

The Legal Construction of Discriminatory Mass Surveillance

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The law and political economy movement can be seen as a Left version of “[legal institutionalism](#),” an approach to social thought that emphasizes the causal importance of politically determined legal institutions. Legal institutionalism stands in contrast to other schools of social thought that, for example, view the law as an epiphenomenon of [class](#) relations, or as a mechanistic means for optimizing [efficiency](#)—or simply [ignore](#) the law altogether. More specifically, LPE writings often undermine conventional distinctions between “public” and “private” law by making visible the hand of the state behind the invisible hand of the market.

What, then, can an LPE perspective contribute to discussions of paradigmatically “public” areas of the law, where the hand of the state is already plainly visible? In this post, I would like to consider specifically what an LPE perspective can contribute to contemporary critiques of digital mass surveillance by the police.

To begin with, there is obviously no need for LPE to reveal that the police are creatures of the state, or that surveillance carried out by the police is a “public” activity. Because no one fails to see the role of the state in policing, it is unsurprising that some of the most sustained discussions of policing by LPE-affiliated writers have focused not on showing how the law constructs policing, but on showing how policing has contributed to the construction of economic inequalities. One example is Angela P. Harris’s excellent multi-part [analysis](#) of *Fant v. Ferguson*. Other examples can be found in LPE scholars’ discussions of how choices in the “public” law of crime and punishment shape unjust outcomes in apparently “private” realms such as the [labor](#) market.

Can LPE offer a distinctive perspective on digital mass surveillance by the police? Or does it have nothing to add to the more general civil-libertarian and civil-rights-based objections to new forms of police surveillance as potentially oppressive and often discriminatory?

Similarly, most LPE-affiliated writings about digital mass surveillance, with [some exceptions](#), have focused on surveillance carried out by [private businesses](#) rather than by public law enforcement agencies. The revolutionary expansion of profit-driven, commercial digital surveillance provides another occasion for LPE to emphasize, in the [words](#) of Amy Kapczynski, “the critical role that law plays in the construction and persistence of private power.”

So: can LPE offer a distinctive perspective on digital mass surveillance by the police? Or does it have nothing to add to the more general civil-libertarian and civil-rights-based objections to new forms of police surveillance as potentially [oppressive](#) and often [discriminatory](#)?

I believe LPE’s legal institutionalist perspective does, in fact, have something distinct to offer. First, an LPE critique of digital mass surveillance by the police could begin, counterintuitively, by emphasizing the extent to which the law, as usually understood, does *not* directly determine police activities, including police surveillance activities. Second, the critique could then draw

attention to the *indirect* role of legal institutions in shaping discretionary police decisions about digital mass surveillance, and in particular to the ways in which unjust legal structures contribute to discriminatory uses of digital mass surveillance.

First, one of the most remarkable features of contemporary digital mass surveillance by the state is precisely how [lawless](#) it is. As I argued in “[Mass Search and Mass Seizure](#),” the Fourth Amendment “currently provides no protection against the vast majority of existing and possible forms of digital mass surveillance.” Looking beyond the Constitution, Barry Friedman and Maria Ponomarenko have [observed](#) that “[p]olicing agencies typically operate under age-old blanket authorizations to enforce the criminal law.” The enabling [statute](#) for the F.B.I., for example, consists more or less of an authorization for the Attorney General to appoint officers “to detect . . . crimes against the United States.” There are, of course, federal, state, and local statutes that govern various aspects of policing, such as the use of wiretaps or drones, but such scattered statutes often reflect makeshift responses to passing public concerns. They leave vast domains of policing, and police surveillance, subject to few specific legal constraints.

It is true that in an abstract sense, policing agencies, simply because they exist by virtue of enabling statutes, are constructed by law. Any law that does not prohibit a behavior can be understood as in some sense permitting, and thus enabling, that behavior—as critical scholars of international humanitarian law have often [emphasized](#). But if the extent of LPE’s contribution to discussions of digital mass surveillance simply consisted of the observation that all police practices are fundamentally “constructed” by policing agencies’ vague enabling statutes, the significance of the contribution would be questionable.

Second, then, a more productive LPE analysis of the police use of digital mass surveillance could focus instead on the many laws that *indirectly* shape how the police use their enormous discretion. Why do some policing agencies engage in certain forms of mass surveillance, while others do not? How do they choose which communities to surveil, and which to pass over?

An LPE analysis might begin by focusing on laws that determine the jurisdictions, political incentives, and resources of policing agencies. Although such an analysis lies far beyond the scope of this blog post, it would likely reveal that marginalized communities are more likely to be subjected to discriminatory digital surveillance as an indirect result of the same legally structured inequalities that are discussed throughout the LPE literature. As I have argued [elsewhere](#), despite certain surveillance-facilitating digital devices being more common among the affluent, “the usual subjects of disproportionate government surveillance—such as racial and religious minorities, and those living in poverty—are likely to bear a disproportionate burden of digital surveillance,” for example through exposure to surveillance devices in [public housing](#), biased targeting by [predictive policing](#) algorithms and [facial recognition](#) software, [immigration](#) dragnets, [e-carceration](#), and [bodycam](#)-wearing police on the street.

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Other connections between LPE scholarship and digital mass surveillance by the police could be explored. There are many obvious intersections between “surveillance capitalism” and the

surveillance carried out by the state. Policing agencies [use data produced](#) by [commercial sources](#) and pay for equipment and [services](#) from private firms such as [Axon](#) and [Palantir](#).

But I will instead conclude with a more general observation about LPE and contemporary debates regarding policing, including debates about surveillance. In a time when disillusionment with the many [failures](#) of police reform has led to [calls](#) for police [abolition](#), LPE's legal institutionalist view of policing suggests a possible alternative perspective. Rather than concluding that the history of American policing reform demonstrates that "[\[n\]othing works](#)," legal institutionalism suggests it would be equally accurate to say that "very little has been tried."

Abolitionist claims suggesting that policing in the United States is by its nature, or by virtue of its [history](#), *essentially* committed to perpetuating racism and economic exclusion, in some ways resemble classical socialist arguments that the institution of private property necessarily implies one or another particular set of unjust material outcomes, and therefore that private property must be [abolished](#).

Legal realists such as [Robert Hale](#), and CLS scholars such as [Roberto Mangabeira Unger](#), following in the anti-essentialist tradition of American pragmatism, reject the assumption that private property as such, or markets as such, entail any essential, fixed set of legal rules. They argue that private property and markets can take many forms. Because they believe in the changeable legal construction of social institutions, they argue for democratic, institutional experimentation.

Obviously, some institutions deserve to be abolished. But do police belong in this category? Or can police be seen as a public good whose abolition would likely lead to the wealthy paying for private security guards while the rest of the public lived in even greater insecurity? There are many countries with far more humane and effective systems of criminal justice, and vastly lower rates of incarceration, that still maintain per capita numbers of police that are [comparable](#) to those in the United States.

Just as it is easy to imagine lowering the rate of violent crime in the United States through improved employment, housing, health care, and other social policies, it is easy to imagine any number of unattempted reforms in the United States that would limit the range of tasks assigned to armed police, reward officers for fair and respectful policing, and finally hold officers accountable for brutality and biased uses of law enforcement discretion. Police in other wealthy countries already receive greater [training](#), are less [militarized](#), and use fatal force [far less often](#).

The emergence of the LPE movement has created an opportunity for rethinking the theoretical foundations of criminal justice, including by recognizing the limits of [rational choice theory](#) and embracing more [predictively powerful models of human behavior](#). But even without transformative new theorizing, a great deal of significant criminal justice reform, including police reform, might be accomplished simply by learning from other countries whose citizens have already rejected what we continue to accept as natural. If police reform in the United States has repeatedly failed, the reason may have less to do with the essence of policing, and more to do with a lack of [political](#) will compounded by [failures](#) in the legal [structures](#) of [our democracy](#).

The most important insight that LPE can bring to debates regarding digital mass surveillance, and policing in general, is the same insight that LPE often brings to debates about economic inequalities: there is nothing inevitable, fated, or natural in the current state of affairs. To the extent that our social arrangements are the product of laws and legal institutions, a more just and free world can be obtained by changing the laws.

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