Liberal Democratic Surveillance: Rules, Legitimacy and the Institutionalisation of Domination

Matthew Hall

PhD Politics

Royal Holloway, University of London

Declaration of Authorship

I, Matthew Hall, hereby declare that this thesis and the work presented in it is entirely my own. Where I have consulted the work of others, this is always clearly stated.

Signed: M. Hall

Date: 27/06/2017

Abstract

The proliferation of public debate around surveillance over the past couple of decades has been marked by defeat for those objecting to it. This thesis sets out to understand not, what harms surveillance brings to values held dear to liberal democracy - like privacy, liberty and political rights to protest - but instead, why it is that surveillance is so widespread in societies that value these things.

Most public and liberal objections to surveillance commonly seek to use liberal values like privacy and liberty on the one hand, and democratic values such as equality on the other, to shield against the harms that surveillance can bring. Surveillance is seen broadly as an *external* harm to liberal and democratic values, and commonly the task of study is to identify instances where surveillance is perceived to be going wrong, being excessively harmful, being used disproportionately, or is mistaken. These kinds of common objections, confident in the role liberal values can play, implicitly hold that surveillance, when properly limited and justified, is nothing to be fearful of. I argue instead that liberal democratic values are implicated in surveillance, not independent protections against it. If rules govern how liberal democratic values are protected and/or violated then surveillance, as a 'technique for securing full compliance with a given set of institutional rules' (as I will define it), is inextricably part of the institutionalisation of liberal and democratic values. Drawing on 'realist' insights into institutional rule making, I seek to explain how value-laden rules, which guide surveillance into practice, are politically contested. If we want to understand the expansion of surveillance, and over whom it is most harmfully applied, we need to understand the politics behind the rules that surveillance enforces.

Table of Abbreviation

ANPR – Automatic Number Plate Recognition

BDA – Big Data Analytics

BLD - Basic Legitimation Demand

CTP- Critical Theory Principle

DWP – Department of Work and Pensions

ECHR - European Convention on Human Rights

ESA - Employment and Support Allowance

FIT - Forward Intelligence Team

GCHQ – Government Communication Headquarters

IP Bill - The Investigatory Powers Act Bill

JIG - Joint Intelligence Group

JTRIG - Joint Threat Research Intelligence Group

NPOI - National Public Order Intelligence Unity

NSA – National Security Agency

NDEU - National Domestic Extremism Unit

OW - Ontario Works

PSYOPs - Psychological Operations

RIPA - The Regulation of Investigatory Powers Act

SDS - Special Demonstration Squad

SOCMINT - Social Media Intelligence

SIS - Security and Intelligence Service

UKBA – United Kingdom Border Agency

WTO – World Trade Organisation

Introduction

1. Getting Real About Surveillance

This thesis arose out of a sense that something was awry with the manner and extent to which surveillance is challenged in liberal democracies. Surveillance seemingly spreads unhindered throughout liberal democratic society in a manner that traduces values cherished by these societies. Not only was I convinced that values such as liberty, equality and privacy were being offended by surveillance. Rather, the following question also demanded an answer: in a society – the United Kingdom – that so highly values such things, how could it be the case that these values were being pervasively violated so comprehensively by surveillance, in so many instances? Insofar as the proliferation of public debate around surveillance over the past couple of decades has been overwhelmingly marked by defeat for those objecting to it, it seems pressing to understand *why* this is so. This striking thought brought me up short as I was considering my own thesis.

My realisation was that, no matter how incisively I, as an enthusiastic PhD candidate, argued that the damage surveillance was doing to liberal values like privacy ought to be taken notice of – and no matter how many intricate puzzles and thought experiments I could think of to show I was conclusively *right* about this – it would not make a difference. This was not an instance of doubting the usefulness of political theory or political science. Rather, it was a doubt regarding liberal and democratic values and the role they play for society in practice, and in particular the role they play in response to surveillance in contemporary times. If it could be shown that surveillance was spreading in a way that damages liberal and democratic values like

liberty, and I believed it could be, why is it that this doesn't seem to matter enough *in a liberal democratic society?* This raised a number of questions, the most important of which came to be not "is surveillance harming values dear to liberal democracies?"; but rather "if this really *is* the case, then *how do they get away with it?*"

By this I mean, how is surveillance which is harmful – and which, as I will argue in the thesis, dominates citizens – legitimate in terms recognizable by liberals, within the framework of liberal democracy? Why this is so, and why this is so widespread in spite of values that would seem to offer some bulwark against such spread, seems an urgent question. Most public objections to surveillance commonly seek to use liberal values such as privacy, liberty and free expression on the one hand, and democratic values such as equality on the other, to shield against the harms that surveillance can bring. Surveillance is seen broadly as an external harm to liberal and democratic values, and commonly the task of study is to identify instances and patterns where surveillance is perceived to be going wrong, being excessively harmful, being used disproportionately or arbitrarily, or is 'mistaken'. These kinds of common objections, implicitly or explicitly confident in the role liberal values can play, indicate that surveillance can be used in ways that is unjustified, whether by design or error.   The implication of such arguments is that, for whatever reason currently, surveillance has gone too far; and they also implicitly hold that surveillance, when properly limited and justified, is nothing to be fearful of.   Another common thread of objection centers around what is known as 'surveillance creep'. Why is it that surveillance, once justified for one reason, has a tendency to be used for another as-yet-to-be-justified reason? This offers a descriptive explanation regarding why the expansion of surveillance may happen without sufficient public debate. But it remains unclear *why* this cannot be successfully combatted.

Contrary to the above-noted accounts, I will argue instead that liberal democratic values are implicated in surveillance, not independent protections against it. If rules govern how liberal democratic values are protected and/or violated, then surveillance, as a *technique for influencing populations to secure full compliance with a given set of institutional rules* (as I will define it), is an inextricable part of the institutionalisation of liberal and democratic values. Surveillance, as such, grows out of putting liberal and democratic values into practice. If we want to understand the expansion of surveillance, we need to understand the politics and ideology that creates the institutional rules that surveillance enforces.

Articulating my argument through a language of legitimacy, I will show how surveillance can be made to seem justifiable to those it does not harm – it is subjectively legitimate. However, for those it does harm, it is not only true that surveillance offends their privacy and liberty (though that is true), but instead, relying on insights from republican conceptions of freedom, I will show that surveillance 'dominates' individuals insofar as they cannot object to surveillance in any meaningful way because of the effects it has on their freedom. This explains surveillance's widespread and continuing expansion in liberal democracies from a political perspective. It is legitimate: and when it is not, people cannot object to it in any meaningful way.

This fairly long introductory chapter will be separated into two sections. In the first section I will firstly review the landscape of surveillance in contemporary times from both an academic perspective and as it appears in public discourse. I will remain focused on the actual *spread and extension* of surveillance, and explanations for that, rather than other factors important to studies of the surveillance phenomenon. I will then critically assess theories that seek to explain why surveillance is so widespread

from both the field of surveillance studies and governmentality scholars, following which I will come to my own argument, presenting it in more detail and defining the terms of debate. The second (somewhat smaller) section will consist in a thorough discussion of my approach and methodology, which draws on 'realism' from political theory; which foregrounds institutions, rules and power to ask of politics not 'is this authority 'right'?', but rather 'what is it that makes this authority legitimate in practice?' Asking what makes surveillance legitimate in practice, is, then, one of the central questions guiding this thesis.

i) **Surveillance Concerns**

While surveillance as a phenomenon can probably be traced back to any society that organises around rules, academic concern with surveillance is relatively new. Between 1960 and 1970 there were just 10 articles listed by 'sociological abstracts' as including the concept 'surveillance' (Marx. G, 2005), and it was deemed to be a minority academic interest. Today, however, the scope of surveillance in daily life is so pervasive that some have labeled this era as that of "Surveillance Realism", meaning in effect that it is easier to imagine the end of the world than it is to imagine the end of surveillance (Denick, 2015). We can predict how the world itself could come to some kind of catastrophic end, but it much harder to imagine the end of the surveillance systems so deeply embedded in our societies. It is prolific to the point that it has become almost unremarkable. From iPhone geo-tagging to Facebook, from police CCTV to credit card transactions, from Google selling internet search records to GCHQ intercepting them, fingerprint ID in some schools and work places, facial recognition being introduced at passport controls, health information passed on to insurance companies, Automatic Number Plate Recognition cameras (ANPR) logging billions of car journeys per year in the UK and automated travel cards on public transport systems, from online targeted marketing from companies to undercover

police operations in political activist groups, it seems whatever we do, we are logged, monitored, identified and tracked as employees, citizens, commuters, workers, threats, opportunities, and risks.

Surveillance, as we will come to define it, both collects and uses data; we produce a 'data trail' through almost all our encounters with institutions – both State and corporate, private and public. Whether it be simple form-filling, or minor exchanges of information that could be seen as voluntary, or whether unbeknownst to us our data is being harvested from the interactions we make with an institution or company for reasons we are not aware of, data is big business in all senses of the term. A leaked document from the NSA *Content extraction enhancements for target analytics. SMS text messages: A goldmine to exploit* shows that the NSA stores 195,184,810 SMS text messages, details of 1.6 million border crossings, and over 800,000 financial transactions, *per day* (Greenwald, 2014), whereas it is estimated that as of 2014 the Big Data Analytics (BDA) market was worth $16.1 billion (Vesset, 2013), and moreover that the BDA technology and services market will reach $187 billion by 2019 (Davis, J. 2016).

This growth has become so much part of the fabric of daily life as to be normalized and in some cases desirable – British attitudes have not hardened against CCTV cameras as they have become more pervasive, according to some public polls on the issue: on the contrary we seem to have become almost dependent on the feeling of 'safety' and 'security' they give us in our local area, whether real or imagined (Cable, 2015). However, in the 40 or so years since there were only 10 articles mentioning surveillance, today there are innumerable journals; *Surveillance and Society; Ethics and Information Technology; The Information Society; Communications, Law, and Policy; New Media and Society* (Marx, G. 2005), coupled with public discourse

through both popular concerns and certain aspects of journalism, dedicating huge amounts of time to surveillance (Greenwald, 2012; 2013; 2014), not to mention the growth of civic society organizations (for example Big Brother Watch, Privacy International, and Liberty) that attempt to defend certain values against surveillance, that together show that the topic taken to be hugely important in contemporary society.

Yet, it is striking that such a wealth of critical intellect and energy has gone in to studying surveillance, and yet that this has also had such seemingly little effect on checking the growth of surveillance across society. I cannot prove a negative of course, and without such criticism, surveillance might, arguably, be far more oppressive and widespread. Perhaps critiquing and emphasising rights that do prevent harmful surveillance is the right approach, and it is for other reasons unrelated to liberal rights that society is becoming more prone to embracing surveillance technologies.

Technological development has played a key role in such an explosion of surveillance capabilities and technologies. Surveillance is more possible due to how we now communicate with one another: this has broadened not just the scope but the nature and form of surveillance, from being viewed as an active practice of observation in institutions – in the workhouse, by the police, prisons, factories and schools (Foucault, 1975) – to now often being a phenomenon that is automated, 'displaced', and seemingly passive or invisible (via, for example, credit card transactions, transport smart cards, and internet search engines). These developments in surveillance practices and possibilities seem, on the face of it, to defuse and confuse the power dynamics and asymmetries involved in surveillance as it has been traditionally understood.

Shifts in patterns of production and communication technologies means more is actually *happening* in the world of information exchange; and what is happening is freed from the workplace, the institution, and the 'public sphere', as it has moved online or into electronic form. More work, more social life, more political engagement, and simultaneously more threats and opportunities can all take the form of recordable information and communication. As such, the argument can be made that the state and private companies are compelled to monitor such information, to maintain security for the former, and in order be competitive for the latter. This reality is used to argue for a re-interpretation of civil liberties and privacy, as well as for a redefining of the public and private sphere of individual life in an environment, whereby such dividing lines are no longer as clear as they once were (Papacharissi, 2010). The argument roughly takes the following form: sharing your information on the internet means you have made your personal information public and so cannot complain if it is used by private companies to market products to you, or indeed gathered by the police without warrant in the course of an investigation.

Another complicating feature of the public/private use of surveillance and data collection regards how communication technologies that we use daily are in the main developed by private companies for uses that are varied but are rarely explicitly *for* surveillance. An iPhone, for example, is designed, amongst other things, with a feature to monitor the location of the user for efficiency and targeted marketing based on the user's location and travelling habits. So an individual doesn't buy a surveillance device, but to all intents and purposes carries one around in a top pocket. And while the State has not constructed a vast surveillance infrastructure of its own in order to force people to comply with its wishes, it does nonetheless have access to a vast surveillance infrastructure through privately developed and freely purchased

communication technologies. Devices and services such as mobile phones and the internet can be tapped into, and adopted and used by the state security services, the police, and many other state bureaucracies, so the distinction is not clear-cut. Such use of private communication networks and devices by the state for surveillance is both allowed and restrained in principle by the law and regulatory limits. The extent to which, and how, such surveillance is restrained, will be explored later on.

Another significant increase in the interest and influence of the direction of such studies, particularly in regards to state surveillance and security, resulted from the 9/11 terrorist attacks, and the surveillance laws and technologies that were developed in the aftermath. Arguments around state surveillance foregrounding *security* made a leap forward as a reaction to 'spectacular' terrorist attacks 'post 9/11', and did so across the spectrum of new laws, powers, technologies, and resources. A concomitant concern grew out of this through new and existing civic organizations such as Big Brother Watch or Privacy International, coupled with increased public awareness and academic interest.

One way to characterize much post 9/11 objection to surveillance is as opposition to what is perceived to be 'undemocratic', 'oppressive' and 'dictatorial' uses of surveillance. Spies targeting their nation's own citizens, eavesdropping in telephone conversations and secret agents acting with apparent impunity, alongside the discretion of other public bodies to collect and use information on citizens in a seemingly arbitrary fashion, is characterized as unbefitting of a liberal democracy and compared unfavorably with other regimes past and present around the world, evoking the language and imagery of Soviet-era secret police, and South American juntas. While not perhaps academically useful, this does reveal a certain tendency in surveillance discourse, and one which can be heard with regards to recent revelations

in NSA and GCHQ spying, to: first, discuss the most extreme examples of surveillance – such as NSA spying, secret eavesdropping and intelligence gathering of protestors – and, second, make objections about such practices with reference to normative liberal standards – that is, what type of surveillance ought and ought not to legitimately take place in a 'free country' or in a democracy. What is noticeable in these comparisons with autocratic or dictatorial regimes seems to be the scale of current surveillance in contemporary societies but not the nature and type of surveillance found in contemporary liberal democracies. Using newsworthy events, such as NSA and GCHQ spying revelations, to warn of the dangers of the autocratic possibilities of surveillance, while stressing the importance of liberal defences, such as privacy rights and civil liberties, are still the most popular public articulation of surveillance concerns. The publicity around more headline-worthy surveillance, concerning national security, seems to absolve -through exclusion from public debate, - other forms of seemingly 'mundane' surveillance undertaken by state bureaucracies and private companies in daily life in liberal democracies.

This contemporary security surveillance debate involves transferring the logic found there, in regards to security concerns, which justifies surveillance for more extreme and obvious threats, into other areas of public and social life. In the literature this is often referred to as "surveillance creep" (Schulte, 2006, p.78). This refers to how surveillance laws and practices of technologies enacted in the wake of terrorist attacks often go on to be used for reasons that, on the face of it, have nothing whatsoever to do with security. The language of security surveillance and 'threat' is covered by Brian Massumi in *National Enterprise Emergency* (2009), who explains that in situations of heightened political temperature around terrorist threats, everything becomes an emergency and surveillance. In turn, as part of a toolkit to manage such emergencies, this becomes a logical tool for public authorities to use in other areas of

public life. Whether it be the Regulatory and Investigatory Powers Act (RIPA) being used by local councils in the UK to spy on parents to discover whether they were living in the correct catchment area for their children's schools (BBC, 2008), or photographers (Jones, 2008), Journalists (Pidd, 2014), and protestors being arrested under anti-terror legislation (Pallister, 2003), all are instances of the use of surveillance techniques and laws designed for use against terrorists, and passed in the aftermath of such attacks. Other examples are provided by surveillance powers being given to the police in order to reduce crime, but then being used instead for reasons of PR or the management of public opinion. The recent revelations that the police had spied upon 18 families seeking, in one way or another, 'justice' from the police, ranging from Stephen Lawrence's family to Jon Charles de Menezes (Lewis, P, 2014), is just one example of surveillance practices that once normalised and accepted are used for less obviously justifiable reasons.

This increase in security against terrorism, and its associated language and concerns, have now become part of the landscape in surveillance discourse; and both publicly and academically, the potential danger, whether one sees security measures creeping into other areas, or one is concerned with the worrying security measures themselves, is often framed in terms of a balance between security and liberty (Neocleous, 2007; Michaelson, 2006). If the growth in the scope of capabilities and activities of surveillance, as outlined with the NSA example above, are anything to go by, it seems that the 'security' aspect of this balance has most usually been the 'winner' in recent years.

Academically, Foucault's seminal studies on surveillance still sit theoretically somewhere in the background of much contemporary surveillance studies, as I will discuss in a moment. Also in the background influencing contemporary studies of

surveillance sits Weber, Marx, Bentham, and Hobbes (Marx. G, 2005). Weber's Iron Cage of Bureaucracy metaphor has influenced thinking on state and private bureaucracies. In short, this regards the notion that all decisions in public life are trapped within bureaucratic rules and codes crushing human spirit to the extent to which a 'rationalisation' of the world compels all that is knowable to first be calculable (Weber, 1904). If bureaucracies need surveillance to operate, which I will claim that they do, then to what extent does bureaucratization compel an associated 'surveillance-ization'?

Karl Marx discussed surveillance as being the necessary overseeing of the intensification of labour practices in order to extract more value from labour, a means of managerial control on behalf of capital (Lyon, 1994). This is certainly apparent with 'Taylorism' (1911), an observation and rule-based scientific managerial technique that divides labour roles, and subjects them individually to targets, sanctions, and calculation of achievement in measurable quantities, and later similar 'Fordist' modes of production. These theories are not just limited to the factory and the past; communication devices today ensure that the very same measurable and observed worker performances that Marx critiqued and Taylor lauded can take place anywhere, anytime, but with observation, sanction, and reward monitored and communicated electronically. Studies on contemporary call centres show how bureaucracy, efficiency, working to rules, and intensive surveillance practices overseeing employees working there, exist in amongst a free and easy aesthetic (Ball, 2011).

These 'grandfathers' of surveillance (Marx G. 2015) show that surveillance and the study of it are not new to modern society. What is new however, and what has changed surveillance's relationship with our society, is "the shift to computerized

record-keeping. What was once stored in static, fixed locations – index cards and filing cabinets and shared with others only under strictly limited circumstances was expanded, became mobile, searchable, shareable, not only within but across organisations and even countries" (Ball, Haggerty, Lyon, 2012, p.4). This, says Lyon *et al* (2012), is the biggest single driver for the expansion of 'new' surveillance in the latter half of the twentieth century.

This *new* surveillance is distinguishable from *traditional* surveillance, which was characteristic of pre-industrial societies. Traditional surveillance was small scale, compartmentalized, limited in view, isolated – often simply entailing one human watching another. It held limited records, if any at all, and any information that was recorded was difficult to recall. Contrast that with *new* surveillance (Marx.G., cited in Ball et al., 2012, xxv), which involves the monitoring of groups, individuals and populations with the capacity to extract, analyse, and even create new information, from the data collected, in the form of patterns and predictions. It is systematic, institutional and organizational. It offers the ability to go beyond what is offered only "by the senses" (Marx, G., cited in Ball et al., 2012, xxv) – through simple watching – to learn, strategise, monitor, and manage populations both from a distance and on a large scale. It is in this second sense – wherein surveillance is an integrated and key mode, if not the principle mode, for the organisation of a society – in which we are described as living in "a surveillance society" (Wood & Webster, 2009, p.260). While being ancient, and probably existing in some observable form wherever there has been any human sociality, these later, institutional routines of surveillance have emerged as the dominant organizing practice of late modernity over the past 40 years (Lyon, cited in Ball et al., 2012, p.1).

ii) Other Approaches: Surveillance Studies and Governmentality

Surveillance Studies, a multi-disciplinary (rather than inter-disciplinary) school which tackles the big questions of surveillance and society in a multi-faceted way, but in a way that speaks to itself within an identifiable field, is as recent as the last decade or two. The study of surveillance itself of course is much older.

Foucault was, at one time, the touchstone reference for surveillance scholars, and the Panopticon the archetypal framework for understanding surveillance. Taken from Bentham's design for a perfect prison, a central watch tower overlooking all cells would hide the guard from view but have a full perspective on each and every cell, the idea being that the prisoners could never be sure whether they were being watched or not. This has been taken on and used as a template for understanding a range of surveillance developments. However, both the complexities in 'new' surveillance, and changes in society more broadly (both organizational and institutional), as well as the saturation of this type of analysis in the field, seems to have led to something of a consensus amongst scholars to leave it behind. In an essay in the book *Theorizing Surveillance: The Panopticon and Beyond* (Lyon, 2006), Haggerty laments the proliferation of various '-Opticons' that sought to apply Foucault's model through extensions in an attempt to catch up with and capture developing technologies and surveillance practices. He lists, among others, the 'super-panopticon', 'electronic-panopticon', 'post-panopticon', 'ban-opticon', 'pedagopti-con', 'fractal panopticon', 'synopticon', and 'neo-panopticon'. Rather dramatically, he concludes that "Foucault continues to reign supreme in surveillance studies and it is perhaps time to cut off the head of the king" (Haggerty, cited in Lyon, 2006, p.27).

Haggerty himself, along with Ericcsson, had made such a move away from Panopticon type analyses with their influential "The Surveillant Assemblage" essay (2000). Drawing instead on Deleuzian analysis, they emphasised the disparate array of organizational forms and technologies of surveillance rather than a fixed institutional state. In the surveillant assemblages, information is organized in flows across society from which data can be extracted, stored, and analysed, creating a 'data double' from that extracted information. Its techniques are to create interruptions to flows of information with checks, stops, and extractions of data throughout society. Instead of people being exposed to the rather static metaphor of the panopticon, they were, Haggerty and Ericcsson suggest, more mobile, and had information extracted about them for analysis rather than being disciplined by a watchful eye (Ball, 2006, p.300).

According to Haggerty and Ericson, Foucault's Panopticon improves upon Orwell's Big Brother by both reminding us that the proletariat have long been the subject of intense scrutiny, and by situating surveillance in the context of a theory of power (2000). Yet they argue both that "rapid technological developments, particularly the rise of computerized databases, require us to rethink the panoptic metaphor" (2000, p.607), and also that such re-evaluating of technologies of surveillance in this way, with a focus on techniques and practices that are not necessarily always 'top-down' as the panopticon metaphor is, influences other forms of surveillance study today. However, the effects that the Panopticon was said to have on people's behaviour – causing them to self-censor, behave in certain ways even though they did not know for sure they were being observed – should not, I will suggest, be completely disregarded when I articulate the impacts of surveillance through the language of 'republican domination' in chapter 2. Republican domination is the idea that if you are exposed to arbitrary power that may interfere in your life – you do not know when or whether

it will, and whether it will is beyond your control – then you should be considered as dominated. Even if such a power never interferes with you, the fact it may, leaves you in a state of unfreedom. Consequences of such domination can be self-censoring, anticipating what behaviours may elicit a response, and 'toadying' to the power with arbitrary capacities to interfere in your life (Skinner, 2005; Pettit 1997; 2001).

Foucault however does continue to influence thought in surveillance studies, but no longer through the Panopticon. Foucault's third aspect of power, following sovereignty and disciplinary power (the second of which forms the basis for Panopticon studies) introduces the idea of governing as the management of populations, or, 'Governmentality'.

Foucault says:

> By governmentality I understand the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument (Foucault 2007, p.108).

This is intimately connected with surveillance studies insofar as governing (whether that be through offering a bounded freedom or otherwise) is dependent on knowledge over the population that is to be governed,

Taking population and 'circulation' of goods and people as its 'problematic', and security as its technique, government, says Foucault, aims to maximise good circulation through both freeing it, and suppressing bad circulation. Honing in on the

meaning of security, Foucault, in his *Lectures at the Colleges de France*: *Security, Territory, Population* (2007), seeks to shift understandings of security away from a matter of sovereignty and territory, and towards it being a matter of analysis of, and intervention into, risky behaviours within a population, as well as normalisation of desirable behaviours. This is distinct from law, which Foucault argues operates by dividing everything into what is permitted and what is forbidden – order being what remains when everything that is forbidden is stamped out (Foucault, 2007, p.46). It is also distinct from disciplinary power, which is based on what is proscribed and what is not (2007, p.46) – Foucault uses the example of a monastic order in which the Monk's life, from morning until night is proscribed – anything not said or set down, is, by implication, forbidden in that order. Instead, apparatuses of security in the governmentality framework seek to "cancel out the reality to which it responds" through practices which seek to "limit, check and regulate reality" (2007, p.47). In this it uses the component elements of reality as it finds it. Unlike an imaginary law or proscribed disciplinary institution, security is "centrifugal" (Ceyhan, 2012, p.40) insofar as its scope – in the pursuit of effective management of populations – expands to include all kinds of other elements of population including production, psychology, and behaviours (Ceyhan, 2012, p.40). No longer should power be considered as being concerned only with its law and its territory, or its institutions, and no longer does it simply forbid or proscribe behaviours; rather, it disposes itself to the regulation of all aspects of population to maximise efficient circulation of what is considered good – this being what is economic, efficient, and orderly – and regulate out what is considered bad. Foucault charts this development alongside the rise of liberalism in the eighteenth and nineteenth centuries. He sees liberalism itself as an art of governing, and its increasing competences as rationalities of governing.

This reading of apparatuses of security has proven relevant today for studies of

surveillance, as surveillance increases its reach over bodies, personal information, movement, financial spending patterns, desires, familial relations, and networks of friends. Made possible by technological advancement in tracking systems, biometrics, facial recognition technologies, and so on, these advancements neither proscribe nor forbid; but they do regulate on mass movements and flows of humanity across society and communication networks. So much, in fact, that governmentality studies themselves now have centrifugally moved beyond and above the nation-state to look at globalised flows and regulation of information and behavior.

In this endeavor governmentality studies work in the ethos of Foucault but are not bounded by his findings (Rose, 1999). Studies seek to understand the patterns of modelling, normalization, and regulation, tracking both ways in which certain populations are seen as risky, and how regulation and normalisation affects them, and their environment (Rose, 1999). Most governmentality inquiry is not in pursuit of grand theory constructs such as naming the society or era (Post-Modern or "Control Societies") (Lyon, 2007), and instead is pragmatically engaged with specific surveillance practices. I will draw on governmentality insights regarding surveillance practices in the chapters to come, which is where I believe it to be strongest, in describing and analysing techniques of control. I will supplement this analysis by showing how technologies of control originate from a political source. While some governmentality scholars do not articulate their studies in the language of surveillance, they do relate explicitly or implicitly to several characteristic features of surveillance; Power, use of information, classification, communication technology, social organisation, administration, and the State.

Surveillance Studies builds on and moves beyond a governmentality analysis to, in Haggerty's plea, not ignore systems of rules, relations, and power in the actors

involved in surveillance (Lyon, 2006). It is on this basis – a focus on the techniques of monitoring, but also interrogating the systems of power and relations they are built on in practice – that many surveillance studies scholars have moved into the 'social sorting' thesis as a schema to understand contemporary surveillance practices (Lyon, 2007)

These 'Sorting' theses (Gandy 1993; Lyon 1994; 2002; 2006) re-inject hierarchies and inequalities back into surveillance. Lyon, and previously Gandy, relate surveillance to its ability and tendency to differentiate people into categories and classificatory systems in order to provide access to, or exclude from, opportunities – to shut off options for some and open them for others. In *The Panoptic Sort* Gandy (1993) explains surveillance "…is a difference machine that sorts individuals into categories and classes on the basis of routine measurements. It is a discriminatory technology that allocates options and opportunities on the basis of those measurements and the administrative models that they inform" (Gandy, 1993, p.15). Lyon's version of 'Social Sorting' understands surveillance as hinging on "the social and economic categories…by which personal data is organised with a view to influencing and managing people and populations….in a way that our life chances are continually checked and enabled and our choices are channeled" (Lyon, 2003, p.2). Surveillance shunts and pulls us towards different life choices and opportunities by providing access to, and enforcing exclusion from, institutional opportunities, both private and public. Through this sorting lens it can be better understood: which groups can use surveillance power for what ends and over whom, what the experiences of groups encountering surveillance practices are like, why it is that they are targeted rather than another group, and why they are disadvantaged when another group benefits from the same practices.

Once it is established how certain groups are disadvantaged by monitoring techniques, and the relations of power on which this is based – such as financial disadvantage, race, employment status, health – the concern from surveillance studies broadly still seems to remain grounded politically in the assumptions of the society it applies critique to. That is to say, while relying on, or being influenced by, insights that hold liberalism to be part of the rationality of surveillance from governmentality studies, and therefore part of the problem, the solutions prescribed are somewhat liberal themselves.

Gary T Marx, one of the most prominent scholars in the field of surveillance studies, sketches what is to his mind the broad and eternal conundrum of state surveillance. He draws on an analogy articulated by Queen Elizabeth (1533–1603) who, he claims, "introduced modern ideas about the rights of the person including protection against 'windows into men's hearts and secret thoughts'" (Marx, G., 2015, p.733), through which, she sought to draw limits on looking, particularly when coercion and inequality are present, as with state power. Yet, Marx concludes:

> as a ruler concerned with the welfare of her subjects she needed information about them, as well as about rule breakers and those who would overthrow her government. Her challenge – juggling the protection of individual's hearts and secret thoughts and the protection of state security – is one that faces democratic leaders everywhere (Marx, G., 2015, p.733).

Surveillance is viewed here (when thinking of how to resolve problems and concerns associated with it) as something like a necessary evil, and the aim is to seek to unearth its unfair and problematic applications – its inequalities, coercions, unequal and harmful effects. Surveillance here is seen as part of governing, and Elizabeth being

concerned with the welfare of her subjects, but surveillance is also as an external and regrettable necessity for state power, one which, regrettably, all democratic leaders must grapple with.

Another precis of the problem with surveillance here from the authors of the *Surveillance Studies Network* (2015), a prominent international research and information network. In "An introduction to the surveillance society" they say:

> As data travel silently across international boundaries, between national states and within transnational corporations, the impact of surveillance becomes even harder to identify, regulate and debate. For us, it is important that this power, based on the oversight of activities and of personal data, is wielded fairly, responsibly, and with due respect to human rights, civil liberties and the law (2015).

An assumption again appears to be held that surveillance can be disentangled from liberal values in order to be identified and regulated, even if it is hard to do that presently. Surveillance in this worldview is positioned as being separate from and external to concepts of fairness, responsibility, rights and civil liberties, not something associated with the rules that govern these concepts in practice. Surveillance can be successfully combatted, according to this world view, through appeals to these concepts and values in order to hold back surveillance from causing too much harm. Surveillance seems to be seen as somewhat 'tameable', on this view, through both a more determined effort to both protect values which are important (such as civil liberties and rights), and appeal to other values and systems to do so (the law, responsibility, fairness). In doing so surveillance can, it is argued, be more regulated and better restrained.

Further, according to Ball, Haggerty and Lyon (2012) in their introduction to the *Handook of Surveillance Studies*, debates concerned with thinking about how citizens should respond to surveillance most often revolve around continued efficacy or otherwise of privacy regimes or data protection provisions (2012, p.3). A split occurs between those who think privacy regimes are still the right avenue, and those who do not (2012, p.3). Some scholars here rely on privacy and data protection, others lament that such protections are underfunded, others give up and (rightly in my view) see these protections as flawed, and so instead rely on "micro-resistances" to surveillance (Gilliom, 2001). 'Civic' concerns, such as those expressed from advocacy and rights groups like Big Brother Watch, Privacy International and Liberty have also almost exclusively been articulated in the language of liberal values too – that is, the language of privacy and civil liberties.

While being multi-disciplinary, any prescriptions that do come out of surveillance studies for combatting surveillance, as outlined above, seem to fall back on established liberal protections. This seems reasonable on certain levels, and I too will relay some of my own related concerns throughout the thesis in this language. It is perhaps also something to do with remaining, as a discipline, "strategically legitimate" through value neutrality (Marx, G., 2012, xi). Relying on the existing societal framework rather than agitating against it could be seen as more academic, as it were. There is also an under-articulated delineation between the democratic and the liberal in concerns about surveillance spread, when discussing the lack of successful response to it. Liberal protections *could* be stronger, goes one argument, if the public, that safeguards are supposed to protect, cared more that they were being violated –that is to say, if there was a democratic demand to protect liberal values. Or is it the case that regulation through surveillance which stops short of violating rights means there is nothing – from a liberal perspective – to worry about? And, if as a surveillance

society, one of the key components of society's organization is surveillance, then is surveillance really so external to these values that are being appealed to for protection against it?

For example, Bigo (2012), shows how the reliance on framing liberty and security as a matter of balance by authorities, and in public discourse, immediately after the '9/11' terrorist attacks means that liberty relies on security to exist. "The conditions of life" Bigo says "depend on the existence of life itself. Therefore, liberty and democracy as conditions of life are consequential and derivative, as they depend on security for life to exist" (Bigo, 2012, p.388). Here, in a contorted form, and if a new reframing of liberty does not happen, which Bigo argues it should, liberty is delivered to people conceptually and practically *as* security and surveillance. These practices keep us safe, alive, and therefore with the capacity to be free. In other words, this framing of security and liberty *produces* a type of liberty, rather than just reflects on it.

The 'security first' paradigm continues today in similar form and, as Bigo identifies, is the real context for the so-called 'balance' to be debated within. On his analysis, the danger is that "we focus on the question of order and the meaning of freedom without engaging into [sic] the question of 'freedom as practice'" (Bigo, 2012, p.401). Bigo is influenced by Foucault and governmentality insights in sketching the state of freedom in this way, and in some sense his theory suggests that a bio-political view of freedom prevails in public discourse around security and liberty; life itself and life alone comes first. You cannot be free if you are dead, is the implied threat inherent in the proclamations favouring 'security first'.

If we can talk about post-'9/11' surveillance and the ubiquitous 'security first' paradigm in surveillance studies, there is also a sense in which we can now talk about

a post-Snowden era. Snowden, as is well known, was a US National Security Agency (NSA) contractor who released an abundance of files regarding the spying activities and previously unknown data collection techniques of the NSA and also the UK equivalent, Government Communications Head Quarters (GCHQ). These revelations, as Bauman et al observe (2014), startled even seasoned observers of surveillance. Rather than any significant backlash against this however – although of course it has proven very newsworthy and well reported – instead there has been an embedding of these practices into law. This is a very important development for the study of surveillance.

This is particularly noticeable in the United Kingdom where the IP Bill (Investigatory Powers Bill) was recently passed into law. This Bill, while limiting surveillance in certain areas, extends the scope and number of state authority institutions that can collect data, and the bill regulated much surveillance that was already being done anyway. That there was no public outcry or opposition to the Snowden leaks, and the IP Bill passed with "not so much as a murmur" (Denick, 2016), led Denick and Hintz (2016) to ask whether we live in an era of 'surveillance realism'. Taken from Mark Fisher's idea of 'capitalist realism' (2009) – meaning, we can sooner imagine the end of the world than the end of capitalism – Denick and Hintz consider, in a study of public and activist responses to the Edward Snowden leaks, whether the lack of resistance to such revelations an indication that as a society we can no sooner imagine a world without mass surveillance than we can the end of society. The 'what have you got to hide?' accusation, says Denick in an article written after the smooth passage of the IP Bill into law, is a paradigmatic example of surveillance realism type of thinking (2016).

However, the public's position seems ambivalent. In an 'Angus Reid Institute Poll' taken to assess people's opinions regarding both Snowden's revelations, and mass surveillance in general, found in fact that in the UK 82% of people said that government surveillance was "very" or "quite important" to them (Angus Reid Institute, 2013), but when asked to assume that their own national government was routinely conducting mass electronic surveillance of them, British people were split (52% to 48%), with marginally more saying it was "unacceptable" rather than "acceptable". Of those people, however, only 19% thought this type of surveillance would be used "strictly for national security/anti-terrorism efforts", indicating that many who think it is acceptable also think it is acceptable to mass collect data for reasons other than security and/or terrorism – the reasons such mass surveillance by security services are primarily justified. Further, 44% thought that surveillance such as the type described a moment ago would end up being used for "any purposes the government chooses" (Angus Reid Institue, 2013), with many, according to the same poll, seemingly perfectly happy with that situation. Two years later polling by YouGov on the (then forthcoming) IP Bill also found a majority of those polled in favour, with numbers ranging up to a high mark of 63% support when "judiciary oversight" was added (Dahlgreen, 2015).

I do not intend, nor have the room for, a thorough investigation of these statistics. What does come through however is that there is no strong and large scale opposition to mass surveillance; and even if people think it would be used for other purposes this itself does not seem to be a major problem, beyond voicing in a poll that it is important and/or unacceptable to them. Many things may seem important and/or unacceptable, but regardless of saying so in polls it does not appear to exercise the public democratically, which seems exemplified by the event of the passing of the IP Bill with very little outcry. People may think it unacceptable for the government and

security services to engage in mass surveillance of everyone's communications, but they do not seem prepared to do much about it. The delineation mentioned earlier between liberal and democratic bulwarks against surveillance is relevant here. If, as some claim, liberal protections like privacy and civil liberties are under resourced, not properly accounted for, not up to date, then others look at the democratic force of the public, or lack of it, which ought to compel states to abide by and protect values such as privacy. If the public do not care about privacy then, democratically, why should the government care?

In a post-Snowden collaborative paper, *Rethinking the Impact of Surveillance*, Bauman et al. (2014) argue that there are three sorts of factors that help explain the public's apparent insouciance in the face of mass surveillance revelations, and why surveillance "of all kinds appears to be publicly acceptable to many" (Bauman et al., 2014, p.142). The first argument set out is familiarity. Similar in a sense to the surveillance realism argument Denick lays out, this implies that surveillance practices are so widespread as to be unnoticed. From the visible surveillance practices, such as street CCTV cameras and security at Airports, to the invisible, such as those embedded in personal devices like digital cameras, mobile phones, cars, through to buildings and places we visit daily which have surveillance embedded in interactions with them in the form of keycards to enter buildings at our workplace, libraries and transport systems. This pervasiveness makes surveillance appear to be, not so much alarming, so the argument goes, but rather unremarkable.

The second factor laid out is fear. People are in fact scared of terrorism, crime and nefarious forces out to get them, their identities, their families or their children. This has, the authors note, significantly increased since 9/11, and the government, security companies who make a living from assuaging people's fears, and the media, have all

sometimes played on this in a cynical way. For security companies fear works because it makes profits, for the government it works because it makes their task of maintaining security easier by clearing objections to security measures away if people are scared enough to accept them, and it works for the media who depend on sensationalist polarisation of "good guys versus bad guys" (Kurzman, 2011, cited in Bauman et al., 2014, p.142). They argue that a chilling effect occurs when the difference between real threats, such as terrorists, and others, such as protestors, is collapsed by governments and the media. I will come to this in detail in Chapter 5 when I discuss protest and dissent.

The third factor introduces the notion of publicity, and of 'user generated content', mostly on commonly used social media platforms. While sounding perhaps trivial, they admit, in the web 2.0 era information is not only generated by institutions and organisations that is *about* populations and individuals, but is generated *by those* groups and individuals. Crucially, social media platforms are not only about generating and publicising user information, they are constitutively structured through relationships. The Facebook 'friend' or Twitter 'follower' being the obvious examples. These networks rely on algorithms to cluster these relationships together and draw information about participants from them. Ostensibly for a better 'user experience' but also, quite obviously, creating vast amounts of detailed information about people's personal lives.

This does not just occur behind the scenes. The National Domestic Extremism Unit (NDEU) in the UK for example, uses SOCMINT (Social Media Intelligence techniques) to assess and monitor a range of threats online. NDEU is based in Lambeth, and employs 17 staff who work 24 hours a day looking at, amongst other things, publicly viewable social media for intelligence gathering. The key point that

the authors make about this 'social surveillance' (or 'peer' or 'lateral surveillance') – voluntarily publicising information and relationships – is that it is fun. Not only is this 'fun', and so encourages use, but it also has become integral to social life for perhaps billions. Users fall out, they argue, they get publicly upset, are hurt, bullied, excluded, appreciated, rewarded, loved and hated through this social surveillance. And all of that, is information.

These observations, and Denick and Hintz observations regarding the sheer pervasiveness of surveillance being a factor in the acceptance of that very pervasiveness, grasps something important about surveillance and society. I will argue, however, that rather than surveillance *becoming* something that we cannot imagine society without, instead, in a liberal democratic society, surveillance has always been at the heart of its functioning. Moreover, I will argue that the values of liberal democracy, of the type relied upon above, are not independent protections against surveillance.

The technological and communications revolution that has occurred across the world, and particularly in developed nations, provides new capacity for information gathering. However, recent technological invention is an extension of the capacity of an already existing necessity to monitor rule-based societies like liberal democracies, not something new. The sanguine attitude of the public towards these new capacities is explained in surveillance studies in a number of ways, most of which focus on the effects that the techniques of surveillance has on us, and by extension our willingness and ability to object to it. That is to say, its pervasiveness seems to have an effect on us; whether that be on our imaginary (surveillance realism), or that through familiarity we are not unnerved by it, or it is integral to our sociality, or we welcome it to soothe our genuinely held fears.

The sorting theses shows how existing inequalities may be exacerbated or reinforced by surveillance patterns and new technological capabilities. However this also appears to stop short of its desire to investigate, as Haggerty wants (2006), the *rules and relations of power* that form surveillance. For that I believe we need to look one level up from the relational power of rules, techniques and procedures of surveillance practices to the politics of those rules.

iii) My Argument

The reason why surveillance is so widespread in liberal democracy, in spite of it offending some foundational values of liberal democracy, and the reason why it seems so hard to combat theoretically and in practice is, I will argue, as follows: liberal democratic values are implicated in surveillance, not independent protections against it. If institutional rules govern how liberal democratic values are implemented, protected and/or violated then surveillance, as a technique for monitoring and regulating compliance with a given set of institutional rules, is inextricably part of the institutionalisation of liberal and democratic values. If we want to understand the expansion of surveillance, we need to understand the politics that create the institutional rules that surveillance enforces.

When surveillance is limited to the role of monitoring and regulating compliance with already justified rules, it itself appears to be legitimate. That surveillance spread is aligned with the legitimate rules of the state means it can potentially be as pervasive as legitimate and justified rules in a given society are pervasive. One reason that imagining a world without surveillance is so difficult, is that to imagine a world without surveillance is imaging a world without a system for implementing and

enforcing the rules of liberal democracy. Focussing attention on the fringes of surveillance practices which step outside this role, such as when surveillance is arbitrary, 'creeps' into other areas, is prone to mistakes, and, I will argue in chapter 1, may successfully restrain surveillance to its 'legitimate' role but does nothing for the continued expansion of surveillance practices.

That is the first, and main, part of the argument: surveillance 'actualises' liberal democracy. That is to say, it implements and regulates the rules of liberal democracy, which are themselves justifiable through their role of bringing liberal democratic values into practice, and as such contains a certain quality of legitimacy. I will discuss which values and how in a moment.

The second part of the argument explaining surveillance's spread is that surveillance is unequal and dominating. While surveillance is a problem for us all, it is most severely a problem for groups and individuals in society who are politically weaker. Because the rules of liberal democratic institutions are politically contestable, surveillance, as it regulates and guides enforcement of those rules into practice, advances certain political interests as values and rules are interpreted for use in practice in society. Because of the effects of surveillance such as fear, self-censorship, and the shutting down of options, discussed in more detail in chapter 2, the capacity of these subject populations to object to surveillance practices – and for those objections to be recognisable to liberal theory as rights claims – is suppressed and limited. This, I will argue, amounts to domination and further explains why surveillance can spread in seemingly harmful ways over weaker subject populations, and without encountering successful resistance. In sum, if you are not harmed by surveillance and see it as legitimate, you are unlikely to object. If you are harmed by surveillance, your capacity to object in any meaningful way is restrained because of

surveillance's effects on you. Surveillance therefore spreads relatively unhindered whether or not it is causing harms.

I will argue that this domination of certain groups de-legitimises surveillance normatively (while still having subjective legitimacy amongst what is called 'the public', if not an actual majority), and as such is the place where surveillance can be successfully challenged. This shows some inherent contradictions in the liberal democratic processes of legitimation, because, as I will show, we can have a water tight process of justification from a liberal perspective that nevertheless supports and legitimises domination of politically weak citizens.

I will set out now how I define surveillance, which values I am discussing that are implicated in surveillance practices, how they are regulated and monitored, what I mean by 'the political', and how certain subject populations are 'dominated'.

It is clear that surveillance can be described through a multitudinous variety of big theories and typologies. I want to define it quite broadly and simply. Surveillance in this thesis is state surveillance, and it is defined as *the practice of acquiring and using information to influence a given population according to a given set of institutional rules*. This is in a way akin to Haggerty and Ericson when they define surveillance as the "collection and analysis of information about populations in order to govern their activities" (Haggerty & Ericson, 2006, p.3), but also limits my definition to institutional rules of the state. Doing so limits the scope of what is considered surveillance to state surveillance, thus allowing me to interrogate both the rules that guide surveillance into practice according to liberal democratic values, and the legitimacy requirements characteristic of a liberal democratic state.

While 'new surveillance' described above takes surveillance beyond the confines of state institutions through advancements in technology, communications, and networked data, state surveillance in a liberal democracy is still confined by and driven by institutional rules. Whether or not the surveillance takes place within a state institution, surveillance is directed by institutional rules, and is limited by rules guiding what is and what is not thereby legitimate. By implication much surveillance that exists throughout society needs such justifications. A private institution or corporation in a liberal democracy must still abide by the rules of the liberal democratic state, and while justifications for private institutions can take a different form, often around the 'voluntary' nature of relationships with private entities and 'free exchange' of information in return for goods or services of some kind, they are still in principle limited by liberal democratic restraints such as civil liberties, privacy, formal equality, how they obtain information, and what they do with it.

Limiting my definition to state surveillance removes the need for these sorts of discussions, and also removes the need to talk about other phenomena of surveillance such as Sousveillance (peer to peer surveillance, and citizen surveillance of institutions), the relationship between surveillance and publicity found in much social media, and so on. I want to understand why surveillance is so widespread in liberal democracies and why liberal and democratic values that ought to be protections against them seem insufficient. These phenomena compel other types of discussions which would get in the way of interrogating surveillance that requires public justification according to liberal democratic values.

Liberal democracy is defined by its values. However, it is also defined by the way in which those values are implemented – which is in principle rule-based and institutionally limited by procedural fairness. The importance of rules being fully

implemented, fair and equally applied, and a reliance on a technique of compliance that does not violate restraints on uses of political power – that is to say, a reliance on political power that is procedurally fair and non-arbitrary, or that is not simple coercion – grows out of this rule-based and procedural commitment of liberal democracies. For example, insofar as formal equality is equality under law and equality of treatment according to institutional rules, the institutions of the state need to know things about you and institutions in which equality is demanded, in order for formal equality to be put into practice.

"The Political' in my argument refers to two things, when I say we must look to the 'politics behind the rules' guiding surveillance into practice. The first sense is that surveillance is required to bring values into practice, and therefore liberal democratic values, are implicated in surveillance. This includes: that I can only practice liberty if I am protected in doing so, and equality can only be put into practice if the rules enforcing it are complied with, I only have citizenship rights if those not entitled to them are successfully excluded, democratic freedoms are only viable if they are successfully regulated so to not threaten democratic order.

The second sense it is political is that the rules that surveillance is enforcing are rules which resolve tensions between different liberal and democratic values, and between different interests represented by those values. What rules are put into practice to resolve these various tensions are not just political in the sense that they are laden with liberal and democratic values. They are also political in that political interests and power gain ascendancy over the interpretation of these values when there is a clash of interests. Less abstractly, the rules decide whose rights or interests are protected and at whose expense. As Raz points out in his writings, disputes about rights concerning their scope and weight are decided in the final instance through claims to other human

interest consequential of those rights (Raz, 1986). One argument that claims privacy is a good as a result of its consequential benefits is that privacy benefits knowledge because people need to be free to pursue any inquiry they choose without risk of censor. Such appeals to additional human interests, and the success of such appeals, is contingent on the political capacity to win those appeals at any given time. However, as we will come to see throughout the thesis, such appeals to other human interests are still contained within the language of liberal democratic values and interpreted through this language. This is in order to maintain legitimacy. As such, political contestation over the purpose of institutions and rules is projected onto and articulated through a political contestation over the meaning and weight of certain values. Classically, this would include, the 'balance between security and liberty', but is also includes contestation over conceptions of fairness in the welfare state and social rights, the meaning of human rights and to whom they should be applied, what citizenship means, who and who is not legitimacy 'protesting', and what defines a 'legitimate protestor' and what does not.

The integral role that surveillance plays in liberal democratic institutions grants it legitimacy that, if properly restrained in its designated institutional task, is difficult to object to on traditional liberal or democratic grounds. This moves the focus to whether or not the rules of liberal democratic institutions are justified. The contest over which rules ought to be created and which ought to be most stringently enforced by surveillance is a battle over the legitimacy of political practice; and in turn, legitimacy is a matter of power, politics, and the capacity to influence populations and institutions.

If bringing liberal democratic values into practice is implicated in surveillance, and, if the rules guiding how these values are brought into practice and how tensions between

them are reconciled are politically contested, recourse to liberal democratic values alone as protections against surveillance is flawed. This is the implication of my argument.

Seeking full compliance for a set of politically contested rules is not in itself unjustifiable, which is the role surveillance plays for institutions of the state. However, whoever in practice loses in a contest over interpreting such rules of the state does matter. This marks a route to the next important point, which regards over whom, precisely surveillance is practiced. The groups over whom surveillance is most intensively practiced, are those with the least political power to challenge the basis of surveillance's legitimacy. It is the case, as will be shown, that those who suffer the worst effects of surveillance are the politically weaker, and marginalized groups of society.[1]

That certain groups suffer more intensive surveillance than others can be understood through the political contest over what institutional rules are, and over whom they will be enforced. This has consequences for surveillance's legitimacy in two further ways. Firstly, the constituency for the justification of surveillance is often separate from the object of surveillance. For example, as I will discuss, surveillance of welfare claimants is justified to 'the public' not to welfare claimants. Secondly, surveillance dominates those subjects under surveillance insofar as it prevents them from being able to object to it in any meaningful way. It is not just that surveillance violates the privacy and liberty of these individuals, it is also that they are relatively powerless to

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[1] Marginalisation does not just happen on prejudicial or arbitrary grounds, but groups can be marginalized by excluding them from the status of a legitimate group with legitimate claims, as will be seen in chapter 6, *Dissent Under Surveillance.*

protest against that surveillance in any meaningful way because they are dominated by it. That they are politically weaker prior to surveillance being used allows the successful legitimation of surveillance over that group. However, it is the technique of surveillance that then dominates them, suppressing any objections recognisable to liberals, such as rights claims. Here, I will find surveillance to have a serious legitimation problem due to the way it coerces consent from subject populations.

I understand domination here in the sense outlined by republican thinkers. That is to say, being exposed to an arbitrary power with the capacity to interfere in your life, without having the capacity to prevent that or have any say over it means you are dominated. This leads to a range of troubling effects including self-censorship, anticipating what may bring censor, kowtowing, self-limiting options, being risk averse, fear, toadying, and undue deferential behaviours (Pettit, 1997, Skinner1998, 2008). However also, as will be discussed in detail at the end of this section when I discuss my approach, I rely on realist insights to highlight circumstances when authorities use their power to secure consent, and identify such instances as examples of illegitimate uses of power. I find surveillance to operate in this way; by coercing consent it de-legitimises legitimacy claims of those surveillance regimes.

Bauman et al. (2014) are right to observe and investigate the importance of public passivity in the face of mass surveillance, and Denick's proposition that we live in a time of *surveillance realism* (2016) seems to capture something important about contemporary surveillance. The reason for such passivity, and lack of apparent alternative ways of organising society – notwithstanding that technological advances have provided surveillance with more capacities and reach providing and monitoring data on a scale unknown in history – is in fact perhaps due to surveillance being integral to the implementation of liberal democratic values, which themselves are

integral to liberal democracy. Technological and communication advances of the 'new surveillance' age mean surveillance is more widespread and prominent in liberal democracies, and has capacities undreamed of by previous states; however surveillance is not fulfilling any new political role, nor does it have any new political justifications, or contrary value system.

As a technique for influencing populations, surveillance suppresses dissent from those groups over which it is used. This is dominating insofar as it coerces consent from them for the rules that are being enforced. This explains surveillance's widespread nature in liberal democracies; surveillance appears to be legitimate because it grows out of liberal democratic practices, and when it is not, individuals cannot object to it in any meaningful way because of the effects of surveillance over them. This is the argument I wish to demonstrate in this thesis.

Supplementary arguments throughout the thesis will discuss the importance of legitimation, different types of political legitimation (discussed at length in chapter 2) and strategies of de-legitimation used on subject populations who are surveilled. For example, authorities can be seen to garner consent for surveillance from those largely unaffected by surveillance, whilst suppressing objections from those who are, through strategies of legitimation and de-legitimation. Whether it be discursively constructed moral problems that surveillance will solve, as with welfare claimants (Chapter 3), criminalising in the case of 'illegitimate non-citizens' (Chapter 4), or de-politicising a group's aims, as with protest movements (Chapter 5), legitimation strategies for surveillance are political insofar as they aim to secure political judgments from the public regarding the problematic nature of the subject population that are to be targeted.

It is also the case that for surveillance to be legitimate it must be justified with reference to society's beliefs (Beetham, 2013). Democratically, surveillance must be publicly justified; liberally, with reference to individual rights. This places the contest over the justifiability of surveillance on interpretation of those beliefs. Strategies of justification by governments and authorities using surveillance fight over how those beliefs and values should therefore be interpreted. That values like liberty, rights and privacy are not neutral, but have political content in this way, provides a further basis for understanding why they are not independent protections against surveillance.

Additionally, the institutional settlements I discuss will emphasise the importance of recognising, as Chantal Mouffe does in describing the "liberal democratic paradox" (2005), that liberalism and democracy are two separate traditions in one state. In certain instances, the values of the two traditions are conflictual and need reconciling. For example, it is legitimate to limit popular sovereignty in the name of individual liberty, or, social equality can be legitimately restrained by individual property rights. On this account, rights, equality and liberties are not only brought into practice through institutional rules, as described above – the limits of which are enforced by surveillance – but institutional rules act to reconcile the incompatibility or tension between contrasting values of liberalism and democracy. The interpretation of these values, and therefore what rules are instituted to govern the tension between them, are politically contestable and unsettled. Democratic freedoms, in the form of protest and popular sovereignty, are limited by personal rights to liberty and property, which accrue to 'the liberal individual'. In another example, citizenship based on an exclusionary notion of 'the people', and what they are entitled to in the modern state, is in tension with a universalist conception of liberal rights, or human rights, the topic of chapter 4.

In another supplementary, but foundational, argument I will propose that institutions in liberal democracies do not just instrumentally implement values, nor just apply them partially; I shall also argue that the concepts on which the principles of liberal democracy rely are 'co-made' by institutional settlements. This includes the co-making of citizenship at the border through surveillance regimes. If, as I have just said, citizenship is based on an exclusionary notion of the people, this is institutionally put into practice through data regimes which 'codify citizenship' into documents, such as the passport (Torpey, 2000). Social rights and liberty for the welfare claimant in the UK are worked into practical conceptions within the Department for Work and Pensions (DWP); their deciding upon what citizens are entitled to is exposed to political contestation. Political freedoms and right to protest are designed and discursively brought into practice by both policing, and policing justifications regarding how protests are monitored and controlled. What the 'right to protest' means in practice is co-made by both democratic institutions and the police. The interplay of institutional rules, surveillance, and politics *creates* the concepts that surveillance allegedly harms as they are put into practice. This is not in the sense that governmentality scholars would argue, that liberal freedoms are themselves allowed to maximise circulation which is part of maximizing good governing. Instead, I propose more that the concepts that liberal democratic values and freedoms rely on are historically determined, context specific, and are 'worked up' (Galston, 2010, p.393) into practice through institutional settlements and political reconciliation.

Additionally, I will further argue that surveillance's increasing capacity to secure compliance further increases what we could call the 'art of the possible' in political rule-making. Surveillance not only enforces compliance with rules, but its existence influences which rules are made in the first place. This has an echo back effect into the decision-making of institutions which are co-making values in practice by putting

surveillance and the possibilities offered by it, into the heart of both how liberal democratic values exist in society, and what they mean for society.

Whereas other more normative approaches rightly and expertly identify instances of offence wrought by surveillance, this thesis looks specifically at the spread of surveillance in liberal democracies at the expense of those values that supposedly ought to protect us against such things as over-bearing surveillance.   What I will not be doing is having a close engagement with other prominent approaches from perspectives of privacy and liberty, except for one discussion at the end of chapter 3 where I make my case for understanding surveillance-as-power. While these concepts will form part of my argument, and, while I will be debating them through that, I will not be taking space to disprove or dispute these approaches directly. Beyond that, a growing literature on surveillance by private companies, which is of great concern, such as Google's influence on political debate, and the power of 'Big Data', but this too is beyond the scope of this thesis, if not the analysis offered. What I will do instead is focus on the political inevitability of surveillance as it relates to liberal and democratic values, and the institutionalisation of those values. I am discussing state surveillance.

Surveillance studies and governmentality studies address the problems I seek to discuss more vigorously than value led or moral political theory, and so it is with these former two fields that I will engage with in more detail in the chapters. However, the gap I find in these approaches, as stated, is a lack of 'politics', and as such a lack of accuracy in explanations regarding how and in what circumstances surveillance spreads through political considerations. As such, I feel, they offer little that can be worked with in the way of resistance to surveillance. Certainly, description and analysis rather than praxis is often deliberately the intention, and not

any flaw in these approaches. In my approach, by implicating liberal democratic values in surveillance, using surveillance studies and governmentality to chart the systemic developments in surveillance, and then bringing this development back to matters of legitimacy and politics, I aim to provide a framework that can be used to think about surveillance broadly, and then through that to oppose it. In pursuit of this aim I hope to offer a framework that approaches surveillance from a position regarding its legitimation and power, to aid political resistance against that, rather than to try and keep up with describing and critiquing technologies and systems of surveillance as they develop at breakneck speed.

This thesis adds to the field a unique use of realism from political theory, which will be discussed in detail below. The application of realism entails looking directly at the technique of compliance for rules of institutional settlements. Richard Bellamy has said philosophers tend to concentrate too much on decisions and not the importance of the procedures through which decisions are made (2007); I believe they also do not spend enough time thinking about the techniques that implement and secure compliance with political rules, and the effect this has on the decisions themselves. In this I aim to offer another original contribution to the political theory literature, and to surveillance studies through political theory. I am also not aware of any approach to surveillance studies which uses realism as a lens through which to analyse the politics of surveillance. Taking studies regarding values and institutional rules from political philosophy and applying their findings directly to widespread surveillance practices has, I believe, not been done. I will also uniquely apply republican conceptions of domination to a framework of realism to argue for an understanding of a form of political domination resulting from surveillance. If surveillance has effects on individuals (observed by republicans), such as fear and self-censorship, which reduces the capacity of individuals to meaningfully object to that surveillance, then the

authority deploying surveillance is using its power to coerce consent for its legitimacy. This is illegitimate in a realist sense, and, as far as I know, has not been applied or discussed in this way within realism, or indeed surveillance studies broadly. This, I hope, will offer a new and unique language for critique of surveillance, finding its widespread nature to be illegitimate both if people cannot freely assent to it, as well as because of the dominating effects of surveillance I identify I will find they cannot. I also uniquely implicate values that seek to oppose surveillance or limit its harmful use in the spread of surveillance itself. Foucault and governmentality studies have the same critical take on liberal governing and uses of rights and liberal freedom; however, I am unaware of any studies which conjoin 'the political' from political philosophy as I use it, and 'governing' as Foucault sees it. I will rely on insights from governmentality to understand what surveillance does to subjects under it, but will then look to 'the political' to understand why.

iv) Structure

I will structure this thesis in the following way. Firstly, for the rest of this chapter, I will justify my approach in detail, and in doing so theoretically set out my position for understanding surveillance. I will draw on a 'realist' approach to political theory which foregrounds institutions, power and the presence of ineradicable political conflict in society. I will discuss how these aspects of political life are essential to understanding the role liberal democratic institutions, rules, and surveillance have in bringing liberal democratic values into practice, and mediating between conflicting interests.

The aim of chapter 1 is to assess the weaknesses of more liberal approaches to the problem of the spread of surveillance. In the first section, 'What about Privacy?' I

will review common explanations around the voluminous spread of surveillance at the expense of privacy. In the next section of this chapter, *'Surveillance Creep'* I will claim we can characterise the common 'liberal' approaches to surveillance as being primarily concerned with surveillance spreading when it is insufficiently constrained. Here I will distinguish between prejudicial harms of surveillance in the subsection *Equality, Prejudice and Bias in Surveillance*, and surveillance which is harmful because it is insufficiently limited, in the subsection *The Mistake*, focusing here on a prominent privacy theorist's concern with the power of mass surveillance being reductive to concern with the possibility of it getting things wrong. I argue that focusing on limiting and controlling surveillance in the way commonly articulated is flawed. Many assume parity of surveillance application amongst the population, with exceptions, and while they argue for texture to be brought back into considerations of bureaucratic surveillance and mistakes, they have a specific viewpoint which removes material inequalities and domination from surveillance. The flaw I see in these approaches is that, explicitly or implicitly, they maintain that when surveillance is properly limited and restrained, that is to say, legitimate, then there is nothing to worry about.

Chapter 2, *Surveillance in Liberal Democracy; 'Legitimate' and Dominating,* will transcend these approaches, and discuss both the legitimacy of surveillance and how it is dominating. Across three sections, the first of which – *Legitimising surveillance* – will argue in detail for a view point of descriptive legitimacy being the right lens to understand why people believe what they believe about surveillance today. This position will argue that it is not necessary to show that surveillance is *right* (although it may be), for it to be legitimate, but only that people believe in its legitimacy. Here I will argue that it matters what people believe about values in society, and ways that these beliefs can be targeted politically to garner consent for surveillance practices.

However, normative legitimacy, which wants to ask how surveillance is objectively '*right*', plays an important role in strategies that aim to influence whether people *believe* surveillance is legitimate for society-specific reasons. Finally, consent provides surveillance with legitimacy, and I will find that the way consent is coerced from those who are dominated by surveillance, gives grounds to challenge the legitimacy of surveillance, which I will expand upon in section 3. First, in section 2, *Surveillance at the Foundations of Liberal Democracy,* I will justify my claim that surveillance is inextricably linked with liberal democracy by honing in on the source of surveillance and its origins within liberal and democratic historical foundations. This will show how surveillance 'reaches in' to society in order to implement liberal democratic values, showing its legitimation was 'historically actualised' in the role it has played in liberal democratic institutions from their inception. Surveillance is produced as a result of political settlements between liberalism and democracy, rather than concepts of modernity, like the bureaucratisation of modern states.

In the third and final section of chapter 2, I will argue that surveillance is a form of domination in two related ways. Firstly, it is dominating from a republican perspective. An individual is dominated from a republican standpoint insofar as an arbitrary capacity exists to interfere in their free choices and life. The presence of surveillance as an arbitrary capacity to interfere in one's life, and lacking the capacity to do anything about that, has tangible effects on one's free choices. This is related to the next sense: I will claim from a realist perspective, following Bernard Williams (2005), that surveillance is dominating insofar as it uses its power to secure consent for its use over subjects. It in effect coerces consent out of those under it, because of the dominating effects I find by drawing on republican theories of domination. In other words, the insights of the implications of arbitrary power brought to us by republicans – that it makes individuals self-censor, live in fear, be uncertain about

rules and sanctions, toady, keep one's head down, and so on – have implications for giving free assent. If the conditions of consent-giving are such that people give it in a state of uncertainty, self-censorship and fear, then we cannot consider that as free in practice or principle – an important component of liberal legitimacy. As such I will argue that in these conditions individuals under surveillance are politically dominated.

From here I will have justified surveillance as being linked to the implementation of liberal democratic values in society, and to its spread throughout society by the ways in which it is uniquely legitimated and dominating. I will extend these arguments in three substantive chapters, 3, 4, and 5, where the interplay between liberal and democratic forces and institutionalised conflicts will be explored. The rights of the taxpayer versus the rights of privacy of welfare claimants are studied in chapter 3 *Welfare Surveillance; A Poor Man's Politics*. In Chapter 4, *Surveillance, the Border and Liberal Democratic Citizenship*, a political decision is made between universal human rights versus exclusionary democratic citizenship at the border. The democratic right to protest versus the liberal democratic *order,* is discussed in chapter 5 *Dissent under Surveillance.*

In chapter 3, on surveillance in the welfare state, I discuss the contest over legitimacy as a matter of social rights, and the rights and economic interest of the public at large, being held in tension. The welfare state, I will argue, is a site of political contestation over rights, social rights, and privacy. Here I find alternative positions of legitimacy from welfare claimants themselves under surveillance, but ones which are dominated and unheard because of the surveillance regimes they are under.

In chapter 4, I argue that 'the border' in a liberal democracy is defined by a political moment of exclusion above everything else. Here, it is the exclusionary notion of the

demos – citizenship – overriding the inclusive and universal liberalism of human rights. This provides some tensions however for the state insofar as access and exclusion is not absolute and is tempered by a more universalist liberal tendency. I will discuss different striations of citizenship and acceptance focusing on what I will define as 'illegitimate non-citizen'. The treatment of such groups is defined by surveillance. I argue the stronger the desire for more exclusionary notions of citizenship are, the more surveillance to resolve these tensions is required, over both citizens and non-citizens alike.

In discussing protest and surveillance in chapter 5 I explore and analyse the inherent tension between versions of democratic institutional settlements and individual rights. Democratic protest is both an instance of and a threat to democracy. It is a democratic 'good' and so must be realised, but is unruly and a threat to democratic 'order', and so must be controlled. The right to protest as a democratic value is thus brought into practice and actualised as a monitored and controlled value. Because legitimate protest is *ipso facto* legitimate, the state must de-legitimise protest before subjecting it to what I will characterise as 'incapacitating' surveillance. Surveillance that incapacitates a group's right to protest, is surveillance that prevents the free 'enjoyment' of that right, short of violating it. I will show the ways in which such incapacitation and de-legitimisation amounts to domination. When surveillance does violate rights to protest, those having their rights violated are often characterised by authorities as being outside of those ordinary protections, and in some cases criminal. Making groups illegitimate prior to such surveillance in this manner clears away rights-based and civil liberties-based objections *because* the group being targeted is de-politicised and characterised as illegitimate.

The structure of each of these chapters, or the sequence of argumentation, will be

roughly the same. I will firstly characterise both the institutional context and the role surveillance plays in resolving an institutional tension of liberal democracy. Next I will show how, in each case, the use of surveillance is justified and legitimated, which explains its widespread use in each instance. Following that I will discuss how the use of surveillance is harmful and dominating in some way. Each case I discuss is textured individually insofar as they each highlight unique characteristics of domination, and unique effects of that domination. They also show how different liberal democratic settlements play out in a variety of ways that produce surveillance. However, each are united by the way in which the target population is politically dominated in some way. This, I argue, de-legitimises surveillance use in each instance.

But no matter, because illegitimacy claims are politically contingent on the power to do something about them. I will, without the room to detail in what manner, suggest politically organising to resist domination by surveillance, rather than claim rights against the state as a 'rights-bearing' citizen, from a politically weak position. However, the disruptive aspect of democracy, that which destabilises a consensus through organizing and protesting, is itself susceptible to be de-legitimised and kept in order by surveillance, as my final chapter shows. I conclude pessimistically about the current state of resisting surveillance. However, what will implicitly be understood is that once the political power to make successful rights claims against surveillance is secured, such claims against surveillance become less necessary as political power defends against an overbearing state anyway. This leads us to a tautology of a kind, but one which is more desirable than the status quo.

In this way, a broader approach is both political and societal. Organising for more equality amongst those most susceptible to surveillance would reduce the compulsion

for categorisation and monitoring characterised by liberal democratic institutions. So long as tensions formed by unequal societies exist in liberal democratic institutions, they will be resolved through surveillance practices. Lessening those tensions through increasing equality should reduce the necessity for surveillance being needed by institutions overseeing societal tensions and overseeing the implementation of liberal democratic values.

2. My Approach: Realism, Rules, Politics and Surveillance

My approach will be to draw on what is loosely termed 'realism' in political philosophy. This will make my thesis useful from two perspectives. If it is realism that is of interest then this thesis will be helpful in regards to working through some more radical uses of realism, using surveillance as a window into some of the tensions and legitimation issues of liberal democratic rules and institutions. Yet, with surveillance seemingly spreading unchecked throughout liberal democracies, by using realism to understand this phenomenon, I aim to provide a language of critique and political opposition towards it. Surveillance spreads seemingly at will and with speed beyond the powers that inquiry has to keep up with each developing technology. As Haggerty and Ericson say, in their seminal essay *Surveillant Assemblages*:

> In the face of multiple connections across myriad technologies and practices, struggles against particular manifestations of surveillance, as important as they might be, are akin to efforts to keep the ocean's tide back with a broom – a frantic focus on a particular unpalatable technology or practice while the general tide of surveillance washes over us all (2000, p.609).

Viewing surveillance in the way I will outline will hopefully provide a framework to

understand both surveillance and the general tide of its continued spread as a matter of politics. Through this I hope to articulate a language through which it can be opposed.

I will chart a line through liberal democratic sources of legitimation which justify dominating surveillance, and ask how this can be the case in a liberal democracy. By showing the contradictions apparent when liberal democratic values are brought into practice in a way that produces surveillance which is dominating, I will aim to question the basis of liberal democratic legitimacy. However, I will also show why it is that, in a liberal democracy, surveillance which is harmful can be legitimate.

This thesis intends to be a proper political philosophy thesis in the sense outlined by Bernard Williams in "In the Beginning was the Deed" (2005), who maintains that political philosophy is neither applied moral philosophy nor a branch of legal philosophy. Rather, for him, "political philosophy must use distinctively political concepts, such as power, and its normative relative, legitimation" (Williams, 2005, p.77). I do not have the space or I believe the necessity to engage in the debates currently ongoing trying to define what realism actually is, argue for its internal coherence, or if indeed it ought to be considered as a separate field of study at all (Galston 2010, 2016, North, 2014 Sleat, 2010) or whether it collapses back into a moral 'ethics first' political theory when staking positions out on the legitimacy of an authority's power (Eerman & Moller 2015). It is an ongoing debate whether a right to rule means simply the might to rule, or, by contrast, whether there are distinctly normative (and moral) legitimation requirements from realists that authorities must have to claim legitimacy (Jubb & Rossi 2015). I will position myself within this debate, but without ongoing reference to those debates that would stand in the way of my analysis. For my studies and this thesis, I intend to use realist insights as a matter of emphasis on institutions, rules and power, and how these are legitimated for

understanding surveillance.

Realists aim to foreground institutions and power, highlight the essentially ineradicable nature of political conflict, the supremacy of order over justice in political practice, and do not seek to hypothesise ideal theory because they generally hold to an 'anti-utopian' view that full compliance with rules of justice taken from 'ideal theory' is ever possible or even desirable.   Instead, taking a view of legitimacy and desirable political settlements as they are perceived and understood to exist in practice, realists tend to set their sights lower and with more caution.

There are objections to framing moral political philosophy as 'ideal theory' in this way, and opposition to it as being 'anti-utopian'; but regardless of those debates, this proclaimed focus for realists has led to accusations of an inherent conservatism in their writings. This would include an in-built caution that analyses of legitimacy should be taken from a standpoint of how things are "now and around here" (Williams, 2005, p.8), rather than how they could be or ought to be.   Many realists seem compelled to view the status quo as imperfect but better than a utopian drive to a more just society (Philp, 2010; Shklar, 1989; Williams 2005); since that drive, in the view of many realists, could rapidly lead to a regressive turn. On this basis many, albeit not all (Guess, 2005; Finlayson, 2015), would rather direct their attention to work around minor institutional or procedural reform. In doing so, some have been accused, rightly in my view, of harbouring a view that rather than simply foregrounding power in analysis, seems to privilege power instead (Finlayson, 2015). When asking us to take heed of the inherently human dimension of politics, and of the irreducible presence of power and conflict, realism has a tendency to accurately point to the mismatch between what liberalism says it is, and what it really is in practice, and in light of this to say 'but this is ok'. Seeing power trumping values, for many

realists, is just a more accurate assessment of what politics is in practice. I aim to use the same analysis of a contradiction between liberalism's justifications and its implications in practice, but instead say 'it's not ok', and then explain why that is. In doing so I hope to radicalise the observations and emphasis of realists for use as a critique against the legitimacy of surveillance.

Observing that surveillance "now and around here" (Williams, 2005, p.8) is an incredibly widespread phenomenon, I aim to use insights of political conflict, power, and institutions to understand why it is legitimate. Not to then support and accept that status quo, but rather to discuss problems with its legitimation process, and to develop a language of opposition to it from within the conceptions of legitimacy that are deployed in practice to justify it. To do that I will depart from some realists in deploying a normative criticism (although not a moral one) (Jubb & Rossi, 2015) of what I find wrong with surveillance; this being that it is dominating in certain ways. However, that it is dominating (in a republican sense) presents political problem for realists, insofar as consent-giving for the political authority conductng surveillance is coerced from the consent-givers. This undermines the legitimacy of surveillance from a realist view point as well as offering a contradictory and troubling problem for liberal and normative legitimacy - coercing consent from people cannot, in practice, be legitimate in a liberal democracy. However I will show that this is precisely the effect surveillance has in certain instances. I will then suggest, back in line with realism (but not conservative realists), that one does not very well get any grip on political practice by pointing out its normative problems alone. Instead, a more combative approach to addressing the normative problems identified will be suggested, which is a political approach hinging on organising for power and resistance to surveillance from those most harmed by it, while recognising the nature of 'the political' as being irreducibly conflictual.

Williams calls for a 'bottom-up' as distinct from 'top-down' (2005) view of politics. In this bottom-up approach political conflict is seen as inevitable and perennial, in contrast to political moralists who are seen as being dangerously optimistic about the possibility of achieving a full practical consensus (Galston, 2010). Williams says, "the idea of the political is to an important degree focused in the idea of political disagreement...[and] political difference is of the essence of politics" (2005). Chantal Mouffe also makes conflict foundational to her propositional politics of 'agonism'. She says, "[B]y 'the political' I mean the dimension of antagonism which I take to be constitutive of human societies, while by 'politics' I mean the set of practices and institutions through which an order is created, organising human coexistence in the context of conflictuality provided by the political" (2005, p.9). Meanwhile Williams comments that "the idea of the political is to an important degree focused in the idea of political disagreement [and] political difference is of the essence of politics" (2005). For Mouffe politics orders the political- dispute and reconciliation form the basis of liberal democratic institutions - for Williams, disagreement not full compliance makes politics what it is.

Through conflict, realists tell us, values are 'worked up' into practical political conceptions in institutions (Galston, 2010, p.393). Institutions are the sites of reconciliation of conflicts emerging from the 'bottom up'. Others, such as Richard Bellamy, approach political philosophy from a position that could be described as a kind of 'decisionism' (Philp, 2010) or 'proceduralism'. Vital actors, such as politicians, are viewed as individuals with personal histories acting in complex and conflicting circumstances, balancing and being forced by various power interests within an imperfect society. Within that reality, institutional mechanisms and protocols of politics, limited by procedural rules, guide such actors in the decisions

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they make. Bellamy emphasises that they do not step out of those institutions, towards decision-making procedures to make objectively moral choices, and should not be judged as such.

"Political philosophers" Bellamy says "have given too much attention to what seem to them desirable frameworks or outcomes, too little to the procedures whereby decisions are made and the dispositions of those making them" (Bellamy, 2007, p.24). If such political interests, histories, desires, and conditions do interject into an authority's decision-making within the context of decision-making procedures however, this also must exist far and wide across society. This is so across the state, the police and in communities, within political groups and in employment, amongst staff of institutions, in the daily life of individuals under political institutions and susceptible to their power.   People under surveillance, as well as actors conducting surveillance within institutions, or making decisions that will be enforced by surveillance, experientially produce objections to their own experience which may not achieve the normative approval of political philosophy, but which may nonetheless still be valid.

Paradoxically, such experientially-based objections from those under surveillance, and resistance to it on that basis, may lead to a perceived necessity by law makers for technologies that can achieve full compliance, and so result in more surveillance. If resistance to rules and laws is to be assumed, then there must be some way of securing compliance. This interplay will be explored as an explanatory framework for surveillance later on in chapter 3, which, as was noted above, is on welfare surveillance.

This interpretation about politics being worked up into institutions demands us to

view politics as not just being contained within already existing institutions or organisations of the state – ranging from political parties, the judiciary, parliament and so on – but instead understanding the political as being inherent to disagreement about the state, from the street to the parliament. Politics, on my view, thus exists on both an individual level and in encounters with state institutions, from welfare claimants to immigrants to protestors. Importantly, however, for this relationship to remain political the subject must have the capacity to challenge and resist their condition resulting from the rules of the institutions being enforced on them. If they cannot challenge such rules, and if they cannot or do not consent to them, then the danger is that institutions of the state have vacated the terrain of the political. If this is the case, the problem that the first question of politics seeks to answer (Williams, 2005) – which is terror, civil disorder, violence - through political order, re-emerges as domination. While often not disputing direct political opponents when it comes to surveillance, it will be strikingly apparent the way in which the state and government de-politicise opposition in order to be able to de-legitimise or suppress any objections under surveillance regimes. Moving objections out of the realm of the political – whether that be for a welfare claimant, and illegal immigrant or a protest movement – and instead criminalising or simply de-politicising those groups, engineers the terrain for surveillance and policing to take the place of politics. In doing so the legitimacy of what I will find to be domination can be publicly maintained and defended.

Disputing surveillance in this way, what I intend to offer is not pure intellectual inquiry through which "rival elaborations of a moral text" (Williams, 2005, p.77) are under dispute, which Williams believes is explicit or implicit with most political moralists. I agree with Williams that the nature of political opposition between opponents is not necessarily reducible to moral disputes, and that conflictual political thought cannot simply be understood in terms of intellectual error (2005, p.77). Our

sentiments, our interests, our physical and cultural particularity, our experiential, and our material existence are all at stake (2005).

Alternative radical views within realism, such as those from Mouffe, seek to shake the adversarial aspects of politics even more vigorously, and bring conflict to the fore 'agonistically' (2005). Mouffe sees hope in accepting the essentially contestable terrain of politics, and in turning the 'friend/enemy' distinction into a radical democratic project. My task is not programmatic in this way. However, Mouffe's observations do help to explain that those under surveillance, or objecting to surveillance unsuccessfully, are not necessarily wrong, but instead, are losing. As such, political resistances or micro-resistances are a useful terrain of action to analyse and study as dissent to surveillance, not captured by ordinary liberal views of the rights-bearing citizen. My analysis of protest and surveillance in chapter 5 will also make clear ways in which 'the political' in practice is not contained neatly inside already existing institutions of the state.

Looking at surveillance guides us towards considering which rules it is that surveillance is enforcing. Looking at conflicts of interests and values that are reconciled through these institutional rules leads to a new understanding of its use and its spread, as well as ways to challenge that through a language of legitimacy. Bringing out experiential objections 'from the street' to those institutional regimes of surveillance shows how liberty and privacy are not separate and contained fields of values that surveillance comes in externally to harm. Instead, they are tied up in, and worked into practice, from inside institutions that effect different people in different ways. As Edward Hall concludes there is not "a domain of values alongside a separate domain of politics, where the non-ideal principles, or rules-of-regulation, that we adopt endeavor to be the best application of our ideal theory" (2015, p.15).

Instead, institutions are the political arena "within which abstract concepts of principles and aims (rights, the general welfare) are worked up into concrete conceptions" (Galston, 2010, p.393). The value of liberty is not separate from the conflict that produces the need to make choices about liberty in practice. In some instances, we can go as far as to say they are *co-made* by institutions. The authority making decisions regarding the privacy of a welfare claimant, for example, cannot be disentangled from that authority's role in creating conditions for that choice having to be made. A decision that the punctuality of welfare claimants needs to be improved is made by the same institution that decides upon the method by which this will be done, including monitoring and surveillance. Questions of coercion and privacy, surveillance and liberty, are worked up into tangible and regulated concepts by the Department of Work and Pensions (DWP) in its reforming process of the welfare state.

As Beetham states in his influential book on legitimacy, in a similar vein to Hall, above, it is not at all the case that legitimation of an action happens in one place, and the power that creates that legitimation is hanging in another unrelated field of politics (Beetham, 2013, Chapters 2 and 3). Rather, both power and legitimacy are created together. To challenge the conditions of privacy for welfare claimants for example is not only to challenge the observable offence, but also to challenge the institutional power in which the concept of privacy for a welfare claimants is created as well as violated. What rights a welfare claimant has, and through which protocols and rules these rights and protections are practiced, are 'co-made' by the DWP as they create conditions for violating those protections in pursuit of other institutional aims. Rights skeptics, such as Raymond Guess (2005), make similar observations about human rights. The state is both the protector and the violator of human rights, and so a

strange tautology exists around the need for human rights in the first place, and who it is that should be responsible for protecting them. I will discuss this in more detail in Chapter 5, which is on citizenship and the border.

The conditions for liberty and surveillance in practice are also inextricably linked with the existence of surveillance as an option with the capacity to enforce decisions. Surveillance has a contingent effect on the type of decisions that are made, because the presence of surveillance at an authority's command means surveillance becomes infused into the decision-making process itself. This relates to one of my secondary arguments, mentioned above. If an authority can implement some policy because it knows it has the technological means to enforce it through surveillance technology, then this itself works into the institutional decision regarding what it is that is to be done. If, as is held by a realist 'anti-utopianism', "principles cannot serve as standards for political life unless their implementation is feasible in the world as we know it" (Galston, cited in Young, 2016, p.120), and, what is feasibly possible in practice ought to be the consideration of political philosophy, then surveillance technologies make certain decisions possible. This creates the possibility of enforcing principles ('co-made' in institutions) more likely through surveillance capabilities. If surveillance is a technique for securing compliance with given institutional rules, then principles which are constitutive on the necessity for compliance, which liberal democratic institutions invariably are, are co-made by surveillance as an institutional technique. In other words, values such as formal equality, liberty, and citizenship cannot exist in practice unless they are regulated and enforced. This makes the technique of surveillance not only a technique of power for enforcing already decided upon principles, but a proper consideration of political philosophy in itself. Similar to Bellamy's claim earlier: if political philosophers are largely uninterested in the procedures within which decisions are made, they are likewise uninterested in the

techniques with which compliance is secured for decisions as a result of those procedures. It is in this sense that surveillance and liberal democratic values are 'actualised' together, and understanding this is another addition I hope my thesis contributes to the field of political theory.

Elkin argues that '[W]e do not best grasp the nub of partial compliance theory by focusing on ideal theory. Rather, we can best understand partial compliance when we understand just why there can only be partial compliance, and what we need to do to achieve even this modest state of affairs" (2006, p.255).   Current surveillance technology is beginning to severely undermine this statement in many policy areas. The more full compliance is achievable, through surveillance, the less of an issue partial compliance becomes. Partial compliance for institutional rules implementing policy can only be partial insofar as surveillance does not have the capacity to enforce compliance. The necessity of surveillance inherently assumes part compliance of course, because surveillance would not be needed if full compliance existed. It is a technique designed to achieve full compliance, not a modest state of affairs, through monitoring populations in order to influence them (Lyon, 2010). Articulated another way, by Galston: "non-consent and therefore coercion or the threat of coercion enter not only into enforcement of decisions against the non-compliant, but also into the decisions themselves" (2010, p.397). As stated above, surveillance as a technique that can increasingly achieve full compliance for authorities enters into both decision-making, and into what it is possible to make a decision about in the first place. The technique of surveillance extends the field of what rules are possible.

The assumption of non-compliance that is built into the technique of surveillance has a bounce-back effect for decision-making. If one believes compliance will not be forthcoming, and yet, a legitimate technology exists that can be deployed by that actor

to secure compliance, decisions that could not be made prior to a surveillance technology existing now can be made (or are brought to mind in the first place). It influences whether or not a political actor takes that decision or not, and what it is they are deciding upon. The technology of the possible, through surveillance, influences politics and political direction. What 'can' happen begins to influence what 'ought' to happen.

According to realists we shouldn't, as mentioned above, view those not complying as necessarily wrong. Instead, they have potentially acceptable political grievances, meaning that they ought to perhaps be viewed as political opponents who have either lost or are currently losing. This is implied in Mouffe (2005), and made explicit by Williams insofar as political victory "does not in itself announce that the other party was morally wrong or, indeed, wrong at all. What it immediately announces is that they have lost" (Williams, 2005, p.13). While many realists look inside institutions and amongst political actors within these institutions for this opposition, it is also the case political actors can be found on the streets, amongst individuals over whom compliance is enforced. If these grievances 'from the street', such as those that will be found with welfare claimants, protestors, and non-citizens in the body of the thesis are justifiable and should be taken politically seriously, then surveillance which suppresses non-consent has a dominating effect on democratic politics by suppressing these grievances and objections.

If politics is not about rival elaborations of a moral text, and is instead a contest for power as Mouffe states, contained even in normal politics (2005), then surveillance adds a compliance option to this power contest, and a practical capacity to enforce political victory over legitimate objections. In this, it can be dominating. In addition, if those objecting are not necessarily wrong, yet technologies of full compliance over

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them are practiced, there seems to be a problem. This problem comes when objections to surveillance practices are suppressed by the surveillance itself. If the consequences for the objector are too high, and the target population is successfully influenced or manipulated by surveillance, then freely objecting to the surveillance or withdrawing consent for it is removed as an option. In these circumstances, legitimate grievances 'from below' are silenced, and, politics for those under surveillance becomes a terrain of domination, not a contest between differing conceptions of what is the correct way to organise society's affairs or institutions. This is a conclusion I will reach in chapters 3-5 when I study welfare, citizenship, and protest.

Many realists take an interest in order as a supreme value. Achieving order without resorting to domination however is of paramount concern. Indeed, Bernard Williams, widely considered the 'father' of realism, provides the reference point for all of this type of political thinking through his Basic Legitimation Demand (BLD). Williams states that;

If the power of one lot of people over another is to represent a solution to the first political question, and not itself be part of the problem, something has to be said to explain ... what the difference is between the solution and the problem, and that cannot simply be an account of successful domination. It has to be a mode of justifying explanation or legitimation (Williams, 2005, p. 5)

Without order - the first political question, there cannot be such a thing as politics because the terrain of contest that would characterise society would instead be one of civil disorder, terror, domination, and naked power, rather than politics. However, answering the first political question cannot be conducted in a way that repeats the problems of what it is seeking to solve. That is to say, securing order through the

proliferation of violence, terror, intimidation, coercion and domination would again not be the realm of politics.

Furthermore, Williams's Critical Theory Principle (CTP) states that authorities claiming legitimacy must not use its power to gain support for the legitimating account offered, on which its legitimacy claims are based. If the legitimating account offered is accepted by the subordinate group as a result of the power of the authority, and not because of the strength of the legitimating story, that is not sufficient. This removes things like coerced consent from the realm of legitimating consent. As I will come to argue, the legitimacy of surveillance is founded on, and secured through, the acceptance from the public for the justifications given for surveillance. Appeals to claims around surveillance's subjective legitimacy in the public's mind – the public accept surveillance practices – are importantly undermined because the constituency for the justification of surveillance is separate from the subject of surveillance. Surveillance of welfare claimants is justified to those not on welfare – 'the taxpayer' – surveillance of protest movements is justified to those whose rights are being protected against that protest: 'the public'. Surveillance of non-citizens is justified to citizens. Even though these groups are not in practice always completely separate (some welfare claimants are also taxpayers for example) the discursive strategies of justification for surveillance in many ways mimic the practice of surveillance insofar as they categorise and separate populations up for different treatment. When it comes to those harmed by surveillance such a legitimation is not possible insofar as surveillance coerces consent from them. Opportunities to object, resist, or freely grant or withdraw assent for those dominated by surveillance is suppressed – the target population cannot agree or object in any meaningful way.

Stability and consensus that is brought about through material inequality and power

imbalances so disproportionate that one side cannot do anything but comply, both demands and often creates political conflict. The recognition that disruption and stabilisation are a permanent duality of proper political life shows the practical dangers to democracy in seeking a system of full compliance through surveillance of what may be political tensions. The discursive strategies of justification discussed in the substantive chapters 3, 4, and 5 will show ways that surveillance is justified by de-politicising opponents to it, or target populations of it. The way surveillance in particular suppresses disruptive politics, and its increasing capacity to do so, will be explored in chapter 5 on protest and dissent.

This legitimation related to the rules of liberal democratic settlements explains how surveillance spreads widely in a way that apparently harms liberal democratic values. But it also exposes ways in which surveillance's effects undermine its own legitimacy. It seems unjustifiable in the terms of the political set out to seek full compliance for institutional rules that are politically contestable. Full compliance (or the attempt at it) in a reality of ubiquitous political disagreement suppresses the political. It suppresses individuals who lose as de-politicised 'non-compliers', not political opponents or citizens with potentially legitimate grievances.

This can amount to domination if we can understand domination in two ways. Firstly, it can be understood in the republican sense whereby power imbalances between two parties (in this case state institutions deploying surveillance, and individuals) leads to the subject not having the capacity to be free at any given time. This means at any given moment they may not be being interfered with directly, but because of the potential for interference, and the lack of capacity to do anything about that potential

interference, they are unfree. This will be elaborated on and discussed further in chapter 2. The important point is that they have no say over whether or not interference will occur, or indeed if is justified.

Secondly, and relatedly, they are dominated in the political sense in that surveillance that is dominating in the first sense suppresses the possibility to express their political grievances against it. The ability to, and the costs of, objecting, disobeying, and resisting a surveillance system that carries harsh (or unknown) sanctions is too great to be considered to be freely assented to. Because of this, surveillance can spread and dominate without dissent that is commonly recognised in liberal democracy as that coming from rights-bearing citizens. The processes of legitimation used to marginalise and then dominate those under surveillance means public legitimacy can be secured while almost hidden domination takes place behind those legitimation processes. This thesis seeks to bring that domination out into the open. Revealing this domination provides both an explanation for the continuing and extensive spread of surveillance in all areas of society, and reveals inherent contradictions and problems in the processes of legitimation that liberal democracies rely on when it comes to surveillance.

In the upcoming chapter I will review the state of public debate around surveillance and argue that current approaches that explain surveillance spread through the way it 'creeps' into other areas of society, or, ways surveillance can spread and be used arbitrarily over subject populations, are limited. Often these approaches seek to restrain surveillance within justifiable rules, and seek to get surveillance working 'properly'. However, surveillance, when fully restrained and legitimate, as I argue

common liberal tendencies tend to argue for, can still justifiably spread in other

harmful ways over certain populations and society at large. This legitimate and

justified surveillance characterises the widespread nature of surveillance, and, as I will

argue, this is in fact part of the problem.

Chapter 1 - How We Look at Surveillance

This chapter will look at ways that the spread of contemporary surveillance practices and privacy issues are commonly understood, both publicly and academically. I will theoretically characterise what I see as the main concerns with surveillance heard in public, and academic approaches, from what I will characterise as a predominantly 'liberal' perspective. Which is, surveillance is a problem when it is being used for reasons it was not originally justified for, for arbitrary reasons, or in error and mistake. All of these concerns, by implication, can be resolved if surveillance is 'properly limited'. I will argue that these types of approaches to understanding why surveillance is widespread, and what the dangers are when surveillance spreads unjustifiably, are limited. Surveillance that is properly restrained, 'justified' and non-arbitrary is the type of surveillance paradigmatic of society, and which, I will go on to argue in the rest of the thesis, is the type of surveillance that should concern us most.

If there is a consensus over surveillance spreading at the expense of rights protecting liberty and privacy – if not a consensus over whether this fully captures the harm that is done by surveillance, or that such rights are equally held and applied - what exactly does harm mean in this context, and how do we explain the apparent inadequacy of liberal protections in the face of the rapid spread of surveillance?

The first section *The Spread of Surveillance: What about Privacy?* will discuss the main arguments common to explaining why surveillance is spreading at the expense of liberal values like privacy, or how privacy as a concept may be changing. In the second part of this short secton I will dissagregate some further common arguments and objections aimed at explaining, restraining or showing the harms surveillance spread can cause. Then, detailing those arguments further in the second section

Surveillance Creep: equality, Prejudice and Bias in Surveillance I will argue that most objections to surveillance, commonly heard and contained in literature focused on privacy, liberty and civil rights, are in fact objections to flaws in the justificatory process of surveillance, or the dangers wrought through insufficiently restraining the use of surveillance. In focusing on this, many liberal type objections miss a number of important factors, including who it is that is more likely to be under surveillance and why. Surveillance studies answers this by identifying the nature of surveillance as social sorting (Lyon, 2005), bringing access and exclusion to people based on who they are, however, it does not answer it in a way that is sufficiently 'political'. Finally, section 3 *Surveillance and 'The Mistake'* will engage with a Kafka analogy proposed by Daniel Solve, a leading privacy theorist, which attempts to illuminate how we are disempowered by databases in a way that I believe exemplifies much thinking around surveillance's harms. I find the analogy limited insofar as the primary concern seems to hone in on the potential for 'mistakes' that databases may make, when in fact, it is when databases are working perfectly that should be of concern.

1) The Spread of Surveillance: What about Privacy?

Both privacy and liberty protected by rights and civil liberties can be understood as liberal values, and interpreted as 'negative conceptions'. Negative here means they are valuable insofar as they can be freely enjoyed without interference from surveillance, and they are negative conceptions in that safeguards in the form of rights and laws protect *against* interference into otherwise free enjoyment of one's privacy or freedom. Privacy and liberty are often assumed to be 'goods'. When these goods stand in need of justification it is sometimes more fully justified as being instrumentally good for the individual and society as a whole. Privacy, for example, is described in ways such as a shelter for imaginative freedom (Cohen, 2013), and, it

is claimed, instrumentally necessary for the full expression of one's free conscience which benefits society as a whole not just the individual (Moor, 1997). A similar type of argument, of a value relying on other human interests to be justified, that I outlined from in the introduction.

Regardless of whether privacy is beneficial in the ways it is claimed, the idea of a 'negative' protection against the state in the form of rights is still the base point of public justifications, and for public debate about freedom and control through surveillance. As a result, it is one of the dominant positions argued for philosophically and politically when it comes to surveillance. Most importantly the idea of such rights protecting individuals *against* one another and *against* the state is one of the defining characteristics of liberal democracy

If surveillance is spreading in liberal democracies to the extent that liberal and democratic values are being seemingly undermined, and the abundance of studies show its ill effects, then why would this be so? The first type of explanation is that privacy, freedom and civil liberties are just not articulated strongly enough. If more of the public and policy makers simply understood the harm that was being done more comprehensively, then they would address the problems. This type of argument encourages work in areas of scrutinizing policy proposals and police practices by rights advocacy groups, such as Big Brother Watch and Privacy International, and in academia, privacy theorists attempt to more accurately and convincingly promote the value of privacy as a 'good' (Solove, 2006; 2008) or legitimate political interest worth fighting for (Lever, 2006). This is a basic position of seeking to articulate new dangers in a more convincing fashion, or articulate more convincing reasons for privacy as a good in order to raise awareness amongst the public and influence policy.

The second type of argument to explain the spread of surveillance, contra the advocates of privacy and civil liberties above, is that the people who are concerned with the harms that surveillance brings are simply wrong. Surveillance as it is constituted in liberal democracies is not a threat to these values or when it is a threat it is dealt with appropriately. This type of argument contends that surveillance is not a danger *because* we live in a liberal democracy, rather than accepting that surveillance could be a danger *even though* we live in a liberal democracy. This type of position is confident that there are sufficient restraints and good will attached to the use of surveillance to render it un-concerning. Using the critics of surveillance argument against them it lays an implicit challenge at the opponents of surveillance by saying that because we live in a liberal democracy, if people genuinely felt so strongly about it they are free to collectively organise and campaign for change. That this is not the case is proof that the naysayers are wrong and surveillance is considered by the public to be, by and large, legitimate.

The next type of counter-argument to critics that justifies surveillance is that the harm surveillance may cause, if any, is outweighed by the benefits it brings. If we understand Liberty as being the absence of restraint of any kind, and regulations and laws which surveillance involves are *always* an offence to liberty, this type of argument states that this ought to be acceptable because of general and specific societal advantages. It is the argument that industry interests and politicians often make with reference to the intentions of such surveillance - security, efficiency, consumer benefits - to distinguish it from more dictatorial uses of surveillance around the world. This type of claim is signified in the security arena by the 'balance between security and liberty' argument. It may be the case that your liberty or privacy is interfered with by this particular surveillance practice, this position implies, but it is worth it to you and others for the added success it also brings in disrupting serious

crime and terrorism.

Fourth, an argument exists that values such as privacy, or at least the interpretation of them, are outdated concepts. This argument suggests that we have no privacy traditionally understood, or if we do, we have a different form of privacy, and not a bad thing too for many people involved in the information industry, as Scott McNealy the CEO of Sun Microsystems unambiguously quips: "You already have zero privacy. Get over it" (Solove, 2004, p.224). Just as the demise of privacy has been sounded with the growth of new technologies Marshal McLuhan, the famous philosopher of communication, believed privacy's growth as a concept in the first place, or the idea of the 'private self' at all, related to the growth of another technology - a 'technology' which created new private architectures in the home (1968). The modern book, he claimed, gave rise to the desire for private spaces to read it in and the private study grew beyond learned professions and into the home, although this seems certain to have been exclusively the affluent home. Based on this insight, an explanation could be that if technology and architectures brought privacy to prominence, it could be expected that technology and architectures of technology may alter its character and importance in contemporary times. Although, it could also be argued that online research, internet surfing, reading and visiting websites ought to be considered the private study of modern times. Collecting information about all the books one read in one's private study in centuries past would, it seems safe to say, have been considered as tyrannical.

The more optimistic version of such arguments for proponents of privacy is that if we are to have civil liberties that protect us from the harm of surveillance and data collection then they need to be re-drawn and re-thought to take account of the fact that information, technology and data is such an important part of how modern societies

function. The internet, it is argued, is not like private study at all. It is a public space where the distinction between what is public and what is private information breaks down and has been altered beyond recognition by technology and more public communicative patterns of behaviour (Papacharissi, 2010). Some privacy advocates argue on this ground (Solove, 2004) in order to re-imagine privacy in ways that could offer new protections.

Finally, and related to the private study claim above is the observation that privacy in particular is in fact a contemporary concept or value, which is specifically a gendered and class-based phenomena. Feminists have shown that when it has existed at all as a 'value', it was the male sphere of privacy that was protected, often to re-enforce patriarchal domination in the private domain - the home - and the freedom to do whatever one pleases in 'private matters' equated in many instances to the removal of freedom of others in the household (Mackinnon, 1989). And while interestingly we have only had an explicit right to privacy in the UK since 1998 under article 8.1 of the European Convention on Human Rights (ECHR 1998), the police have only been obliged to investigate 'domestic incidents' – often and obviously incidences of domestic abuse – under specific codes of practice since 1990 (Harwin, 2008). This observation has led some to claim the relatively recent explosion in concern over privacy is only due to those who have always had it – wealthy, middle-aged, white males – starting to lose it (Lyon, 2003, p.19).

This final point makes a fundamental contribution to understanding surveillance. It is not necessarily the broad extent of surveillance that is concerning, but over whom is it most intense, who does it protect, and whose interests are harmed by it. I will revisit the idea of unequal power relations and the differential treatment of certain groups and individuals under surveillance at length in the substantive chapters.

Explaining from a privacy standpoint, as these arguments do, why surveillance is widespread in contemporary society even though it apparently causes harm, gets us so far. However, in a liberal democracy the actual harmful effects of surveillance are less important than the justifiability of those harmful effects, and the proportionality with which it offends such values. This can be assessed by discussing surveillance's legitimacy. Is it legitimate to read someone emails, for example, and in what circumstances and for what defined reason is it legitimate to do so, given that doing so is an invasion of that person's privacy, which is ergo harmful? Or, is it an invasion of privacy to gather *all* metadata of all citizen's telecommunications in order to have the content available should it be necessary, as the recent IP Bill has done, and if so, for what reasons is this justifiable? Is this an invasion of privacy? And if it is, is it a legitimate one?

The next set of arguments direct explicit objections at surveillance's widespread nature from a position of its justifiability, finding problems in the way it is used and justified across society. Primarily concerned with surveillance that is not properly limited, or can be used for arbitrary reasons, these kinds of objections accept surveillance's inevitability in society but seek to find ways to limit surveillance more properly, and identify what they see as unjustifiable uses or consequences of surveillance. These sets of arguments don't necessarily get involved directly with debates around the original justifications for surveillance powers or technologies but instead highlight that we are not mindful of the power surveillance gives to authorities and private companies, and if this power is not suitably restrained it has a tendency to be used for other reasons that have not been publicly justified.

These arguments can be split into the following taxonomy, the unjustified and

insufficiently controlled. Within these two groups lie concerns that surveillance and databases are prone to mistake or error, that surveillance has 'gone too far', - the 'slippery slope' argument - this argument is academically identified as 'surveillance creep' whereby once surveillance is justified for one reason it has a tendency to be used for other yet to be justified reasons - the 'future threat' argument, whereby governments today may be benign, but giving all the data to them means any future government could have it too and the 'arbitrary argument' complaining all of the above could happen if surveillance is not properly limited by enforceable rules.

All seem to answer in some way the crude and misleading common sense argument that 'if you've nothing to hide you've got nothing to fear'. All warn of potential dangers of accepting government justifications at face value, because, the rules may be mistaken, they may go into areas not previously justified, or once justified for something else like crime. They may be applied partially by bias and prejudiced operators. You may trust a benign government today, but in creating a technique for full rule compliance are you leaving yourself susceptible to more malign governments in the future? [2] Yet in their own way, resolving the problem they identify, they implicitly then agree with the 'if you've nothing to hide…' argument. Once and if surveillance is properly limited and restrained by democratically accountable rules, the problem identified by this set of arguments based around the controls and restraints placed on surveillance are resolved.

The further assumption underlying this (and these objections) is that if you stick to the rules, and the rule makers stick to the rules, then you will not suffer harms. Underlying that assumption is the further assumption that the rules themselves are

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[2] Surveying the pattern of democratic elections currently in the West, liberals may begin to take this argument more seriously

justifiable and non-harmful. I will argue that surveillance causes harms even when sticking to properly limited rules, and will question the basis of justifiability for the rules, and the role surveillance plays in creating new realities in practice which then influence rule making. For now, I will argue against seeing the problem with surveillance as it being insufficiently restrained or controlled.

2) Surveillance Creep: Equality Prejudice and Bias in Surveillance

Objections directed at surveillance going too far, or being 'unjustified' are often approached and widely articulated through the language of 'surveillance creep', where the worry is that once a surveillance practice is in place, or once data has been collected for some reason, it will be used for new reasons without further justification. Responding to this in a liberal fashion however, does not reduce the spread of surveillance. In order to reduce arbitrary use and misuse, authorities deploying surveillance are compelled to make more rules and procedures to limit arbitrary possibilities, ironically increasing the volume of rules that need monitoring, and foreground surveillance in the solution to arbitrary surveillance. The second liberal response, as was seen in the IP Bill discussed in the introduction, is to take what could be considered previously unjustifiable mission creep, and make it legal, justified, legitimate and regulated. Again here, surveillance has been codified and 'restrained' but not reduced. This objection to surveillance, it seems, while accurate in how it identifies ways in which surveillance can gradually creep into more areas of life not previously considered, cannot get round that problem by proposing more regulation of surveillance. If the aim is to reduce *unregulated* surveillance then preventing 'creep' and arbitrary use of surveillance can succeed, but if it is to reduce harmful surveillance broadly considered, it is limited.

Moreover, surveillance often 'creeps' on the basis of liberal and democratic value-

laden judgements and justifications by authorities deploying it. The surveillance creep objection is troubled, for example, by local councils using the anti-terror laws, the Regulatory and Investigative Powers Act (RIPA), to spy on people in their borough for reasons that are spurious and certainly not connected to terrorism. This could be seen to be an arbitrary misuse of the power that the RIPA law bestows on public authorities inasmuch as the controls on the interpretation of the law and use of these practices needs tightening. Here, it is interpreted as a simple case of it being *unjustified* because it is being used for quite another reason than the original justification, and therefore, on these grounds, illegitimate.

One infamous complaint about the misuse of the RIPA laws (BBC, 2008) was that the law which was passed for one reason, terrorism, was being used for a wholly different reason by local councils, which was to ensure children from the correct catchment areas were being sent to the correct schools. It seems a prima facie case of unjustified surveillance of citizens and intrusion into liberty and privacy. The argument against such surveillance is that the Act itself was publicly justified at the time for the use of terrorism, not for enforcing catchment areas for local schools. However, the RIPA laws themselves do not in fact mention terrorism as the core reasoning (2000). This seems to be a case of what Brian Massumi's argument, outlined in the introduction, is that at times of terrorist threat laws are passed with public justifications not included in the actual law which, once in existence, have a logical tendency to then be used for other reasons as part of an authority's toolkit of powers for achieving their aims (2009).

However, another way to look at it is that the councils using these powers were in fact using the most efficient and effective method at their disposal to ensure another core purpose of their competences and responsibilities, formal equality through the

application and enforcement of formally equal rules and laws of the liberal democratic state. In this case, ensuring that universal rules (who is in a catchment area for a local school and who is not) is applied in a formally equal way. The argument against this is that this *particular case* of state authorities achieving formal equality does not justify such an intrusion by surveillance. However, this does not alter the motivating factors and causal reasons for the public authority using such surveillance being based upon formal equality and procedural fairness. The use of bureaucratic surveillance - monitoring in order to secure bureaucratic rules and procedures for schools admissions - being the most efficient and effective way in which to achieve this. Indeed the council's defence against accusations were precisely on these grounds, that they were, in times of limited places and resources, applying the rules in an equal way, often to counteract the effect of, possibly, 'sharp-elbowed' middle class parents (BBC, 2008).

The surveillance creep argument is a position which acutely observes what is actually happening with the spread of surveillance – that is surveillance that is justified for one reason is being used for another and so on – but doesn't go into why, in a liberal democracy, that could be so. That surveillance has a tendency to be used for other yet-to-be-justified reasons, is only one aspect of understanding why it spreads in the way it does. I think this tendency is accurately characterised as 'creeping', and one may say it is unjustified because it goes beyond the original justification. However, public authorities can also make claims with reference to the beliefs of society and show such surveillance to be legitimately 'creeping'.

What is unusual about this case is the public were given the opportunity to 'choose' at all in a public space in which it was justified and contested. On bureaucratic operational matters, it is rare for public debate to be heard at all. RIPA laws have

also been used for close to 3 million times as of 2011, and in the 5 year period between 2011 and 2016, according to a freedom of Information request by the Liberal Democratic Party, councils who responded (amounting to approximately a third of all councils) were authorized to use surveillance on 55,000 days (Asthana, 2016) newer findings. These are for more seemingly mundane and less high profile reasons not exposed to public justification (Justice, 2011; Asthana, 2016) from dog fouling to correct bin use. It seems perhaps to depend on who it is that is under surveillance which relates to how publicly justifiable it must become.

The next type of objection is not that legitimate surveillance will suffer mission creep but that existing powers will be misused and abused. Honing in on prejudices, bias, perceived misses and abuse implicitly (and sometimes explicitly) suggests that surveillance is not sufficiently controlled and limited by rules. While accepting the basis on which explanations around the legitimacy of a surveillance practice may be correct, these type of objections points to un-discussed harms based on the application of surveillance in practice, relating to it not functioning as it should, containing human error, arbitrary input into the rules and categories of data collection and surveillance. It is interesting to note that certain advocates of privacy and liberty who critique surveillance and 'fail' in the first type of objection, that a surveillance practice is unjustified, often fallback on this argument as a way of limiting what they see to be already harmful surveillance, claiming it is too dangerous, gives too much power, is open to abuse. The subsidiary argument of this which claims that surveillance 'will not work' is a strategic argument that is a dangerous one to deploy if the intention is to prevent surveillance, because it can lead, contra one's intentions, to the improvement of the particular surveillance practice one is critiquing (Ball & Haggerty, 2005, p.15).

Concerns with the troubling nature of such surveillance include the effects of the

actual technique of observation, and to what and whom it is directed, focussing on the technology, law or practice of surveillance. Further, no matter how formally equal and non-arbitrary bureaucratic surveillance is in practice it may, through the arbitrary potential of human input into the bureaucratic system, have arbitrarily based categorisations and rules that can be harmful. Here is the concern that the arbitrary interpretation and use of surveillance is done in ways that are prejudicial and open to abuse if not properly controlled. Lyon (2006) observes that prejudices of the 'operators' of bureaucratic data systems may become 'embedded in the codes' of categorisation (2006, p.34) if input is not suitably restrained and controlled. This can mean categorisations that are accurate but have no objectively justifiable basis to treat people unequally – discrimination here is not based upon formally equal rules and factors that can be justified, but arbitrary features and characterisations coming from human operators, database managers and computer coders.

Likewise, Armstrong and Norris in a famous study (1999) of urban CCTV interpret the fact that young black males in London are far more likely to be intrusively monitored and followed by CCTV operatives as 'embedded' prejudice. In their study they found that the basis of monitoring and following individuals around a certain area of South London, with swivel cameras that were noticeably following certain subjects, was race, age and gender. This is a case of the arbitrary application of universal rules to specific cases, and seemingly offends both the formal equality and effectiveness of this surveillance type. Again however, resolving this in a liberal fashion with rules and restraints seems to not only increase surveillance per se. Where young black males may have been targeted arbitrarily, restraining the arbitrariness means they are then targeted in a 'fair' way according to formally equal rules. Surveillance increases for all in this way, but then is still targeted at certain populations most intensively.

Resolving this however may be problematic. The extent to which rules are universally and accurately applied in a formally equal and non-arbitrary way is contingent on the extent and capacities of bureaucratic surveillance. This makes it more effective, efficient and less open to these objections above, and, because it is *more legitimate* through the rules governing the exercise of it as a power. Secondly, reforms that seek to eliminate 'prejudices' or 'arbitrary capacity' within surveillance systems, it would seem, must have a tendency to increase the capacities, accuracy and extent of surveillance practices. This is through more efficiently implementing impersonal and procedural rules governing data use and collection internally in order to decrease the autonomy of the operator, the bureaucrat, the manager or the insurance company to apply prejudice to decisions, or make mistakes. And, outwardly in order to be more legitimately applied, the tendency is to gather more data, create more capacity to interpret data more accurately and more capacity to universally apply the rules across populations in order for it be less arbitrary and prejudicial and discriminatory.

Eliminating arbitrary prejudices and use in the functioning of CCTV makes it both more effective at what it does, which is important for the legitimating reason for its existence, and at the same time makes it more efficiently, formally equal and procedurally non-arbitrary. These are interdependent processes. Applying universal rules more equally and universally – ensuring formal equality and procedural non-arbitrariness - ensures bureaucratic surveillance operates more *effectively* in its aim and purpose and is also more *legitimate* with reference to the beliefs of liberal democracy.

Note, this would not necessarily mean young black males in London would *in practice* be followed and watched less on CCTV cameras, only that the rules

justifying this practice would not be based on prejudice. The legitimacy and justifiability of a CCTV system is contingent on its effectiveness in preventing crime as well as it not being perceived to be operated prejudicially. If it was the case that young black males in London were seen to be more likely to commit crime according to objectively defined criteria then a justification for continuing to observe these groups while not being seen to be prejudicial and arbitrary would exist. This can be resolved by increasing the volume of cameras and automation of operation and/or the impartial enforcement of de-personalised and formally equal rules that ensure these subject populations are continued to be watched.

It would be wrong to assert strongly that it is a cast iron rule however, and that such objections to the arbitrary operation of CCTV *causes* the creation of such improved CCTV systems of course. It would be implausible to causally link objections of arbitrariness to all extensions of surveillance capacities and the extent of surveillance we witness today. It is more accurate to say that the more universally applied, formally equal and non-arbitrary CCTV surveillance is the less open to objections around arbitrariness it is, and importantly, that this is often contingent on its extent, its capacities and power, encouraging more efficient and widespread surveillance so as not to be arbitrarily applied.

This intensification of surveillance, both internally to the operation of a surveillance system – through de-personalising the interpretation of rules of who to follow and why - and externally, through a more comprehensive CCTV system that does not require individual operation exists in many contemporary CCTV systems. Smart CCTV cameras now interpret suspicious behaviour automatically and cover areas far more comprehensively, meaning people do not need to be individually and intrusively 'followed' by CCTV camera operators. Coming facial recognition technology will

scan everyone but only pick out faces already held on a database. Such a system is less arbitrary and less biased than trusting the judgments of operators, but whether it is more desirable in a liberal democracy is unclear.

When surveillance is at its most efficient and effective is when it is not being used in arbitrary ways, but for objectively defined reasons to differentiate between people based on universally applied rules related to the likelihood of crime. These may indeed result in one group of people being monitored more than others but this is not due to personal prejudices and arbitrary judgements of the operator, but by design. These objections around operator arbitrariness appear not to be the rule of surveillance but instead aberrations, or glitches which, once resolved, results in a legitimised surveillance system that contributes to surveillance's spread, extent and accuracy, yet still monitors the same people.

In achieving this accuracy and non-arbitrariness such a surveillance system can base claims as to its legitimacy precisely on the extent to which it is formally equal and non-arbitrary - CCTV watches, as far as is possible, *everyone* in a certain area - and applies universal rules to all cases - in the form of pre-determined categories of suspicious behaviour that automatically 'flag up' suspicious behaviours. And this formally equal and procedural non-arbitrariness contingently relates to both the *effectiveness* of reducing crime as well as the *legitimate exercise* of liberal democratic power. If achieved, significant objections to surveillance are overcome. However, surveillance is not reduced but intensified for accuracy and spread over larger populations in a more equal fashion. Such large scale surveillance is exemplified in databases of personal information, be it state or private company databases. Everyone's personal data is stored somewhere and exposed to universal rules of interpretation by state agencies ranging from UKBA to Public Education institutions.

3) Surveillance and 'The Mistake'

Daniel Solove (2004), a leading privacy theorist, provides a comprehensive study of the dangers of this type of widespread surveillance through data collection in his efforts to re-conceptualise privacy for the 'digital age'. He argues that instead of continuing to view privacy as something that is intruded upon in a way that causes harm in specific instances we should instead view the thousands of instances of seemingly non-harmful collection of either publicly available data, or only mildly intrusive data collection, as *cumulatively harmful* to our privacy. While invasions of privacy or intrusion into liberty can of course occur if the powers bestowed upon the police are not effectively restrained, or private data collection can come to be in the hands of a different organisation, Solove articulates the additional harm that this cumulative effect can bring, which is in the way that it is "disempowering" rather than "interfering" (Solove , 2004, p.8 & p.41). If data *use* is uncontrolled then cumulatively we become less free, more disempowered, less in control of our fate and in our interactions with private and state bureaucracies. However, it is also the case, I wish to argue, that *accurate* categorisation free from mistakes is also disempowering and cumulatively harmful. It all depends on who is being categorised, and what you are being categorised for, not whether categorisation is mistaken or 'uncontrolled' necessarily.

Solove comparatively discusses the metaphor of Kafka's Trial over George Orwell's Big Brother, to explain the harm that bureaucratic use and misuse of personal information can cause. There is no diabolical plan in reality, as there is in Orwell's characterisations of surveillance, says Solove, and often not even a particular 'wrongdoer' that can be remedied with regulations, rights and criminal sanctions.

Surveillance instead is defined by 'vast dossiers' of details about one's life, which are used in ways that have "profound effects on our lives…" (2004, p.9). This is illuminated by Solove with the idea of K. in Kafka's Trial being unable to find out why he has been arrested, what he is accused of, most frustratingly who is his accuser, and even who to speak to in order to clear up what K. believes must be a simple, but in the end devastating, mistake.

Solove goes on to say that the problem is that bureaucracies in the real world, while not perhaps with such sinister consequences as Kafka's metaphor, are still prone to "mishandling", "mistakes" "carelessness" and "error" (2004, p.9) which we are powerless to prevent and rectify. His concern is two-fold, one concern is targeted at data that is passed to other organisations without one's consent, and the other related concern is with errors and misuse of information that cumulatively becomes unaccountable and unrestrained, which impinges on your future life in some way. The more information and volumes of personal data that are collected and shared the more one is not in control of potential misuses, and the more likely mistakes or mishaps will occur. Like K. in The Trial it is assumed there must be some mistake or misuse of data, which is a position that is not against the categorisation of bureaucracies through surveillance in principle, it is instead against the potential for *mis*-categorisation, and an inability to correct and control such mis-categorisation when it occurs due to the impenetrability, unaccountability and sheer scale of data collection and use.

Solove expertly visualises the individual's position vis a vis a bureaucracy collecting personal data. However, bureaucratic categorisation and data use is not defined by how it mis-categorises data or embeds error in how it handles data. Instead its efficiency is directly reliant on how accurate it is. Bureaucratic surveillance, as the most efficient and effective way of achieving certain aims, has a definable interest in

operating efficiently. In order to more accurately, effectively and efficiently achieve non-arbitrary and formally equal results - ensuring that all categorisation is accurate, ensuring every calculation is procedurally non-arbitrary – a tendency for more data and more capacities to universally apply the rules more effectively exist. Whether it be the police, an insurance company, an internet search engine, a state bureaucracy or a bank, using bureaucratic surveillance in the most efficient and effective way to achieve institutional aims regarding data use and information and this is contingent also on it being exercised in a legitimate way: that is to say, accurately. The 'formal rationalism' which drives this logic of bureaucratic data collection will be discussed in detail in section 2 of chapter 2.

While it certainly seems right that giving an individual more control over personal data in order to rectify mistakes and mis-categorisation, as Solove proposes, addresses one aspect of data collection being dis-empowering, the extent to which *accurate* categorisation is not dis-empowering seems to depend on what category one finds oneself in within the now accurately functioning bureaucracy. Solove's proposal seems to assume that if we are given power and control over our data inasmuch as we can rectify errors and control what is done with our data, the 'corrected' and accurate categorisation of perfectly working bureaucratic surveillance will be less disempowering. Or, equally empowering for each individual and group.

Solve's objection contains the desire to correct bureaucratic use of data to the extent that it seeks to make what is procedurally arbitrary, non-arbitrary, it seeks to make inequalities of treatment that are in practice unjustified (mis-categorisation), justified, which is a desire for the more accurately functioning formal equality of bureaucratic data use. However if the ends to which the bureaucracy is directed is dis-empowering for an individual then one seems to be dis-empowered whether or not, or *because*,

data is accurately categorised.

Solove expertly takes up the challenge of characterising harms that are difficult to articulate in the usual language used to describe harms to liberal and democratic values such as invasion, interference and offence. However, concerning the tendency of surveillance to spread widely despite objections, the concern of this thesis, these observations of Solove's are observations of the exception rather than the rule of bureaucratic surveillance. When database surveillance of this type is not being arbitrary, making mistakes, embedding prejudices, it is more justifiable and legitimate, however *whether* it is less harmful and *to whom* is separate point. That surveillance is legitimate, accurate and properly functioning does not mean it will not be cumulatively disempowering or harmful to all groups and individuals.

A simple example of accurate categorisation being disempowering could be private bureaucracies accurately categorising data through applying universal rules, for example a financial profile, in a formally equal way. It seems unarguable that this is disempowering in some way for those categorised *accurately* towards the bottom of such a financial scale providing information for something like financial products. Whether or not this is perfectly justifiable is not the issue - which, in terms of economic efficiency it most certainly is justifiable.

Solove poses another way of looking at this when he continues with another aspect of bureaucratic data use which, contra his first concern, seems to indeed be based on the accurate functioning of bureaucratic formal equality. He observes that someone who may have been arrested in a protest in the 1960s for some form of civil disobedience is categorised as having committed a misdemeanour under a classificatory term of something like 'disorderly conduct' which "…appears no differently from the arrest of

a vandal" (Solove 2004, p.49). Solove's complaint, which I agree with, is that the information held on databases "…often fails to capture the texture of our lives" (2004, p.49), instead, only brute facts which impact on our future. However, we do not have to judge whether this classification is 'right' or 'wrong' for either assailant - protestor or vandal - to see quite clearly how the criminal records bureaucracy in this case is justified in categorising past behaviour such as this on a criminal record. It is because of the principle of formal equality which picks out both the protestor and the vandal for differential categorisation from the rest of the population, based on the objectively defined and categorised criminal behaviour of 'disorderly conduct'.

The same would apply with, for example, credit ratings, or dealings with another private company that uses databases to calculate the service you receive. If it is harmful for the individual whose data has been mis-categorised, meaning they struggle to get credit, it must be harmful for someone who is accurately categorised through formally equal rules and objective factors too - in one case accurate and in the other case mistaken. The same cumulative harm occurs but in one case it is justified and on anther it is mistaken. This argument begins to hinge on who ought or ought not be in certain categorisations, because all that is recorded is brute facts, but not that categorisation cannot be cumulatively harmful in the same way insofar as it reduces freedom and dis-empowers the individual who is accurately in a certain category.

Accurate but nevertheless harmful categorisation can be seen in an example from Lyon's influential *Social Sorting* (2003) thesis, in which he uses the state-led classification of Toronto in terms of wealth, from the 'Affluentials' category at the wealthiest end to 'Big City stress' category at the bottom, to outline how unequal treatment under surveillance manifests. These classifications are used by health insurance companies in order to segregate their customer base and provide different

cover and prices for insurance based upon where one lives in the city. He explains the process of categorisation in this way as being the codes of the databases and algorithms of the insurance company acting as "…switches that place someone in the 'affluentials' criteria and the next in 'big city stress', one person as having health risks, the next good prospects" (Lyon, 2003, p.23). This unequal treatment, for Lyon, is an example of an 'unacceptable' discrimination and unfairness he is concerned with.

Bureaucracies that produce *accurate but unfair* outcomes through surveillance and data use justify unequal treatment based upon efficiency and profit, as with the example above. Lyon is concerned that they embed disadvantages rather than offer an equality of opportunity to, in a word, re-categorise themselves. This is basically an appeal that categorisation does not hinder future opportunities to be treated in a different way by embedding judgements of individuals on past categorisations.

While Solove, in his example, may want the protestor to be treated differently and perhaps get a more descriptive, 'textured' or indeed noble classification for her deed, it seems under the law of the liberal democratic state this breaks with the principle of treating people equally. If it is true that someone who '*ought not'* be categorised alongside a vandal, or ought not have a bad credit rating, or ought not be 'sorted' by an insurance company can have their future life impinged by this 'wrong' categorisation, then it must be the case that perfectly functioning, accurate, *justified and legitimate* categorisation, can also have the same effect.

A more pressing complaint around accurate categorisation then could be about the extent to which certain groups are *more likely* to be categorised in this way on criminal records databases, based objectively on factors such as class and race, not

just mistakes. That is, it being factually correct that more people of certain class and ethnic backgrounds *are* on criminal records databases and are there *accurately*, which impinges on their future life perhaps poses a more fundamental question to be asked about the brute facts contained in databases that impact on people's future. The mythical protestor is vindicated by Solove, but who and in what moral frame is the vandal vindicated in order to have their life chances unimpinged? This may seem frivolous but the point is clear that a certain type of citizen is more likely to be the university graduate activist than the one shoplifting or vandalising. The underlying structure of judgement that seeks to rectify mistakes, without interrogating the rules that perfectly function databases would enforce, seems problematic.

If K. in the Trial knew exactly why he has been arrested, who the accuser was and for what reasons he was being held, it certainly puts a different slant on the story being told, but is it less disempowering for K.? Perhaps it is the case, as Weber (1904) and De Tocqueville (2003) thought of rationalised democracy (which will be discussed in the next chapter), that the rational and predictable organisation of society increases freedom and individual's ability to calculate consequences and their own future life. If K. was arrested correctly, and knew exactly why, perhaps he is more free and less dis-empowered. If K., knew why he was under arrest accurately, knew also that he was from a group or class that was more likely to be under arrest, is less uncertain generally about what categories he is in broader society and why because he is more likely to be in those categories, it could be said that this increases K.'s ability to plan around, predict and calculate his future life. Alternatively, under surveillance that reinforces his position in society it may be that this knowledge is in fact disempowering and dominating inasmuch as the effect of knowing one is always watched and under surveillance, and categorised in certain ways, in fact leads to less of an ability to plan one's life. It is not that K. in the *The Trial* is there by mistake

necessarily. The implication of the parable, it seems to me, is that if K. knew who put him in that situation, and why, it is not necessarily that he can rectify a mistake, and thus receive redress from his jailers, but more that the knowledge of who put him in that situation and why gives K. *the power* to defend himself from his accusers, whether he is guilty of anything or not, and whether he is there by mistake or not.

Conclusion

Surveillance that is authorised for reasons that are justifiable, the exercise of which is not arbitrary or prejudicial, appears to have a legitimising force that contributes to the tendency surveillance has to spread beyond more tightly governed core purposes, and, importantly, may still be harmful as much as it is legitimate.

Like the RIPA laws being used to ensure formal equality of educational access, or the health insurance company above, using objectively defined factors in order to differentiate between customers in a formally equal and non-arbitrary way, or the criminal records bureau judging people solely on whether a crime has been committed, comprehensive CCTV systems filming multitudes of people, and other more general bureaucratic data collection and use. A strong tendency of surveillance based upon the force of its legitimate rule-based exercise of power is to spread in order to be more accurate and therefore legitimate. However, accurate and legitimate surveillance, as it spreads, is not necessarily less harmful. That it is less harmful for certain groups in wider society – it is ordinarily not harmful for 'ordinary' people - could be an explanation for why it is not objected to on a large-scale basis. Subjective legitimacy of surveillance – that is, people believing it to be legitimate – is likely to be influenced, it seems, if 'the people' granting legitimacy to surveillance practices are not harmed by it.   This will be discussed in more detail in the chapter to follow. However, what is also contingently necessary for the expansion of

surveillance practices, is the legitimacy of the rules governing power that surveillance seeks to enforce.

What makes exercises of power in society legitimate, and on what basis legitimacy of surveillance is 'historically actualised', comes from the institutional settlements of liberal democracy itself, and the rules governing how liberal and democratic values come into practice. And while surveillance practices may be democratically authorised for convincing and justifiable reasons, the cumulative effect of *justified and legitimate* surveillance and data use can be harmful insofar as it can be 'dominating' of certain groups. Perfectly functioning surveillance and data use that surveils individuals in a way that dis-empowers and dominates them, however, not because a mistake has been made, but because of perfectly working and 'legitimate' surveillance, is the type of surveillance I argue is most concerning.

Chapter 2 - Surveillance in Liberal Democracy: 'Legitimate' and Dominating

Introduction

One way surveillance can be legitimate, and thus become widespread, is that it is justifiable to those subject to it. My argument is that one basis of surveillance's justifiability is the way surveillance grows out of, and is necessary for, the implementation of liberal democratic values in practice. This legitimating quality of surveillance can be traced, as I will do below in section 2, to the processes of implementation and coming into being of liberal democracy in the early modern period. The relationship between early liberal democracy and surveillance points to a paradox; that being, demands for democratic freedoms could only be implemented if the state reached into society to administer, implement and enforce these liberal and democratic freedoms. This discussion will show that using surveillance as a technique constructs values in practice, at the same time as it unleashes a type of power that offends them.

That surveillance is seen to be legitimate in many ways explains its widespread nature, and public acceptance. However, a problem exists because of the effects that surveillance has on 'politically weaker' members of society. As explained in the introduction, these effects amount to domination in the republican sense, and consequently those under surveillance cannot object to the surveillance that they are subject to in any meaningful way. Republicans, as mentioned in the introduction and discussed in detail in section 3 of this chapter, hold that if an individual is exposed to arbitrary power, that is to say power that has the capacity to interfere in their life but they have no power over whether it will or not, then this amounts to domination. The effects observed by republicans resulting from this domination include second guessing, self-censorship, 'toadying' to power, fear and uncertainty. Importantly, all

of these are harms that could be brought by surveillance, but are not recognised by liberal viewpoints; a liberal viewpoint of individuals as 'rights-bearing citizens' who carry safeguards against unnecessary *interference,* but do not carry safeguards against overbearing, cumulatively harmful and dominating surveillance, the harms of which are more hidden and less tangible.

Not only does such domination further contribute to surveillance's pervasiveness by undermining people's ability to object to surveillance in any meaningful way, it also makes surveillance normatively illegitimate in how it is used because of the inability of these groups to freely consent, or object, to it. This both presents a problem for the coherence of liberal legitimacy in practice, and makes the spread of surveillance that is apparently harmful explicable.

By 'politically weaker' members of society I mean those who are *historically subordinate* (Beetham, 2013) often on the basis of factors like wealth, class, race and gender, but not exclusively so, and those who are marginalised can be marginalised in other, often not clear cut, ways. I will show in the following three chapters how authorities work to politically weaken, de-legitimise and marginalise groups, as well as those not historically constituted as a subordinate group, such as protestors (in chapter 5). Connected to the domination just mentioned, this process of marginalisation further undermines the legitimacy of the surveillance used over these groups. This is insofar as these groups are not the constituency for receiving public justification of surveillance, only its targets.

In the three sections that follow I will show how surveillance grows out of the implementation of liberal democratic values in a way that is at first legitimate, but on closer inspection, is also dominating, which undermines those first claims to

legitimacy. The argument will unfold as follows; the first section will be a discussion about legitimacy, distinguishing between subjective legitimacy and normative legitimacy, and how they both relate to consent-giving. This discussion will show the difference between how liberal democratic authorities can rely upon what people *believe* to be legitimate in a liberal democracy, and, on the other hand, externally verifiable claims about what is and what is not legitimate in a liberal democracy, and how these two are connected by *politics*.

The second section will then show how surveillance grows out of and is integral to the implementation of liberal democratic values. This will be both a historical and conceptual discussion of liberal democracy, and the relationship this has with rationalised rule-making, bureaucratisation and surveillance. The third section will discuss domination. Here I will argue that no matter that surveillance is subjectively legitimate and can be satisfactorily justified to 'the people', it is nevertheless dominating for politically weaker members of society. I will draw on republican theories of freedom as non-domination to show some of the unique ways surveillance can make us unfree, and, how the effects of such 'domination' by surveillance may in fact de-legitimise surveillance normatively and politically, opening space for resistance to it.

By the end of this chapter I will have set out why legitimacy is important for understanding the spread of surveillance in liberal democracy, how that legitimacy was historically actualised, and continues to be so, through surveillance's relationship with the implementation of, and contest over, liberal democratic values, and finally ways we can understand 'legitimate' surveillance as being dominating. This theoretical basis will then be used for more contemporary discussions of liberal democratic arrangements and institutional settlements in the following 3 chapters.

1. **Legitimising Surveillance**

There are three ways to approach legitimacy which are important to distinguish when considering surveillance. Subjective legitimacy, normative legitimacy, and, tied to both of these, some form of 'consent-giving'. Do people generally *believe* that surveillance is 'right'? Is surveillance 'right'? And finally, on this basis, do, or can, people consent to surveillance, or the justifications given for it, freely? The first, subjective legitimacy, is concerned with what society-specific reasons there are for people believing a political order or action to be legitimate. There are a number of reasons why people can *believe* in the legitimacy of a political order or action - such as law, custom, religious doctrine and so on – and any society which has shared beliefs about the legitimate source of authority in that society, can be said to be have some kind of legitimacy in the eyes of the people subject to its power. In a theocracy, this could relate to how closely governing matches with scripture, here in a liberal democracy, the society specific reasons for believing an authority to be legitimate, relate to how closely governing matches the values of liberalism and democracy on which society is based, and on which government's justify their authority. Normative legitimacy assesses whether a political order is legitimate with reference to a set of independent political, ethical or moral standards that *ought* to be achieved for that political order or action to be considered as legitimate. Consent-giving can be judged by whether people *ought* to consent to an authority, either by normatively judged standards, or, whether there are society specific reasons as to whether, and why, they *do* consent to the legitimacy of an authority. The legitimacy of an authority can be judged to be independently wrong if there is no possibility of consent. If, for example, consent is coerced from individuals. An authority can lose practical legitimacy if in practice people do not consent or cannot be judged to be consenting.

What is justifiable or not is of course contestable, however a normative approach seeks to judge whether an exercise of power in a particular instance is right or wrong by grounding this judgment in reference to rationally and morally defensible standards commonly understood. For example, is it *right* that the police can hack into people's phones without a warrant if they have reasonable suspicion to believe they are involved in crime or terrorism? And why is it right? The other approach, made common by Max Weber, is to take what people in a society *believe* about a power to be the signifier of its legitimacy. So rather than take a set of rationally and morally defensible standards, and judge whether the exercise of power lives up to those standards, this approach sees legitimacy being granted to a political power *by the beliefs* of those who may be subject to its exercise.

In a liberal democracy however, subjective and normative legitimacy, contained in these public justifications, are not clear cut distinctions, because the subjective appeals to the "shared beliefs of society" (Beetham, 2013, Chapter 3) made in a liberal democracy are open to normative interrogation. This is because what a political authority must appeal to in order to secure a belief in its legitimacy is often an appeal to shared moral, political or ethical beliefs. So, whether or not someone *believes* an authority is legitimate in a liberal democracy, can often be determined by the extent to which it has achieved certain normative standards recognised by that society - secured through public contestation over the interpretation and value placed on principles at different times.

This frames public justifications and debate. If a government wishes to interfere in people's lives for some reason, it must justify this interference with reference to what people in that society feel to be legitimate, and, with reference, indeed respect, to what value that the government is violating. One of the primary beliefs of liberal

democracies is respect for individual liberty and rights, such as privacy. In justifying surveillance, an authority needs to reference this with respect for privacy and liberty, and provide convincing reasons why in this instance such values will be interfered with. For example, detecting serious crime is a prima facie case why someone's liberty may be interfered with. Airport security to prevent terrorism is another. However, no matter that these cases seem to provide prima facie justifications for surveillance, they are still framed within liberal democratic legitimating procedures and beliefs. We, the police could say, respect rights, however in our mission to keep the public safe we must conduct this form of surveillance, or have these surveillance laws. In a liberal democracy subjective legitimacy could also be secured through appealing to the democratic authority to deploy surveillance. The targets of that surveillance, the authority could then explain, are having their privacy rights respected insofar as this is possible (referencing society's beliefs in privacy), and the reason such surveillance is being deployed is, for example, to understand who is entitled to what benefits in the welfare state, and it is only 'fair' that this is done to ensure a 'just' distribution of benefits and burdens. All of this justificatory language is politically contestable, and what privacy, democracy, justice and fairness mean is open to interpretation and contestation. Nevertheless, such an appeal is importantly framed in ways understood by liberal democratic society at large - the United Kingdom - as referencing that society's beliefs.

This framing of legitimacy follows Beetham (2013) for whom legitimacy is secured by appeals to the *beliefs of society*, not just made up descriptively of what individuals in that society happen to believe is legitimate, which is a critique of Weber's earlier framing of legitimacy (1946). If an individual rejected the legitimacy of a liberal democratic authority for religious reasons, for example, this is not sufficient to bring into question the legitimacy of that political order, or the authority's activities. Even

though one of its members does not believe in its authority, this is not for reasons based in society's shared beliefs, nor is it from where that political order morally, ethically or politically draws its authority or makes its legitimacy claims.

Challenging the legitimacy of a liberal democratic political order on the basis that it violates rights, liberties or freedoms through surveillance however must be taken more seriously by that authority. Rights, such as privacy and other civil liberties, are both part of the shared beliefs of liberal democracy, and so influence subjective legitimacy (whether people believe something to be legitimate), but rights also have normative content by which they can be judged independently. This relates to the third consideration of legitimacy for liberal democracy, which is linked to both aspects of legitimacy considered - the necessity of some kind of 'consent-giving' to authority by society's members and those subject to an authority's political power. It can be said that some kind of consent must be assumed (however this is defined) for liberal democratic power to be said to be legitimate. This can be hypothetical consent based on achieving normative standards which satisfy what a reasonable person in a liberal democracy *would* consent to. Consent can also be claimed if there are sufficient mechanisms and liberties present that provide opportunities to freely object to the government practices. The lack of such objections indicate, it can be claimed, that people do indeed consent to government practices that impact their lives.

One position securing normative, subjective and consent-giving legitimacy for surveillance relates to the law. This could run something like, the law itself, as a framework, is normatively legitimate. Secondly, the particular policy operating within that legitimate legal framework - for example, phone hacking - is seen to be justifiable within the framework of that law. Therefore, it could be said to be right and legitimate for the police to hack into someone's phone without a warrant because

it is lawful. This is the standard to which a thin normative view of legitimacy could

take and be satisfied. Additionally, phone hacking of suspects phones could be said to

be further subjectively legitimate because people in a liberal democracy *believe in* the

legitimacy of the law, and as a result believe in the justifiability of the police's actions

limited within the law. Finally, because it is normatively legitimate, it could be

assumed that 'reasonable people' ought to consent; meanwhile, because people

subjectively *believe* in the legitimacy of law, they practically consent to it as well,

judged through expressed approval, obedience and compliance with that law.

However, there are a number of objections that could be made with claiming

legitimacy solely on the basis of law in this way. Beetham (2013) shows us how the

law is often used to overcome or suppress 'common rules', not enshrined in law but,

through repeated use or convention, have become legitimate rules or 'ways of doing

things'. Overriding convention with law in this way could describe many grievances

to surveillance; surveillance which was once limited to targeting a specific number of

individuals has now, as outlined in the introduction, become entwined with other uses

not previously accepted as an appropriate target for surveillance. The grievance

being, while it is lawful it is stepping into new areas which are (or were)

conventionally off limits to surveillance. Much of chapter 1 covered similar

grievances, articulated through the language of 'creep'.

There is a similarity that the objections covered there have with other types of

objections to illegitimate uses of power, in that "the breach of such rules by the

dominant constitutes one of the most frequent sources of grievance on the part of the

subordinate, though one which does not necessarily undermine the legitimacy of the

power structure as a whole" (Beetham, 2013, p.67). As I said in chapter 1, objecting

to surveillance when it has gone too far or 'creeped' into new areas not fully justified

does very little to tackle the (il)legitimacy of surveillance use per se, only to point to its lack of specific justification for the incident being objected too. Similar to historic liberal democratic authorities overstepping and intruding into common law, 'rights of freeborn Englishman' - as E. P. Thompson puts it (cited in Beetham 2013, p.67) - and 'rights of way', surveillance's reach today often oversteps and intrudes into areas in which it was previously understood that it would not commonly be used. However, that surveillance spreads into new areas in this way without specific justification, does not then mean it is illegitimate.

Further, the sheer scale of *new surveillance*, described in the introduction, and the new era of communicative information technology that characterises the *surveillance society* it is claimed we live in, changes entire regimes of organisational form in society. This means surveillance not only intrudes into areas it did not previously, but also, as communications technology creates fresh terrains on which sociality takes place, in which rules are created anew, and in which no commonly held beliefs or understanding about the legitimacy of rights (now beginning to be articulated 'digital rights') previously existed, such as on social media, mobile phone technology and the internet more generally.[3]

Alternatively, Weber (1946), in his legitimacy schema, reduced what made the law legitimate to the fact that people believed in its legitimacy because they believed in rationality. In John P. McCormick's introduction to Carl Schmitt's *Legality and Legitimacy* (2004) however, he claims Weber misses what makes law independently legitimate. Namely, it is law's *rationality,* not people's *belief* in rationality, that grants law legitimacy. So, it is not law's subjective legitimacy but because it has

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[3] Perhaps today's equivalent of the conventions of legitimate 'rights of way' and rights gained from repeated use now being violated can be found at more libertarian ends of the internet community. Here, some feel that *their space,* that they used prior to government interfering in it, is now being, or has been, intruded upon.

normative legitimating qualities that is important. Because beliefs and law are not always reconcilable, McCormick says, people could be made to believe something else about law, giving law a very weak and context-specific legitimacy based solely on a given society's beliefs in it at a given time. Schmitt exploits this loophole in Weber's thinking, says McCormick, to say exactly that in *Legality and Legitimacy (*2004*)*. In his attempts to undermine a reliance on law for a political order's legitimacy - in order to undermine the Weimar republic - Schmitt reduces a *belief in* rationality of law to a mere opinion or cultural disposition.

Additionally, Schmitt pointed out (quite hypocritically in hindsight), a belief in legality-as-legitimacy allows nefarious forces to capture law and fill it with content that, from an independent point of view, could be considered as evil, violent, discriminatory and unjustified. This observation shows that law-based regimes which are nevertheless despotic, oppressive or dominating to sections of their populations, still maintain a certain legitimacy on the strength of them abiding by a rule of law of some kind. Showing that law can be objectionable and unacceptable in this way, shows that law itself does not necessarily explain why surveillance could be so widespread and subjectively legitimate in liberal democracies. Conversely, it is not always the case either, that things that are *unlawful,* are seen as illegitimate in law and rule-based societies such as liberal democracies.

Take the consequences following the Snowden revelations discussed in the introduction for example. The 'illegal activity' that was revealed, resulted in *illegal* practices being made *legal* by law makers. That is to say, that such practices were outside the law did not, in the eyes of the government, parliament or it seems much of population of the United Kingdom (see polling in the introduction), make them illegitimate practices. If they were seen as both unlawful *and* illegitimate, they would

have not have been brought into law and codified in a way that makes them now-legal practices. The practices could have been viewed as illegitimate *because* they were not lawful, something remedied by bringing them under the law, but this detaches the substance of the practice itself – mass data collection and surveillance – from considerations of legitimacy or illegitimacy.

Bringing those surveillance practices under law certainly strengthens the legitimacy of them, but does not seem to be the basis of their legitimacy, nor the reason that, as was discussed in the introduction, much of the population seem to accept such surveillance practices as legitimate, or at least not be exercised to oppose them in any meaningful way. Pointing to unlawful, unregulated and uncodified surveillance practices does not reduce those practices necessarily, or render them illegitimate, but instead may simply compel states to regulate them. Perhaps in this way preventing more arbitrary or unrestrained uses by security services, but not, as with the example of the IP Bill, reducing the actual substance or spread of those surveillance practices.

It is not only whether surveillance is lawful or unlawful then which designates its subjective or normative legitimacy, or indicates consent, and thus its ability to be deployed widely in a liberal democracy. However, what *is* important for liberal democracy, is that surveillance law is not "disconnected from both those who make it and those over whom it is applied" (McCormick, cited in Seitzer, 2005, xxiv). If there is a lack of what Mouffe calls a *shared symbolic space* (2005) or what Beetham calls a *common framework* (2013) of aims in the law, then it may de-legitimise that law, certainly in the eyes of those who do not feel part of such a shared symbolic space or common framework.

A shared symbolic space or common frameworks means that no matter that people

may contest and disagree with policies, there is a terrain on which society can agree to contest upon. Modern liberal democracy rests on a shared symbolic belief in things like individual liberty, rights and democratic process. 'Democracy' as such, is a shared symbolic space for politically contesting how society should be governed, organised and resources distributed. The manner in which disputes must take place, and into what areas disputes must not go, limits and restricts contestation about society's direction within a common framework of understanding. Other shared common frameworks that can be invoked include the idea of 'security' being important for democracy to take place at all. Everyone who agrees or disagrees with, for example, phone hacking, can still be placed into the same symbolic space of wanting to be protected. Terrorism and 'the public' can be mobilised to put the majority of the public who are under surveillance into a shared common framework *with* GCHQ – the framework of fighting terrorism and providing security for society, as former GCHQ directors David Omand and Kevin Tebbit imply in their *In Defence of GCHQ* article (Omand & Tebbit, 2013). A framework that, because of society's commitment to law, liberty and rule-based power, must be brought to heel and restrained within legal frameworks, but a framework of 'security' that nonetheless has independent legitimating qualities prior to it being made legal. These legitimating qualities are grounded in the creation of, or existence of, a shared common framework *against* terrorism, that may or may not be lawful in practice.

Often it is also lawful by omission, which is sometimes as a result of the 'glacial pace' (Fussey, 2015) with which law and regulation attempt to catch up with surveillance technologies to restrain them. Moreover, the appeals to shared beliefs, shared values and common frameworks concern more everyday cases of society's organisation and surveillance, and, as I will argue in section 2, legitimise surveillance through its common aim of implementing and regulating liberal democratic values more widely.

Shared values like democracy, liberty, security, procedural fairness, formal equality, citizenship rights and human rights all form part of the justificatory belief framework within which such appeals are made. In this way what people believe about surveillance - subjective legitimacy – and the normative standards by which it is assessed, intersect. However, these shared values are also contestable. What they mean, to whom, in different contexts, what is the legitimate use of power to deploy or interfere in them, on whose behalf and in the cause of what interests, is the essence of politics. So, the shared common framework from which legitimation can be drawn is of course politically influenced.

Beetham makes this point clearly in *The Legitimation of Power* (2013) stating that it is impossible in practice to extricate processes of legitimation from the power that requires legitimacy. That is to say, power does not exist in some unrelated field distinct from legitimation processes (2013). As such, strategies to politically *create* common frameworks and shared beliefs, that legitimate state power must be considered, and will be considered in chapters 3-5. The framework within which surveillance draws its legitimacy, as I will argue in the next section, is from the institutional implementation of liberal democratic values. Further, I will discuss throughout chapters 3-5, the ways some groups and individuals are excluded from such a shared common framework *in order to be* put under surveillance. For example, a common framework can be used, as I will argue in chapter 3 on surveillance of welfare claimants, to mobilise a figure of 'the public' *against* welfare claimants, whom it is necessary to place outside of such a common framework, in order to get approval for intrusive surveillance over them.

Separating groups out in this way impacts upon the final legitimation necessity,

consent-giving. The argument around mass surveillance from GCHQ could be that only terrorists should be worried, however everyone else ought to reasonably share our aims. On this basis it is reasonable to assume consent. Likewise, surveillance of welfare claimants could be justified by claiming it is only those people doing something wrong who ought to be concerned, and on this basis it is reasonable to assume consent from those who are not wrongdoers. This starts to unpack the legitimating basis of the often crude but effective proclamation that 'if you've nothing to hide you've nothing to fear' from surveillance. Assuming we have a shared common framework for surveillance practices, only the unreasonable or the wrongdoer could object. It is a powerful claim, but one which is flawed.

Flawed because, as laid out in the introduction a political authority in 'ordinary' circumstances must give some kind of account to those subject to its power. Some marginalised groups, whom surveillance targets, are placed *outside* the shared common framework for legitimation, without sufficient justificatory reasons offered, removing them from the constituency to which justifications for surveillance are offered, or appeals to shared beliefs made. Legitimacy is brought into question in this way in the cases I consider - non-citizens, welfare claimants and protestors – in which I find no satisfactory account is offered to these groups for the political power they are subject too. Secondly, because of the effects of surveillance I identify they further cannot object to it in any meaningful way, meaning their consent is not secured freely. This, I argue in section 3 of this chapter, and expand in chapters 3-5 makes surveillance in fact both dominating and illegitimate.

The argument so far shows how, in a liberal democracy, there are basic political values – equality, liberty, procedural fairness and so on – and political institutional arrangements are legitimate to the extent that they reflect these values in some way.

This is because, for normative legitimacy, political arrangements must be hypothetically justifiable to a given set of citizens, in this case, citizens of liberal democracy. However, realising these values in practice produces surveillance (section 2 below will cover this in detail), and surveillance offends some basic values on which society is based - such as equality, liberty, fairness. Nevertheless, surveillance enjoys subjective legitimacy on the strength of it being associated with protecting or bringing into practice shared common values of liberal democracy. I will show how those who are harmed by it, have their protests or non-compliance de-politicised and de-legitimised to the extent that they cannot object to surveillance practices in any meaningful way. In this, they are dominated (discussed in section 3 below), and, would not hypothetically, or in practice, consent under these conditions. This brings into question the legitimacy of surveillance regimes based on these justifications, while explaining how it is the case that they are widespread.

I will illuminate the illegitimacy problems with surveillance practices in the following chapters by looking at the beliefs in the *rules* governing the exercise of power, and surveillance as an exercise of power that seeks to implement and enforce compliance with those rules. I will explain the processes by which legitimacy can be achieved or claimed with reference to these beliefs, and how this explains the tendency of surveillance to spread widely, seemingly unhindered by the harm it brings.

Now I will discuss the contingent relationship that surveillance has with liberal democratic rules, the implementation of liberal democratic values, and the legitimacy of specific types of power coming from the implementation of liberal democracies, historically and theoretically.

2. Surveillance at the foundations of liberal democracy

State surveillance was "historically actualized" (Habermas, 1990, p.205) through the formation of the modern liberal democratic state, both historically and theoretically. There are two key ways in which this occurred. The first is through the institutional reconciliation of political contestation; contestation that was released through freedoms brought about by liberalism and democracy. That is, a conflictual politics of competing interests requires a system of institutional reconciliation, which, as I will argue, requires rule-based enforcement and surveillance. Such things as elections and other methods for aggregating popular demands, but also concepts like democratic citizenship (as I will discuss in chapter 4) and institutionalising dissent (as I will discuss in chapter 5), require information gathering and monitoring to oversee competing interests and interpretations of the values underpinning them. The second way relates to the implementation of liberal democratic rules, in a formally rational way, through 'bureaucratic surveillance'.

Bureaucratisation is well covered since Weber (1904), however it is not only the case that bureaucratisation is linked inherently to capitalism and modernity, it is also linked to the implementation of the non-arbitrary, procedurally fair and formally equal rules that define liberal democratic institutions. The key point is that the origin of surveillance in the role of implementing institutional rules that bring liberal democratic values into practice, also grants surveillance a society-specific legitimation in liberal democracy. It is not only that surveillance is linked to the rise of the modern state – although this is also, in some ways, true – but is intimately connected to liberal democracy insofar as liberal democracy is a political order that relies on the equal enforcement of its procedural rules to bring its values into practice, and protect them. So, liberal democratic states, in order to monitor and enforce equal compliance of its

rules and procedures, must "penetrate" its territory administratively (Dandeker, 1990, p.53). Moreover, the extent to which the state is successful in ensuring equal implementation and compliance with the state's rules, is contingent on the extent and power of 'bureaucratic surveillance' to do so. The more power bureaucratic surveillance has – the more resources, databases, information, authority - the more effectively implementation and compliance to its rules can be achieved – and the success of equal implementation and compliance is important for the legitimacy of the rules themselves. This is because of the bureaucratic logic of formal rationalism, which creates, and defines, what bureaucratic surveillance is.

Formal rationalism defines the bureaucratic nature of rule based institutions, which are compelled to conduct surveillance to operate. Formal rationalism is a formally equal bureaucratic process of interpreting and using information that has been associated with bureaucracy since Weber (1904). It is the logic of making the world calculable, through collecting data, and the universal application of rules to that data. Turning information, which can be anything – bodies, movement, events - into data and interpreting that data through universally applied rules, laws and procedures to classify and categorise that population in order to produce impartial and impersonal decisions and results, is the method by which bureaucratic surveillance is effective and efficient. These first two processes are instrumental means with which to more efficiently achieve the purpose of the organisation conducting surveillance, whatever that purpose may be (Weber, 1904; Ritzer 2009). The ability to turn information about the world into data for use, is reliant on the capacity to collect sufficient amounts of data, and the more complete the information collected is that needs calculating, the more efficiently bureaucracy can calculate the world with it. This is the nature of bureaucratic surveillance and bureaucratic growth in pursuit of the goal of increasing efficiency.

This bureaucratic logic of surveillance can be seen today, on the street in the CCTV camera system 'flagging' up suspicious behaviour as a result of pre-determined classifications as to what ought to be deemed suspicious, it is in the welfare office where claimants are granted or refused benefits according to criteria observed by the job advisors or housing benefit officers, it also monitors how many claimants are successfully got back into work by the job advisor against universally applied targets set in advance. It is the application of universal rules and criteria which calculates and socially sorts (Lyon, 2005) who it is that gets an easy ride through the facial scanners at airport security and who is less likely to do so based upon travel habits, ethnicity, and country of origin. It is effective for policing functions, economic efficiency and, because of its formally equal approach to the world - its application of universal and impartial rules to particular cases - it effectively implements and administers the formally equal values of the liberal democratic state.

It is not only true to say that whether the state successfully implements formally equal rules in practice is contingent on the extent and capacities of bureaucratic surveillance to do so, but also, that the *legitimacy* of the liberal democratic state hinges on this success. That is, because the state draws some of its legitimacy from claims around formal equality and institutional fairness of liberal democratic rules, surveillance is needed for the legitimacy of the state and its ability to claim legitimacy, on the strength of its ability to implement and enforce its rules equally and fairly across its territory.

In this role surveillance is a productive power for liberal democracy, it 'produces' legitimacy, not just an observational or external power, as it is commonly framed in public justifications. Surveillance is productive not only for the modern state,

capitalism or security then, as is often understood - liberal democratic values are then offended as a result of that, it is claimed. But rather, *surveillance 'produces' liberal democratic values in practice for liberal democracy*. The conundrum for liberal democracy is that the administrative and bureaucratic reach *in* to society to garner information - to assess, observe, monitor and categorise - which may offend liberal and democratic values, was driven in part by the very democratisation of those societies.

For example, surveillance *creates* formal equality. Formal equality is built on the political need within liberalism to eliminate prejudice, favour, personal privilege and ambition that preceded political power in the pre-liberal era (discussed in more detail shortly). The ability of a state to treat people in a formally equal way according to procedurally fair rules is reliant on the capacity to implement, monitor and enforce compliance with the rules governing formal equality. This is in turn reliant on the capacity to gather information about the implementation and violation of those rules. Without this capacity, compliance with institutional rules of formal equality is not possible, and formal equality cannot be brought into practice. Surveillance expands into new areas, such as social rights and border control, as the state extends its democratically authorised competences over these areas. Wherever there are rules guiding values into practice – and liberal democracy is inherently a rule-based society – surveillance plays a productive role in securing and implementing those values through rules.

Surveillance is implicated in bringing liberal democratic values into practice in a number of other ways, overseen by bureaucratic processes that require surveillance. Accountability is a democratic trait grounded in the legitimating requirements of public justification, discussed in the first section. An increase in the democratic

accountability of policing functions - accountable to both the people that are being policed, now with democratic rights, and to democratic institutions as representatives of 'the people' – ironically increases the requirement to control, monitor and constrain the freedom of the public. As Waddington discovered in his studies of the Metropolitan police (1994; 1999), the more accountable the police are made for their actions, the more risk averse they become, and to offset risk in public order situations, they seek to control those situations more. Having responsibility for order and safety in a public space, and being accountable should something go wrong, brings a compulsion to control as many aspects as possible of what the police are accountable for. This leads today, to increasingly honed techniques to maintain public order, and surveillance to ensure all eventualities are monitored. However, because of the requirements to control the public to protect the public, while respecting rights and liberties of the public, outright coercion and naked force are not legitimately permitted, as they may be in other non-democratic countries. This paradoxically compels further intensification of surveillance practices. Other functions of modern policing can be said to increase surveillance as well of course, but policing is also driven to surveil the public in liberal democracies to legitimise their actions democratically, and anticipate what they may be held democratically accountable for.

Realism gives us an insight into the necessity of surveillance, and its role in the institutionalisation of values, in a society in which political conflict is irreducible, such as a plural democracy, and in which shared institutional frameworks of political values oversees reconciliation of that conflict and of competing interests. New political plurality in society, both driven by, and a driving force for democratisation, necessitates a system of both reconciliation between interests, and a system of enforcing compliance with rules governing this reconciliation.

In this view of society, as one of competing interests, and institutional reconciliation the 'democratisation' of rights and liberties itself comes about as a result of what Giddens calls "recurrent arenas of contestation" between rulers and the ruled (Giddens, 1985, p.205) 'Democratisation' of modern states is defined by the achievement of demands by the subordinate population for universal and equal political representation and franchise, and political freedoms in the form of civil rights and formal equality under state law, primarily across the 18th, 19th and early 20th centuries (Giddens, 1985). Formal equality, as mentioned, means treating people in an equal fashion without prejudice, discrimination or favour unless specific justification for differential treatment exists. This requires, not only the creation of formally equal rules and regulations, but, in practice, the implementation of them in a formally equal manner. This is to say it requires agencies and authorities to enforce and mediate formal equality in impartial and procedurally non-arbitrary methods to ensure that prejudice, discrimination, favour and personal ambition is not practiced as these rules are actualised.

The welfare state, for example, is an expression of formal equality in the form of social rights and redistribution, and is susceptible to democratic change and political contest over its purpose, expressed through how it is reformed and maintained. This will be covered at length in chapter 3. This doesn't play out simply however; in Bismark's Germany, for example, such social reforms granting *economic rights* were instituted, Giddens claims, to forestall the granting of demands for political rights (Giddens, 1985, p.205). Whereas in Britain, it is class conflict which is the medium through which to view the institutionalisation of *political rights* of citizenship for the working class (Giddens, 1985, p.205).

Democratisation was not, and continues not to be, a natural process, detached from

power struggles and competing interests. Looking at liberal democratic history from a realist perspective, the formation of the liberal democratic state was fought over politically, and contested, compromises were forged and victories, defeats and lost causes lie in the wake of institutions and have residual presence in political settlements. The competing interests and demands on the state and held in broader society - the demands of the poor for equality, and the demands and interests of the rich, protecting individuals and private property, for example - are reasons which causally create the formation of institutions to reconcile these differing interests.

Today, as a result of continued struggle over social rights in social policy we can see areas of responsibility for liberal democratic governments expanded and altered, changing surveillance requirements and forms. Post-war, welfare state style liberal democracies took an even more substantial view of the responsibility of government beyond early social rights to enforce a standard of distributive equality, or equality of basic wellbeing across health, housing and financial support for job seeking. The welfare state was a commitment to ensure the consequences of these uneven distributions of power and resources were checked for citizens inasmuch as citizens would not be allowed to fall below a minimum standard of wellbeing. This provides a basic level of equality of opportunity and a minimum level of social equality. The intensity of surveillance required for the task of ensuring formal equality extended into material wellbeing is vast, and necessitated the intensification of levels of bureaucratic surveillance power in society, particularly over those in need. However, the 'rolling back' of the welfare state of recent years has not rolled back surveillance, on the contrary less resources have motivated a more intense scrutiny of those still eligible to receive resources, and intensified surveillance of those receiving government welfare and benefits. This is the topic of discussion for chapter 3.

The demands of democracy and liberalism together in one state were brought about, it is important to remember, not from the theoretical abyss but from grounded economic and personal interests and conflicts, such as liberal defences of personal property and democratic demands for more economic, social and material equality. This is related to the second closely linked contestation wrought from the motivation to defend against possibilities of both personal abuse of power - the 'power of princes' - and democratic majoritarian tyranny. This is expressed in the constitutive commitment in liberal democracy to the impersonal, non-arbitrary and procedural character of political and state power that restrains any such possibilities. Committing to procedural power, locating power in the office not the office holder, and dispersing responsibilities amongst state institutions defends against both personal abuse of power, and majoritarian tyranny, violating an individual's liberty.

As Habermas notes, because societies do not by and large have an 'a priori' preference for the specific type of organisation that would satisfy their demands, questions of democratisation are "organisational questions" (1991, p.186). They are also conflictual questions. Institutions are fought over, with reference to equality, liberty, rights, and varying interests of individuals and groups. Conflict reigns in democratic politics and forges a necessary reconciling function of institutional rules governing how these conflicts can play out, and, enforced through surveillance techniques and bureaucratic organisation.

Giddens recognises 3 'clusters' of rights that must be provided with the rise of democratisation (1990, p.45), and as Dandeker points out, in his book looking specifically at surveillance and modernity, "…each cluster of rights is focused on an organisational, and thus surveillance context" (1990, p.69). These rights are civil rights, which include right to assembly, free speech, association, movement and equal

treatment under law, mediated through the rule of law, which is organisationally linked with the police and other administrative functions of the state. Equal political rights to participation in the electoral process, which administratively links the organs of the state and the electorate. And finally economic rights which involve the necessary mediation of the relations between capital and labour (Giddens, 1990, p.53), ensuring that the power over property and over an employee cannot be arbitrarily expressed, these include labour laws, regulations and worker's rights. These demands can be interpreted as demands that are *formally* and *politically* equal inasmuch as they provide equal treatment under law and in the economy. These demands were met by extending participatory rights in the public and political sphere, as well as increased social welfare, but without providing any more substantial social, material or economic equality.

As universal equality under law, franchise and representations expanded, and as arbitration between competing interests and demands in the economic sphere motivated the state to expand its area of responsibilities in order to organise and mediate such demands, so too more laws, rules and procedures grew necessarily to accommodate them. This requires in practice, as H. L. A. Hart explains in discussing legal orders, the existence of second order rules prescribing the manner in which primary rules and laws are to be recognised, implemented and adjudicated, which in turn require 'specialist agencies' to enforce them (Hart, 1961, p.77). The means of those specialist agencies with operational authority over the second order rules of liberal democracies, clustered around sets of rights are - as Giddens (1990), Dandeker (1990), Weber (1904; 1946) and Foucault (1975) explain - through administrative and procedural bureaucratic institutions. These operate on formal rational grounds, as discussed above, with the democratic need to seek more information in order to both efficiently and legitimately fulfil the tasks they are charged with.

Surveillance in this sense is both internal, in that it supervises the implementation of laws through bureaucratic structures that restrain the power of the bureaucrat and official within the bureaucracy, *and*, surveillance is outward facing in that it monitors and oversees proper implementation of the laws and regulations that mediate between competing demands, interests and grievances, from and between individuals in wider society. Most specifically for this thesis, the laws and rules around social policies, citizenship and political rights that were 'released' by democratisation, and the sets of rights Giddens refers to, above.

Another competing force between democracy and liberalism as liberal democracies were forged is apparent. While the force of democratic abhorrence for the arbitrary power of the monarch subjugating 'the people' may have motivated demands for democracy, there was a counter-fear of the tyrannical power of the masses riding roughshod over individual freedoms and minorities (De Tocqueville, 1835) - whether the democratic goal tended towards reactionary or utopian aims mattered less than how it could impact negatively on the individual and their rights, particularly their property rights. Democratisation in this sense could mean, for some such as Weber and De Tocqueville, a tyranny of the majority (Dandeker, 1990, p.43), if the ends to which such democratisation was directed was not checked sufficiently.

Restraining arbitrary and discretionary power for both personal and majoritarian ends by applying democratic rights in a *procedural* way – through rules and regulations, impersonally and impartially administered with surveillance methods - restrains the potentially tyrannical possibilities of both, and importantly, from the liberal perspective these included formally equal property rights. A system of enforcing formally equal property rights requires bureaucratic organisations to oversee contract

fairly, and policing functions to enforce contracts on newly acquired property as property ownership spread, and the functions for protecting it became more centralised as legitimate use of violence became monopolised by the state (Weber, 1946). The extension of property more broadly is linked to capitalism, but here I have shown that liberalism and democracy, and the contestation for more rights, liberties and economic equality because of liberal and democratic rights, also led to the extension of formal property rights. The coterminous development of *formal* economic and political freedoms, under both liberal democracy and capitalism, are symbiotic in many ways.

The nature of competing interests throughout society, released as a result of more economic equality and democratisation, relies on institutional reconciliation through which actual conflict is substituted for political contestation over institutional rules – the nature of 'the political'. Such a formalised contest becomes a contest over competing interpretations of values that will most promote one group's institutional interests. What is fair, what is equal, what is the proper limit of personal liberty or privacy are not abstract concepts, but are worked up into practical existing conceptions through contestation and co-made by institutional settlements.

There is a particular tension in this example of formally equal property rights for example. They protect the individual, in the form of his or her rights to private property, and provide equality insofar as everyone has the right to have property rights should they be able to afford it. However, at the same time, property rights defend individual power against demands of the property-less. Popular sovereignty, that is to say, *democracy*, finds its limits at the door of an individual's property rights, that is to say, *liberalism,* which is not historically accidental.

'Liberalism' as a self-conscious movement was not really apparent until after the heyday of absolute sovereign monarchs (Geuss, 2001, p.105). So, while liberals could claim an unease with absolute and arbitrary sovereign power leads to a commitment to individual rights and property rights, it seems more precise that the aversion to arbitrary political power, was conceived alongside fears of the majority pursuing a range of potentially tyrannical democratic demands. The resulting extension of democratic rights and power was at the same time restrained in its possibilities through a web of oversight and implementation - rules and regulations in the workplace, in property law, policing and governance which depended on the efficient administrative functioning and procedural rules of state administrations. Formal democracy was codified in this way and 'allowed' to be put into practice in a monitored fashion. The extension of democratic rights always depended on surveillance; in the workplace to discipline the now democratised worker seeking to extend demands of democracy into economic demands, in property law, as mentioned, to oversee and enforce contract and to police and protect increasingly widespread property ownership, while disbarring personal use of violence and private militias (again a demand that can be linked to democratic accountability discussed above), and in governance more broadly to oversee continued expansions of bureaucratic responsibilities.

This causal force outlined above of bureaucratic surveillance is linked to other sources as well of course. Weber, for example, saw the causal link of bureaucratisation in Western states being primarily inherent to *capitalist* states (Weber, 1914). For Weber, rationalisation and bureaucratic organisation would spill out from capitalist organisations and into all other areas of public and private life – politics and the personal spheres (Weber, 1914). This is due to capitalism's inherent *rationality,* which in order to be stable and efficient required a 'rational-legal' bureaucratic

framework, rather than any other prior political commitments necessarily (1914). The rationality which Weber characterises in bureaucracy that is beneficial to capital, hinges on the application of universal rules and procedures to particular cases in an impartial and impersonal way, including, as just discussed, individual property rights. So while it may be the case, indeed it is the case, that bureaucratisation enabled capitalist enterprises to be most efficient, it is also precisely what the rule-based formal equality of liberal democratic states require, based upon the values inherent to these political developments. The ability to rationally monitor competing interests within a rational-legal bureaucratic framework mirrors the necessities of implementing liberal democracy, not just capitalism.

Foucault's influential genealogy of liberalism looked at the relationship between capitalism and liberalism in a different way. In *Security, Territory, Population; Lectures at the College de France 1977-1978* (2007) Foucault shifts the focus of his genealogy of 'liberal freedom' as an 'art of governing' between 17th and 19th centuries. Foucault links liberalism with capitalism through the concept of circulation, the implications of which are important for how we experience rights and freedom today. Previously, 'sovereignty' decided the seat of government for a territory, and 'discipline' structured the space within that territory and enforced functional hierarchies within it (Foucault, 2007, pp.20-21). But this is no longer sufficient to respond to a society of individuals with rights, says Foucault. "What is important for our modernity, that is to say, for our present, is not then the state's takeover *(etatisation)* of society, so much as …the 'governmentalization' of the state" (Foucault, 2007, p.109). Through this the state disposes itself towards the population as a political subject, specifically with the capacity to revolt, and particularly that revolt can be as a result of scarcity because of insufficient political-economic management. Therefore, Foucault says, the maximisation of 'good circulation', which

is circulation of economic goods and activities that prevent the possibility of scarcity (and therefore revolt), becomes the priority of governing.

Foucault moves beyond his earlier analysis of discipline and freedom, in which he locates the origins of liberal freedom in 18th century institutions in which demands were "ballasted" by disciplinary techniques – for children, workers, soldiers – that guaranteed freedoms for everybody else by disciplining these populations (Foucault, 2007, p.48). Instead, the important thing to consider about the ideology of liberal freedom is that its source is one of circulation, Foucault says, and freedom becomes the idea of "not interfering, allowing free movement, letting things follow their course; laisser faire, passer et aller" (Foucault, 2007, p.48). This ideology of circulation-as-freedom is, for Foucault, one of the conditions of the development of modern (that is to say capitalist-economic) society in the 18th century. Foucault says the key to understanding freedom in this way is that freedom is not fundamentally an ideology at all. Rather than ideology freedom is a *technology* of power based on maintaining good circulation in political economy. Circulation *comes into being* through being regulated. Goods and people across different terrains circulate well and freely, through a reliance on 'apparatuses of security'. That is, to secure good circulation and increase free circulation, security that prevents interruptions to this is required. The idea of government itself is not an idea of sovereignty but "the idea of an administration of things" and "power [is] thought of as regulation that can only be carried out through and by reliance on the freedom of each" (2007, p.49). Freedom becomes "nothing else but the correlative of the deployment of apparatus of security" (2007, p.48). Regulation, circulation and power, being achieved through allowing things to circulate through regulating, monitoring and securing good circulation, becomes both freedom's purpose and source.

Fouacult expertly characterises the techniques and implications of freedom-as-circulation and its relationship with capitalist development. Insofar as I have described the development of rules as a result of contestation over values as politics however, Foucault's technology of power is not implicit in the development of surveillance and monitoring of liberal democratic values. It may indeed be an accurate description of the type of regulatory freedom dominant in society, and I will rely on contemporary governmentality insights into surveillance in the chapters that follow, however I want to emphasise the rights and values that can be in opposition to, and create the contestation over, such a purpose of governing. What Foucault could say about democratisation, formal equality and social rights won by the ruled from the rulers in the way I am framing it is that these concessions maximise good circulation in pursuit of governing which reduces the risk of revolt. Indeed Giddens, mentioned above, says something similar in the case Bizmark's Germany. I don't intend to engage deeply with Foucault's arguments around this, and whether or not the value of principles and politics that were inherent in many democratising demands and movements can be explained through scarcity. Rather I wish to foreground power and contestation over the meaning of values, and the pursuit of interests for this thesis, that better explains for my purposes the prevalence of a regulatory, monitored and rule based freedom, overseen by surveillance.

Equal administration of a stable social and political order can also be seen as desirable inasmuch as it increases the ability and freedom to plan one's life without arbitrary and unexpected interruptions. Policy and law cannot, in principle, be enacted on a whim in a bureaucratised democratic state permitting, on behalf of the population, an ability for rational calculation of the consequences of actions. Rational order would be something many realists could recognise as desirable; the primacy of political order above civil disorder seems to be promoted by a rational system of formal equality

with clearly set rules, instituted and monitored efficiently and equally. Compliance with legal contract, law and policing needs a system of enforcement in order to secure citizen's statuses, and, to secure against an official or a citizen *unequally* applying such rules, or to breaking them, or offending someone else's formal equal status under law, or violating their rights which guarantee such formal equality. The system required to monitor and enforce against this, is the system of bureaucratic surveillance discussed.

Weber was amongst the first to observe that organising this rule-based procedural system based on enforcing legal norms and rational outcomes in this way– one which enables the population to calculate their way through a stable social and political order (Weber, 1904) – requires huge organisational capacities. The capacity for the subject population to be able to calculate their way through a stable order must be matched by the state's ability to translate policy directives into "...detailed procedures and regular routines throughout its territory" (Dandeker, 1990, p.12). Weber, while accepting the benefits of rule-based bureaucratic social order, articulated the danger he foresaw in this trend of an increasingly calculable and rationalised bureaucratic world through his famous fear of the 'Iron Cage' of bureaucratisation (Weber, 1904).

Further, the ability to rationally calculate one's way around rational rules which are fully justified, thus increasing freedom, doesn't necessarily match with rules benefitting your interests. I will also argue that surveillance in fact does not promote visible rational rules that are known to all and can be navigated. On the contrary, those under intensive surveillance, or groups exposed to different treatment as a result of the same surveillance, are often in a state of palpable uncertainty about the rules governing their life. It is often unclear what rules are governing surveillance practices (even if they are rationalised), and what counts as violations of them. This is

exemplified with the condition of welfare claimants discussed in the next chapter.

Many scholars, most prominently Foucault and Weber, have charted surveillance's integral rise with the modern state, capitalism and liberalism. My addition here has not been to dispute them but to use their insights to link this aspect of modernity - the bureaucratic, institutionalised rule-based aspect - theoretically to the philosophical necessities of putting liberalism and democracy into practice in one state. And to do so within a terrain of permanently competing interests that require institutional rule-based reconciliation.

The discussion so far tells us that surveillance is not external to liberal democracy, which shows one reason why using rights, equality, privacy and liberty is not successful in defending society against surveillance. Instead, surveillance is integral in many ways to bringing these values into practice. It also shows us the importance of the legitimacy of surveillance as a technique of power in its role of guiding value-laden rules into practice. The discussion has also shown that the primary requirement of expressing political power is that it is publicly justifiable on the basis of shared beliefs of liberal democratic society. This is contestable but limited within recognisable parameters that take rights, liberties and equality seriously, transferring contest to contests about the legitimate interpretation of those values.

I also argued for the importance of the specific institutional context within which those values are worked up into practicable conceptions. However, if surveillance has its legitimating origins as being a constitutive part of the institutionalisation of liberal democracy - as the technique to enforce the rules, and successfully enforcing the rules being of legitimating importance for the state, thus compelling increased surveillance - we could be in a tautology of legitimation and surveillance spread. That is to say,

surveillance is *always* legitimate because of its legitimate role implementing and securing compliance with legitimate rules.

That this is not the case, that surveillance is not always legitimate, hinges on the fact of politics being partial, and so enforcement of liberal democratic rules is partial. In other words, what has so far been explained is the spread of surveillance resulting from its inherent legitimacy as a rule based power guiding legitimate liberal democratic rules into practice. From here I will now turn to discuss over whom it is used, and what the consequences are for those over which it is deployed. Because, just because all are watched, it is not the case that all are watched equally.

3. Surveillance and domination

We can ordinarily look at liberty or privacy under surveillance as negative concepts or protections. Looking at freedoms in this way, we can say that these values are protected *against* surveillance interfering in the full enjoyment of these values. Up to now I have been suggesting that looking at surveillance in this way, as external to the practice of values, is insufficient. Of course, if one was *only* concerned about liberty or privacy at the expense of other values, or ignored other values (for valid theoretical reasons), it could be said that we could indeed protect them from intrusion by surveillance. However, political practice is not like this, values are brought into being through contestation and compromise, and the regulation and surveillance of rules. Not only is surveillance tied up with implementing liberal democratic values, and so difficult to disentangle from the full enjoyment of values across society, but also the harms to freedom brought about by surveillance often take a form not captured fully by traditional liberal understandings of liberty and freedom.

To look at privacy as a negative value, having privacy means being free from the watch of surveillance. We can consider privacy to be freely enjoyed if interference in a given instant is not apparent; no data is being collected, no observation of personal activity is occurring, there is no gaze under which someone 'enjoys' their free thoughts and activities. Likewise with liberty; under surveillance, negative liberty is enjoyed to the extent that otherwise free choices and actions that an individual would have taken are not hampered in any way by surveillance interfering in an otherwise free activity. Freedom as negative liberty under surveillance is best interpreted as being violated as a result of the consequences attached to surveillance, such as penalties for forbidden behavior. You are free on this account insofar as surveillance is only watching you so it can ensure you are not doing anything wrong, unlawful or forbidden. Should you do 'nothing' wrong your negative liberty is unlikely to be interfered with. The nothing to hide nothing to fear argument is based on this assumption of surveillance's limited role in impacting on freedom. If you are behaving 'rightly' your freedom is not interfered with. This tends to encourage critique of surveillance, as discussed in chapter 1, only when it is being applied 'wrongly'.

However, if an individual is under the watchful eye of a CCTV camera, or official of some kind monitoring them with no observable interference, yet that individual does not clearly know which behaviours are likely to elicit a response from that authority conducting surveillance, then freedom may be impacted in another way. Imagine if that individual did not know which behaviours may elicit a response, or knows from experience or judgement that certain behaviours *may* bring some kind of sanction or redress, but is unsure which behaviours. That is to say, the possibilities of being penalised or scolded in some way are present but not clearly set out in law, rules or in the mind of the watched. It could be said that their freedom is harmed by surveillance

in a number of ways not well covered by liberal or negative freedom, and expressed in rights and civil liberties.

For example, an individual could, if they know, or suspect, they are being watched by their boss, engage in behaviors they anticipate will please them, which would not be the case should that individual know that they are *definitely not* being watched in the workplace. Or, surveillance of a public place may motivate people in that place to self-censor, or 'act normal' as they pass under CCTV cameras. Knowing that your internet search history is being stored for two years through the new laws brought in by the IP Bill, discussed earlier, may make you think twice before searching for certain pieces of information or websites, limiting your tangential train of thought or inquisitiveness. Knowing that the police surveil protests and keep details of certain people in the *Domestic Extremism Database* (*Powerbase*, 2016), a database with thousands of names on it, may reduce the likelihood you attend that protest. That it is unclear precisely what the police do with this information, may further make you less confident to attend certain protests that you anticipate it may be more likely the police would be interested in. In a more limited and specific example a whistle blower, or a source for a journalist, may hesitate before they make the call to a newspaper in the knowledge that this information is stored and is accessible by the police for reasons the whistleblower or source is not entirely sure of. Not knowing for sure whether they may be identified, but knowing the capacity exists to identify them because of surveillance of mobile telecommunications, may play strongly on the mind of such a person.

Such effects have been captured in terms described as 'chilling' for democracy, freedom and free speech. For example, Montgomery (2016) discusses the perceived chilling effect on journalistic freedoms in a survey of journalists in Canada.

Surveillance that sits in the background somewhat not directly intruding into your freedom, is hard to defend against in the language of rights, and through liberty as a negative concept. No direct interference takes place with one's choices, it could be argued, but nevertheless one is effected by its presence in a way that could be described as freedom-reducing. Chilling effects is a good descriptive term of some of the ramifications of this situation. Likewise some arguments around the instrumental goods that privacy can bring could address ways you may self censor on the internet. However, it is better captured by looking outside of liberty as a negative concept and relying on the observations of republican theorists of freedom.

Republicans observe that an individual does not have to be exposed to an interference 'event' in order to be considered as unfree. Freedom for these theorists is being free from the *possibility* of interference. If you are exposed to an arbitrary power then the possibility for interference in your life is always present, and therefore you ought to be considered as unfree. Freedom as non-domination means being free from the presence of arbitrary power in one's life. If you have no control over whether or not someone interferes in your life, have no knowledge of what it is that is likely to motivate interference, certain effects and limiting impacts can manifest.

Famously, republicans take examples from 'Neo-roman' republican thought on freedom, and point to the condition of slaves to make their case (Pettit, 1997, Skinner, 1998, 2008). A slave under a benign master can make a variety of apparently 'free choices'. The master is not particularly inclined to treat their slave badly, and gives him or her a relatively free reign. This slave however is still unfree, and this is because, republicans point out, at any given moment the master has the power to withdraw the free reign they have, and whether the master does or not is out of the slave's control. This induces certain effects in the slave's behavior. The slave

'toadies', curries favour, second guesses and 'kow-tows' to his master, in the phrases often used by republican theorists (Petiit, 1997; Skinner, 1998; 2008), and self-censors his behaviour in anticipation of what would and would not please his master. Moreover the slave's freedom as an event (that is, at what point interference is likely to take place or not) is contingent on the master – dependent on his disposition or his mood – and this means the slave can learn behaviors which are less likely to elicit a response, contingently linking a set of learned behaviors with an increase of freedom from interference.

This captures a field of 'unfreedom' not articulated through the language of negative liberty or rights. The effects of being in a situation of where one is exposed to arbitrary power can have unobserved impacts on the individual's behavior, which amount to a reduction in freedom, and which in fact amount to domination according to republicans. That someone may plausibly 'second guess' what websites are now stored, could either be of immediate interest to the police, or which could come back in some way to bite you seems a likely effect for some of the IP Bill. A worker in an office, may kow-tow to their boss in subtle ways if they know they are being observed and anticipate what behavior would elicit an unfavourable response and avoid it.

Nevertheless, should these effects not be engendered, and, in each given instant that free choices are not impacted - and the slave was not toadying and anticipating reactions or self-censoring – ought they be considered as free? Republicans claim that no matter whether in each instant a person is acting freely, their *status* is one of unfreedom. Even if they are not self-censoring and changing choices to second guess reactions, or anticipating what may happen, they could at any time be interfered with anyway. The point is the relationship, and the power that is held over that subject that, at any given time, could be used against them. They are, importantly, in no

position to do anything about whether interference happens or not. They cannot resist it, change or input into any behaviour their master may decide is forbidden.

This under discussed area in surveillance studies, of harms to freedom from a republican perspective, does not necessarily undermine surveillance's legitimacy. As we have seen, its whether or not surveillance is justifiable that is the contingent point for its legitimate use and its widespread nature, not the harms it brings necessarily. But if this dominating aspect of surveillance plays a role in the legitimation of surveillance itself, then it becomes a more vital consideration. I will argue in the coming chapters that this captures the condition of politically weak members of society under surveillance who, it is claimed, consent to surveillance in some way. Or who, it must be assumed for liberal democratic legitimacy, have an opportunity and ability to object to surveillance regimes harming them. I argue such effects, or such a status of being in another's power, severely limits people's ability to object to such surveillance regimes. Whether that be a welfare claimant, a non-citizen or a protestor being surveilled by the police, the effects are not fully captured by privacy rights and civil liberties.

As such, surveillance can be considered as dominating in two interrelated ways which contribute to its spread in society, and can explain why it flourishes without successful resistance. The second sense of domination results from the first, just discussed. In this second sense surveillance restricts the capacity of individuals to make any meaningful objection to surveillance because of the effects that dominating surveillance has on them, thus they are subject to power they have no say over and can not freely consent too in any practical way. This combined shows that the authority deploying surveillance uses its power to coerce consent out of that individual for that surveillance, de-legitimising that surveillance in a normative sense.

Firstly, it is de-legitimised in the sense outlined by Bernard Williams (2005) discussed in the introduction; which is that an authority can not use the power it has to unduly influence consent-giving for that power. Williams says that an authority is illegitimate if it uses its power to secure consent for its legitimacy when it might otherwise not have been forthcoming. Williams argues that an authority's legitimacy in liberal democracy relies on the possibility of free assent being given to it by those subject to it (2005). If an authority uses the power it has to influence people's subjective beliefs in its legitimacy, it undermines that legitimacy, because the belief in it is not freely given. As discussed, beliefs are something that are politically contested and fought over in society, not least by actors such as legitimate political authorities. William's point was not about the broad beliefs of society that form part of the terrain of political contest, but more, the power-over subjects that an authority may have. He called this the Critical Theory Principle (CTP) in his theory on legitimation (2005). If legitimacy is secured through the free assent of citizens that are subject to that authority's power, then threats, coercion and intimidation are removed from the field of the political. In this sense, the political authority's role in answering the first political question - that of political order - does not reproduce the same problems it sought to resolve - violence, civil disorder, threat and intimidation.

Because of its dominating effects just discussed (publicly legitimated or not) those under surveillance are dominated insofar as they are hindered in either resisting or freely assenting. They are prevented, as I will argue in the following chapters, from withdrawing consent or objecting to it because of the effects that surveillance has over them. Subjects who do not know what effects may be induced if they object, or which rules there are they are subject to which, if broken, could bring penalties and sanctions, have fear and self-censorship engendered by the presence of surveillance.

Moreover, even if they do know what effects and consequences can be brought by surveillance they are, as I will outline, politically too weak to object and resist such regimes. The effects surveillance has over them thus draws surveillance out of the realm of politics and into the realm of domination.

This characterisation, it may be obvious, is not the experience of everyone under surveillance of course. You may be thinking I don't fear surveillance in this way. Surveillance is in fact beneficial to most under it. As I will lay out, following David Lyon's social sorting thesis (2005), this is the vital point. That is, surveillance harms some while at the same time benefiting others, provides access for some where it excludes others. It is those that are harmed by surveillance that are dominated. It is those not harmed that provide the subjective legitimacy for surveillance regimes by accepting or not objecting to surveillance practices, that harm other groups. The groups discussed under heavy surveillance lack, for reasons of economic condition (Chapter 3), identity (Chapter 4) or political beliefs and/or aims (Chapter 5), the means by which to object to surveillance precisely because surveillance is used over them in a dominating fashion. It is these groups who are politically excluded from the common framework and shared symbolic space, already discussed, within which values, such as rights, rights are respected.

Insofar as 'the public' at large, on the other hand, *feel* free from surveillance they are not likely to object to it on the grounds that it is harming them. There may be principled grounds for objecting to it however, but not ones referencing personal and specific harm. That surveillance suppresses dissent in those it most intensively surveils is the second part of the explanation. Those who *are* harmed by it, and those who may have experientially based objections to its harms, are those incapable of objecting because surveillance is dominating them in the ways outlined. This

provides the explanation for surveillance being both widespread and harmful at the same time.

This 'pre-political' conception of domination, concerned with conceptions of freedom and justice, is matched and contributes to a sense we can consider people to be *politically dominated* under surveillance in the realist sense. Groups who are targeted for surveillance that is harmful are often themselves de-legitimised to the constituency the justification is being made to. Insofar as they are portrayed as behaving illegitimately, having an illegitimate status or illegitimate aims they are characterised as not political subjects with legitimate grievances, but de-politicised non-compliers with rules, which then justifies the requirement of surveillance to enforce compliance with such rules. In this, authorities are providing no sufficient justification for their treatment of them, consent is not possible, and meaningful objection or dissent is foreclosed.

This second sense is again taken from realist thought (Williams, 2005), however it is similarly expressed by republican theorists like Pettit (1997), however, who argue that unless an individual or group can self-govern they should be considered as unfree. Self-government can be interpreted widely, but importantly it relates to some form of political equality through which one can be described as being the architect of one's own life. Preventing citizens from objecting in any meaningful way, firstly limits their proper role as an equal citizen engaged with surveillance, and further it prevents them from contributing to the polity of which they are the subject. This makes that surveillance normatively illegitimate, I will claim. But the conundrum, as mention in the introduction, is that claims against an authority's illegitimacy are contingent on the ability to do something about it.

That they are targeted is because they are politically weaker members of society, that they are politically weaker is in many ways because they are targeted in order to be de-legitimised so they can be surveilled. They lose out in the contestation over rules guiding the interpretation of values into practice in the first place, and that they cannot object to the consequences of that, is also because they are politically weak members of society. A tautology cemented by surveillance's effects on their freedom. The solution is the equality of political power. However, in line with this thesis which foregrounds political practice as it exists in contemporary institutions and society, this is not a normative call, or 'ideal-theory' proposal.

Instead, people must have enough in the way of resources and enough in the way of political power to be able to look one another in the eye without reason for fear or deference (Pettit, 2015). It may be the case that because of resources some citizens receiving welfare assistance must 'kowtow' to the welfare officer surveilling them. Even if formally they have enough by the way of rights, they do not have enough by the way of political power to effect those rights, or make claims about their status as one being exposed to illegitimate and overbearing domination through surveillance. Both improving their political power increases equality, and, in this sense their political power which can make claims against surveillance. This is another tautology insofar as increased equality lessens the need to separate people for categorisation and classification. It reduces surveillance at the same time as it increases an individual's capacity to object to domination brought by surveillance.

To have the power to be free from surveillance relates to being politically equal to the extent that claims against illegitimate uses of surveillance can be made. It means subjects most harmed by surveillance, in order not to be dominated, must build political power through organising for power, not through rights claims that are

ineffective without the power to make them so. How this is done precisely is beyond the scope of this thesis, but suggestions and potential avenues will be discussed in the following 3 chapters. Nevertheless, practical opposition and resistance in pursuit of equality of power, which lessens both the need for and the harmful effects of surveillance, is what I suggest.

First I will turn to subjects who are politically weakened by their economic position, as I show ways in which the surveillance of welfare distribution is 'legitimate', the ways in which this institutional settlement is politically contested, and the consequences for both welfare claimants and the legitimacy of surveillance over them.

Following that, I will discuss the institutional settlement of 'the border' and citizens. Here I find the political contestation between exclusionary democratic citizenship and inclusive liberal human rights driving the type and intensity of contemporary surveillance practices over citizens and non-citizens. Finding again that those subject to surveillance are dominated, and for this to have legitimation problems. Finally, the chapter on protest and surveillance investigates the legitimacy of practices which seek to resolve the tensions between democratic freedom and democratic order. I argue that those pursing democratic freedoms outside of acceptable institutional frameworks have their rights and democratic freedoms 'silently incapacitated' by surveillance as they are dominated by it. I conclude pessimistically about surveillance's impact on political and democratic freedom under surveillance, but not hopelessly. It is still towards political organising for the power to enforce equality of rights and freedoms that I rely as a possibly route out of the domination brought by surveillance.

Chapter 3 - A Poor Man's Politics: Welfare Claimants, Surveillance and Domination

Introduction.

Sitting in a van at dawn outside a single mother's house to discover whether or not she is living with a partner, is not something one would intuitively think a state agent of a liberal democracy should, or would, be doing. However, in the United Kingdom this is precisely what the DWP have its officers doing (Gentlemen, 2011). This chapter will discuss how this is so, and how surveillance over welfare claimants conducted in this way is seemingly 'legitimate' on grounds understood by liberals, and justifiable to 'the public' in liberal democracies.

Surveillance in the welfare state, I will argue, grows out of a number of liberal democratic practices. While democratic demands for social rights provided the driving force behind much development of welfare from the bottom up, the concept of liberal reciprocity demands a perceivably 'just' distribution of burdens and benefits contained in the welfare state. In practice, I will argue, this creates 'conditionality' in the welfare state, where a regime of sanctions and responsibilities must be navigated in order to be eligible for social assistance. Through this, liberalism provides the basis for the need for surveillance – the need to monitor reciprocity through enforcement of conditionality in the welfare state. At the same time, liberal 'reciprocity' provides the legitimating justification for this dominating surveillance in practice – that is, it is said to be 'fair' to organise and monitor welfare provision in this way. As a result we see surveillance practices coming out of and being justified through liberal and democratic values at the same time. These practices are then legitimised for use over welfare claimants in a way that convinces 'the public' but dominates its targets. This allows surveillance to spread without resistance, firstly because it appears to be a legitimate thing to do, with reference to liberal democratic values, and secondly

because resistance and objections from the welfare claimants are suppressed. Through such domination the state undermines its legitimacy by effectively coercing consent from the individuals under surveillance at the same time as engineering discursive norms around problems with welfare and welfare claimants to 'the public' at large. So, the public are convinced that surveillance is required to solve these perceived problems, but even according to the standards of legitimacy endorsed by liberals – which emphasise the consent of the governed - there is a problem.

Surveillance, as defined, uses information to influence a given population according to a given set of rules. What influences any population under surveillance can vary, but in welfare surveillance the mechanisms of influence are very clear. Sanctioning and penalties, and the threat of them, attached to breaking the rules of welfare assistance are the method by which welfare claimant's behaviour is targeted. The scale of sanctions and penalties enforced through surveillance is large and growing. 6.8 million sanctions were applied to JSA claimants between 2000 and 2014, and 120,800 sanctions have been applied to ESA (Employment and Support Allowance) claimants since its introduction 2008 (Bramley et al., 2014).

I will utilise realist insights into legitimation practices that asks of an authority doing the surveillance not 'is this right'? but instead 'what gives you the right to do this to us?' An authority could claim we have this right because you let us get away with it (Runciman, 2014). If people are not successfully objecting, politically organising, forming associations and protesting against such surveillance in practice, then surveillance of welfare claimants achieves a certain legitimacy on the strength of it being widely accepted, and little resisted – at least, in the way recognised as political by liberal theorists.

An objection could be that there is a circularity to this view of legitimacy, that being, rather than only foregrounding power it also privileges power and hones in on the status quo without trying to cut into it with moral claims and critique. 'It is legitimate because it is accepted - it is accepted because people view it as legitimate'. But mine is a critical claim. I will use the realist position on legitimacy to explain how authorities gain subjective legitimacy for surveillance, yet, undermine that by using the power of surveillance to secure it. In this chapter, the question asked of authorities deploying surveillance will be; does surveillance seem legitimate to people living under your power because you use your power to manipulate their opinions and judgements of you, or, is there a story that can be told about your surveillance that is independent of you using your power to craft that story? (Runciman, 2014). The independent account required is one in which the power of surveillance to influence people is not implicated in securing the acceptance of the legitimacy of that surveillance (Williams, 2005).

I'll conclude that there is a partially convincing story of the justifiability of surveillance, independent of the power surveillance holds over welfare claimants. The democratic authority to act and deploy surveillance, and the approval of this political practice which is publicly justifiable with reference to liberal democratic values provides such surveillance regimes with a certain subjective legitimacy. However, it has normative problems which undermine it. Firstly, the constituency for the justification of surveillance is separate to that of surveillance, the welfare claimants. Through this audience, 'the public', discursive norms of legitimation are engineered *about* welfare claimants to justify surveillance. For welfare claimants, I will find that gaining assent for the legitimacy of surveillance cannot be extricated from the influence surveillance has on them. Using Bernard William's 'critical theory principle' (2005), which is that legitimate political authority can be legitimate only if

it does not use its power to garner assent for its power, I will find a problem with how surveillance operates over claimants. In other words, an authority cannot claim it is legitimate on the basis of people believing it to be legitimate, while at the same time using its power to influence people's opinion of its legitimacy when they otherwise may not have held that opinion.   In short, welfare surveillance coerces agreement out of those subject to it. Here will be the edge into which critique of welfare surveillance regimes is most sharply open, and offers potential ways to resist the harmful affects felt by welfare claimants who are dominated by surveillance regimes.

The argument is, that authorities use recognisable liberal and democratic values to discursively convince 'the public' of the justifiability of surveillance regimes. This however dominates the welfare claimants in a number of ways, bringing into question surveillance's legitimacy. The chapter will be in two sections. *A New Deal in Welfare Provision; Terms and Conditions Apply* and *Who accepts the Welfare Deal?* The first section discusses how the language and logic of liberal accounts of legitimacy is deployed in support of surveillance regimes. The second half of the chapter will raise objections to this process of legitimation, objections which are furthermore comprehensible or implied by the accounts by legitimacy given. This brings these legitimating accounts into question.

The argument will proceed as follows. The first section, will be in three subsections, firstly discussing common legitimating stories that are told about welfare surveillance around fairness, trade offs, deals and conditionality, drawing on surveillance studies and government justifications, which legitimate surveillance's use over welfare claimants. Here, the common-sense basis on which the duties and obligations that it is thought welfare claimants ought to discharge for receipt of welfare benefits, drawn from interpretation and contest over of liberal and democratic values, is questioned.

The concept of liberal reciprocity, makes conditional the full enjoyment of democratic social rights that have been won from the state.

The first subsection i) *Fairness and Conditionality in welfare surveillance,* will question whether conditional and behavioural obligations on the part of the welfare claimants unbalance somewhat the 'fair deal' it is assumed welfare provision is based on. Taking this further in the second subsection, *ii) Norm Enforcement and the Engineering of Consent for Surveillance*, I will critically assess explanations from governmentality schools of thought, which show how common sense assumptions around the norms of behaviour of welfare claimants inform the public's view of what are and what are not legitimate forms of behaviour - of both the claimants and the state intervening in claimant's lives. Governmentality scholars show how common sense assumptions around 'fair deals' and justifiable interventions come to be held through discursive regimes of government. The generation and enforcement of norms, and the 'activation of consent' from the public for increasing regimes of intrusive surveillance, is achieved by targeting their beliefs about welfare claimants and the inherent problems with them. These governmentality theses also show why the rights of, and protections for, welfare claimants exposed to surveillance may not be as effective as they claim to be, helping to understand surveillance's widespread nature.

These insights from governmentality scholars however provide no existential threat to the legitimacy of liberal democratic power from a liberal democratic point of view. I will show in the next subsection iii) *Those who tell the stories rule the world* how these discursive strategies used by authorities are in many ways the essence of politics in a liberal democracy. Discussing them through the language of liberal democratic legitimacy and politics, I find the legitimating stories that are told about surveillance

to be partially justifiable. If we grant that the authority deploying surveillance is a legitimate democratic authority then according to liberal principles it will follow that it has in principle the right to deploy political power. That authority also has political dominance over the interpretations of what the welfare state is for, its problems, and why surveillance is necessary to solve them, which is then deployed within procedural limits of how power, in liberal democracies, can be used in practice.

However, in section 2, *Who Accepts the Welfare Deal?* I will ask to whom is this legitimation story being offered? And is it as justifiable to them, as it is to 'us'. Questioning, in the first subsection i) *Domination: silent assent or suppressed objection?* whether welfare claimants do, or even *can*, freely assent to surveillance in practice through discussing the tangible impacts that surveillance on them from a republican perspective. In light of this, in the second subsection ii) '*We', the people?*, I will ask who the real constituency for legitimating stories actually is, questioning how we judge consent and dissent. I will argue that while surveillance grows out of liberal democratic practices, the legitimating story being told about surveillance cannot be extricated from the power crafting that story, nor from the undue influence that surveillance has that is garnering consent from the subject population.

A political problem demands a political answer, and this is what I will suggest. Whether forms of dissent don't register as dissent because they are not articulated in terms of liberal rights-bearing citizens, will be discussed in this subsection. Identifying dissent, objections and alternative forms of resistance to surveillance not recognisable to liberal formulations of non-consent, dissent and objection, shows welfare claimants may not silently consent at all. However, these practices are hidden from public legitimation and to make them public and thus more widely effective,

political power, not just hidden resistance to political power, is required. How that is achieved, however, is beyond the scope of this discussion.

1. A New Deal in Welfare Provision; Terms and Conditions Apply

i) Fairness and Conditionality in welfare surveillance

The 'deal' that modern society strikes for surveillance - says Marx, G., in reviewing Gilliom's *Overseers of the Poor* - which "legitimises intrusions into private realms…" is exemplified in welfare: "Give us your information in exchange for [fill in the blanks] welfare, employment, a license, insurance, a loan, tax reductions and various privileges, subsidies, exemptions, and identities" (2005).

Looking at welfare claimant's situation as a deal in this way we could say that if an individual is to receive public goods in the form of resources found in welfare provision, then in return this requires collection of data, monitoring of outcomes and oversight of claimant's personal situation. It seems intuitively reasonable that it is like this - a trade-off, of information for resources. In large complex democracies with an array of social rights and benefits, bureaucratic information systems seem an inevitable necessity to monitor those who have the right to claim those resources. Indeed, this is the argument I made in the chapter 2 - the organisation of formal equality - in this instance in the form of social rights and public goods - compels bureaucratic organisation which is coterminous with surveillance. Surveillance of welfare recipients, it could be said, is simply enforcing and regulating the 'just' distribution of benefits and burdens throughout society, and any intrusive aspects of enforcement or regulation through surveillance can be justified insofar as having one's data collected is an exchange for public goods of some kind. Inherent to certain strands of liberal principle of legitimacy, as mentioned, is the idea of reciprocity and obligations. John Rawls claims the principle of liberal legitimacy as being based on a

"criterion of reciprocity" (Rawls, 2005), for example, and liberal theories of consent and obligations to obey are often grounded in this type of reciprocity. Rawls' criterion of reciprocity expresses the "intrinsic (moral) political ideal" of justice as fairness (2005, xlv). Holding that "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" (2005, xliv). So, not only is welfare state surveillance the result of demands for social rights combining with the formalisation of equality of rights, producing large bureaucratic systems, but it is also imbued and limited by liberal interpretation of what is 'right' and 'fair'. The liberal justifications for taking political actions, just outlined by Rawls, is found in practice to limit the unconditional nature of social rights won through democratisation and found in the welfare state, This is insofar as it produces both the need and extent for surveillance, but also, as I will discuss in a moment, surveillance's type – which can be described through 'conditionality'.

Rule-based procedural power, a uniquely legitimate form of power in liberal democracies further compel any transgressions of clearly set out rules - you are entitled to this public good for this reason – to be backed up with sanctions that are found in welfare regimes, such as losing portions of one's benefits or losing them all together. Surveillance monitors that enforcement in various spheres of the welfare state. Iain Duncan Smith, the UK Government's Work and Pension's Secretary 2010-2016, makes this point clearly in a speech, *Universal Credit: Welfare that Works*, when identifying rule breaking as an issue in welfare provision: "That is why we are developing sanctions, for those who refuse to play by the rules" (2010). However, the sheer volume of sanctions attached to surveillance seems to show that something is awry.

Hartley Dean explains the unequal nature of such a deal - a deal which is characterised in public as being fair and just - particularly when attached to sanctions and penalties, as much of welfare provision is. In discussing the fragility of 'social rights', such as those found in welfare provision, he observes that; "because of their conditional nature they are usually implicated in processes of social control of individual behaviour" (2002), not a simple matter of a deal of free exchange. Not only give us your details and data in exchange for X, but moreover change your behaviour in exchange for X. The deal struck being more akin to 'we will exchange financial aid, housing and benefits in exchange for certain behavioural standards being adhered to on a regular basis and, subject to review, punishable by sanctions'.

The rules that Duncan Smith is concerned people may be refusing to play by have more behavioural caveats for claimants than it first seems. New Labour's 'rights in exchange for responsibilities' governmental mantra of the late 90s, seen as the beginnings of a "something for something" (Field, 2001) culture in the modern British welfare state, exemplifies this trade off type of thinking. A move from winning social rights, as something that could be considered as owed to the citizen on the strength of them being a citizen, to what we could call a more reciprocal liberal interpretation of rights. However the trade off here, 'rights for responsibilities', was being justified on the basis of a perceived moral problem created by welfare dependency, remedied by enforcing notions of contractual duties and obligations to the rest of society when it comes to welfare. This reciprocal contract, 'deal' or trade off involving duties and obligations to the rest of society - not just a simple matter of a deal struck with individuals for limited and specific welfare provision - is inherent to the justification for the current conditionality within the welfare state.

In his 2008 independent report for the government, Paul Gregg noted that

"conditionality is the principle that entitlement to benefits should be dependent on satisfying certain conditions" (Gregg, 2008, p10). Conditionality, the report goes on to say, is important for ensuring the system is *perceived* by the public as fair and can bring substantial behavioural effects including the acquisition of new skills and habits. So, the public at large are brought into the equation by having a stake in this deal or trade off, and other effects and consequences for welfare claimants beyond the trade off type deal for specific resources, are directly considered. Bringing the public in to the deal in this way is important for the legitimation strategies deployed by governments to get approval for their policies, which I will address below in the later part of this section.

There are three forms of conditionality in this welfare deal; category, circumstance and conduct. Category and circumstance relate to whether a person is entitled to benefits because of who they are (homeless, single parent, disabled, jobless) and what level or type of help they require dependent on their situation, their circumstances (means testing levels of need) (Clasen & Clegg, 2007). These both require surveillance, however the major growth in surveillance and that which requires more interventionary and controversial surveillance, including sanctioning, is that based around *conduct conditionality.* A claimant's behaviour is observed and penalties are dispatched if that claimant 'breaks the rules' of conduct set out in the deal with the welfare state.

Conduct conditionality is "rooted in the concept of reciprocity" (Miscampbell, 2014, p.8), a contractualist idea that, as stated, in return for welfare, claimants must uphold their end of the bargain by actively seeking work to relinquish their dependency on benefits. And, it is also specifically linked to a conceptualisation of 'fairness' "which is intolerant of 'free riding' and sees 'deservingness' as a key moral criterion for the

allocation of societal goods, with deservingness defined primarily in relation to preparedness to make a societal contribution via paid work" (Bramley et al., 2014, p.15). Here is an example of the interpretation of liberal values, for which I argued in the previous chapter justifications must be formed within a common framework of political interpretation and contestation, being interpreted in a way that is context specific for political aims over welfare claimants. Welfare claimants, because of a liberal reciprocal contract with society must contribute, but must contribute via paid work or conditions of receiving benefits. Of course, that may be only one way to contribute, but it shows how the beliefs of society at large, while it is difficult to not refer to them and maintain legitimacy, can be stretched within a framework for political ends.

Contrary to this, cases of welfare provision without these contractual and conditional aspects embedded in them seem to require no surveillance over the welfare claimants, or very little beyond administrative functions. A period in post war US welfare provision for example, called the 'Declaration era' (Gilliom, 2001, pp.28-29), operated by allowing claimants to articulate their own and their family's needs to state officials, who took it at face value, and provided assistance where applicable. Their categorical and circumstantial conditions being assessed by what they themselves declared, without any conduct conditionality attached. Thus, this system had no surveillance attached to monitor reciprocal duties that were required to be discharged in exchange for welfare.

This was seen as the fairest and most equitable way of distributing welfare because who knows one's family's needs more than people from that family (Gilliom, 2001). The idea that this type of proposal would gain any traction as a reasonable or sensible way to distribute welfare today seems fantastical, which suggests that the kind of deal

involved with surveillance and public goods we see today is undecidable by universal rules. This example, it could be argued, shows the more democratic side of a strong sense of citizenship; that being, social rights are something the state owes the citizen, not something the citizen must prove he or she is worthy of, or can be responsible for. This example is also contained within the liberal democratic framework of justification, but shows that political reasoning is required to decide on what conditions are attached and why and how such a trade off is 'sold' to the public, and then enforced by surveillance.   What seems fair in one era of welfare provision does not seem fair now today, and what seems to be a problem with welfare claimants in one era is not in another.

Trusting citizens with social rights seems inimical to the system of contemporary welfare surveillance. The behavioural conditionality element of surveillance today - backed up as it is by permanent monitoring of individuals and penalties and sanctions – seems to imply that the authorities believe that one end of the bargain is likely to not be fulfilled. Changes in the behavioural standards expected of welfare claimants that demand to be monitored are justified around perceived moral defects of those welfare claimants - that they are dependent, dishonest, fraudulent, or lazy and as a result will be less likely to hold up their end of the deal – particularly when that deal involves them changing those behaviours.

Public justifications currently heard around fairness have this implied problem contained within it. Surveillance and sanctions regimes are right and fair because they are intended to enforce changes in the behaviour of claimants, who it is said have become dependent on welfare and need 'help' to get off that dependency. Presumptions about the supposed 'problem' of welfare provision generally, and the 'dependency culture' it creates, influence what is seen as fair. Another such argument

runs something like, surveillance is right because it is only fair that individuals do not claim money they are not entitled to. Eradicating fraud and criminality from the welfare system is a fairness issue for the taxpayer. 'Innocent claimants', it is said in this account, if they've nothing to hide have nothing to worry about. A 'common-sense' approach that is predicated on fraud being a problem in the welfare state.

Contrary positions objecting to this contractual model emphasise the fundamental and unconditional social rights that people have, and claim that people do not have to behave in certain ways to have those rights respected. Alternatively, the counter moral case sees conditionality, surveillance and sanctions "as punitive, disciplinary and iniquitous, 'punishing the poor' by holding them to standards of conduct not required of more advantaged groups" (Bramley et al., 2014, p17). This objection does not accept the premise that social rights should be conditional. It seems obvious to say for those objectors, that a wealthy individual will not suffer the indignity of a Department of Work and Pensions (DWP) surveillance van parked outside their house surveilling their activities (Gentleman, 2011), or, to fill out forms dealing with their personal and intimate relationships for the government. And herein social rights are seen to be held more weakly by people who are poorer, as they are far more likely to require state assistance. The differential treatment based on social stratification, wealth and class here, for these objectors, is unjustifiable.

Many of the social sorting theses from surveillance studies tackle this inequity head on with the basic claim that the harms and benefits of surveillance are unequally distributed in society and as such surveillance compounds people's positions in society thus worsening poverty, powerlessness and disadvantage. Secondly, like all surveillance, and because of the nature of surveillance as social sorting, the ill effects are countered by positive outcomes for most people. This points to an explanation of

sorts as to why widespread surveillance of 'problematic' welfare claimants exists. The public at large are not affected by such intrusive surveillance, with harms unevenly distributed and, for most people, as David Lyon (2010) and others have shown, surveillance is in fact beneficial and convenient, rather than troubling and offensive. It may be the case that a lack of concern for surveillance is because surveillance that is harmful does not, and will not, affect them.

This contractual basis for welfare distribution is familiar to liberal democracies, and surveillance of circumstantial and categorical conditionality are explicable through administrative necessity, again explicable through the expansion of democratic responsibilities won on behalf of citizens insofar as social rights in the form of welfare assistance needs to be administered in a formally equal way across a territory. However, behavioural conditionality as the basis of the contract between state and citizen with these social rights is interpretable through liberal notions of reciprocity. The legitimation narrative framed in terms of 'reciprocity' is politically crafted through particular 'common sense' assumptions and commonly held ideas of fairness and created and perceived problems of the welfare state and with claimants.

ii) Norm Enforcement and the 'engineering of consent' for surveillance
The change in such common sense assumptions around surveillance trade offs, fairness and conditionality is tackled by governmentality scholars through discussing norm creation. Consent and democratic approval for welfare surveillance, for governmentality scholars, is *engineered* by both creating and then enforcing norms of behaviour through surveillance[4]

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[4] Often welfare provision in its entirety is seen as a form of surveillance for governmentality scholars.

Looking to political announcements and government declarations as a useful source of understanding the underlying motivations for political action, governmentality scholars identify the techniques of sanctions and surveillance found in welfare, as technologies to control, discipline and normalise the behaviour of the poor, as a technique of governing both the poor and the population at large.

There is an abundance of examples that seem to prove the case for governmentality positions. Analysis of welfare reform from Wiggan, taken from Conservative party and HM Treasury announcements between 2010 and 2013, shows that "intensification of conditionality and economic rationality in welfare reinforce messages of personal responsibility, self motivation and the superiority of market rationality, which are presented as an economic and moral imperative if growth in the British economy is to be restored, the budget deficit reduced, and a broken society fixed" (Wiggan, 2013, p.385). The Treasury here, throughout its announcements on welfare reform, for a governmentality analysis, is telling us firstly the techniques by which it aims to secure a certain world view amongst welfare claimants - personal responsibility for one's own economic situation and believing in the superiority of market rationality - and secondly, the reasons behind doing this: to aid the British economy and fix a broken society.

Looking at a direct quote from David Cameron; "The benefit system has created a benefit culture. It doesn't just allow people to act irresponsibly, but often actively encourages them to do so" (Cameron, 2011, p.1) shows how the government identifies the problem with both claimants of welfare and the current welfare distribution system that encourages irresponsible behaviour. What this is doing is moving common sense about welfare, from one committed to a system based on need and want, which is now

said encourages irresponsibility, to a system that encourages responsibility through surveillance and sanctioning to enforce desirable behavioural norms. This also shows how responsibility and the surveillance enforcing it becomes tied up with the conception of freedom inasmuch as 'freeing' welfare claimants from the welfare system that encourages them to be irresponsible and dependent on it, involves shaping their behaviour through surveillance so that they behave in a different and more personally responsible fashion. In achieving this, through surveillance, sanctioning and conditionality, they are 'freed' from their dependency.

The creation of behavioural norms not only explains the control over the target subject population through surveillance - observation, monitoring, sanctions, interventions - but can also, for governmentality scholars, explain the acceptance gained from the public at large for welfare surveillance programmes. In posing the welfare claimant as both 'other' to the public and a problem that needs solving - because they are irresponsible, dependent and dishonest - surveillance regimes that intervene into the lives of welfare claimants are made to seem necessary. Members of the public are further reassured that such surveillance will never target them, the member of the public to which the justification is directed. Behavioural norms also shift the ground on which fairness and fair deals are made. For example, if a problem is said to exist around laziness, it becomes more plausible to say that 'it is only fair that this person receives benefits on condition they apply for X jobs a month'. If dishonesty and lying is perceived or crafted in discourse to be a problematic behavioural trait of welfare claimants then it makes more sense for lie detector tests to be deployed (Ramesh, 2014). In this way politics and cultural norms are injected into the trade off discussed by G Marx (2005) and other scholars, and into the conditionality of welfare provision.

A quite extreme example of norm creation is highlighted by Jensen and Tyler (2015)

in a study of the case around Mick Philpott - portrayed as an archetypal 'bad' benefit claimant who, it was said, had a 'benefit brood' of many children. Philpott, in May of 2012, burnt his house in down in Derby, United Kingdom, in order to claim money and to get his family rehoused, but in doing so tragically killed 6 of his children. Jensen and Tyler argue that this extreme case was used to "activate mechanisms of consent" (2015, p.474) for imposing acceptable norms and behaviours of welfare claimants through both the government and media supporters. For example, they show, in April 2013 Chancellor George Osborne directly linked the Philpott case to excessively generous child benefit and welfare payments (2015). By linking this particularly disturbing case with the concept of welfare provision itself, the case was juxtaposed as an issue and symptom of the welfare state against a vision to what welfare reforms were aimed at - which was a more responsible, 'normal' and familiar family life.

Figures such as Mick Philpott, Jensen and Tyler argue, are used to culturally and politically craft "welfare policy formation, both as "technologies of control…but also as technologies of consent" (2015, p.474). Consent is garnered by activating an acceptance of intervention to challenge dangerous and extreme deviations from the norm which then allows justification of other interventionary measures into less extreme cases within welfare. Because it is the system as a whole that produces these extremes, the system as a whole needs intervention. The public discourse that conflates moral problems with the welfare system as a whole can be seen with this George Osborne speech at his first Conservative Party conference as Chancellor, likening benefit cheats to "muggers who rob you in the street" (cited in Patrick, 2011, p.5). Here the conflation of crime with welfare seems deliberately deployed to problematise the *individuals*, whereas Philpott, an individual who has committed an horrific crime, is used to problematise *the system,* which produces such individuals.

Other cases of interventions and surveillance techniques which, on the face of it are enforcing rules of welfare, seem to simultaneously enforce the normalisation of family life for those on welfare. As stated at the outset, covert 'dawn surveillance' by DWP surveillance officers (Gentleman, 2011) of single mothers to discern whether or not a single parent is living with a partner is a common surveillance technique used by the DWP. While ostensibly such dawn surveillance is deployed to ensure rules governing 'circumstantial conditionality' are abided by, as explained by the DWP, 'Fraud Guide' (2016), a governmentality position would be to emphasise the norm creation inherent in such surveillance. The need to encourage, officialise, and to make normal the partner relationship somewhat collapses the private and public spheres though the use of intrusive surveillance. The condition of having public goods of some kind is that 'the public', from which this single mother seems removed, are owed a return in the form of enforcement of certain behaviours, moral and otherwise. To secure public approval for these measures, discursive strategies around women's morals - why they get pregnant, or the spectre of mass working class teen pregnancy tricking the public to pay for their children - must be prevalent in order to justify such an action.

Other less extreme discursive strategies highlighted by governmentality writers operate in the same way to individualise responsibilities for personal issues and situations found within welfare provision that need governmental intervention. For example, in the Coalition's 2010 Green Paper, *21ˢᵗ Century Welfare*, and White Paper, *Universal Credit: Welfare that Works*, not only was the primacy of deficit and financial constraints emphasised but "…the terms that dominate – worklessness and dependency – construct the persistence of poverty and unemployment as originating in the poor choices and behaviour of individuals" (Wiggan, 2012, p.400).

By linking poverty to behavioural and not structural causes it follows that the subject claiming welfare will be the target of technologies of political control and influence designed to alter their problematic behaviour. Through this "…an expensive, well meaning system of state support is portrayed not only as ineffective, but as reinforcing social problems by permitting people to make the 'wrong' choices, due to poor incentives in the benefit system, with devastating consequences for poor families" (Wiggan, 2012, p.400).

Mitchell Dean goes further, saying "the goal of a neoliberal critique of the welfare state is a displacement of social policy and social government by the task of *cultural reformation*" [Emphasis added] (Dean, M., 2010, p.201). Dean centres on the 'American culture wars' but the point translates to the UK in terms of rhetoric around 'scroungers' and the culture of work that aims to mobilise the public in order to make much welfare provision and certain behaviour unacceptable.   Indeed, as Lord Freud, Minister for Welfare Reform in 2011, stated in a speech in December of that year: "That's what the welfare revolution is all about - that's the final goal - to bring an end to long-term benefit dependency and begin a cultural transformation" (2011, p.1). From a realist perspective however such 'culture wars' and the type of cultural transformations proposed by Lord Freud could simply indicate the ineradicable nature of political conflict in society. Power, in the case of Lord Freud seeking to remake society for certain group's interests, and an American style culture war could be viewed as a proxy conflict, for economic interests that have been displaced from politics. Alternatively they could in fact not be a proxy for economics, but the nature of human political contestation over group values and the values of society. In other words, ordinary but unique political disagreements.

There's a contradictory element within government justifications highlighted by

looking at welfare reform in this way. Justifications which maintain that individuals are simultaneously responsible for their own actions as individuals in society, while at the same time being dependent on the welfare state appears to mix up a pre-political subject that the techniques of welfare surveillance aim to 'liberate' from structural dependency - the independent, responsible individual - while at the same time blaming the individual for their predicament. Surveillance and sanctions both aim to simultaneously *make* the subject that the government wants to 'liberate' from dependency.

From the discussion above we can see how discursive strategies related to surveillance and sanctioning are aimed at the public in the pursuit of generating support. On the basis of perceived problems and generated consent, the trade off and deal that requires surveillance are claimed by the government to be seen as right and fair to 'most people'; whether this equates numerically to most people in the country is disputable, but is part of the political crafting of consent. This begins to answer why surveillance over welfare claimants is so widespread in liberal democracies.

However, in a liberal democracy people have rights and liberties that, if surveillance is so bad, ought to activate to protect welfare claimants from such overbearing surveillance. Framing the difference between governing viewed in terms of *citizens,* and governing in terms of *liberalism* Mitchell Dean (2010) explains that:

> Examined through the notion of the citizen, the question for liberalism is to define a form of state compatible with her or his rights and liberties and to establish a political form that allows the aggregation of citizen's diverse interests. Examined through the figure of the normalised subject, the problem becomes how to shape the liberty of the citizen in such a way as to ensure that

she or he exercises freedom responsibly and in a disciplined fashion (2010, pp.144-145).

In this context, how you shape behaviour so that the welfare claimant can *enjoy* his or her freedom in a responsible way becomes both the problem and aim of welfare surveillance. Through such shaping and molding of behaviour it is plausible then that no specific offence takes place, or importantly, no offence is felt and perceived to take place by those subject to welfare surveillance that would activate legal protections, or induce claims of rights violations by the claimants. In other words, liberal and democratic protections designed to deal with observable and tangible intrusions into freedom and liberty through interference by state power – as a result of, we must remember, bringing liberal and democratic values into practice - are not offended.

On this view the 'governing rationality' of welfare surveillance is 'hands off', and not directly coercive inasmuch as it relies on welfare claimants - through sanctions, advisor meetings, 'nudges' and behavioural changes - to self-regulate their behaviour to become a more successful market citizen. Along the way no directly intrusive, disciplinary or overbearing offences take place through such surveillance, contra the institutionalised poor of the workhouse, prison or other state institutions of early modernity.

This seems accurate insofar as it depicts the governing rationalities of welfare surveillance - that is, the variety of ways that the state now influences the behaviour of individuals on welfare through surveillance, as well as methods for garnering public consent. Yet it is inaccurate in its claim that individuals labour under an illusion of freedom as self regulating subjects, and therefore feel no intrusive losses of liberty. For poor welfare claimants what we find is not an illusion of freedom or a hands off

molding of norms, but instead quite hard edged fear, intervention and sanctions. To continue the example under discussion, the DWP vans pulling up at dawn outside the single mother's house, or randomly turning up on their doorstep is not hands off, but seems quite hard edged state intervention for activities not coming under criminal law.

As Maki (2011) also makes clear in a study of the 'Ontario Works' (OW) programme in Canada, a welfare reform programme for the unemployed, "If OW was self–regulatory in a governmentality sense it would at least provide the illusion of freedom; instead, under OW and its welfare surveillance practices, a recipient's so–called liberal freedoms are highly curtailed" (2011, p.56). Moreover, in asking welfare claimants about surveillance many "…expressed their experiences of welfare as similar to incarceration because of the restrictions on their freedoms and feeling like they are being watched at all times" (Mirchandani & Chan, 2007, cited in Maki, 2011, p.56). Maki, using primary research of policy documentation identified and studied 8 surveillance tools, including drug testing, welfare fraud hotlines and recipient audits, that were used on those receiving welfare adding to the feeling of being under severe and intrusive observation, rather than simple and less interventionary hands-off nudging.

Strong governmentality theses rely on the idea of freedom being *utilised* for political ends of governing, not being curtailed in this way. Maki takes the point further, saying: "Poor people are not trusted to become self–sufficient on their own and instead need constant surveillance and discipline to become independent and 'good client citizens', as evident in the discussion about workfare and anti–fraud measures" (Maki, 2011, p.165). The justifications for much surveillance of welfare claimants, as discussed, is based around their percieved dishonest, immoral, dependent or untrustworthy character; in that scenario trusting them to self regulate their freedom

seems a counter intuitive approach for government. The justifications and discursive strategies around moral problems under discussion are needed precisely to justify intrusive measures.

The specific techniques analysed by governmentality scholars are prevalent, and the discursive techniques described that are used to create norms and engineer consent are powerful, plausible and useful for understanding the basis of justification on which the spread of surveillance is planted. However, the assumptions about the individual under such regimes don't hold up against the experiences of the poorest welfare claimants. Welfare claimants do not have the resources to get off welfare, and so have no power to prevent or change their condition. The feeling of 'being watched all the time', coupled with this lack of power, is, it seems a classic case of domination.

Moreover governmentality theses of this type provide no existential threat to the legitimacy of such liberal democratic practices. However unpalatable one may find these strategies of governing around welfare surveillance, and the techniques of norm enforcement to secure subjective legitimacy, the techniques are the essence of liberal democratic politics in many ways. Focusing only on the actual techniques of governing and surveillance in society is not where opposition to, or successful critique of, welfare surveillance can be found. Nor an explanation for its spread over both welfare claimants and society at large. By interpreting the findings in this first section through the language of liberal democratic legitimacy, we will find more grip for a critique of surveillance of welfare claimants from a liberal democratic perspective. In the next section I will explain how these types of techniques are part of the legitimation process of liberal democracy, before in the second half showing how that is undermined by the dominating effects surveillance has, before finally finding some alternative means of non-consent that de-legitimises surveillance at the same time as it

offers potential resistance to it.

iii) "Those who tell the stories rule the world": Legitimation Stories for Liberal Democracy

Defining surveillance as I did in the introduction as the collection and use of information *in order to influence* a given population according to a given set of rules, there is prima facie case for the government of the day to say something by way of an explanation (Williams, 2005) to those people over which it is directly deploying surveillance. Some kind of 'legitimation story' must be told to that subject population in order for the political practice of surveillance to maintain legitimacy, and have the authority to act over certain sections of the population in the way they do. There is a number of ways this must be framed politically in a liberal democracy.

One integral part, and the first and basic demand, of this legitimating story is the procedures through which it is told and enforced. One agreed upon way in practice for political power to be legitimated, in a way justifiable to those under it in liberal democracies, is through a power's 'democratic authority' to act. Usually, this authority to act is sufficiently achieved if properly constrained democratic decision making procedures are in place. If we can interpret legitimate authority being created by appropriately constrained collective decision making procedures in a liberal democracy (Peter, 2008) then the legitimacy of political power or coercion is not distinct from the authority from which it comes. In other words whether political power is legitimately wielded in a democracy is dependent firstly on by whom it is wielded; that is, a democratic authority. This answers the legitimating question of who has the right to do what to whom? A fairly unarguable position in the context of this thesis; the government of the day wields power over the welfare state, including enforcement through surveillance, because they are the legitimately elected

democratic authority. 'We were elected, here are our policies' provides both normative and subjective legitimating reasons.

Within this sphere of democratic authority giving legitimacy to the government of the day however the government cannot just act as it wishes. Legitimately wielding power is contingent not just on who wields it but for what purpose; a purpose that must in principle be justifiable to all those under it. The democratic authority must also 'say something by way of an account' (Williams, 2005) to the public in order to legitimise the use of its power. This has been the discussion so far of discursive legitimation strategies of welfare surveillance attempting to engineer consent and approval for policies. The 'something' that is said to justify an authority's use of political power cannot just be anything at all.

Common to familiar accounts of legitimacy from within the liberal democratic tradition is the view that, as Matt Sleat says, "…political power is only legitimate if used according to principles which are justifiable to all those subject to it" (Sleat, 2010, p.489). For example the government, through properly constrained democratic procedures, could not very well say we are conducting such welfare surveillance because we hate the poor, or because it is Tuesday, or because God told us to do it. One could of course say that if the government did say such things it would seem to indicate that the decision making was not properly constrained through democratic procedures, as it seems unlikely people with such views would find themselves in a position of democratic authority. But what is in fact restraining outlandish views being legitimate (and getting into a position of authority in the first place) is that political authority and power must also be justified "in terms of the shared beliefs of society" (Beetham, 2013, p.69) in order to be perceived as legitimate by them, as set out in chapter 2.

The public do not believe, indeed would never believe in contemporary UK society, that God was a good enough reason to give to surveil the poor. It is more plausible that they believe, according to polls (Taylor & Taylor-Gooby, 2014), that surveillance ought to be conducted because there is a perception of various moral problems attached to welfare claimants which make it necessary. These reasons, as was outlined above, are crafted within a shared political framework for understanding the values of society and what values are legitimate – that being, a shared understanding of democratic social rights, privacy, reciprocity, contract and different versions of fairness therein. The normative force of this type of legitimacy- public reasoning with reference to the terms of beliefs of society - appeals to the 'rightness' of that practice in the public's eyes influencing subjective legitimacy. The necessity of this is derived from the democratic tradition, established over centuries in liberal democratic society, from which there is a specific need to justify political power in public and on a basis on which the public can accept (Patton, 2016, p.230).

The phenomenon to be explained with welfare surveillance then is not the surge in surveillance per se, or whether it is morally justifiable. Instead it is the politics enabling the surge in surveillance over welfare distribution in the first place, and how this political contest centres around the beliefs of liberal democratic society. Stepping back from the policy itself to look at how that policy comes about in this way gives more insight into the spread of surveillance in a way that harms other welfare claimants. Ensuring people 'stick to the rules' seems fair and has a legitimating force, but the content of the rules that 'ought' to be adhered to, and to whom they *most apply*, has a contestable political character.

Regarding the welfare state, as Goodin correctly points out, we can see that it is a

"political artefact", meaning its purpose, size, scale and problems are defined through the politics that creates it. It is the product of 'historical deposits' left through political compromise, conflict of interest, programmes with different purposes in mind and political victories of various kinds (Goodin, 1988, p.1). Looking upon this unsettled contestable political institution, what your political tendency is, or who you see as your political forebears, characterises what you celebrate in the welfare state and where you see its flaws (Goodin, 1988, p.1). For example, one may agree with Beveridge-inspired justifications based upon remedying market failures - whose 1943 social reform report is seen widely as the founding of the modern welfare state. More ethically based justifications view it as a public responsibility to provide a safety net for 'palpable distress'. Socialists may emphasise social equality and as such are more in favour of redistributive aspects of the welfare state such as tax credits or subsidising services used by the less well off such as free bus passes (Goodin 1988, p.2).

As a result of these political perspectives and institutional history, the welfare state is *definitionally reliant* upon the justifications given for it (Goodin 1988, p2). If I said the welfare state is defined by public provision of universally required needs, such as health, and as such its core areas are institutions like the NHS and Education, you could object that this is not the case, and it is in fact to provide a basic safety net for destitution and poverty (Goodin, 1988, p2).   What matters in this is who has political power over the welfare state (in terms of both policy and wider beliefs about it) in a given context and time, providing the definitional justification for protection and/or reform.

Technologies of welfare surveillance are politically created in the same fashion, through the contest over what the welfare state is definitionally for, what it is not for,

its purpose and importantly for surveillance and sanctions, its flaws. It seems somewhat back to front when Maki says "…neoliberal policy changes to social assistance have been well documented by welfare scholars [but] the surveillance technologies behind them have received less scrutiny" (2011, p.48). Surveillance technologies enforce changes to social assistance, this is certainly correct, but what is behind surveillance technologies is the politics challenging the terrain of understanding around what social assistance *is* and what it is not, and this is what deserves attention. Societal beliefs around the nature and problems of social assistance are changed, and once achieved, this change in perception justifies the surveillance techniques that enforce these changes to social assistance, or welfare.

What causes surveillance, its political origin, and what causes the public to accept it is the successful narrative between politics and surveillance (Zimmer, 2011). This insight is not apparent in much surveillance studies scholarship. Emphasising the political context of surveillance detached from external moral requirements shows why the technology is there in the first place to make objective judgments about, and which groups are most vigorously targeted by it.

The idea that fraud is a problem in the welfare state for example is widespread, according to polling conducted by the TUC in 2013 (TUC, 2013). The reality is somewhat different according the real figures offered by the government department in charge of welfare (DWP, 2013). However the inaccuracy of the belief is superfluous to the existence of a narrative, or perhaps more accurately a myth, between politics, belief formation and the surveillance technology that then gains acceptance from the public. A lie detector test for claimants, as mentioned, is dependent on the justification that dishonest claims in the welfare state are a problem. Fraud hotlines that set neighbour against neighbour (Rowlands, 2013) are dependent

upon agreement that one can delineate betwen good citizen and bad, and that welfare claims which are false harm everyone, are wrong and ought to be reported. Idleness is resolved through a work sanctioning regime, and the monitoring of punctuality with sanctions attached is necessary because time-keeping is a problem.

Beyond what a majority of the public is persuaded to *believe* to be legitimate, there is a basis of liberal democratic values which inform what can or cannot be acceptable as legitimate reasoning. This leaks somewhat into a normative conception of legitimacy. That is because it implies there must be some kind of external verifiable standards to protect minorities which if not reached undermine legitimation claims in a liberal democracy. This is true, and I don't maintain there is clear water between a realist subjective legitimacy and normative conceptions of legitimacy. However this is because as well as a need to publicly justify reasons to the public established throughout the democratic tradition mentioned above, there are fairly constant shared values which inform stable modes of reasoning and apply certain limits and standards. Rights, liberties, procedurally limited use of power are also the terms of the beliefs of society. Beetham's full quote about beliefs and legitimacy, referred to in chapter 2, is: "[a] power relationship is not legitimate because people *believe in* its legitimacy, but because it can be justified *in terms of their beliefs*" [emphasis added] (Beetham, 2013, p.11). So, in a liberal democracy, while invoking religious authority is not plausible because of the substantive beliefs about religion held amongst the public, there are relatively constant values and beliefs that restrain the appeal to the public's considered judgements on what is and what is not legitimate *ways to use* political and state power.

What kind of stories that can be told to legitimise political practices include and are limited by these fairly constant societal beliefs of a liberal democracy. No matter

whether or not enough of the public are convinced idleness is a problem for the welfare state, the government is still restrained in how it then deals with that within limits of liberal democratic values. The government could not say, for example, once agreement was assumed about the fairness of welfare reform that it is also fair to instil fear into people arbitrarily in order to gain obedience to these fair rules of welfare. Or that it is right to give DWP officers unlimited powers in these austere times to do as they will to welfare claimants. The legitimation story is a necessary condition to justify interference into the rights and liberties of individuals in the first place, but *how* political power is then wielded - once established that a legitimate democratic authority is wielding it for reasons perceived to be legitimate by the public- is further limited by procedural limits and rules and shared beliefs of what those limits are.

As set out in chapter 2, this type of procedural power is constitutive of the functioning of the liberal democratic state and is a foundational value responsible in part for the form that bureaucratic and institutional surveillance takes. Bureaucratic surveillance - rather than other methods of coercion or oppression that could be used to achieve a government's aims - is justified in terms of the beliefs of a liberal democracy that both includes and is limited by procedural rule-based power. So with welfare surveillance we can observe a legitimate (democratic) authority acting, in ways publicly justifiable and limited by procedural constraints, and understood in terms of the beliefs and values of a liberal democratic society.

More precisely, to interrogate the example I framed the chapter with, a DWP surveillance team in the car outside the single mother's house are there on the authority of the government, to enforce policies that have been publicly justified through a method of observing a limited activity - the presence of a partner - within procedural limits on how they can do so, how long they stay there, how many times

they visit, what precisely they can observe, when and by what method. The reason she has been chosen by the DWP is not arbitrary but because one of her neighbours perhaps 'informed' on her[5] and it is legitimately questionable as to whether she fulfills certain circumstantial conditionality that form part of the agreed upon deal for welfare assistance discussed in section 1. The individual's freedom is hindered by paranoia, self-censorship, or in ways unknown to her, covered by republican freedom, discussed in earlier chapters.

However, the goal is to reduce benefit fraud because it is right and fair that people only get money they are entitled too, and the economic necessity of reducing the UK's deficit - it needs to be determined whether she is breaking the agreed upon rules of 'the deal' for social assistance - so any potential negative impacts on her freedom justifiable. The rules themselves are justifiable and the surveillance practices to determine rule breaking are procedurally limited. Such justifications are made to the public, and it could be claimed, according to British attitude survey polls (Baumberg, 2014) that the public broadly approve of this activity. It could further be said, as I did at the outset, that in a liberal democracy people are free to protest, complain, campaign and organise against such treatment, and the benefit claimant herself is free to claim her rights if she feels they are violated. This explains why, in spite of the harms identified by this practice, and its seemingly incongruous presence in a 'free' society, regimes of surveillance such as these can be widespread within liberal democracies. There is a plausible legitimation story which is framed in terms of the beliefs of society showing how surveillance is implementing and enforcing liberal democratic values of both social rights and reciprocity, which is broadly acceptable to 'the public', not exposed to it.

[5] This informing is often however, it is recognised, done for arbitrary reasons. For example ,a freedom of information request by the Observer in 2016 showed of the just over 1million calls made between 2010 and 2015 reported benefit fraud 85% were shown to have no merit and were not pursued (Cowburn, A., 2016)

However there is a problem with this account of the legitimacy of surveillance. The problem is this: The legitimating story cannot be extricated from the power to influence populations represented by the regime of surveillance. In other words, a system that is designed to influence a population cannot be held completely independent from the acceptance of the legitimation story from that population. It is not only the public at large that must accept the story as they are, in principle, subject to its use. Those who are actually exposed to the use of such power – welfare claimants – must in principle be able to accept it and as a result freely consent to its use, so who is this type of legitimation story offered to? And do they (or can they) assent to it in practice?

2. Who Accepts the Welfare Deal?

i) Is it possible for welfare claimants to accept, or reject, welfare surveillance?

By conforming to a subordinate relationship it does not logically follow that you therefore assent to it however, and so it does not have to be the case that for something to be proven as wrong, it is required that it is successfully overturned by protest or objections. This would be a tautology - saying anything in political practice that exists is *right* on the strength of it existing as a practice and not being overturned. Nevertheless, in social practice and political practice the defenders of liberal democracy, and here the defenders of welfare surveillance regimes, commonly claim people could and should be protesting if it is so bad, and have ample accountability and complaints procedures, as well as advocacy groups and lawyers to defend any rights violations occurring. This presumes that silent subordination is a practice of assent.

However, William's notion of legitimate power provides a caveat – his CTP - that is useful to understand what this subordinate or silent assent under welfare surveillance may or may not be telling us. "The acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified" (Williams, 2005, p.6). This means an authority cannot claim it is legitimate on the basis of people believing it to be legitimate, while at the same time using its power to influence people's opinion of its legitimacy when they otherwise may not have held that opinion.

"Essentially [it is] the idea that we must guard against instances in which power is used to justify power by being able to identify genuine free assent from that achieved via coercion" (Sleat, 2010, p.488). This principle dictates that for political power to be legitimately exercised, besides democratic legitimacy and approval, some justification that the *individual* under surveillance could plausibly give free assent too must be offered. And, the authority seeking legitimation cannot use its power to achieve it.

This is fraught with philosophical problems of how to judge what is free assent, whether people are assenting to political power or not, and whether they ought to do so or not (Sleat, 2010). However one way of cutting through that is to look at the nature of the power requiring assent. Rather than ask whether free assent ought to be given to surveillance. Or whether it is empirically given to surveillance in practice, which as shown is hard to discern. Instead the pertinent question seems to be whether it is *possible* or not under those conditions to freely assent to surveillance.

Can an individual freely assent to a surveillance regime that is influencing, sanctioning, monitoring and controlling them? I want to claim that under welfare

surveillance it is impossible to freely consent. I will make the specific empirical case for welfare claimants being in a relationship of domination so severe, due to their dependency and the uncertainty created by surveillance regimes, that claiming any genuine free assent for the legitimating stories told from those individuals is an implausible claim.

The uncertainty of rules around sanctions that can lead to the material impoverishment forms the basis of this claim. Dependency as I use it here is not in the morally condemnatory way done often offered in public discourse, but describes simply the acute dependency on resources necessary for life. Beyond the well covered effects of surveillance from earlier chapters - fear, uncertainty, second guessing behaviours and so on - welfare claimants are in a specific relationship with the authority surveilling them based on the resources relied upon. This means that it cannot be plausibly considered as a free choice to remain or withdraw from the welfare regime under which an individual suffers surveillance.

For example, in a report on welfare reform the Scottish Government said that; "Negative outcomes over the long-term can include: debt and hardship; poor physical and mental health; negative impacts on the development and well- being of children affected by sanctions" (Scottish Government, 2014). Figures from the Trussell Trust show that "up to half of all people turning to food banks are doing so as a direct result of having benefit payments delayed, reduced or withdrawn altogether" (Gore, T. & McDaid, L, 2013 pg.3) and research on the experience of sanctions amongst vulnerable young people found that 84 per cent had cut back on food as a result of being sanctioned (YMCA, 2014). Homeless Link (2014) found similarly that many homeless people experience food poverty and rely on food banks while sanctioned.

Fitzpatrick et al. (2012), in a study into the effects of sanctioning regimes in welfare provision in the UK, document the problems associated with sanctioning and withdrawal of benefits amongst the most vulnerable group on benefits, the homeless, showing that: 38 per cent of homeless respondents in their study had shoplifted to obtain food; 32 per cent had begged; and 10 per cent had obtained food by engaging in sex acts. What these figures exemplify is that the effect of benefits being withdrawn, through sanctions, has consequences so severe that freely assenting to surveillance, which monitors whether or not sanctions ought to be applied, seems implausible. The coercive power of welfare surveillance in this instance, seeking assent to its authority, is held in the power of the relationship between dominant and subordinate parties involving dependency on resources. This power over resources necessary for life and their withdrawal seem to violate the principle William's sets out for legitimate political power. Here is liberal reciprocity, but with a fatal edge to one side of it.

If those are the stakes of misunderstanding or falling outside the rules, it may be expected that the rules are made very clear, but this is not the case. While from the DWP side a complex, specific and bureaucratic system of rules and regulations with definite aims and objectives is in place, from the side of the claimants however, without sufficient knowledge of the range of sanctions and penalties attached to which rules, this engenders an inherent uncertainty around which behaviours are or are not allowed. In these circumstances it seems rational *not* to object, for fear of being punished for some unknown transgression.

Again in a report by the Scottish Government: The "punitive and arbitrary nature of the new sanctions regime […] appears to be creating a climate of fear around job centres rather than encouraging claimants back to work" (The Scottish Parliament,

2014, p.12). If one is not sure what behaviour is likely to be punished and what the punishment will be, one cannot consider oneself having the capacity to make free choices. Second guessing, self-censorship, toadying to authorities and being uncertain how to act results from unknown limits to one's behaviour.

Further "evidence points to customer letters that are hard to understand *'even for those working in the area'* with unclear and vague wording" (Oakley, 2014, p.36). Oakley (2014) further argues that claimants may be "being sanctioned for a lack of understanding rather than intentional behaviour" (2014, p.36). This uncertainty around sanctions and behaviours does not just occur on visits to the Job Centre, or DWP advisor. Indeed, as has been recently highlighted on the DWP website, claimants are told that "You may get a visit from a Department for Work and Pensions (DWP) officer to check that your benefit payment is correct" going on to say "your name is selected at random to be checked. The officer will interview you in your home and will want to see 2 forms of identification. They'll also ask to see documents about money, savings and rent" (2017). The dry professional language cannot very well mask the uncertainty this will no doubt engender through the random nature of this surveillance hanging over the welfare claimant, and whether or not their documents are in order.

Such uncertainty and randomness is compounded by communication complexities which includes evidence from Citizens Advice Bureau to the Scottish parliament that "many of their clients do not know they have been sanctioned until they "go to the bank and find they have no cash" (Scottish Parliament, 2014, p.15). Further, "evidence from Barnado's Scotland [points to] the complexity of letters sent out, which are 'full of jargon' and difficult to understand (Bramely et al., 2014, p.29). And Mitchell and Woodfield (2008) found some claimants were unaware of having to

attend an interview until they were sanctioned for non-attendance, having not received an initial contact letter, as well as considerable confusion among claimants around the wording of letters.

A recent independent review of the operation of JSA sanctions raised similar concerns, in particular around the poor understanding of the sanctioning system among the most vulnerable claimants (Oakley, 2014). Consequently, when Esther McVey from the DWP provides on their website the seemingly quite reasonable justification that those who refuse to play by the rules ought to be penalised - "We always make the rules very clear – it's only right that there is a penalty if people fail to play by them" (McVey, 2013) the reality of uncertainty and arbitrariness means that that justification does not match in practice how surveillance and sanctions operate.

Whether or not, and for what reason, an individual will be sanctioned is inherently unknowable in many cases. Rules are oblique, arbitrarily enforced in many cases and hard to understand, so what is and what is not correct behaviour is difficult to discern. The power of the officials interpreting rules on which your life is dictated is, because of the gravity of effects, an imbalance sufficient enough to be considered one in which free assent, proven by whether one could freely object or not, is not plausible.

Part of the context for considering this case is the sheer volume of sanctions applied, stated at the outset of the chapter: 6.8 million sanctions have been applied to JSA claimants in the past 13 years and 120,800 sanctions have been applied to ESA claimants since the introduction of ESA in 2008 (Mitchell & Woodfield, 2008). This either show huge numbers of people are deliberately breaking the 'agreed upon rules', an act of mass disobedience so great it ought to be considered as a mass refusal and withdrawal of consent, *or*, that the rules they are breaking are obtuse, arbitrary,

unclear and designed to generate a lot of sanctions for the cultural reformation, economic savings and getting figures of welfare claimants down, as evidenced in many public justifications by government. The next section below will detail some ideas that much of this 'refusal' may in fact be alternative means of dissenting and withdrawing consent. This kind of resistance to abiding by the rules that have been justified in a reciprocal fashion - as being for the benefit of the claimant, the poorest and worst off at the same time as being of benefit to society at large – if interpreted as non-consent seems to undermine the basis of justification for those rules, while paradoxically at the same time justifying the need for surveillance to enforce the rules (because people refuse to abide by them). Either way, under such domination, and with such vivid 'refusal' to 'play by the rules', it is neither possible, not practically the case, that consent is given.

One could also say however that this shows the rules need to be made more clear. In a procedural sense this fits with scholars like Frank Lovett's view of Republican freedom (2010) (and Weber, discussed in chapter 2) arguing that a more rationalised and intensively rule-limited system for both authorities and claimants, will increase the capacity to navigate the regimes of welfare surveillance, thus increasing freedom. What this discussion has shown instead however is that rules, and the content of rules, and why they are created to tackle certain issues in the first place, are grounded in political power and imbalance of political power between benefit claimants and the rest of society, and between claimants and the authorities surveilling them.

Due to the undue influence of surveillance it is both unclear in practice or in principle that welfare claimants lack of objection is sufficient to judge plausible acceptance of surveillance regimes. It seems far more likely that the implementation of social rights, here through conditions of reciprocity and conditionality implemented and enforced

by surveillance, in fact dominates those under it. The basis on which surveillance is spread widely and justified is premised on unequal power – of both material resources requiring people to claim social assistance, and of political rights in the form of weak citizenship demanding unequal reciprocal arrangements - provides scope for critique and possibilities for showing how surveillance could in principle be reduced. There are, however, other ways to dissent that may not be familiar to 'us'. However, the 'we' to which discursive justifications are made, are not as clear as authorities claiming legitimacy from those justifications make out.

ii) "We" The People; Who is the 'us' that accepts the legitimacy of surveillance?

It is not that each individual needs to agree and consent. There will always be those who do not. However, there is a debate to be joined amongst realists and liberals concerning who gets to decide whether a legitimation story is acceptable or not. Lamore says, "to respect another person as an end is to require that coercive or political principles be as justifiable to that person as they presumably are to *us*" [Emphasis added] (Lamore, 1999, p.608). This moral basis of liberal legitimacy offered by some, highlights the crossover between moral and realist versions of legitimacy - between normative and subjective. However, while Lamore seeks to find a normatively justifiable consensus of values that could justify political power that is acceptable to all, there is an inherent unlikelihood of such a universal consensus for a practice premised on unequal power and subordinate/dominant relationships, as we find with welfare claimants and welfare surveillance. The position of power being justifiable to all is sound. However, the practice of surveillance makes achieving this impossible.

A political realist may say the answer is to question directly whether those subject to

such surveillance accept such regimes, and that it must be in principle acceptable to all subject to it. Whether the legitimation story is adequate or not is up to those people subject to that power to accept or reject the premise on which it is based. This is a position not dissimilar from the need for public justifications from a democratic authority outlined at the top of this section.

Understanding, as we do now, the unequal distribution of surveillance in society, and the unequal distribution of its harmful effects, the constituency demanding a justification in this instance seems to be those individuals actually on welfare. And whether they do, or should plausibly, accept or reject such regimes of surveillance that act over them is the question. It seems reasonable that they would reject such a regime which, as described above, can be incredibly intrusive, overbearing and fear-inducing.

As Galston (2010) points out however it is certainly plausible that citizens might wrongly or unreasonably reject the legitimacy of surveillance regimes they are subject to. He says, "the nub of the matter for political realists is this: political theory must not assume that the motivation or capacity to act in a principled manner is pervasive amongst all members of a political community. Some members are impaired in their capacity for justice, some lack it outright" (2010, p.395). Here we find the reasonable assumption that people may reject a legitimation story for a number of nefarious, misinformed or selfish reasons.

But as Finlayson (2015) states in answer to this, it also means that the motivation or capacity to act in a principled manner may not be pervasive amongst institutions and the actors within them that deploy political power either. What is motivating a DWP minister may be as nefarious, unprincipled or self-motivating as what is motivating

someone who is dodging their responsibilities on welfare or objecting to their treatment. We simply cannot know, according to Galston via Finlayson (2015, p.130).

It also seems to be the case that the 'capacity for justice' that has people properly discharging their duties, and that Galston sees lacking amongst certain members of the community, could in fact not be a *lack* but an alternative capacity for justice, viewing legitimacy with an alternative and justifiable rationale. John Gilliom, in *Overseers of the Poor* (2001) discovered that welfare claimants, likening their condition to that of a prison at times, did not articulate their condition in terms of a rights violation, neither did they object to it and nor did they complain. Instead, they were concerned primarily with care for their families. They implied that while they knew 'the rules of the game', they saw it as imperative to break those rules to care for their families. Many said they experienced strong feelings of guilt from the cash work they did to supplement the welfare they received. Nevertheless, paramount to them was caring for their loved ones and people who relied on them (Gilliam 2001).

This interesting paradox of knowing or feeling one is doing right and wrong at the same time, and accepting surveillance regimes (rightly and wrongly) as part of that situation, provides an alternative justification for both rule-breaking or consenting. It also shows surveillance regimes may be considered regimes that one must outsmart rather than claim rights against or indeed consent to, and this perhaps offers some explanation of the lack of objections and rights-based challenges to surveillance. More precisely however, it questions whether assumed consent or passive assent is what it seems, and shows the difficulty in judging how justifiable surveillance regimes are to the people under them. The lack of publicly observable resistance, in the form of rights claims, protest and so on, 'allows' governments to implement these policies without resistance, may indicate a submissive assent to the regime on rational grounds, rather than grounds that one can assume is based in agreement or assent to

the surveillance regime.

An individual under surveillance is not the pre-political citizen of a community, either sticking to the rules or breaking them, nor is their behavior objectively *right* or *wrong,* nor is it part of the public legitimation story told about surveillance. It could be instead an alternative capacity for a sense of justice and legitimacy grounded in a political reality of poverty. And poverty is a ground on which people are more likely to be the subjects of such welfare surveillance. Putting the immediate needs of one's close family over that of abstract rules of justice of the welfare system, seems a plausible alternative frame of legitimacy for taking action.

There seems to be no compelling reason for such people to *actively* accept and obey rules of welfare, and surveillance regimes enforcing it, other than being an abstractly 'good citizen'. There seems instead a strong reason to passively accept and not object to regimes of welfare surveillance for one's own rational reasons, and because one is dominated and does not wish to risk provoking any interference from the arbitray power one is under. This is not to bring a *moral* case in their favour and against the surveillance regimes such claimants may outsmart and dodge, but is to show the plausibility of alternative value systems created by the very existence of the surveillance regime that is monitoring them, and the need to avoid its more harmful effects for them and their family.

Nevertheless, as Galston's argument above implies, and as Richard North explicitly states in arguing against realist versions of legitimacy, "to deny the possibility of a third person standpoint that is inherent to the very idea of justice and legitimacy" (North, 2014, p.1) prevents us from saying anything useful about legitimacy "…[o]ther than being able to extend the scope of reasonable disagreement forever

more." (2014, p.1). If I can frame a type of legitimation in the way I just have, founded on the individual interpretation of welfare claimants needs and that of their families, the challenge from North is this; what is to prevent people crafting all sorts of legitimating accounts of their actions that are true for them and them alone? This is an appeal for a normative and externally verifiable source from which to say this surveillance regime is legitimate, or it is not.

The examples of welfare claimants and surveillance discussed seem to specifically show that alternative legitimating ideas are not developed randomly however, but developed in quite particular conditions, and under quite specific political practices; under conditions of poverty and state monitoring that can simultaneously induce different (and perhaps necessary) ways of acting in a 'principled' and 'just' fashion in those specific conditions. It does not seem possible to extricate this alternative judgement of legitimacy from the conditions under which surveillance is experienced. That is to say, these individuals in Gilliom's study are not simply pulling 'reasonable disagreements' out of thin air which can be extended 'forever more', but instead are making judgments in response to their material conditions - their poverty - and the regime that monitors them and dominates them. In the way that it 'makes sense' for the slave to kowtow to their master, it makes sense for the welfare claimant to resist and dissent in ways not recognisable by those authorities with the arbitrary capacity over them. Another effect of domination then, beyond effects like self-censoring, is hidden resistance and dissent, both hidden from the eyes of authorities and of a type that is hidden, or not recognised as dissent, by 'liberal' eyes too.

This is not only what Lefort calls a "radical indeterminacy" of values - of law, justice and legitimacy (meaning interpretations of primary values of liberal democracy are in permanent contestation and flux (cited in Mouffe, 2005)) but a *rational* indeterminacy

(Gray, 1995). This means this is not just unreasonable and nefarious disagreement, but disagreement based on rational and very often material conditions like poverty.

I have argued and shown throughout that many of the legitimating features of surveillance are subjective by being based on beliefs that are crafted by authorities in certain ways, and the values underpinning them are interpretable and contestable through politics. On that basis this subjective legitimacy of alternative forms of non-consent and dissent from the bottom up seems to demand acknowledgment too. It hasn't politically 'won' in the public sphere or gained majoritarian support however, as governmental legitimacy or surveillance has. However as also shown, these governmental legitimating reasons are not the only basis for legitimacy of certain practices, just the politically ascendant ones.

What the third person standpoint seems to desire in this situation is a reasonable consensus over coercive power arrived at free from the effects of that power. A neutral position. However this, the 'consensus model' of democratic legitimacy "is premised on the unsociological assumption that consensus is somehow established and maintained by processes that are completely independent of the existing relations of power within society. Power exists in one corner, as it were, and legitimacy is conferred, and legitimating ideas developed, in quite another" (Beetham, 2012, p.104). The legitimating stories crafted above cannot be extricated from the purpose or the effects that surveillance has on the population at large or the subject. The response to surveillance of refusal and dissent can therefore not be extricated from judgments about the legitimacy of that surveillance practice for the same reasons.

The creation of surveillance and the legitimation of surveillance, it is hopefully now clear, does not occur outside of society or of liberal democracy. It is not an external

harm that can be objectively judged with liberal democratic values, because liberal democratic values are informing and building its legitimacy in the first place. If legitimacy of surveillance is created in practice through politically interpreting liberal democratic values through discursively securing consent for separating out members of society for surveillance, as I have argued it is, then alternative frames of legitimation and objections to surveillance are crafted on the same terrains and in the same fashion. They too are not formed from an objective viewpoint held above the mechanisms of politics and power involved. Resistance, objection or disagreement does not necessarily come in the form of the 'good citizen' claiming rights in the correct fashion. If rights, or claims against surveillance practices, are not done 'correctly', this also does not mean consent can be assumed. In other words, it is not necessarily the case that people object on grounds of privacy rights even if their privacy rights are violated. It seems to be from within this terrain of alternative frames of just action and legitimacy that objections and resistances to surveillance will be found and ought to be looked for. However, such 'micro resistances' challenging surveillance are by their nature, hidden. To challenge the spread of surveillance they would need to be made public, and that requires power.

Conclusion

This chapter has argued that surveillance practices in the welfare state grow out of liberal democratic values and principles, not in opposition to them. It has analysed welfare reform and the surveillance that is justified to accompany and enforce it by examining how legitimacy is achieved in practice. This forces us to look not at who has the right and wrong interpretation or position on surveillance, but at the winners and losers - at the winners and losers of whose version of the welfare state and accompanying surveillance is ascendant and more widely accepted - and at the state

surveillance practices that result from this. Particular political tendencies deploy their beliefs through political practice and win out temporarily over the beliefs of society per se. It is not that people who disagree (and lose the argument) are morally or normatively wrong about surveillance, whether in favour of it or objecting, although they may be. Nor are they fooled by politicians, or living in false consciousness under an ideology that is influencing their belief system, or merely labouring under an illusion of freedom as described by governmentality scholars. Nor do they lack a capacity for justice that Galston implies (2010). It is more simply that in a liberal democracy the essence of politics is directed at changing those beliefs in favour of certain political interests or groups. The 'rightness' of this, is contained partially in the success with which it succeeds in changing societal beliefs in practice. That is to say, rightness in this sense is produced through *the political.*

This means any account of legitimacy in practice - that is, any attempt to understand why it is so in a liberal democracy this kind of surveillance is acceptable - is a political (and even culturally specific) one, not a moral or theoretical one. Liberal and democratic values being put into practice within a state produce surveillance and the need for it. Nevertheless, there are constants within liberal democratic society within which these beliefs must be framed and limited. How rights are interpreted, how liberty is constituted, how political power is expressed and coerces citizens, on what basis these values are argued for, interpreted and implemented are all political questions within the framework of liberal democracy. Unequal political power is the overarching influence here – of both the 'winners' and those suffering domination from surveillance.

Grounding legitimations of surveillance in the political reality of poverty and power shows the problem with the legitimation story being told around how to best

implement liberal and democratic values through surveillance - both about and too welfare claimants. Bringing liberal democratic values into practice requires surveillance which then dominates those it is used over. This further explains why it is so widespread over this group – it is a matter of power over the legitimation stories told to the public through a capacity to most successfully interpret constant values of liberal democracy - and in the final analysis, I showed why these claims to legitimacy from the state are flawed because of the imbalances of power between the authority and the welfare claimants.

Nevertheless, as exemplified throughout the chapter, the political conditions under which such a counter claim around welfare surveillance could be made to a society with beliefs around welfare such as ours, seem limited. The answer is not perhaps as disheartening as governmentality scholars may suggest in their sketching of governing and power over welfare, nor as disheartening as I have perhaps made out. The problem is political and so the answer, if welfare claimants were to be given the freedom to assent to their condition, is, it seems, to have the power to challenge their conditions of dependency, poverty, reliance and fear. More rules, or more strictly limited rules, or better communicated rules and regulations addressing domination in a republican sense, or, alternatively regulating data protection and privacy rights, will not make conditions under surveillance for claimants more 'free'. Only a relative equalising of political power could bring challenge to the condition of claimants under surveillance, which implies the answer is also political. The less difference that there is in political power between state and citizen and amongst citizens, as mentioned earlier, seems to offer a more powerful citizenship of the type that was apparently present in Gilliom's discussion of the 'Declaration era' in the section above.

Political power can come through organisation and expression of political interests

and demands by, and on behalf of, the poor and welfare claimants.   There are alternative legitimating frameworks within which to view people's condition under welfare, coming from those very people under surveillance, however those alternative frameworks need legitimating publicly to reduce surveillance. The alternative frames of legitimate action through discussed above, such as care for one's family in a material reality of poverty, or such as resisting surveillance through action designed to outsmart it and so on, may hold the key to overturning some bases of legitimation of widespread, and what is clear for welfare claimants harmful and dominating, surveillance. Welfare claimants however appear to be relatively weak citizens politically currently. The implementation of citizenship itself, and enforcement of it, motivates much other contemporary surveillance, which is what the next chapter will turn to discuss directly.

Chapter 4 - Surveillance, the Border and Liberal Democratic Citizenship

Introduction

The question answered by the border in a liberal democracy, is a political one: 'Who is a member of 'the demos' and who is not?' 'Who is a citizen and who is not?' Surveillance, as the technique to enforce full compliance with rules that govern the political settlements around citizenship and the border, increases in intensity and scope as the requirements to control and facilitate non-citizens entering sovereign territory increases.

Developing studies in border surveillance are marked by the incredible shifts in global pressures on borders in recent years. Global economic forces, migration and refugees, along with terrorism and the changing nature of democratic citizenship, means states are acting within, and reacting to, outside pressures. As Torpey says, in *The Invention of the Passport* (2000), sovereignty is claimed, and is practiced through surveillance, in an environment not of that state's making. He says, paraphrasing Marx, that states do indeed make their own policy around citizenship and the border, but "they do not make it just as they please; they do not make it in circumstances chosen by themselves, but under circumstances directly found given and transmuted from the outside" (Torpey, 2000, p.2). Reacting to demands on citizenship from economic and migratory pressures, liberal democratic states must still legitimise what they do as a response to those pressures however. Looking at how surveillance is justified from a political perspective, reveals how liberal democratic values produce, import and generate surveillance practices of the liberal democratic state.

Citizenship in a liberal democracy differs from other states insofar as it is a *political* concept. That is to say, it is, in principle, attached to a contestable web of interacting rights and state obligations, rather than on a sovereign 'people' or an ethnic basis of nationhood, which differentiates liberal democracy from other non-liberal democracies, or non-democratic nation-states. What is under surveillance is a status – democratic citizenship - and this is striated in a way that provides different categories, protections and levels of access/exclusion from a nation's territory, public goods and rights that full citizens enjoy.

If the political demands of citizens to strengthen the border and harden the edges of the identity of citizenship grows, then surveillance, because of the necessity to isolate, identify and exclude non-citizens from territory and public goods, increases. It is because of this that the implementation of liberal democratic values around citizenship, produces mass surveillance over citizens and non-citizens alike within a given territory.

Yet this is not a simple matter of access/exclusion. There is firstly differing types of non-citizen. There is the *'Illegitimate* non-citizen', those who are not in the state for approved reasons, rather than legitimate non-citizen including those on designated work visas, tourists, business travelers and so on, are considered in discussions of differing treatment at borders. Distinguished sometimes as the difference between 'bona fide' and suspect travelers (Aas, 2011); border surveillance being there to separate between 'tourists and vagabonds' (Baumann, 1996), and so on. My argument will focus primarily on the surveillance, and ultimately on the domination, of these illegitimate non-citizens.

Secondly, it is not a simple matter of exclusion because of the necessity to justify state power with reference to the beliefs of society. This is necessary to legitimise political practices around surveillance, and brings the tensions between liberalism and democracy into play. Democratic citizenship has an edge which excludes non-citizens, barring access to a range of rights and entitlements. Liberalism on the other hand has values based on universalism, inclusion and human rights; when implemented, these are held in tension, meaning non-citizens are simultaneously excluded from citizenship but embraced by liberal rights.

Even though an individual is excluded from democratic citizenship, they are still embraced by a liberal universalist politics and belief system, which is required to legitimise state power in liberal democracies. The result is to internally exclude people by monitoring access to different parts of social and public life. Such surveillance, unique to liberal democracies in how it is produced and justified, can be variously described as "humanitarian confinement" (Makaremi, 2009) or "'care and control' surveillance" (Lyon, 2001), which I will discuss in section 1 and 2 below. Again, here in this chapter, I will argue that it is the implementing of liberal democratic values in practice, and monitoring and enforcing of the rules governing the practice of those values, which produces surveillance.

Importantly, a more exclusionary institutional settlement does not necessarily have to *physically* exclude more people. Instead, such settlements can separate, categorise and identify with surveillance, to enforce different treatment and access to different levels of citizenship. Brexit, the election of Donald Trump, and 'democratic authoritarian' forms of government across Europe in places like Hungary and Poland seems to be hardening the membership requirements for the demos as a political demand *from* the demos. I don't have room for a wide discussion of this, but this is

the context in which this chapter is being written, however if I am right in my conclusions, these nascent political demands and movements will concomitantly compel more surveillance to enforce compliance with the rules of the exclusionary pressures that are emerging. Not only could a democratic 'authoritarian turn' in liberal democracies compel more surveillance simply because such governments may be more inclined to do so, but specifically because the political pressure is a democratic one – so exclusionary – contra, a more liberal universalist politics. The answer - of more categorisation, exclusion from public goods, stronger enforcements of access in and around the territory and so on - is built on an information and database led surveillance regime of access and exclusion, which will generate the need for more surveillance over all, citizens and non-citizens alike.

This simultaneous humanitarian inclusion/political exclusion from the demos is problematic, I will find, in the way it de-politicises those under it, insofar as they are not the authors of their own rights protections. De-politicised in this sense means that they cannot challenge or participate in political society themselves, through the democratic procedures, institutions and sets of practices common to politics in liberal democratic states. The democratic argument, that those subject to state power ought to have a say in it, is void for those excluded from the demos in this way. As a result, the liberal universalist position that all human beings should have the right to basic standards of decent treatment, cannot be actuated against state surveillance fully by those excluded from the demos. As such, they are dominated in the way republicans lay out, that is, they have no possibility of self-government, and are exposed to the arbitrary enforcement or withdrawal of rights protections.

Citizens, on the hand, are political subjects under surveillance. The requirement to give an account of state power to them in order to maintain the legitimacy of an

authority, is demanded by the concept of the citizen. They are the holders of rights, liberties and entitlements to due process that checks state power, and against which uses of state power must be justified. That is to say the *audience* for such public justification for wielding state power are citizens, because citizens are the subject that demand a prima facie need to justify wielding state power that constrains them in some way. Citizens are also *political* subjects insofar as citizens qua citizens can contest the basis of legitimacy on which this authority is claimed.

Wielding power over non-citizens that constrains them is justified *to citizens*, not those subject to that power. It is striking that saying *something about* Yarls Wood detention centre in order to legitimise its existence, is said to people who are outside its walls, and who are also never liable to be within them. Being outside the 'common framework' in this way, discussed in chapter 2, while still being liable to being constrained by surveillance, amounts to 'political domination' in the way outlined by Williams (2005) in the introduction. If those people who are constrained are not given some account of the power that constrains them, then their condition is removed from the terrain of politics, and they are treated, in William's words, "merely as enemies in the midst of citizens" (Williams, 2005, p.135).

Focusing on the political nature of the exclusion experienced by such people from liberal democratic states, explains the apparent 'blind spot' that this situation seems to hold for public and political discourse across liberal democracies. Liberal protections are afforded in principle, however seem to operate more accurately as discursive justifications for (humanitarian) containment and (care and control) surveillance. Even though rights apply officially, this political blindspot is a result of the exertion of the political primacy of citizenship *over* liberal universal rights.

If these illegitimate non-citizens cannot rely on protections of citizenship, because they have none, and they cannot rely on human rights because they have no political power to ensure those rights are respected, a third option for protection against dominating surveillance is demanded. Politically organising to assert equality of treatment, on the grounds that if one is subject to political power, one ought to have a say in it, is my proposal.

My argument, then, is as follows: the techniques of surveillance around citizenship and the border are best understood in a political sense, growing out of liberal and democratic values being enforced and actualised in a context of global migratory pressures. However, through this, 'illegitimate non-citizens' are dominated, which is 'legitimised' by being justifiable to an exclusionary demos. Concomitantly, perceived demands from the demos that seek to harden the edges of citizenship entitlements within liberal democracies (to work, healthcare, housing and so on), bring with it increased surveillance to identify and enforce compliance with the rules of these more exclusionary, institutional settlements. I suggest that equalising power from below is the way out of this, for both those who are dominated and for reducing mass surveillance broadly of all citizens. I won't however be optimistic about the current likelihood of this being made a reality in the current political condition of liberal democracy - it seems instead that the enforcement of more exclusionary identities around citizenship will increase.

The argument will be structured as follows. In section 1, *The Liberal Democratic State We Are In: The Surveillance Techniques of Access and Exclusion* I will sketch how other writers approach the concept of the border and citizenship as an exclusion. Then, drawing on social sorting from surveillance studies, and governmentality approaches, I chart the techniques of access/exclusion at the border, and where new

surveillance technologies 'locate' the border. The treatment of citizenship and mobility is often characterised as a security issue, both by states and, critically, by scholars. However, I will argue that inserting a political explanation gives a broader, and I believe more accurate, and predictive framework, to studies of surveillance and the border. While security, mass migration flows, terrorism and globalisation can be taken one at a time, each can be encompassed within liberal democratic exclusion, protecting the political 'inside' from the outside. I will show how this plays out in the way nation-states 'display' their sovereignty through the surveillance techniques they use to enforce exclusion, and ways in which legitimation demands both compel displays of sovereignty, as well as limit them. These displays of sovereignty are often 'publicised' through exclusionary surveillance practices.

Next, in *"Unequals Will Not be Treated Equally"* (Schmitt, 1926)*: De-politicisation, Surveillance and Domination,* I will make the case that it is liberal democratic exclusion driving surveillance by drawing on past writer's insights into the paradoxes of liberal democracies, such as Carl Schmitt (1985; 1996), through Mouffe (2005). Surveillance answers the paradoxes between liberal inclusion and democratic exclusion, by policing the rules of reconciliation between the two, and enforcing institutional settlements that holds the liberal and democratic traditions together in one polis and territory. Citizenship as a status is then demarcated into differing levels of legitimacy, ending with 'illegitimate non-citizen'. Here is where I find individuals to be dominated. Finally, in section 3, *Challenging the Domination of Surveilled Citizenship: Politicising the Rights of the Rightless.* I suggest solving domination under surveillance at the most extreme end through organising for more political power to claims rights and equality from the bottom up. If there is less difference between statuses of citizenship, there is less to monitor and control, and so less surveillance is required to enforce rules of categorical significance. However, as

mentioned, I will not find grounds for optimism in the likelihood of more equal citizenship and less surveillance. On the contrary, exclusions around citizenship seem the more pressing demand in liberal democracy currently.

1. The Liberal Democratic State We Are In: The Surveillance Techniques of Access and Exclusion

Many writers on citizenship, migration and rights in the liberal democratic state, such as Benhabib (2011), offer a cautiously optimistic view about the slow advance of human rights informing the laws around citizenship of countries across the world, however qualifies this, in her book *Human Rights*, with her subtitle, *In troubled times* (2011). As the International Declaration on Human Rights heralded a new age in how states could treat people at their borders and non-citizens within their territories, 60 million migrants of one kind or another being 'on the move' worldwide, according to the UNHCR's annual Global Trends Report, and "worldwide displacement is at the highest level ever recorded" (UNHCR, 2015). The force of such numbers challenges the effectiveness with which nation-states can control with certainty who comes in and who crosses borders. This is putting the concept of democratic citizenship to the test, challenging tolerant images that liberal democracies, in Europe and America, have hitherto held of themselves, and is stretching interpretation of the declarations of human rights and refugees to their conceptual limits.

According to some governmentality scholars, since 9/11 "…authorities have increasingly redefined mobility as a problem of security" (Loader, 2002, p.137) and as such the primacy of security above all other matters has positioned mobility itself "above the realm of normal politics" (2002, p.137). Where, according to Loader, social justice is displaced by efficiency, and "questions of 'effectiveness' emerge as paramount" (2002, p.137). Security can also be tied in with citizenship however, as

Makerimi (2009), another governmentality scholar argues, since the end of the East/West divide in Europe - nation states have been "…reshaped through new lines of rupture, shifting from concerns about competing social and economic models to concerns about security and citizenship and transformations in the conceptualisations of borders" (2009, p.411). This implies that the post 1989 'end of history' coincided not with a flourishing of liberal democratic norms, as was wished for (Fukyama, 2002), but with a doubling down of more historic nation-state priorities, centred around security.

No longer was it necessary to focus on the benefits of competing economic models, because, once the economic argument had 'been won' as such, and all liberal democracies shared in it, attention turned to what separates or threatens the nation. Paradoxically, if this is the case, the flourishing of liberal democracy as the agreed upon politico-economic approach - free markets, rights and elections - led in part to a focus on what divides nations, and with it, stricter border controls and limits on citizenship to enforce such division. [6]

It could be that what has motivated the turn away from more open borders has been the reality of increased flows of people over those open border, exemplified in the recent migrant and refugee crisis in and around the EU. Crossing the Mediterranean from Libya into Italy, or from Turkey into Greece is the most common route for such refugees and would be asylum seekers to enter into Europe. If people make it to dry land, 'reception centres' in places like the Italian island of Lampedusa and in Eastern Greece and Greek Islands conduct fingerprinting and documents are checked, some are detained for processing or more often than not released to return for further

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[6] This is not the case with the EU Schengen area that took the reverse approach, encompassing nations within a common travel area, with the right to work and travel in other people's nations. Although evidence suggests (as we'll see below with an account of Spanish border guards in Africa) that the hard border simply moved, and encompassed the edges of the EU more sharply.

processing and assessments of their claims. Surveillance defined their experience as included/excluded non-citizens. The EU has created "…a new system of quarantining migrants in southern Italy and Greece to enable the forcible and swift registration, fingerprinting, expulsion, and, if necessary, detention for up to 18 months of those deemed to be illegal immigrants crossing the Mediterranean from Libya" (Traynor, 2015). When the state is compelled into action in this way to deal with increased inflows or perceived crisis, a refinement of values and principles is necessary in order to publicly justify such action.

It becomes a matter of immediate interest to decide whose interests trump whose, what values ought to hold sway over others, and, what is legitimate for the state to do to non-citizens at the border and within its territory. International conventions apply, but, as seems to be becoming more apparent, so do the political demands of the demos – the citizenry -which in recent times seems to be turning against migration and asylum seekers in liberal democracies. Talking more broadly of politics, Kwame Anthony Appiah says, "many questions of justice only arise once people behave unjustly" (cited in Galston, 2010, p.395). Here, it seems, matters of citizenship entitlements, asylum rights, or the powers of border police *inside* territories only arise when citizenship is perceived to be threatened, rights appear to be violated or the border appears to be porous. It is then that politics enters to re-exert the primacy of different liberal democratic values and concepts over others, or re-settle the issue that was, up to this point, less relevant.

It is the case that the border is *ordinarily* policed though surveillance, and citizenship and non-citizenship is ordinarily demarcated by the state in various ways for access to and exclusion from the state. However, the current crisis, or significantly increased migration flows, brings into question the consequences of border regimes acting in

that way, and brings the justifiable basis on which they act into question more sharply. This also seems to have a concomitant, or dialectical, effect on perceptions of citizenship within the liberal democratic nation-state. This is insofar as citizenship is more stringently exerted at times when more non-citizens are present, through culture, politics and policies of surveillance, like identity requirements for healthcare. How this political moment of exclusion is enforced through surveillance is important for understanding how surveillance technologies spread throughout and inside liberal democracies, as well as at the fringes.

Social sorting theory (Lyon, 2005), based as it is on categorical access and exclusion, seems to identify correctly the administrative exclusion and access present at borders, between those who are welcome and those who are suspect. For example, surveillance as social sorting could be used to describe airport security and surveillance differentiating between 'bona fide' travellers (Aas, 2011), (who are surveilled in order to get smooth passage through borders) and the suspect traveler (surveilled in order to deny access to them) – including economic immigrants, asylum seekers, holders of passports from 'suspect' countries, non-elite travelers from impoverished countries and so on.

The border, enforced through surveillance, does not just exist at the territorial fringes of a nation state in this way however. Ericson and Haggerty's 'surveillant assemblage' thesis (2000) understands this, describing the mobile and interconnected sense of where the border can appear across and within a territory with surveillance systems built on and into citizenship. 'Surveillant assemblages', as discussed in the introduction - informed by de-territorialisation ideas taken from Deleuze and Guattari (1980) - point to striations of spaces in which space, for example the territory of a nation-state, is disrupted by walls and barriers; flows and mobility is blocked, checked

and interrupted. Rather than the inside of a territory being 'smooth' - that is, being a free space in which to move around uninterrupted by considerations of the border - the border exists in restaurant kitchens when UKBA (UK Border Agency) raid to check the status of people working there and during hospital appointments that need to be checked against registered patients, and at train stations where UKBA have conducted documentation checks, denying they were racially profiling people, but not explaining how they were identifying people for such checks (Batty, 2013). Through the forms and identification documents that provide or deny access to certain public goods, such as hospitals and schools, and free movement on public transport, we can observe a re-expression of the border at different territorial points within the nation-state.

Governmentality studies, around the securitization of borders are similar to assemblages in finding the securitization agenda to be operationally apparent not only at the fringes of territorial space, but through the "amplification of surveillance practices on and beyond the border" (Wilson & Weber, 2008, p.124). Both Aas (2005) and Sheptycki (1998) have proposed that it is technology, rather than geography, that increasingly defines the space of governance (cited in Wilson & Weber, 2008, p.124). The policing of global mobility now takes place in "informated space", through transnational networks aimed at the "bureaucratic production of knowledge about suspect populations" (2008, p.124). The border appears and re-appears in spaces ranging from online travel booking forms, to landlord registries and health databases, all premised on the same basis – surveillance systems to discern identity and eligibility – access and exclusion.

Some scholars go as far as saying "securitization of immigration [is] the result and not the cause of the development of technologies of control and surveillance" (Bigo, 2002, p.73). While I disagree with a solely technologically deterministic explanation,

what this does show is technology's role in what is possible. As outlined earlier political decisions are informed by the realm of the possible, and, what surveillance technology makes possible at the border can, in a dialectical relationship, echo back into decisions making around levels and stringency of exclusions of citizenship at the border and within society. And surveillance makes it possible for the border to appear in different locations internally, and temporarily.

Regardless of what techniques of exclusion appear at the border or internally, for liberal democracies, human rights dictate that in principle states ought to be, and certainly often claim to be, treating excluded people in accordance with international commitments to human rights. The risk with idealising accounts of such things as human rights however, is that they can be prone to what Charles Mills calls "descriptive idealization" (2008), confusing the practice of human rights with the promise invested in them. In reviewing Seyla Bernhabib's book mentioned above, *Dignity and Adversity: Human Rights in Troubled Times* (2011), James Ingham says "The danger, to which idealizing theory is especially prone when it seeks to interpret institutions and events, is that we will see actual political entities in terms of their normative justifications or potentials rather than (instead of in addition to) the forms of power and exclusion they inevitably also embody" (2013, p.350). My approach to normative justifications is different. I am showing that such idealising normative justifications promoted in public discourse are the legitimating force behind surveillance, which function *as a* power to categorise, monitor and exclude. Rather than falling short of what is promised, they produce in practice, that which was unexpected, but still justifiable in the language of liberalism.

Makaremi captures this disjuncture between practice and promise through an interestingly termed paradox, mentioned in the introduction - which holds similarities

with care and control surveillance, and with the inclusion/exclusion practice of liberal democracy itself – describing the conditions of refugees, asylum seekers and other 'undesirables' as one of "humanitarian confinement" (2009, p.430). Target population are viewed by the state as both vulnerable and criminalised at one and the same time. In other words, both a security issue *and* a political, or liberal, responsibility. This condition pertains to the extreme edges of non-citizenship, characterising the situation of many migrants in camps, 'reception centres' and detention facilities like Yarls Wood in the UK, under close watch with strictly monitored, but still in principle enforced, rights. This term is used to describe the way "rather expedient and ad hoc practice acquires a degree of institutionalization and legitimation in the public sphere" (Makaremi, 2009, p.430). The recent eviction of the Jungle in Calais, where migrants and refugees were removed but given papers to be transferred elsewhere, provides another type of example where previously unusual practices begin to acquire degrees of legitimation, and can then become normalised in political language.

Reacting to unique events in this way through the language of rights, and with the practice of documentation, processing and surveillance, such an internal exclusion becomes an ordinary part of surveillance practice. For citizens, the refugees and asylum seekers become an internal and normalised presence with which citizenship becomes identified *against*. For illegitimate non-citizens, the border, and their status (as illegitimate non-citizens), is worked up and carried in temporary documents around with them, moved now from Calais to pavement camps in other French cities. Such documents are similar to the 'Nansen Passports', issued to refugees in Europe between the two world wars in order to enable movement but without embedding any rights - the holders of which Hannah Arendt referred to as "legal freaks" (Arendt, p.278). As with these illegitimate non-citizens, their status was one of surveilled

exclusion, and these ad hoc and temporary solutions, of administrative surveillance and exclusion of the present but 'outsider' status, becomes normalised and held in temporary documents.

Governmentality scholars, such as Makaremi, excel at fashioning concepts like this that operate in what Rabinow calls "proximity to concrete situations" (Rabinow, 2003, cited in Walters, 2015, p.3). As I've argued throughout, liberal democratic institutions themselves fashion, or more accurately 'co-make', concepts and values as they are 'worked up' into concrete practices to deal with developing situations. This contestable nature of surveillance - both as an ad hoc solution to unresolvable political situations, described by Makeremi, and as a system for implementing and protecting institutional values that are worked up in contestation, and never finally settled - challenges the view of surveillance as an exclusively a rationalised system of order, as it is sometimes characterised. While a rationalised system of order is one way to view it, state surveillance of borders, which is enforcing political values, can also be described as chaos. While one cannot access public goods without identification, and this is efficiently coordinated through databases and sometimes biometric identification, refugees in Kos, for example, were locked up in an old football stadium and controlled with sound bombs and other riot control paraphernalia by Greek police as they waited for "papers" (Kingsley, 2015).

These figures on the fringes challenge the idea of surveillance in interesting ways, one of which being, they are not pre-identified by these states and so are *free from* such surveillance. They are not political subjects and as such do not have political identities under the state that can be surveilled, monitored and assessed. Yet *not* being identified and documented means one cannot get access to public goods, housing or travel freely within that state, or with access to the ordinary sociality of a society in

which one lives. Without a categorical status related to citizenship, whether semi-citizenship or designated asylum seeker, a staus that is codified and defined by administrative surveillance, they have no access to goods necessary for life. The description of the *sans papier* status in France exemplifies such a condition. So, while being 'liberated' from surveillance, they exist in stasis being unable to access public goods and ordinary life. They are almost bare life, in the sense Agamben uses it (1998) free from surveillance that encompasses ordinary citizens in a web of rights and access to social and public life. However, the arbitrary nature of what may happen next to them, and the modicum of protection they receive seems to mean they are more accurately held above bare life and dominated in the republican sense. Without any control or say over your treatment or method by which the state will control you, and no redress to that, one entirely lacks self-government, and is in the "grace and favour" (Skinner, 2008) of the Greek government, police and indeed humanitarian volunteers who may or may not arrive to help. These yet-to-be-identified non-citizen, reveal humanitarian confinement to be premised first, on idenitification of the non-citizen. Only once they are codified and idenitified *as* a non-citizen can they be 'embraced' by care and control surveillance or placed in humanitarian confinement - until that point, they elicit a more directly coercive responses from state actors.

Alternatively, coercive state power is sometimes used *as* surveillance in place like, for example, Yarls Wood detention centre in the UK. This centre does not detain 'failed asylum seekers' or asylum seekers that have committed a crime, but holds several hundred women seeking asylum, who are yet to have their claims processed or who are appealing asylum claims (Youseff, 2011). This type of detention is surveillance par excellence. While policing and surveillance will interact in the discussion of borders and citizenship, they are united by how power, which is often coercive, is

justified and to whom that justification is politically made, in order to gain the appearance, and language, of legitimacy. Yarls Wood detainees for example are within liberal democratic justifications while simultaneously being dominated - it is just that this justification, which grants such detention an appearance of legitimacy, or subjective legitimacy, is made to those not within the fences of Yarls Wood.

Values that are inherent to liberal democracies, the shared beliefs of those societies which grant power legitimacy, still demand that 'the excluded' ought to be treated humanely on entry. This results in a political discourse defined by denying and/or limiting access to public goods and other freedoms, while maintaining humanitarian help. This type of exclusion is quintessential to the justificatory language of the liberal democratic state, which as a consequence produces surveillance necessary to implement those values, and worked up interpretations of such values, important to liberal democratic societies.

The notion, in practice and discourse, of denying access while offering humanitarian help in the ways discussed by governmentality and surveillance scholars, can be explained in a more politically useful way for my purposes as follows; illegitimate non-citizens are *excluded* democratically while *included* liberally. In other words, the democratic exclusionary principle of the demos - who is included in the count of 'the people' - is juxtaposed against a universalist liberal principle of human rights that seeks to include *all* humanity in its count. This explains exclusion and treatment of non-citizens, and why regimes of surveillance are *politically* necessary for the liberal democratic state - beyond issues of state security, territorial integrity - to assess and enforce who makes the count of citizenship and who does not, and the way those who do not, are treated.

2. "Unequals Will Not Be Treated Equally": De-Politicisation, Surveillance and Domination.

In *The Crisis of Parliamentary Democracy* (1926) Carl Schmitt states: "Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally" (1926, p.9). He goes on to say that democratic states first need homogeneity and second, if necessary, the "elimination or eradication of heterogeneity" (1926, p.9). Schmitt's desire and main interest is maintaining the unity of the state, and in this he is rejecting liberalism's notion of an abstract and universal idea of equality (persons are equal because they are persons), in favour of an equality with substance related to national communities (persons are equal because they are from this nation). He believed that the abstract universalism of liberalism is a danger to the maintenance of a unified state, a national community, inasmuch as liberalism treats humans qua humans as equal, treating people differently upon no distinction other than that which is normatively justifiable, just as merit, and not race, community, ethnicity or religion.

Disturbing as it is to read this quote in the knowledge of Schmitt's later political loyalties, he gets to the heart of something quite unique about liberal democracies, as rediscovered by Chantelle Mouffe, amongst others (2005). That is to say, liberal democracies contain simultaneously a drive to exclude and include - to exclude from the demos yet include within universal rights; to have a frontier with regards citizenship whilst being universal with regards to its ethical commitments.

Democracy and politics understood in this way entails a moment of inclusion and exclusion regarding who will be treated equally - the drawing of a frontier between us and them - while the contention for liberalism in the democratic context is precisely

its inability to draw such a frontier of political exclusion. Liberalism on its own cannot conceptualise 'the people' as a morally justifiable basis to treat people unequally. This is not to say such democratic exclusion is 'wrong' necessarily, just that the exclusion and inclusion of citizenship in practice is based upon being a member of a political or national community. This is not an abstract consideration, as to whether one ought to be treated in accordance with certain standards (the way Human rights often operate), rather it is a factual and political observation.

A way to surveil individuals in order to internally exclude, according to liberal and democratic pressures, creates surveillance practices widely seen in society today, such as rules and databases policing access to public goods like education, housing and work. Citizenship as a *state-dependent* status is directly linked to surveillance inasmuch as citizenship and national communities are not just imagined concepts but are "codified in documents" (Torpey, 2000, p.6). The passport, the legitimate identification document, and now for some the print on your finger codifies citizenship and joins individuals to political communities, as members or legitimate visitors or residents, excluding those without legitimate identifying papers and prints. What is unique about liberal democracies is the production of surveillance practices driven by the identity of liberal democratic citizenship (with attached rights giving access to public life, freedoms and public goods), and the inclusionary and universal liberal tendency to be open and respect individuals on the strength of them being human, not citizens. While other states are signed up to human rights declarations that are not liberal democracies, they lack the liberal and democratic need for *public justifications* on grounds referencing such liberal values, in order to legitimise political action to a democratic 'public', as discussed in the previous chapters. As such, the spread of surveillance is linked to political pressures on and from these values, and not just because of increasing economic or migratory pressures limited by

international law.

While liberalism holds majoritarian sovereignty in check, citizenship itself is not a binary and simple exclusion. Elizabeth Cohen, in Semi-Citizenship in Democratic Politics (2009), talks of the proliferation of semi-citizenship in contemporary times and of different types of citizenship pertaining to separate bundles of rights. She says: "Citizens have access to an intertwining set or 'braid' of fundamental civil, political, and social rights, along with rights of nationality. Semi-citizens are accorded only subsets of those rights" (2009, p.6). Importantly she goes on to say that because rights create political relationships - that is to say, rights that grant certain access to societal goods, protecting those rights against other demands, and so a reconciliation of antagonism - it is crucial that "states be able to disaggregate bundles of right" (2009, p.6). A semi-citizen may have no political rights at all, or numerous configurations of overlapping rights are conceivable, such as rights to healthcare but not a right to employment as for asylum seekers for example. "The unbundling of the braid of citizenship rights has the effect of shaping and managing populations whose diverse elements could not all be governed by a single set of rules" (2009, p.6). This means a method of untangling citizenship rights, who has access to what goods in society, is necessary. This need is a constitutive part of surveillance in society at large. From NI numbers to healthcare identity requirements and landlord registers. Cohen further says "In the absence of this capacity [to differentiate between what different individuals have a right to in society] …, states would have to do things like immediately and fully enfranchises all immigrants…" (2009, p.6). While Cohen is not discussing surveillance, this observation is acute when it comes to what would be the necessary reality to flatten out and reduce the need for it: equality of status.

Such exclusions from liberal democracy takes stratified forms for different non-

citizens. Importantly, distinctions also exist as to what makes up 'the politically community', and, who is the 'public' to whom the state addresses at different times to justify its use of coercive power and surveillance when enforcing exclusion of certain individuals. Schmitt himself seemed to be referring specifically to the idea of a political community based upon *ethnos*, coming from the Greek, the counterpart of which is *demos*. Ethnos refers to "the people as an imagined community of membership and affiliation" and the demos to "The people as the collective subject of representation, decision making, and rights" (Balibar, 2001, p.8). This is complicated by the fact that legitimate *non*-citizens exist within a territory that are not part of either political community yet receive rights of citizenship.

This type of status is exemplified by EU citizens within the UK. Such migrants are not part of the imagined community of membership and affiliation, yet are the partial subjects of 'representation, decision making, and rights'. They have rights to work, healthcare, education, rights to vote in local elections (but not general elections), are entitled to due process of law, sick pay and so on. This has been and remains politically problematic in the UK insofar as 'problems with immigration' that are publicly articulated can be a complaint against the presence of people not part of the *imagined community* yet receivers of the rights and privileges of citizenship. The imagined community, the ethnos, seems to be coming in to considerations of the demos, with complaints and political grievances articulated in this way. The complaint can be crudely put, and sometimes is, that as a nation we ought to 'look after our own first', as well as concerns around distribution and scarce recourses in housing, healthcare and welfare. Proposed restrictions on access to welfare was being politically considered prior to the Brexit vote, making such discussions. Indeed, much 'anti-immigrant' sentiment is often articulated in terms of entitlements to public goods like healthcare, housing and work. Whether that articulation is a proxy for other

deeper reasons for such a desire to exert an exclusionary democratic citizenship is beyond this discussion. [7]

This citizenship identification regime does not just exist at the fringes of a state's territory either but, as discussed, internally compels identification systems for a myriad of access to public goods necessary for life - health, education, employment, welfare, housing. At root access to public goods are identifications of citizenship and entitlements afforded by that status. Biometric identification systems now redefine the border relating it to an identity rather than a physical barrier – the identity of citizen - and identity management within territories. Irma van der Ploeg describes the border becoming "…part of the embodied identity of certain groups, verifiable at any of the points of access to increasingly interconnected databases" (van de Ploeg, 2005, p.133), producing some identities which are more "habitable" than others (Lyon, 2010, p.43) within liberal democracies.

The aborted UK ID Card plans for example were justified by then home secretary David Blunkett through his desire to know who is here by monitoring what people were entitled too, stating "I want to know whether they're working legally. I want to know whether they are drawing on services legally" (Travis, 2003, p.42). Indeed, the Labour government at the time specifically referred to and promoted the scheme as "Entitlement Cards" (Lyon, 2010, p.42), in order to permit checks on entitlement to employment, healthcare and education. In spite of this scheme being jettisoned in the

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[7] The status of EU citizens at the time of writing is now held in status somewhat by the UK government before negotiation in the coming 'Brexit' deal. A quite unique situation for 'semi-citizens'; Their rights are intact but only temporarily, and, their status socially has undoubtedly been de-legitimised and undermined by the vote and the limbo they are in. They are not the legal freaks that Arendt talked of above, but uniquely may have the bundle of rights they have held up to now negotiated away in a trade deal over access to European markets.

face of both public opposition and cost issues a myriad of other documents and databases serve to function in the same way. More surveillance is required as rights and citizenship entitlements are extended, but also perceived to be not serving the exclusionary function that democratic citizenship enforces.

A further layer of contestation is that of fully fledged British citizens, who are entitled to all public goods, but who are perceived and portrayed politically by governments or other political interests, as either not being in, or acting in a way that remove themselves from, affiliation with the imagined community. The obvious example in the UK being the Muslim community, who themselves are subject to more intensive surveillance than other groups. Most obviously, and ostensibly, because of a terrorist risk. However, suspicion and misunderstanding seems to characterise the surveillance of the Muslim community, with widely criticised policies like PREVENT (O'Toole et al., 2015), monitoring children for showing signs of extremism in circumstances that can be explicable to one community but not the other. The problematic relationship of surveillance with this community, seems to be driven in part by not being a member of the 'imagined community' from which the official conducting surveillance comes from.

As discussed in previous chapters, the state is seen to be legitimate either when it is properly *restrained* by adherence to certain standards of justification within a normative framework, but also secures subjective legitimacy (and therefore the ability to act) when it acts in conjunction with what is desired by the demos, achieved through public justifications. What appears to be prescient with current citizenship in the UK, and border issues, is that the state often finds itself justifying its *inaction* in

the face of 'popular demands'[8] to exert sovereignty, and project power more forcefully, in order to exclude and keep 'others' out.

Balibar believes this leads the state to engage in what could be described as *displays* of state power over migration and non-citizens (2004), rather than actual expressions of sovereign power enforcing territorial integrity or successful exclusion. This does not play down the impact of the state wielding power over individuals through intensive surveillance and coercive capacities of border police, rather it is to question whether these displays are in fact an expression of sovereign control over the means of movement, or, a representation of it. It could be that through wielding power over illegitimate non-citizens "the state *demonstrates* (at a low cost) the force it claims to hold and at the same time reassures those who suspect its destitution" [emphasis added] (Balibar, 2004, pp.36-37). Demonstrating for 'a public' concerned with illegal immigration, that control exists even while perhaps it does not.

An example of this is a collaboration of Spanish and Senegalese border patrols for Frontex (an extension of EU borders in collaboration with other countries to prevent illegal migration into the EU) which were "…an exercise in what police chiefs called 'visibility' — to show 'candidates' that the police were ready to cut short any attempted boat journey to Europe […] [They] were also about visibility in another sense — as a show for the funders and the visiting researcher. In Dakar's seaside neighbourhoods, former clandestine migrants deported from Spain said they never saw the patrols" (Anderson, 2014, p.128). This expression of state power was to show would-be migrants that the EU was in control of its borders, but interestingly also apparently to prove to the ethnographers that accompanied them too.

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[8] Whether 'popular demands' are crafted and engineered, or genuinely reflect the desires of the majority, was covered in the discussion of engineering consent for surveillance of welfare claimants, in chapter 3. The figure of 'the public' demanding a 'problem' is solved, is often mobilised in a number of ways by politically interested parties.

Displays of sovereignty through exerting surveillance power over individuals satiates in one way the perceived demands of the demos while not going too far in violating people's fundamental rights, and certainly not on a large scale. Political proposals to make Hospitals and GPs in Britain ask for ID before treatment seem to be a case of the state both displaying its sovereignty, through identification and surveillance regimes, to what is perceived to be a restless public, while at the same time expanding surveillance over both citizens and non-citizens. Because of course, the person not entitled to healthcare, the figure of the 'health tourist', however large or small in number in reality, will not be the figure under surveillance. Those put under surveillance are those entitled to healthcare – the existing citizens. The non-citizen here is 'freed' from surveillance by omission from the database, insofar as they are 'freed' from the ability to get healthcare. [9]

Whether it be external immigrants, or internal 'others', the liberal aspect of a democratic nation excludes, *in principle*, an ethnic Schmittian extremism, insofar as legitimate state power must give some account of itself to citizens of the nation, in order to be legitimate. The shared common framework, discussed in the introduction, which includes the liberal universalism and respect for individual rights, places limits on this. This liberal universalist blocking mechanism is the precise threat that Schmitt saw liberalism posing to national communities, because of the way it undermines democratic communities, by viewing *all* as receivers of ethical rights. It thus draws 'others' in, and includes them in the justification requirements for state power. This creates the political capability of keeping 'outsiders' within nation-states, without

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[9] Again, the reality of who 'The Public" actually are, or what "The People" want is politically contested, but it is noticeable that what it is claimed 'the people' want, is rarely a more inclusionary and universal demand. The political figure of 'The People' seems always to be mobilised instead to legitimise some kind of exclusionary measure, mirroring the political idea of the demos itself, as an exclusionary body of members.

necessarily forming part of the national community found there, creating the *political* need for a territory wide system of categorization, exclusion/inclusion and monitoring, to enforce rights, and exclusions of citizenship and non-citizenship.

In principle, such surveillance of the levels and statuses of citizenship offers protections to those not included. However, it also involves the *depoliticisation* of those it excludes. They are de-politicised insofar as they are administered as *merely* human beings (excluded but subject to ethical and humanitarian care) by nation-states rather than as political subjects with political claims on states - that is, rather than as citizens (or legitimate non-citizens) with access to political participation, civil rights, due process, courts to challenge the basis of their treatment. Notwithstanding the fact that others can and do challenge the state's treatment of them on their behalf - most recently the court released one hundred women from Yarls Wood detention centre having being challenged by human rights lawyers that their detention was illegal under such human rights legislation (Taylor, 2010) - having advocates to prevent abuses is different from having access to political rights, due process and receiving some kind of account from the state of your treatment. In short such de-politicised subjects have no power over whether their rights are respected or not, even while the state justifies their surveillance, confinement or containment on humanitarian grounds.

Such surveillance is thus justified publicly in two ways, reflecting the two sides of liberal democracy that need to be 'spoken to'. These two sides are the necessity to *not* treat non-citizens equally, in order to maintain the substance of equality of citizens, while secondly, still including them equally as persons under liberal universal rights. This is resolved through this de-politicised surveillance, which both controls and cares for the individual. As administrative problems (politically excluded but present bodies) such migrants are *controlled* in that movement across territories and access to

public goods is limited and managed through exclusion based upon identification, and '*cared for*' insofar as humanitarian care is provided and the basic standards of human rights are in principle adhered to.

The problem is that being monitored in order to be 'cared for' in this way, leaves the individual under liberalism's protections, but de-politicised and dominated. In the situations described individuals lack of ability to know when, or whether or not, their 'cared for' status will change under surveillance seems to out of their hands. Liberalism 'looks after you', and must monitor this care and exclusion from democratic citizenship - but you have no control over whether these liberal protections, such as they are, will be strong enough to do so in the future in the face of other demands which bring pressures on the from the demos. For example, political discursive legitimations around asylum seekers over two decades have had a direct impact on the setting up of the ultimate surveillance regimes, detention centres. Rights under liberalism or democracy have not changed but politics has. The power of such illegitimate non-citizens to defend oneself against *politics* however which, I have argued throughout, provides the decisive interpretation of values in practice - and expressed through intensive surveillance regimes internally excluding these individuals from the demos - is out beyond one's capacity. In this they are dominated in the way republicans describe. They simply do not know when or what will happen to them - they have no self-government, as such.

That these individuals live in fear of arbitrary arrest, or in camps or indefinite detention - that immigrants sear off their own fingerprints to avoid surveillance schemes like Eurodac (Dembour, 2011) - reveals in practice severe problems with *only* receiving ethical/humanitarian and not *political* protections, producing the puzzling concrete situations, of humanitarian care and control, as defined by

surveillance.

Lechte and Newman, considering the public reaction to refugees drowning as they attempt to reach Europe's shores, claim that such figures "… constitute a certain blindspot for nation-states and public opinion, which fail to acknowledge the full catastrophe that is currently taking place" (Lechte & Newman, 2013, pp.12-13). The problem does not seem to be with a lack of acknowledgment of the catastrophe taking place per se - people are fully aware of it – it is more accurate to say that there is a legitimacy associated with *inaction*. This offers a more direct answer to this blind-spot which recognises the primacy of the political in public opinion and decision making discussed above. The blindspot is because of the *legitimate* exclusion from the demos that stateless people, refugees, migrants necessarily incur from the fact of not being citizens. They are subjects of humanitarian aid, basic human rights and no doubt pity but not *political action,* nor, which is the blindspot, are they part of the same political community.

As fellow citizens, some account of the current inaction would have to be given directly to those suffering as the basis for the continued legitimacy of the authority of the state. They are not enemies in the Schmittian sense but just that their plight is not a political one, it is *only* moral and ethical, complicated by the threat they pose to the 'integrity' of citizenship of the nations they seek to gain entry to, and the legitimacy with which their forced exclusion is carried out. And while ethical considerations of humanitarian treatment form the basis of legitimations of state power and inaction, it seems you cannot treat excluded people 'too well' lest it clashes with the necessary exclusion from equality of citizenship.

Bringing into the demos the conflict that the status of illegitimate non-citizen poses to

the national community - threatens the integrity of citizenship which is based on exclusionary treatment of 'unequals being treated unequally'. This is resolved with administrative solutions, policed through care and control surveillance, which acts as a kind of 'technical fix' to the never settled problem of global flows of migrants coming up against the exclusivity of liberal democracy's citizenship. It does not politically resolve anything once and for all. However, it does endlessly reproduce expanding surveillance systems to administer, monitor and control such flows. Without a political resolution, rather than a rights-based, legal, administrative or technological solution, the trajectory is of ever increasing surveillance which contains but does not control or resolve such a situation.

3. Challenging the domination of surveilled citizenship: Politicising the rights of the rightless.

The domination suffered by illegitimate non-citizen's as a result of their de-politicised status, evokes some older criticisms of the effectiveness of universal rights. Geuss (2001) observes that states are both the guarantor and violator of rights, resulting in an insoluble problem at the heart of organising politics and life around rights. States have other legitimate political, economic and governing interests that, influenced by statecraft, power or interests does not put rights at the heart of what it does. States are inherently haphazard in upholding human rights because states qua states violate rights in the pursuit of these other contingent interests.

Additionally, the insufficiency of rights which are claimed on behalf of people has of course been noted prominently before not least by Hannah Arendt. Precisely 25 years after Schmitt wrote *The Crisis of Parliamentary Democracy* (1926) Arendt, in the aftermath of World War 2, considered the condition of those excluded from national communities in terms of rights and the palpable insufficiency those rights had in

protecting people. Arendt claimed (1951) that a contradiction explaining the condition of the stateless can be posed between rights of the citizen and 'rights of man' (today human rights) being both an abstraction and concrete reality.

The rights of man were an abstraction inasmuch as a person can 'have' those rights yet be subjected to oppression, domination and death. But those rights are a concrete reality in the moments and occasions they are enforced by states on behalf of people. In considering abstractedness of such rights with the reality of refugees fleeing their homes all over Europe during both the first and second World War, Arendt concluded that the rights of man are the rights of those without rights (1951). Such rights as protections against oppression can only be activated, paradoxically, through membership of a national demos. Precisely the people - citizens - not in need of such protections because of the rights that they also hold as citizens.

These alleged abstractions - for people who 'have' human rights but cannot see them activated or use them as protections - are not without their own power either however, that can be mobilised by the supposed 'rightless'.   Rights were activated for example as a rejuvenated political claim by people in Eastern Europe under the Soviet Union. Rights here acted not as abstract and empty devices, nor did they fulfil their role as protections, but as the basis of a powerful rhetorical politics promising the end of the era of subjugation they were suffering (Ranciere, 2010). The people making these claims were however 'a people'. Even if at the time they were living under a regime that did not grant them the rights that they wanted, the claim for those rights were made by a 'national community in waiting'. The situation for the people considered here - the stateless, the refugee, the migrant - is different. They are part of no community in waiting; that is to say they are not part of 'a people', or a potential and unified national community, an ethnos, from which to claim rights for.

This rhetorical political power that rights language has within liberal democracies already exists in discourse around the treatment of excluded migrants. A phrase common amongst migration and asylum activists (such as 'No Borders') is the slogan 'No-one is illegal'. Interpreting this as a claim for the rights of the rightless, and a recognition that one's status as such ought not to be deemed illegal, has rhetorical power in the way it rehumanises those deemed to be outside the law. Paradoxically, they are being 'rehumanised' by being drawn up from the status of *merely human* and into civil and political recognition (from 'Bios' to 'Zoe')[10].

Yet, while moving usefully beyond ethical and humanitarian language, that intertwines innocence and legality with citizenship, it doesn't undermine the basis on which exclusion functions. One's *status* as human may not be illegal, the state could say in response, but then what one does, how one acts, what religion, race and country of origin, one's identity and so forth, is the basis for access to full benefits of citizenship, that we, the state, provide. The claim also contains the distinction of rights being fought for, and claimed on behalf of, the rightless, which maintains the status of the illegitimate non-citizen as de-politicised - albeit 'cared for' by the state, and championed by activists, with a more powerful language challenging the illegality of their status. De-politicised non-citizens making such demands cannot compel the state by challenging its legitimacy, however. This is on account of not being the political subject that the state must *say something* to. This situation reflects the reality of state action and current policy, but is not historically fixed.

As I've argued in Chapter 2 and 3, politics doesn't only come from above, from state policy and state institutions that constitute political practice. If all changes to state

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[10] See Agamben 1998.

policy and institutions - and who became part of the 'political public' to which accounts are given - came about itself as a result of state policy and institutions, then those historically excluded from them would remain so excluded. That this is not the case can be found in the gradual politicising of the unpolitical, and the winning of recognition of citizenship from excluded, marginalised and oppressed groups within nation-states and liberal democracies of the past.

Benhabib (2010; 2011), from a human rights perspective, highlights the importance of civil society organisations in shifting opinion towards the rights she wishes to see emerge from democratic politics, for example. However civil society doesn't necessarily operate towards a cosmopolitanism, that Benhabib wishes to see emerge. Moreover, particularly in the UK, many think-tanks, the media, political parties and other organisations have played a role in shifting the context and meaning of the rights of others, away from an inclusive human rights.

'Micro-resistances' to surveillance by those dominated by it also exists, involving disposing of documents and identification cards, and in extreme cases searing off fingerprints, taken on entry to Europe into the EURODAC scheme, to avoid future identification (Dembour & Kelly, 2011, p.60). However, the sustainability of such resistance, in light of the way 'liberating' oneself from surveillance also 'frees' oneself from access to public goods, as discussed, seems questionable.

Political demands, in the form of assertions into the legitimacy claims of state actions, has power to reinvigorate the rights of the rightless and the dominated. Rather than aiming for human rights to be abstractedly respected, or to design idealised frameworks within which this could occur, challenging the legitimating basis on which democratic governments exert power over people can be challenged

Women in revolutionary France were excluded from political participation in the new republic yet could still be taken to the guillotine for being political enemies of that Republic. One woman, Olympe de Gouges, famously argued that if one was liable to punishment *as* a political subject - that is, punished as a political enemy through the state's guillotine, then one must be afforded the same political rights as the rest of the demos (Ranciere, 2013, p.68). Put simply, if women were 'allowed' to go to the scaffold they should also be allowed to go to the assembly (Ranciere, 2013). Another example of politically right-less, yet still nevertheless *political* subjects, were women in liberal democracies prior to universal suffrage. Those fighting for the vote could and did make claims *to* the demos *as* political subjects of that democracy, but political subjects without political rights. Again, the claim is similar; if one must live by the laws of a society one must have the opportunity to pick the lawmakers.

Re-politicising such subjectivities, by making claims that some sort of account *must* be given to them about the power that is dominating them, presents the realist challenge. Which is for power to move from naked domination to legitimate power, some kind of account must be given to those under it that they could consent to. Similar to women in liberal democracies prior to universal suffrage, this can liberate certain groups from a de-politicised status that drives exclusionary and constraining aspects of surveillance. Of course, the state could say, you are not citizens being denied your political status, you are not citizens at all. To which a response could be, from those women inside Yarls Wood for example; if 'we' are to be punished by the demos through detention then we ought to be entitled to a status that gives an account to 'us'. If legitimate state power is wielded over us in detention centres, fingerprinting and databases, excluding us from habitable identities within the state, then we must be able to challenge the basis of that legitimate power.

This is open to a charge of being unrealistic, however. Whereas it would not be realistic to support a notion akin to that of the late 18th century England whereby, for a time, if and when anyone managed to get themselves onto the shores of England, they were "as free as a freeborn Englishman" (Linebaugh & Rediker, 2000) - only a trickle of people came to England in the 18th century, and citizenship was very much detached from state entitlements of the kind we see policed today in an era of mass migration and globalization - on the other hand, it seems equally unrealistic *because of* mass migration and global forces to maintain the current situation. One in which an administrative fix to a never settled problem of liberal democracy – in a context not of these state's own choosing - results in mass surveillance of the citizenry, and domination of those it seeks to exclude.

To circumvent these two options, a way in which state power can be challenged by those subject to it, through politically collective organisation, forcing their way into the demos to demand an account be given, and political recognition achieved, seems an historically reliable approach.

Instead of accepting the separate status of citizen and non-citizen, and appealing for better humanitarian care, a political answer is to challenge the basis of legitimacy through which the state separates out those under its power for differing treatment, based upon an identity and status rather than justifiable differences. By re-politicising the rightless under surveillance control through treating their condition as a political (and democratic), and not just a humanitarian (and liberal) catastrophe, the necessary demarcation that sorting surveillance requires is challenged and the depoliticised administration of such people possibly diminished - borders, walling and surveillance reduced.

Who is the subject of different rights and treatment, and the striation of identity of 'the public' to whom an account must be given, is the underlying *political practice* that compels the sorting and categorisation that necessitates surveillance. Administration and surveillance reveals the unequal treatment of people under surveillance, yet it is a *political inequality* creating the need to sort and categorise in this way in the first place. Mass surveillance is necessary to administer this inequality in this current context, which is *necessary for* liberal democratic values.

The status of illegitimate non-citizen contains within it multifarious identities - of race, religion, ethnos - as seen from the political examples just addressed. Mobilising solely around such identities doesn't in itself challenge the political inequalities and demarcation of citizenship identity that surveillance is based upon. The political power and context to be a full and equal citizen hinges on many things, including race, class, religion and gender. However, within the figure of the illegitimate non-citizen status, all such identities potentially exist. Resolving the figure of the refugee and the stateless, they who are rejected from citizenship under surveillance - that is to say, liberating them from the need to be cared for and controlled by surveillance under liberalism through equalising their political power - could not only limit domination under surveillance for non-citizens, but present a potentially quite fundamental unfolding of these citizenship categories that compel surveillance in the first place. Unequal statuses under liberal democracy compels surveillance - making statuses more equal, however, is contingent on the political power to do so. This demands an equality of power that must be organised from below, not granted from above.

Conclusion

In maintaining legitimacy for its 'home audience', liberal democracies are compelled to exclude, and striate, rights and entitlements amongst populations living within its territory. Because of the nature of democratic citizenship, and access to rights and public goods this imparts, intensive surveillance is required to maintain a monopoly not only on movement but access to entitlements of citizenship. To maintain its legitimacy in the eyes of the demos, the state must also exclude effectively, but not to do so in a way which amounts to naked tyrannical power. This means ordinarily that the excluded are still included within liberal and universalist human rights.

It is important to repeat here what was laid out at the start – citizenship and border surveillance also provides an understanding of surveillance of the norm, surveillance that is conducted ordinarily, and without much notice. Because I found that if one is to deny access efficiently then ipso facto the state must also enable access efficiently. This means more surveillance per se and more surveillance of citizens within the state, explaining the pervasive growth of surveillance over access to all public goods – it is legitimacy securing and enforcing the concept of democratic citizenship. Therefore, re-forging the fringes of liberal democracies and non-citizens under surveillance also reduce surveillance in the centre. However, the persistent and decisively political events at the global level continue to create a permanent situation of humanitarian crisis, and while democratic upheavals in host countries leading to more exclusionary demands around citizenship, surveillance and exclusionary administration seems to be only on one trajectory.

I have not provided an answer but a political approach. Found historically and contemporarily, this approach aims to counter general patterns of exclusion that are enforced through expanding surveillance practices that reproduces exclusions. It is a simple point that the more unequal people are – be it status, power, wealth – *under*

liberal democratic values that produce the need for surveillance, the more surveillance is produced. A political approach that seeks to dismantle the edges of those statuses through increasing equality of status, identity and political power would reduce surveilllance by design. How one forces this to happen cannot, it seems, be found through policy, or acting on behalf of non-citizens, but through political organisation and the seizing of collective political identities that attempt an account is given to them, and break through the legitimation requirements of the current liberal democratic arrangements, from below.

More detailed discussion of the content and identity of citizenship in liberal democracies, which I am suggesting could be broken down, could take place, to understand democratic citizenship's enduring link to the concept of a national community (an ethnos), and the link this has with religion, race and ethnicity. This is because it seems a compelling argument that not only is the blindspot to the humanitarian disaster grounded in the idea of non-citizenship (and so *political*), but is also grounded in an aversion to the *identity* of these would-be citizens - primarily being of a different race, culture and religion. Could we, for example, imagine a situation in which white christian Europeans of whatever 'political' community were dying at such a rate on Europe's shores without conclusive intervention?. The intuitive answer to this seems to suggest that the 'imagined political community', the one which surveillance striates, categorises and enforces, and the community who influence the concept of legitimacy – the political demos - is both fluid beyond single national territories, but simultaneously regressive around a tighter cultural, religious and racial identity.

The boundaries to challenge are not simply borders at the fringes of territories, nor the membership of the demos, but boundaries of the actual identity of citizenship that

drives who is being assessed, sorted and controlled, and who the symbolic figure of 'the public' is, who legitimates these constraints on membership. The ethnos, it seems, can be seen to creep into the justifications for exclusion from the demos.

Nevertheless, democratic legitimacy dictates that states need to give some account to those they coerce, but this is unlikely to be heard by states unless non-citizens organise politically. Next, I will assess the condition of such political organising under expanding surveillance regimes. Finding that political protest, dissent and political freedoms, in liberal democracy, that I would hope to offer route out of mass surveillance, are susceptible to the same forces of legitimation, de-legitimation and surveillance. I'll discuss this now.

Chapter 5 - Dissent Under Surveillance: Protest and Policing

Introduction

'Demonstration' originates, etymologically and historically, in both the act of proving that something is true, and the description of a group or class of society *demonstrating* its power. Such a gathering of people on the doorsteps of government institutions in protest had, and intended to have, an inherent threat contained in it; authorities often responded in kind to the intentions of such assemblies, whether peaceful or otherwise. Protest and assembly was seen as illegitimate by authorities because it was a threat to the state, and ipso facto groups prepared to participate in street protests and assembly were challenging the legitimacy of the state *because* they put themselves on the streets politically; antagonistically demonstrating that they believed political assembly to be legitimate contra the state authorities (Thompson, 1963). Reactions by authorities and the success of protest and demonstration were often reduced to political, and actual, strength.

Protest exists in a different paradigm today, often as a direct result of the struggles for political and economic freedoms of early democratic struggles in liberal democracies. The often violent responses of authorities to protest in the past was a reaction against the struggle for political and economic rights, and has extended political citizenship, discussed on chapter 1. Extensive democratisation of the liberal democratic state along these lines has established today mechanisms with which to express, contain and accommodate democratic dissent through protected political rights and freedoms to protest. The more blunt struggle of threat and force from both sides giving way to more complex roles for both protest and policing of protest in liberal democracies, vividly described by Waddington in his seminal study of policing in the UK, as the

transformation from "shooting and stoning" to "pushing and shoving" (1999, p.81). Overt and naked violence on a large scale has been replaced by extensive strategies of surveillance. Infiltration, negotiation and control that enforces exclusion and marginalisation of groups and individuals that are still, in spite of protest now having an acceptable role in liberal democracies, exposed to significantly more robust forms of surveillance and policing. While protest is today legitimate, not all protests and not every protestor is; and while rights to protest are in principle protected, protestors have never been under more surveillance.

The problem that this chapter seeks to unravel is the reality in which protest and dissent flourish alongside a massive expansion of surveillance activities over them. More specifically, why is it that some protest and dissent is left alone while others are put under intense surveillance and policing, what this means for the expansion of surveillance in liberal democracies, and what does this mean for rights to protest?

My argument is that, as protest rights have been 'won' democratically, the suppression of protest changes; rather than outright coercion, surveillance is used, which dominates protestors in the republican sense. The effects of this domination *incapacitate* rights to protest - through fear, self-censorship and so on - while not violating those rights. As such, this surveillance does not stand in need of public justification and can silently suppress the ability to protest against the prevailing order. However, when surveillance and the police *do* violate rights, this stands in need of justification. To do this, authorities de-legitimise protestors in order to undermine safeguards provided by those rights. This makes police action that violates protest rights legitimate, by de-legitimising those it targets, and thus making them illegitimate non-compliers, not legitimate protestors. This explains how surveillance can be so widespread in a way that suppresses protest rights, and because of the

domination I will identify, I will discuss ways I consider this surveillance to be illegitimate. I will outline the structure of the argument in a moment, but first I need to unpack the nature of surveillance and protest rights, how such surveillance develops as a consequence of liberal democratic institutional settlements, and what role legitimacy plays in monitoring and controlling rights to protest.

Rights to protest are not held externally from surveillance, to be used as protections against it. Instead, surveillance and democratic rights to protest are *actualised* together in liberal democracy; that is, protest rights are brought into existence as controlled and monitored freedoms, *and*, surveillance is produced by the institutionalisation of democratic demands made through protest. Protest rights are used *against* institutions that previously did not 'allow' such rights, and as such, they are brought into practice conditionally – through contest, compromise and institutional arrangements - and in this way, protest can be considered as both an instance of, and threat to, democracy. As such protest rights should not be considered as pre-political values sought by the populace, but are instead *political values,* existing as political settlements, produced by reconciling the demands of the demos against institutions of power. Protest rights and democratic freedoms as such cannot exist in practice without surveillance, because they need to be both allowed and controlled simultaneously – put another way, democratic freedom is considered by the liberal democratic state as a 'good' and so must be 'released', but is unruly, and so must be controlled. In practice, such rights do not exist outside of the practice of monitoring and controlling use of them. They are controlled insofar as the right to protest is contingent on the aims of the protest being 'legitimate', and the ramifications of any program attached to it, as well as being contingent whether the strategy and behavior of protestors is 'legitimate'.

Legitimacy of political dissent and protest aims is evaluated by authorities on the basis of whether such dissent can be accommodated within established political arrangements for expressing dissent. Such political institutional arrangements resolve an inherent political tension between liberalism and democracy. At root, the traditions of liberalism and democracy have an essential tension summed up by understanding that in the final analysis it is legitimate to set limits on popular sovereignty in the name of individual liberty (Mouffe, 2005). The two traditions co-exist within the state, as discussed in chapter 2, by reconciling this tension through a series of established mechanisms created historically as a response to democratising forces, including; parliamentary representation, formal equality, equal property rights, institutionalisation, free press, free speech and of course political rights such as the right to protest. These established mechanisms, and the boundaries of acceptable political behaviour within them, serve to contain democratic and popular claims in a way that is non-threatening to the established liberal system, constituted through individual rights. These institutional answers to resolving this tension provide legitimate arenas for democratic freedoms to be expressed under institutional moderation. Outside of these mechanisms, and this is the focus of the chapter, rights to protest are curtailed in various ways through surveillance and surveillance-assisted policing.

Because democratic rights like protest are a danger to the liberal democratic order, as well as an example of it, they are held conditionally. What I will show is that you do not have the right to protest freely about anything, nor as effectively as you would like. Rights to protest are contingently held on condition you express such protest in particular agreed upon ways within 'normal' liberal boundaries, and are directed towards 'acceptable' and 'reasonable' causes. For example, as I will show below in section 2 and 3, policing strategies towards protest groups with individual and isolated

grievances, that is to say those who are expressing themselves as liberal individuals, albeit collectively, are treated very differently to those who are viewed as having 'an agenda' for wider social change.

Stepping outside the boundaries of what is acceptable protest behavior means your rights to protest are not enjoyed freely - however this does not mean they are necessarily violated. Not only are rights themselves contingent on what you use them for, but the capacity to use them for democratic change, or enjoy them 'freely', are held conditionally. Surveillance, when activated against those who are deemed to be illegitimate protestors or those engaging in illegitimate protest activity, 'silently incapacitates' the right to protest of those involved. I will detail what this entails, but briefly, as in other chapters, the effects of republican domination brought about by being exposed to arbitrary power that surveillance represents, curtails the ability to protest freely. It again does this without violating rights to protest in a tangible way understood by liberalism. On this basis, surveillance can be widespread over protest in liberal democracy as a monitoring technique which leaves rights intact, only intervening when protest is viewed to have become illegitimate, and, when it intervenes in the lives of protestors it does so in a way that does not violate their rights necessarily, limiting the scope of liberal objections to such surveillance.

When surveillance does violate rights, it is justified through the de-legitimation of protestors that serves to remove (or weaken) protections offered by political rights that legitimate protestors hold. Through having one's activities or aims de-legitimised, protest groups can be de-politicised and thus exposed to more robust surveillance and policing not appropriate for groups deemed to be legitimately political, and therefore protected by political rights.

Mechanisms of reconciling democratic grievances, through processes that legitimise protest groups and movements include institutionalisation, negotiation, representation and bringing dissenting groups which are a 'threat' to the state into the legitimate political centre and mainstream. This offers such groups ways to further their political agendas while at the same time neutralising threats to the legitimacy of the liberal order that such groups could pose. One example is Trade Unions of western countries being 'mainstreamed' in the 1920s and 1930s, as a way to avert a more critical class confrontation. They were 'brought in' on the condition that they pursue their agendas within the established language of rights and on the terrain of capitalism (Waddington, 1999). This served to avert popular claims over individual liberty - held within 'liberal' property rights, and guaranteed by the liberal state - that a strong working class trade union movement could bring. Below I will outlline how protest and dissent more broadly is legitimised and de-legitimised and how, put simply, in the eyes of the authorities, some types of protest are acceptable and some are not. This is not defined by criminality or disorder, but by legitimacy; illegitimate protests are those seen as a threat to the liberal democratic order and therefore liable to incapacitating surveillance and policing.

In the first section below, *You have the' right' to protest: Surveillance and the Incapacitation of Political Rights,* I will show how rights to protest are incapacitated, through protestors being dominated by surveillance. Discussing the effects this has on dissenters, I will show how surveillance can incapacitate rights to protest and dissent without violating those rights necessarily. I apply republican insights of the effects of domination to examples from protest movements to discuss the consequences of surveillance, and how it limits a protest group's capacity to achieve wider objectives through their rights to protest, without violating that right necessarily. In this way, surveillance can be used expansively over protest and dissent in a liberal democracy in

a way limits political horizons and intended outcomes of such protest and dissent, without preventing protest and dissent from formally taking place.

I will argue in the next section *Democracy, Liberalism and Legitimation* why, in a liberal democracy, certain groups are de-legitimised in this way. Firstly, in the subsection *Reconciling democracy and liberalism 'legitimately',* discussing how the tension between liberalism and democracy is institutionally expressed, I argue that it is those groups and demands that cannot be reconciled through these institutionalised mechanisms for maintaining the liberal democratic order, that are de-legitimised. I will extend this theoretical argument about the production of both legitimacy and surveillance into practical situations of protest and surveillance in the second subsection, *The creation of legitimacy and illegitimacy through policing strategies*, to show how contemporary surveillance-assisted policing strategies de-legitimise protest groups. Drawing on 'contentious politics' literature and other academic studies of surveillance and protest, I will show how the boundaries of what is deemed 'acceptable' protest behavior are drawn, and how policing strategies around protest and dissent de-legitimises and excludes certain groups from what is deemed legitimate protest activity. Once de-legitimised and de-politicised, these groups are removed from the terrain of the political where the more robust forms of policing they now become exposed to, would itself be viewed as illegitimate. These groups are then policed as de-politicised non-compliers, rather than groups with democratic expressed grievances.

The third and final section, *Publicly Justifying Surveillance of Protests: What About Rights to Protest?,* will discussing how surveillance that does violate rights is publicly justified, and arguing that democratic rights to protest are held contingently when it comes to protest. This will focus on how legitimacy is assessed, asking what is a

legitimate protestor, or protest aim, and assessing how these judgments de-politicise certain groups, thus exposing them to more robust policing and surveillance.

Before getting into the first section, I will define some necessary terms. I've used protest and dissent interchangeably up to now - as I have surveillance and policing. This will continue because while they can be separate activities - one can dissent without protesting, however one rarely protests without dissenting - I will argue they are unified by their susceptibility to state surveillance on the same basis of being judged legitimate or illegitimate. Dissent is not just referring to non-conformity in this chapter, or a simple "rejection of the values that most people hold" as it defined elsewhere (Sunstein, 2003, p.7). Dissent here is linked to a desire for societal and political consequences as a result of such dissent. As Franks puts it, "it is one thing to be discontented, it is another… thing to know how to improve the world and urge others to exercise power to achieve that end" (1989, p.24). This more specific, yet still of course very broad understanding of dissent includes speech acts, political organisation, public assembly and political writing.

Dissent often leads to or is linked with protest of some kind, and concomitantly surveillance of dissent is often used to gather information to inform policing of protest movements and street demonstrations. Protest here refers to the type of activities that physically present and express themselves, with a view to having an effect on society, organisations (public and private) or government - including street demonstrations, direct action, occupation of buildings, rallies snd so on. This definition also includes the industrial 'protest' of trade unions, including strikes and workplace organising, although this is a broad area of study on its own and will be less diligently covered here.

There is a large body of work coming under the banner of 'contentious politics', defining activities that aim to be disruptive in order to make a political point. While this covers my broad area of protest, and I will be relying on many insights from this field, dissent does not have to be disruptive in order to be put under surveillance, so 'contentious' doesn't quite grasp the range of activities that are surveilled politically for my arguments; I will remain with the interchangeable and broader coverage offered by 'protest and dissent'.

As discussed in the introduction and throughout 'the political', or something being 'political', is the reality of the contestation between values, principles, ideas and beliefs referring to organisations, society, government and individuals. It is, further, contestation with a view to either changing or maintaining the order of such organisations, society, government and individuals. Whatever way the contest exists in practice, it is the contest of such values and beliefs that is defined as political. In the case of protest, while there are cases of partisan interests of individuals or political parties influencing policing and surveillance strategy, and while arguments that it is political ideology that drives policing and surveillance exist, 'political' in this context is not about ideology necessarily, but about the contestable political mechanisms of the liberal democratic state that 'manage', organise and reconcile such ideologies, political beliefs and activities. Such mechanisms of course have political and philosophical principles integral to them - democratic and liberal - and this is what this chapter aims to unpack. Understanding the political in this way will also challenge the supposed neutrality of surveillance as an 'operational matter' of policing.

This thesis is about surveillance, but surveillance and policing cannot be easily separated in this chapter. Surveillance affects how people are treated and policed in

practice. Surveillance often informs wider policing strategies of protest and dissent, and more specific policing decisions and actions in particular protest scenarios. Surveillance is also of course a form of policing itself in many instances, which I will discuss when analysing the effects surveillance has on dissenting individuals and groups below. Firstly, I will now discuss contemporary policing strategies and ways the effects of these incapacitate rights to protest.

1. You have the right to protest: Surveillance and the incapacitation of political rights.

From post-war to contemporary policing of protest and dissent, a transition has been charted from 'escalated force models' - which reacts with overwhelming force to law breaking, unlawful protesting and disorder (Gorringe & Rosie, 2008), to 'negotiated management models' in the 80s and 90s - which seek to bring into consultation protest leaders and organisations prior to protest events, institutionalising them where possible, to finally, in an era that is regarded as 'post-Seattle' policing - referencing the large scale and disorderly shutdown of the WTO meeting in Seattle by activists in 1999 - a hybrid model of 'intelligent control' and 'strategic incapacitation' (de Lint & Hall, 2009; della Porta & Reiter, 1998; King & Waddington, 2005; Noakes & Gillham, 2007).

The strategic incapacitation and intelligent control model relies heavily on surveillance and is described by Gillham as including:

> (1) the use of surveillance and information sharing as a way of assessing threats and managing risks before protests; (2) the use of pre-emptive arrests before protests and weapons such as tasers during protests to disrupt certain groups of people who are deemed risky; and (3) the cordoning off of city spaces to isolate

certain groups and contain protestors who are deemed to be 'non-institutionalised' by police (2011, p.666).

In addition it relies upon the negotiated management model of the 80s and 90s as part of the 'intelligent control' process. My discussion sits in this latest contemporary policing strategy.

For example, in the UK, Forward Intelligence Teams (FIT), deployed during protests, monitor and record the activities of individuals and groups. These teams have been linked with adding details and images of protestors to the 'Domestic Extremism' database, containing now tens of thousands of names (Powerbase). This database is run and managed by the National Public Order Intelligence Unity (NPOI), previously the Special Demonstration Squad (SDS). Housed at a secret location in London, its official remit is "to gather, assess, analyse and disseminate intelligence and information relating to criminal activities in the United Kingdom where there is a threat of crime or to public order which arises from domestic extremism or protest activity" (*Powerbase*, 2011).

GCHQ is almost exclusively justified as a secretive and state security department because it deals with threats to national security from terrorism and other nations. However, its remit extensively covers 'domestic' threats, dissent and protest from activists, through the sub-department; the Joint Threat Research and Intelligence Group (JTRIG). A leaked presentation from the Snowden files, shows the extent of targeting aimed at domestic political activity (Greenwald, 2012). The presentation details the list of tools designed by the JTRIG which were used for internet surveillance and 'PSYOPs' (Psychological Operations), designed to, amongst other things, manipulate and distort online political discourse and disrupt political

organising, extending to the surveillance of social media and public profiles through a surveillance practice called SOCMINT (Social Media Intelligence).

Further details revealed the activities of JTRIG (Joint Threat Research and Intelligence Group), charged with policing political activities and other 'domestic extremists'. The capacities of this group include the ability to "change the outcomes of online polls" (UNDERPASS), "Mass delivery of email messaging to support an Information Operations campaign" (BADGER) and "mass delivery of SMS messages to support an Information Operations campaign" (WARPARTH), "Find private photographs of targets on Facebook" (SPRING BISHOP) "A tool that will permanently disable a target's account on their computer" (ANGRY PIRATE), the "ability to artificially increase traffic to a website" (GATEWAY) and the "ability to inflate page views on websites" (SLIPSTREAM), "Amplification of a given message, normally video, on popular multimedia websites (Youtube)" (GESTATOR), "Ability to spoof any email address and send email under that identity" (CHANGELING), and the capacity to "connect two target phone together in a call" (IMPERIAL BARGE) (*Powerbase*, 2011).

What is noticeable about these remits and techniques, apart from the names perhaps, is that they are not in response to any directly criminal behavior necessarily, nor are they limited to merely monitoring and observing. They are designed to intervene into political discourse, organising capabilities and individual's lives and friendships, specifically to disrupt and manipulate. Surveillance-assisted policing of political groups here merging into, what during the CoinTelPro years in America was called, counter-intelligence.

Awareness of this surveillance, yet insecurity about what is and what is not definitely

being monitored, or what may bring redress, can force people to go 'off the grid' almost altogether. "It's got to the stage where I will only use a public telephone or meet someone face to face if I want to discuss something sensitive," explains Janie Mac, a legal observer for the Occupy LSX movement "…we are all very aware that our accounts are being monitored" (Wright, 2013, p.1). Surveillance here can limit the political horizons and possibilities achievable through such rights without offending them explicitly. Fear, self-censorship, disruption, second guessing what behaviours may be being monitored and which may bring consequences, and all other harms discussed in chapter 1 espoused by republicans as instances of unfreedom through domination, seem to operate here. In this way, out of sight, and beyond the need of public justification, it silently incapacitates the ability to fully use one's right to protest.

The power that surveillance has to impact upon protest, also often lies in its simple investigation and reporting activity. As Franks states, in his influential study of Canadian security services, the security services are empowered "to act by way of obtaining information and forming views that, when committed, may affect the ability of residents to enjoy some state benefits - of privacy, employment, citizenship, or subsidy" (1989, p.23). One is 'free' to continue one's activity but is exposed to documenting of activity, social control or social limits, described as 'partial sanctioning'. Such partial sanctioning "adds to the bundle of social costs attached to an activity" (Franks, 1989, p.24).

Surveillance in this sense is an indirect application of power where "power becomes silent, where it ceases to reveal itself in an open and engaged fashion [and where] the legal regime is supplanted by something else" (Franks, 1989, p.37). This silent power is thus because it is on the one hand invisible insofar as subjects under surveillance

don't know for sure they are under surveillance, and it is not admitted that they are, but it is power nonetheless, because it causes effects based on the belief or suspicion that one is under such surveillance. This unknowingness, as well as the further unknown but real differential treatment between different groups and individuals in interactions with state authorities and bureaucracies, acts to incapacitate the ability of some to exercise their rights to protest and dissent freely and fully. This represents a classic case of domination in the republican sense, merging a lack of knowledge and a lack of control over a power that may intervene in your life, with the knowledge that this power *could* do intervene, and is perhaps likely to do so, leaves one in a state of domination which is likely to lead to a range of restraints on behavior.

In a study of contemporary social movements by Leistert (2013), one anonymous interviewee from a protest movement in Madrid states that "You might be observed but you never know, so you internalize the surveillance. All the time paranoid, because you *might* be monitored all the time" [emphasis added] (p.113). This participant goes on to say that this very possibility creates a debilitating feeling that limits the activity of the social movement, claiming "…the bigger enemy might be paranoia, which is a meta-level on self-monitoring, how much you have to monitor yourself about the others not to monitor you [sic]. There is a risk of blocking the necessary flow of information here" (Leistert, 2013, p.114). One cannot defend oneself against this type of unknowable, and yet debilitating, state power in the way one could if criminal charges are brought, for example. There is nothing here under surveillance to challenge, no evidence to produce to the case, no proceedings to undergo and finally end the status of being under surveillance, as there is when under criminal suspicion.

The politically contested area of unlawful/illegal/illegitimate protest activity is

shadowed in this way by surveillance through a silent and hidden area of monitoring, punishment, costs and sanction, that is itself uncontestable by those under it. One here experiences a range of effects described earlier by republicans, by such hidden surveillance that works not only to create a status of domination, but as such it incapacitates the right to protest, making formally held rights unworkable and curtailed by those under such surveillance. The 'self-monitoring' in order to get 'the others not to monitor you' without knowledge if they are, or how to prevent it, is a classic case of domination. The incapacitation of rights this causes, however, does not stand in need of justification the way more observable or ordinarily understood coercion does; conducted as it is out of view, out of sight and beyond the liberal theoretical need for public justification.

Explicitly interventionist surveillance and disruption strategies which incapacitate political life 'silently' occur in real-time on the ground during protests as well. Tactics on the ground in both the UK and USA include monitoring activist's phones during protests, and, importantly also disrupting the services of the phones targeted. Telephones are used extensively on demonstrations to co-ordinate, speak to friends, plan and move around - disrupting this capability is an important interventionist surveillance tactic. For example, in the Ferguson protests, which was one of the first large scale Black Lives Matter demonstrations against police shootings of black men, 'non-police' vans marked 'Emergency Management' were reportedly using 'Stingray' devices to deny service to mobile phones in the vicinity of the protest (2014, FilmingCops). Not being able to communicate with friends or organisers in real-time severely limits the ability to exercise rights in 'event' situations, like protests. Leistert (2013) shows in his studies of contemporary social movements and mobile media, referenced above, how participants in protests and social movements rely prominently

on mobile communication technology at the same time as knowing it to be a mobile surveillance device. His governmentality approach to this topic interestingly posits the political rationality of the mobile phone as a 'site' of both control and freedom.

In the legal and 'political' realm, dissent often provokes confrontation, however surveillance, in contrast, evades confrontation with dissent. It therefore becomes impossible for dissent or dissenters to confront surveillance and engage with surveillance power through established political mechanisms channels and activities. In other circumstances a dissenter who is to be punished or harmed in some way is entitled to legal access and redress. Such an individual is accused of something and recognized as a citizen *to be punished*, and concomitantly entitled to legal protection under such punishment.

Such silent surveillance power, that does not acknowledge its own legal status and activity, can mete out silent punishment in the form of unending partial sanctioning of social life, without redress, limiting access to administrative functions, and equal treatment. In the most extreme recent cases of infiltration, as with the 'SpyCop' scandal in the UK, one is not even entitled to know whether one has had a child with an agent of the state or not (Federman, 2014).

Through such methods, the true scale of surveillance is unknown, while it is known to be growing, and this, from a perspective of republican domination, only amplifies the potential harms and changes in behavior brought about by being dominated in this way. The unknown quality of surveillance becomes a prominent component of its effects on potential targets, and, because of this, surveillance also operates below the need for more robust public justification. Firstly, because it is 'unknown' and hidden, and secondly, because the harmful effects are not tangible enough to compel liberal

justification, as would be the case with clear rights violations.

This is one way they 'get away with it' in spite of liberal protections and rights, and makes explicable the continued (but often unquantifiable) expansion of surveillance over protestors in liberal democracy. The direct relationship surveillance has with the actualisation of liberal democratic values in practice will be discussed now to understand the liberal boundaries against which contingent democratic rights to protest are limited. Having discussed how surveillance dominates in a way to incapacitate rights to protest, and understanding the coterminous relationship between surveillance and protest that actualizes protest rights in the section about to follow, I will turn to discuss in the final section what type of protestor it is that is most intensively surveilled. Here, rights to protest are often undermined in a different way - by de-legitimising the protestor and their aims. Here I will understand how protest rights are held conditionally under surveillance, depends on who you are and what type of demands you have.

2. Democracy, Liberalism and Legitimation.
i) Reconciling Democracy and Liberalism 'Legitimately'

It must be restated firstly that the traditions of liberalism and democracy have no necessary relationship to one another. Liberalism's core is individual liberty, rights, the rule of law and limits on governmental power; democracy is based on the simple and powerful idea of popular sovereignty. No properly liberal state could accept a temporary majority in government revising state secured rights and liberties, while no properly democratic state could allow sovereignty to lie with anyone but 'the people' (Gray, 1995, p.71). Liberalism could flourish under non-democratic regimes so long as they were constitutionally limited by law, and democratic desires are in no way bounded by rights to property and individual liberty.

The two traditions, as discussed earlier in the thesis, have fused together in the last two centuries influencing each other as they have combined and come into practice in state form. As Chantelle Mouffe explains "…the old democratic principle that 'power should be exercised by the people' emerges again but this time within a symbolic framework informed by the liberal discourse, with its strong emphasis on the value of individual liberty and on human rights." (2009, p.2). Or, explained in another way by C B Macpherson, liberalism was democratised and democracy liberalised (1973, p.5).

In this context, two questions drive the analysis of surveillance of protest rights in liberal democracy. How, in actual and historical terms, is liberalism - a "political theory of modernity" (Gray, 1995, p.78), with its concern for autonomous spaces of private interests through liberty and privacy, reconciled with 'the ancient's' philosophy of popular participation in public life through democracy. Secondly, how is this enforced? While the first contextualises the uniqueness of democratic rights to protest in the liberal democratic state politically, answering the second allows us to politicise operational matters of policing and law enforcement discussed.

One way of framing an answer to the first question is through the problem of political and social 'disorder'. Good governing of liberal democracies on the one hand means favourable democratic institutions, non-arbitrary government, representation, political freedoms guaranteed through separation of powers. However, on the other, it means 'allowing' democratic freedoms, which brings with it a paradoxical problem for 'good' democratic government. The problem is, good democratic government is one that also must be capable of *controlling* democratic life (Ranciere, 2009, p.7).

In short, democratic freedom is good and so must be released, but is unruly and so

must be controlled. Competing interests, majoritarian popular sovereignty and popular claims are regulated through parliament and representation and tempered by liberalism's tenets of the rule of law, rights and individual liberty. In this context, democratic rights become conditional; conditional on the interpretation of what is and what is not a legitimate terrain for political contest. What is *not* legitimate is that which challenges the framework of democratic order within which political contestation has been agreed. The limits of which are interpreted through a liberal viewpoint of the state, defending individual rights and liberties against popular claims that may undermine them.

This translates into the figure of the 'legitimate protestor', as I will discuss in the next section, as a rights-bearing liberal individual expressing an isolated grievance within an agreed upon framework. *Illegitimate* protestors become those operating in organisations that are 'agitating' for wider social change; interpreted by authorities charged with maintaining democratic order – such as police, security services, and judges granting surveillance warrants - as protestors who are undermining the agreement within which democratic grievances are expressed. This further shows one way liberal democracy does not provide a check against the advance of such surveillance; it does not do so because surveillance is necessary for the functioning of a harmonious and *orderly* liberal democracy.

As well as the disorderly consequences of democratisation, the tension between the two traditions has also been resolved through the de-politicisation of the economy, as discussed in chapter 2. Here, liberal liberties and property rights are non-negotiable limits against egalitarian and democratic demands; protestors with wider economic claims that cannot be accommodated within formal economic settlements, become liable to be de-legitimised. Because 'the economy' per se is depoliticised (that is to

say, the fundamentals of capitalism and property rights, not specific economic policies, are de-politicised) demands upon the economy are also liable to be de-politicised, leaving those making those demands liable to have safeguards protecting political demands removed or undermined. Constituting values such as equality and liberty at the symbolic level, held within legal frameworks – that is, held in *formal rights* of equality and liberty - reconciles an essential paradox by making the conflict an interpretation of values, the limits of which are contained within existing institutional settlements.

Rather than material or social equality being implemented, formal equality is proposed as the *way* to achieve social equality by ensuring a level playing field. This creates an equality without a violation of property rights, or redistribution of existing power. And rather than popular sovereignty, we get popular sovereignty tempered by the separation of powers, rights and representation. These tensions between the two traditions are reconciled pragmatically, rationally, symbolically, institutionally and formally, but always temporarily and imperfectly.

While the definitional quality of politics is contestation, legitimacy, is the necessary concept hitched onto this symbolic ordering of established mechanisms such as protest, in order to maintain it. This is necessary in order to exclude other principles and sources of political legitimacy, because competing, or rather antagonistic, principles of legitimacy, according to Chantelle Mouffe, *cannot co-exist* within the same political sphere without questioning the political reality of the state (Mouffe, 2005, p.24). That is, the state as the political form of organisation claims a monopoly of the political legitimacy of that form within its territory, without which the unity of the state as a stable political reality is at stake. A political contest over different interpretations of the democratic tradition within this tension is a permanent political

feature of liberal democracies, as discussed in chapter 2 - the 'problem' of political life that requires controlling. However, while differing and competing political understandings of the world can exist in one state, competing *ways* of doing politics, cannot. Challenges to accepted and established ways of doing things can be interpreted as threats to this symbolic ordering – the broad common framework discussed in chapter 2 - that reconciles liberalism and democracy, and holds the tension apart between competing demands. Political activity and dissent that *threatens* the legitimacy of the political mechanisms through which political contestation occurs are de-legitimised themselves.

Protest that presents this challenge, that is to say, challenges the basis of agreements within which contestation 'should' occur, are liable to be de-legitimised and de-politicised. As such, these types of protestors have their activities removed from the terrain of the political, thus removing the protections of rights and status of 'legitimate protestors, exposing these protestors to more interfering surveillance as unpolitical agitators, criminals, 'hijackers' of 'legitimate grievances', and so on.

ii) –The creation of legitimacy and illegitimacy through policing strategies and surveillance.

Not all surveillance is done secretly in the way discussed in section 1. More visible surveillance can be legitimised by, as just discussed, removing the weight of that right through de-politicising the aims of the rights holder. So, while protest itself has become an established and legitimate mechanism by which democratic desires and aims can be expressed in liberal democracy, it is only thus within policed boundaries that establish this activity as legitimate. You can protest, however the extent to which you can protest freely (that is, free from harm inducing surveillance), depends upon how 'legitimate' your protest is.

Other 'threat explanations' are prominently invoked to account for surveillance and policing strategies of protests. These types of explanations states quite simply that the police and authorities respond to threats by and from protestors. The threat this discussion can slot into these analyses is the threat posed to the legitimacy of established mechanisms for accommodating popular and democratic claims.

Threat explanations from the literature often rely primarily on force and coercion to empirically prove it's point. According to Davenport (2007) the amount of force used by the state is proportionately tempered by the degree to which an event is threatening, though there are clear boundaries (for example deadly force) that the police will not cross except in the rarest of situations (McCarthy & McPhail, 1998).

A political explanation of the threat analysis claims suppression of protest is dependent upon, and can be correlated with the level of threat posed to economic and political elites. However how specifically the police are influenced by such actors is more complicated and less strongly evidenced (Earl & Soule, 2006). The major problem with this explanation hinges on how a threat is defined both by scholars and the authorities. It may indeed be that authorities are responding to a perceived threat, but what the threat is and to whom it is threatening is ambiguously defined at best (Earl et al., 2003; Davenport, 2007; Soule & Davenport, 2009).

'Situational threats' of public order and police safety are used as 'behavioural' indicators of police responses (Earl, 2006). Situational threats as a predictor of policing in these contexts seem to more accurately frame the problem, but is complicated by the nature of protest itself being both politically and often behaviourally contentious (Soule & Davenport, 2009). Another gap in this approach,

for my purposes, is that many appear to view protests as 'events' that are policed and surveilled, whereas an individual can be surveilled far removed from a protest event. If one is placed on the domestic extremism database, for example, because of protest activity, the affects of this surveilled status become detached from events and isolated protests. Surveillance also informs policing of protest prior to that event, and while this could be explained as intelligence gathering in order to assess situational threats, this explanation does not tell us over whom do authorities initially decide to surveil in order to assess that situational threat.

Beyond limiting protests to 'events' in this way, according to Leistert, scholars such as Castells (2004) and della Porta (1998) also characterise protestors as a "…static, essentialist subject"' (2013, p.26) in confrontation with an essentialist state. When in fact, for governmentality scholars like Leistert, both surveillance and subject are formed and behaviour molded in interaction with one another.

An influential study of Canadian security services by Franks (1989) reveals that authorities may seek to link the surveillance of groups with that group's political intentions, rather than likelihood of creating a situational threat of the type discussed above. If dissent – including protest, speech acts and so on - "…is exercised in conjunction with… activities which constitute a threat to national security" then the SIS (Security and Intelligence Service) is empowered to "surveil, assess individual loyalty to Canada [and] advise ministers on immigration and citizen issues of individuals under surveillance" (1989, p.73). Definitions of threats to national security include serious violence to persons or property, however it also prominently includes "undermining by covert unlawful acts, or destroying or overthrowing …the constitutionally established system of government in Canada" (1989, p.22). Quite a high bar it would seem to empower the agency to act. However, there cannot be much

dissent without some threat to the current order, and when "'legitimate dissent' is identified that could be used with a view to undermining the system of government (no matter how effective or likely that undermining would be) it is exposed to the power of security services" (Franks, 1989, p.23). So, it is not just those that have the *means* to undermine or overthrow the system of government or the constitutionally established order, but those whose beliefs *could* be used towards such a goal.

'Threatening dissent' of this type is often categorised as illegitimate through using terms such as 'subversion' to describe it, and more recently in the UK, 'domestic extremism'. These concepts, Grace and Leys believe, serve an essentially unchanging function which is "…[to] de-legitimise activities and ideas opposed to the established order" (1989, p.62) and with "the emergence of the liberal democratic state, which greatly extended the sphere of lawful dissent by affirming a wide range of rights and liberties, placed a heavy burden on this mechanism [of de-legitimisation]" (1989, p.62). Like the concept of national security, subversion seems wide ranging, however, "…it has always referred to a fairly clear reality: legal ideas and activities directed against the existing social, economic and political order" (1989, p.62). So very rarely criminal activity, but more *ideas* expressed outside of the state mechanisms designed to accommodate such 'democratic' attacks.

Whyte and Macdonald ask the question to which this discretionary policing directs itself; "Does promotion of a programme for reform enjoy the same protection as the identification that something in society fails to achieve some stipulated social virtue?" (1989, p.24). The MET police answer this by distinguishing between 'genuine' protestors and what they call 'the opposition', based on a distinction between those who have an isolated grievance and those with 'political agendas' for social change; this second group are interpreted as 'professional protestors' that 'hijack' any cause

for their own aims (Waddington, 1994). This insight from Waddington into the mindset of the MET police shows what legitimate protest is, in their eyes - those who expresses dissatisfaction but without a broader horizon beyond a specific protest setting or isolated issue.

If rights are contestable, which they are, and in practice they are policed, then the discretion of policing provides, no matter the rhetorical justification, a great deal of influence over which political rights are more protected than others. In this analysis one can complain and raise issues unhindered so long as one does not mobilise for broader political change on that basis. Protest without consequences beyond that protest, is what is given weighty protection here. Looking at protest rights in this way sees them as *activities* to be protected, but when directed towards broader change that is not criminally threatening, but is constitutionally and politically threatening in a different way, they are policed and surveilled differently.

The introduction of negotiated management models, discussed in section 1 brought protestors of the type considered as 'genuine' into the mainstream, while creating categorical illegitimacy for those groups refusing or being incapable of negotiating with the police. King notes that infiltration and pre-emptive arrest is "particularly directed at those groups outside the institutionalised 'negotiation and accommodation' spectrum" (2006, p.41). It could be said that - and the police could think that - if they are not prepared to negotiate then they must be intending to cause trouble, or are de-facto unreasonable – a similar logic to the if you've nothing to hide you've nothing to fear argument. While it certainly would be less troublesome for protest groups to negotiate with the police prior to the demonstration, the aim of protest is not to necessarily take the option of most convenience. Political considerations of the protest and the political beliefs of certain groups would lead many groups to refuse to

negotiate with the police.

Protest groups are not equally willing to negotiate with the police for quite understandable reasons, unrelated to any wish to hide criminal and disorderly intentions. Many are distrustful of the police's motives through previous categorical de-legitimation of the groups activities and surveillance. For example, climate and environmental activists who have been infiltrated heavily by police in the past, anti-fascist activists and indeed many trade unions who have a long history of being infiltrated, spied upon, and in recent revelations, blacklisted from working.

More recently, the actual method of organisation of many political groups has become structurally opposed to the possibility of negotiating with the police. 'Horizontalism' is the method of choice for many contemporary social movements meaning there is de-facto no leader or representative for the police to speak to. And while some may send what are termed 'spokes' to negotiations (spokespeople), many on principle do not. Occupy was an example of this type of organisation, and, in policing this movement in the UK, Occupy activists were indeed categorised as 'domestic extremists' by City of London (Wright, 2013). In observing the police's relationships with protest organisers over several years Waddington also found that "most frequently, organisers were used as a source of information about other protest groups" (1994, p.112). Not only is the group that institutionalises itself more easily controlled, but they are then used as a surveillance tool by the police. This is something not lost on activists, as NetPol, an organisation for monitoring the activities of police, make clear in their protest guidance (NetPol, 2015).

Waddington makes this point further in his seminal study of policing that, at root, and for reasons including lowering the possibilities of 'comeback' for the police (which

counter-intuitively is a result of increased democratic accountability procedures according to Waddington), the police have a need to control any protest situation, and one method is the negotiation and the institutionalisation of protest groups and leaders. And in a later study of UK policing Waddintgton notes that "Institutionalisation is a very effective method of controlling conflict, [and for dissident groups to exchange their capacity to disrupt for the opportunity to exert modest influence on decision-making" (1999, p.196). This 'modest influence' counterposed to the groups 'capacity to disrupt' signifies the accommodation of political contestation within acceptable and established means. Once institutionalised they are considered by the police as partners, in an albeit unequal relationship, however the pay off is that they are now within established mechanisms for expressing their dissent politically, so they suffer less infiltration, surveillance and pre-emptive arrest. While rights to protest are then formally 'freely' and equally held, it is made clear by the police they will not be freely enjoyed unless you and your group embed yourself within institutional structures in which modest and controlled political change may be possible, thus remaking political rights as conditional.

This prior demarcation of institutional legitimacy and illegitimacy transfers to spatial and situational contexts during a protest itself covered above, 'the event'. Barriers and fences are now ordinary sights for defending and demarcating spaces on protests and defending any 'targets' of the protest (Gorringe & Rosie, 2009). This shift in protest policing to geographical demarcation and physical separation of city spaces was noticeably increased after the Seattle protests against the WTO in 1999, according to scholars of protest policing (Gillham & Noakes, 2007). Since that time, particularly here in the UK, police agencies have adopted more aggressive crowd control tactics such as kettling or 'containment' (Noakes et al., 2005) on protests in situations far removed from the 'big demo' set pieces from where such tactics are

drawn. Such tactics physically prevent certain groups of protestors from moving, separating out large groups from the rest of the protest who are allowed to leave the kettle on the condition of submitting to data processing of facial image and name and address (Noakes et al., 2005).

Disobedience to this spatial regime is interpreted as illegitimate protest activity in the same way refusal to be institutionalised is. "With the deployment of more forceful tactics post-1999, groups willing to participate in 'free speech' zones face little antagonism, while those who challenge control efforts are deemed illegitimate and subjected to repressive actions" (Monaghan & Walby, 2012, p.657). Illegitimacy is conferred by dissenting to this spectacle of protest, which is a view of illegitimacy based upon disobedience, rather than criminality. One can regain legitimacy on the ground by operating within acceptable boundaries set by the policing strategies. Such tactics in the new strategies of policing protests have, while not completely abandoning the conciliatory nature of negotiated management, been supplemented by an arsenal of coercive tactics. These include snatch squads targeting key organizers, 'less than lethal' weapons, sound cannons, no-go zones and the banning of face coverings at protests (Waddington & King, 2007; Zajko & Beland, 2008).

The development of 'categorical suspicion' in police training prior to protests, surveillance gathering and intelligence reports target groups and tendencies within the crowd who have been 'pre-surveilled', and are then more exposed to interventionist policing whether or not they are actively committing a crime. In a study of policing and surveillance strategies leading up to the G8 in Toronto in Monaghan and Walby found that "knowledge of anarchist threats were produced through several years of intelligence operations, the most extensive aspect of this programme including a national, JIG-coordinated (Joint Intelligence Group), covert infiltration programme

that targeted groups on the suspicion they might be anarchists." (2012, p.658).

Intelligence gathering here, based initially upon a political persuasion that by its nature is not reconciled within established dissent mechanisms, producing categorical suspicion and assumed criminality. "To rationalize this surveillance, JIG did not employ discourses of national security. Instead, they employed discourses of criminality" (2012, p.658). The surveillance of political groups here is legitimated through rhetorical public justification of prevention of law breaking, and "claimed to have engaged significant amount of data-mining, crime analysis and intelligence analysis of the activities of individuals/organizations that publicly or covertly incorporate criminal activity and/or violence within their *modus operandi*" (italics in original) (2012, p.658). The twinning of anarchism with criminality producing 'categorical suspicion' in this way lends credence to surveillance and infiltration efforts.

The conjoined de-politicising of groups of 'extremists' as 'criminals' while emphasising political violence as a more existential threat to national security places, such political association, groups and individuals as being way beyond the pale politically. Rhetorical justifications in the UK on this basis have gone so far as to solidify criminal association of anarchists on the evidence of simply being an anarchist, leading to the MET police to ask people to 'report anarchists' if they were aware of any in their area (Booth, 2011). Political activity is categorised as illegitimate in order to be able justify 'pre-surveillance' of groups by police. Criminal intentions are levelled at people who do not negotiate with police, disobey spacial control and surveillance, and have certain sets of political aims for change irreconcilable with constitutionally accepted means and established institutional mechanisms for controlling democratic dissent. All imply an inability to be accommodated within the established mechanisms for containing democratic claims,

and as such are de-legitimised, isolated and observed.

Surveillance here maintains its 'legitimacy' while restricting the political horizons of such 'unacceptable' political aims and behaviours. Surveillance both maintains its own legitimacy, and limits this ability of protestors to fully utilise their rights, by strategies of as de-legitimisation of its targets. This provides the justificatory reasoning offered by public authorities for more intrusive policing methods, by undercutting the relevance of the protections afforded by political rights to these protestors. Surveillance also operates in a more subtle and silent way, to incapacitate political outcomes of dissent and protest, as I discussed in the first section, which limits the need for public justification, but the consequences of which amount to domination for those who are surveilled.

Other public justifications are deployed however, when *observable* rights violations occur through surveillance, to ensure surveillance can continue to legitimately expand over protests and protestors.

3. Publicly justifying surveillance of protest: What about Rights to protest?

The first obvious type of justification for rights violations is that groups and individuals are surveilled with a view to detecting and disrupting criminality, disorder and threats to national security, and the likelihood of this motivates the likelihood of surveillance. In this position security is paramount, surveillance is effective, and it is quite right that crime and criminals are put under surveillance in order to protect the public while 'innocent' protestors are left alone with their rights intact. This is the closest version to a publicly justifiable reason for authorities conducting surveillance. Because police detect crime and equally apply and uphold the law, for such

surveillance to be fully justified it can only be directed towards individuals and groups that are more likely to be committing crime or causing disorder. If you are protesting it must be within the law, and the police are justified in using surveillance to monitor those who may not do so.

An extension of this first argument is, because we live in a liberal democracy that protects rights and freedoms to protest, surveillance is the least worst option for maintaining law and order, and combatting potential threats to national security or preventing criminal activity. This position, again often publicly heard, contrasts liberal democratic methods of policing protest favourably with the policing and suppression of protest in other non-democratic countries. This however, as we have seen in the above section, does not recognise violations of freedom that are not tangibly observable or interpreted through rights violations.

A less generous but important argument states that you have the right to protest but this is a different right than the right to privacy, particularly because protest is by definition public; that this right is under surveillance matters not. This justifies the monitoring of political rights and freedoms by equating surveillance harm solely with privacy interests, and if protest is public, this protection does not apply. This shows one way how privacy and rights based opposition to surveillance is unfruitful in this context. This position believes, or claims to believe, that surveillance is a passive form of policing with neutral consequences for subjects under surveillance and does not effect the right to protest, or if it does have effects on protest rights these positions don't pay the consequences much mind. This position, because it does not rate the stakes involved for protestors under surveillance, passively justifies intensified surveillance of certain groups as not being the concern of those concerned with rights.

A more liberal position would be more concerned with the potential for rights violations and interferences in freedom through surveillance that is not properly and thoroughly justified. One common version widely articulated emphasises the importance of striking the correct balance between surveillance and dissent - as is common in other discussions of security and liberty - and political groups being heavily surveilled while others are left alone in a way that causes concern could be that the police have got this balance wrong in those cases. This position is not however separate from the ones above in that occasions where the balance is 'right' are occasions where those with criminal intentions are under surveillance. Where this balance is perceived to be wrong, that is surveillance is being conducted without proper justification, the legitimacy of this type of policing may be brought into question.

Notwithstanding issues already discussed with the 'balance' framing of surveillance and liberty, protest and surveillance viewed as a balance in this way, also empties out the political content of protest and dissent as a factor in whether it is put under surveillance or not. Protest is homogenised as an *activity* to be 'freely enjoyed' rather than something imbued with political substance. This type of position implies the aims of protest from whatever political persuasion is to *protest freely* and the aims of policing is to facilitate that free protest. Seeing protest only as a 'good' to be protected - and in some instances the police get it wrong when weighing up the balance of 'goods' - between security and liberty, freedom to protest vs prevention of disorder – this position omits an analysis of the ends to which such rights may be directed, and what ramifications that may have for whether or not surveillance is used over such a protest. The operational decisions of policing are seen as functional decisions towards maintaining order and detecting crime, and sufficient oversight or legal restraint needs to be in place to ensure rights aren't unnecessarily violated.

Another type of balance shows rights to protest are not absolute but conditional. That is, they are interpretable, contested and contingent on being balanced with other liberal rights. As such, there is the necessity, commonly espoused, of balancing the rights of protestors with the rights of the public to go about their lawful business. The question of when and in what circumstances certain rights trump others, or more specifically what weight do certain rights have in certain instances, and how do the police assess this, is one of the ways in which the operational matter of policing can be considered political. This begins to get to the heart of the knotty problem that is balancing democratic forces and popular desires with liberal protections - political rights that have been won through democratisation against rights protecting the individual and property – or the rights of protestors versus rights of the public. Marx was the first to notice the contingent nature and partiality of rights effecting such a balance.

When assessing such a balance and how it is reconciled, a Marxian position would emphasise the partiality of such rights to protest under surveillance, by emphasising the importance of the subject to whom the rights apply, being based upon a certain view of the individual as an 'isolated monad' separate from society, corresponding with the bourgeois view of freedom as the right to unhindered pursuit of self-interest in civil society (Marx, 1843). While the 'egoistic' and 'self-interested man' Marx observed as the agent being protected by rights may seem historical, this figure often re-appears in the contemporary policing lexicon of protests discussed above. Today, as already noted, police can be heard dismissing the legitimacy of 'professional protestors' who have an 'agenda' for wider social change, by counterposing them unfavourably with the legitimate and 'genuine protestor', characterised as an individual with an isolated and personal grievance (Waddington, 1994). This

important distinction both grants and removes legitimacy from certain protests and groups, and as such leaves some open to more robust surveillance-assisted policing on the basis of their desire to structurally or systemically change the democratic liberal order in some way.

These arguments distinguish between 'types' of dissenting subjects being separated on grounds of authenticity (the egoistic man, and true freedom as individual freedom), and show how the weight that is given to certain rights is based upon economic and social power. Rights to protest on this understanding are weak formal rights when set in opposition to the rights of capital and property. Could it be then, that those protesting against property and capital are those who, because they do not recognise that true freedom is that protected by rights (individual liberty), have less weight attached to their rights, and because of their collective and political activity, more liable for surveillance and policing?

It does coincide with the claims of political ideological bias mentioned above that those (left wing) organisations that protest and organise against capitalism and property rights are under more intensified surveillance. However, how would this explain the case of the suffragettes for example? Or the civil rights movement in America? Both groups were seeking the extension and universalisation of formal political rights yet were extensively surveilled and repressed. Or the intensified surveillance of the recent 'Occupy movement' discussed, who, while some claimed were anti-capitalist, did in fact have quite simple demands (when demands were expressed) around redistributive taxation and the regulation of banks (Wright, 2013). This Marxian position cannot quite explain why groups who are actually demanding rights (rights from, and included in, the liberal capitalist state which Marx critiques) are also policed, surveilled and in many instances repressed in the way avowedly anti-

capitalist groups are.

It is not quite as simple as recognising the gap between universal legal regimes of rights and the particular (capitalist) interests that sustain or deny them. While these power dynamics are nevertheless important, and the Marxian position on the importance of who the subject protected by rights is, proves a vital distinction, Claude Lefort's (1988) argument that formal rights are never *merely* formal and instead leave a 'materiality' in social life seems apt here. In this argument Lefort states it is not the case that the interests of capital, wealth and power will always side with formal rights *because* formal rights act as masks for real power. Rather, rights themselves can be used to make headway into political interests of power and wealth, and as such the repression and surveillance of democratic expressions seeking formal rights can be explained. Politically, such protestors are coming up against interests of maintaining order as it is, whether or not those challenging that order want it overturned entirely, or just systemic (but manageable) change.

Certain contemporary theorists such as Agamben (2005; 2011), Wendy Brown (2004; 2009) Douzinas (2000) Honig (1993) Zizek (2005) fuse somewhat the Marxian observations of the partiality of rights with a Foucauldian analysis of power relations. What they note is that one must articulate one's demands within an overall framework of rights to legitimise those demands. However, because rights are often favourable to those with more power - due to the increased ability to articulate, defend and pursue rights - it matters *who* is articulating political grievances and demands in the language of rights. This implies a weight to the influence of economic and political actors rather than ideology which, while it has some merit, does not quite account for how this would directly influence policing on a protest by protest basis, nor the methods through which such actors influence operational matters of the police.

The partiality of rights and power relations (who has them, what weight they have in different contexts and for different people, which rights trumps which and so on) can be used to explain the different types of treatment of those expressing *their right* to protest, free assembly and dissent. Wendy Brown hones in on the importance of who the agent is that is holding the right, to both democracy's durability and distribution of power within and beyond democracies, believing that "modernity's birth of the a priori free moral subject …establishes democracy as the only legitimate modern western political form. This is the figure of the subject that made and continues to make democracy's legitimacy literally incontestable" (2009, p.52). However, this a priori subject while having rights equally applied, is not equally recognizable. Not only egoistic isolated 'man' of Marx, but more particularly white and male and Western (Brown, 2009, p.52), demanding with protest things that such a subject 'ought' to be demanding. So, while rights matter and mean something, how much they matter and what they mean may depend quite simply on who you are and what you have to say.

Being put under debilitating and dominating surveillance is more likely if one cannot articulate demands in the language of rights, or if one holds rights with less weight because of a range of other factors relating to the type of dissenting subject. This would go some way to a theoretical basis for the suppression of the suffragettes movement and American civil rights cause which are now, or have partially forced their way into being considered, part of the make-up of the now expanded a priori moral subject.

What is more misleading about these justifications of surveillance of protest, is the way in which it situates surveillance as an external factor. The liberal and

conservative views of surveillance, for example, coincide with one another in viewing

surveillance and policing, while critically or favourably, in the context of security. As

discussed earlier in the thesis, surveillance of protest may of course be condemned

from these positions as an offence to rights and liberty, because surveillance has

reached too far into valued principles and offended protections against unnecessary

state interference. And commonly in these justifications what is seen as unique to

liberal democracy is the manner in which power is restrained through democratic

oversight and defended against through expression of such rights. The analysis

therefore tends to focus on defending *against* surveillance power in this way, viewing

it as perhaps a necessary evil, the ill effects of which are assuaged as far as possible

by rights, liberties and the rule of law, not implicated in it.

A Marxian approach externalises surveillance and policing of protests in a different

way, as concerns of capital and property, and liberal democracy in this view has

formalised protections for individuals against these forces which, in the final analysis,

only serve the interests of property and capital, against individuals. This also shifts

the importance of surveillance and policing out of the traditions of liberalism and

democracy, interpreting these traditions, as they exist in capitalist societies, as masks

for where *real* power lies - the economy.

Surveillance studies itself often does likewise; surveillance is understood through the

forces of *modernity*, not liberal democracy, and reams of work highlight the offences

that such forces bring to values and principles we hold in liberal democracies,

although not making these traditions themselves involved in the creation or influence

of such forces. Modernity is what is considered intrinsic to society here, and

liberalism and democracy are externalised from these forces that make up society.

Values we hold dear seem to be characterised as defences against unwelcome forces

of modernity, like surveillance, rather than part of it.

Governmentality studies do the almost exact reverse, implicating liberalism itself in the concept of security as it exists in liberal democracies (Foucault, 2007; Liestert, 2013), but in doing so, this approach likewise empties out any other power from liberal or democratic principles themselves. Security here is the raison d'etre of the liberal state leaving little room for political contestation within the security paradigm. While I can agree that resistance informs security - that is, the state learns from resistance to it in terms of techniques of control and laws - characterising this all in the paradigm of security evacuates *the political* from it. Resistance through protest and dissent in governmentality theses is wired in to how we are governed, and if all resistance formatively impacts upon the security apparatus anyway, there is no space for politics itself, because at root it is not contestable.

Liberalism and democracy however, have political traditions that go far beyond control, security and resistance, and these traditions have weight within governing practices on the ground, conducted by police and authorities. Ranciere's sentiments on this point that democracy's critical function is what keeps "…politics from simply turning into law enforcement" (2009, p.79) seems congruous. Rather than security replacing the political as a tool of analysis, security must be seen *as* political *for* analysis. The more revealing uniqueness of liberal democracies is found by placing surveillance into the political workings of the liberal democratic state itself, and not externalising it as a security issue, a capitalist ideological tool, a facet of modernity or evacuating politics from the liberal democratic state altogether by merging the concept of security and liberalism as it exists in state form.

Instead, politics and policing while not distinct as liberals and conservative would

have it, nor inseparable as governmentality scholars would have it, nor is politics reducible solely to policing, and nor is surveillance and the rules that guide it a simple mask for other capitalist interests. Instead liberal democracy and surveillance are *actualised* together, in a terrain of competing political interests, and the reality of politics and values being put into practice.

Conclusion

Instances where authorities are threatened - which has various interpretations - are commonly used to explain when authorities respond to protest with intensive surveillance and robust policing. I have argued that it is an authority's legitimacy being threatened that seems to be a more prominent indicator of when protest and dissent will be countered with surveillance. What I have also argued, is that illegitimate political activity is both created and policed by the authorities through surveillance, in order to maintain the unified legitimacy of the mechanisms by which democratic demands and liberal protections can be reconciled politically within one state. Acts, organisations and political aims outside of that are a threat to this legitimacy, and as such are considered by authorities to be unacceptable uses of political freedoms and protest rights. On this basis the essence of democratic rights to protest in a liberal state are controlled and contingent rights, that are brought into existence through monitoring. However, the stakes for democracy are that the outcomes and horizons possible through surveilled protest rights are limited, and in many cases for those deemed illegitimate, incapacitated through domination. Rights to protest and dissent become, in a sense, freedom without consequence.

I have focused on activities, organisations and ideas in the context of protest and dissent. Protected by rights these activities are part of the achievement and maintenance of democratic citizenship. However, the capacity to interject into these

rights, manage them and undermine them, and finally to silently incapacitate them through the effects of domination wrought by surveillance, seems to be a serious danger to democratic development achieved through protest. Democratic freedoms have pushed the interplay between freedom and order in different and new democratic directions throughout the history of liberal democracy. If one side of this, the capacity to maintain order without violating rights through surveillance, becomes too adept at what it does, and by its nature is secretive and dominating in a way that is therefore not exposed to normal public justifications, then it seems to pose a serious problem for democratic freedoms and liberal democracy at large. Yet, as has been shown, surveillance is fulfilling a 'legitimate' role within liberal democracy, making such surveillance difficult to object to, and bringing charges of illegitimacy against that surveillance, particularly by those dominated by it, incredibly difficult. This both poses a problem and makes the continued expansion of surveillance of protest in liberal democracy explicable. Whether this is inevitable, or whether instead there are more disruptive and less controlled versions of democracy we could promote to undermine the assumption that rights must be monitored in this way to be practicable, will have to wait for further study, which I will mention when concluding my thesis, which I will do now.

Conclusion

If, as I have argued, the result of making liberal democratic values practicable in society is surveillance, then is ever increasing surveillance the inevitable future? Is the future of liberal democracy and surveillance one of an ever-tightening relationship? And what would be the consequences for the type of democracy we have, with a trajectory of increasing surveillance? This was and remains the urgent context for my research.

 Since I began writing this PhD two developments in the world of liberal democratic surveillance intensified the importance of my study: asking, as I did, why it is that surveillance seemingly spreads in liberal democracies in spite of the values it offends. Firstly, the revelations from Edward Snowden, the NSA contractor, showing to the public the extent to which secret services, in particular the NSA in US and GCHQ here in UK were, to put it bluntly, collecting *everything*. As discussed in chapter 1, the interesting thing about the 'post-Snowden era' has not been the revelations themselves necessarily, remarkable as they were, but the way the public fallout has been marked not by a significant turn against what was shown to be mass (and often illegal) surveillance by the state. On the contrary, while poll findings are nuanced (Dahlgreen, 2015; AngusReidGlobal, 2013), the surveillance practices exposed, particularly in the UK, have not been reduced but have instead been legalised and extended by the state without any significant public disapproval. The IP Bill, as was reported in the introduction, passed with barely a murmur of discontent from the public.

Denick and Cable (2017) suggest this indicates an era of *surveillance realism*, whereby we simply cannot now imagine society without surveillance, and so this leads to widespread acceptance (or resignation) for surveillance on a mass scale, if not enthusiastic support. This type of framing of a 'surveillance society' is what makes my research of importance: to attempt to think our way out of a situation that is demonstrably harmful in a number of ways, yet widely unchallenged in public debate, is vital to study. Making these practices public as Snowden did, has in fact extended the substance of them while apparently regulating out the capacity for arbitrary use. This, as I will suggest below, provides a compelling area for further study, begun here, into the legitimation practices of the liberal democratic state and nature of public justifications, because it seems to be the case, exemplified with the IP Bill, that legitimising mass surveillance in a way that addresses liberal concerns around proper legal limits, compounds and extends its spread in liberal democratic society.

The second main development that exemplifies the importance of this study, which came more recently, is what I have described at various points as a democratic authoritarian turn. Even though I have contended that liberal politics has by and large failed to prevent the mass extension of surveillance – and is in fact implicated in that spread - the tensions between liberalism and democracy in one state seem destined to now play out in interesting and concerning ways over the coming years. A concern, lightly articulated in studies of surveillance but present in public debate was always, what if an authoritarian gets hold of all this power the government is accumulating? Presently, the answer to that 'what if' question seems to be on the verge of revealing itself.

The politics of liberal democracies are, as we are seeing, unstable. This shows the importance of studying, as I did, the power and politics behind surveillance as an

explanation for, and to investigate resistances too, surveillance. If surveillance can be based on a new politics entirely but within the framework of liberal democracy, understanding how that directs surveillance towards new political targets and priorities will continue to be a vital task. This brings me back to the core of much of my argument. Even though mass surveillance is produced by implementing liberal democratic values, and in the main it seeks to enforce those values, it does so partially. All people may be watched, but not all are watched equally. Power inequalities are of vital importance to who is and who is not surveilled.

The significance of my study academically is in two fields: in liberal political theory that deals with theoretical concepts of legitimacy and power, and in surveillance studies. For political theory, I used liberal and democratic values to show how surveillance grows out of liberal democratic values in practice. Showing this to be the case revealed a number of academically important points. By putting values into practice surveillance is produced, not as an external 'other' to liberal democratic values, but as a foundational aspect of liberal democracy in practice.

There is a paradox at the heart of implementing liberal democratic values which is this; putting values into practice both produces and offends those values at the same time. This is a new viewpoint about surveillance drawing insight from realism by foregrounding political practice and power, contra so-called 'ideal theory'. Whereas many realists think that power is paramount in considering legitimacy and the protection of values, through looking at institutions and political actors, I show how institutions and rules governing these values produce surveillance power. I emphasised what I thought was wrong with the legitimation process of surveillance by showing how citizens are dominated by practices which pass legitimating tests of liberalism in practice. While it is not necessary to understand realism and liberal

political theory as two distinct fields, instead I have shown the importance of foregrounding political practice and power *in* theory to understand the implications of putting values into practice, and 'legitimate' uses of power itself. Using surveillance as a window into liberal legitimacy adds a new to understanding into how it is practiced.

As such, my thesis made another contribution to this field. As discussed in the introduction it is not only that realists foreground power in their analysis, but by and large they privilege power. Which is to say, they see 'ideal type' theories as unrealistic in the real world where power and conflict reign. I agreed with this observation about power in practice but reversed the conclusion. Surely it is the case that once we fully understand the flaws in the practice of liberal and democratic values because of power, domination and political conflict, we do not say, and therefore that is fine. Otherwise we reduce the practice of philosophy to something akin to chronicling power inequities and their consequences, in order to give a snapshot of what is seen to be legitimate at a given time in history. The job for political philosophy is surely not this, but to interrogate power inequalities and the consequences that we observe in order highlight and identify their harmful effects and unjust implications.

Taking this position of foregrounding power in political philosophy I was influenced by Geuss (2005) and Finlayson (2015). However, I applied the concept of domination from the republican tradition to bring out the implicit problems with legitimating rule-based compliance techniques found in surveillance, and justified through liberal theory. Showing that domination caused by surveillance can be legitimated in ways justifiable from within a liberal framework severely undermines the assumptions behind the practice of liberal power. In doing so I used realism in a novel way,

showing that power does indeed influence liberal democratic legitimacy, as conservative realists tell us, but that the regimes of domination suffered under surveillance seem to seriously undermine legitimacy claims based upon that power. Using Bernard William's influential schema of illegitimate power (2005), I showed from a liberal perspective that the moral usefulness of those claims to legitimacy in the face of such domination was contradictory and weakened. I intend to take this forward into further studies of political philosophy and legitimation of power concerning the techniques of coercion that stand in need of justification, represented by surveillance.

What I found was that the interpretation of liberal democratic values, as they are brought into practice using surveillance, serve political interests and express political conflict as they do. Whether that be political ideology in the welfare state, political and democratic pressures on citizenship, or political-ideological suppression of oppositional protests, liberal democratic values both require surveillance and surveillance is used it for political ends. Academically, this expands the understanding of liberal values as they intersect with techniques to enforce compliance with them, surveillance, and gives new insights into how they are implicated in surveillance.

Republican domination is surprisingly not prevalent in the study of surveillance. With exceptions (Hoye & Monaghan; 2015) this is a gap that needs filling that I first noted during my Masters thesis on *Data collection and Domination* (Hall, 2010), where I struggled to find a reference point with which to debate *in practice*. The theory of domination from republicans (Pettit, 1999; Skinner, 1998; 2008) it seems to me, crosses over into understanding surveillance harm in practice perfectly. Showing ways in which surveillance can be harmful which are not fully captured by liberal

values and democratic concerns is enlightening, and can articulate and bring into contact with political philosophy more recent developments and concerns around the 'chilling' effects of surveillance, discussed presently around the impacts surveillance practices have on journalists (Turk, 2016). Interpreting surveillance harms in this way is most certainly a further area of study that I intend to pursue. It is also theoretically significant in the way I used domination to challenge the legitimacy of surveillance from a realist perspective. If someone is dominated, I showed, how can they consent, and if they cannot consent, how is the power standing in need of legitimation from them justifiable?

Another contribution to the field is that this thesis has provided a multi-disciplinary examination of surveillance and the theories explaining it. In each chapter, I attempted to use governmentality and surveillance studies (broadly remaining focused on the social sorting ideas which best suited my purposes), and extend the observations of surveillance techniques from those fields into legitimation strategies and politics from political philosophy. I think this marrying of techniques of surveillance found in governmentality and surveillance studied with politics, interpreted philosophically, is vital for understanding properly what is happening in the field of surveillance. I intend to continue this multi-disciplinary approach in looking at surveillance practices and their implications.

This study remains politically important insofar as it offers a framework for opposition to surveillance grounded in the politics of institutional rules and liberal democratic legitimacy. Haggerty's observation (2000) referred to in the introduction that the pace of development of technologies outstrips the ability to interrogate the consequences of each technology still stands. By showing how surveillance is legitimised subjectively I show what is needed to bring into question those

legitimations around new technologies. By bringing surveillance directly into contact with political power, inequality and politics, I construct a framework for questioning the inevitability of a 'surveillance society' on a seemingly inevitable trajectory.

My study further showed that surveillance is grounded in a reality of inequality. I found that the success of discursive strategies of legitimation justifying surveillance use is grounded in the political context of inequality and unequal political power. This is because, as I argued, successful legitimation of surveillance in liberal democracy can be interpreted as the expression of value-laden power. That is, successful interpretation of competing values by different power interests guides what values are held to be prominent at a given time, and how they are interpreted, which then guides the rules governing surveillance in practice. Unequal political power around the contestation over the interpretation of values harmed by surveillance, and brought into practice by surveillance, influences over what and whom surveillance is used most intensively. Discursive power and the stories told about those groups who are to be surveilled are both necessary prior to, and are compounded by, being under surveillance. This came out in the main case chapters studying welfare claimants, non-citizens and protestors. I think this adds to an understanding of the political expediency of categorisation for certain political projects, for example the restructuring of the welfare state, and the need to challenge the assumptions on which categorisatons are made, which are then enforced and exacerbated through surveillance practices.

Looking to a surveillance future being one where surveillance were reduced not expanded, it seems obvious to say this future would be one with reduced inequality, prior or alongside reducing surveillance. I think this is important to note for surveillance studies, because while surveillance studies as a field is acutely aware of

this differentiation in how surveillance is experienced – indeed it is the basis of the 'social sorting' framework (Lyon, 2002) – taking analysis one step back, as I did, to understand the political inequality inherent in what rules are made that need surveillance, gives a politicised take on why it is that surveillance is justified. It further provides the basis for a project to lessen surveillance by increasing equality of political power against surveillance practices, and can inform surveillance studies and political opposition in practice.

My overarching question sought to answer why it is that surveillance is so widespread in liberal democracy in spite of liberal democratic values. I concluded that surveillance grows out of the implementation of liberal democratic values, but surveillance being produced by liberal democratic values in this way was not the end of the story. Surveillance does grow out of the enactment or institutionalisation of liberal and democratic values, but it does so in often not entirely predictable ways, and in ways that are contingent on contemporary political practices and power. In some cases, surveillance seemed to be produced through the contestation and reconciling mechanisms of opposing political forces, using the framework of values to further their interest. This seemed the case with the protest chapter for example, showing the historically specific nature of how a right is interpreted depends on the political nature of the society at that time. Likewise in the welfare chapter, I found that whether social rights were seen as absolute, or conditional – and therefore what kind, and what intensity of surveillance was manifest - was contingent on that society's contemporary political framework. Or, surveillance seemed contingently produced through tensions produced by the liberal and democratic traditions, as I discussed in chapter 4 on citizenship.

However, the overall framework I believe to be proved correct. No matter that politics and power considerations make it a less smooth articulation to discover from whence surveillance comes once and for all, the point was that surveillance comes from a range of contestable political sources, unbridled by being exposed to the normative force of certain values, like privacy and liberty. The point about the politics and power of legitimating surveillance is that it is unstable and contestable. This became manifest in the main chapters, as I discussed the politics of each situation. It seems accurate to say that surveillance grows out of the implementation of values, but *how* depends on who is in power, how successful resistance is and what is the democratic context. Rather than attempting a 'big theory essay' in which I can '(re)name' the new society we live in as a result of what I have found that defines our current era, instead, I believe my overall answer describes and identifies the right political framework for understanding the operation of surveillance: a framework that makes liberal democratic values and surveillance inseparable.

My approach to political philosophy is one that is grounded in a conflictual and contested politics and focused in this thesis on state surveillance. While in principle I believe much or all legitimations of surveillance in liberal democracy can be drawn from liberal democratic values, it is not the case that the implementation of liberal democratic values *produces all* surveillance in liberal democracy. Capitalism and security are two large areas under discussed in my study. However, while the findings may be different in each context, studying these two areas within the framework I have presented would be fruitful. Questions I could bring to those fields from this study include, how is surveillance that is driven by the necessities of political economy, or specifically by corporations, or, how is surveillance directly concerned with, and justified through, security, legitimised according to liberal democratic values. How do the values of security and capitalism interact with liberal democratic

values, and on what political basis does surveillance grow out of implementing and reconciling these different values?

Considering surveillance from within the liberal democratic value-system was an important objective. This is not in the way governmentality approaches would suggest - because liberal freedom is in fact a productive power and integral to the art of governing. Instead, taking values at face value and understanding them in a context of competing power and permanent conflict of interests and power dynamics, shows the way values produce by necessity reconciling administrative rules and institutional settlements. It is in this outgrowth; values – rules – surveillance, that the causation of surveillance can be found.

So, in answering my overarching question, surveillance is widespread in liberal democracies in spite of traducing values foundational to liberal democracy because the implementation of liberal democratic values produces surveillance. I explained this paradoxical conclusion through showing how institutional rules are constitutive of liberal democratic values existing in practice; surveillance as a technique for using information in order to influence a population according to a given set of institutional rules, is integral to the monitoring and implementation of compliance with rules that give values purchase. It is therefore the case that surveillance cannot be extricated from bringing values into existence. However, how this comes into practice is through political interests successfully interpreting values in the public sphere in their favour. Subjectively legitimising surveillance in this way expands its use in society, while at the same time I found the effects it has over those it is used can be dominating, which undermines its legitimacy both normatively and politically.

In the introduction I set the scene for the importance of asking, if surveillance harms liberal democratic values, why is it spreading so rapidly and widely across those societies? I looked at other approaches and how they answer this type of question, concluding that what was missing from much of the analysis was *politics*. Drawing from realists, I characterised the importance of politics in surveillance as the conflictual and contestatory nature of competing interests, reconciled through the mechanism of rules and institutions. While surveillance studies gets to grips with the rules that enforce access and exlusion and discriminatory categorisation of surveillance, I suggested we look at the politics behind those rules.

In chapter 1, I found that it is flawed to address surveillance from an assumption that when surveillance works correctly and is 'suitably' restrained and limited it ought to be of little concern. While this is not the position of all who interrogate surveillance, it is prevalent in discussions about the need to reduce surveillance or prevent it *spreading,* which was the concern of this thesis. While surveillance which 'creeps' into other areas of life without justification is important and concerning, I argued that surveillance which is expanding without justification is not the main source of surveillance spread. I argued in chapter 1, that it is when surveillance is properly restrained and legitimate that *that* should interest and concern us. I also disaggregated the argument types offered to explain losses of privacy, suggesting other patterns and politics that may be at work that undermine and intrude upon, or seemingly alter the nature of, privacy.

As a result, in chapter 2, I sought to explain a deeper pattern to surveillance growth that showed it was not externalised from liberal democratic values. Here in a theoretical and historical chapter I showed firstly, why legitimacy is vital to understanding the spread of surveillance by conceptually distinguishing between

normative and subjective legitimacy. I did this to show the importance that power has for legitimation strategies, and the link with the beliefs of society that must be referenced when trying to justify the use of power. I then extended the argument that surveillance is not external from liberal democracy by setting down the theoretical and historical relationship surveillance has with liberal democratic implementation in practice. I argued that it is important to recognise how surveillance was historically actualised in a way that legitimates it, if we are to understand how it is legitimated today. Engaging with well-known writers on the topic such as Weber, Giddens, and Foucault, I separated my thesis from these thinkers and approaches insofar as my focus is on the institutionalisation of liberal democratic *values* per se, not in seeing surveillance or liberalism as an extension of modernity, capitalism, or governing. In a realist sense, in which I emphasised conflict with other political pressures, rather than systemic understandings, I showed how institutional rules are implemented and compliance with those rules is secured through the deployment of surveillance across liberal democratic society.

As such, I articulated a framework for understanding surveillance within a terrain of value-laden political conflict and the legitimacy of liberal democratic power – rather than a system or systemic description of liberal democracy, bureaucratisation, modernity or liberalism as an art of governing. Understanding liberal democracy in this way, as a framework which *produces* surveillance, points to the inevitability of surveillance, but, then shows that interrogating the rules of liberal democratic institutions can get a grip into objecting to the political power and conflict over values that inform the rules of surveillance. I then showed how surveillance could be dominating in ways missed by liberal interpretations of liberty, privacy and other interpretations of the harms surveillance can bring. Looking to republican domination in the final section of that chapter as a lens to understand surveillance harms directly

addresses the consequences of power over the rules set out in the first part of the chapter. Here it was shown that no matter whether or not there is a tangible impact on liberty or privacy, people encountering surveillance can still be dominated if they have no power to do anything about the surveillance that harms them, or *may* harm them.

This established that surveillance is not best assessed solely in terms of how limited and restrained it is within rules, nor the harms it brings through more common positions. Instead surveillance is most usually conducted and implemented according to well established rules which are legitimised through bringing liberal democratic values into practice and in ways which are perhaps not captured fully as direct violations of privacy, or other rights. Instead, I suggested that looking at how people can be dominated under surveillance, and the effects that this has on freedom and the legitimacy of the authority justifying that surveillance, may be more fruitful. Next, I turned to test this in three substantive chapters where I took instances of state surveillance I thought important, and looked at the liberal democratic values and institutional rules bringing them into practice.

First, surveillance and the welfare state was tackled in chapter 3. In this chapter the values I discussed bringing surveillance into practice were democratic social rights, regulated by the need to provide a 'just' distribution of burdens and benefits. Articulated through conditionality, I argued, this finds its justificatory language and legitimacy from liberal reciprocity and ideas of 'fairness'. I explained this through the discursive strategies employed by government, drawing on governmentality scholarship in this area that showed how the public was split into receivers of welfare surveillance on the one hand, and the audience to which justifications for surveillance were given on the other. This I showed to be problematic from a liberal standpoint because of what Bernard Williams tells us about legitimacy (2005). The authority in

this case is not saying something by way of an account to those it subjects to its power. Moreover, I argued, not only are welfare claimants not given a proper account of why they are subjected to surveillance, bringing into question the legitimacy of the justification claims by authorities, but they are also dominated by surveillance. The effects of this, I argued, are such that consent is coerced from them in a way that undermines these legitimacy claims of those surveillance practices. I also pointed to other instances of what could be interpreted as dissent or alternative legitimacy frameworks, not covered in liberal accounts of what should be considered dissent by 'rights-bearing citizens', and as such are missed in any 'assumed consent' of those claimants. Here, surveillance was seen to be spreading through the interpretation and bringing into practice of liberal and democratic values around welfare provision, which then suppressed objections and coerced consent from claimants for surveillance practices, which, notwithstanding these problems, gains subjective legitimacy from the public, and so can spread with little resistance.

In chapter 4, I studied surveillance and citizenship. Here I politicised the use of surveillance at the border and over citizenship internally by emphasising the tension apparent between liberal and democratic traditions in one state. This tension referred to a more liberal universalist and inclusionary notion based on human rights, contrasted with the democratic exclusionary pressures of citizenship. The result, I argued, is political pressure to surveil and exclude non-citizens internally in a context of increasing mobility. Relying again on surveillance studies and governmentality insights to chart the techniques of citizenship, surveillance and the border, I articulated what is shown from these fields about surveillance in the language of liberalism and democracy. Surveillance here comes out of the reconciliation and implementation of both values of citizenship and more universal liberal values in one state in a context of mobile flows of people across territories. I described the resulting

surveillance, following David Lyon, as 'care and control' surveillance (2001), wherein illegitimate non-citizens are excluded from a range of citizenship rights, while their containment, or the surveillance over them, is justified in liberal or humanitarian terms. The political blind-spot regarding this situation was, I suggested, because these individuals cannot actuate their rights against a state of which they are not citizens.

The final substantive chapter was grounded in a desire to understand how bringing democratic values of protest and dissent into practice is expressed in surveillance regimes. What I found was protest is an instance of democracy at the same time as being a threat to it. Democratic freedoms to protest are 'controlled rights', brought into practice and governed through rules and institutions guiding the fringes of their legitimate expression. Those which pose a threat to this democratic order are de-legitimised and de-politicised in order to be surveilled. One could argue on one understanding that democracy is in fact more about an orderly expression of aggregated interests of society, institutionally organised. Or, one could maintain that democracy is contingently linked with breaking with the established order and status quo, and disrupting to a certain extent the orderly aggregation of interests, as protestors and other political activities do. This chapter showed that not only are certain groups and individuals separated and categorised for surveillance based upon who they are, but also what they do, and what they think. Being marginalized in order to be surveilled can occur to those who threaten the current liberal democratic order. Again, here in this chapter I showed that more insightful effects of surveillance can be drawn from applying and understanding republican domination. Protestors had their rights incapacitated by surveillance, I argued, through the effects of being under domination, but this often stopped short of having their rights violated, and so surveillance could continue apace without liberal objections having the necessary force to prevent it.

I had anticipated that I could discuss how liberalism and democracy as two separate traditions, were reconciled through institutions and that this produces surveillance. The picture was more complicated. For example, in chapter 5 it was more the case that different interpretations of democracy were in tension rather than liberalism versus democracy. Further, in chapter 3 on welfare, it was democratic social rights being restrained and regulated by liberal impulses, whereas chapter 4 on citizenship it was the democratic tradition acting as the more exclusionary force tempered , albeit in problematic ways, by liberalism. What became more evident as my thesis developed, and what I did not expect, was the importance of these values and two traditions, however constituted, being held in tension and fought over in pursuit of securing the legitimation of certain surveillance practices by authorities. Not only does surveillance come from these values, but referencing them and interpreting them allows other sources of power and domination to be expressed in a legitimate fashion through surveillance. Such values proved to be quite malleable discursive terms in practice that can be captured by political interests, and then used to justify surveillance that implements and monitors political programs in certain ways.

This leads me to a second finding that emerged and seems important but which I did not consider at the beginning, or at any great length. Surveillance is not only a system by which to bring values into practice. I also showed that surveillance enforces compliance, which is part of the successful implementation of rules. In this context, to what extent is it legitimate and desirable to seek 'full compliance' with society's rules, as it is described in liberal political theory, and what role does surveillance have in this? Without prophesising surveillance technologies to come, we can conceivably imagine a level of surveillance where near full compliance can be monitored and enforced by surveillance in certain areas of democratic policy. In this case, or rather

on this trajectory, it seems compelling to ask, not is this or that surveillance technology justified (because we can find both that it is, and that it is not, depending on how we enact liberal legitimation strategies); but the more pertinent question becomes, is a society built with techniques to enforce full compliance, which accurately enforces society's justifiable rules, a desirable one? Or is it the case that in a liberal democracy it is desirable to encourage space for rule-breaking? And as such, is it more desirable to promote the messier more disruptive and inherently non-compliant forces that were seen to be valuable to liberal democracy in the final substantive chapter?

This would take me directly to consider policing as a function in liberal democracy as further research. Looking at policing from a position of restraining it in its justifiable role, while at the same time providing ever more surveillance infrastructure and coverage, seems problematic. Whether it is instead the right approach to ask, not how can we restrain policing and surveillance within laws, but should we make policing more difficult in liberal democracies as a *principle,* and what would be the consequences for that approach? Further research into the philosophical implications of surveillance-assisted policing functions that may be fully justifiable on liberal terms, but appear problematic to the extent that they can achieve near full compliance with laws through surveillance, appears important as technology increases its capacities. This is particularly the case in areas that blur the distinctions between policing of crime and politics.

A philosophy or principle of making policing difficult in liberal democracies would, it seems obvious to say, face discursive resistance, and this hinges on another finding that emerged from my research that I was not expecting. Namely, the importance of discursive politics and strategies in a society whose beliefs are grounded in liberal and

democratic values, but in which politics is framed by the need to legitimate one's actions around interpreting those values. I intend to pursue my line of inquiry around discursive strategies, liberal democratic values and surveillance technologies to see what other 'common sense' narratives are engineered in order to secure consent, and ways in which these could be tackled and challenged. As I suggested throughout, while the dominant political common sense seems to be that surveillance is of paramount importance, or it is inevitable, showing the vital role that discursive strategies play in the re-interpretation of liberal democratic values to secure legitimacy of surveillance in this way, shows that another scenario is also possible. This, as made clear throughout however, is dependent on the political power to do something about it.

Power, legitimation and political institutions were key to my research, and as I applied it, an addition to the literature around surveillance. My findings about power and the inequalities of power having a bearing on who is surveilled are not new, but were re-interpreted through realism for use against liberal legitimation claims. Power is not only implicated in legitimation strategies – and can thus be seen to undermine that legitimacy – but are also a constitutive part of victory and defeat for those justifying surveillance and those being surveilled, or unsuccessfully objecting to surveillance. This, as I suggested, may undermine liberal theories of legitimation that apparently justify domination of weaker members of society.

A 'democratic identity' in contrast to a 'liberal identity' came to the fore in the final chapter. Perhaps this identity could be a space for a counter discursive de-legitimation of the control and monitoring that surveillance implements over society. A more collective identity that values the possibilities that disruption to the institutional rules that guide surveillance could bring. One that sees an unsettling of the institutional

arrangements of surveillance as democratic, rather than an identity that is a more isolated rights-bearing *individual,* characteristic of the 'legitimate' protestor identified in chapter 5. A more disruptive identity that comes from democracy, and therefore still within the framework of values and beliefs necessary for liberal democracy, is a place to begin thinking about strategies that offer critique, in theory and practice, to surveillance beyond liberal and individual rights.

In this vein, and in light of the questions that emerged, future research that seems pressing is around what is and what is not a 'legitimate' democratic identity in the public space, and how this is created and surveilled. I aim to study how democratic identities are formed and legitimised and de-legitimisied under surveillance. Most particularly around protest and dissent, what is surveillance's role in de-legitimising democratic subjectivities? For example, a 'rogues gallery' of protestors that police would like to speak to, published in a newspaper, as is commonplace after a demonstration in which crimes were committed, 'looks guilty'. What relationship between surveillance (which controls values in practice) and publicity (which gives values democratic expression) does that play?

Other areas of research pointed to by my discussion include other striations of categories of democratic citizens. I did not look in detail at which other groups amongst existing and 'full' citizens are separated out by surveillance for differential treatment. While by implication I did so in the chapter on welfare claimants, it seems important to conduct a more direct investigation into how class, religion, race and gender striates across the 'bundle of rights' associated with democratic citizenship, and how this is surveilled.

In particular, with reference to the new 'democratic authoritarian' context in which I am now writing, it seems pressing to ask how this politically changes a liberal democracy characterised by an increasingly exclusionary notion of the democratic 'people'. How internal exclusion will play out with surveillance, and how surveillance polices a changing and increasingly contestable notion of where the boundaries of 'the people' lie, through access to and exclusion from public goods and social life, seems pertinent. What effects will this have on access to healthcare, welfare and policing? For example, as discussed in chapter 4, the responsibility for checking immigration status of tenants has been placed on landlords by the UK government (Cameron, 2015). How the landlord, as a citizen, decides who is not a citizen, seems to be open to discursive and problematic ethno-centric interpretations. Will full British citizens with 'foreign sounding' names be looked upon more suspiciously by a landlord and rejected because of the possibility of being fined for renting out to illegal immigrants? Likewise, the government has suggested it may use school registry pupil information to gather data about illegal immigration. What kind of effects this has on the subjectivity of the child and parent in relationship to the school as an institution is a concerning and interesting one for surveillance and citizenship. The implications of increasingly contestable notions of 'the people', seems to be cut through by studies in surveillance that, I showed, codifies and enforces the boundaries of who is and who is not counted amongst 'the people'.

Further study is also required to assess the nature of democratic engagement and strength of citizenship related to material resources, class and wealth and how this relates this surveillance in light of findings throughout. In chapter 3 for example, there was the case about the welfare declaration era that seems to make this point. Of course, other practices of surveillance and oppressions existed, but it did seem to show

that political strength – or equality of political strength - could be linked with less surveillance insofar as less inequality commands less surveillance.

How well does my thesis transfer into other areas, most obviously security, will be interesting to discover. Here Bigo's (2012) insightful work around this, relating to my thesis, could be developed. He says, as outlined in the introduction, that in the balance between security and liberty, liberty is *mad*e by security, as a derivative of it, in public debate around balancing the two. Therefore, I would like to ask, to what extent is security *democratically made* insofar as the democratic demand for security seems to trump individual (liberal) liberty currently. The interplay between the two seem important, particularly with the current direction of political discourse in democracies worldwide. To what extent is security *becoming* a democratic value, and what does this mean for surveillance and the individual?

Surveillance poses a threat to democracy and liberal freedoms while at the same time coming out of the values and practices of liberal democracy. This presents a quite serious conundrum for the future of liberal democracy and surveillance. If surveillance seems to be dominating and corrosive to individual freedom, as well as democratic expression, and as I found further damaging to the ability of people to consent and object to regimes that they are subject too, there is a liberal democratic paradox when it comes to implementing and enforcing these 'legitimate' practices.

The significance of my study, in light of what I discovered and developments ongoing in the world of surveillance and liberal democracies, is to show the inescapable relationship surveillance has with liberal and democratic values and the functioning of liberal democracy. Understanding this internal nature about surveillance's inevitability – rather than an inevitability from outside the philosophy and principles of liberal

democracy – shows the importance of interrogating the politics around the rules, which surveillance implements and enforces, the necessity for the legitimacy of those rules, and how they can be challenged.

A way out, I believe, is a reinterpretation not only of surveillance's role, but of the importance of values that do not rely on implementation and full compliance with rules. This demands a restatement of a more messy and disruptive democratic politics without full compliance, and one grounded in the primacy of equalising power differentials. This seems a better hope for limiting surveillance and directing new technologies of information towards ends that are not dominating, rather than seeking to enact value-laden rules, or attempt to restrain surveillance with more rules. As I have discovered, the liberal democratic method of extending values into society more widely seems premised on a law of diminishing returns, as more rules are needed to reconcile them with other values, that then diminish the extent to which they can be freely held and enjoyed. As such, can increasing both democracy and liberty, both equality *and* freedom, within the liberal democratic state be possible *without* a reliance on rules and surveillance to enact them? This is what I will commit myself to finding out from hereon.

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