potential ally or an enemy. There is no question the “mass” has not only expanded its range but there is also a strange phenomenon that initially was thought to operate as a counter to Leviathan but that has created an entirely new system with its own suppressive dynamics and societal reshaping. In that system, instead of uniformity writ large we see an aggressive and compelled conformity within fragmented subsystems that operate according to their own ideologies and seek to force

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possibility of reason’s having any effect ceases and its place is taken by slogans and chimerical wish-fantasies.” C.G. Jung, *The Undiscovered Self* 12, 13 (Mentor 1957). Translated from the German by R.F.C. Hull.

<sup>72</sup> FROMM, *THE SANE SOCIETY*, supra n. , at 208,209. Compare this idea of the human as collectivist drone with the description of Existentialist individuality, responsibility and accountability offered by Maxine Greene. For Greene, there is an inescapable connection between creation of individual identity and the actions we take that form that identity. “For the existentialist, the self is devoid of character or coloration before action is taken. When the individual begins devising projects and purposes, he begins creating an identity. No outside factor or force, no science or set of rules or moral law, can make decisions for him. The only significant choices are those that involve him totally and project his existence into a future still unknown. The only meaningful choices are those for which he takes full responsibility.” MAXINE GREENE, *TEACHER AS STRANGER: EDUCATIONAL PHILOSOPHY FOR THE MODERN AGE* 256 (1973).

<sup>73</sup> FROMM, *THE SANE SOCIETY*, *id.*, at 209. See also Heather Mac Donald, “Law School Humbug,” *CITY JOURNAL*, Autumn 1995, available at [http://www.city-journal.org/html/5\\_4\\_a2.html](http://www.city-journal.org/html/5_4_a2.html) (last visited June 24, 2004).

The speech code movement in academia owes its theoretical scaffolding to the critical race scholars. From its onset, critical race theory has singled out the First Amendment for particular scorn: free speech, the theory argues, is nothing more than a tool of the powerful to oppress the weak. The marketplace of ideas will never correct racist views, the theorists claim, because racism silences its victims. Therefore, censorship is needed. “We should not let a spurious motto that speech be ‘everywhere free’ stand in the way of outlawing speech that is demonstrably harmful,” argue Richard Delgado and Jean Stefancic of the Colorado Law School. “Overextending the [First Amendment] provokes the anger of oppressed groups.” *Id.*

others to act and believe according to those ideological preferences. Others are seen as “outsiders”. One result is the emergence of a political community made up of uneasy and shifting alliances.

Jung spoke of authoritarian tyrannies. Historically, we have tended to restrict the concept of authoritarian tyranny to governments and very large-scale and pervasive institutions such as the organized political church. Presumably this is because no one else possessed the tools to be able to monitor and communicate broadly, organize and mobilize virtually instantaneously, and to bring the immense pressures of ostracism and other sanctions to bear against others. As with Hawthorne’s Hester Prynne in *The Scarlet Letter*, sanctions through ostracism and formal legal means were specific and restricted or at least required a close knit community to have the desired effect. The tools required to intimidate allowed some kind of process performed according to reasonably clear standards. That has changed in ways that we still do not entirely understand, representing a fundamental shift in social behavior.

### **We Discover a Discouraging “Truth” about Human Nature**

Access to the Internet has provided an unfortunate and embarrassing picture of the darkness of the human soul. It has fostered communications that are vile, malicious, stupid, predatory and even insane. It has allowed criminals to expand greatly their ability to harm, scam and abuse. It has brought out the worst in humanity to the point where even with all its incredible benefits the Internet may well be the means by which we become irreversible cynics about society and other humans.

A consequence of the Internet is that everyone suddenly has a “voice” that can be broadcast to everyone else. The first reaction to this as a theory in support of true democratic government and a free society is that such an empowerment is wonderfully positive. And to some extent that is certainly true. But the reality has turned out to be somewhat darker than anyone could have expected. Nor is the issue as simple as that of data overload caused by the need to sift through millions of intelligent messages. There are applications that allow us to sort through the immense mass of data based on criteria

we consider most relevant. At the heart of the “problem” from the perspective of democracy and human evolution is that a look at the content of even a limited number of the billions of Internet-based messages sent daily demonstrates that “silence is golden” and many people should never have been empowered to speak. Surely they should not be able to speak while hidden behind a mask of anonymity because this removes any real accountability.<sup>74</sup>

Joseph Hamburger says of John Stuart Mill that his mission was to cause a restructuring of society and human from the ground up.<sup>75</sup> This conflict over social structure and values, much of it advanced through stealth and deception, produces a great tension between those who prefer stability and the status quo and those who seek to achieve change in areas of significant consequence. The social experiment of redesigning human behavior and society through the power of law is ongoing. In discussing his theme of how intellectuals must act in transforming transitional societies, Mill suggested the need to implement strategies that almost invisibly undermine a dominant orthodoxy over a substantial period, rather than to attempt a direct attack that will be easily recognized and defended against with the full power of the orthodoxy.<sup>76</sup>

We are discovering that contrary to democratic theory many people should be quiet. I’m not saying they should be suppressed but that you wish they would understand their input does not enrich our dialogue. Self-repression has its virtues. But the Internet seems to have removed all inhibitions from our speech. Cowards who would never dare to say anything close to the ignorant venom they spew on the Internet in a face-to-face situation

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<sup>74</sup> James Madison recognized the need to balance competing interests in his analysis of factious groups. In *Federalist No. 10*, Madison sets out the idea of faction in the following words. “By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Federalist # 10* (November 22, 1787) THE FEDERALIST, Edited and introduced by Jacob E. Cooke (1961), at 56. Madison goes on to describe two “cures” for faction. One is to “destroy the liberty” that allows it to bloom, the other is to give “to every citizen the same opinions, the same passions, and the same interests.” *Federalist # 10, id.*, at 58. He concludes both “solutions” are impractical. The truth, Madison argues, is that the “latent causes of faction are ... sown in the nature of man, according to the different circumstances of civil society.” *Federalist # 10, id.* With the power of the Internet and speech and language “redesign” of human discourse it may be that what was impractical in Madison’s world is now not only achievable but part of political agendas.

<sup>75</sup> Joseph Hamburger, *John Stuart Mill On Liberty and Control* 18-41(1999).

<sup>76</sup> See John Stuart Mill, *On Liberty*, in ESSENTIAL WORKS OF JOHN STUART MILL 255 (Max Lerner, ed., 1961); and John Stuart Mill, *Theism*, in THREE ESSAYS ON RELIGION (1884).

or even when it could be attributed to them at a distance become “enabled” by the electronic medium to the point of inanity and viciousness.

Rather than a proportional degree of self-effacing silence while they consider the positions and arguments being offered by people who have actually sought to understand the issues in question, it is stunning in this Internet Age how many communications are ignorant, mean-spirited, malicious and divisive.<sup>77</sup> One consequence is that the steady pounding of uninformed arguments and unsupported conclusions undermines any willingness to sacrifice for the benefit of the common community as long as such idiots and unprincipled “slime” are an obvious part of it.<sup>78</sup>

The Internet has become an uncensored “stream of consciousness” outpouring of our minds and hearts. The problem is that 95 percent of the output is raw sewage and five percent intellectual or spiritual nourishment. The exposure of the truth of our “inner selves” contradicts the ideality of our political and social systems. In order to operate successfully, such institutions require a degree of hypocrisy, faith, positive assumptions and the equivalent of the literary “suspension of disbelief” to deceive ourselves about the “truth” of who we and others are.

We are deeply imperfect but avoiding the worst effects of those imperfections remains essential if we are to retain any respect for our system of government and for other

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<sup>77</sup> Philip Hensher, “The bigger a community gets, the easier and more virulent anonymity becomes”, The Guardian, Friday 23 August 2013; <http://www.theguardian.com/commentisfree/2013/aug/23/bigger-community-easier-virulent-anonymity>. Hensher writes: “The possibility, and the dangers, of anonymity started to become apparent long before we all went online, and both have only continued to grow.” He adds: “We are now much more anonymous than we used to be. We are less and less likely to know even our most immediate neighbours – one survey found that over 50% of us don't even know their names. Robert D Putnam, in his celebrated 2000 study, *Bowling Alone*, found that everyday personal interaction had been on the decline in North America since 1950.”

<sup>78</sup> Katie Terhune, “Retired Justice Sandra Day O'Connor, in Boise, laments 'alarming degree of public ignorance'”; Idaho Statesman, Sept. 6, 2013; <http://www.mcclatchydc.com/2013/09/06/201376/retired-justice-sandra-day-oconnor.html#storylink=cpy>. “Two-thirds of Americans cannot name a single Supreme Court justice, former Justice Sandra Day O'Connor told the crowd that packed into a Boise State ballroom to hear her Thursday. About one-third can name the three branches of government. Fewer than one-fifth of high school seniors can explain how citizen participation benefits democracy. “Less than one-third of eighth-graders can identify the historical purpose of the Declaration of Independence, and it's right there in the name,” she said.” “The more I read and the more I listen, the more apparent it is that our society suffers from an alarming degree of public ignorance,” O'Connor said. That ignorance starts in the earliest years of a child's schooling, she said, but often continues all the way through college and graduate school. ... “We have to ensure that our citizens are well informed and prepared to face tough challenges,” she said. “If there is a single child not learning about civics or not being exposed to what they must do as citizens, then all our lives are poorer for that.””



humans. Under the guise of “transparency” and the “public’s right to know” the uncontrolled garbage that spews forth throughout the Internet strips away our ability to ignore the reality of human nature, ironically even while anonymity is the rule of the day.<sup>79</sup> As a result we are forced to confront the baseness of humanity and its behavior. We are looking at ourselves in the electronic mirror and the image is not pretty.

The continual calls for greater “transparency” in all we say and do—both governmentally and as private actors—shatters a necessary systemic delusion. This fracturing is dangerous because it destroys our respect for government and others. Our “heroes” now always have “feet of clay” and a host of fatal flaws. Our government is always corrupt, untrustworthy and deceptive.<sup>80</sup> Having these realities laid bare and exaggerated and sensationalized, is akin to the idea of losing our basic coping mechanisms that allow us to deal with the travails of life and the inadequacy of ourselves and others. We need such mechanisms and we need to be able to rationalize our flaws and inadequacies because we—and our governments and leaders—are imperfect. Knowing that fact as a general proposition is one thing. Being forced to see with crystal clarity that which cannot be changed and with which we have learned to cope as necessary fictions is quite a different matter.

It is not that the individual operating according to effective coping mechanisms could not sometimes benefit from high quality therapy related to underlying problems. We might even become a “better” person through that process. But such a process demands a

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<sup>79</sup> See Philip Hensher, *supra* n. , who concludes: “The question is, surely, the size of the community. In smaller groups, a writer can be pseudonymous, but not anonymous – the “hacktivists” of Anonymous, for instance, were not anonymous: they knew each other as Tflow, Topiary, Sabu and Kayla, and were familiar with each other’s personalities. But in a larger group, where familiarity is not likely to grow, the named individual is likely to want protection against the masked stranger. So he turns to the computer, logs on as LondonGirl4796, and begins to write, with joy and liberation.”

<sup>80</sup> We don’t have far to look for examples. Spencer Ackerman, “NSA under renewed fire after report finds it violated its own privacy rules”, Friday 16 August 2013. The Guardian, <http://www.theguardian.com/world/2013/aug/16/nsa-violated-privacy-rules-audit>. “Revelations that NSA collected records it was not permitted to acquire pile further pressure on intelligence chief James Clapper”. “The NSA serially violated its own restrictions on bulk surveillance, according to a report that puts further pressure on beleaguered intelligence chief James Clapper and strengthens claims by a leading Senate critic that a “culture of misinformation” exists at the agency. The Washington Post reported, with information provided by whistleblower Edward Snowden, that internal NSA audits found thousands of instances where the powerful surveillance agency collected, stored and possibly searched through vast swaths of information it is not permitted to acquire. The revelations contradict repeated assurances this summer from senior Obama administration and intelligence officials that the NSA’s programs to collect Americans’ phone records and foreigners’ communications in bulk contain adequate privacy protections.”

skilled therapist to guide and support. It also requires the capacity to control change and the ability of that therapist to assist the individual in developing more honest and strong modes of behavior—in effect, “better” coping mechanisms. We have no such capacity and no skilled “therapists” to guide us. Instead, we have lost our faith in institutions and people due to the overwhelming exposure to the “dark side” of humanity while having our traditions, social myths and ideals that allowed us to cope with social and political reality shredded.

The effects of this “shredding” are profound. Overwhelming divisiveness and corrosive cynicism of our communications will ultimately prove to be one of the fundamental defining events of our age (along with terrorism, bigotry and ethnic hatreds, joblessness, extreme religious and atheistic mindlessness, economic collapse and ecological disasters). The demands for transparency in a situation such as described by Jack Nicholson in “A Few Good Men” is one in which all the deficiencies of humans and their societies, beliefs, relationships, sense of self-worth and the like are stripped away but there is no therapist to assist in gaining the kinds of values and insights that would make us “better”.<sup>81</sup>

The “electronic mirror” of humanity is not only unforgiving but multiplies our sense of banality, corruption and evil spread throughout our society. This is because the morbid and the sensational are what attracts ratings and so our negatives dominate our positives by an order of magnitude. What we see is the worst of who we are and this shapes our perceptions of self and culture. The effects on the political system are profound. It is one

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<sup>81</sup> The legal system is not a self-contained theoretical construct of ideal justice, but reflects, diffuses, and balances competing claims for political and economic power. In this vein, Roscoe Pound tells us: “Conflict and competition and overlapping of men’s desires and demands and claims, in the formulation of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure.” ROSCOE POUND, *NEW PATHS OF THE LAW* at 3. (University of Nebraska Press, 1950). But when the legal system itself becomes complicit in advancing the interests of a limited number of groups and issues then it has corrupted the very principle on which it is based. That must have something to do with the uproar about the political favoritism demonstrated in the IRS’s “witch hunt” for conservative organizations based on use of words like conservatism, anti-Obama and so forth, condemning such expressions as propaganda. See, Gregory Korte, “IRS list reveals concerns over Tea Party ‘propaganda’”, *USA TODAY*, September 17, 2013. “Newly uncovered IRS documents show the agency flagged political groups based on the content of their literature, raising concerns specifically about “anti-Obama rhetoric,” inflammatory language and “emotional” statements made by non-profits seeking tax-exempt status.” I was unaware that “rhetoric” whether anti-Obama or otherwise was a criterion applied by the IRS. Or that screening was done on the basis of “emotional” or “inflammatory” language.

thing to operate under the assumption that most people are decent, kind and compassionate. We intuitively want to help such people improve their lives because they are the victims of misfortune, whether of birth or unfairly denied opportunity. In that context we assume we are contributing to the well-being of decent people.

It is quite another issue when we discover (or are overwhelmed by) the meanness, selfishness, sloth, ignorance and depravity of so many people. It is as if God sent them to remind us of the impact of the “Seven Deadly Sins”—pride, envy, gluttony, lust, anger, greed and sloth. The “sins” seem to represent well over 90 percent of our communications and characterize most of our behavior and aspiration. Contrast the “sins” with the “Seven Heavenly Virtues” of faith, hope, charity, fortitude, justice, temperance, and prudence. I can think of few things that can cause a person to “rethink” one’s commitment to community than exposure to the malice and banality of so much of Internet communications. It has stripped us bare and we are an ugly species on the whole.

### **The Fragmentation of the Social Order**

At the same time that it is revealing our severe limitations the Internet is also creating a degree of separation and social fragmentation of a kind we never before experienced. In theory such a commonly shared means of communication, research and dialogue ought to develop our common bonds. In reality it “enables” the emergence of a host of “micro-factions” far beyond what James Madison warned about in *The Federalist* when he wrote about the inevitability of factions and the two ways to deal with them.<sup>82</sup>

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<sup>82</sup> Madison, *The Federalist*, *supra*, n. . See also, John Fonte, “Upstream,” *supra*, n. . Fonte notes: “Sidney Hook forcefully restated the liberal-democratic concept of civic assimilation, declaring that ‘precisely because’ American liberal democracy is a ‘pluralistic, multiethnic, and uncoordinated society’ all citizens need a ‘prolonged schooling in the history of our free society, its martyrology, and its national tradition.’ Today, the traditional idea of assimilating immigrants into a national identity is officially rejected by the governments of Canada and Australia, and is under constant attack by elites in the United States. The leading organization of American civic educators declares that national assimilation is often ‘neither democratic nor humane.’ Suggestions that liberal-democratic regimes should limit immigration to levels consistent with steady civic assimilation are fiercely denounced as both impossible and immoral. Put bluntly, cultural democrats are saying that traditional liberal democracies do not have the moral right to reproduce themselves, either by fostering civic assimilation, by limiting immigration, or by some combination of the two.”

The Internet does this by facilitating links between people who would never otherwise be able to “find” each other. For some this is a positive fact that contributes to personal and societal well-being. I have no desire to demean the positive aspects of the communications possibilities. People connect with friends from their distant past. Families maintain easier communications in ways that strengthen bonds. But for far too many the Internet has become the primary means to vent their worst hates, urges and fears and does so because they discover they aren’t alone in their dark universe. The Internet has in a strange way legitimated the way they think and how they look at people and the world.

This extreme factionalization is not a minor consequence. Until now, people who harbored the worst, sickest or contemptible thoughts or who drew conclusions based on biases and ignorance operated locally and spoke only to their most trusted associates. They knew, or were at least uncertain and therefore apprehensive about revealing their true self did not safely communicate in “polite society”. In that context you could not be certain that the people you were speaking to face-to-face shared your prejudices. The Internet has created a completely different sort of anonymous “connective tissue”.<sup>83</sup> Now the “sickos” have easy access to others who share their prejudices and visions—whether child pornography, race bias, religion or some other volatile matter. The anonymity of the Internet allows communications to the point that relationships can be developed with other people hiding behind their masks.

This is the downside of the Socratic and Enlightenment belief that humans are essentially “good” at their core. If one believes that to be true, then once a person is educated and possesses knowledge, the ability to communicate intelligently and to perceive the truths of the world will inevitably work to the overall benefit of society.<sup>84</sup> Unfortunately, this

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<sup>83</sup> For an example of an effort to end anonymous comment see, Roy Greenslade, “Huffington Post ends commenter anonymity”, Thursday 22 August 2013, [theguardian.com; http://www.theguardian.com/media/greenslade/2013/aug/22/huffington-post-ariannahuffington](http://www.theguardian.com/media/greenslade/2013/aug/22/huffington-post-ariannahuffington). “The Huffington Post is to end anonymity for commenters by requiring them to use their real identities. The change was announced by the site's founder, Arianna Huffington, after speaking at a conference yesterday (21 August) in Boston. She said: “Trolls are just getting more and more aggressive and uglier and I just came from London where there are rape and death threats.” Explaining the “need to evolve a platform to meet the needs of the grown-up internet,” she said: “I feel that freedom of expression is given to people who stand up for what they say and not hiding behind anonymity.””

<sup>84</sup> This principle is reflected in the words of Justice Brandeis, concurring in *Whitney v. California*:

vision of human nature is as flawed as that of Karl Marx who essentially mimicked the Christian faith in predicating his system on the principle of “from each according to his ability, to each according to his need”. Each ideal is noble, and each is false. In any event, one thing we have discovered in the real world is that many people should not have a “voice” at least until they have done the hard work necessary to know what they are talking about.

The granting of information and communications power to individuals and special interests does not mean that governments have lost power. Governments are using the Internet to monitor billions of private communications. This is occurring to the extent that after the Edward Snowden/National Security Agency affair no one knows for certain whether “privacy” in the traditional sense even continues to exist.<sup>85</sup> It is clear that governments—both authoritarian and those supposedly “democratic” such as the US and UK—have leapt across traditional lines “in a single bound” without the slightest hesitation. The extent of the intrusion is dramatic.<sup>86</sup>

### **Marshall McLuhan’s Observation on the Mutating Impact of Technology on Humans**

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“Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile...”<sup>84</sup>

<sup>85</sup> Conservative scholar Walter Berns observes, for example, in criticizing the effects of *Roe v. Wade*: “[W]hat were we taught by *Roe v. Wade*? That the Constitution is on the side of the big battalions or, at least, the most strident battalions. That an up-to-date judiciary is contemptible because it is nothing but a political body but, unlike a political body ... it pretends not to be. And we were also taught the necessity to form battalions of our own, which ... is being done on a massive scale.” Walter Berns, “Judicial Rhetoric,” in *RHETORIC AND AMERICAN STATEMANSHIP* 55 (A. Thurow & J. Wallin ed. 1984).

<sup>86</sup> John Kampfner, “As in Russia, the terror threat has become the excuse to curtail our rights” Tuesday 20 August 2013, *The Guardian*, <http://www.theguardian.com/commentisfree/2013/aug/20/russia-terror-excuse-curtail-rights>. “Our surveillance culture was conceived to keep us safe, but is now widely abused. And the checks and balances don't work.” “Governments, Tory and Labour, have long adopted the dragnet approach to criminal justice. Nobody is safe. Everyone is a potential terrorist. Therefore keep tabs on as many as possible, just in case now or sometime in the future they might get up to no good. Why enact a targeted law when you can have a vague one? Why restrain your security apparatus when you don't have to? By the time Tony Blair left office in 2007, he had built a surveillance state unrivalled anywhere in the democratic world. Parliament passed 45 criminal justice laws – more than the total for the previous century – creating more than 3,000 new criminal offences. That corresponded to two new offences for each day parliament sat during his premiership.”

An intriguing aspect of what is happening is that people are being transformed by technologies. I am not speaking metaphorically.<sup>87</sup> Marshall McLuhan once wrote about how the invention of the printing press altered humans by extending the senses associated with reading while simultaneously minimizing other skills, talents and senses that were no longer as relevant. This “redesign” of the human through the effects of transformational technology is occurring so rapidly that a fundamental “wave” of reinvention and mutation of technological humanity is taking place through much of the world. Our traditional sense of who we are, what we want to be, and the limits we expect governmental (and corporate) actors to honor have largely disappeared.<sup>88</sup>

We are literally becoming different than before the widespread access to the information systems, just as we can be modified by chemicals or prosthetic devices or implants such as in “The Six Million Dollar Man” or “The Bionic Woman”. Some of the modification is fantastic. I love having instantaneous access to much of the world’s information base. I would never be able to connect with it if I had to work through the snail-like pace of traveling to libraries, going through a host of indices, seeing if the particular place had the material, and gaining a context of the best material in a field.

I spent years earlier in my career checking out several thousand books from the university’s library and stacking them on the floor of my office while working my way through various disciplines. I had to renew them physically every three months and that required numerous trips with carts full of books being wheeled back and forth. Plus there

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<sup>87</sup> Our self-interest makes a mockery of Aristotle’s “highest virtue”—justice. Aristotle says about justice that “justice is often thought to be the greatest of virtues .... And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also .... For this same reason justice, alone of the virtues, is thought to be “another’s good”, because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.” ARISTOTLE, NICHOMACHEAN ETHICS, Bk. V, C. 1 (W.D. Ross translation and ed. 1925), IX THE OXFORD TRANSLATION OF ARISTOTLE.

<sup>88</sup> John Kampfner, “As in Russia”, *supra* n. , reports on the UK’s shift toward ever wider monitoring through technology: “The next area of threat, the internet and other instant forms of communications, was covered by the Regulation of Investigatory Powers Act. This enshrined into law the right of hundreds of public bodies (not just the intelligence services) to snoop on emails, phone calls and to film antisocial members of the public. The surveillance culture was known to be extensive. But it was only thanks to the Guardian’s Prism revelations that the public finally understood that all communications were considered fair game. Whenever challenged about the breadth of these powers, government ministers talk of checks and balances. None of these work properly: not parliament, not the courts, not ministerial accountability. Most MPs and peers do not have the technical knowledge to grasp the details of online surveillance. It’s easy for the security agencies to run rings around them. Lawyers struggle to find out the facts as so much of the legal side of the security state is now held in secret. As for the politics, the government gives the police sweeping, vague powers and then says it cannot comment on operational issues.”

was an enormous amount of information that I knew was “out there” but it was too complicated and time-consuming to access. Now, virtually everything is at my fingertips and I read, integrate, consume data, structure, predict and project. It is as if my brain has had a “portable drive” added to it that extends its capacity and ability to access and integrate knowledge. That is what I mean when I say the technology alters us, both for good and bad.

### **Government Surveillance as the “Wizard of Oz”**

The foundation has been laid for the rise of increasingly powerful and intrusive governments. The desire for security is driving an exponential expansion of government powers.<sup>89</sup> In the US, the UK and Western Europe the psychology is one based on security from externally-based threats that can be manifested in other locations, in transportation systems between countries, and also within the nations’ own borders.<sup>90</sup> In countries such as China and Saudi Arabia it would seem the intrusiveness is in large part to anticipate and eliminate internal challenges to existing regimes. In either context the detection and monitoring systems are infiltrating the societies to an unsurpassed extent.<sup>91</sup> Along with the National Security Agency’s (NSA) immense surveillance activity this

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<sup>89</sup> While I collapse the process under the heading of security, one [to remain unidentified] reader of a draft of this essay put the argument more directly by arguing: “It’s laziness, a pretend egalitarianism that always seems to choose a “principled” course of action that results in taking more from those who do work, not [being willing to risk] anything by taking your principles to the wall, and having a great time at rock concerts and wristband-wearing fests.” As to the kinds of government reaction being experienced in Europe following the July 7 bombings, *see*, John Hooper, Gwladys Foucha, Jon Henley, Ian Traynor, Krysia Diver, Giles Tremlett and Nicholas Watt, “Fearful Europe steps up security: Vulnerable countries act quickly to bring in new powers,” *The Guardian* [online], 7/28/05; and Louise Christian, “Stay calm, the government says, in a mad panic itself: Proposed new anti-terrorist laws will be counterproductive,” *The Guardian* [online] 7/30/05.

<sup>90</sup> James Madison warned: “If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy.” He added: “It is a universal truth that the loss of liberty at home is to be charged to the provisions against danger, real or pretended, from abroad.” *Selected Quotes of James Madison*, [http://www.constitution.org/jm/jm\\_quotes.htm](http://www.constitution.org/jm/jm_quotes.htm).

<sup>91</sup> One of the more frightening depictions is offered by Glenn Greenwald, “Inside the mind of NSA chief Gen. Keith Alexander: A lavish Star Trek room he had built as part of his “Information Dominance Center” is endlessly revealing”, Sunday 15 September 2013, <http://www.theguardian.com/commentisfree/2013/sep/15/nsa-mind-keith-alexander-star-trek>. “It has been previously reported that the mentality of NSA chief Gen. Keith Alexander is captured by his motto “Collect it All”. It’s a get-everything approach he pioneered first when aimed at an enemy population in the middle of a war zone in Iraq, one he has now imported onto US soil, aimed at the domestic population and everyone else. But a perhaps even more disturbing and revealing vignette into the spy chief’s mind comes from a new Foreign Policy article describing what the journal calls his “all-out, barely-legal drive to build the ultimate spy machine”. The article describes how even his NSA peers see him as a “cowboy” willing to play fast and loose with legal limits in order to construct a system of ubiquitous surveillance.”

makes it questionable what can be said on the telephone or on-line without triggering the NSA's automatic recording. I joke with friends whether we can say certain things on our cell phones without running afoul of the surveillance systems.

The understandable desire for security—one of the most basic human drives and the consensual first purpose of government—is resulting in the subordination of freedom and the rapidly expanding intimidation of honest speech.<sup>92</sup> Even though we are still in the early days of where all this is heading we see sweeping electronic surveillance that was the “stuff” of science fiction only a decade ago. Along with this surreptitious invisible monitoring go more obvious intrusions such as intensive and expansive new financial reporting requirements supposedly aimed at money laundering and suspicious transfers, airport security screening accompanied by Transportation Security Administration intimate “pat downs” along with barely trained TSA personnel giggling at the virtually naked pictures of travelers subject to their authority.<sup>93</sup>

That is just the tip of the issue. In the name of security FBI “stings” aimed at catching terrorists are constructing a culture of continually expanding governmental powers. Mosques are being infiltrated and monitored by undercover agents in efforts to identify potential conspirators and threats to US security and determine whether extremist imams or other recruiters are attempting to radicalize young Muslims to engage in Jihad whether in America or elsewhere.<sup>94</sup> US prisons are, of course, centers for conversion of prisoners

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<sup>92</sup> “Of all the enemies of public liberty, war is perhaps the most to be dreaded, because it comprises and develops the germ of every other.” *Selected Quotes*, Madison, *supra*, n. .

<sup>93</sup> Jay Rosen, “The NSA's next move: silencing university professors? A Johns Hopkins computer science professor blogs on the NSA and is asked to take it down. I fear for academic freedom”, Tuesday 10 September 2013, <http://www.theguardian.com/commentisfree/2013/sep/10/nsa-matthew-green-takedown-blog-post-johns-hopkins>; Jonathan Kaiman, “Chinese activist jailed over Yahoo email is freed: Shi Tao was sentenced to 10 years in 2005 after Yahoo disclosed politically sensitive email he had sent”, Sunday 8 September 2013, <http://www.theguardian.com/world/2013/sep/08/chinese-activist-yahoo-email-freed>; Jonathan Kaiman, “China cracks down on social media with threat of jail for 'online rumours': People will be charged with defamation if false information is reposted more than 500 times under new rules”, Tuesday 10 September 2013, <http://www.theguardian.com/world/2013/sep/10/china-social-media-jail-rumours>; Roy Greenslade, “Grenada law 'threat to press freedom’”, Tuesday 10 September 2013, <http://www.theguardian.com/media/greenslade/2013/sep/10/press-freedom-grenada>. “Grenada's parliament has enacted a law that press freedom bodies believe will have a chilling effect on free speech. People who send emails and tweets or make comments on social networking and media websites that are deemed to be “offensive” face a potential punishment of a year in jail.”

<sup>94</sup> See, Amelia Hill and Anushka Asthana, “Nigeria cartoon riots kill 16: Churches burned in widespread violence as Danish cartoonist defends publication,” *The Observer*, 2/19/06.



who suddenly “find Allah” and in doing so possess the fervor of new converts to any ideology.

I spend a great deal of time on the Internet researching topics having to do with terrorism, surveillance and the movement of Islam into Western Europe. It would be surprising if my research patterns and topics avoided notice but it is an area in which I am fascinated and concerned so I will keep on doing as I have been doing. Six months ago I posted a tongue-in-cheek piece on a blog site titled “Jihadi Paradise”. The odd thing is that my wife who comes to sleep about an hour later than I do remarked to me on several occasions about why I had not turned off the computer because she heard it “booting up” after I had left my study. The problem is that I always turn the computer off so it should not have been doing that.

I have not a single paranoid bone in my body but this was quite strange. I do not believe in coincidences even though I will never know if it was some problem with my computer or something else. All I can say is that it happened at least three times and occurred when I was writing something that was certainly capable of being identified by computer programs using coded algorithms related to “jihad” and “paradise”. One response that is almost appropriate is that I either should not have been writing on such a topic or if that is what NSA surveillance programs do then we can breathe easier because it shows they can effectively identify a retired law professor writing on a provocative topic. If only the “jihadis” were as cooperative and explicit.

The new regimes that are emerging justify their intrusive measures as necessary responses to an unending “global war against terror” or a permanent struggle against violent extremism.<sup>95</sup> We are cooperating freely in this process. It is not that there is no

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<sup>95</sup> The powerful words of Robert LaFollette on the floor of the United States Senate state my position as well as any. Under savage public criticism for being one of six Senators voting in 1917 against going to war he felt compelled to confront the dominant mood of the day, offering the following words: “I think all men recognize that in time of war the citizen must surrender some rights for the common good which he is entitled to enjoy in time of peace. But, sir, the right to control their own Government according to constitutional forms is not one of the rights that the citizens of this country are called upon to surrender in time of war. Rather, in time of war, the citizen must be more alert to the preservation of his right to control his Government. He must be most watchful of the encroachment of the military upon the civil power. He must beware of those precedents in support of arbitrary action by administration officials which, excused on the pleas of necessity in war time, become the fixed rule when the necessity has passed and

real threat to security. We are in the midst of a new kind of multifaceted set of guerrilla wars—ones spread across such diverse locations as the United States, Britain, France, Spain, Sweden, Russia, Egypt, the Philippines, Indonesia, much of Africa and the Middle East. These “wars within wars” are creating pressures within societies to develop strategies to detect, suppress and eliminate the threat of terrorist violence even while keeping the semblance of peaceful civil societies, albeit ones changed rather dramatically from historical models. The appropriate balance between security and freedom is uncertain and perhaps ultimately unsustainable since the nature of the enemy and the tactics keep changing in ways that require rapid adaptation and anticipatory strategies.

### **The “Mission Creep” of Surveillance Technology**

The problem is that we are experiencing in the use of surveillance technologies what in the military context is referred to as “mission creep”. At the beginning of a conflict expectations always run high and planners and strategists tend to be optimistic about what will occur and how long it will take. For the US easy examples are offered by Viet Nam, Afghanistan, and Iraq. Each of those conflicts started “small” and then grew in almost invisible incremental steps like a cancer. Each of these conflicts could be captured by a documentary in which our political leaders and military strategists pompously explained that they are the experts, not us, and that the conflict was not only necessary but would be resolved quickly. As the documentaries grow longer we would see each struggle turned into a lengthy and poorly understood conflict in which enormous amounts of money, time and human life were wasted as days led into months and months into a year and years into a decade or more.<sup>96</sup>

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normal conditions have been restored. More than all, the citizen and his representative in Congress in time of war must maintain his right of free speech.” Robert M. La Follette, “Free Speech in Wartime (Abridged),” delivered October 6, 1917. This version taken from Ronald F. Reid, *American Rhetorical Discourse* second edition, published in 1995 (Waveland Press: Prospect Heights, IL) 702-705.

<sup>96</sup> John F. McManus, “GOP Senator Sees Iraq Quagmire as Another Vietnam,” *THE NEW AMERICAN*, Sept. 19, 2005 (quoting Republican Sen. Chuck Hagel, “We are locked into a bogged-down problem not unsimilar—dissimilar—to where we were in Vietnam. The more we stay, the more problems we’re going to have.”); Rupert Cornwell, “Kennedy Evokes the Vietnam ‘Quagmire’ Fears of Americans,” *THE INDEPENDENT* (LONDON), Apr. 7, 2004, at 5 (quoting Democrat Senator Edward Kennedy describing the Iraq war as “George Bush’s Vietnam”).

The result of being in a state of war (declared or undeclared) is the continual expansion of governmental power. Along with this goes a militaristic psychology within the culture and the justification of emergency measures, diversion or exhaustion of financial and human resources, and a sapping of political will.<sup>97</sup> The situation of the erroneously defined “War on Terror” is worse than a simple declared war against a defined enemy. Unlike an open and declared conflict with a clearly identifiable enemy, in the series of “gray wars” we are conducting steps taken to control speech, monitor citizens and empower groups with individual political agendas will not be temporary measures initiated “for the duration” of a clear and limited conflict. This is because the conflict does not have an end.

The psychology and politics of the “War on Terror” will continue to produce a permanent and pervasive expansion of governmental power.<sup>98</sup> This is demonstrated by the newly created Consumer Financial Protection Bureau that is monitoring 80 percent of our credit card transactions and plans on capturing 95 percent of our mortgage transactions.<sup>99</sup> A

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<sup>97</sup> Chris Chambers, “NSA and GCHQ: the flawed psychology of government mass surveillance: Research shows that indiscriminate monitoring fosters distrust, conformity and mediocrity”, Monday 26 August 2013, [theguardian.com. http://www.theguardian.com/science/head-quarters/2013/aug/26/nsa-gchq-psychology-government-mass-surveillance](http://www.theguardian.com/science/head-quarters/2013/aug/26/nsa-gchq-psychology-government-mass-surveillance). “Recent disclosures about the scope of government surveillance are staggering. We now know that the UK’s Tempora program records huge volumes of private communications, including – as standard – our emails, social networking activity, internet histories, and telephone calls. Much of this data is then shared with the US National Security Agency, which operates its own (formerly) clandestine surveillance operation. Similar programs are believed to operate in Russia, China, India, and throughout several European countries.” .... “While pundits have argued vigorously about the merits and drawbacks of such programs, the voice of science has remained relatively quiet. This is despite the fact that science, alone, can lay claim to a wealth of empirical evidence on the psychological effects of surveillance. Studying that evidence leads to a clear conclusion and a warning: indiscriminate intelligence-gathering presents a grave risk to our mental health, productivity, social cohesion, and ultimately our future.”

<sup>98</sup> Yochai Benkler, “Time to tame the NSA behemoth trampling our rights: From leaks and Fisa court papers, it’s clear the NSA is a bloated spying bureaucracy out of control. It can’t be reformed by insiders”, Friday 13 September 2013, [theguardian.com. http://www.theguardian.com/commentisfree/2013/sep/13/nsa-behemoth-trampling-rights](http://www.theguardian.com/commentisfree/2013/sep/13/nsa-behemoth-trampling-rights). “The spate of new NSA disclosures substantially raises the stakes of this debate. We now know that the intelligence establishment systematically undermines oversight by lying to both Congress and the courts. We know that the NSA infiltrates internet standard-setting processes to security protocols that make surveillance harder. We know that the NSA uses persuasion, subterfuge, and legal coercion to distort software and hardware product design by commercial companies. We have learned that in pursuit of its bureaucratic mission to obtain signals intelligence in a pervasively networked world, the NSA has mounted a systematic campaign against the foundations of American power: constitutional checks and balances, technological leadership, and market entrepreneurship. The NSA scandal is no longer about privacy, or a particular violation of constitutional or legislative obligations. The American body politic is suffering a severe case of auto-immune disease: our defense system is attacking other critical systems of our body.”

<sup>99</sup> Richard Pollock, “CFPB’s data-mining on consumer credit cards challenged in heated House hearing”, SEPTEMBER 13, 2013; <http://www.foxnews.com/politics/2013/09/13/cfpb-data-mining-on-consumer-credit-cards-challenged-in-heated-house-hearing/?intcmp=latestnews#ixzz2esS1f3rV>. Pollock reports: “Consumer Financial Protection Bureau officials are seeking to monitor four out of every five U.S. consumer credit card transactions this year — up to 42 billion transactions — through a controversial data-mining program, according to documents obtained by the *Washington Examiner*. A CFPB strategic planning document for fiscal years 2013-17 describes the “markets monitoring” program through which officials aim to monitor 80 percent of all credit card transactions in 2013. In addition, CFPB officials hope to monitor up to 95 percent of all mortgage transactions, according to the planning

simple question is “Why?” Of course there are shady financial transactions and money laundering for reasons that include criminal activity, tax dodges and terror financing. But that fact there is some questionable activity going on in financial transactions should not be converted into a bootstrapping justification for sweeping, intrusive and very expensive governmental invasion of its citizens’ affairs. That justification can be applied to virtually any area of human activity and if there are not bright lines drawn and clear limits set there is simply no bar to draconian and invasive governmental power in any domain.

Part of the reason for the vast expansion of “nosy” government is the development of the wide array of technologies for communication, surveillance and data storage. All-encompassing surveillance is only part of the threat. Linked to surveillance is the capacity to permanently store and immediately access the immense volume of information. Everything captured by our surveillance systems remains. The data do not disappear into space and evaporate but are caught in “The Cloud” or some other retention system.

It is as if the old joke in which your high school principal tells you that something bad you did was going into “Your Permanent Record” suddenly became real. This is precisely what is occurring.<sup>100</sup> We all now have a Permanent Record. We have no idea

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document. “This is one step closer to a Big Brother form of government where they know everything about us,” said Rep. Sean Duffy, R-Wis. At a Wednesday hearing before the House Financial Services Committee chaired by Rep. Jeb Hensarling, R-Texas, CFPB Director Richard Cordray defended the data-mining practice and said his agency is monitoring credit card usage at 110 banks, including Morgan Chase, Bank of America, Capital One, Discover and American Express. In a related development, Rep. Spencer Bachus, Hensarling’s predecessor on the House Financial Services Committee, told the *Examiner* he believes CFPB violated at least two federal laws by using the impartial U.S. Trustee Program to gather bankruptcy data as part of the data-mining campaign. When Duffy compared CFPB data-mining to the National Security Agency’s surveillance program, Cordray angrily replied that “there is no comparison between the NSA and the CFPB.” “Oh, there is,” Duffy retorted.”

<sup>100</sup> There is ample evidence of the growth of surveillance, both internationally and domestic, in the ongoing controversy concerning the activities of the US National Security Agency. The Guardian has provided an array of reports and analyses following the release of internal NSA documentation by Edward Snowden, a hero in the eyes of many and a traitor in those of many others. For information, *see*, Alexander Abdo and Patrick Toomey, “Now we know all Americans’ international email is searched and saved, we can see how far the ‘collect it all’ mission has gone”, Sunday 11 August 2013, [theguardian.com](http://theguardian.com); James Ball and Spencer Ackerman, “Spy agency has secret backdoor permission to search databases for individual Americans’ communications”, Friday 9 August 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/world/2013/aug/09/nsa-loop-hole-warrantless-searches-email-calls>; Michael Boyle, “A president who came into office pledging to take the ‘war on terror’ out of the shadows plunged it deeper into those shadows”, Monday 5 August 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/commentisfree/2013/aug/05/obama-legacy-shadow-wars>; Reuters in Washington, “Wiretaps and telephone records are being funnelled across the country

what it contains, no opportunity to “fix” or explain it. And our Permanent Record is accessible to invisible people at any moment for whatever purposes they might have. A result is the transformation of our social order in ways that seriously degrade the democratic ideal. One option is to simply “shut up”. Another is to become banal and expose our worst qualities. The one I prefer is to challenge the slide toward governmental intrusion and intimidation.

An honest admission that incursions into civil liberties are inevitable was made following the July 2005 London bombings by Eliza Manningham-Buller, the head of Britain’s MI5.<sup>101</sup> The report states Manningham-Buller: “has publicly warned that civil liberties may have to be eroded to prevent future terrorist attacks in Britain.... Dame Eliza said she recognised rights had been hard fought for. ‘But the world has changed and there needs to be a debate on whether some erosion of what we all value may be necessary to improve the chances of our citizens not being blown apart as they go about their daily lives.’ .... Dame Eliza described what she calls a ‘central dilemma - how to protect our citizens within the rule of law when intelligence does not amount to clear-cut evidence and when it is fragile’. It is in this context that she warned of the potential erosion of civil liberties.”<sup>102</sup> The question, however, is the extent to which we should submit or agree to

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to launch criminal investigations of Americans”, Monday 5 August 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/world/2013/aug/05/secret-dea-unit-surveillance-authorities>; Michele Catalano, “Officers showed up at our home on Long Island, New York, suspecting we were terrorists because we looked up info on pressure cookers and backpacks”, Thursday 1 August 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/commentisfree/2013/aug/01/government-tracking-google-searches>; Glenn Greenwald, “XKeyscore: NSA tool collects ‘nearly everything a user does on the internet’”, Wednesday 31 July 2013, [theguardian.com](http://www.theguardian.com), <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>.

<sup>101</sup> Richard Norton-Taylor, “MI5 head warns of liberties trade-off to fight terror,” Saturday, September 10, 2005, *The Guardian* [online].

<sup>102</sup> Taylor, *Id.* It is fascinating that the doctrines relating to speech suppression and punishment have to deal with technology. The system of the Star Chamber was created independent of the Common Law courts apparently in response to the heightened capability of mass printing and the ability to spread criticism more widely than by simple rumor and word of mouth. See, “Consultation Paper on the Crime of Libel,” The Law Reform Commission, Dublin, Ireland 1991, [http://www.lawreform.ie/publications/data/volume10/lrc\\_65.html](http://www.lawreform.ie/publications/data/volume10/lrc_65.html) (8/24/05), where it is stated that: “In 1476, Caxton set up the first printing press at Westminster and in 1488, the Star Chamber was set up in order to monitor and suppress criticism of Church and State, which were at that time closely interwoven. The primary libels with which it was concerned were therefore libels of a seditious or blasphemous nature. However, the Star Chamber also wished to suppress duelling, which was the fashionable means of vindicating attacks upon honour or reputation, and to this end it also punished defamatory libels i.e. libels which impugned the integrity a private individual. In 1606, the Star Chamber held in the celebrated case of *De Libellis Famosis* [(1606) 5 Co. Rep. 125a.] that it was an offence to defame the deceased Archbishop of Canterbury. The nature of the tasks of the Star Chamber and common law courts were therefore altogether different; while the Star Chamber was attempting to discourage matter which either threatened state security or might cause a breach of the peace, the common law courts were concerned with rectification of damage done to the reputation of an individual.”

alterations in our civil liberties. As the Edward Snowden/National Security Agency debacle reveals, there has been no debate, there has been abuse, and governmental officials' claims that we should just "trust them" ring a bit hollow.<sup>103</sup>

In the UK there have been continual expansions of governmental power over speech justified by the need to provide enhanced security against terroristic threats.<sup>104</sup> The expansion of monitoring capacity reached a new high with the recent introduction in the UK of CCTV cameras that talk to offenders. The UK has installed thousands of CCTV cameras in public areas and has now pioneered ones through which a monitoring officer can talk in real time to people engaging in anti-social behavior.<sup>105</sup> The increasing tendency in Europe to use state power to suppress expression along with indirect governmental empowerment of private actors to use law to intimidate discourse represents a pattern that is being replicated in America.

While adaptations are obviously required to deal with the challenges posed by international terrorism and the increased diversity of cultures within Western nations, countries such as Great Britain and the United States are going far beyond what is

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<sup>102</sup> Constructive treason involved the offense of criticizing the Crown, speaking in favor of the King's death or aiding his enemies. Nor should we conclude the doctrine of seditious libel has been abandoned. See, e.g., the opinions of Taschereau, J. and other jurists in *Boucher v. R.*, (Supreme Court of Canada), [1951] S.C.R. 265, where on appeal Taschereau, J. observed: "At the first hearing of this appeal, the Court did not agree as to the ingredients that are necessary to constitute the offence of seditious libel. Upon application, a new hearing was granted and heard by the full Court, and in view of the opinions now expressed by the majority, it is settled I think that generally speaking, the writings complained of must, in addition to being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects, be intended to produce disturbance of or resistance to the lawfully constituted authority." [Taschereau continued] "But as pointed out by my brother Cartwright, there is another definition of seditious intention which I think, must be accepted. I agree with him that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it, is a seditious intention. In the present case, there is I think sufficient evidence upon which a properly instructed jury could find that there was a seditious intention."

<sup>102</sup> The rightness of the protests by the collective interests and their goals of fair treatment, opportunity and non-discrimination should not mask the fact that the language used by each collective movement (and counter-movement) has been language of attack, protest and opposition—not reasoned discourse. It is language used as weapons to gain or defend power. It also includes the ability to inhibit others' use of language. See, e.g., the controversies and strategies reflected in such situations as academic speech codes, criminalization of social discourse critical of groups with apparently heightened "sensitivities." On such themes, see, Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (Transition, 1991).

<sup>103</sup> Madison concluded: "All men having power ought to be mistrusted." *Selected Quotes*, Madison, supra, n. .

<sup>104</sup> These can be found on the British Home Office website. These obviously increased following July 7, 2005. The UK's Home Office website at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/>, contains links to the "Terrorism Act 2006"; "The Prevention of Terrorism Act 2005"; "AntiTerrorism, Crime and Security Act 2001"; and the "Terrorism Act 2000." It also links the reader to "Checks on terrorism laws" based on the admission that: "Terrorism laws must strike a delicate balance between providing effective tools to investigate and prevent terrorism, while ensuring that our civil liberties are not unnecessarily infringed." (visited 4/5/07).

<sup>105</sup> See, *BBC News*, "'Talking' CCTV scolds offenders," 4/4/2007.

needed. The risk is that we will create a culture in which we become uncertain and apprehensive about what we are allowed to say and with whom we think it is safe to associate. The cultural ethos then becomes subtly and powerfully repressive because we are uncertain about what is allowed. Such uncertainty and apprehension is not appropriate for a democratic system.

Security, after all, is the first obligation of government.<sup>106</sup> This takes on significant meaning in the context of such things as New York City's "stop and frisk" laws, the infiltration of mosques in that city, investigations of journalists and prosecution of leakers of government information under the Espionage Act of 1917, and London's frequent sidewalk interrogations and searches of predominantly minority youth. The problem with the exponential expansion in "stop and frisk", communications, monitoring and data recapture improvements is that there is virtually no action that cannot be justified under cover of the need to prevent terrorist acts, inhibit illegal activity, or extend the scope of intelligence gathering activity for those purposes.<sup>107</sup>

### **Intimidation through Concerted Private Action**

Direct governmental intimidation of speech is only one side of the equation. Intimidation is also occurring on the non-governmental level. This is reflected in the fact that communication in American culture has become characterized by deceit, propaganda, "shout-downs" and intolerant argumentation rather than actual rational and fact-based discourse.<sup>108</sup> It is on this level where concerted private interests bring pressure on targeted persons or interests and impose consequences on anyone voicing a disfavored

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<sup>106</sup> The UK's Home Office website at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/>, contains links to the "Terrorism Act 2006"; "The Prevention of Terrorism Act 2005"; "AntiTerrorism, Crime and Security Act 2001"; and the "Terrorism Act 2000." It also links the reader to "Checks on terrorism laws" based on the admission that: "Terrorism laws must strike a delicate balance between providing effective tools to investigate and prevent terrorism, while ensuring that our civil liberties are not unnecessarily infringed." (visited 4/5/07).

<sup>107</sup> A truly fascinating example of government action in the form of a local California school district is described in: Michael Martinez, "California school district hires firm to monitor students' social media" CNN, Saturday, September 14, 2013. "A suburban Los Angeles school district is now looking at the public postings on social media by middle and high school students, searching for possible violence, drug use, bullying, truancy and suicidal threats. The district in Glendale, California, is paying \$40,500 to a firm to monitor and report on 14,000 middle and high school students' posts on Twitter, Facebook and other social media for one year. Though critics liken the monitoring to government stalking, school officials and their contractor say the purpose is student safety."

<sup>108</sup> For analysis of the shift see, Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (Random House, 1998).

opinion. At a minimum we must confront the extent to which we have suppressed free speech in the name of even admirable causes. We must recapture the willingness to be insulted and to “call a fool a fool” or even to be one.

*Guardian* columnist Polly Toynbee has argued for the importance of preserving our “right to offend a fool.”<sup>109</sup> One of my favorite columnists, she captures the consequences of such restrictive laws: “Laws change cultural climates: it’s what they are for. Religion will become out of bounds in many spheres. Schools, universities, the arts, broadcasting, will feel social pressures that induce self-censorship. A small example: if you wonder why there have been no penetrating exposes of cults like Scientology in recent years, it is because they have sued so often that the media caved in - fear of litigation outweighs the story. That is how the law cast its shadow.”<sup>110</sup>

It seems just yesterday when a Danish newspaper published cartoons that resulted in violent reactions in the Islamic world. Many Westerners educated in cultures that set free speech as a central principle of democracy supported the publication. *The Economist*, for example, commented on the resulting Cartoon Riots that: “Freedom of expression, including the freedom to poke fun at religion, is not just a hard-won human right but the defining freedom of liberal societies. When such a freedom comes under threat of violence, the job of governments should be to defend it without reservation.”<sup>111</sup> Rather than defending free speech the U.S. State Department announced it “was ‘unacceptable’ to incite religious hatred by publishing such pictures” and “Britain’s foreign secretary, called their publication unnecessary, insensitive, disrespectful and wrong.”<sup>112</sup>

The failure of democratic governments to defend free speech is not all that surprising even though it is quite disturbing. It is by looking at Western Europe that we can tell our own future. That future involves suppression and sanction of critical speech and speech that offends special interests that have been unilaterally granted the right to determine

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<sup>109</sup> Polly Toynbee, “My right to offend a fool: Race and religion are different - which is why Islamophobia is a nonsense and religious hatred must not be outlawed,” *The Guardian* [online], Friday June 10, 2005.

<sup>110</sup> Toynbee, “My right to offend a fool”, *id.*

<sup>111</sup> “Cartoon wars,” *The Economist*, *supra* n. at 9. *id.*

<sup>112</sup> “Cartoon wars,” *The Economist*, *supra* n. at 9. *id.*



what is offensive. Western Europe is the “canary in the mine” on issues of free speech and the use of governmental power to suppress discourse and comment about critical concerns because the expression predictably offends a particular interest group.

The point is that Western societies must not give in to the otherwise admirable tendency among courteous people to not want to offend others in areas of cultural and religious sensitivity. We should be absolutely unforgiving when faced with interest groups threatening the use of violence if something offends them. Nor is the problem limited to militant Muslims. I share Salman Rushdie’s disbelief at the closing of a play in the UK due to threats of violence by Sikhs who considered the play an insult to their religion. Rushdie has spent years hiding after the Iranian Ayatollah Khomeini issued a *fatwa* calling for his death for writing *The Satanic Verses*, and has criticized the British government for failing to protect freedom of expression. “It’s been horrifying to see the response,” he said. “It is pretty terrible to hear government ministers expressing approval of the ban and failing to condemn the violence when they should be supporting freedom of expression,” ...” <sup>113</sup>

US Supreme Court Justice Stephen Breyer recently observed that burning a Qur’an even in America might be like falsely crying “fire” in a crowded theater and as such not be protected by the First Amendment’s free speech provision due to the anger it incited among Muslims abroad. Surrendering to such pressures, as is implicit in Justice Breyer’s statement concerning free speech, the burning of the Qur’an and the “crowded theater” undermines the very fabric of the Western political invention we call the Rule of Law.<sup>114</sup> While prudential concerns about acts that are likely to produce violent reactions are rational and understandable from a political and security perspective, government’s power must not be used to support the demands of cultural and religious bigots who insist

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<sup>113</sup> See, Lee Glendinning, “Rushdie attacks closure of Sikh play,” *The Guardian*, Monday, December 27 2004.

<sup>114</sup> See, Chris Neefus, “Justice Breyer Suggests That Burning a Quran Could be Like Shouting ‘Fire’ in a Crowded Theatre--Thus Not Protected by 1st Amendment,” Wednesday, September 15, 2010. “Muslims believe the Quran, in the original Arabic, to be the infallible “final revelation” of Allah to Mohammed. (CNSNews.com) – Supreme Court Associate Justice Stephen Breyer said on Tuesday that globalization may change the way the First Amendment applies in the United States, and he suggested that Pastor Terry Jones’ proposed Quran-burning may or may not be protected under the First Amendment.”

that they must not be offended.<sup>115</sup> The power of government must be brought to bear against the violent actors, not the speakers.<sup>116</sup>

### **“Hate” Speech, “Hate” Crimes and the “Capture” of Governmental Power by Factions**

While it is indeed “bad form” to deliberately insult another, that possibility is part of participation in a democracy. Allowing the nature of what constitutes an insult that might even justify the use of private violence against the speaker to be unilaterally determined by the militant actor who considers himself or his identity insulted is something that destroys the integrity of our society when taken to the extreme.<sup>117</sup> Those who are unwilling to accept such a basic condition of democracy should either live in a culture whose members share their restrictive view or at a minimum not have resort to the power of government to suppress others.

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<sup>115</sup> On this theme *see*, Will Hutton, “A gagging order too far: If it becomes illegal to criticise religious belief, we will lose a precious freedom. And that will not help Muslims,” Sunday June 19, 2005, *The Observer* [online]. Hutton reports in a well-reasoned essay that: “the Racial and Religious Hatred Bill has been reintroduced, a seemingly more than justified response to what is actually happening on our streets [increasing reports of abuses directed toward Muslims]. Inciting hatred over someone's religion is to have the same status as inciting hatred for their race, a provision expressly formulated to deal with the Muslim issue. [He adds] It all sounds extremely reasonable, but it isn't. It has crossed another line that is no less dangerous in a liberal society. To incite or express hatred for someone because of the colour of their skin is plainly unacceptable, but to put the expression of views about religion in the same off-limits territory, even if only in tightly drawn circumstances where they incite hatred, is wrong. By protecting belief systems from criticism, it challenges the very heart of why and what we are.”

<sup>116</sup> I guess if Breyer's approach hasn't quite made it into the Constitution's perspective of free speech, the minions of the law found a way around the prohibition according to a recent Associated Press report. *See*, Associated Press, “Florida pastor Terry Jones arrested on way to burn Qur'ans: Jones is stopped in pickup truck towing barbecue-style grill before planned burning to mark 9/11 anniversary”, Thursday 12 September 2013, [theguardian.com](http://www.theguardian.com/world/2013/sep/12/florida-pastor-terry-jones-qurans). “A Florida pastor was arrested on Wednesday as he drove to a park to set fire to nearly 3,000 Qur'ans to mark the September 11 terrorist attacks. Sheriff's deputies in Mulberry, Florida, arrested Terry Jones, 61, and his associate pastor, Marvin Sapp Jr, 44, on felony charges of unlawful conveyance of fuel as they travelled in a pickup truck towing a large barbecue-style grill filled with Qur'ans soaked in kerosene. Jones had said he was heading to a nearby park to burn 2,998 Qur'ans – one for every victim of the 2001 attacks.”

<sup>117</sup> Humans necessarily hold critical aspects of their lives and beliefs in compartments because this helps to mute the conscious conflict between our incommensurable systems of thought and behavior. In other words, the ideal of the fully integrated person is an impossible fiction because we have so many different roles to play and responsibilities to fulfill. Hypocrisy, self-deception, and knowing when not to pursue a line of inquiry are invaluable tools for ordinary life. Individuals possess incompatible systems of valuation within themselves. Some of these incompatible systems are legitimate and necessary. Others are inadequate and even warped. Ernest Becker has written of the “delicately constituted fiction” of human aspiration, saying: “The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man.... Man's freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.” ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2d ed. 1971).

An example of how government power is being abused is found in the troubling cases of Brigitte Bardot and the late Italian writer Oriana Fallaci. Bardot's "crime" was based on her criticism of Muslims in France and the suggestion that they might not be the best of her country's recent imports.<sup>118</sup> After authoring a book titled *Un Cri dans le Silence* (A Cry in the Silence) in which she criticized the Islamization of Europe, Bardot found herself prosecuted by French authorities for her critical remarks, convicted, and fined.<sup>119</sup>

Bardot is not alone. Following the 9/11 tragedy the late Italian journalist Oriana Fallaci authored several books relating to the collision between the Islamic and Western worlds. The widespread popularity of these books, reflected by sales of over a million copies, indicates a substantial degree of public interest in the issues she addressed. In *The Force of Reason* Fallaci criticized Europeans for surrendering their culture to the "sons of Allah." Among her comments deemed offensive were: "Europe is no longer Europe, it is 'Eurabia,' a colony of Islam, where the Islamic invasion does not proceed only in a physical sense, but also in a mental and cultural sense. Servility to the invaders has poisoned democracy, with obvious consequences for the freedom of thought, and for the concept itself of liberty."<sup>120</sup>

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<sup>118</sup> Staff and agencies, "Bardot weeps over racism charges," Friday, May 7, 2004, *The Guardian* [online]. The report indicates: "The French actor Brigitte Bardot yesterday broke into tears after defending herself against racism charges in a Paris courtroom. The ageing icon is charged with inciting racial hatred in her best-selling book, *Un cri dans le silence* (A Cry in the Silence). The book, which topped French non-fiction best-seller lists last year, contains inflammatory rhetoric on immigration, homosexuality, the role of women in politics and unemployment. .... Bardot has written that she opposes the "Islamisation of France" - referring to the five million Muslims resident in the country. This is not the first time she has faced legal proceedings for her controversial views - she accrued two fines for outspoken opinions and for making comments about "sheep-slaughtering Muslims" in the 90s." [She was found guilty of a criminal offense and fined]. See also, Polly Toynbee, "Get off your knees: Afraid of being labelled Islamophobic, the left has fallen into an embarrassed silence on religion. We must speak up," Friday, June 11, 2004, *The Guardian* [online]. Jon Henley, "Jail sentence for sexist insults under new French law," Thursday, June 24, 2004, *The Guardian* [online].

<sup>119</sup> David Orland, "Brigitte Bardot's Cry in the Silence," VDare.com, [http://www.vdare.com/misc/orland\\_silence.htm](http://www.vdare.com/misc/orland_silence.htm) (September 2, 2003, visited 7/28/05). David Borland concludes: "Brigitte Bardot has written a fairly silly book. But it deserves to be remaindered, not prosecuted. Contemporary French political discourse being what it is, Bardot instead found herself on the best-seller list—and facing criminal prosecution. She was right about one thing: when it comes to the question of contemporary immigration, 'human cowardice knows no limits.'"

<sup>120</sup> She also warned: "You cannot survive if you do not know the past. We know why all the other civilizations have collapsed—from an excess of welfare, of richness, and from lack of morality, of spirituality." .... "The moment you give up your principles, and your values . . . the moment you laugh at those principles, and those values, you are dead, your culture is dead, your civilization is dead. Period." <http://www.worldmagblog.com/blog/archives/015541.html>. June 23, 2005/ visited 7/11/05. "How civilizations die," Posted by Veith at June 23, 2005 02:04 PM.

Fallaci was indicted under the Italian penal code for the crime of “vilifying” religion.<sup>121</sup> Oddly enough, her main accuser--a Muslim--was himself indicted for calling the Roman Catholic Church a “criminal organization” and also sought to have crucifixes removed from Italian hospital rooms because he considered them an offense to Islam.<sup>122</sup> This was paralleled in the UK in legislation aimed at sanctioning negative comments about religious groups. The proposal applied to incitement to racial hatred under the 1986 Public Order Act and dealt with stirring up of hatred against people of any religious faith. A maximum seven-year jail sentence is a potential punishment.<sup>123</sup>

### **The Search for Total Knowledge and the Embarrassing Limits of Humans’ Interpretational Ability**

It seems fair to ask, if so many criticize government for its inefficiencies and wastefulness how can they simultaneously turn around and deny the tools needed to operate a system based on detailed knowledge and proven fact? Knowledge is not only power but an essential component of successful action. When we possess the ability to understand, interpret and react efficiently and effectively the more knowledge we have the more focused and productive are our actions. This includes decisions not to take action as well as knowing the best timing for effective action. At least that has always been our premise.

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<sup>121</sup> Serge Trifkovic, “Islam’s Immigrant Invasion of Europe,” *FrontPageMagazine.com*, January 6, 2003, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=5239> (visited 9/7/05). Serge Trifkovic writes that: “Twenty years ago, there were voices in the West – even eminently enlightened, anti-racist, post-nationalist, liberal voices – raising concerns and wondering what sense is there in respecting those [conservative Muslims] who don’t respect us, what sense is there in defending their culture when they scorn ours. The reaction back then was the same as today. When Italian writer Oriana Fallaci declared ‘I want to defend ours and I am informing you that I prefer Dante to Omar Khayam,’ the sky came crashing down. They crucified her: ‘Racist! Racist!’ And she was a color-blind, ultra-tolerant, diversity-conscious Leftist! Lesser brave souls naturally preferred to remain silent.”

<sup>122</sup> See Tunku Varadarajan, “Prophet of Decline: An interview with Oriana Fallaci,” *WSJ.com Opinion Journal*, 6/23/05, <http://www.opinionjournal.com/forms>, visited 6/23/05. See also, John Hooper, “Anti-Islamic Italian author in new legal fight: Long-running battle over post-9/11 books pits freedom of speech against respect for religious belief,” *The Guardian* [online] Wednesday July 13, 2005. A contrary view voiced shortly after the publication of one of Fallaci’s most recent tracts is offered in, Sophie Arie, “Anti-Islamic books’ success fuel fears of racism in Italy,” *The Guardian* [online], Saturday, August 7, 2004. Arie writes: “Human rights groups warned yesterday that racism was becoming increasingly tolerated in Italy after the country’s biggest-selling newspaper published a book by a veteran journalist which warns of an Arab invasion of Europe. The 126-page tract by Oriana Fallaci appeared on newsstands with the *Corriere della Sera* newspaper. In the book Fallaci makes sweeping criticisms of authorities for failing to stop Europe becoming “Eurabia” and “a colony of Islam”, in a stealthy process she describes as the “burning of Troy”. ....”

<sup>123</sup> “Religious hatred bill unveiled today,” *supra*, n. .

In that context where knowledge and successful action are inextricably joined, of course I want to be omniscient. I want to know everything. If I am charged with the responsibility of defending my nation against threats, internal and external, assuming I can reach that level of effective knowledge I can bring the enormous power of the state to bear on those who might seek to harm the citizens of my community or who have violated or intend to violate its laws. The challenge is that it is easy to make such an assertion and its singular logic seems irresistible.

Once accepted as a valid aim and with the ability to achieve the goal, total knowledge becomes a sort of Holy Grail. The problem is that it cannot be the only goal of great significance in a democratic community and it is much too difficult to know where to draw the lines and make appropriate trade offs between competing incommensurable values. How much knowledge is too much? What are the tradeoffs when the instrumentalities needed to acquire that knowledge involve extremely intrusive actions? Where should lines be drawn and what should be accepted as the price of drawing lines that leave us short of omniscience?

One of the problems we confront when trying to grasp the possibility of gaining total information that in theory would allow the identification of threats before they manifest is that analysts, decision-makers and actors represent a wide and diverse variety of functions, methods and values. If the agencies of Washington, DC have taught us any lesson over the past decades it is that they detest having to collaborate, much less actually cooperate. The people and the institutions they serve are incompatible on so many levels that the “Intelligence Community” is a true oxymoron.

Government bureaucracies do not even know everything about what they are doing within their own boundaries much less possess the interest and capability of dealing with other actors on the federal, state and international levels. The Federal government in Washington, DC (and its outside DC “outliers”) is a system of fiefdoms and disconnected political “principalities”. The idea that it is a coherent system of mutually interdependent decision makers willingly acting together and sharing resources and information is, for

anyone who has had reasonably extensive contact, at best naïve and much closer to ludicrous.

The truth is that no matter how well intentioned, platitudes are not only meaningless but counterproductive and sometimes dangerous. The “ideal” of efficiency through total data acquisition and interpretation is a false, counterproductive and dangerous ideal. It stands for the proposition that we are almost god-like, capable of perceiving, integrating, monitoring, organizing and controlling our world on levels that are far beyond human capability. Camus warned against the inevitable failure involved with thinking our capabilities were greater than they are. He stated: “There does exist for man ... a way of acting and of thinking which is possible on the level of moderation to which he belongs. Every undertaking that is more ambitious than this proves to be contradictory.”<sup>124</sup>

There is an enormous gap between what we claim we want to do, what we actually want to do, and our ability to achieve our professed goals. This gap exists even if our pursuit is honest and our goals clear. The dream of total knowledge is at the center of the movement toward “Big Data” and the collaboration between government and private sector data collection entities that I defined earlier as “quasi-governmental” in nature. The lines of function and capacity have blurred to the point where private sector actors are operating as surrogate governmental agencies to the extent that one is the creature of the other and it is not always clear in which direction the power flows.

This sometimes parasitic and sometimes symbiotic set of relationships includes the scale and design of the NSA surveillance activities. Something lost in the discussion of the needs of the NSA surveillance are the profound limitations of the human ability to obtain, process, understand, share, interpret and act on enormous volumes of “cloudy” information. The NSA premise, along with that of the intelligence community generally, can best be described as a “God delusion” in which we arrogate to ourselves abilities and values far beyond our capacities. In the process we also assume a level of good will,

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<sup>124</sup> Albert Camus, *The Rebel*, at 302, 303 (Anthony Bower, trans. 1956).

non-self interest, and resistance to the human need for power and prestige that has no real relationship to how people and human institutions actually work. It certainly has no relationship to how Washington, DC operates. A result is that we set out an ideal of human capability that is fundamentally flawed and unreal. Yet if we accept that false ideal it nonetheless by its logic sets in motion a further centralization of power in the agencies of the federal government.

Then in seeking to create the ability to attain that “impossible dream” we invent mechanisms that do not work to achieve their professed goals but do have important secondary and tertiary consequences in that they fundamentally alter our social system in ways that damage its essential core. A significant element of the NSA surveillance system is grounded on what in the environmental field is described as the *Precautionary Principle*. In the areas of intelligence and prevention of terrorist acts the idea is that we need to create a total “early warning” and threat recognition system that allows the anticipatory identification on the most comprehensive and detailed levels of specific threats, connections and developing actions by “bad guys”. This would presumably allow us to immediately develop a strategy to interdict that action and eliminate the enemy wherever found.<sup>125</sup> Sounds great, doesn’t work.

I suggest that there are two main defects in the precautionary principle as applied to the immense system of data collection now developed by government and the “quasi-governmental” private sector actors such as Google, Yahoo and Facebook justified on the basis of identifying and eliminating serious threats. One is that when defined as a total knowledge system in which all data are obtained, processed, interpreted, ranked and converted into levels of significant and impending threats, and backed by strategic planning, deployments and interventions after working their way up through bureaucratic

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<sup>125</sup> Helene Guldberg, “Challenging the Precautionary Principle: How Has Society Come to be Governed by the Maxim ‘Better Safe Than Sorry’?” *Spiked*, July 1, 2003. <http://www.spiked-online.com/Articles/00000006DE2F.htm>. See also, David Barnhizer, “Waking from Sustainability’s ‘Impossible Dream’: The Decisionmaking Realities of Business and Government,” 18 *Georgetown International Environmental L. Rev.* 595 (2006).

chains-of-command located in the military, intelligence and Executive Branch segments of our government it doesn't work.

It is within such a context I argue that even taking the good intentions of the creators of the NSA's surveillance programs at face value they are of very limited utility in practice. In part that is due to the limits of human ability to process information, recognize its nuances and implications, convert even accurate interpretations to forms capable of informing others, and convincing them of its significance and the need to identify actions in real time that can eliminate or mitigate the threat.

There is a substantial degree of irony in the tragic fact that the two New York City bombings that were attempted failed due to poor technical workmanship, not intelligence activity. The arrest of the bomber in Washington state who was planning to attack LAX with explosives occurred largely by accidental discovery at the border. The recent Boston Marathon bombing was not detected beforehand even though there were clear indicators that indicated a potential threat. The Fort Hood murder by a serving Army Major, Nidal Hasan, occurred even though he had exchanged e-mails with Anwar al-Awlaki and had already made statements indicating a degree of radicalization.

As these examples suggest, "Who are we kidding" with the idea of a total information government data gathering, interpretation and action network that is going to keep us secure against threats? We can certainly do the data gathering and snooping on everyone and everything. We can "collect". We can "store". We can do some interpretation. But bottom line is that a system that fails to understand the limitations and vagaries of total data, the inadequacies of human interpretations and information sharing, and the numerous blockages, delays and distortions of the policy makers that have to approve action is a "social cancer" rather than a solution.

In numerous areas of life the "data freaks" gain control of the situation because they seem so precise, clear and in control. They have models, templates, "apps", decimal points, predictive methodologies and more. What they quite often do not have is the ability to



predict and project through the uncertainties of human nature, strategic deception and the uncontrollable features of reality. In government and business, those in control of the models control the discussion and planning. Then when reality strikes we hear, “you have to tear up the game plan as soon as the first shot is fired”. This is the government’s “total knowledge” reality and it can’t do in advance what it is assumed or claimed to do. It can be a useful tool for mining data after the fact to help discover who did what in a specific context. It can assist experienced human decision makers in providing some knowledge about what is likely to occur, but that is a difficult process involving a degree of instinct and the ability to both take and hedge against risk.

Decisions in real systems have to be made on imperfect knowledge, by imperfect people operating within biased, self-interested and imperfect political systems. Thinking that we can sift through and understand unbelievably large masses of deceptive and confusing data in ways that allow us to take effective pre-emptive action is a delusion that not only requires enormous resources but produces deep intrusions into peoples’ privacy and inevitable abuses of power by governmental officials. By its nature the delusion of security through total data collection has set in motion an erosion of democratic society that will continue to grow larger and larger to the point that nothing can withstand its intrusive power.

Relying on even the best computerized systems and most sophisticated software still requires that the input not only be valid but clear and comprehensive to the point of allowing accurate conclusions in “real time”. It requires that we overcome the likelihood that we are in a GIGO situation (“Garbage in, Garbage out”) concerning the “total” data we are relying on. This means that the subjects of surveillance need to act in such a way that they have no sense of the possibility of surveillance and do not mask or encrypt their inputs. This is not the way things work. It is particularly so since we seem so impressed with our abilities whenever there is a positive surveillance outcome that someone immediately leaks the details to the press and puts the enemy on notice. How did al-Qaeda and the Taliban find out we could locate them in Afghanistan and Pakistan by their cell phone communications? We told them. How did the Pakistanis find out that

we used a Pakistani doctor and an immunization program to discover Bin Laden's location? We told them and the doctor was convicted of treason while numerous aid workers have been murdered as a result.

The recent spate of embassy closings around the world based on an intercepted threat may well offer an example of the enemy "messing with our heads". When someone knows the systems they are using for communication are being monitored it is a short step to decide that it would be humorous to "pimp" the system by sending out a bunch of "chatter" about supposedly planned actions. Then you can sit back and watch the people scuttle around responding to the imaginary threat.

This offers a fine example of "psychological warfare". It also could be called the "boy who cried wolf" repeatedly when there wasn't an actual threat. He did so to the point that the people who originally came to help him the first time or three ignored his pleas when the wolf actually showed up. The fact that the "chatter" caused the US to close 19 embassies is a victory for the bad guys. Weren't there 19 9/11 bombers? What might that tell us? The fact that there were 19 demonstrates that the systems did not identify anything with specificity. The fact that our response was to close embassies that should be guarded and militarily staffed is a sign of weakness. It is also a signal of profound failure to have taken steps over the past decade that secured and "hardened" our embassies in North Africa and the Middle East, including Libya.

A rationalization technique that allows us to serve power while deceiving ourselves involves the creation of mechanisms that we pretend provide the method and data required for accurate decision-making.<sup>126</sup> We seek to avoid facing our impotence and

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<sup>126</sup> Larry Lohmann, a researcher at the Corner House in the UK, has said about the method of "cost-benefit analysis" that: "Cost-benefit analysis (CBA) is often regarded as a pure form of practical reasoning which can shift accountability onto supposedly impersonal mechanisms, summarize complex choices in a formulaic way, and transmute popular pressure, political debate and political conflict into quiet, office-bound operations performed on fixed and agreed-upon preferences. Yet CBA's commensuration of things which no one has any experience in commensurating leads to odd new ways of treating reason, democracy, public opinion, space, time and personhood. And the more practical steps are taken toward its algorithmic ideal of decision-making, the more unforeseen political and social difficulties crop up, including popular resistance, which elites using CBA find hard to handle." "Cost-Benefit Analysis: Whose Interest, Whose Rationality?" (Corner House, 1997). The full document can be found at: <http://www.thecornerhouse.org.uk/summary.shtml?x=52011>. See also, The Corner House, "The Cost-Benefit Analysis Dilemma: Strategies and Alternatives," first published 8-10 October 1999. This document is derived from a conference

compensate for our limits by constructing all-encompassing policy and decision-making models. These models attempt to reduce or compress complex reality into a coherent matrix. Such techniques purport to reflect the conditions with sufficient accuracy and validity that they allow wise decisions and create a sense of mastery.<sup>127</sup> The fact that the sense of mastery is false and delusional is largely irrelevant because we use such devices to feel as if we are in control and know what we are doing. Forcing the complexity into an apparent pattern also has another significant set of consequences. One is that the decision-making models we adopt—however flawed—take on a life of their own. Another is that if our “enemy”—in this case al-Qaeda and its ilk—is made up of people who refuse to “play the game” as we define it, the strategies and tactics we use are likely to be ineffective.

### **Imperfect Knowledge, Imperfect Institutions, Imperfect People**

In the months following the publication of the *Global 2000 Report to the President* in 1980 I was working at the Natural Resources Defense Council’s Washington, D.C. office. One of the projects in which I was involved included working with a lawyer at the International Institute for Environment and Development (IIED). We were charged with pulling together a report for the President’s Council on Environmental Quality (CEQ) concerning large corporations’ approaches for dealing with the kinds of issues considered in *Global 2000*.

Decision-making in the public sector is driven by its own conditions of self-interest just as in the private sector. Resistance to change and “doing things differently” are basic characteristics of governmental managers. This self-interest involves such factors as “turf” protection, career security and salary, and continuation of funding so that the institution itself is “sustained.” Regardless of the formal legal mission of a public

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on cost-benefit strategies held at Yale University in October 1999 at which I served as a moderator. See: <http://www.thecornerhouse.org.uk/item.shtml?x=52026> [visited June 18, 2005].

<sup>127</sup> The language used by each collective movement (and counter-movement) has been language of attack, protest and opposition. It is language used as weapons to gain or defend power. On such themes, see, Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (Transition, 1991).

institution that mission is no more than secondary to the actual operation of the entity.<sup>128</sup> It was painfully ironic from the perspective of having been working at NRDC in the immediate aftermath of the Carter administration's *Global 2000 Report to the President*<sup>129</sup> to hear the second Bush administration and the *9/11 Commission* complain about the lack of coordination and sharing of information among key federal agencies.<sup>130</sup>

The *9/11 Commission's* findings produced a sense of *deja vu* that took me back twenty-five years. During the last few months of the Carter administration in the autumn of 1980, there was substantial recognition of the many deficiencies in cooperation among federal agencies. Even when the agencies appeared to be talking about the same issues, they used radically different assumptions, databases and trend projection models.

Numerous interagency meetings were held following the July 1980 release of the *Global 2000 Report to the President*. This process led to a set of recommendations contained in a report designated *Global Futures: Time to Act*.<sup>131</sup> *Global Futures* sought to offer a strategy for integrating and harmonizing federal databases and analytical systems to ensure that projections, data and policy recommendations within the Executive Branch were on the same page.

Jimmy Carter lost the November 1980 election. The incoming Reagan administration immediately embargoed the *Global Futures: Time to Act* report, destroying it even before it had the chance to collect dust on shelves.<sup>132</sup> But even if it had been retained and efforts were made to implement its recommendations, anyone who has dealt with the system in

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<sup>128</sup> Martin Blackmore, "Mind the Gap: Exploring the Implementation Deficit in the Administration of the Stricter Benefits Regime," *Social Policy and Administration*, V. 35, Number 2, June 2001, 145-162, <http://www.ingentaconnect.com/content/bpl/spol/2001/00000035/00000002/art00224>. Visited 12/2/05. Blackmore's paper reviews evidence indicating: "the coercive aspects of UK unemployment and social security policies have not been implemented as rigorously as policy statements and commentators have implied. [Abstract]" It admits that a main problem is indicated in the context of policy ambiguity in which real implementation of the supposedly desired objectives can be undermined. This failure of implementation occurs through allowing decision-makers a wide zone of informal discretion. It is here where those decision-makers can act in ways to nullify or ignore the policy objectives they favor least."

<sup>129</sup> *Global 2000 Report to the President* (Council on Environmental Quality, 1980).

<sup>130</sup> See, *9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, Official Government Edition, July 22, 2004.

<sup>131</sup> *Global Future: Time to Act. Report to the President on Global Resources, Environment and Population*, (U.S. Dep't. of State, 1981).

<sup>132</sup> I still have a copy of *Global Futures* smuggled out to me by out-going staff of the President's Council on Environmental Quality.

Washington, D.C. knows there is an inherent resistance against harmonizing systems among the federal agencies and other executive branch institutions. The Reagan administration had its own report and governmental efficiency strategy in the form of the *Grace Commission* and the work on OMB *wunderkind* David Stockman.<sup>133</sup>

The *Global 2000* follow-up project in which I was involved included visiting numerous corporations and interviewing key personnel about their strategies.<sup>134</sup> Two companies, AT&T and Royal Dutch Shell, remain in my mind even after twenty years. At AT&T we sat down with the company's main "futures group" to discuss how they were working to ensure that AT&T kept on top of important unfolding trends and used them to its advantage. They devoted considerable time to showing us their glossy reports and explaining how their innovative work was a key aspect of the company's behavior. It was impressive.

We then interviewed the AT&T Vice President who was in charge of the futures group as well as other responsibilities. We told him of our fascinating interaction with the group. He looked at us rather blankly, considered for a moment what we had said, and then said words to the effect, "oh you mean the people who do all those long reports! I can't actually say I have time to read them because I'm spending all my time trying to figure out how we can make a profit on all the copper wiring we have strung across the country and are now taking down."

The primary messages are several. They also apply in even more relevant terms to the behavior of government bureaucrats who do not even have accountability for finance and profit or loss. The first is that many companies have smart people doing interesting work. In fact, private companies are more likely to have ready access to talent than

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<sup>133</sup> See the report of the Grace Commission, "President's Private Sector Survey on Cost Control: A Report to the President, Vol. I," January 15, 1984. <http://www.uhuh.com/taxstuff/gracecom.htm>. Visited 12/22/05.

<sup>134</sup> Thomas Hoffmann and David Barnhizer, "Looking Back, Looking Ahead: An Analysis of How Major U.S. Corporations Reacted to the Global 2000 Report." Report to the U.S. Council on Environmental Quality, May 31, 1982. [Report on file with author]. Among the conclusions is that: "Private companies are mainly interested in global resources and environmental data to the extent that their corporate destiny is clearly entwined in a particular issue. .... Not only must linkages be specific for global issues to be seen as relevant, but the consequences and stakes must not lie too far in the future." *Id.*, at 5.

governmental bureaucracies. But if the company doesn't value or listen to what is being said, and the key internal figures who must buy into the findings fail to understand or value what is being said or are too busy with other things, it doesn't matter. The question is whether you have gained the attention of key decision-makers. If those key decision-makers do not value (or understand) the information or insist that it be incorporated into the decision-making process it is only an interesting intellectual enterprise.

The Royal Dutch Shell example was one of decision-making taking place within inordinate complexity. We sat in the New York offices of the company and had another fascinating discussion with a key executive in charge of futures analysis. He showed us an organizational chart that was absolutely stunning. The chart depicted the Shell group as being made up of 240 or so separate companies representing an incredible array of functions. It was obvious that while it was possible to create the superbly detailed organizational chart, it was impossible for anyone to understand and synthesize the activities of that number of discreet actors or create a coherent strategy that incorporated their behaviors. This example is far closer to the US government than we might otherwise appreciate.

A third example of the reality of how businesses function involves a well-known company that obtained great public relations mileage among environmentalists from a process it labeled *Pollution Prevention Pays* or PPP. In the environmental community this program was considered a glowing example of responsible corporate citizenship. It was thought if this could be done by one major company the others would see its wisdom and quickly fall in line based on their self-interest. During a conference at which the individual who headed the PPP program was speaking I had the opportunity to talk with him in the hotel's lounge over drinks. As I told him how impressive the PPP program was, he made a face and explained to me that the reality was that while PPP did in fact save hundreds of thousands of dollars for the company, he had been unsuccessful at convincing many other executives to accept the approach. They simply didn't want to bother with something different from how they had been trained that would require them to accept an unfamiliar approach and alter how they behaved. Again, the parallels to

government are undeniable. The lesson is that managers create obstacles to change, sometimes because they don't understand the opportunity but quite often because they simply are not open to change and are locked into doing things in ways with which they are most comfortable.

### **How Government Agencies actually Operate**

Regardless of such proposals such as *Global 2000* and the innumerable meetings that were ordered to mandate and implement information sharing in the federal government nothing really changed. An intractable problem is that if you have spent your career working in key positions in a federal agency, it is a completely rational personal “sustainability” [read “survival”] strategy to create a context in which you can claim unique insights and vital roles that cannot being satisfied by others. If all federal agencies worked on identical terms, models and data, any specific agency or agency component might be shown to be redundant because someone else could do the same job.

This brings to the fore one of the most fundamental systemic obstacles to sound decision-making—the absolute commitment of political institutions everywhere to survive, continue and grow. Turf protection was rampant in the period of the *Global 2000 Report* and its follow up activities. The same dynamic exists today no matter what politicians and bureaucrats proclaim. Our government agencies operate like independent fiefdoms ruled by a permanent set of managers who witness the coming and going of political appointees and presidents while all the time providing the true governance.

Each agency, legislative branch committee and staff has its own unique culture, expertise and “way” of doing things. One of the fundamental rules is to not allow others to invade and take over your “turf”. Believe it or not, government really is inefficient, overly expensive and wasteful from the perspective of doing the jobs that are assigned them by statute and the Administration. But they are extremely efficient at their “real” job of providing employment to millions, growing continually larger and surviving all attempts to force them to do what they are mandated by law as their mission unless they want to.

Rational, complete and coherent sharing and coordination of data and operational strategies is dangerous from the perspective of a manager of a federal agency because it would provide others with the ability to make accurate critiques and intrude in operations. It also offers a level of transparency that for many politicians and bureaucrats would be quite embarrassing. Regardless of the rhetoric, all the rules of government and power involve defending your domain even while offering the appearance of reasonableness and cooperation.

The very powerful and generally invisible bureaucrats of the federal government's Senior Executive Service represent the core of our national government's structure. They quietly endure the coming and going of individual administrations while controlling the Executive Branch institutions. They have mastered the appearance of taking things seriously while continuing to do what they had always done. They are a core of master bureaucrats who can and do sabotage the "best laid plans" of the fresh-faced ingénues and political hacks who receive an incoming administration's *Plum Book* appointments as the reward for political and financial support of the incoming administration, not for their intrinsic merit, experience and knowledge.<sup>135</sup> The bureaucratic Senior Executives do largely what they want—all while allowing the administration's appointees to think they are running the show. In an era of massive budget deficits and cuts in all but the military budget turf protection has become even more intense.

Then and now the CIA operated its own shop and only spoke grudgingly to the FBI when compelled. Presidents Bush and Obama can draw up as many strategies as they want to restructure the intelligence gathering system but the changes will be largely doodles depicting hypothetical new chains of authority and titles rather than actual behavior. The Department of Energy, for example, may have had a key role in energy systems but DOE doesn't really coordinate with the EPA or with the departments of the Interior or Commerce.

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<sup>135</sup> There really is a "Plum Book" indicating the top presidential appointed jobs in Washington. It comes out every four years and can be obtained from the Government Printing Office. Its technical name is *United States Government Policy and Supporting Positions*. <http://www.gpoaccess.gov/plumbook/>. Visited 12/22/05.



I was once engaged in a lengthy negotiation with DOE during a lawsuit on behalf of a collection of environmental groups over DOE's nuclear program, research labs and storage facilities. It was apparent that DOE is a massive, poorly run and sloppy entity unable to manage its own systems and activities. DOE didn't bother to let anyone know they were polluting huge portions of the country with poorly stored radioactive waste. Nor did they want to admit they don't have much control over their research labs or outside contractors operating critical nuclear development, research and processing facilities.

Given that DOE can't even coordinate its own activities efficiently how realistic is it to expect them to coordinate with other agencies or be willing to air their really very dirty laundry in public? The same can be said for Attorney General Eric Holder in his professed ignorance about the "Fast and Furious" gun running program and Hillary Clinton's abysmal behavior in relation to the failure to provide security for the American Ambassador Christopher Stevens in Benghazi. To this can be added the Obama Administration's embarrassing episode involving the Internal Revenue Service's targeting of conservative groups and the difficulty in obtaining information about just who was responsible and knowledgeable in the Agency's chain of command.

This suggests another reason why transparent information and data systems are resisted by governmental and other institutions. Good information leads to accountability. People do not want others to be able to follow a detailed information chain directly to them. A few years ago I discussed this with a Honduran researcher in Tegucigalpa in the context of countries such as Honduras. His response was that the problem was not just a function of poor record keeping by accident or even negligence. He concluded that governmental and business leaders and their subordinates had very clear motives for deliberately preventing accurate record keeping systems from being created. They did this because when something bad happened they had plausible deniability. They could demand that their accusers produce hard proof, or shift the responsibility to someone else as a scapegoat.

## Conclusion

As we have seen in the aftermath of the intelligence failures related to 9/11, U.S. government agencies are still unwilling and unable to talk the same language other than that of empty Washington *bureaucratese*. Their fear must be that if you keep good information on activities and decisions people could ultimately be held accountable. Information that proves wrongdoing is not the friend of the culprit. Transparency gives ammunition to your enemies. So even though there is a continual call for transparency in governmental decision making there is an equal, though silent, resistance. One need only recall the account given by former Terrorism Czar Richard Clarke concerning the point in time when the Bush II administration and National Security Advisor Condoleezza Rice had information concerning possible terror attacks prior to 9/11. Ms. Rice demonstrated as clearly as possible during her statements the importance of shoddy and self serving record keeping aimed at allowing plausible deniability as part of a strategy to avoid accountability.

Shortly after the government began its follow up to the *Global 2000 Report* that was committed to coordinated data bases and decision making I served as the *Rapporteur* to the House of Representatives' Energy and Commerce Committee National Foresight Capability Workshop. Participants came from throughout government, congress, private interests and the private sector. Nothing could better demonstrate the lack of what then being called "foresight capability" and coordination among the components of our federal government. There were, of course, participants from the Office of Technology Assessment (OTA) and Congressional Research Service (CRS) and I have respect for several of them in the sense of continually "fighting the good fight". But for everything else situations are judged according to special interests and "what does this do for ME" and "What can YOU do for ME?" The system is not amusing but it is a joke.

In the Workshop convened by John Dingell as the guru of the moment of government, there was the CIA, Departments of State, Energy, Commerce and much more including

public and private interests. As the workshop unfolded it became clear that the participants had never spoken with each other, had no idea how decisions were made outside their own context, and flowed along different paths with different interests. This is the reality of governmental decision making and data analysis—then and now.

To me, this indicates strongly that the gathering of massive data by the government and its quasi-governmental partners is so imprecise and unfocused that it is a danger to what we think of as our fundamental democratic values. The encroachments are coming so quickly that it is unclear how we can stop them. I, for one, do thank Edward Snowden for his revelations regarding the intrusions into our domestic lives. At the same time I consider his release of information that reveals the extent and methods of US surveillance of foreign governments and actors to be a significant betrayal.

Just as I hope that our systems work well enough to have “glommed on to” my writing about “Jihadi Paradise” and “vetted” that project even if outside my awareness, I want my government to be spying on Germans, Egyptians, Syrians, Indians, Brazilians, Pakistanis, Saudis, French, Mexicans, Israelis, Chinese and even our British friends. It would be totally against our national interests not to be doing so, just as it is against theirs to not obtain as much information about America and its intentions as possible. They are our allies, and allies are not the same as friends. Allies have interests of their own and while those interests may align for the moment they can also shift in ways that are not in our own interests.

My criticisms are aimed at the fact that domestic surveillance of our citizens creates a psychology that damages our political community and that the community is already in dire straits. The criticisms are also focused on what I see as a rapid drift toward the intimidation of citizens whose views are not consistent with those of a minority that has gained hold of the power of government and is using law as a means to further embed those powers and intimidate citizens into compliance.

Even though much of the controversy is over the clear abuses of power and massive data gathering through surreptitious monitoring by the agencies of the federal government the fact that it is doing so is considerably more important than what is done with the data. It seems to be a basic human trait that uncertainty intimidates us more than even a hard reality. Not knowing what is being done, or not being able to know who has access to our personal data according to rules we do not understand creates a climate of apprehension in which we imagine the worst scenarios even if they may be entirely inaccurate.

Nor does it help to discover that there has been a 26 percent increase over the past three years in cases of misconduct by Transportation Security Agency (TSA) workers who were recently found to be violating the TSA's own rules and in twenty percent of the instances abusing the significant power they possess relative to air travelers under the guise of protecting us against terrorists.<sup>136</sup> It does not make us trust in the officials of the federal government to discover that the IRS conducted a screening program directed against Americans based on their political leanings. Nor is it encouraging to discover that top level IRS officials apparently sought to cover up just who is responsible for the violations of their vast powers, including one official who remains with the IRS even though she exercised rights under the Fifth Amendment and refused to testify before Congress about what her role in the program was.

The unfortunate list seems endless. Included are the admitted lies and ignorance of James Clapper, the Director of US National Security concerning the scope of the government's surveillance program. Former Secretary of State Clinton's "dropping the ball" on protection of our embassies generally and Benghazi specifically and the ensuing cover up further brings into question the integrity of an individual who has sought the Presidency and appears poised to do so again. The specter of former Bush Administration National Security Advisor Condoleezza Rice as she "bobbed and weaved"

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<sup>136</sup> A recent GAO Report (Government Accounting Office) on the increase in rule breaking among TSA employees was reported by Jena McGregor, "Report: TSA employee misconduct up 26 percent over the past three years", Washington Post, July 31, 2013. <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/07/31/report-tsa-employee-misconduct-up-26-percent-over-the-past-three-years/>.

in her testimony before Congress after the 9/11 attacks while seeking to avoid all responsibility for not picking up on any of the significant pre-attack signals about an impending attack on US soil.

As any informed reader is aware there are so many examples of human failures, systemic abuses, empty rhetoric, “blown” opportunities, and ignored evidence about threats that volumes could be written about the inadequacy of our government and the people who work within this vast and intensely politicized “welfare” system. To expect truly intelligent and strategically effective actions by this bloated set of institutions that has been co-opted by so many interests on so many levels is a profound miscalculation.

Expecting our political leaders who operate within an insulated “bubble” and are mainly in touch with the interest groups who keep them in office is naïve. To think that such people actually know enough to be able to cope with the incredible complexities of our challenges is delusional. What can be said about Congress other than that they are a bunch of insulated political hacks committed mainly to ensuring their own re-elections. In addition, what is it we expect from long-term Executive Branch agencies which possess their own political agendas and whose employees have comfortable and well-paying jobs they have no desire to endanger by “rocking the boat”. They are bureaucrats, not innovative risk takers. They follow rather than lead, and if you have ever worked in Washington, DC you know that the bureaucrats flood out of their buildings at 5 PM like clockwork.

What I am trying to suggest is that the problem is less what the federal government (including the NSA, CIA and FBI along with the numerous parts of Homeland Security) will actually do with the mass of data. These institutions are clumsy and slow bureaucracies. They are also largely reactive and better at tracking things down after something has already occurred than at early identification and prevention. As mentioned earlier, from an actual surveillance point of view and invasion of privacy in the deepest and most personal sense we should almost certainly be much more concerned about the Big Data businesses of the private sector. They are considerably more

innovative, intrusive and problematic. And their evolving relationships with government as sources of data makes it difficult to consider those quasi-governmental actors as separate from government simply due to their being defined as private sector entities. In that sense and context the public and private sectors are forging a troubling symbiotic relationship.

The real threat from massive government surveillance is psychological. The apprehension about what they “could” be doing along with who is looking at our profiles intimidates and “dumbs us down”. What we think the NSA is doing is building up something like our High School Permanent Record or even our credit record that contains potentially bad things about us that we are not allowed to see or rebut, including the opinions of people who may have reasons to criticize us fairly or unfairly. In relation to that Permanent Record we have a fear of exposure of things we would prefer to remain hidden. It is as if J. Edgar Hoover and his oft-rumored files have suddenly been brought back to life. Hoover was long thought to retain his enormous power over politicians in Washington due to possession of secret files detailing the “sins” of our leaders. Now the ability to control all of us by our “sins” if we “get out of line” is feared to be moving to the corridors of the National Security Agency.