Surveillance, Speech Suppression and Degradation of the Rule of Law in the “Post-Democracy Electronic State”

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Abstract

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. 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. He explained:

“[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 stuperfies 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.”

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.”

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. It is, however, a matter of scale,

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1 Alexis de Tocqueville, Democracy in America. While none of us can claim such quality of original insight it is impossible to deny that we are experiencing a more or less “gentle” drift toward the loss of integrity amid what is increasingly a “pretend” democracy.

2 Tocqueville, id.

3 See Adolf A. Berle, Power 92 (1967).
intensity and degree of control that is achieved. Another vital element is concern for “what” is being controlled and by whom. Though Berle’s proposition about acquiring power over institutions through democratic processes seems legitimate in the abstract there are degrees of control and co-optation that shift the political form from legitimate to illegitimate. That is what I see happening with the faded former democracies of America and Western Europe, particularly in the United States and the United Kingdom. The mechanisms of control include the vast expansion in public and private surveillance activities, the use of legal interpretations and statutes to confer powers of “linguistic cleansing” on special interest and single-cause identity groups, the incredible networking power of the Internet, and the creation of what now seems to be a psychology of “permanent war” under the heading of a misnamed “War on Terror”. It is the coalescence of these factors that has produced transformations now redefining the nature of Western society and altering the spirit of the Rule of Law.

At this point I think it is useful to remind ourselves of Lord Acton’s statement on the abuses and corruption of power. While Acton is oft-quoted for the statement that: “All power corrupts and absolute power corrupts absolutely” the fuller context is more useful for analyzing the behavior of any powerful group. Acton states: “Liberty is not a means to a higher political end. It is itself the highest political end ... liberty is the only object which benefits all alike, and provokes no sincere opposition ... The danger is not that a particular class is unfit to govern. Every class is unfit to govern [emphasis added] ... Power tends to corrupt, and absolute power corrupts absolutely.”

The Rule of Law in the “Post-Democracy Electronic State”

America is changing by the moment into a new political form, the “Post-Democracy Electronic State”. That post-democracy 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. What is occurring within American society involves the rapid coalescence of a set of powerful phenomena. These range from the technical to the economic, political and cultural. Any one element by itself would have significant effects but it is the combination of factors that is multiplying the speed and impact of the changes that are altering the essence of American society, including the “social glue” provided by the Rule of Law.

A result of the interacting forces is that there is no longer an American democracy. It has “morphed” into competing fragments of special interests operating within the physical territory of the United States and tenuously holding on to some of the basic creeds that

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4 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.”

5 From Great Thinkers on Liberty, “Lord Acton’s epic warning that power corrupts, and absolute power corrupts absolutely,” http://www.libertystory.net/LSTHINKACTON.html.
represent what we long considered an exceptional political experiment. Peter Drucker described what is occurring as the “new pluralism” stating: “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.”

These “single-cause, single-interest groups” have taken control of the language of discourse and are using language as a weapon of propaganda and intimidation.

The transformation also includes massive information gathering businesses functioning as “enablers” by amassing an inconceivable amount of data on Americans and everyone else for that matter and using that data for their own purposes while offering it to anyone willing to pay the price. The impact of the data systems cannot be overstated. John Naughton notes that: “The social networking service [Twitter] 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.” He adds: “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.”

A consequence of the emergence of aggressive “single-interest” groups is the fragmentation of our traditional ideas of community. The disintegration of a sense of common community coupled with aggressive rejection of some of the most important foundational principles and myths of the “American experiment” has profound implications for the operation of the Rule of Law. It is an open question whether the ideal of the Rule of Law can withstand such things as the emergence of aggressive sets of self-interested ideologues of both the Left and Right—political and economic--armed with the superficial certainty of righteous belief in their causes and the immense power of networking and attack provided by the Internet and communications and data capture technologies. The impacts are profound when these “events” combine with the masks of anonymity and non-accountability behind which many of our most important communications are now hidden and the fragmentation of any semblance of larger community into fractured “tribes” and identity and interest groups engaged in a civil war with anyone who dares question their right to power.

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6 See PETER DRUCKER, THE NEW REALITIES 76 (1989). In Propaganda, Jacques Ellul reminds us: “A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor .... The stereotype arises from feelings one has for one’s own group, or against the “out-group”. Man attaches himself passionately to the values represented by his group and rejects the cliches of the out-groups.... The stereotype, ... helps man to avoid thinking, to take a personal position, to form his own opinion.” Jacques Ellul, Propaganda 180 (1965). Ellul writes, “propaganda seeks to induce action, adherence, and participation—with as little thought as possible.”

7 John Naughton, “Twitter and the transformation of democracy”, The Observer, Saturday 14 September 2013. He adds: “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)?”

8 Naughton, “Twitter and the transformation of democracy”, id.
Yet another factor of great importance and effect is playing out alongside these dynamics. That is the by now almost permanent psychology of the “War on Terror” in which the claims of national security and the need to take “war-time” actions to protect the citizens of the US, the UK and Western Europe against a barbaric and ruthless enemy are leading to a state of continual and pervasive surveillance and anti-terror laws that are subverting the traditions of individual rights and privacy.  

I pose these concerns because I agree with Ernest Becker’s observation that we live within a set of “fragile fictions”—ones that include the Rule of Law and quite importantly contradict much of what it means to be “naturally” human. He warns: “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.”

Regardless of what we might like to think about the “fiction” of the inherent goodness of members of the human race the reality is far closer to that of Hobbes’s “state of nature” in which a “war of man against every other man” was the rule of the day. In the “natural” state of humanity the political entity we think of as being America could not even exist. In the “natural” state of humanity progress in civil rights would not have occurred, women would remain captives of narrowly defined roles and gays would be ostracized or killed.

The Rule of Law is the increasingly fragile “fiction” that has made the ongoing Western political experiment possible. The problem is that while we think there is an immutable permanence to the ideal, the Rule of Law is an ongoing, hit or miss, experiment in social engineering that represents a moral direction and tendency, not a consistent or continuing linear evolution. We far too often take that experiment for granted as the best and most moral way to organize the relationship between individuals and the political community. But the bundle of rights and duties the Rule of Law creates and imposes is not a natural inevitability.

Because it is a cultural ethos the Rule of Law has been such a central component of the lives of most citizens of Western nations that we can hardly conceive of our societies without it. This is a source of its power but is simultaneously the mark of its vulnerability. The reality is that we have little idea of what the Rule of Law is, how it works, and the ways in which it is threatened through our neglect, self-interest, and ignorance. We certainly lack the ability to recreate the system once lost because it is like no other in human history.

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10 See Ernest Becker, The Birth and Death of Meaning 139 (2d ed. 1971). Id.

11 Thomas Hobbes, The Leviathan

Unfortunately, we take the Rule of Law’s continuing integrity for granted at the moment that it is under enormous stress. The Rule of Law in America (and Europe) is a political “story,” a narrative, and a performance. It is a long-running play and a fiction we have created over centuries, based on choices about what kind of society we desire to inhabit. The Rule of Law is neither a scientific nor a particularly rational invention, but an unfolding performance that has been “playing” in America for several hundred years, albeit with some very serious abuses and blind spots. In Erving Goffman’s terms, it has become increasingly difficult to maintain the separation required for the “audience’s” suspension of disbelief in the “performance” of the multilayered narrative of the Rule of Law.\(^\text{13}\)

Even given its fragility, the Rule of Law is a powerful cultural ideology because in some form it is necessary if a society is to function with any degree of broad-based justice. As legal historian Lawrence Friedman notes, law, legal institutions, and legal processes crystallize and solidify cultural norms and ideas into “more permanent, rigid form.”\(^\text{14}\) In that complex process the Rule of Law is the mechanism by which the institution of law avoids becoming just another tool for power and law is a strategy and specific tactic by which the Western experiment is being implemented.

The Rule of Law is facilitator, catalyst, and barrier against the abuse of power. The Rule of Law serves as a governor on the uses of collective power against members of our community. In this sense, the Rule of Law provides a rallying point from which individuals may morally resist abuses of power by the community. In this latter dimension, the Rule of Law limits the ability of the state to control citizens through the specific exercise of legal power. We are now witnessing the emergence of conditions that indicate significant abuse of governmental power through widespread surveillance and invasion of citizen’s privacy, intimidation, failure to enforce laws, selective prosecutions, aggressive support of specific groups’ agendas, and a vast expansion of government authority over virtually all aspects of citizens’ lives and activities.

We are also creating a host of so-called “laws” that are vague, imprecise, intrusive and open to wide discretionary interpretations of the kind characteristic of authoritarian regimes rather than transparent systems of governance operating under clear legal strictures implemented according to rules of due process and fairness. Much of this is being done through the creation of the permanent “war” psychology and the demands for extraordinary powers associated with national security.

Another avenue has been the granting of formal and informal powers of linguistic control and intimidation to self-defined “identity groups”. These groups are being empowered to claim “insult”, “insensitivity”, “offense” and the like as devices for shaping what others are allowed to say in a system of the Rule of Law allegedly committed to constitutional guarantees of free speech.\(^\text{15}\) This latter avenue involves both the enactment


\(^{14}\) *See Lawrence Friedman, American Law* 257 (2002).

of laws aimed at controlling speech on behalf of identity groups and the creation of a legal
and social culture that has come to see the sanctioning of others’ speech as valid.

Along with this behavior of traditional government leaders and institutions we are
experiencing on the one hand a shift to economic actors and regulators that are outside the
control of any nation including the US and that transcend any suggestion of democratic
behavior. The result is that the Rule of Law simply does not apply as a system able to
define, monitor, investigate and hold accountable an enormous range of economic, financial
and multilateral behavior.\(^\text{16}\) Many of the economic actors, whether technically in the public
or private sectors, operate on such a scale of power that they must be considered as
governmental actors in themselves regardless of the technical niceties of legalism.

Whether the actors are “too-big-to-fail” banking institutions, arms manufacturers
and defense and security industry providers of goods and mercenary services anywhere in
the world, oil companies and oil producing nations, the IMF or World Bank, the systems
that have been created transcend the control of any single nation. The central actors and
beneficiaries of these systems and institutions are ultimately unanswerable because of
outdated laws of sovereignty, the scale and power of the participants or [ironically] legal
location outside any individual national jurisdictions. Effective actions would require
complex and enforceable international agreements and that is and will not be allowed by
the systems’ beneficiaries and controllers.

Part of the process involves the deliberate reconstruction of language and values.
Some of this 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 intimidating or
shaming into silence 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.

Ellen Nakashima reports: “The Obama administration secretly won permission from a
surveillance court in 2011 [FISA] 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…. The administration’s assurances [as
to legitimacy] 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.”\(^\text{17}\) Rather than illuminating in the highest sense, as we naively hoped would result

\(^{16}\) George Monbiot, “How have these corporations colonised our public life?: Our politicians have delegated
power to global giants engineering a world of conformity and consumerism”, Tuesday 8 April 2014, The Guardian. Ken
Clarke, “A threat to democracy? The EU-US trade deal is no such thing”, Thursday 13 March 2014, The Guardian.
http://www.theguardian.com/commentisfree/2014/mar/13/eu-us-trade-deal-no-threat-democracy-monbiot-
transatlantic-partnership. George Monbiot, “Give and take in the EU-US trade deal? Sure. We give, the corporations take: I
have three challenges for the architects of a proposed transatlantic trade deal. If they reject them, they reject democracy”,
give-corporations-take.

\(^{17}\) 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-
from those technological developments, they have been turned into weapons. The ability to monitor, spy and intimidate is unprecedented in a democratic society.

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.” 18 This face-to-face dynamic and the combination of familiarity and experience with the varying individuals presumably was thought to create a situation in which statements and positions could be evaluated for merit and substance. Of course that model bears no resemblance to what we now have as our governmental form. The problem is that we have now shifted entirely away from the ability to know true merit and substance into a context where propaganda, sound bites, distortion, “spinning”, secrecy, hidden agendas and outright lies dominate our “discourse”.

In extremely large and diverse political system anonymity, secrecy distortions and propaganda obstruct our ability to know the merits of 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. 19 Welcome also to a nation in which language is being used—not as an aid to intelligent and balanced discourse—but as a barbed weapon of intimidation and accusation by single interest groups intent on achieving their ends no matter the cost to others.

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 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.” 20 He nonetheless

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19 Naughton, supra, n. 2, observes: “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.”

20 Aristotle, The Politics, Bk. 4, c. 4, 1326a35, at 123. See, THE POLITICS OF ARISTOTLE, Translated and
considered democracy the best form in the real world because he concluded 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. We have, however, created a system in which numerous “classes” have emerged with many of them empowered through law to assert their unique interests at the expense of other “classes”. The Internet and other forms of electronic communication have become central methods through which the intensifying struggle between competing class and identity groups is taking place. The result is not a greater community of interest but a fractured and increasingly corrosive political context where propaganda, legal power, money, vilification and lies are woven together in a corrupted “stew” that has poisoned the overall society.

Aristotle also argued the size and composition of a city-state is 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.” 21 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.” 22

We are far beyond Aristotle’s Athenian context and have irreversibly lost the tenuous connection between community, law and power in American society. Our social environment has reached a degree of transitoriness to the point that we know little or nothing about each other. A result is that there is at best only slight awareness of the individual merit of those with whom we deal. Nor is there a sense of community bonds outside of small fragments of interest and relationship. This has destroyed any common sense of being a tight knit community.

We reside within a framework of “thinned” relationships and even anonymity. This alters our behavior in ways we are still trying to grasp. Lord Devlin concluded, “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.” 23 Charles Taylor argues that the supposed tolerant morality of current culture is parasitic upon the morality and institutions

introduced by Peter L. Phillips Simpson. (North Carolina 1997). Aristotle concluded that even with its numerous flaws, democracy was the best real world option. His three true forms of government were kingly rule, aristocracy, and constitutional government. The three corrupted forms were tyranny, oligarchy, and democracy.

21 Aristotle, Politics, Bk. II, c. 8, supra n. 7. Politics, id. Bk. 4, c. 4, 1326b7, at 124.
22 Aristotle, id.
developed by the Western and Judeo-Christian culture and morality.  

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”

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 overwhelming speed. It is as if a “social tsunami” has swept through our society and 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 overnight from a world in which government and communications moved at relatively slow speeds and under controlled access to the ability to present our views broadly and where billions of voices resound in uncontrolled cacophony. The impact on governments and other traditional institutions is profound and continuing to develop.

Once a system moves beyond being 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 becomes much more competitive and superficial. It also depends on the creation of larger institutional forms to operate within the increased scale of activity. As the organizational forms increase their scale they take on lives of their own and begin to manage us rather than the other way around. As Jacques Ellul explained in *The Technological Society*, these large-scale instrumentalities of technique overwhelm the individual and alter the nature of the culture.  


25 See Jacques Ellul, *The Technological Society* (1964). The power and scale of institutional structures is part of the phenomenon of *technique*, one that Ellul describes as shaping modern society. We become role players within the larger instrumentalities of *technique* created to cope with our complex societies.
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...."  

We are still left with a “marketplace” but it is one of power and influence, not ideas and strong evidence. The pseudo-discourse that results is always outcome-directed. Gaining or keeping 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 but the technology has expanded the dynamics of the conflict exponentially.  

The Exhaustion of Our Social Capital

Robert Putnam has exhaustively documented the fact that American “social capital”—defined as the social ties that make our communal lives more productive—has been disastrously depleted over the last forty years. As Putnam observes, Americans no longer participate in community or civic institutions at anywhere near the levels of the early to mid-twentieth century. We are becoming a nation of insular families and individualists who no longer vote in significant numbers, no longer participate in civic organizations, have declining participation in religious organizations, and volunteer less than we used to.  

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. 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. The problem with this approach is that it is no solution, at all because the underlying damage to American society has already been done. Humpty Dumpty does not go back together just because we’d like it to be so and go back to “before the fall”.

Putnam almost admits that the solution should come from some external event, stating: “[Creating social capital] would be eased by a palpable national crisis, like war or depression or natural disaster....” But 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 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

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28 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.
29 Putnam, *Id.* at 31-133.
30 Putnam, *Id.* at 134-147.
31 Putnam, *Id.* at 402-414.
32 Putnam, *Id.* at 402.
extinction and we have entered an age of intense fragmentation and factionalism.

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." 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." We appear to opting to do each "cure" simultaneously through intimidation and the imposition of overt and covert language codes. What comes next is unclear, but it is unlikely to be uniformly positive.

What is occurring is a change in the nature of American society. There is a shift in the form of government from a hybrid form of complex democracy that at least sought to be reasonably representative to a strange mixture of George Orwell's 1984 and Animal Farm along with William Golding's Lord of the Flies. 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. For governments, however, this new power in the hands of citizens is often seen more as threat than positive development. Russia, for example, is doing everything it can to inhibit its citizens' critical communication. China is imprisoning activists and bloggers. Turkey is blocking Twitter accounts in an effort to prevent pre-election criticisms of Prime Minister Erdogan related to corruption.

33 Federalist # 10 (November 22, 1787) The Federalist, Edited and introduced by Jacob E. Cooke (1961), at 56.
34 Federalist # 10, id, at 58.
35 A fascinating fact about the sudden recent rediscovery of Orwell 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.
38 See, ”Why freedom of expression is under threat in Turkey”, @guardianletters, Thursday 27 March 2014, The Guardian. http://www.theguardian.com/world/2014/mar/27/letters-turkey-freedom-expression. The participating writers state: “We are writers from around the world who love, live and breathe words. We are united in our belief that freedom of expression is a universal and fundamental human right. We are gravely concerned about “the freedom of words” in Turkey. We connect both within and across borders through words, written and spoken. A free exchange of ideas is essential for democracy, as well as for creativity, empathy and tolerance. As revealed in a Pen report on last year’s protests, Turkey has many freedom of expression issues, from criminal defamation to self-censorship within the mainstream media, to police violence against journalists and a narrowing of freedom of expression on the internet.”
The dilemma is collective courtesy versus the willingness to challenge and contest. 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.”  

Ironically, this “right” is under attack by not only governments but by private groups who are intolerant of any views inconsistent with their own. The past several decades have seen the rise of a variety of suppressive techniques on the part of aggressive private interests in which speakers are intimidated or punished for expressing views not approved by a powerful and organized constituency.  

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 [essentially] face-to-face interchanges of the kind we always assumed were central to true democracy through the capabilities of real-time communications technologies. 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 embarrassing level of ignorance and the degradation of our educational systems to the point where there has been a widespread 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. In this vein Jacques Ellul has argued that: “modern man is beset by anxiety and a feeling of insecurity. He tries to adapt to changes he cannot

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39 The *Universal Declaration of Human Rights* (UDHR) Articles 18 and 19.
40 Robert Dahl warns: “by emphasizing aspects of the self that are enhanced by organizational or segmental gains, organizational pluralism helps to produce in political actors a set of perceptions and beliefs, even a persistent political culture, in which the absence of a common, public, or widely shared set of interests is a self-fulfilling prophecy. I and my “interests” become attached to my social segment and my organizations; leaders in my organizations in turn seek to increase the strength and salience of my attachments; my public interest becomes identical in my mind with my segmental interest; since what is true of me is true of others, we all passively or actively support the organizational fight on behalf of our particular interests; finally, as levels of distrust rise and effective communication declines, the “rational” pursuit by each of us of our particularistic self-interest may lead to mutually damaging outcomes.” Robert A. Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* 44, 45 (Yale University Press 1982).
41 See, e.g., James Ball, “Brendan Eich declines to discuss donation to campaign against gay marriage in California but says he will not resign”, Wednesday 2 April 2014, theguardian.com, [http://www.theguardian.com/technology/2014/apr/01/mozilla-ceo-brendan-eich-refuses-to-quit](http://www.theguardian.com/technology/2014/apr/01/mozilla-ceo-brendan-eich-refuses-to-quit). My question is exactly why should he resign? He participated in the democratic process as an individual, made a contribution during an intense period in which a ballot initiative relating to gay marriage was being considered in California, was not in favor of gay marriage (along with a majority of California voters) and is now being attacked for that exercise of democratic choice. The position of those who are demanding his resignation must be that a majority of California voters should not be employed because by their support of the initiative they demonstrated a state-of-mind that means they are unemployable.
comprehend. The conflict of propaganda takes the place of the debate of ideas.”

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. A concept intended to protect honest and substantive political discourse where there might be a threat of unfair recriminations against the speakers has instead allowed the most ignorant, base and malicious among us to poison the sphere of social and political discourse. This is 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.

Along with these go the abuses of power, uses of the technology to harm, and the inability of governments to know how to draw limits on their desire for information. One recent report indicates: “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.”

At this point we do not have the slightest clue about how to deal with the interacting forces of the new and still evolving form of government and accompanying social order. 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.”

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45 Jonathan Kaiman, “China to train leaders to manage online public opinion: Xinhua reports on government training programme designed to control flow of online information on sites such as Sina Weibo”, Monday 10 March 2014, theguardian.com.
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”. 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. Each fragment, whether representing an economic interest or one of political activism, is committed to relentlessly pursuing its particular agenda. Part of this process includes strategies of intimidation, punishment and contempt directed at anyone who criticizes a group’s positions.

**The Death of Compromise**

The social fragmentation that has taken place arguably is one of the central factors in governmental and business actors being able to conduct the 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. The operative rule seems to be that only “weak people” compromise. This may well be because we have become so intellectually inadequate that all we really have are superficial slogans and

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

48 The Chinese government is taking a number of 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, 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.

49 Arun Kundnani, “No NSA reform can fix the American Islamophobic surveillance complex: Muslim Americans likely make up the bulk of US domestic spy targets. This is what it’s like for innocent citizens to live in fear”, Friday 28 March 2014, theguardian.com; http://www.theguardian.com/commentisfree/2014/mar/28/nsa-reform-american-islamophobic-surveillance-complex. “for those living in so-called “suspect communities” – Muslim Americans, left-wing campaigners, “radical” journalists – the days of living on the receiving end of excessive spying won’t end there. How come when we talk about spying we don’t talk about the lives of ordinary people being spied upon? While we have been rightly outraged at the government’s warehousing of troves of data, we have been less interested in the consequences of mass surveillance for those most affected by it – such as Muslim Americans. In writing my book on Islamophobia and the War on Terror, I spoke to dozens of Muslims, from Michigan to Texas and Minnesota to Virginia. Some told me about becoming aware their mosque was under surveillance only after discovering an FBI informant had joined the congregation. Others spoke about federal agents turning up at colleges to question every student who happened to be Muslim. All of them said they felt unsure whether their telephone calls to relatives abroad were wiretapped or whether their emails were being read by government officials.” The intriguing aspect of the shift to what John Fonte calls “cultural democracy” comprised of identity groups is that it should not therefore be surprising when members of self-defined identity groups are brought under greater scrutiny when some members of those groups of “closed system identities” and beliefs or faiths clearly pose dangers to the overall community and to other groups that don’t share their beliefs.
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.”

As we travel deeper into the world of propaganda, superficiality and banality we can no longer engage in real debate and interactive problem solving. 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”, the most 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 being 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 primary tools of political interest groups that often are unfair and damaging. Their power derives from being impossible to rebut because doing so essentially requires the unfortunate victims of the charges to accomplish the impossible task of “proving a negative”, i.e., “I’m not phobic” or “I’m not a bigot”.

Although it is unlikely to be seen as a popular position, I consider the 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

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much too casually applied strategies of “phobias”, “racism” and sexism.52 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.53

Some of this concern is being played out in Australia, a country we might generally think of as being ethnically homogenous other than its serious issues about treatment of Australians of aboriginal descent. A recent judicial decision invalidated a key section of Australia’s “insult” law on the basis that it granted too much of a carte blanche entitlement for individual ethnic groups to dictate what statements “insulted” or “offended” them. One report described the conflict as one where: “The section makes it unlawful to “offend, insult, humiliate or intimidate” a person or group because of their “race, colour or national or ethnic origin”. Fresh speculation about the extent of changes has triggered a joint statement by community leaders expressing their “vehement opposition”.54

Viewing the signatories opposing the changes in the law helps demonstrate just how fragmented the “identity culture” has become. Hurst reports that: “The letter – signed by the National Congress of Australia’s First Peoples, the Armenian National Committee of Australia, the Arab Council Australia, the Chinese Australian Services Society, the Korean Society of Sydney, the Australian Hellenic Council, the Chinese Australian Forum and the Executive Council of Australian Jewry – urged the government against removing the words “offend, insult, humiliate” from section 18C.”55

But exactly who are the arbiters who decide what words and phrases “offend, insult, or humiliate”? Endowing any identity group with the subjective right to determine in its own interest what offends them and insults them is an offense against all traditions of freedom of speech and thought. In part the offense against free speech is created not only by such a law’s inherent subjectivity but by the fact that there are certain advantages that can be gained for an identity group by expanding the range of perceived “insult”. This means that considerations other than actual offense and humiliation come into play and the power to dictate the allowable terms of discourse becomes a grant of authority and


53 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.

54 Daniel Hurst, “Racial discrimination: groups unite against ‘morally repugnant’ law changes”, supra, n. .

55 Daniel Hurst, “Racial discrimination: groups unite against ‘morally repugnant’ law changes”, supra, n. .
privilege. It also becomes a means for organizing an identity group’s constituency as a political bloc. This intensifies the divisions between segments of society rather than bringing diverse elements together. Divisive issues are identified and then magnified as a tool of political strategy.

I could, for example, easily take offense when accusations are made against all “men” for some perceived offense against a person or group that considers “men” to be the root of all historic discrimination against them. The same can be said for the far too casual and common condemnation of “older white men”. But I am not bothering to be offended and have far too many positive things to occupy my time. Real discrimination in opportunity is a condition I care about. Hurt feelings are something I try very hard not to cause, but in a democratic system based on freedom of expression it is a price we all need to be willing to pay.

Looking at this litany of potentially offended groups, Korean, Greek, Arabs, two different Chinese identity groups, the “First Peoples” and the Armenians offers a sense of the never ending expansion of the interests that are potentially offended by something someone says. I am surprised that the Scots, Welsh, “exiled British” sent to Australia as their sentence for alleged wrongdoing, Indonesian boat people, Malaysian emigres, Bangladeshi pilgrims, Indians fleeing Portuguese oppression in Goa, and numerous other groups did not jump on the band wagon of “you better not say anything that makes me feel bad”.

The “insult” movement has become a tool not only of repressive identity groups but of repressive governments seeking to stifle criticism. The concept of “insult” of government and its leaders, or of religious and other groups is a powerful means of suppressing speech. Tiny 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. Roy 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 known to be false but is reproduced in order to cause “annoyance... insult... and ill will.”

We see a host of such strategies in China. “Insult” prosecutions rose dramatically in


57 See Reuters, “Charles Xue tells Chinese media he spread irresponsible online posts:” supra, n. 32: “Detained Chinese-American venture capitalist Charles Xue, known for making controversial remarks on social and political issues,
Mohamed Morsi’s Egypt when he was in power, and laws against insulting language and “hate” are flooding the United Kingdom.⁵⁸ They are all varieties of 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.⁵⁹

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.⁶⁰

Instead we have become a collection of clones, drones and followers who submerge our identities in a mass and are committed to the interests of the identity group that

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, 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”.

⁵⁸ See also, See, Kristen Chick, “Egypt pursues blasphemy cases as Morsi defends ban”, http://www.csmonitor.com/World/Middle-East/2012/0927/Egypt-pursues-blasphemy-cases-as-Morsi-defends-ban-at-UN. at UN”, Christian Science Monitor, September 27, 2012. 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 Krysia 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.”

⁵⁹ Paul Craig Roberts, “Role Reversal: How the US Became the USSR”, July 23, 2013, 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. 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.”

provides our sense of meaning.\textsuperscript{61} The intriguing thing about what has occurred is that the ability to communicate, connect and act in concert has not brought us together in a larger sense of shared community but has generated an increasingly fractured and antagonistic populace.\textsuperscript{62} 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.

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.” \textsuperscript{63}

“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. The simple fact is that no matter how obvious a target the National Security Agency and CIA may be, companies such as Google, Yahoo and Facebook are far


\textsuperscript{62} Peter Preston, “There is no such thing as community: The idea that society comprises homogenous groups is deluded,” Guardian, 7/18/05.

\textsuperscript{63} GABRIEL MARCEL, MAN AGAINST MASS SOCIETY (1969) at 136, 137. Roberts, “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 enslaves 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.”
superior at data acquisition, management and interpretation.\footnote{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."']

Private businesses have designed software and monitoring systems that surreptitiously observe what we look at on the Internet by recording our searches, computer keystrokes, 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 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.\footnote{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/}
the form of newly emerging collaborations between governments and massive private sector businesses such as Google, Yahoo, Facebook and LinkedIn.66

These companies were collaborators with the NSA over providing data they obtained from customers. While publicly whining after their participation was exposed through Snowden’s release of PRISM records the company CEOs claimed they had to cooperate or face imprisonment. Yahoo CEO Marisa Mayer stated the heads of the companies faced jail if they even told anyone that the NSA was accessing their records.67 Yahoo already had a record of kowtowing to the Chinese government in “outing” people in that nation who used the Internet for disapproved purposes so Mayer’s protests properly fall on deaf ears.

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.68 A label such as the “Public/Private Surveillance Complex” might help us understand what is occurring. Of course, it might have helped that the NSA paid large sums of money for the records.69

66 Dan Gillmor, “Obama’s NSA phone-record law ignores the other (big) data we’re giving away: We are no longer merely creatures of metadata. We are now bystanders to the demise of privacy. Will anyone protect us?” Wednesday 26 March 2014, the guardian.com. http://www.theguardian.com/commentisfree/2014/mar/26/obama-nsa-phone-record-law-big-data-giving-away. Gillmor writes: “So President Obama is finally ready to do something about the government storage of our phone records, preparing legislation for Congress that would partially change the National Security Agency’s bulk collection. Except he’s missing something much more important: all of the other, much more revealing data we generate simply by living our daily lives. What about all of the other data that internet companies buy and sell, and that yet more companies create and sell without even telling us – indeed, all of the rest of a data retention program that you and I helped build?”


68 See, 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, the guardian.com. http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance. Rushe reports: “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.”

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, a “Big Pharma” 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. 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.

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.

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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.”

70 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. 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. I think Geary misses the point that there is very little online “debate” as opposed to stone throwing.
This includes lying. For the justifications offers: “Krishna’s maxim—“By telling a lie to save a life, one is not touched by sin”—defines deception in war in terms of self-defense.” In applying this rationalization to our social struggles Sullivan writes that some claim that: “In general, the threat of violence by someone stronger invites deception as a countermeasure. And when the weaker party in a conflict is perceived as unfairly at a disadvantage, we tend to see deception as a justifiable means to right the imbalance of power. Which is one reason the heroes in fairy tales and folk tales so often resort to deception. Told from the point of view of the underdog, many of these tales glory in the triumph of those who are weak but tricky over those who are strong but gullible.” 71

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 shills” praise or attack without conscience or remorse. 72

We have divided into factions and fragments comprised of 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. John Fonte argues that what is occurring is a shift from traditions of “liberal democracy” to something he calls “cultural democracy”, explaining: “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.” 73 He adds: “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.” 74

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

73 See, John Fonte “Upstream,” National Review, February 6, 1995. Fonte concludes that: “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.”
74 Fonte “Upstream,” National Review, id. See also Deborah TANNEN, THE ARGUMENT CULTURE, supra n., 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.
“white” subgroup created in part by the fact that many whites are feeling they are being forced into an increasingly disempowered and threatened group simply because they are white. The driving force is that since everyone else in the system is claiming a unique “identity” then “ethnic survival” mandates a protective response to prevent being overwhelmed.

The “White Privilege” interpretation in which opportunity for all whites appears to be culturally institutionalized as an advantage vis-à-vis 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” and specific words, etc.) is beginning to irk me, I can understand how such self-satisfied and smug hypocrisies must be impacting on those who haven’t spent their lives immersed in issues of social and racial justice.

There are many forms and contexts in which discrimination arises and I detest it in all its forms. For me, racism is an 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 as compensation 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 impose on them simply for the reason 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 (or “Black” privilege, “Hispanic” privilege, “Asian” privilege, “Female” privilege, “Gay” privilege?) against people who never discriminated. But justifying the necessity to take action to remedy the worst consequences of the historical discrimination (which I accept as necessary) does not alter the reality of what we are doing. In such a context we should not be surprised if many people become tired of rhetoric and arguments that indicate they have the responsibility to bear the burden of the actions of dead people from past generations and have no “voice” or right to present their points of view without being labeled “bigots”.

This clever political framing of the language used to describe the terms under which we operate is itself a form of discrimination painted with far too broad a brush in which “all whites” or more precisely “all white men” have responsibility for all things done by people with those characteristics in history. Stratagems such as “white privilege”, “institutional
racism or sexism”, “homophobia”, Islamophobia” and numerous other “phobias” are not honest answers to anything. They are overly sweeping, condemnatory and divisive methods of imposing guilt, not as a legitimate insight or true responsibility but as a leverage strategy aimed at intimidation and 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.”

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 publication unnecessary, insensitive, disrespectful and wrong.” 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

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76 Associated Press in Newark, “New Jersey Muslims appeal federal ruling on NYPD surveillance”, Friday 21 March 2014, theguardian.com. http://www.theguardian.com/world/2014/mar/21/new-jersey-muslims-appeal-nypd-surveillance. The AP report states: “A group of Muslims from New Jersey is appealing a federal judge’s ruling that determined that the New York City Police Department’s surveillance of Muslims did not violate their civil rights. Attorneys from the groups Muslim Advocates and the Center for Constitutional Rights filed a notice of appeal on Friday in federal court in Newark, challenging the dismissal of a 2012 lawsuit brought by Muslim individuals and organisations who said the NYPD programs constituted unconstitutional surveillance based on religion, national origin and race. The suit had accused the department of spying on ordinary people at mosques, restaurants and schools in New Jersey since 2002. US district judge William Martini, in dismissing the suit last month, said the NYPD’s activities were part of a lawful effort to prevent terrorism. Martini said he was not persuaded that the plaintiffs were targeted solely because of their religion, writing that “the police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself”.


78 “Cartoon Wars,” id.
probably not be able to say much of anything without offending, insulting or “dissing” someone.

“They Simply Wanted Me to be Silenced”

This attempt to suppress free speech and punish individuals for offering unpopular comments has seldom been demonstrated so clearly as in the withdrawal by Brandeis University of an honorary degree it was to confer on Ayaan Hirsi Ali. Protests by mainly Islamic students, CAIR, and some faculty due to Hirsi Ali’s criticism of Islam produced a cowardly response by Brandeis administrators. Hirsi Ali responded to the university’s anti-intellectual rationalizations by stating “They Simply Wanted Me to be Silenced”. I quote at length because it is important to understand the full context.

Yesterday Brandeis University decided to withdraw an honorary degree they were to confer upon me next month during their Commencement exercises. I wish to dissociate myself from the university’s statement, which implies that I was in any way consulted about this decision. On the contrary, I was completely shocked when President Frederick Lawrence called me — just a few hours before issuing a public statement — to say that such a decision had been made.

When Brandeis approached me with the offer of an honorary degree, I accepted partly because of the institution’s distinguished history; it was founded in 1948, in the wake of World War II and the Holocaust, as a co-educational, nonsectarian university at a time when many American universities still imposed rigid admission quotas on Jewish students. I assumed that Brandeis intended to honor me for my work as a defender of the rights of women against abuses that are often religious in origin. For over a decade, I have spoken out against such practices as female genital mutilation, so-called “honor killings,” and applications of Sharia Law that justify such forms of domestic abuse as wife beating or child beating. Part of my work has been to question the role of Islam in legitimizing such abhorrent practices. So I was not surprised when my usual critics, notably the Council of American-Islamic Relations (CAIR), protested against my being honored in this way.

What did surprise me was the behavior of Brandeis. Having spent many months planning for me to speak to its students at Commencement, the university yesterday announced that it could not “overlook certain of my past statements,” which it had not previously been aware of. Yet my critics have long specialized in selective quotation — lines from interviews taken out of context — designed to misrepresent me and my work. It is scarcely credible
that Brandeis did not know this when they initially offered me the degree.

What was initially intended as an honor has now devolved into a moment of shaming. Yet the slur on my reputation is not the worst aspect of this episode. More deplorable is that an institution set up on the basis of religious freedom should today so deeply betray its own founding principles. The “spirit of free expression” referred to in the Brandeis statement has been stifled here, as my critics have achieved their objective of preventing me from addressing the graduating Class of 2014. Neither Brandeis nor my critics knew or even inquired as to what I might say. They simply wanted me to be silenced. I regret that very much. 79

Although the language control movement has spread throughout Western society as part of a conscious political strategy by identity groups, universities initially led the charge through the imposition of speech codes. The power to condemn has been demonstrated in university speech codes that reflect academics’ agreement with the suppression of open discourse. It is also seen by many of the identity collectives as a one-way street. Seth Stevenson writes: “These codes have their roots in theories, which gained favor with campus radicals in the 1960s, contending that … “[i]f the powerful and the weak were required to play by the same rules . . . the powerful always would win.” In other words, this theory goes, the disadvantaged need different rules. What’s more, these rules should extend to speech, not just to actions, because speech can be just as powerful and hurtful.” 80

That’s how degrading and degraded I think our culture has become. The “identity sects” also include education lobbies, immigration advocates and opponents, defense industry beneficiaries, and much more. Some 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. 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.81 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." \(^{82}\) 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 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. “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.\(^{83}\)

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 (or have us do so) as threats to our own narrow conceptions and beliefs.

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.” \(^{84}\) 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...” \(^{85}\)

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 technologies to detect “enemies” speech and project our own propaganda increases.\(^{86}\) The

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\(^{82}\) 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).


\(^{86}\) 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
abilities to repress and sanction have become an irresistible force that is most likely irreversible. 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.” 87

This has dire implications for the degradation of any honest democratic discourse.88 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. The insistence that we conduct ourselves rationally in our discourse has been assailed as an illegitimate means by which men control 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 should ignore seeking to come as close as possible 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.

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 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....” 89

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**The Irresistible Momentum of Technology**

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).


88 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.

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. Pentagon Papers distributor Daniel Ellsberg recently warned we are on the verge of becoming a “police state”, concluding, “We have not only the capability of a police state, but certain beginnings of it right now”. It 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.

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: “that 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.”

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90 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.”

91 Spencer Ackerman and James Ball “NSA performed warrantless searches on Americans’ calls and emails – Clapper”, Tuesday 1 April 2014, The Guardian; http://www.theguardian.com/world/2014/apr/01/nsa-surveillance-loophole-americans-data. “US intelligence chiefs have confirmed that the National Security Agency has used a "back door" in surveillance law to perform warrantless searches on Americans’ communications. The NSA’s collection programs are ostensibly targeted at foreigners, but ... a secret rule change [has been revealed] allowing NSA analysts to search for Americans’ details within the databases. .... [T]he director of national intelligence, James Clapper, has confirmed for the first time the use of this legal authority to search for data related to "US persons". [This] was denounced by [Congressman] Wyden as a “backdoor search loophole.” Many of the NSA’s most controversial programs collect information under the law affected by the so-called loophole. These include Prism, which allows the agency to collect data from Google, Apple, Facebook, Yahoo and other tech companies, and the agency’s Upstream program – a huge network of internet cable taps.”

92 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).
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 terrorist activities. We have been witness to exposure of 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.93

Yet the NSA’s all-encompassing PRISM program is simply one 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. This apparently includes an episode in which the CIA could not resist spying on a Senatorial Oversight Committee engaged in assessing the Agency’s behavior.94 We can go back a decade to the debate over John Ashcroft’s proposed Terrorism Information and Prevention 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 capability remains.

Admiral John Poindexter was initially authorized to create the Total Information Awareness Office (TIA) in the Pentagon that mirrored much of what Ashcroft sought.95 TIA was set up under that name for a brief period in 2003 until being renamed the

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93 Dan Roberts, “NSA analysts deliberately broke rules to spy on Americans, agency reveals”, Friday 23 August 2013, 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 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.”


95 Lawrence Donegan, “Pentagon creates a Big Brother so Uncle Sam can keep his eye on us,” Sunday, November 17, 2002, The Observer [online] http://observer.guardian.co.uk/international/story/0,6903,841731,00.html. “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.”
Terrorism Information Awareness Program. The *Guardian* reported 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.”  

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

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). The debate over John Ashcroft’s proposed Terrorism Information and Awareness Program 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.  

The Internet-as-weapon has been refined into a tool for surveillance, persuasion and intimidation by government, private business and political interests. 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. With blogs, e-mails, “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

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97 Jane Black, “Some TIPS for John Ashcroft: Mr. Attorney General, forget your plan for a system to promote Americans spying on Americans.”  

98 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*. http://observer.guardian.co.uk/international/story/0,6903,841731,00.html.  

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.

**The “Oppressive Yoke” of Uniformity**

Former Library of Congress director Daniel Boorstin once asked: “Have we been doomed to make our dreams into illusions?” He warned: “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.”

Boorstin added: “An illusion ... is an image we have mistaken for reality.... [W]e cannot see it is not fact.” 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." 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....”

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-

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103 “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 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. FROMM, THE SANE SOCIETY, supra n. , at 208,209.
tolerant, diversity-conscious Leftist! Lesser brave souls naturally preferred to remain silent.”

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.”

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.” 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.”

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


106 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 [last visited June 24, 2004]. MacDonald observes: “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.

107 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.
“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 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.

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 because the “internal censor” of common sense and decency that tends to control our face-to-face
communications has been destroyed.\footnote{Philip Hensher, “The bigger a community gets, the easier and more virulent anonymity becomes”, The Guardian, Friday 23 August 2013; \url{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.”}

Visualize the cartoons in which we all have a little angel sitting on one shoulder and a little devil on another. The angel works to prevent the victory of our “demonic” side over our behavior while the devil is always seeking to beat the angel and convince us to “act bad”. For many people the Internet, its anonymity, lack of accountability and ability to gain support from the fact that we see others acting in the way our “devil” urges us to do opens the door in ways that are socially (and even personally) destructive. If our new society were a Star Wars episode I would have to conclude that the Empire is on the move and the Dark Side of the Force is winning. Unfortunately we don’t seem to have any Jedi Knights and Princesses when we need them.

Joseph Hamburger says of John Stuart Mill that his mission was to cause a restructuring of society and human from the ground up.\footnote{Joseph Hamburger, \textit{John Stuart Mill On Liberty and Control} 18-41 (1999). See John Stuart Mill, \textit{On Liberty}, in \textsc{Essential Works of John Stuart Mill} 255 (Max Lerner, ed., 1961); and John Stuart Mill, \textit{Theism}, in \textsc{Three Essays on Religion} (1884).} 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.\footnote{See Philip Hensher, \textit{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.”}

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 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.\textsuperscript{111} 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.\textsuperscript{112}

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 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. 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.\textsuperscript{113} Having these realities laid bare and exaggerated

\textsuperscript{111} 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.”

\textsuperscript{112} 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.”

\textsuperscript{113} When the legal system itself becomes complicit in advancing the interests of a limited number of groups and
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”.

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 attract 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 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 wellbeing of decent people.

It is quite another issue when we discover (or are overwhelmed by) the meaness,
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 Accelerating 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.114

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 wellbeing. 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 fragmentation is not a minor consequence.115 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”.116 Now the

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114 Madison, *The Federalist*, supra n. See also, John Fonte, “Upstream,” supra n.

115 John 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 declare 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.”

116 For an example of an effort to end anonymous comment see, Roy Greenslade, “Huffington Post ends commenter anonymity”, Thursday, http://www.theguardian.com/media/greenslade/2013/aug/22/huffington-post-
“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. Unfortunately, this vision of human nature is as flawed as that of Karl Marx who essentially mimicked the Christian faith in predicking 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. 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.

arihannahuffington. “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.”

117 This principle is reflected in the words of Justice Brandeis, concurring in Whitney v. California: “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....

118 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.”

119 Kampfner, “As in Russia, the terror threat has become the excuse to curtail our rights”, i.d., 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
Marshall McLuhan’s Observation on the Mutating Impact of Technology on Humans

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 individual identity, what we want to be, and the limits we expect governmental (and corporate) actors to honor have largely disappeared.

An intriguing aspect of what is happening is that people are being transformed by technologies. I am not speaking metaphorically. See, for example, the intriguing discussion of actual changes in the human brain due to online technology in a report by Michael Rosenwald in The Washington Post. The report suggests fascinating effects such as the increasing concern on the part of cognitive neuroscientists that: “Humans ... seem to be developing digital brains with new circuits for skimming through the torrent of information online. This alternative way of reading is competing with traditional deep reading circuitry developed over several millennia.”

In comparing traditional reading with Internet-based reading it is suggested that: “The Internet is different. With so much information, hyperlinked text, videos alongside words and interactivity everywhere, our brains form shortcuts to deal with it all — scanning, searching for key words, scrolling up and down quickly. This is nonlinear reading and it has been documented in academic studies. Some researchers believe that for many people, this style of reading is beginning to invade when dealing with other mediums as well.”

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.

120 Michael S. Rosenwald, “Serious reading takes a hit from online scanning and skimming, researchers say”, Washington Post, April 6, 2014. http://www.washingtonpost.com/local/serious-reading-takes-a-hit-from-online-scanning-and-skimming-researchers-say/2014/04/06/088028d2-b5d2-11e3-b899-20667de76985_story.html. “I worry that the superficial way we read during the day is affecting us when we have to read with more in-depth processing,” said Maryanne Wolf, a Tufts University cognitive neuroscientist and the author of “Proust and the Squid: The Story and Science of the Reading Brain.” The Report adds: “Before the Internet, the brain read mostly in linear ways — one page led to the next page, and so on. Sure, there might be pictures mixed in with the text, but there didn’t tend to be many distractions. Reading in print even gave us a remarkable ability to remember where key information was in a book simply by the layout, researchers said. We’d know a protagonist died on the page with the two long paragraphs after the page with all that dialogue. ... “We’re spending so much time touching, pushing, linking, scrolling and jumping through text that when we sit down with a novel, your daily habits of jumping, clicking, linking is just ingrained in you,” said Andrew Dillon, a University of Texas professor who studies reading. “We’re in this new era of information behavior, and we’re beginning to see the consequences of that.”

121 Rosenwald, “Serious reading takes a hit from online scanning and skimming, researchers say”, id.
We are literally becoming different people than we were prior to widespread access to the information systems. Just as we can be modified by chemicals or implants as fictionally represented in television series such as "The Six Million Dollar Man" or "The Bionic Woman" the Internet, computers, software applications and the like are adding capabilities and eliminating others. Some of the modification is fantastic. Whether it is Google Glass, Facebook, information gathering and spyware programs we have not even begun to understand what these lightning-fast developments are doing to us as well as to our social and political communities. I love having instantaneous access to 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 have always been obsessed with understanding a wide range of disciplines and knowledge sources. Earlier in my academic career I spent years checking out hundreds upon hundreds of books from the university’s main library and stacking them on the floor of my law school 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 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. It is good because it provides this capability. It is bad because it is addictive and obsessive, and because it alters the nature of contact between people. Arguably it is also bad because it gives government and other powerful institutions powers that they should not have because they cannot be trusted to impose limits on their intrusive behavior.

**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. 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. In countries such as China, Turkey and Saudi Arabia the intrusiveness is in large part aimed at anticipating

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122 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.

123 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.
and eliminating internal challenges to existing regimes. In either context the detection and monitoring systems are infiltrating the societies to an unsurpassed extent.\textsuperscript{124} Along with the National Security Agency’s (NSA) immense surveillance activity this 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 one generally considered the first purpose of government—is resulting in the subordination of freedom and the rapidly expanding intimidation of honest speech.\textsuperscript{125} 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 unfortunate enough to be subjected to their authority.\textsuperscript{126}

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.\textsuperscript{127}

\textsuperscript{124} Madison warned: “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.” \textit{Selected Quotes of James Madison}, http://www.constitution.org/jm/jm_quotes.htm.

\textsuperscript{125} 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, theguardian.com. 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.”

\textsuperscript{126} 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 leadership/wp/2013/07/31/report-tsa-employee-misconduct-up-26-percent-over-the-past-three-years/ 2013. See also, Jason Edward Harrington, “The Parable of the Mashed Potato Police”, March 27, 2014. http://www.politico.com/magazine/story/2014/03/tsa-confessions-mashed-potato-police-105116.html#.Uz2OtsdkDLZ. Harrington is a former TSA officer. He concludes: “The agency was the product of a panicked national moment—fertile soil for poor decision-making—and irrationality was etched into the TSA’s DNA.” He adds: “I had repeatedly witnessed TSA breaking its promise to the public that the screeners who reviewed the full-body scanner images would never come face-to-face with the passengers whose naked bodies they’d just seen.”

\textsuperscript{127} Arun Kundnani, “No NSA reform can fix the American Islamophobic surveillance complex: Muslim Americans likely make up the bulk of US domestic spy targets. This is what it’s like for innocent citizens to live in fear”, Friday 28 March 2014, theguardian.com.  http://www.theguardian.com/commentisfree/2014/mar/28/nsa-reform-
The recent decision by Federal District Court judge William Martini concluded that the plaintiffs' complaint should be dismissed because while they argued "they had been targeted for police monitoring solely because of their religion. [The Court concluded]: "The more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies. The most obvious reason for so concluding is that surveillance of the Muslim community began just after the attacks of September 11, 2001. The police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself."128

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. Some 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.129

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. 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:

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“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 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.”  

We are cooperating freely in this process. It is not that there is no 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 in the use of surveillance technologies we are experiencing 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 who favor taking action tend to be overly 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 and 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 years and years into a

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decade or more.\footnote{131} Bottom line is that we are being lied to up front in these situations for a variety of reasons including ideology, the desire of military leaders to demonstrate their prowess, and the compulsive need for defense industries to continue to make exorbitant profits. An alternative is that our leaders and generals just aren’t that smart.

The result of being in a seemingly permanent 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. The effects of this “surveillance state” on those subjected to its pressures should be understood as profound and lasting just as it has been in the cultures of Communist China and the former Soviet Union.

To pretend (or delude oneself) into thinking there are not serious cultural effects is the height of ignorance. I agree entirely with one analyst’s observation that: “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.”\footnote{132}

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.\footnote{133} The erroneously defined and entirely amorphous

\footnote{131 John F. McManus, “GOP Senator Sees Iraq Quagmire as Another Vietnam,” \textit{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,” \textit{The Independent} (London), Apr. 7, 2004, at 5 (quoting Democrat Senator Edward Kennedy describing the Iraq war as “George Bush’s Vietnam”).}

\footnote{132 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. Chambers adds: “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.”}

\footnote{133 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; 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/world/2013/aug/09/nsa-loophole-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/commentisfree/2013/aug/05/obama-legacy-shadow-wars; Reuters in Washington, “Wiretaps and telephone records are being funnelled across the country to launch criminal investigations of http://www.theguardian.com/world/2013/aug/05/secret-dea-unit-surveillance-authorities; Michele Catalano, “Officers
“War on Terror” is worse than a declared war against a defined enemy. Unlike an open and declared conflict with a clearly identifiable enemy, in the series of “gray wars” collected under the “War on Terror” umbrella we are conducting steps taken to control speech, monitor citizens and empower groups with individual political agendas. These will not be temporary measures initiated “for the duration” of a clear and limited conflict because the conflict has no end.

The psychology and politics of the “War on Terror” will continue to produce a permanent and pervasive expansion of governmental power. This is demonstrated by the newly created Consumer Financial Protection Bureau that is said to be monitoring 80 percent of our credit card transactions and plans on capturing 95 percent of our mortgage transactions. A simple question is “Why” is this kind of system-wide data collection necessary?

Of course there are shady financial transactions and money laundering for reasons that include criminal activity, tax dodges and even terror financing. But the 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 all 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 no bar to draconian and invasive governmental power in any domain.

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/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/world/2013/jul/31/nsa-top-secret-program-online-data.

134 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. “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.”

135 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 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. … 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.”
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. Because the capability exists governments and massive commercial enterprises cannot resist the compelling urge to use the power. Otherwise, they might ask, “what is it for if not to be put to use?” 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, governmental and private, 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 suddenly became real in which your high school principal tells you that something bad you did was going into “Your Permanent Record”. This is precisely what is occurring. We all now have a Permanent Record. We have no idea what it contains, no opportunity to “fix” or explain it. We don’t know for certain who has access to it or how it can be used against us. Our electronic “Permanent Record” is accessible to invisible people at any moment for whatever purposes they might have, including those who use their skills to hack into data banks to which they were not supposed to have access. 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.

It is a matter of degree and trade offs between privacy and security—although one of the most intrusive domains in which privacy is being invaded involves the large-scale data gathering systems of commercial entities. A surprisingly 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. 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.”

The question, however, is not the fact of incursions into civil rights due to the

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137 Richard Norton-Taylor, “MI5 head warns of liberties trade-off to fight terror,” Saturday, September 10, 2005, The Guardian [online]. See also, Alison Flood, “John le Carré warns of threat posed by secret services to democracy: Novelist defends himself against accusation former colleague John Bingham ‘deplored’ portrayal of intelligence services”, Wednesday 5 March 2014, theguardian.com. http://www.theguardian.com/books/2014/mar/05/john-le-carre-secret-services-democracy-bingham. “John le Carré has warned that the intelligence services could “become as much of a peril to our democracy as their supposed enemies” if they are not subjected to rigorous examination.”
terrorist/national security context in which we live. It is all about the extent and nature of the intrusions including once the supposed threat is over how do we “ratchet back” governmental intrusiveness. The extent to which we should and must submit or agree to alterations in our civil liberties is at the heart of what should be a national debate. As the Edward Snowden/National Security Agency debacle reveals, however, there was no debate, and there has been abuse. In that context governmental officials’ claims that we should just “trust them” ring a bit hollow.\textsuperscript{138}

In the UK there have been continual expansions of governmental power over speech justified by the need to provide enhanced security against terroristic threats.\textsuperscript{139} 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.\textsuperscript{140}

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. 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.”\textsuperscript{141}

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 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 yet 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. This takes on significant

\textsuperscript{138} I generally accept Madison’s conclusion that: “All men having power ought to be mistrusted.” \textit{Selected Quotes}, Madison,

\textsuperscript{139} 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).


\textsuperscript{141} On such themes, see, Max Lerner, \textit{Ideas Are Weapons: The History and Uses of Ideas} (Transition, 1991).
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.\textsuperscript{142}

Michael Martinez describes an example of government action represented by the actions of a local California school district. He reports: “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.”\textsuperscript{143} “Student safety”, “national security”, “terrorism prevention”, “detection of potential mass murderers before they strike”, etc., etc. are all legitimate aims. Once voiced such justifications are difficult to deny as being reasons to take action. The problem is that they have no inherent checks or “governors” that tell us how far those who “protect” us should be allowed to go in their efforts. Perhaps the classic “road to Hell is paved with good intentions” and “the perfect is the enemy of the good” might come into play at this point in helping us realize lines must be drawn and limits imposed on those whose intentions are admirable but who don’t understand the need for restrictions and common sense. I must not be the only person in the US who cringes every time I hear of an elementary school student suspended for pointing a finger on a playground as if it were a pistol or reading about a six-year old boy being dismissed from school for sexual harassment after hugging a female classmate.

\textbf{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.\textsuperscript{144} It is on this level where concerted private interests bring pressure on targeted persons or interests and impose consequences on anyone voicing a disfavored

\textsuperscript{142} The UK’s Home Office website at \url{http://www.homeoffice.gov.uk/security/terrorism-and-the-law/}, contains links to the “Terrorism Act 2006”; “The Prevention of Terrorism Act 2005”; “Anti-Terrorism, 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.”

\textsuperscript{143} Michael Martinez, “California school district hires firm to monitor students’ social media” CNN, Saturday, September 14, 2013.

\textsuperscript{144} For analysis of the shift see, Deborah Tannen, \textit{The Argument Culture: Moving from Debate to Dialogue} (Random House, 1998).
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.145

Guardian columnist Polly Toynbee has argued for the importance of preserving our “right to offend a fool.”146 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.” 147

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.” 148 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

145 See, Press Association, “Religious hatred bill unveiled today,” The Guardian [online], Thursday, June 9, 2005. It reported: “The home secretary, Charles Clarke, will today publish a controversial bill banning incitement to hatred on the basis of religious belief, which opponents believe will outlaw religious jokes and curtail free speech. The racial and religious hatred bill will extend current offences on incitement to racial hatred under the 1986 Public Order Act to cover the stirring up of hatred against people of any religious faith. The offence will carry a maximum seven-year jail sentence. The government argues the present law is unsatisfactory because it covers followers of some faiths, such as Jews and Sikhs who are also considered as racial groups, while giving no protection to Muslims, who come from many racial backgrounds.

“The proposal [religious hatred bill] has come under attack from critics, including the comedian Rowan Atkinson, who argue it will undermine free speech by inhibiting discussion of religion. They cite recent furores over BBC2’s televising of Jerry Springer - The Opera and Sikh protests against the play Behzti as indications that religious groups have taken the government proposals as a green light to try to stamp out critical or irreverent commentary on their faith. Mr Clarke insists that the legislation will penalise only the incitement of hatred, and that satire, criticism and jokes will still be allowed. … Although the legislation has won support from many religious groups, not all faith representatives back it. A spokesman for the Evangelical Alliance has warned that it could ‘damage community relations and usher in a new climate of illiberalism and repression ‘. The play, Behzti, was closed following violent protests and the continuing threat of further violence.”

146 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. In words that echo Amir Butler’s recanting of his faith in the Australian anti-vilification law following the Catch the Fire decision, Toynbee suggests: “The irony is that those spending most time in the courts will be the religious themselves. A similar law in Australia brought a burst of litigation and demands for arrests from one bunch of fundamentalists against another. Hate-filled evangelicals were creeping into mosques to take notes on imams’ hate sermons. So extreme Jews, Muslims, Hindus, papists and Paisleyites will all challenge each other’s fiery thought crimes while the Bible and the Qur’an incite enough religious hatred to be banned outright.” For the Catch the Fire decision see, See, Islamic Council of Victoria v. Catch The Fire Ministries Inc., Victorian Civil and Administrative Tribunal (VCAT), 2005 VCAT 1159, VCAT Reference No. A392/2002; applying Racial and Religious Tolerance Act 2001 (Vic).

147 Toynbee, “My right to offend a fool”, id.
148 “Cartoon wars,” The Economist, supra n. at 9. id.
publication unnecessary, insensitive, disrespectful and wrong.” 149

Under the heading of “be careful what you wish for” the law of unintended consequences came into play immediately following the Islamic Council of Victoria v. Catch the Fire Ministries decision in Australia.150 Inevitably laws become weapons and those against whom they are originally directed soon learn how to turn them on their opponents. Amir Butler, the executive director of the Australian Muslim Public Affairs Committee (AMPAC) and one of the original supporters of the anti-vilification law applied in the decision, soon wrote that he had come to agree with its critics that it was a “bad law.” Even though he had originally sought the legal outcome I offer Mr. Butler’s comments at length because it is important to understand the destructive effects suppression of speech has on society and the extent to which such laws expand government power in ways that are dangerous for the health of democratic systems.

The ironic reason behind Mr. Butler’s surprising conversion post-victory, was that: “As someone who once supported their introduction and is a member of one of the minority groups they purport to protect, I can say with some confidence that these laws have served only to undermine the very religious freedoms they intended to protect. At every major Islamic lecture I have attended since litigation began against Catch the Fire Ministries, there have been small groups of evangelical Christians - armed with notepads and pens - jotting down any comment that might later be used as evidence in the present case or presumably future cases.”151

Butler goes on to lament: “The organisations being targeted by these evangelical Christians are neither involved in nor supported the legal action by the Islamic Council, and yet must now suffer the consequences of having their publications and public utterances subjected to a ridiculous level of scrutiny and analysis. The hope being, I assume, that some elements of the Christian community might exact revenge on the Muslim community by way of their own vexatious legal actions.”152

Mr. Butler achieved an epiphany we should all heed 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.”153 Yet this also indicates the problem. Each religion possesses a system of right and wrong and that is its business. But that does not mean either that it has the privilege of imposing its beliefs on others or that its belief system is not subject to criticism by those who do not share it. The values in the West rely on the necessity for tolerance of others’ views and acceptance of others’ right to hold their views.

149 “Cartoon wars,” The Economist, supra n. at 9. id.
Many people confuse tolerance in a democratic system with a requirement that the views be respected. Respect of the substance of the views themselves is quite a different matter.

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 in America 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 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 recent arrest in London of an individual preaching against what he considered the evils of abortion under the “hate speech” laws because a woman indicated she felt offended is an example of grotesque speech intimidation and the “chilling” of communication. Such dangers were warned against when the UK proposed “hate speech” legislation.  

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,” ...

Not long ago US Supreme Court Justice Stephen Breyer 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. While prudential concerns about the desirability of 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

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154 Leader, “Blows to democracy,” The Guardian [online], Saturday, September 17, 2005, “Under the proposed law anyone who “glorifies, exalts or celebrates” any terrorist act committed over the past 20 years could face a sentence of up to five years. Rarely, even within notorious conspiracy legislation, has there been such a broadly drafted clause.”


156 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 not be protected under the First Amendment.”
bigots who insist that they must not be offended. The power of government must be brought to bear against the violent actors, not the speakers. Otherwise we have granted the violent and the malicious veto and censorship power over what we say and do.

"Hate" Speech, "Hate" Crimes and the "Capture" of Governmental Power by Factions and Fanatics

While it is indeed generally “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. 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. If they do choose to act violently they should be dealt with in the sternest ways by the institutions of the nation.

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. After authoring a book titled Un Cri dans le Silence (A Cry

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157 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.”

158 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.”

159 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, David Orland, “Brigitte Bardot’s Cry in the Silence,” VDare.com, 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
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.  

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.”

Fallaci was indicted under the Italian penal code for the crime of “vilifying” religion. Oddly enough, her main accuser—the 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. 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 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.” 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.”


“Religious hatred bill unveiled today,” supra, n.
seven-year jail sentence is a potential punishment.¹⁶⁴

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.

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

¹⁶⁴ “Religious hatred bill unveiled today,” supra, n. .
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.”

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, 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. 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 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 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 then convincing those who must authorize action of its significance and the need to identify and implement 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 computer 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 a consequence is that 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 in late 2013 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.\(^{167}\)

We seek to avoid facing our impotence and 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.\(^{168}\) The fact that the sense of mastery is 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 decision-making models, regardless of how flawed or incomplete they might be, 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**

It was painfully ironic from the perspective of having been working at NRDC in the

\(^{167}\) 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 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].

\(^{168}\) 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).
immediate aftermath of the Carter administration’s *Global 2000 Report to the President* 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. 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*. *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.

But even if it had been retained and efforts were made to implement its recommendations, anyone who has dealt with the system in 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.

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

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172 I still have a copy of *Global Futures* smuggled out to me by out-going staff of the President’s Council on Environmental Quality.

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 institution that mission is no more than secondary to the actual operation of the entity.174

The Global 2000 follow-up project in which I was involved included visiting numerous corporations and interviewing key personnel about their strategies. 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 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

174 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.”
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. 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.

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. One of the

175 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.
arguments presented by high-level DOE administrators and lawyers during negotiations was "you can’t really expect us to know what all the related pieces of DOE's nuclear programs are doing? It’s too complex!"

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 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 the context of countries such as Honduras when I was in in Tegucigalpa. His insightful 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**

Information that helps proves wrongdoing or corruption is not a friend of the actor. Transparency gives ammunition to your enemies. 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 accurate information on their activities and decisions they could ultimately be held accountable.

This means that even though there is a continual call for transparency in governmental decision-making there is an equal, though silent, resistance against creating a database that could come back to “bite” them. 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 Condoleeza 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 a 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 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 National Foresight Capability Workshop convened by Congressman John Dingell, participants included the CIA, Departments of State, Energy, Commerce and numerous other 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 in pursuit of different interests. This is the reality of governmental decision-making and data analysis—then and now. Of course it is possible to represent a coherent process analytically and visually that theoretically would allow for complex, interactive decision making among the various interests. It is impossible, however, to make it work in the real world of governmental decision-making.

To me, this indicates strongly that the gathering of massive data by the government and its quasi-governmental partners is so imprecise and unfocused as a matter of actual and continuing institutional behavior—rather than the abstractions of organizational theory—that the comprehensive data-gathering and surveillance are 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 at some points and on some issues they can also shift in ways that are not in our own interests.

My criticisms are therefore primarily 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. 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.\textsuperscript{176} 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.\textsuperscript{177}

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” 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

\textsuperscript{176} 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 leadership/wp/2013/07/31/report-tsa-employee-misconduct-up-26-percent-over-the-past-three-years/ 2013. http://www.washingtonpost.com/blogs/on-

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 suggesting 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 the source 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.

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 formal and informal powers of government and is using law as a means to further embed those powers and intimidate citizens into compliance. An interesting aspect of many of the terms is that superficially identical words possess radically different stereotypical content depending on the user and recipient. “Tea Party” or “Tea Partier”, for
example, when voiced by a Liberal Democrat most likely evokes images of people who are ignorant, greedy, Conservative Christian, White, racist, bigoted, homophobic, women with “Big Hair”, anti-immigrant, gun-toting and selfish. To a “Tea Partier”, however, the identity is one in which he or she is a patriot, resisting attempts by “Big Government” to take over everything, strong individualism, against the spread of the Welfare State, protecting the nation through the Second Amendment, preserving the Constitution in the face of Leftists who want to destroy it, protecting religious values and the Christian heart of America, and so forth. There is no chance that these interpretations, beliefs, agendas and values can be brought into alignment or important compromises reached.

The same situation exists in relation to many of the terms by which our propagandists are “framing” critical matters. The “War on Terror” is an intriguing example in the sense that “terror” is only a tactic. You don’t conduct a war on a tactic as opposed to a conflict directed against the users of that tactic. But the word “terror” produces an emotional state of continual apprehension that, when coupled with “National Security” and the need for “intelligence gathering” on an “invisible” and “ruthless” enemy, justifies the continual expansion of intrusive governmental power. After all, the most important function of government is to provide security against threats. What is occurring through the application of such powerful emotional “cultural memes”, “frames” and stereotypes is the creation of a national psychology of subjugation due to the need to be “protected” from outside threats.

Other “frames” used by what we commonly think of as the Democratic Left, Progressives, or Liberals include the need to be “fair”, “just”, “tolerant”, “diverse”, “progressive”, “reasonable”, and “open to difference”. These are all “open textured” terms that lack content until someone “fills” them with meaning. Barack Obama’s use of the responsibility to “pay your fair share” in tax offers an example where the idea of what is “fair” contains a moral imperative. But there is no way of determining specific content other than through government using its power to pass laws that impose “fair” taxation obligations on people whether or not they agree with the concept or its application. It is governmentally dictated morality that paradoxically is a kind of “official state religion”.

The use of the poorly defined term “Middle Class” operates in the same way because no one really knows who is included or what the criteria happen to be. I know many people earning $125,000 to $150,000 per year who consider themselves members of the “middle class”. My Blue Collar family members who spent their lives in the steel mills where I worked in the summers while in college would consider a claim by what they would see as “rich” people to be laughable. But the symbolism has evocative power because it appeals to those who want to consider themselves to be “Middle Class” while safely signaling to them that they are conveniently set off from the greedy “One Percent” who should be required to pay more simply because they can. The use of the term has several effects. One is the signal it sends to what can charitably be called “High Upper Middle Class” Democrats that they will not be taxed at an increased rate. Another is the creation of a divisive “us versus them” mentality that further ensures social hostility while seeking to capture a specific bloc of voters.
The labeling goes on and on and it is vicious. Of late, we “know” that Republicans are all bigoted racists who hate blacks, Hispanics and gays. We also know that although many women are Republicans those who identify themselves in that way are engaged in a “War against Women”. But for those who think of themselves as Republican, Conservative, Capitalist, or even Tea Party-like, there are important matters to be defended such as “acting responsibly”, “preserving traditional values”, “protecting the traditional family”, recognizing “American Exceptionalism”, not “spending beyond the nation’s means”, protecting “hard working Americans against those who just want a free ride and to be on the dole”, the “Free Market”, practicing or defending Christianity, and so on. On either side of the political equation the strings of stereotypes are pulled together into a set of cultural memes that prevents agreement and compromise between the conflicted interests and is intended to do so because political power flows from the clash.

With these types of “frames” being used throughout America’s political universe it is irrational to think that we are capable of engaging in legitimate discourse. What was described as a “Culture War” in the 1990s may have changed its focus and techniques but it is intensifying in ways that are undermining American democracy. We can’t fix it. We can’t change it. We are speaking different languages with competing agendas representing distinct interest and identity groups.

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.” 178 The problem is that the seizure of language has bestowed significant amounts of power on competing identity groups whose members see only their interests as legitimate.

This shift, coupled with the great increase in the knowledge and technologies of communication and manipulation means that the conflicts between competing groups continually operate according to the “sin” described by Mill in seeking to impose a specific group’s “opinions and inclinations” on all others. Since we have no legal way to keep these behaviors under restraint in a society based on freedom of speech and association there is no way of stopping the fanaticism that has substituted propaganda for political discourse.