

Surveillance Technology and the Neoliberal State: Expanding the Power to Criminalize In a Data-
Unlimited World

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Academic Abstract

For the past several decades, the neoliberal school of economics has dominated public policy, encouraging American politicians to reduce the size of the government. Despite this trend, the power of the state to surveil, criminalize, and detain has become more extensive, even as the state appears to be growing less powerful. By allowing information technology corporations such as Google to collect location data from users with or without their knowledge, the state can tap into a vast surveillance network at any time, retroactively surveilling and criminalizing at its discretion. Furthermore, neoliberal political theory has eroded the classical liberal conception of freedom so that these surveillance tactics do not appear to restrict individuals' freedom or privacy so long as they give their consent to be surveilled by a private corporation. Neoliberalism also encourages the proliferation of information technologies by making individuals responsible for their economic success and wellbeing in an increasingly competitive world, thus pushing more individuals to use information technologies to enter into the gig economy. The individuating logic of neoliberalism, combined with the rapid economic potentialities of information technology, turn individuals into mere sources of human capital. Even though the American state's commitment to neoliberalism precludes it from covertly managing the labor economy, it can still manage a population through criminalization and incarceration. Access to users' data by way of information technology makes the process of criminalization more manageable and allows the state to more easily incarcerate indiscriminately.

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General Audience Abstract

Since the era of President Reagan, the American economic and political tradition has been committed to opening trade, limiting government regulation, and reducing public benefits in the interest of expanding freedom from the government. Despite this commitment to shrinking the size of the government, the government still considers it responsible for public security, including both national security and criminalization. At the same time as this wave of deregulation, information technology companies such as Google have expanded their ability to collect and store data of individual users—data which the government has access to when it deems such access necessary. The deregulation of private markets has ushered in an era of extreme labor competition, which pushes many people to use information technology such as computers and cell phones, to market their labor and make extra money. However, whenever a person is connected to GPS, Wi-Fi, or uses data on their phone, their location information is being stored and the government has access to this information. Neoliberalism therefore encourages people to use technology that allows them to be watched by the government. Location information is one of the main factors of criminalization; historically, a person's location informs the police's decision to arrest them or not. Enforcing laws against vagrancy, homelessness, prostitution, etc. require law enforcement agencies to know where someone is, which becomes much easier when everyone is connected to their location data by their cell phone. This gives the state a huge amount of power to find and criminalize whoever it wants.

Table of Contents

I.	Introduction.....	1
II.	Chapter 1: Dissecting The Neoliberal STATE.....	6
	a. Introduction to Neoliberalism.....	7
	b. Neoliberal Ideology and Freedom.....	11
	c. Neoliberal Policy and Surveillance.....	19
III.	Chapter 2: Information Technology And Neoliberal Power.....	26
	a. Technology and Neoliberal Politics.....	27
	b. Collection and Production of Data.....	33
	c. Privacy, Security, and Technology.....	40
IV.	Chapter 3: Location, Surveillance, And Criminalization.....	46
	a. Strangers at Home.....	47
	b. Neoliberal Rights and State Violence.....	54
	c. The Wrong Place at the Wrong Time.....	59
V.	Conclusion: Big Brother, Where are Thou?.....	63
VI.	Bibliography.....	67

INTRODUCTION

“To be Governed is to be watched”

Pierre-Joseph Proudhon, *General Idea of the Revolution in the Nineteenth Century* (1851)

The authority of the modern American state is maintained by myths about the relationship between economics, governance, and technological surveillance. From westward expansion to the Great Depression, the American government has historically been deeply involved in the development of the economy, managing and protecting the private market to facilitate social and political ends. Recently however, a commitment to free enterprise and reduced government regulation has led the American state to reduce its involvement in the private sphere, while expanding its authority through policing and national defense. This ideology of reduced government involvement in the interest of market freedom has been broadly dubbed neoliberalism.¹ While some authors consider neoliberalism a scheme to consolidate class power,² an inversion of democratic values,³ or merely a “scheme of valuation,”⁴ geographers, political scientists, and sociologists tend to agree on the major features and ramifications of neoliberalism. Neoliberalism relocates sites of power and policy from the realm of the public sphere of state control and (under effectively democratic conditions) public accountability to the private sphere, thereby effectively concealing and decentralizing its governing and

¹ David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005), Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), James Galbraith, *The Predator State: How Conservatives Abandoned the Free Market and Why Liberals Should Too*, (New York: Free Press, 2008).

² Harvey, *A Brief History of Neoliberalism*.

³ Sheldon Wolin, *Democracy Incorporated*, (Princeton NJ: Princeton University Press, 2008).

⁴ Brown, *Undoing the Demos*, 21.

surveilling capacities by disguising them as private economic practices and goals. The rise of neoliberalism as the prevailing American political and economic ideology has encouraged deep skepticism toward overt state involvement in the private sphere. Libertarian economists who believe deeply in the natural logic of markets as a means to solve social problems see the state as only an inefficient meddler in an otherwise working system. The combined popular and intellectual resistance to state action has emboldened politicians to embrace an ideological rejection of the state in most spheres, including those in which it was historically active, such as education and environmental protection. However distasteful government intervention may appear to modern Americans, and however much this has legitimized the patterns of neoliberal governance, there is a glaring exception in which the strength of the state is accepted and encouraged, even when the locus of this power shifts to the private sector: criminal detention.

Of the many previously-state functions that have been shifted to the private sector, one of the most revealing is the practice of private surveillance data being used for means of law enforcement. Through subpoenas, affidavits, and other legal means, the American government can access location information that cell phone providers collect and store. In November 2015, The Federal Bureau of Investigation arrested Timothy Graham, a man suspected of committing armed robbery at two banks in Ramona, California. According to an article published during the investigation by *The Verge*, an online news publication, Graham was able to be reliably identified as the suspect in the second robbery, but concealed his face and therefore could not

be reliably identified at the scene of the first robbery.⁵ Special Agent David Coonan of the FBI filed an affidavit in support of a search warrant on Google, Inc. in order to place Graham at the scene of the first robbery.⁶ Though Graham had not been identified at the first bank, after acquiring a warrant the FBI was able to use the location data that Google (apparently) benignly collected on Graham's cellular phone to pinpoint his location at the first bank. The FBI then used this information about Graham's location as well as a physical (not facial) description from the bank clerk to charge Graham with the first bank robbery.

Though Google is a private corporation, not a state entity, its and other information technology firms' potential role in both criminal identification and crime prevention gives the state unprecedented capacities for surveillance in investigations by extending the reach of the state through non-state bodies. Google's surveillance actions are protected from political scrutiny by a shield of neoliberal capitalist logic; by tracking users' location data, Google can provide high-demand information such as GPS directions, restaurant recommendations, and tomorrow's weather. Google is only the most prominent example of what is a general phenomenon: cell phone companies selling users' data to other corporations in order to provide a service.⁷ This information benefits the consumer, and therefore fits comfortably within the neoliberal conception of the duties of a private company. Though the cooperation between the state and information technology companies like Google seems surprising in an

⁵ Russell Brandom, "Police are filing warrants for Android's vast store of location data," *The Verge* (June 2016), <http://www.theverge.com/2016/6/1/11824118/google-android-location-data-police-warrants> (accessed Feb. 2, 2017).

⁶ Brandom, "Police are filing warrants for Android's vast store of location data," *The Verge*.

⁷ Stephanie Pell and Christopher Soghoian. "Can You See Me Now? Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact," *Berkeley Technology Law Journal* 27, 1 (2012) pp. 117-195.

American political climate that abhors state interference in private enterprise, it represents a pattern in neoliberal governance. In order to satisfy critics of state power, the government relocates some of its duties to the private sphere, including surveillance. The power of the state is thus concealed and retains the potential to expand unchecked.

The arrest of Timothy Graham showcases not only the neoliberal state's ability to access vast stores of cellular phone users' personal location data, but also law enforcement's ability to criminalize individuals based on their location and movement patterns. For law enforcement officials, location is key in the process of recognizing and classifying some individuals as criminal.⁸ Many popular journalists as well as academics in the philosophy of technology field have raised concerns about the implications that private companies' collection of location data hold for the users' privacy. However, few of these authors consider the role that these companies can play as an arm of the state under neoliberal regimes of governance.

Through the expansion of state surveillance power, authorized by neoliberals' commitment to an unlimited capitalist marketplace, police are able to expand their power to criminalize individuals based on their location data generated and stored by private corporations. The sociological basis of classifying criminals rests on identifying strangers, vagrants, and those who are out of place or not where they belong.⁹ The case of Timothy

⁸ Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, (New York: Routledge, 2000); Pell, and Soghoian. "Can You See Me Now?" 134-140; Jay Stanley and Barry Steinhardt. "Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society" in *Readings in the Philosophy of Technology*, ed. David Kaplan, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2009), 293-308. ⁹ Ted Claypoole and Richard Balough, "Privacy Considerations Limit Geolocation Technologies," *Business Law Today* (March 2012): 1-4.

⁹ Ahmed, *Strange Encounters*; Lisa Marie Cacho, *Social Death* (New York: New York University Press, 2012); David Harvey, *Spaces of Global Capitalism*, (London: Verso, 2006).

Graham elucidates this power and raises concerns not only of privacy but of limitless expansion of the state's criminalizing power through neoliberal channels. The American state's ability to access the location information of anyone who carries on their person a device that uses cellular networks or wireless internet is a troubling prospect, especially in the context of a regime that seeks to arrest not only bank robbers but protestors and journalists.

CHAPTER 1: DISSECTING THE NEOLIBERAL STATE

Political, technological, and economic shifts have dramatically altered practices of governance since the latter-half of the twentieth century. Historically, economic governance in the US has treated the economy as a state-centered, and even state-building, project and used the state to direct markets into producing positive social outcomes. Since the 1980s however, proponents of limited regulation and free capitalism such as President Ronald Reagan claimed that the economy and state were separate, opposing entities and that expanding one necessitated limiting the other. After the finance collapse leading to the Great Depression, American politicians regarded capitalism as a useful productive force that required state limitations to prevent it from producing negative externalities. However, neoliberals claim that the role of the government should only be to facilitate the workings of the free market and protect individual rights that allow for voluntary economic activity. This new form of governance stems directly from the economic and political ideologies of free market luminaries such as Milton Friedman, Fredrick Hayek, and Adam Smith, all of whom resisted attempts to use state power to regulate economic activity and plan social order, advocated by political economists such as John Maynard Keynes, Paul Krugman, and Joseph Stiglitz. These political economists see market interactions as useful but not sufficient for achieving desirable social ends and believe that the government should intervene when necessary, even if its intervention is less efficient than markets. Nowhere has neoliberalism gained more traction and power than in the United States, especially in the years since President Ronald Reagan.

Introduction to Neoliberalism

The foundation of neoliberal ideology rests in a practical division of the state and the private market under conditions of advanced industrial capitalism. This division results in different expectations and allowances for the public and private spheres, and it is a recent phenomenon, as Dani Rodrik shows. Rodrik reflects on some of the misunderstandings that economists like Friedman, Hayek, and Smith have fostered within political and economic discourse that have paved the way for neoliberalism, both in theory and practice. In his famous work *Capitalism and Freedom*, Milton Friedman argues that “the preservation of freedom is the protective reason for limiting and decentralizing governmental power.”¹⁰ It is often in the name of freedom that these economists claim markets are free and ethical channels in which social problems are solved and the needs of society are met. Rodrik employs examples from the start of colonial expansion and after the 2008 global recession brought on by the collapse of the United States housing market to demonstrate the change in Americans expectations of the state in relation to the economy.¹¹ Rodrik is deeply troubled by what he sees as not only a lack of appropriate economic regulatory measures by the American state but by the recent theoretical separation of states and economies, which allows markets to work, unregulated, for better or worse. He claims that all economies were once states and all states economies; under such conditions the state directed and bounded market forces to serve the needs of the

¹⁰ Milton Friedman, *Capitalism and Freedom*, (Chicago: University of Chicago Press, 1962), 11.

¹¹ Dani Rodrick, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W. W. Norton, 2011).

sovereign. His historical investigation into the states of eighteenth-century Europe show that economies were once used as state-building apparatuses.¹² The separation of the state and the economy as independent natural forces is, according to Rodrik, a recent invention and one that produces deeply problematic politics and policy. If politicians presume that markets will achieve positive social ends when left to their own devices, the state has no recourse for limiting pollution or protecting consumers. Neoliberal theory rests solidly on this conception of the state and economy as independent institutions and neoliberal policy stems from the misconception that of these two institutions the market is more just and logical.

Rodrik and other critics of classical liberal and neoliberal economics¹³ chastise economists for making the rules of the economy appear natural, stable, and ungovernable. Marx toed this line of determinism in *Capital, Volume One*, by treating “the evolution of economic formation of society as a process of natural history.”¹⁴ Though much more critical of markets than modern neoliberal economists, Marx still wrote of markets as natural and logical and was therefore able to predict the crisis of overproduction. However, the greatest flaw in this approach to markets was, and remains, the inability for economists to account for problems of power and social ends that guide the development of markets. Neoliberals retain the classical affection for capitalistic determinism and therefore see any economic governance as unnecessary and meddling. Just as it would be folly for states to try and control the

¹² Rodrik, *The Globalization Paradox*, 3-46.

¹³ Wolin, *Democracy Incorporated*, Galbraith, *The Predator State*.

¹⁴ Karl Marx, “*Capital, Vol I*,” in *The Marx Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton & Company, Inc., 1978).

weather to aid in agricultural development, neoliberals see state interference in markets as not only foolhardy but detrimental.

This apolitical and anti-governance approach to the economy places neoliberal states in a precarious position. Without the ability to overtly manage the economy or other spheres of public concern such as education, environmental protection, or social justice, the state must rely on the private transactions of markets to provide positive social outcomes and manage the wellbeing of its population. Harvey similarly traces the movement of state power to private markets through what he terms “accumulation by dispossession.”¹⁵ Accumulation by dispossession is accomplished by privatizing all previously public goods which thus converts state expenditures into private revenue for companies that preform privatized state functions; bolstering the financial industry which gives learned financial experts a way to profit from any financial transaction, even failure; managing global economic crises through global economic regulatory organizations, which allows wealth from poorer countries to be siphoned into richer ones; and institutionalizing redistribution of wealth to funnel more wealth into the upper classes.¹⁶ Though Harvey describes neoliberalism in terms of a shift in the locus of power from the state into the private sphere, the movement of power that neoliberalism facilitates is not a wholesale gifting of governing power to markets but a merging of state and economic power. The state is still very active in influencing and protecting private markets, but it may shroud its actions in the machinations of the economy to disguise its efforts to manage, categorize, and govern its citizens.

¹⁵ Harvey, *A Brief History of Neoliberalism*, 160.

¹⁶ Harvey, *A Brief History of Neoliberalism*, 160-165.

The rise and expansion of neoliberalism since the administrations of Ronald Reagan in the United States and Margaret Thatcher in the United Kingdom has been well documented and critiqued by countless journalists, political scientists, and economists. The ideology is based in the conception that economies are independent, apolitical artifacts and that in order to secure social and material prosperity political institutions should not meddle with the natural laws of economics.¹⁷ Conservative and libertarian politicians used the academic support of neoliberal economic theory to justify deregulation of economies and to conceal methods of state control within the channels of the private market. This has allowed politicians who believe that markets, and not politics, are effective, efficient, and appropriate tools of social governance and change, to shrink the size of the state and limit government intervention in spheres in which it was historically demanded, such as education and environmental preservation.¹⁹ The key characteristic of neoliberalism in the US has been the shift in policy that hands control of previously state-run or state-regulated institutions to private market actors.²⁰ Wendy Brown further describes this shift by claiming not only that the market is taking on new, previously-political social responsibilities, but that “economic growth has become both the end and legitimation of government.”¹⁸ This relocation of policymaking and control wherein the state is merely the facilitator, not manager, of the economy, appears to weaken the governing power of the state. From its academic roots, neoliberalism has expanded into policy-making and politics to support the small-state agenda of politicians who seek to conceal state action and

¹⁷ Harvey, *A Brief History of Neoliberalism*, 64-67

¹⁹ Harvey, *A Brief History of Neoliberalism*, 8-9 ²⁰ Brown, *Undoing the Demos*, 115-150.

¹⁸ Brown, *Undoing the Demos*, 26.

expand profits in the private sector. As Rodrik and Harvey illustrate, this is a recent shift, grounded in misguided economics and proliferated by politicians who do not appreciate the historical powers of the state. The focus of this chapter will be on two small aspects of both of these branches of neoliberalism as I have described it: the ideology of freedom and the policy of surveillance.

Neoliberal Ideology and Freedom

Part of neoliberalism's success in the United States can be attributed to its particularly market-oriented definition of freedom. American politics surrounds itself with talk of freedom and the rise of neoliberalism has placed a particular vision of freedom and the forefront of political and economic thought. Neoliberalism defines freedom in such a way that allows politicians to treat freedom as a primarily, if not entirely, economic good. One of the most crucial ideological aspects of neoliberalism is the way it has changed Americans' conception of freedom and the conditions that sustain it. David Harvey and Wendy Brown present comprehensive critiques of this reimagining of freedom. For these authors and many others, neoliberalism's focus on freeing markets from state control leads individuals to understand freedom as merely negative freedom from government interference in their private affairs.¹⁹ This conception draws a hard line between public and private, individual and collective, and economic and political. However, since the neoliberal ideology claims that market interactions

¹⁹ Berlin, I. (1958) "Two Concepts of Liberty," In Isaiah Berlin (1969) *Four Essays on Liberty* (Oxford: Oxford University Press).

are necessarily voluntary, classical Marxist conceptions of positive freedom, or the freedom to rule oneself.

Isaiah Berlin describes positive freedom as the extent to which an individual can claim to be “conscious of [them]self as a thinking, willing, active being, bearing responsibility for [their] choices and able to explain them by reference to [their] own ideas and purposes.”²⁰ Marx also conceptualized positive freedom as self-rule, a kind of autonomy that transcends rule by external market forces.²¹ Freedom from labor and freedom from markets are not only anachronistic but inconceivable to neoliberals. Labor and markets are the places where neoliberal is expressed, since neoliberal freedom is merely the freedom to buy and sell without state interference. The negative freedom that neoliberalism offers is much easier for the state to provide than the positive freedom that Marxists, communitarians, and a variety of conservatives and liberals, typically demand.²⁵

This shift from one inflection to another of one of the oldest and most significant concepts in political thought has touched countless aspects of American life and is deeply intertwined with the individualistic implications of a shrinking state and deregulated markets. The effects of considering freedom as purely economic reach out almost endlessly into social, economic, and political spheres. Classical liberals such as Locke and Hamilton define freedom as a political and social good that positively reflects the extent to which someone can choose their own future, often independently of the needs of the economy. However, as Brown

²⁰ Berlin, “Two Concepts of Liberty” p. 203.

²¹ Marx, “Economic and Philosophic Manuscripts 1844” in *The Marx Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton & Company, Inc., 1978) pp. 66-125. ²⁵ Berlin, “Two Concepts of Liberty.”

elucidates, while neoliberalism favors negative freedom over positive freedom, it is also more concerned with market freedom (i.e. the freedom to purchase goods and sell one's labor) than personal freedom. Since neoliberals see all necessary freedoms packaged up in economic freedoms, concerns over limitations of freedom to buy and sell in a marketplace dominate concerns over limitations to life free from coercion, pollution, or labor. Consequently, even as freedom appears to expand as a result of government deregulation of markets, individuals have less control over their own values and lives because economic incentives govern most of their choices. Brown uses the example of education: a gifted artist may put aside her education and be pushed into a more lucrative field in order to be more marketable to businesses.²² Brown argues that "the neoliberal revolution takes place in the name of freedom—free markets, free countries, free men—but tears up freedom's grounding in sovereignty for states and subjects alike."²³ Neoliberalism therefore bundles all freedom into a narrow conception of economic freedom and therefore sees economic freedom as the only freedom at stake. By redefining freedom as merely the ability for an individual to participate in largely uncontrollable markets, neoliberalism reevaluates the deregulation of the economy as an expansion of freedom.

Neoliberal freedom invigorates the classical American distrust of government by posing government regulation and individual freedom as opposites, even though it favors the negatively free market over the positively free individual. While advancing freedom to participate in markets, neoliberal freedom also requires freedom from the power of the state to regulate and manage markets. One of the most significant aspects of freedom from the state

²² Brown, *Undoing the Demos*, 176.

²³ Brown, *Undoing the Demos*, 108.

that the neoliberal conception does not include is the freedom from being watched, often referred to as privacy. In an American political culture that fears the government and clings to a thinning conception of freedom, the freedom from government surveillance is paramount because what the government does not know cannot be used by the government to hurt you. As long as an individual's criminal (often economic) activities are unobservable, the state has very little power to manage and criminalize these activities and individuals. Interference, regulation, law enforcement, and state violence all begin with the state's ability to observe in the most general sense. The deep connections between observation and state control, upon which Proudhon famously remarked in the nineteenth century,²⁴ will be discussed at length in Chapter 3. For now, my focus will be on the isolating the transfer of surveillance power from the public to the private as a piece of a larger neoliberal pattern. In order to carry out surveillance measures that would offend citizens seeking freedom from the state, the government may merely allow private entities to surveil extensively and then force these companies to reveal information collected through surveillance when the state requires it.

Such was the case of Timothy Graham, who was unaware that he was being surveilled at the scene of the first robbery with which he was charged. Graham was as free from active state surveillance as any average citizen; his phone was not subject to a court-ordered wiretap, there were no FBI cameras or federal tracking devices in the bank letting the government know where he was at all times. The vision of the state was not obvious in the walls of the bank. However, Graham was carrying a device—this cellular phone—that generated a continuous

²⁴ P. J. Proudhon and John Beverley Robinson, *General Idea of the Revolution in the Nineteenth Century*, (New York: Haskell House Publishers) 1969.

stream of data, which could allow Google servers to triangulate his location. As most Americans do, Graham doubtlessly agreed to Google's terms of service, allowing the company to constantly collect data on the device's location. Graham, like many mobile device users, was unaware of the extent to which his life was enmeshed in modern data networks. Crucially, Graham's location at the first bank he was accused of robbing was able to be ascertained by the FBI because he freely agreed to be monitored by a private company and not the government.

Prior to his arrest, Graham was free in the neoliberal sense in which all Americans are free. He had participated in un-coerced market actions that allowed his location to be constantly tracked by Google's servers, presumably for the same reasons many Americans subscribe to this service: to allow his cell phone to provide GPS directions, weather forecasts, and other convenient information. Because a neoliberal definition of freedom is focused on the negative freedom guaranteed to individuals as freedom from state interference in market transactions, it leaves no room for critiquing potential breaches of freedom by private corporations such as Google. However, Graham was only free from the reach of state power until he committed an act that the state deemed punishable, namely, robbing a bank. While criminal actions are defined by the state and individual's information is wantonly and continuously collected by private companies, freedom is indeed in jeopardy.

Graham's supposed freedom from the state is an application of a key aspect of neoliberal ideology that critics such as Brown and Harvey refer to as a kind of 'neoliberal rationality.'²⁵ Because neoliberalism constructs market economics as an inevitable

²⁵ Harvey, *A Brief History of Neoliberalism*, 54; Brown, *Undoing the Demos*, 62.

phenomenon governed by a set of natural laws, companies are in a sense incapable of invading individual freedom, as this is a capacity only of the state. The myth of voluntary market interaction further deliberately the idea that companies can violate individual freedom. Neoliberal freedom is narrowly focused on an individual's ability to interact with markets without interference by the state and does not concern itself with the consequences of these interactions on social, political, or environmental welfare. Wendy Brown investigates the neoliberal conception of freedom and describes "neoliberalism's hollowing out of contemporary liberal democracy" in a way that offers insight into the way neoliberalism redefines freedom.²⁶ Classical liberalism is deeply concerned with individual freedom, and the liberals who constructed the American government used the term so effectively that it remains a staple of American political rhetoric. However, these liberals used freedom in a rich, positive sense when designing a government that (ideally, however imperfectly) allowed people to rule themselves and not be ruled by alien forces. Neoliberals have "hollowed out" this term, according to Brown, by continuing to use it with the same gusto as classical liberals but with none of the theoretical richness. Brown explains how neoliberalism secures academic, and eventually political, legitimacy by using the well-established vocabulary of liberalism while insidiously "hollowing out" these rich political terms until they only apply to market interactions.

Judging by the politics it espouses and the vocabulary it uses, neoliberalism seems to cultivate freedom at unprecedented levels, when freedom is defined as free markets, low taxes,

²⁶ Brown, *Undoing the Demos*, 18.

and minimal state intervention in private markets. While this condition may look like freedom, and indeed be referred to as free in a variety of senses, Brown argues that it is merely freedom to man conceived of as an entirely economic, not political, being. In her critique of the neoliberal conception of freedom, Brown pushes back against this definition and says that modern American citizens are indeed not free to pursue their true academic interests, influence their government, or engage in projects of collective governance with their fellow citizens, all as a result of neoliberalism.²⁷ She claims that American citizens, regardless of their rights or needs, are “sacrificed” to the greater goal of economic prosperity when the government refuses to intervene in the economy with social programs that protect consumers and workers from the tides of the free market.²⁸ While neoliberalism promises to liberate the citizen from the state by relocating all policy-making operations into the free market, what it truly does is liberate the state accountability to from the citizen by allowing the mechanisms of governance to hide within the often opaque channels of the private sector.

Political opponents of neoliberalism tend to discuss the deleterious effects of neoliberal ideology by criticizing states for making a series of depoliticizing moves that are made to seem useful, democratic, or in the interest of expanding freedom as seen through the lens of a neoliberal ideology. Instead, Brown, Harvey, Rodrik, and Sheldon Wolin argue that neoliberal policy in fact decreases individual freedom, in a positive sense, by limiting public action to economic spheres and shrinking political arenas by relocating all policy to market interactions. For Wolin, the most detrimental effect of this is that the American government is now more

²⁷ Brown, *Undoing the Demos*, 202-210.

²⁸ Brown, *Undoing the Demos*, 210-220.

beholden to private economic interests than the interests of the public. He claims that in modern American politics “what is absent is the political, the commitment to finding where the common good lies amidst the welter of well-financed, highly organized, single-minded interests rabidly seeking governmental favors.”²⁹ For Wolin and other critics, when the only duty of the state is to ensure the functioning of the economy, the state becomes an agent of private growth, not public service. These and other critics of the merging of the state powers and private interests lament the lack of governance in the economy, claiming that a shrinking state and deregulation of markets so severe that citizens lives are governed entirely by the whims and movements of free capital. They despair at the decay of the political in American politics and push back against neoliberalism’s focus on the market as the most objective and important site of public policy.

In *A Brief History of Neoliberalism*, Harvey puts “Neoliberalism on Trial” and documents a series of neoliberalism’s failures as well as the ways in which it has shaped American politics. Harvey criticizes neoliberal politics by showing that they fail to fulfil promises of economic growth and instead create injustice, insecurity, commodification, and instability. He views neoliberalism as capitalism unrestrained by the newly “hollowed out”³⁰ liberal values that once kept it in check. By allowing markets to dictate the social and political goals of the country, he argues that neoliberalism has shaped the United States into an unmanaged wasteland in which individuals manage themselves to fit as best they can within the ever-changing tides of the markets, sacrificing safety, job security, and personal development along the way. Harvey also

²⁹ Wolin, *Democracy, Inc.*, 66.

³⁰ Brown, *Undoing the Demos*, 18.

discusses particularly the way that neoliberal rhetoric about freedom intentionally masks the features of the neoliberal economy that take it away. In line with Brown, Harvey laments the redefinition of freedom from a rich political concept referring to a relationship between an individual and his capacity to realize his ambitions and desires to a shallow economic concept which obfuscates all sources of unfreedom other than state interference in the economy.

Harvey and Brown describe the shift from positive freedom, in which individuals should be free to live as they wish, as a political goal to mere negative economic freedom, in which individuals are only protected from state interference in their market affairs.³¹ Though Brown and Harvey thoroughly examined the changing freedom of the average American to pursue their goals, they do not delve deeply into a perhaps more literal conception of freedom that I will discuss: the freedom of an American to live outside of state detention or fear of detention. State policy on law enforcement represents a lacuna in both the major critical literature on neoliberalism and the neoliberal conception of freedom, which detention uncomfortably draws back into a public arena of consideration.

Neoliberal Policy and Surveillance

In the United States, neoliberal policy, such as the de-regulation of the Reagan era, is grounded in neoliberal ideology. Because American political rhetoric has been, since the nation's founding, so hyper-focused on the undefined ideal of freedom, neoliberalism's redefinition of

³¹ Berlin, "Two Concepts of Liberty," 203-204.

this term has often gone unnoticed as it has led to drastic policy moves that have reshaped the relationship between citizens and the state. Critics of neoliberalism have often focused their critiques on these policy changes that have left previously governed sectors of public life largely in the hands of largely unregulated non-state economic actors.

According to James Galbraith, the harmful effects of America's neoliberal policy appear in the economy's hijacking of the state and creation of what he terms the predator state.³² He is concerned, first and foremost, with the ways that economic interests usurp the political realm and reimagine the state as a firm.³³ This troubles Galbraith mainly because he sees states as governed by at least a presumption that they will act consistently with the will of the public, whereas firms are subject to no such constraint, even in the abstract. This subtle imagination of the nature of the state allows private firms to absorb previously public domains but be immune from the formal accountability that states are often subject to. If the state is depicted as oppressive and the markets free, the state must then be repurposed as a tool to support private interests and corporations can flourish by providing the services and support previously provided by institutions in the public sphere.³⁴ Galbraith argues that the enduring push for deregulation and a supposedly smaller state allows private businesses to swoop into sectors that were previously dominated by the public sector, like education and healthcare. However, while these sectors still receive a huge amount of aid from the American government and therefore the American taxpayers, "they are firms that have no intrinsic loyalty to any country."³⁵ To Galbraith,

³² James Galbraith, *The Predator State* (New York: Free Press, 2008)

³³ Galbraith, *The Predator State*, 147

³⁴ Galbraith, *The Predator State*, 147

³⁵ Galbraith, *The Predator State*, 131

neoliberal policies do not limit interaction between the state and the private sector, they merely repurpose the state into a mechanism for protecting corporate interests, as opposed to the interests of citizens.

When left critics such as Rodrik, Brown, Harvey, and Galbraith investigate the negative effects of neoliberalism, they tend to look deeply into unregulated and preventable negative market externalities such as stock market collapses, recessions, climate change, and political instability and unaccountability. Yet this focus leaves unexamined the nature of depressions, environmental degradation, and exploitation as necessary to the functioning of the modern capitalist state, not unfortunate externalities to be corrected by a more active government. Examining law enforcement and detention under a neoliberal regime gives a slightly different perspective on the relocation of state power. In the United States, even while schools, parks, healthcare, and social services become increasingly privatized, property protection in the form of law enforcement is still accepted as a designated job for the government. Even the barest and most economically-focused states must guarantee law and order in the form of legal contract enforcement and asset protection. Anti-state authors such as the anarcho-libertarian Robert Nozick and others³⁶ have developed theories of the state that purport to guarantee the most individual freedom (taken in a non-political, neoliberal sense) by limiting state action as much as is practical.

³⁶ Friedman, *Capitalism and Freedom*; F. A. Hayek, *The Road to Serfdom*, (Chicago: University of Chicago Press, 1944); Tibor Machan.

Nozick provides an illustrative example in his theorization of the “ultraminimal state,” a version of the night watchman state of nineteenth-century classical liberalism.³⁷ In his quest to theorize a utopia in which individuals have practically unlimited freedom, he describes a state that operates unabashedly as a firm, collecting dues from members who it then guarantees protection from the free acts of others. Nozick wholeheartedly disregards concerns from the likes of Galbraith, who sees a firm and a state as different kinds of actors which ought to have entirely different standards of accountability. In Nozick’s utopia, the state is accountable to its members much in the way that a publicly traded company is accountable to its shareholders—if the state fails to live up to the standards of its members, they will “simply” subscribe to a competing state within the free market. Citizenship however is much more complex than owning stock. Though Nozick may consider the complications inherent in changing citizenship or moving to a different country to themselves be unjust, his analogy overlooks a crucial detail of political engagement that many critics of neoliberalism implicitly defend: citizens care about each other’s wellbeing. Absent in Nozick’s metaphor are any non-self-interested desires that citizens possess and any sense of a shared civic identity. A shareholder at a firm dumps his stock when the company is not fulfilling his expectations regardless of the effect this may have on other shareholders. A citizen however, may wish to remain within a flawed state and use political channels to improve it for herself and her fellow citizens instead of simply checking out and finding a better match. This key oversight in Nozick is emblematic of neoliberals who fail to see features of freedom beyond the freedom to exchange.

³⁷ Robert Nozick, *Anarchy, State, and Utopia*, (Englewood Cliffs, NJ: Basic Books, 1974), 26.

In the anarcho-libertarian utopia that Nozick describes, in which states and firms are one and the same, states still retain a power that (as of the publication of *Anarchy, State, and Utopia*) had eluded the grasp of private companies: the power to punish. Because, as Nozick axiomatically claims, “[i]ndividuals have rights, and there are things that no person or group may do to them (without violating their rights),”³⁸ it is incumbent upon the ultraminimal state to secure members’ negative freedom from state meddling but not to ensure positive freedom to live free from market control.³⁹ The ultraminimal state protects the (personal and economic) rights of individuals through the legitimate use of violence.⁴⁰ Even in the most minimal and libertarian conception of the state imaginable, violence is the most crucial power of the state. Though Nozick is a classical liberal, this doctrine of state power lives in neoliberalism. While American federal spending has been reduced in all sectors that can be replaced by private firms, such as education, healthcare, and environmental protection, the state still directs an effectively infinite amount of money and resources to national defense. However, while classical liberal terms such as freedom have been “hollowed out”⁴¹ by neoliberals such as Friedman and Hayek to mean only freedom within the uncontrollable and unregulated sphere of the free market, the definition of state violence has remained chillingly literal in the neoliberal frame. Though liberal giants who asserted the desirability of social goals such as individual rights and freedom may have been justified in their claims that states should use

³⁸ Nozick, *Anarchy, State, and Utopia*, ix.

³⁹ Berlin “Two Concepts of Liberty,” 194.

⁴⁰ Nozick, *Anarchy, State, and Utopia*, 26.

⁴¹ Brown, *Undoing the Demos*, 18.

violence to protect these, the malleability of these terms has allowed neoliberalism to redefine them in ways that would be unrecognizable to the likes of Locke, Smith, or Hamilton.

If the most fundamental power that grants the state its authority is, as Max Weber famously claimed “the monopoly of the legitimate use of physical force within a given territory”⁴² the state must rely on formal and informal interpretations of laws that designate some people and activities as criminal and others as non-criminal. This power further entails the power to observe and classify.⁴³ For even the most minimal, regulation-averse state to be able to identify, contain, and punish those whom it defines as criminals, it must recognize some activities as criminal and some as benign; in order to begin to manage and enforce this crucial power it must first have the power to observe its citizens. Despite its overt logic of negative freedom, neoliberalism has not reduced this power, but has instead managed its expansion by means of its partial relocation into the private sphere. It is with the cooperation and consent of the public as well as private companies that the state exerts its powers to contain, punish, and discipline certain individuals over others. In order to the FBI to place Timothy Graham at the scene of his first bank robbery without the assistance of Google’s private location data, the federal government would need to distribute devices that tracked individuals’ locations and require all persons of actual or potential interest to carry them at all times. To Nozick and other neoliberal philosophers, this would doubtless be a deep infringements of individuals’ rights to privacy and substantial negative freedom. Not only this, but such a project would be daunting,

⁴² Max Weber, “The Profession and Vocation of Politics,” in *Political Writings*, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994), 309-369.

⁴³ Ahmed, *Strange Encounters*, 21-37.

expensive, and legally almost impossible for the modern American state. However, the logic of neoliberal capitalism allows Google to convince users to give up some of their freedom for convenient returns, and for the state to use private corporations as part of its apparatus of power.

Investigating law enforcement reveals that the governing power of the American state has not been reduced by neoliberalism, but merely relocated and thus obscured. The American brand of neoliberalism is at its core a partnership between a powerful disciplinary state and an artificially depoliticized economy. Examining the state's use of private companies to assist law enforcement reveals that the economic is not only pushing the political out of the state—the state is subtly shifting its powers into the economy in order to circumvent the inefficiency of the political and continue the guise of minimal regulation and uninhibited free enterprise.

Considerations of privacy that would make Americans deeply suspicious if raised by the public sector are largely unnoticed or flippantly accepted when raised by the private sector. It is partially the government's legitimate power to criminalize that makes individuals so wary to provide the government with their private information. However, since the prevailing neoliberal definition of freedom only describes the involuntary relationship between the state and the individual and not the voluntary interactions between corporations and consumers, the exact relationship between Google and its users whose information it stores is difficult to articulate. The combination of a definition of freedom that cannot stretch to include abridgements of rights committed by non-state entities and the relocation of state power into just such entities produces an almost entirely unchecked and inconspicuously depoliticized American governing apparatus. While neoliberal ideology claims to limit the extent to which

the American state may be involved in private affairs, the spheres in which the state is still expected to act, such as detention, reveal the true scope of the state's expansion of power concealed by a supposed commitment to neoliberal economics.

CHAPTER 2: INFORMATION TECHNOLOGY AND NEOLIBERAL POWER

The vast expansion of both private and state surveillance is a well-documented phenomenon of the late twentieth and early twenty-first centuries. One of the most commonly cited justifications for state surveillance is security. In order for the state to find criminals, terrorists, and deviants before they can commit socially or economically damaging acts, we must allow the state to watch all citizens so that it may separate the guilty from the innocent. This justification is used so frequently that the supposed trade-off between individual privacy and group security has become rote logic in arguments supporting either privacy or surveillance. If crime prevention and criminal prosecution are the most sacred duties of even the most minimal state, surveillance can be explained as an instrumental part of the state's effort to ensure security. In order to understand how the modern American state surveilles to ostensibly protect security, this chapter will explore the relationships between technology, privacy, and freedom under neoliberal rule. Because neoliberal freedom cannot conceptualize a breach of individual rights by private corporations, surveillance by the private sector can grow without fear of criticism or opposition under neoliberal conditions of society and governance. In the neoliberal frame, the interests of private corporations and the interests of the state are, at an important level,

merged in both ideology and practice. As I suggested in the previous chapter, using the work of Robert Nozick, even the most minimal conception of the state leaves a place for state violence in the interests of national security and crime prevention. To maintain the appearance of a minimal state while expanding surveillance networks, the neoliberal state shifts the power to surveil from the public sector to the less regulated, less critiqued, and less visible private sector.

Technology and Neoliberal Politics

The neoliberal logic of capitalism posits that markets are the most effective and efficient tools to achieve political and social ends. In some ways this is consistent with classical liberal theories that describe markets as composites of natural forces whose operations push history forward in tandem with, but not necessarily as a result of, human intervention and action.⁴⁴ Many classical theorists of markets see their actions as passive, natural, and therefore merely landscapes for power, not loci of power themselves.⁴⁵ Theorists of technological history, most famously Thomas Kuhn, make similar arguments about the natural progression of technology, claiming it is similarly inevitable and follows an evolutionary path.⁴⁶ This depiction of technology as a linear march forward is often called technological determinism, and is closely linked to capitalist production in classical demand-driven economics; if demand for new

⁴⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 1776, ed. Edwin Cannan (New York: The Modern Library, 1994).

⁴⁵ John Locke, Robert Nozick

⁴⁶ Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962)

products exists, entrepreneurs will invent to meet the demand.⁴⁷ Thus, technology and capitalism reinforce each other, with markets weeding out undesirable innovations and rewarding innovative entrepreneurs. Even supply-side economics, which began with Henry Ford and was supported by the arguments of Milton Friedman,⁴⁸ credits the pressure and competition of markets with providing the sole incentive for technological progress. More recently however, critics of these classical descriptions of the relationship between innovation and capitalism have argued that technologies are not lying in the ether simply waiting to be discovered by a sufficiently ambitious capitalist. Rather, capitalists tend to choose the most profitable venture among many possible technological solutions.⁴⁹ Therefore it is socioeconomic incentives, not the deterministic march of technological progress that produces new technologies.

In the same way that markets do not shape culture independently of politics, technologies do not exist outside of the realms of power and politics. In his famous article “Do Artifacts Have Politics?” Langdon Winner uses the work of Engels to explain how the acceptance of certain forms of technology requires and reinforces particular forms of social control. He argues that “the adoption of a given technological system actually requires the creation and maintenance of a particular set of social conditions as the operating environment

⁴⁷ Andrew Feenberg “Democratic Rationalization: Technology, Power, and Freedom,” in *Readings in the Philosophy of Technology*, ed. David Kaplan, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2009) 139-155.

⁴⁸ Jeffrey Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W.W. Norton, 2007).

⁴⁹ Feenberg, “Democratic Rationalization,” 142.

of that system.”⁵⁰ Winner claims that technological progress does not shake out deterministically; instead, technologies are consciously developed and adopted to foster support for a particular kind of political power.⁵¹ Technological determinists who separate the nature of a technology itself from systems of political power tend to see the coincidence of technology and power as historical accidents that could potentially be repaired but occurred only by happenstance.

For example, when King Leopold ruled the Congo at the end of the nineteenth century, he forced his subjects to harvest rubber by smearing it on their bodies, transporting it, and pulling it off, harming themselves in the process.⁵² Where a technological determinist may overlook the significance of this practice by claiming that such methods lead to weak, easily exploited subjects and a cruel ruler, Winner would encourage us to see such practices as instrumental to a specific political agenda, such as the centralization of Leopold’s power. Indeed, there are many ways to harvest rubber that do not reinforce the logic of colonial power, but the Belgians adopted a particular technology that would effectively subjugate the Congolese while conveniently advancing economic interests.

According to this theory of the relationship between technology, economics, and power, information technologies, such as those accessible via computers and cellular phones, reinforce the hyper-individuation endemic to neoliberal power. Much of neoliberalism’s academic, political, and public support is due to its promise to shrink the size and scope of the

⁵⁰ Langdon Winner, “Do Artifacts have Politics?” in *Readings in the Philosophy of Technology*, ed. David Kaplan, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2009), 256.

⁵¹ Winner, “Do Artifacts have Politics?” 252.

⁵² Frieden, *Global Capitalism*, 80-85.

government. Wendy Brown argues that the neoliberal government merely shifts all responsibility for social outcomes to individuals, relieving the government not of its power to subjugate and control through force, but of its responsibility for producing positive social change and ensuring social welfare. She claims that “even as we are tasked with being responsible for ourselves in a competitive world of other human capitals, insofar as we are human capital *for* firms or states concerned with their own competitive positioning, we have no guarantee of security, protection, or even survival.”⁵³ By giving individuals the ability to more easily cultivate themselves as human capital, interact in micro-market transactions at nearly instant speed, and access and manage their finances independently, information technologies support the neoliberal dissemination of power that relieves the state of responsibility for negative social outcomes and forces all citizens into constant competition with each other.

The most essential capacity of modern information technology in supporting the individuation power of neoliberalism is in the production of human capital, understood as not just a person’s labor, but the economic value of their intellect, security, and potential productivity. Information monetizes intellectual capital so that any individual can be conceived of as a responsible, self-sufficient economic agent. Phone applications which allow individuals to apply for jobs, make money by looking at advertisements, and check their credit score all individualize the processes of labor so intensely that citizens are reduced technologically to merely economic units. Both Brown and Moulrier-Boutang claim that the speed with which information can be created, distributed, and lost facilitates the unprecedented precariousness

⁵³ Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015) 37.

of individuals under neoliberal rule.⁵⁴ Moulier-Boutang claims that “work has de-materialized” as he argues that the deftness of information technology has made responsibility and selfsufficiency burdens of the neoliberal subject. And why not? When an individual can earn a degree and then run a business from her computer, check her stocks on her internet-enabledphone, and manage employees all over the country via email, she certainly appears to be a selfsufficient agent. Under the guises of ease, accessibility, and democratization information technology places all burdens of life under capitalism fully upon the individual, from responsibility for earning present income to responsibility for future livelihood.

As technology produces users as merely human-capital-generators, it enframes all facets of the user’s life as part of an economic standing-reserve.⁵⁵ When all activities can be monetized and developed into potential economic transactions, subjects are seen by corporations (and begin to see themselves) not as ends in themselves, but as potential consumers who exist to produce data. Corporations like Google that help users search the internet provide mountains of market research for advertising companies to better target potential markets.⁵⁶ This process converts users’ internet activity into tradeable pieces of information. Users are thus enframed as data-producing monetary resources for information technology companies who use this data for profit. Information technology itself both

⁵⁴ Brown, *Undoing the Demos*, 210-220; Yan Moulier Boutang, ed. Emery, *Cognitive Capitalism* (Malden, MA: Polity Press, 2011).

⁵⁵ Martin Heidegger, “The Question Concerning Technology,” in *The Question Concerning Technology and Other Essays*, trans. William Lovitt, (New Work, NY: Garland Publishing, Inc., 1977), 17.

⁵⁶ Stephanie Pell and Christopher Soghoian, “Can You See Me Now?” *Berkeley Technology Law Journal* 27, 1, (2012): 117-195, 130.

produces and conceals this enframing by converting user's activities into untapped mines of useable data.

The political implications of such enframing and hyper-individuation are evident in the development of the neoliberal state. Information technologies allow many previous burdens borne by the state, such as education, healthcare, and regulation, to be thrust upon the individual. Before the internet became popular, when information was more controlled and less dispersed, it was the responsibility of the government and government-supported agencies to provide the public information about their food—where it comes from, what it contains, etc. Now that individuals can search for this information on the internet, responsibility for eating healthy food has shifted much more onto the individual than regulatory agencies. Information technology, with its powers of individuation and rapid data production, also supports the neoliberal definition of freedom. Supported by technological and capitalist determinism, neoliberal ideology depicts the spread of information technology as an expansion of positive freedom while completely concealing concerns of negative freedom.⁵⁷ For example, expanding online marketplaces apparently expand freedom in the neoliberal sense. The freedom to shop, sell, and trade is nearly unbounded in the age of the internet; individuals who participate in online markets become commodities themselves as even their market activities can be monetized by advertising agencies. Furthermore, as GPS-enabled personal cell phones expand individuals' freedom to eat, shop, and travel, their location data becomes another commodity for corporations to buy and sell. However, within the neoliberal frame, freedom from

⁵⁷ Heidegger, "The Question Concerning Technology:" "In Enframing, that unconcealment comes to pass in conformity with which the work of modern technology reveals the real as standing-reserve," 21.

corporations, markets, or technology—e.g., under the rubric of privacy—is a contradiction.

According to neoliberalism, markets are the spaces in which freedom manifests and technology only enhances and facilitates this freedom.

For neoliberals, technology facilitates ultimate individual market freedom. For example, consider Uber, a popular ride-sharing app. Using this application, an individual needs only a cell phone and a car to monetize her free time by driving around other cell phone users, providing a necessary service. Uber is the epitome of the free market experience: flexible prices, free interaction, supply, and demand dictate the functioning of the company. If individuals provide this service, using technology to cooperate freely in the market, the government may eventually shed its responsibility to provide adequate public transportation, instead allowing the markets to meet this need. Power is therefore apparently disseminated as the state is released from its burden of providing the service of public transportation, and individuals with cars and phones have more freedom, and consequently more responsibility, both to themselves and their community. While this appears to neoliberals as the epitome of classical markets at work, it is really the work of the underemployed and unemployed, selling their time to a corporation to secure their survival under an indifferent state.

Collection and Production of Data

While information technology and neoliberal ideology work together to relieve the government of its responsibility to supply public services, the most important public service for a powerful state, security, is still under state control. The same information technologies that transform

American citizens into objects of human capital also aid the state in its remaining power: providing national security and through international and domestic crime prevention. The connection between neoliberal freedom and technology obfuscates the power to criminalize that the state wields by means of the same technological artifacts. When discussing the political nature of technologies, Winner claims that “the invention, design, or arrangement of a specific technical device or system becomes a way of settling an issue in the affairs of a particular community.”⁵⁸ The initial popularity of cell phones during the rise of neoliberalism in the US led to technological advancements that made them almost a necessity. For example, who today would be considered for a corporate position if they did not have an email address? Constant access to email, provided by cell phone applications, is an expected feature of the neoliberal job market and a key feature of an individual who has used technology to develop her human capital. Cell phones connected to wireless internet (Wi-Fi) also allow the government to solve certain issues of criminal prosecution, as in the case of Timothy Graham.

Though the American state does not require or ensure cell phone ownership, it has capitalized on the popularity of cell phones as an “arrangement of a specific technical device” to solve questions of who is criminal or not—questions fundamental to the most essential functions of the minimal, neoliberal state. Criminalization is the classifying mechanism through which the state determines whether violence against an individual would be legitimate or not. The process of criminalization begins with observing a subjects location in space.⁵⁹ The relationship between technology and observation was most famously theorized by Michel

⁵⁸ Winner, “Do Artifacts have Politics?” 252.

⁵⁹ Ahmed, *Strange Encounters*

Foucault in his description of panopticism.⁶⁰ For Foucault, the goal of the Panopticon is the “conscious and permanent visibility that assures the automatic functioning of power.”⁶¹ Power through physical force is obvious, limited in form and flexibility of application, and at times invites resistance, but the subtle and even automatic power exerted by modern disciplinary practices is difficult to see or describe. The invisible nature of surveillance allows it to weave the functions of power into culture in such a way that it becomes nearly unnoticeable. For Foucault, the goal of these power functions is to discipline and normalize the subjects who are disciplined, which supposes a normative goal for behavior or society and directs individuals’ behavior toward that goal. The ‘ideal’ apparatus of the Panopticon illustrates the logic of modern surveillance practices: individuals begin to discipline themselves, whether or not they are actively being watched, as they are always subjects of potential observation. Foucault describes discipline as “a ‘physics’ or an ‘anatomy’ of power,” and he describes Bentham’s Panopticon as an almost perfect physical manifestation of discipline.⁶² Foucault connects surveillance and discipline, describing the subtle, often hidden, interconnecting paths of disciplinary power that exist when all bodies in a particular space are watched by themselves and others. The potential of constant surveillance produces self-discipline, which is the holy grail of disciplinary politics for Foucault because it allows power to disguise itself perfectly within logic, social order, and even individual will.⁶³ He argues that this is why all disciplinary

⁶⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York, NY: Vintage Books, 1995).

⁶¹ Foucault, *Discipline and Punish*, 201.

⁶² Foucault, *Discipline and Punish*, 215.

⁶³ Foucault, *Discipline and Punish*, part III, “Panopticism.”

⁶⁸ Foucault, *Discipline and Punish*, 236.

facilities, such as schools and hospitals, come to resemble prisons.⁶⁸ Foucault was concerned about spatial power and observation in physical reality. However, technologies reconstruct observation in terms of data, rather than physical space. They do this in two main ways: collection and production of data.

Technologies used by both the government and private companies collect, produce, and store information about individuals. Data collection, as I shall use the term, involves a passive but symmetric relationship between the technology and the object of surveillance. Video cameras which capture the location of thousands of individuals in public streets and in private businesses collect data about the whereabouts of these people. Crucially, these cameras, while subtle in their physicality and operations, are often visible in stores and at stop lights. Even those cameras that are difficult to observe are often publically known to exist. For decades, individuals in cities and shops have been commonly aware that their location information is being collected.⁶⁴ Furthermore, consumers accept the logic of companies placing cameras in stores in order to prevent theft. Both the purpose of the technology and the technology itself are observable in the process of data collection. Cell phone applications that require the user to submit his or her location in order to receive accurate directions or weather forecasts likewise collect information in order to provide this service. Because the user submits her location into these apps to receive the directions or forecast, she is aware (or has at least nominally accepted) that the company providing the information knows her location. Data collection is thus information skimmed off the surface of technological interactions for a

⁶⁴ John McGrath, *Loving Big Brother: Performance, Privacy, and Surveillance Space*, (London; New York: Routledge, 2004), 19.

transparent purpose. Google maps, for example, has an obvious need for the user to provide both her location and destination in order to receive accurate directions. Users offer up their location data to Google's map application for a clear and useful purpose and they realize that Google has this information because the application is able to tell them exactly where they are.

Data production is much more complex and essentially covert. When, in the process of surveillance, more information is collected from the surveilled individual to be put to some financial or practical use by the surveilling body or individual, data is being produced. Data production is more similar to what Foucault described as panopticism than is data collection, specifically because the observed subject often does not realize that she is being observed at any given moment and has no clear knowledge of why she may or may not be. For example, when someone uses a search engine to browse cars for sale in her area, the search engine collects information by saving the search and the webpages she views, allowing her to easily conduct the same search again or revisit the pages. While users are aware of this feature when they access the internet, they are often unaware of the extent to which they are being surveilled and their data used. The search engine also produces information without the user's knowledge. Based on the search, the company providing the search engine service knows that the user is buying a car and can advertise to her accordingly.⁶⁵ Furthermore, the user will likely only pursue links to car dealerships in her area, so by aggregating this information the company can reasonably determine where the user lives. As a result of this car search, she may see advertisements for local restaurants that have paid the search engine to advertise for them. By

⁶⁵ Pell and Soghoian, "Can You See Me Now?" 131.

drawing even more inferences from her searches, the search engine may even advertise websites such as Craig's List, because when someone is looking to buy a car they are often selling one as well. All of this information about the user is collected without her knowledge and is used to monetize her through advertisements. These hidden actions of potential surveillance produce data from the user's otherwise unrelated interactions with internet networks.

To further explain the difference between data collection and data production, consider the example of passive or active surveillance under older technologies. A woman walking two blocks down a city street pauses to look at a shop window and then enters an apartment building. The surveillance camera in the store collects her location information as she passes by and the shop security guard has no more information than her location and a limited record of her movements and visible actions. However, if she is also being actively surveilled by the police because she is a suspect in a crime, the police are producing data by conducting surveillance. By watching her movements they are gaining more information than her mere location; they know, for example, she is not returning to the scene of a crime, she is not at home, and she is not at work. Because the police can use the data about her location to weave together more information that the surveilled subject is not aware or in control of, they are producing information from her location, not merely collecting it. Data collection is surfacelevel observation done for transparent reasons: cameras watch to see if a person is shoplifting, Google tracks users' phone locations to tell them if they've made a wrong turn. Data production develops the surveilled individuals' surface-level actions into a web of potential actions with meanings and interpretations.

Two key differences between these processes are the subtlety with which contemporary information technology can produce data compared to older technologies and the level of regulation and acceptance of data production. In the United States, law enforcement typically needs a warrant to conduct active surveillance that produces data, but corporations can produce data from anyone using their information services. By subscribing to many free services provided by information technologies, users agree to allow corporations to collect their data. Whereas a warrant requires those engaging in data production to justify their interest in surveilling, user agreements allow corporations to produce data from each one of their users indiscriminately. Furthermore, the state can often access the data produced by private corporations. While the state requires a warrant or affidavit to gain access to this data, the data is produced beforehand. For example, Timothy Graham was not under state surveillance when he robbed the first bank, but because he had agreed to corporate surveillance, his location data was already recorded when the FBI discovered they needed it to prosecute him. This action by the state is not interfering in private market transactions or regulating the information producing capabilities of these corporations, so the state still appears small. Access to this information for the purposes of law enforcement gives the state enormous power to identify and criminalize individuals.

The case of Timothy Graham exemplifies the convergence of corporate and state data production. Google, the particular corporation involved in Graham's case, was not collecting his location data in order to furnish evidence that could be used to prosecute him in the future. More likely they were storing his data for the same practical economic reasons that incentivize all corporate data production: to recommend stores, products, and other market interactions to

him. Stephanie Pell and Christopher Soghoian reported that in 2012 “law enforcement agencies can either request historical data already stored by the [cell service] provider, or request prospective surveillance that will provide data to the law enforcement agency as soon as the carrier receives it.”⁶⁶ Thus, by simply providing a service as a result of free market transactions between producers and consumers, cell phone companies are producing an extensive system of data that allows law enforcement to triangulate the location of potential suspects. The speed with which cell phones and apps that produce location data have proliferated have made legislation on what data can be available to law enforcement “anything but clear.”⁶⁷ While civil rights and legislative actors scramble to determine the legal bounds that should restrain government access to location data, law enforcement has been actively pursuing cell phone companies and using their data to aid their investigations.⁶⁸

Privacy, Security, and Technology

Law enforcement and technological surveillance are closely related. Historically, one of the most powerful and convincing justifications for widespread public surveillance is crime prevention and, more recently, national security (including both terrorism prevention and border security).⁶⁹ Most surveillance related to crime prevention takes the form of data collection, though at times law enforcement engage in data production, as in the case of active

⁶⁶ Pell and Soghoian, “Can You See Me Now?” 131.

⁶⁷ Pell and Soghoian, “Can You See Me Now?” 122.

⁶⁸ Pell and Soghoian, “Can You See Me Now?” 139-150.

⁶⁹ McGrath, *Loving Big Brother*, 20.

surveillance. The particular qualities that make information technology so useful within the neoliberal frame also allow for the combination of private data production and state data collection. The neoliberal use of these technologies carries dangerous implications for the future of freedom from criminalization.

The recent proliferation of cellular phones has created a truly staggering amount of user's location data, and the data mountain is growing constantly. Most cellular providers offer plans that give "unlimited" data use to their users, with a monthly ceiling of around 22GB.⁷⁰ Using a cell phone to make a call or connect to GPS or Wi-Fi all produce data about the user's location that a wide range of companies, from service providers to advertising agencies, can then use for everything from recommending restaurants in the area to targeting advertisements.⁷¹ Jay Stanley and Barry Steinhardt draw attention to potentially embarrassing situations in which an individual's location outside a sex shop results in them being targeted for an advertisement that their family then observes.⁷² Though a potentially superficial example, this hypothetical situation demonstrates the tension between the privacy of personal activities and the expansion of corporate surveillance. The camera in the shop first collects her location data, then the shop produces data about her potential interest in purchasing from the shop. Whether or not the woman is truly a potential customer, the shop presumes that she is based

⁷⁰ Martha DeGrasse, "AT&T Extends Unlimited Data to All Postpaid Wireless Customers," RCR Wireless, (Feb 17, 2017), <http://www.rcrwireless.com/20170217/carriers/att-extends-unlimited-data-to-allpostpaid-wireless-customers-tag4>, (accessed Mar 10, 2017).

⁷¹ Pell and Soghoian, "Can You See Me Now?" 128-130.

⁷² Jay Stanley and Barry Steinhardt, "Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society," in *Readings in the Philosophy of Technology*, ed. David Kaplan (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2009) 293.

on her location information and thus sends her an advertisement, leading her family to believe that she was indeed a potential consumer at the sex shop. If this woman then manages her behavior based on the knowledge that she is potentially under surveillance, the technology begins to assert a panoptic discipline.⁷³ When individuals change their behavior because they believe they are being watched, they engage in self-discipline enforced by whatever body they believe to be watching them.

Privacy regarding one's whereabouts is, in the United States, an important political and Constitutional right that is disappearing because of the extensive data collection done both passively and actively by cell phone companies.⁷⁴ In his discussion of the nature of privacy, J. Roland Pennock defines it as a necessary but instrumental good, not a good in itself.⁷⁵ While privacy may not be intrinsically valuable, the ends that it facilitates are deeply related to individual autonomy and thus to any meaningful conception of freedom. The mere act of observation interacts with an individual's actions, regardless of whether the individual finds them benign. Stanley and Steinhardt's woman outside the sex shop for example has every right to be interested in the products in the store and even the most limited conception of freedom would permit her to purchase and use whatever products she wishes. However, if this woman was aware at the time that her family would later be made aware of her browsing, her freedom to shop at the sex store would be drastically limited. Pennock explains the particular privacy requirements of alternative or subaltern populations to protect themselves from oppression by

⁷³ Foucault, *Discipline and Punish*, part III, "Panopticism."

⁷⁴ *Griswold v. Connecticut* 381 U.S. 479 (1965).

⁷⁵ Roland Pennock and John Chapman, *Privacy*, (New York: Atherton Press, 1971).

majority groups by being allowed to practice their alternative lifestyles without fear of repercussions from general observance.⁷⁶ Knowledge or fear of constant surveillance enforces self-discipline and makes all of an individuals' actions (whether in fact or in their opinion) subject to popular scrutiny and censure. In this sense, privacy is essential to not only positive freedom to do, but negative freedom to be safe from the potential actions of others. The relationship between safety and privacy becomes more apparent when location information itself has the potential to become public knowledge.

Timothy Graham was arrested for committing a bank robbery and his location information was made available to the FBI in order to charge him with this crime. Moral tolerance for the FBI's invasion of Graham's privacy, and the private data collection that make the invasion possible, in this case relies heavily on the assumption that his actions were illegal and therefore immoral. The implicit justification here, that community security depends on the state's ability to surveil criminals, requires a monumental and undeserved level of trust in an increasingly securitized and unaccountable state. Under a different legal system, the woman in Stanley and Steinhardt's article could easily have been similarly prosecuted for browsing alone in a sex shop. However, a neoliberal state would supposedly never fall down such a slippery slope as prosecuting individuals for engaging in particular market transactions, meaning the woman in the sex shop is safe as an ordinary consumer-citizen. However, as Nozick's neoliberal theorization of the state makes clear, the sole responsibilities of the neoliberal state are the protection of individual rights (as recognized by the neoliberal mindset) by way of the

⁷⁶ Pennock and Chapman, *Privacy*, xiv.

prosecution of individuals like Graham for crimes of property damage or violence. Nozick's ideal ultraminimal state derives legitimacy *only* by guaranteeing its citizens protection of a narrow range of bodily and economic rights.⁷⁷ Gary Marx argues that it is this very feature of neoliberalism that requires the American government to rely so heavily on surveillance.⁷⁸ Just as Brown posits that neoliberalism forces individuals to take responsibility for their personal economic wellbeing and security in a world of increasingly hostile and competitive markets, Gary Marx claims that modern surveillance techniques force individuals to take responsibility for their own security, relieving the state of even its most basic responsibilities to citizens.⁷⁹ Thus, information technology converts security questions into technical problems of data analysis and Gary Marx argues that this model demands that individuals supply the state with enough information to solve these technical problems.⁸⁰ Providing the state with data by complying with surveillance measures further produces the panoptic discipline that influences subject's actions whether or not they are actually being surveilled. Patterns in the use of information technologies in neoliberal societies individuates security in the same way it individuates markets. Just as technology turns humans into products of human capital, it characterizes them as individual units within an insecure nation.

In the same way that information technologies convert activities into data to turn users into potential capitalist subjects, they also turn users into potential criminal subjects. In "The

⁷⁷ Nozick, *Anarchy, State, and Utopia*, chapter 3, "Moral Constraints of the State."

⁷⁸ Gary Marx, "Soft Surveillance: The Growth of Mandatory Volunteerism in Collecting Personal Information—'Hey Buddy Can You Spare a DNA?'" in *Surveillance and Security* ed. Torin Monahan (New York: Routledge, 2006) 37-56.

⁷⁹ Brown, *Undoing the Demos*, 84; Marx, "Soft Surveillance," 49.

⁸⁰ Gary Marx, "Soft Surveillance," 49-52.

Question Concerning Technology,” Martin Heidegger explains technology as not merely a collection of artifacts but a world view that enframes and orients individuals in particular ways.⁸¹ Though useful, technologies often hide the operations of power behind their practicality. Heidegger argues that technologies provide a frame within which the natural or human world presents itself, using his famous example of the hydroelectric plant on the Rhine. While a bridge over the river leaves the nature of the river intact, a hydroelectric plant encourages people to view the Rhine and other rivers as standing-reserve, or spaces of potential productive output.⁸² The bridge merely interacts with the river, whereas the hydroelectric plant converts part of what the river is into alien power than can be exported and used for external purposes. Thus, some technologies encourage people to see nature and the fellows as standing-reserve for potential productivity.

Information technology that allows users to cultivate every facet of their talent or time into human capital converts them into a standing-reserve. Technologies that allow individuals to monetize their free time convince individuals to view themselves as standing-reserve that could always be better educated, more productive, or more efficient. Furthermore, by converting the labor, recreation, education, and location of people into streams of data, information technology reveals user-subjects as potential-subjects.⁸³ Most of the data produced from users of information technology is produced by either corporations or states for potential purposes. Advertising and investigations both render the subject a mere potential

⁸¹ Heidegger, “The Question Concerning Technology,” 20-21, 27.

⁸² Heidegger, “The Question Concerning Technology,” 16.

⁸³ Heidegger, “The Question Concerning Technology,” 18.

consumer or criminal; the implication being that if any user can be a potential consumer, any user can be a potential criminal. While the state already has a nearly unquestioned ability to criminalize certain populations at will, the increasing use of private surveillance data to detect criminal behavior places nearly all Americans in a precarious position regarding the law.

CHAPTER 3: LOCATION, SRUVEILLANCE, AND CRIMINALIZATION

So far this thesis has examined the ways in which an American dedication to neoliberal ideology over the past half-century has shifted some of the state's powers and responsibilities to its citizens into the hands of private market actors. I ended my discussion of the ways that neoliberalism and information technology interact to reinforce each other by beginning to question the ways in which information technology enframes users in terms of their potential actions. By converting users' behavior and habits into tradeable streams of data, information technology enframes users as not individuals but data-producing subjects whose information can be economically useful. The individual user's right to control the use and distribution of this information I termed her right to privacy. Though the right to privacy is guaranteed in the United States Constitution, as interpreted by the Supreme Court, the extent of this right in the era of information technology is still undetermined, vague, and likely to remain so, considering the speed with which technology develops compared to the speed of the judicial system.⁸⁴ This

⁸⁴ Stephanie Pell and Christopher Soghoian, "Can You See Me Now?" *Berkeley Technology Law Journal* 27, 1, (2012) : 117-195.

chapter will explore the nature of criminalization as it relates to value of privacy, both from corporations and the state, the relationship between location and state criminalization, and finally the implications of an unaccountable state possessing nearly unlimited powers of criminalization.

Strangers at Home

In exploring criminality, criminalization, and the histories of detention and crime, sociologists often begin with a conception of the strange.⁸⁵ Some of the oldest stories about criminality explain that when a horrible or violent act is committed, it is easier to blame the stranger (or out-group-member) in the village than to contend with the idea that a common villager (or ingroup-member) could commit such an act. The solution to blame the stranger is not simply scapegoating, but the rejection of the reality that in-group-members who share most traits with oneself, can be evil and violent. In his novella *The Stranger*, Albert Camus famously depicts the criminalization and pathologization of the stranger, especially during his acts of violence. By revealing the stranger as not only violent, but idiosyncratic and potentially insane, Camus connects his fictional character to the process of state criminalization, which often relies on pathology and othering strategies to justify the treatment of criminals. Characterizing

⁸⁵ Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality* (New York: Routledge, 2000), 117; Valerie Jenness, "Explaining Criminalization" *Annual Review of Sociology* 30 (2004) : 147-171. ⁹¹ Ahmed, *Strange Encounters* 39-40; Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected*, (New York: New York University Press, 2012), 78.

criminality as a disease and violence as a symptom allows in-group-members to further remove themselves from the criminal acts, and justifies behaviors to quarantine or cure criminals.⁹¹

Tellingly, it is at the moment where Camus's character Meursault commits violence that he seems most unstable and disconnected from reality:

The sea carried up a thick fiery breath. It seemed to me as if the sky split open from one and to the other to rain down fire. My whole being tensed and I squeezed my hand around the revolver. The trigger gave; I felt the smooth underside of the butt; and there, in that noise, sharp and deafening at the same time, is where it all started. I shook off the sweat and sun. I know that I had shattered the harmony of the day, the exceptional silence of a beach where I'd been happy. Then I fired four more times at the motionless body where the bullets lodged without leaving a trace. And it was like knocking four quick times on the door of unhappiness.⁸⁶

In many ways, *The Stranger* is an absurdist rendition of the act of criminalization and the title character, Meursault, is so unrecognizable and unsettling that the other characters can never make sense of his mind or his actions. All that the other characters seem to understand about the stranger is that he is essentially and fundamentally different from the other members of the village. This perception makes his actions, while inexplicable, seem at least manageable because he is so different from the normal villagers, who would never commit such a crime. In this way, the alienation of the stranger gives the villagers peace of mind.

Though the villagers do not understand the stranger, there is no confusion over what is to be done with him: because of his absurd and violent choices, the stranger is killed by the state, thus removing him from the community and expiating his crime. Sara Ahmed explains the complex act of act of recognizing such a person within a group by claiming that "we

⁸⁶ Albert Camus, *The Stranger* (New York: Vintage International, 1989), 59.

recognize somebody *as a stranger*, rather than simply failing to recognize them.”⁸⁷ The stranger is not simply a blank, unknown person, but an outsider who is given content-rich attributes by those who see him as a stranger. The unrecognized person appears as a community member with whom one has not yet been acquainted, but the stranger is distinctively an outsider whose strangeness characterizes him as different, dangerous, and capable of anything. Recognizing a stranger as a stranger means assigning them an identity of unpredictability and madness—an identity exemplified by Camus’s stranger.

Everything that happens between the stranger and the group, from the initial recognition to the eventual murder of the stranger happens because of the location of the stranger. Bodies seen as strange and alien have a place where they belong, otherwise they could not be recognized as out of place *here*. The strangeness of the stranger therefore comes from his location. The place of the stranger allows us to identify him as “some-body we know as not knowing, rather than some-body we simply do not know.”⁸⁸ Therefore, the space in which the stranger appears is familiar to those who recognize him, as in the case of Camus’s stranger. Indicators that allow white Americans to identify strangers out of place tend to be race and productivity.⁸⁹ White individuals are not unable to recognize a black man in their neighborhood; instead they recognize him as a stranger out of place, and tend to call the police if he does not have an obvious purpose there. The concepts of strangeness and criminality are united by criminalization, the procedure of identifying, classifying, and managing outsiders by

⁸⁷ Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, 21.

⁸⁸ Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, 55.

⁸⁹ Ahmed *Strange Encounters: Embodied Others in Post-Coloniality*, 27-30.

means of “several regulatory approaches and practices authorized by the state,”⁹⁰ such as police patrols and neighborhood watch programs. Through criminalization, the state makes the strange deviant and legitimizes the use of violence against outsiders. One question which I will address later in this chapter is: under what circumstances do neoliberals grant the state the legitimacy to violate someone’s rights? For now, I will answer: when and how is that someone deemed a criminal?

Criminalization, rather than prosecution, punishment, or discipline, constructs an identity which is assigned to individuals that the state then prosecutes, punishes, and disciplines with the official goal of preventing crime. Punishment requires a discrete subject upon which the state can legitimately exert violence, and criminalization provides this subject by imbuing criminality into certain racial, sexual, or economic traits. Criminalization allows states to justify punishment, preemptive disciplinary behavior such as electronic surveillance (e.g., shot tracking sensors) and police patrols in communities characterized by these traits, which are connected to criminality. Criminalization is a kind of data production that creates various realities about an individual simply by observing them and their movements. Lisa Marie Cacho explains how this makes criminalization crucially different from stereotyping: “to be stereotyped as criminal is to be miscategorized as someone who committed a crime, but to be criminalized is to be prevented from being law-abiding.”⁹¹ Stereotyping is a factual error in which an observer presumes that someone has committed a crime based on their appearance, but criminalization connects an individuals’ appearance to a robust criminal identity resistant to

⁹⁰ Jenness, “Explaining Criminalization,” 148.

⁹¹ Cacho, *Social Death*, 4.

factual evidence. Criminalization is the merging of criminal activity and particular bodies, so much so that the same activity can be considered either criminal or benign based on the characteristics of the individual.⁹² In the United States, it is the socially constructed “stranger,” the non-white, or LGBT, or unemployed, lone individual who is often criminalized, not the white, heterosexual, working family member. Processes of criminalization allow the state to justifiably inflict harm on some and not others by depicting certain individuals as threatening and dangerous. Race is the most important indicator of criminalization, according to Cacho, and it acts as the “technology of biopower that justifies and naturalizes why the state makes some live and leaves others to die.”⁹³ Race is such an effective tool of criminalization in the United States because mythologies of white entitlement continually depict people of color as un-productive and opportunistic; when people of color do work they are stealing (note the language of criminality here) jobs from deserving Americans and when they are prohibited from working they turn to crime (so the mythos goes). Criminalization is a more intense categorization than mere suspicion, which I will turn to next. However the depth and completeness of racial embodiments of criminalization, upheld by law enforcement and courts, sets an important precedent for the US neoliberal state’s ability to criminalize indiscriminately. The state often relies on intense cultural biases that form perceived connections between the strange and the criminal to cultivate suspicion and legitimize violence against particular communities.

⁹² Cacho, *Social Death*, 2.

⁹³ Cacho, *Social Death*, 99.

As I have argued, information technology reinforces the power of the neoliberal state by converting users' activities, locations, and human capital into tradeable data streams. A huge amount of this data is used to predict the potential activities of users, thus stimulating the "\$120 billion online advertising economy."⁹⁴ Online advertising requires a massive amount of data generated by an individual's online activities in order to get the highest return from the most sophisticated targeted advertisements. For example, a person who uses one website to shop for camping tents and another to search for information on hiking trails near Lake Michigan may start to see advertisements for thermal sleeping bags and kayaks on seemingly unrelated webpages. This is because so many advertising companies purchase data from websites in order to narrow their markets and advertise effectively. By converting online activity into data, information technology converts users into the ultimate "standingreserve."⁹⁵ The scope of information technology allows companies to not just treat an individual's *labor* as a standing reserve, ready to be harvested, but even their leisure and recreational activities. The individual's needs, interests, and privacy are all secondary to a company's ability to mine her activities for data in order to sell her as a potential consumer to advertising companies. In the same way that information technology converts data from online activities into potentialities of consumption, it converts data from users' location into potentialities of crime. A condition of constant potential surveillance, and even retroactive surveillance, is a condition of ultimate

⁹⁴ *The Economist*, "Data: Getting to know you" Sep 11, 2014, <http://www.economist.com/news/specialreport/21615871-everything-people-do-online-avidly-followed-advertisers-and-third-party>, accessed Apr. 3, 2017.

⁹⁵ Martin Heidegger, "The Question Concerning Technology," in *The Question Concerning Technology and Other Essays*, trans. William Lovitt, (New York, NY: Garland Publishing, Inc., 1977), 19. ¹⁰² Cacho, *Social Death*, 18-23.

vulnerability to the coercive power of state. The state already criminalizes LGBT people, people of color, and other populations it can describe as “strangers” by attaching mythologies of crime to underemployed and underprivileged populations.¹⁰² Unproductivity is a key feature of criminalization—if someone does not appear to be actively working, the legitimacy of their very existence is called into question.

Strangeness and suspicion are linked, through location knowledge, to criminality and the law-enforcing power of the state. Spaces of belonging include group-members while excluding others as strange, potentially violent criminals. Police patrolling of black and low socioeconomic neighborhoods indicates the state connections between particular criminal localities and state violence. Unproductive individuals, standing on street corners, sitting on the stoop, are made to embody criminality by dint of their location. Police observe criminality, officially to prevent crime, and stop or question particular individuals who appear likely to commit crimes, focusing on unproductive man of color.

There were many people at the first bank that Graham robbed at the time he was robbing it. At that time, the Google applications on Graham’s phone were collecting his location data with no idea that it would retroactively be used in a federal investigation. Every person in the bank whose location data was being collected by Google or any other corporation beholden to the will of the state was unwittingly—but with their consent—a potential criminal suspect. Timothy Graham just happened to be the only one committing a crime. When the FBI looked back at Graham’s data, they were looking for specific information, for a stranger out of place, who should not have been at the bank at that time. The murder of Camus’s character Meursault and the apprehension of Timothy Graham are both examples of what Weber argues

to be the backstop of all state power: the legitimate use of violence.⁹⁶ The end goal of criminalization is to allow the state to legitimately harm, remove, or in some way detain nongroup-members who appear to pose a threat to the rest of society.

Retroactive surveillance and potential criminality allow the state to imprison criminalized subjects nearly indiscriminately. I will conclude by returning to the case of Timothy Graham, and by telling a story of potential criminality. When Graham was arrested after robbing the second bank, he was already suspected of robbing the first, but the FBI needed Google's data on Graham's location to place him at the scene of the crime. Suppose, however, Graham had not been at the first bank but instead had been attending an anti-government protest with his phone's location services fully activated. While attendance at such a protest may not be illegal, this kind of political activity can raise suspicion and incentivize law enforcement officials to incarcerate Graham or otherwise prevent him from engaging in such actions. The current condition of American politics is one of precariousness and uncertainty as the United States continues to embrace neoliberal ideology and policy, the extent of technological surveillance becomes extremely concerning.

Neoliberal Rights and State Violence

The ideals of classical liberalism prevail in the political history of the United States, including the history of law enforcement. Because the US was built a rights-based governance structure, and

⁹⁶ Max Weber, "The Profession and Vocation of Politics," in *Political Writings*, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994), 309-369.

many American academics, politicians, and ordinary citizens consider both public and private respect for individual rights to be paramount to any functioning society. Many neoliberals cling to the sanctity of this rights-based⁹⁷ governance strategy in letter, if not in spirit. The neoliberal “hollowing out” of terms that concerns that Wendy Brown applies as much to “rights” as it does to “freedom.”⁹⁸ While neoliberals continue to use the terms of their liberal forbearers, they have stripped the term of any meaning but a shallow, economic one. Just as neoliberals are more concerned with negative than positive freedom, as Berlin defines them, they are often more concerned with negative rather than positive rights.⁹⁹ If negative freedom, in a political sense, is freedom from government interference, then negative rights are those rights that guarantee negative freedom. The First Amendment of the U.S. Constitution contains these negative rights of American citizens. These rights to noninterference are crucial to neoliberals, especially as they apply to economics such as freedom from having to pay workers a salary planned by the government, not determined by the market. It is in the name of these economic rights that neoliberals have dismantled many social protections and safety nets previously in place to protect individuals from the uncontrollable booms and busts of a market

⁹⁷ In his discussion of Locke, Nozick describes rights in a classical liberal sense, citing the big three: life, liberty, and property. In Locke as well as other state of nature theorists, these are negative rights, or rights to noninterference. Other thinkers in the American liberal-republican tradition such as Thomas Paine and Thomas Jefferson describe negative rights as a limit on the liberty of others to do what they wish to an individual. Positive rights, largely ignored by neoliberals, but discussed by John Rawls and others, include not just noninterference but actions that others must take to ensure that an individuals’ rights are met, such as the right to an education.

⁹⁸ Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), 18.

⁹⁹ Isaiah Berlin, (1958) “Two Concepts of Liberty,” in Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969).

economy.¹⁰⁰ Though the neoliberal ideology is fiercely supportive of individual rights (in a negative sense), modern neoliberals allow the state to legitimately violate many of an individual's rights when that individual is criminalized.

Dubiously, it is the state that criminalizes and then acts in violent, rights-violating ways against those it deems to be criminals.

In nearly all modern societies, formal laws originate with the state, and therefore the state is at the root of even the most defensible claims of criminality.¹⁰¹ Criminalization provides legitimacy for prosecution, regardless of the defensibility of the particular law, which allows states to violate the rights of a criminal by subduing, imprisoning, or killing him. Criminality is crafted to fit particular individuals, sometimes in a way that prevents their bodies from appearing benign or non-suspicious (such as the single black male) and sometimes in a way that embodies the person himself as illegal (such as undocumented migrants).¹⁰² These tactics of criminalization, "deprive noncitizens of legal personhood" and therefore all sacred rights of the US Constitution.¹⁰³ Criminalized bodies, be they citizen or noncitizen, are afforded none of the rights that neoliberals so bitterly defend at the cost of social welfare and government aid.¹⁰⁴ The right to privacy is one of the rights that both imprisoned criminals and criminalized people have lost. With the use of information technology, especially those that track the user's

¹⁰⁰ Brown, *Undoing the Demos*, 115-150.

¹⁰¹ Jenness, "Explaining Criminalization," 148.

¹⁰² Cacho, *Social Death*, 103

¹⁰³ Cacho, *Social Death*, 103

¹⁰⁴ To clarify the rights of criminals: The Constitutional rights of *habeas corpus* and due process are sometimes afforded to criminals in the United States. However, these negative rights guarantee that the state may not interfere in particular ways in the lives of criminals, who already are allotted very few negative and almost no positive rights under the neoliberal United States government.

location, the state can construct a model of the Panopticon that neither Bentham nor Foucault could have predicted. Furthermore, while it is those who depend on privacy for their safety who are usually criminalized, any user whose location can be retroactively collected by the state becomes a potential criminal.

The value of privacy is related to the power relationship between particular individuals and the state, which claims to act in the interest of the majority group. The individual becomes subject to state (presumed group) violence when he is identified as an outsider or criminal. The more violent and less discerning is the group, the more privacy the individual requires in order to be free, not only from fear of violence, but to live as she wishes. For example, a lesbian woman living in a society where a majority-led government strictly punishes homosexuality requires privacy in her sexual affairs in order to live as she wishes and to be safe from violence. If she lived in a society that accepted lesbians, she may still desire privacy, but she can live as she wishes without it. In Sara Ahmed's book *Strange Encounters*, she explains the process of observation, identification, and eventually criminalization through the example of a neighborhood watch. In order to recognize a person as a stranger and then as a criminal stranger, observers must first be able to conceptualize a place as their own, a spatial boundary between 'us' and 'them.' This boundary serves the state, law enforcement, and ordinary citizens whom the state takes on the duty of protecting, namely the 'normal' white, heterosexual, working-class family. Once potential observers construct an imaginary of the value, safety, legality, and normativity of their place, they are able to identify and recognize

those who are out of place. Often, state agents rely on the “common sense”¹⁰⁵ of civilian observers to bring strangers to the attention of the police or INS. Strangeness and suspicion build criminalization and within a community “the neighbor who is also a stranger—or who *only passes as a neighbor*—is hence the danger that may always threaten the community from within” (emphasis added).¹⁰⁶ While race is the most insidious and dangerous basis upon which observers construct criminality in the United States, any outsider who once passed as a neighbor or appeared to belong can be criminalized if they falter in performing their previously acceptable behavior. Privacy is therefore an essential and potentially life-saving right to those who may otherwise be harmed if they are criminalized. As another example: if an undocumented worker, employed with the aid of false documents, Googles ways to attain a Green Card in his state, his safety depends upon his employer not having access to this internet activity. As rights to privacy become more porous, populations such as undocumented migrants, who already require more privacy and protection to ensure their safety, are further imperiled by the spread of information technology.

The technological artifacts and practices that reinforce neoliberal power and the necessity of self-reliance and individual responsibility are also the artifacts and practices that greatly reduce privacy for those who need it most. In modern neoliberal America, turning off your phone so that you cannot be surveilled by corporations (and potentially the state, if it deems such action necessary) is a privilege not available to all. Individuals reliant on the gig economy for survival, referred to as “intermittent workers” by Moulner Boutang, must allow

¹⁰⁵ Ahmed, *Strange Encounters*, 29.

¹⁰⁶ Ahmed, *Strange Encounters*, 23.

themselves to be monitored in order to work. Accepting surveillance is not a free choice to the professional Uber driver, the freelance contractor, the sex worker using an open-source app to select safer clients, or the working mother who spends a few hours clicking through advertisements to make extra money.¹⁰⁷ Those who must depend on information technology, who rely on short-term employment and require easy-to-access information, cannot simply opt-out of corporate surveillance. In the modern United States, a smart phone is as necessary as a car for most people to conduct their work.

Even in classical liberal theory, markets rely on the initiative of individuals to solve group solutions. Adam Smith's initial explanation of the invisible hand functions to provide for the communal good despite the presumption that all market participants are immediately selfinterested. Smith explained, "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."¹⁰⁸ While many liberals believed that markets could provide efficient solutions in ways that eluded the capacities of governments, many neoliberals misunderstand the invisible hand theory to mean that altruism and collective action are pipedreams. This is why neoliberal policy often attempts to apply market solutions to problems such as basic education, public health, and environmental protection. Neoliberalism makes individuals so responsible only for themselves, that it erodes the status of community, partially depriving both individuals and communities of the social services and channels previously used for collective action.¹⁰⁹ The continual

¹⁰⁷ Yann Moulier Boutang, *Cognitive Capitalism*, ed. Emery, (Malden, MA: Polity Press, 2011) 132.

¹⁰⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], ed. Edwin Cannan (New York: The Modern Library, 1994), Bk. I, Ch. II, p. 15.

¹⁰⁹ Brown, *Undoing the Demos*, 201-210.

neoliberal push toward individuation makes opting out of information technology nearly impossible not only for members of the gig economy but for all Americans who are attempting to start a business or seek gainful employment. Neoliberal capitalism encourages all individuals to deterministically embrace modern technology by depicting advancements in technology as apolitical productions of innovators working with markets to produce cheaper and more efficient versions of products that consumers demand. Neoliberal policy and rationality enforces the use of these technologies by foisting responsibility for economic success in a bitterly competitive world into individuals. The personal nature of information technology and the rugged individualism of neoliberalism causes many Americans to rely on such technology for their survival.

The Wrong Place at the Wrong Time

Historically, the fact of an individuals' location has been crucial for law enforcement workers to identify criminals. Citing classic work in the theory of criminalization, Valerie Jenness claims that original vagrancy laws were instated to manage labor populations who were being unproductive at a time of labor shortages.¹¹⁰ Vagrancy is a prime example of how belonging or lack of belonging in certain localities become criminally relevant identifiers for law enforcement and citizens who wish to assist law enforcement. Observation and location are salient

¹¹⁰ Jenness, "Explaining Criminalization," 150.

components to the criminalization of not only vagrants but of prostitutes and the homeless.¹¹¹

While race, age, and socioeconomic presentation come into play, the location of an individual is also important in the process of criminalization. The mere act of standing on a street corner with no obvious productive purpose becomes suspicious enough to merit engagement with the state through law enforcement, though a white man in a suit is in much less danger than a young black woman in a small dress. Existing outside of one's designated productive area becomes so intertwined with suspicion and classification as an outsider or criminal that the two become practically synonymous.

The convergence of neoliberalism and information technology individuates security while expanding the state's power to control through surveillance. Those who seek to opt-out of the surveillance network are subject to a different kind of suspicion. Individuals who desire to live "off the grid" make themselves into outsiders and may be accused of risking the security of others by not making their information available to those who supposedly use it to keep citizens safe.¹¹² Furthermore, in surveillance societies, "absence of evidence can also be proof of concealment."¹¹³ By removing oneself and one's data from the surveillance networks maintained by corporations for (mostly) corporate interests, an individual becomes a suspicious outsider. Even the quest for privacy can indicate suspicious activity of most of a society is comfortably bought in to corporate surveillance. In Timothy Graham's case, if he had disabled

¹¹¹ Jenness, "Explaining Criminalization," 151.

¹¹² Gary Marx, "Soft Surveillance: The Growth of Mandatory Volunteerism in Collecting Personal Information—'Hey Buddy Can You Spare a DNA?'" in *Surveillance and Security* ed. Monahan.)New York: Routledge, 2006) 49.

¹¹³ Cacho, *Social Death*, 100

the GPS and Wi-Fi features on his phone before entering the bank to rob it and enabled them immediately after leaving, the lack of data regarding his whereabouts at the time of the robbery would have been just as suspicious (if not as damning) as the data placing him at the scene of the crime. Though taking this measure might have prevented the FBI from gathering enough evidence to prosecute him, if he Googled the bank's location or used a map application to find it, he might have been as easily prosecuted. Even before he entered the bank though, Google and other data-collecting companies had built up a store of evidence about Graham's whereabouts any time his cell phone was active, just as they had for every other individual in the bank.

The ability for modern technologies to continuously collect and indefinitely store information allows law enforcement to review and produce information retroactively. While a citizen may be legitimately surveilled *today*, they are always in a state of potential criminality when data from their surveillance *yesterday* can be added to a larger information picture. When location data is stored in easily accessible formats, such as data bytes in a secure server, data production becomes a simply accomplished task. The paradox of neoliberal policy is that it appears as though the state has less control and manages less information. However, because the corporations that surveil for private profit are beholden to the security demands of the government, the state has access to vast stores of information collected under capitalist pretenses that it may use for prosecutorial purposes. While the state maintains disciplinary supremacy within its borders, neoliberalism makes the state less accountable for social, political, ecological, and infrastructural degradation. Neoliberal citizens come to expect so little from the state and so much from private corporations that the presence of state power nearly

disappears, until law enforcement action is enlisted. While neoliberal ideology makes technology appear deterministic and neoliberal policy makes reliance on information technology a necessity, the state can increase its power to police invisibly, putting citizens at the mercy of the legal policies made by a state over which they have nearly no control. The neoliberal state's supreme lack of accountability expands its disciplinary power and technological artifacts expand its power to surveille. The most insidious feature of this expansion of state power is that it occurs through technological channels that appear to shrink the power of the state.

CONCLUSION: Big Brother, where Art Thou?

The campaigns and outcome of the 2016 presidential election indicate that the politics of neoliberalism are still dominant, and potentially getting stronger. So far, the unpredictability of the Trump administration raises concerns about the security of Americans with alternative lifestyles. In recent years, the hyper-militarization of the police has continued to devastate Black communities in the US, and tragedies like the murder of Michel Brown make questions of state power all the more concerning.¹¹⁴ Resisting practically constant and nearly invisible surveillance is a herculean task. As Foucault suggests, the beauty of the Panopticon is that it makes the threat of observation omnipresent an undetectable, and in this way functionally irresistible and fundamentally constitutes governance. While opting out of a life managed by

¹¹⁴ Kristian Williams, *Our Enemies in Blue: Police and Power in America* (Cambridge, Mass: South End Press, 2007), 19-38.

information technology is a viable option for some, it is impossible for those most at risk from surveillance and it does not upset the neoliberal paradigm. Choosing not to use Google or Verizon if you do not wish to be surveilled is a neoliberal solution to a problem caused by neoliberal ideology; it supposes that the market choices of individuals can protect them from surveillance and places the responsibility on persons to not be surveilled. Similar individual solutions such as encryption may keep the whereabouts of one person private, but this solution again places responsibility on the individual to opt out of the surveillance state alone if she wishes. Furthermore, the idea that public pressure on Google (for example) of thousands of consumers who do not wish to be surveilled taking business elsewhere will cause them to change their policies is a similarly misguided solution. Location information is extremely valuable to Google, similar corporations, and the state, and privacy seems a small price for one individual to pay for access to the internet. Individuals are unlikely to sacrifice their internet access to be safe from a conceptual threat, such a potential criminalization, that they cannot even see.

Current policy proposals to limit law enforcement's access to particular data are similarly disappointing because they do not address the expansion of state power that neoliberalism allows, they merely manage its growth for the time being. While policies that protect users' information and data are commendable, legislation in recent years has proven notoriously slow compared to the growth and spread of ever-advancing technological capabilities. What is more, since most of American politics has been dedicated to the neoliberal ideals of hands-off government and less regulation, this solution is far from realistic. Any farreaching limits on collection of users' data would likely put information technology

companies out of business, as many are able to provide services for free because they are supported by revenue from advertising agencies. If web services like YouTube and Google begin charging users to access their content, their nearly monopolistic hold on internet services would likely crumble as smaller, open-source 'hacktivists' or average entrepreneurs infiltrate the market. While opting out and policy reform may not be viable solutions, collective resistance to state power seems an even less viable alternative.

Enacting means of effective resistance against neoliberal politics is notoriously difficult because neoliberal ideology makes neoliberal policy seem natural, practical, and logical. Furthermore, the decay of American social democracy and the hyper-individualism of neoliberalism make resistance in the form of collective action nearly impossible. However, understanding the means of state control is a step toward subverting it. While individual cases of opting out may be privileged and ineffective expressions of individual preference, mass occasions of opting out may at least be effective enough to somewhat limit the surveillance powers of corporations and the state. While not identical to opting out, encrypting ones' data is another individual solution that can keep personal information away from the highest bidder. Data encryption is becoming more widely used, and if open-source and easily accessible software is soon available, it may be a useful way to combat the prying eyes of corporations and state entities.

Information technology itself has been a boon to the American quality of life. Access to vast stores of knowledge, art, and entertainment may be too much to give up in return for a state that lacks the ability to criminalize so indiscriminately. However, those seeing most of the benefits of information technology are not those facing the most potential harm. Protecting

those most likely to be criminalized may mean making sacrifices in the short-term. A busy employee would need to commit to collective action, such as hiding his location data, in solidarity with a sex-worker who uses an app to meet customers but is thereby always being surveilled and her location data recorded. This sort of collective action is directly discouraged by neoliberalism. If one potential employee gives up her smart phone as part of a political activist movement, a company will easily hire a less civic-minded individual who is available to answer emails at all hours of the night or day. In a political climate the values rugged individualism over political activism, we cannot count on the state to educate persons in the ways of resistance. Ironically, activists may have to turn to the internet and online communities of like-minded anti-government organizers in order to subvert this trend. Combating neoliberalism therefore means engaging in outreach, education, and promising to support (financially or otherwise) those who are unable to opt out in effective ways. Community, comradery, and fellowship are anathema to neoliberalism, and sometimes deadly in a neoliberal state, but they may be the only means to secure freedom for future Americans.

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