

The Impacts of State Surveillance on Political Assembly and Association: a Socio-Legal Analysis

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Abstract

Based on group interviews conducted in 2006 that included 71 social justice organizations, this paper analyzes the impact of surveillance on the exercise of assembly and association rights. We link these protected legal activities with analytic frameworks from social movements scholarship in order to further a socio-legal conception of political violence against social movements.

Key Words

social movements, surveillance, repression, assembly, association, political violence
First Amendment

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Introduction

This paper presents a study of state surveillance in the US in 2006. We are interested in developing an interdisciplinary understanding of surveillance between sociological and legal analysis and strategy. The Constitutionally protected act of “assembly” is what sociologists call a “social movement mobilization”. From the scholarship on social movements, we know that mobilizations are not spontaneous; they are created through meetings, networks, strategic planning, and extensive communicative and solidarity-building activity. These preparatory activities are undertaken by “social movement organizations” – the sociological term for what are protected in the law as “associations”. Thus, our unit of analysis in this study is the association, which includes both formal and informal organizations. Mobilizations/assemblies, moreover, depend on the associative activity of people who decide to express dissent by joining in, innovating, and forming new groups. These expressive activities, so diverse and numerous that they defy full enumeration, give social movements their import for social change and their inscrutability.

We are concerned with the fragile acts of association which make for significant dissenting assemblies. Declassified archives of counterinsurgency operations show the planning of pervasive disruption of associative activities. This study shows the effective destructiveness of these operations. In an effort to assess the impacts of current surveillance against associations (and, thereby, assemblies), we analyze the impacts of

state surveillance systematically, according to concepts developed by social movements scholarship. Ultimately, we hope that similar analysis (of media coverage, marketing cooptation, etc.) could build a legal defense of social movements themselves.

Framework

This study examines the effects of state surveillance on social movement activity in the United States in the post-Seattle era. On n30 (30 November 1999), diverse non-violent protesters in Seattle were able to successfully shut down the WTO Ministerial meetings for a full day with creative direct action. Seattle has become a symbol for the joining of US anti-corporate social movements with the global alterglobalization movement. However, the post-Seattle era is more accurately dated to 1998, with a series of ecodefense actions and several direct action protests of global governance meetings in Canada. Although physical violence against protests has been visible during this era in the form of tear-gas, rubber bullets, and violent arrests, other forms of repression have been less visible and not well understood.

While social movements scholars have studied “political violence” by social movements themselves (Della Porta 1995), most of the scholarship on state political violence (aside from genocide and war) has focused on totalitarian societies. Yet research on state political violence against social movements in democracies has not gone much beyond protest policing (Della Porta & Reiter, ed. 1998). While we do not intend to diffuse the meaning of ‘violence’, nor to enter into debate about its proper contents, it is apparent that less overt forms of state repression wreak comparable damage to social movements. (Fernandez 2008) Our research shows that overt, bodily violence against protesters is part of a dense continuum of state activity. (Starr & Fernandez 2008) The density is important because bodily violence is neither clearly the worst thing that can happen to an activist nor is it entirely separable from other forms of repression, over which it looms as an explicit or implicit threat. As anthropologists have documented, repression is a multimedia assault that arrives in the psyche all at once. By referencing one another, both bodily violence and other forms of repression have a cumulative force and impact, as documented in studies of state terror. (Corradi et. al., ed. 1992, Robben 2005, Mahmood ed. 1997-)¹

One of the most significant scholarly studies on surveillance, which has particular relevance to our project, is David Cunningham’s study of memos from the FBI’s Counter Intelligence Program (COINTELPRO). From 1956-1971 counterintelligence programs designed to “expose, disrupt, misdirect, discredit, or otherwise neutralize” (2004, p. 6) various political organizations were official FBI

¹ Our interviewees were not able to disassociate completely their experiences of surveillance from their experiences of policing, most markedly from police violence: “Also it’s about how cops in the street make people feel ineffective, marginal.” Additionally they were not able to separate surveillance from the impacts of prosecutions, specifically from increasing sentences, the banning of political motivations from court proceedings, and grand juries.

policy. However, the “normal” intelligence activities of the agency, before, during and after the official programs, included much of the same activity, and very similar effects on targets. (p. 185) Histories of surveillance, police action, and incarceration of political prisoners show clearly the violence of the state against political activists. But COINTELPRO was organized to disrupt political *organizations* associated with several social movements. State surveillance inhabits a shadowy realm of public affairs, often secret and barely legal. As Cunningham points out, its operations are a constant negotiation between popular political moods and elite government interests. Donner (1990) shows how litigation works this terrain and shapes the near future of surveillance.

We begin our analysis of the impact of surveillance from the perspective of the First Amendment. The preponderance of legal discourse about the First Amendment focuses on the protection of individual speech acts. These acts are often viewed as isolated, discrete events. Each has an individual speaker, a space, a speech. But as social movements scholars, we wonder how did the speaker get there? Were they alone? What were their fears and risks? How did they have the courage to be there? How did they learn about what they spoke about? How much time did they spend in meetings in advance of that speech act? Social movements scholars recognize that most political speech is not isolated, but exists in an institutional and cultural context which supports it.

A less litigated aspect of the First Amendment is assembly. Since Seattle, public events like marches and rallies have been subject to increasingly rigid constraints. Civil litigation has focused on protecting access to public space with “time, place, and manner” reasonable to protest groups. This has generally not gone well, with protests confined to “protest pits,” surrounded with riot cops, or re-located far from legally assured “sight and sound” of targets. As with speech, these assembly issues have been litigated as isolated, discrete events. Questions from a social movements perspective would include: What resources are required to access and use public space for dissenting assemblies? Are assemblies about different issues treated differentially in their access to public space? How does the restriction of opportunities for dissenting assembly impact the quantity and quality of dissent expressed, and by whom? What are the physical and social conditions of organizing people into that space – who is included and how are they notified? What are the network dynamics of a given assembly? What form does decision making about the format of the assembly take? Who is excluded? Who controls the diversity of individual and group expression?

The unit of analysis of such inquiries is a Social Movement Organization, or even a coalition, or the wider community of individuals and organizations who might participate. The formal or informal organization which coordinates the assembly, the coalition which endorses, advertises, and embodies it, and the pool of potential attendees (members and non-members of organizations) each represent a unit of analysis relevant to understanding the impacts of surveillance. Any one of these could be understood legally as a protected “association”, since association rights have both the meaning of a noun (as in, the right to form an organization) and of a verb (to associate, a person’s right to join a demonstration they hear about). The meanings and protections of assembly and association have yet to be fully explored in litigation.

The right of political association sits somewhere between First Amendment rights to freedom of speech and assembly, the Fourth Amendment right to be free from unreasonable search and seizure, and the Fourteenth Amendment's implicit right to privacy. While not explicitly enumerated in the Constitution, association is recognized as fundamental to the workings of a healthy democracy: "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." (*Kuiper v. Pontikes*, 414 U.S. 51, 56 (1973)) The right of association derives from enumerated rights of speech, assembly, and petition, while simultaneously working to preserve those same rights. Despite its derivative nature, it is clear that "freedom of association is so essential to the First Amendment that in its absence, the First Amendment would lose much of the protective force that it was intended to have." (Kaminsky 2003, p. 2282) The Supreme Court has affirmed, "it is now beyond dispute that freedom of association for the purpose of advancing beliefs and ideas and airing grievances is protected". (*Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960))

The rights afforded by the Constitution are generally seen as rights of individuals; thus even rights of assembly and equal protection are viewed as applicable to groups but are held by the individuals in a given group. This implies that the rights of the group *qua* group are rarely recognized as such, although association may stand as an exception: "[T]he right to associate only serves an instrumental role. That is, it can only be invoked when individuals exercise their First Amendment rights through collective action." (Kaminsky 2003: 2283, citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)). This suggests that the right of association is group-centric, but this has yet to be established in litigation.

From a social movements perspective it is painfully obvious that assemblies simply do not exist without social movements and social movement organizations. Even spontaneous insurrections depend, if not on formal organization, on cultures of resistance, the development of a political "frame", and on social networks as an organizational resource – none of which can be reduced to the acts of individuals nor their aggregates.

A number of legal cases have connected the right of association with the right to be free from unwarranted government surveillance. In *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), the Supreme Court held that compelled disclosure of an advocacy group's membership list would be an impermissible restraint on freedom of association, observing that the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." The Court recognized that the chilling effect of surveillance on associational freedom "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs," (357 U.S. at 463; also see *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975)), a point echoed by the courts in subsequent decisions: *Bates v. City of Little Rock*, 361 U.S. 516 (1960) asserted that tapping a political organization's phone would provide its membership list to authorities, which is forbidden. *Dombrowski v. Pfister*, 380 U.S. 479 (1965) asserted that organizations had been harmed irreparably when subjected to repeated announcements of their subversiveness, which scared off potential members and contributors. Judge Warren wrote in *U.S. v. Robel*, 389 U.S. 258, 264 (1967): "It would indeed be ironic if, in the name of national defense, we would sanction the

subversion of...those liberties...which makes the defense of the Nation worthwhile.” (Also see Christie 1972.)

The difficulty with much of the litigation to date is problematized in *Laird v. Tatum* 408 U.S. 1 (1972). In that case, the plaintiff objected to the chilling effect on First Amendment rights by the mere existence of a government surveillance program, but did not allege any specific harm to himself as a result of the program except that he “could conceivably” become subject to surveillance and therefore have his rights potentially chilled. In the very recent case of *ACLU v. NSA* (06-CV-10204, E.D. Mich. 2006), Judge Anna Diggs Taylor rejected the government’s invocation of *Laird* in defense of its warrantless domestic eavesdropping program, noting that the plaintiffs in that case (journalists, scholars, and political organizations) had demonstrated actual and not merely hypothetical harm as the result of unwarranted surveillance.

We now know more about surveillance than how victims feel about it; we also know a good deal about its intents. Cunningham explains that intelligence operations can serve two goals, investigation of federal crimes and (the more controversial) precautionary monitoring through information gathering about organizations. Counterintelligence operations may take a preventative goal, to “actively restrict a target’s ability to carry out planned actions” or may take the form of provocation for the purpose of entrapment of targets in criminal acts. (2004, p. 6) Some of the “normal intelligence” activities undertaken by the FBI outside of official COINTELPRO which nevertheless have a preventative counterintelligence function are: harassment by surveillance and/or purportedly criminal investigations, pressured recruitment of informants, infiltration, break-ins, and labeling or databasing which harms the group’s reputation impacting its ability to communicate with the media, draw new members, and raise funds, “exacerbate(ing) a climate in which seemingly all mainstream institutions opposed the New Left in some way.” In addition, infiltrators acting as agents provocateurs is, inexplicably, part of normal intelligence operations. (p. 180-214) Can these kinds of operations be understood as violations, not only of individuals’ political rights, but against associations themselves?

Since associations and social movements work for decades, they have interests separate from their participants. Previous literature shows that knowledge (or fear) of surveillance and infiltration forces organizations to direct their energies toward defensive maintenance and away from the pursuit of broader goals. (Boykoff 2006, Cunningham 2004, Davenport 2005, Flam 1998, Goldstein 2001, Marx 1970, 1974, 1979, 1988) Alternately, activists may respond by turning from overt collective forms of resistance toward more covert, individualistic forms of resistance (Davenport 2006, Johnston 2005, Zwermer et. al. 2000) or to the emergence of more militant, even violent, factions. (Della Porta 1995) Organizations’ funding, relationships with other groups, the press, and the public may be affected as well. (Marx 1970, 1974, 1979, 1988, U.S. Congress 1976, Theoharis 1978, Churchill and Vander Wall 2002, Davenport 2006, Klatch 2002, Schultz and Schultz 2001)

We need a framework for analyzing the impacts of surveillance on assembly and association. Understanding assembly as mobilizations made possible by social movements, we use an analytic framework based on social movements literature, which recognizes five constitutive elements. Social movements draw on many different kinds of “resources” – money, time, bodies, space, equipment, membership, allies, publications, etc. (McCarthy & Zald 1977) In some sense, nearly everything that

movements use is a resource, but scholars have separated out several of these aspects for distinct analytic attention. They treat separately both the historical-institutional-rhetorical context of “political opportunities” (Eisinger 1973, Meyer & Minkoff 2004) and the conceptual “framing” (Snow et. al. 1986) work of movements. Recent scholarship has also identified culture as a sufficiently powerful aspect of movements as to require independent attention. (Coutin 1993, Johnston & Klandermans ed. 1995, Polletta 1997) Finally, political sociologists emphasize the psycho-social and ideological dimensions of social movements as a realm of study that they call “political consciousness”. (Mansbridge & Morris ed. 2001) We analyze impacts on “social movement organizations” (Zald & Ash 1966) separate from movement resources because organizations correspond to the legal concept of “association”.

Methods

We conducted 49 interview sessions in 4 regions of the United States. We identified organizations in each region based on their reputation. We then used snowball sampling to identify additional organizations.

Organizations were invited to convene a session regarding the impacts of surveillance. Session conveners invited participants from their own and other organizations. Participating organizations were requested to have more than one member present in order to help with memory. Individuals were not required to identify themselves. One demographic survey was filled out for each represented organization. No identifying information was attached to any of the data; a number was used to link demographic surveys with interviews. Our unit of analysis is organization and the total number of organizations represented is 71.

Although we are interested in the impacts of surveillance on organizations of the political right, we restricted this study to “social justice” organizations on the left. Our political credentials and recommendations from people who knew us were essential in securing participation.² We also composed our sample purposively,

² We experienced two response rate issues. First, a number of organizations refused the interview on the basis that they were not under surveillance, despite our assurances that we wanted to hear from a spectrum of organizations including those which have experienced little or no surveillance. Some of these were organizations which we strongly suspect to be under surveillance. They insisted that the state would have no interest in them because “everything we are doing is above board”. Others were concerned that involvement in the study would cause them to come under surveillance.

Second, our study happened to begin just as the Green Scare was beginning in early 2006. A number of indictments, investigations, and grand juries were in progress, charging Non-Violent Direct Actions as “domestic terrorism” with proposed sentences up to 30 years. Moreover long-term infiltrators, extensive electronic surveillance, and cooperative indictees were appearing in court. Much of the Left disassociated itself

including diverse issues and levels of surveillance. In the end, our sample represents a cluster of multi-issue organizations involved in the following political work: Latin American solidarity, anti-war/peace, anti-globalization, police accountability, immigrant rights, and environment.³ We look forward to future studies of the impacts of surveillance on labor organizations and domestic anti-poverty organizations.

We asked the organizations about organizational structure and formality, the status of their organization, and what kinds of activity they spend energy on. The following table presents this demographic information:

Organizational structure (mark all that are true)		
We have a mission statement	66%	
We are an informal organization with shifting participation		46%
We are a 501c3 or 501c4 non-profit organization		
or affiliated with one	45%	
We have paid staff	30%	
Status (mark the one that best describes your group)		
We are organizationally stable	61%	
We have disbanded our group	17%	
We are having some difficulties	14%	
We are sort of taking a break	6%	
What percentage of organization's energy is spent		
in each of the following areas:		(median for sample)
education	46%	
civil disobedience/civil resistance	35%	
international solidarity	25%	
lobbying	17%	

The median age of the organizations was 8 years. Members from 18-70 years of age were well represented among the groups.

We used a long, detailed interview schedule with three sections. First we asked about each organization's experiences of surveillance.⁴ In this section, which consumed

from the accused movements and did not provide solidarity with the arrestees nor oppose the grand juries. The isolation and uncertainty of this time, along with the sudden severe criminalization of former grey-area activity, caused activists to feel unsafe in every space and relationship. To have a conversation, activists must now decide that it is worth the risk.

³ When asked to identify the issues they work on, they listed an average of 6. Anti-war/peace, globalization/international solidarity, economic justice, and environmental issues were each listed by 40-60% of our sample. Immigrant rights and prison/policing were each listed by 30% of our sample. Other issues included gentrification, animal rights, food /agriculture, gender and feminism, homelessness, union issues, 911 truth, voting issues, and media/arts.

⁴ Types of surveillance: [1] Direct: observation and visits by officers, such as writing down license plate numbers, and also raids, questioning, and burglary. [2] Electronic: phone, covert audio recording, email, web, computer, video and photo. [3]

2/3 to 3/4 of the interview time, we only gathered data on surveillance experienced directly by interview participants or by members of their organization. Although we view paranoia induced by perceived surveillance as one of the damaging effects of surveillance, for the purposes of this study we considered a group to have been surveilled only if they were able to verify that surveillance. Verification took the form of information from court proceedings, released files, interactions with police officials, eye witness, interventions confirmed by professional consultants, or evidence very difficult to explain in any other way (such as a “robbery” in which only political items were taken, and valuables left in place, telephone interruptions that the telephone company was not able to explain or repair, computer interventions examined by computer professionals). We asked many follow up questions about the evidence before considering an event verified. Every organization had experienced some form of overt surveillance, such as being recorded on video at events. Many of the organizations had also experienced various forms of covert surveillance which they had been able to verify. In the end, our sample included groups with experiences well spread along a continuum of intensity and diversity of surveillance experiences from public video surveillance only, to remote computer access of members home computers, to multi-agency armed house visits.

In the second section of the interview, we invited participants to discuss their organization’s perceptions of the landscape of surveillance, locally, regionally, and nationally. In this section they were welcomed to discuss events that happened to other organizations. In the third section, we asked them to describe the impacts of direct and indirect surveillance on their organizations, their communities, and the social movement that they see themselves as part of. We persistently used follow up questions to elicit descriptive and empirical explanations of statements and interpretations like “it was really scary”.

The interviews lasted from 1 to 5 hours in length and were tape recorded with permission of the participants. The tapes were transcribed verbatim. In the rest of this paper, the phrases ‘organization/s’ and ‘group/s’ are used interchangeably to refer to the organizations in the sample.

Analysis

We have organized our analysis according to the major concepts from social movements literature, shown in the diagram above. We examine the impact of surveillance on movement resources, political opportunities, strategic framing processes, cultures of resistance, political consciousness, and social movement organizations/associations.

How surveillance impacts resources

Undercover: undercover police, informants, infiltrators, and agents provocateurs. [4]
Databasing.

“5 peoples homes being raided leads to intimidation of millions of people.”

One of the most important social movement resources is participants. Recent publicity of massive surveillance databases, along with codes and tags such as “criminal extremist” and “domestic terrorist”, have created widespread fear to participate even in completely legal political events. Interviewees explain that “People who might be sympathetic, are now either just completely neutral or don’t want to know.” Reluctance to participate impacts donations to organizations, numbers of participants in events, willingness to sign petitions and public statements, volunteering, and receipt of newsletters and other educational materials normally sent to members.

Interviewees were responsible about acknowledging that quantitative shifts in membership and level of activity are multi-causal. Many said “well you can never really know” why someone doesn’t participate any more or why fewer new people have joined this year. Despite this cautiousness, nearly every interviewee was able to think of people they know personally who had explicitly stated that they were leaving political work due to their fears of surveillance. Several interviewees stated that they personally knew 20-30 people for whom that was the case. When asked to count specific people who used to be active and no longer are who the interviewee either knows or strongly suspects curtailed their activism due to surveillance or fears of it, every interview participant counted at least two people; many counted 5-10.⁵ One insisted that s/he could list 300 people. Another interviewee explained “I would not want to give you a small number because it is my conviction that almost everyone that I know in [this city] doesn’t want to come out.”

A number of interviewees stated their suspicions that “leaks” of database information to the media as well as the contents of FOIA releases were strategic law enforcement activity designed to cause potential participants to think twice. Activists who have reviewed a lot of released files observed that “the redaction was deliberately inept”, which they interpreted as a counterinsurgent act. Enhanced law enforcement databasing increases information collection, with no opportunity to purge, correct errors, or challenge interpretations. Rapid information sharing between jurisdictions (including internationally) exponentially increases the impact of criminal and terrorist tags. These leaks raise serious dilemmas for established organizations. Knowing well that mailing list members and donors may be spooked and withdraw their support from the organization, interviewees wondered if they have an obligation to inform members and donors about surveillance? (This may explain why organizations in denial pretend not to know or don’t want to find out.)

While individuals are concerned to participate, surveillance also threatens the solidarity between organizations in networks. Surveilled organizations are often abandoned by their allies. “As soon as your organization’s name is linked with another organization, that may or may not be under surveillance but you believe is, then there's this sense of we're going to trigger the alarm bells and we're going to be under surveillance too, just because we had a picnic with these folks.” According to an

⁵ After asking this question, the tape recorder was turned off and/or the interviewer left the room so that participants could coordinate their tallies so as not to count anyone twice.

interviewee, organizations have become reluctant to share listserves and are even mistrusting when they try to have a meeting together. An interviewee explained that even educational events are infused with distrust.

One of the pacifist groups in our study had been meeting in a church hall. After the media revealed that they were under surveillance, they were no longer welcome to use the church and their relationships with that congregation have been strained because they were viewed as having put the church at risk. An interviewee explains how police violence affects regional organizing,

“People say ‘I don’t want to go [to do political action] in [city]. It’s scary, it’s dangerous there.’ When you hear that you realize that the surveillance on [city’s] activists has worked....You shouldn’t have to stay home to be safe. You should feel safe wherever you go to express yourself.”

An activist explains how delicate participatory coalitions are damaged by surveillance.

“...meetings used to have 50 people and now they have a dozen...We had pacifists and militants working together, talking...But add the pressure of [surveillance] and what was difficult but not impossible, becomes improbable.”

Interviewees were not only concerned about the chilling of fellow citizens’ dissent, they also explained how it isolates those who are active.

“5 peoples homes being raided leads to intimidation of millions of people. It needs to be clear that a goal of such activity is to isolate the movements that are being repressed, using the fear of millions of people to create that political isolation.”

This isolation changes everything about political action. Not only does it reduce participation, and preempt solidarity relations between organizations and movements, it also demoralizes activists who experience their politics as more marginal than it may be. “People are staying home to avoid being on a list, so then it feels like nobody cares.”

Strategic campaigns require extensive logistics, interdependencies, coordination, and timing. Surveillance disrupts the elements of relationships and communication that make strategic planning possible. Scared to be creative, wary to trust, aware that no conversations were private, organizations have great difficulty generating strategic plans. An interviewee explains the “paralysis” of how trying to be strategic and creative to create effective actions is impacted by “worry about the heat you're going to get for even trying – for even talking about it... if we do ANYTHING we are going to be watched, hammered down.” Another says “we couldn’t think creatively.”

Finally, events of any kind depend on organic leadership development and on volunteerism. Several interviewees observed the surveillance targeting of people who are stepping up and taking responsibility for logistics, outreach, or safety roles like marshals and medics. Such surveillance puts a criminal taint (implying accusations of agitation or conspiracy) on logistics roles and volunteerism in general.

How surveillance impacts political opportunities

“...the difficulty of assessing what doesn't happen...”

We were not sure that political opportunities would be a useful analytic concept, but we found that surveillance forecloses political opportunities in a number of ways. First, it remakes public space as a space of imminent police violence: “I can think of three or four individuals who have gone to more spiritual activists, like meditations, prayers, and conversations and will not participate in public rallies.” Inexperienced activists were easily put off by the teargassing of a permitted demonstration or rally. But even more experienced activists were discouraged to organize and participate in demonstrations: “It gets tiring when you are shadowed by 40 cops ready to beat your ass down when there are no illegal actions planned. It's just a protest.” Interviewees were struck by the lack of openness of the system to peaceful dialogue. Reflecting on police seizure of art materials, an interview explains:

“There's a strong statement: ‘our threshold for your dissent is so low, it's way down here. We're not going to tolerate perfectly legal building of perfectly legal things’.”

Several pacifist groups we interviewed had been infiltrated during civil disobedience actions. Going through the intense experience of preparing for arrest and then finding out that one of their fellow arrestees was an agent shook people deeply. In conjunction with recent judicial shifts (increasing sentences and the restriction of political motivations from court proceedings, forcing the defense to rely on technicalities), surveillance forecloses space for civil disobedience, which depends on using the judicial system. “You don't want to get your friends and nuns and old people involved.” Civil disobedience also includes activity like street art, mass bike rides,⁶ and squatting, which have been subject to police escalation and criminal charges.

One of the most important changes to the political opportunity structure is the creeping criminalization of dissent. The most obvious area is the coding of property crime as violence. “When people are being thrown in jail for 25 years for destroying vehicles it means that we are just supposed to follow orders.” The reclassification of military recruiters as federal officers makes interfering with them in any way a felony (criminalizing pacifist actions at recruitment centers). Creeping criminalization chills discussion of legal activities that may not be legal next week. One interviewee argued that criminalization is happening in part because current social movements are in fact non-violent.

“People aren't committing the crimes that they want them to commit. They

⁶ Critical Mass is an international tactic in which a group of bicyclists travel city streets together to defend rights of bicycles, oppose automobilism, and have fun. Acting on the concept “We aren't blocking traffic, we are traffic”, participants directly challenge traffic policy. In several US cities, Critical Mass has been criminalized, riders arrested, etc. see <http://www.critical-mass.org/>.

can't throw them away, lock them up, so they will invent....charges.”

This criminalization also changes the social context in which assemblies occur. While marginalizing dissenters may encourage social conflict on its own, a number of groups we interviewed described the appearance of counterprotesters or opponents at events which had not been announced to the public. This led them to believe that the police were circulating surveillance information regarding groups' plans to opposing social organizations. An interviewee suggested that such police invitations to counterprotesters invites vigilante violence against dissenters.

How surveillance impacts framing

“...we spend a lot of time reworking and rewording simple statements”

Surveillance impacts framing in three ways. First, the criminalization of groups interrupts their ability to implement their frame. An interviewee who was labeled a “criminal extremist” based on international solidarity work explained that losing control over their frame

“makes it difficult to have a discussion and be taken seriously. It's easy to diminish the importance of what someone is saying when police say they are a radical criminal extremist.”

Second, surveillance steals the frame, preventing groups from deciding how to communicate about themselves. An interviewee explains that the imposed criminal frame “communicate[s] that we are illegitimate and...a threat to the safety of everyday people in the community.” Similarly:

“Since the hugely successful mass action in Seattle with WTO, routinely since then, large gatherings on a whole range of issues have been portrayed in the media as criminal, violent, disruptive. [They are portrayed as] people come from no home, coming out of the shadows, the alleys, to descend on this area and provoke violence and chaos.... creates the image of the left as a criminal element of society.”

The third way that surveillance impacts framing is by causing groups to feel they must re-frame themselves. Groups talk about spending extra time choosing their words very carefully.

“The assumption that everything is being read puts pressure to word things carefully to make sure it's clean...We spend a lot of time reworking and rewording simple statements.”

What do they mean by “clean”? It's not about violence or illegality; they are “concerned about seeming inflammatory [or] confrontational.” The group joked that they now have a “department devoted to that”. The joviality wisped away and the group became grave, describing the significance of this vigilance as “an accepted dimension in how we operate...it [surveillance] creates a new priority that wouldn't

otherwise exist.” Another organization even re-frames their assemblies:

“We don't hold ‘protests’ or ‘demonstrations’ we hold ‘public awareness rallies’. Our language has changed. We have to be more precise. You can't talk like a regular person... if you're chatting away you might say the wrong things.”

How surveillance impacts the culture of protest

“New people can't get involved. It's hard to build a movement on community when secrecy is an important thing.”

Surveillance impacts the culture of protest by reducing the quality and quantity of political discourse:

“We're scared to be able to openly and honestly talk about issues in our community. The state is using that information to crush legitimate movements.”

A middle-aged person in a peace group told us

“My mom is scared to talk to me on the phone...She's not sure what she is allowed to say and not any more.”

A peace group reported that before they found out about the extent of surveillance they were under

“We used to be a lot closer. Now we sometimes talk in code, we're more cryptic, share less information. We're all a bit more reserved in terms of our speech.”

An activist explains

“I don't like even talking about politics...because I don't want to get either of us confused in each other's business. If someone is being watched for something I'm not being watched for, I don't want to talk about politics with those people.”

Another activist says “People are scared of the implications of just being radical. There's almost no space that we consider safe...People just stopped expressing those views entirely.”

We found three distinct impacts of reduced discourse. The first is elimination of “cross-pollination”:

“It was nice to be able to tell stories of like I worked with this organization and can I help you build... Here's what we did that you all might be able to do... Now...you can't help them out, you can't tell them stories of things you've done before. Because if they were a snitch you'd be in a really bad situation.”

A second aspect of reduced discourse is secretive planning. As mentioned above, organizations are communicating much less and across fewer media.

“There isn’t that constant discussion, which can be really beneficial. Then you get everybody’s opinion if you can talk to everyone.”

This interviewee went on to explain how reflection is intentionally reduced as a protective measure:

“Here, we can only talk about what’s going on here. Next week we can’t talk about this any more. And we can’t talk about something else until it’s sure who’s going to be part of it...”

If actions cannot be discussed later, the strategy of the movement no longer moves forward. The third aspect of reduced discourse is the lack of debriefing.

Secretive planning is just one dimension of what activists call “security culture”. An activist explained, with alarm, that security “was the first thing we talked about, even before our name or what we’re going to do.” Another interviewee pointed out that security culture has become so common that people are using it for actions that don’t need to be protected. “There’s confusion over what actions need to be clandestine and what doesn’t.”

Surveillance has caused security culture to replace organizing culture, with devastating impacts on inclusivity, solidarity, bonds of friendship and community, and prefigurative practices. (Polletta 2004) The function of organizing culture are inclusivity and solidarity.

“When I see people I don’t know I get excited. When I first saw the undercovers I was amazed that we had attracted folks that don’t fit in, and I was sad when I found out they were undercovers.”

Another interviewee described how people who fit too well are suspicious as well as people who don’t fit in. The hallmarks of security culture are exclusion, wariness, withholding information, and avoiding diversity. An activist described their group as showing “paranoia, freakiness, and unwelcomingness that results from the fear.” Another activist jokingly described security culture as the “icemaker”, which has replaced the community building “icebreaker”. S/he went on: “Like handing out a signup sheet...people are not only afraid to sign up, but afraid of asking for it.” A new activist described the experience this way:

“What’s the opposite of unites? When I’m suspicious or they are, it creates a tension, conscious or not, about who people are and what their intentions are.”

Another interviewee summed it up: “secretive planning is a disaster in community building.”

A second impact on cultures of protest is breaking the experience of trust, bonds of friendship and community. After an infiltration was revealed, “people were tense, held back, uncommunicative, not feeling good about themselves and other people... [There’s] something insidious about destroying the trust.” An activist

describes the intimacy and urgency of political community that was disrupted by infiltration:

“We're lonely in our churches and organizations where we work. So there's an incredible sense of community when we meet [other peace activists]. We're hugging and learning to protect each other.”

An interviewee who learned that a long-term and close friend was an FBI informant describes the effect of the experience:

“If this friend of mine could be an informant, then anybody could...anything could be true. My entire reality was disrupted.....all my friendships and alliances thrown into question...I'm not really doing much any more.”

The last aspect of impact of surveillance on cultures of protest is the impact on prefigurative practices. One version of this kind of shift is a church group who described how surveillance caused the congregation to question (and ultimately to largely abandon) their established sense of “Christian obligation” to social justice. A more widespread version of this impact is its disruption of participatory democracy, one of the hallmarks of current US political culture. Many groups reported that they were no longer maintaining their former level of inclusivity in decisionmaking. “Sometimes a handful makes decisions and it never used to be that way.” Not only are the decisions made by fewer people, but by a group whose diversity is constrained by suspicion: “There's not as many people involved, there's not as many voices in the decision making, there's not as many people from different walks of life.”

How surveillance impacts political consciousness

“There was a time in my life when I felt like I was going to do something powerful. WE were going to do something powerful. And it was all taken away. And now it feels like I'm just going through the motions. I'm just verbalizing it, I'm not living it.”

Although the unit of analysis for this study is groups, not individuals, some effects of surveillance on individuals are related to groups' exercise of assembly and association rights. Interviewees talked about the impacts on their own capacity to work:

“When you're socially isolated it's hard to be an organizer. If you're in that kind of fear level it attacks ...your ability to relate to people.”

It also causes organizers to see their political work and oneself as marginal or criminal:

“Even the word ‘activist’ is stigmatized. People have disgust for what you do. You're not a committed, responsible citizen.”

Another impact is the perception of oneself through the eyes of others as a possible infiltrator: “I must look suspicious. I was vague about myself. I see myself as an

infiltrator.”

For many interviewees, surveillance has caused them to see the government as lawless. Aware that the line of criminality is moving, they believe that anything could happen at any moment: “...rendition without charges...I think that enters into people’s subconscious, like every moment of their day.” An activist explains the effects of creeping and variable criminalization:

“...stepping off the sidewalk, those are only civil infractions and only circumstantially illegal. ...it's so often arbitrary. Sometimes you can march in the streets sometimes you can't. That's the area most affected for people. Their political imagination gets curtailed by repression.”

A young activist says:

“It is scary that maybe one day the police will just walk in my door and take me or I’ll have a bunch of charges that I don’t know are accumulating, legitimate or illegitimate. The way the government is operating now it doesn’t seem to really matter the accuracy of the data.”

The next area of impact on individual activists is the pressure to disassociate from risky areas and people. What is striking, again, is that the activities of concern are not illegal. “I have really shifted the things that I’m willing to work on from anything that was progressive and radical to things that are more peace and justice as opposed to fighting the system.” Another interviewee explained

“I’m cautious about people I meet. I met someone from Pakistan and I have his card. But now I am choosing to get rid of materials associated with him because he’s in the Middle East.”

An interviewee describes how seeing their every action as surveilled and subject to criminalization discourages any and all political activity:

“It’ll be easier for me to hang out and drink beers instead of being passionate and political ... At this point I assume the FBI will know whatever I do: [so I always think] Is this worth it being on my FBI file?”

Perhaps the most chilling impact on political consciousness is the discouragement to be associated with critical ideas and practices. This was discussed by many of our interviewees with regard to the case of Ward Churchill.

“Anyone associated with Ward Churchill is contaminated. If you honestly come out and say “I think that Ward was right” you’re a pariah....”

How surveillance impacts social movement organizations

“...and you’re trying to communicate with millions of people...”

The organizations we studied included formal organizations, like churches and nonprofit 501c3 organizations. Much social movement work happens outside formal organization, in various informal groupings. Our study included temporary groups organized around events (affinity groups and event conveners) and informal but long-term community groups.

The first way that our interviewees explained their organizations being affected by surveillance is the experiential aspects of general criminalization. They were subject to surveillance implying criminality when they were not involved with anything illegal. Weekly meetings were criminalized, watched, patrolled. This gives the message to groups and activists that “not only are we watching you, but everything you’re doing is wrong.” An interviewee described police activity:

“they drive by on a regular basis...[Sometimes they are] out of their cars walking down the block writing down plate numbers. This intimidates people from coming to our meetings.”

Another explained

“We barely did anything and got fucked with by the cops...It affects peoples motivation. They become apathetic, depressed, alcoholics. Depression and alcoholism are on the up and up. Political activism is on the down and down.”

Surveillance sullies the reputation of organizations – this is the public relations function of criminalization. Without any prosecution having occurred, potential participants, donors, and supporters perceive an organization as criminal. Social justice groups that are part of religious congregations found that their reputation for surveillance damaged their relation with their communities:

“If we were being watched and beat up, then there must be something not right about what we’re doing... As if we’re not really [religious people]...Our reputation was tainted. If the police don’t trust you, something must be wrong with you.”

As recognized by Boykoff 2006, Cunningham 2004, Davenport 2005, Marx 1970, 1974, 1979, 1988 and Flam 1998, organizations under surveillance tend to shift their agenda from projects to self-defense. Interviewees described this repeatedly as “a distraction”. An interviewee states

“what I want to be doing is on the street holding a sign and doing my protesting. But we got pulled off into being concerned with countersurveillance.”

An interview observes that the new leadership of their group

“avoids anti-war and anti-military and protest. But we’ve always been about war and peace and nonviolence!”

Other organizations described their struggles against the criminalization or

restriction of demonstrations. The most striking example of this shifting agenda was a church we interviewed whose governing board was so spooked by surveillance that they curtailed charitable donations from their endowment. Interviewees expressed their shock that the church failed even to give money for aid after Hurricane Katrina.

Even once the immediate self-defensive activity is over, the agenda of the organization may be permanently shifted. A long-time board member of a 27 year-old peace and justice organization reflected on the effects of overt surveillance 6 years after it happened.

“It's scared us from sponsoring events...My sense is we would have been much more active against the war. As an organization we've avoided initiatives... We've participated in other groups' events, [holding] banners... I think we've stayed away from contentious issues. We haven't said anything about immigration or about the war.”

We were very surprised to find widespread chilling of internal communication in organizations. Regardless of the legal status of the activities they participate in, nearly all of the groups we interviewed have reduced their use of email and telephone, have instituted “complicated” communications systems, or try to have their meetings in person. Typically, a pacifist group explained

“We did not use email at all, for anything. We set our meetings at rotating locations and everybody knew where the meeting was going to be. We wouldn't communicate by phone.”

An interviewee joked self-deprecatingly,

“It totally changes the character of any conversation. ‘Do you remember that meeting we talked about last week? Well it's happening tonight. What's it about? I'll tell you later.’”

Interviewees were quick to point out how much this “slows us down.” Because of the difficulty in communicating, “things that take a lot of planning don't ever happen.”

Conclusion

As we have shown, current surveillance is an alarming threat to mobilizations (constitutionally protected assemblies) and social movement organizations (protected associations). Our findings about the post-Seattle era are consistent with studies of previous eras (Marx 1970, 1974, 1979, 1988, 1992, Flam 1998, Churchill and Vander Wall 1990, 2002, Donner 1980, 1990, Schultz and Schultz 1989, 2001, Powers 1987, Cunningham 2004, Davenport 2005, 2006, Boykoff 2006) with the enhancements of technology and influenced by the current popular leniency for policing and criminalization. Readers may be surprised by the broadbased nature of current surveillance and by the inclusion of pacifist organizations among targets. However, as

Cunningham (2004) has documented, the lack of criminal standard or test is nothing new. And Donner (1990) traces the recent history of “terrorist” accusations against pacifist organizations to the early 1980s targeting of anti-nuclear, anti-death penalty, and Latin American solidarity organizations by local police, as well as federal agencies. Disruptive counterinsurgent activity against organizations which have not meet a criminal standard, was officially forsworn with the closure of COINTELPRO. Yet these same acts are now undertaken by a network of law enforcement organizations.

We are concerned by social movement organizations’ persistent attempt to rationalize surveillance and repression. Rather than opposing government repression, too many organizations work to reinforce a hard line between legal and illegal political activities (a distinction also claimed by the organizations who refused interviews on these grounds), expending extensive resources in “careful wording” which they believe will keep them safe. This conceptual framework simply does not correspond with scholarship on surveillance, which documents a long and continuing history of targeting of non-criminal organizations on the basis of their political ideas. Lack of clarity about who is targeted for surveillance has led to a rationalization of repression, taking the form of blaming young people for their repression (particularly for “provoking” police actions at protests); and little support for “Green Scare” defendants and others facing illegal investigations, “terrorist” indictments, absurd bonds, and decades-long sentences for non-violent political activities. Rationalization collaborates with the creeping criminalization of dissent and political activity.

As shown above, the impacts of surveillance on associations included: fundraising, relations with members, reputation and connections with allies, redirection of agendas, displacement of strategic framing, and foreclosure of space for civil disobedience. Interviewees’ quantification of activists who have dropped out due to surveillance was striking. Moreover, rather than finding the customary dualism in which hardcore activists become more militant while others become more moderate. (Lichbach 1987, White 1989, Tarrow 1998, Zwerman & Steinhoff 2005) we found signs of pervasive pacification. In lieu of going “underground” to continue their actions (Davenport 2006, Johnston 2005, Zwerman et. al. 2000), organizations are abandoning “grey area” civil disobedience activities and moving toward doing exclusively educational and permitted activities. Yet, knowing that even educational events are under surveillance, organizations do not feel safe even undertaking this most pacific type of action, increasing the risk and burden on groups wishing to participate in democratic dialogue. We heard reports from all types of groups that strategic and ideological dialogue has been both reduced and self-censored.

We were most alarmed to find security culture displacing organizing culture in most groups, including peace groups, pacifist groups, and other groups who only do legal activities. Activists concerned about creeping criminalization of grey and formerly legal activity take extreme precautions, foregoing inclusivity and destroying all written records of their work. Groups also reported not taking notes at meetings. “We’re afraid to have a piece of paper with anything written on it at the end of any meeting.” Many interviewees, having internalized suspicion of undercovers, said that they don’t want to be seen writing anything down, as it would make them look as if they are surveilling the meeting. Moreover, concerned about future investigations, they do not keep diaries. This lack of archiving is the destruction in advance of the history of the movement, with implications for social movements’ capacity for active

reflexivity. Moreover, affiliations become more temporary and less committed, with the result that “I’ve noticed a big shift from long term strategizing and community building.”

Conservative decisions on the part of activists and organizations are understandable in light of the costs of surveillance to organizational resources. The government provides no administrative mechanisms of accountability for false accusations, improper or unwarranted investigations, or erroneous surveillance. One organization that was illegally searched spent more than 1500 hours of volunteer time dealing with the fallout for their membership and relations with other organizations. Their lawsuit for damages took 5 years to resolve. Of the 71 organizations in our study, only two had managed to take legal action regarding surveillance. Our findings indicate that the harm suffered by political organizations and individuals as a result of widespread surveillance, infiltration, and documentation is legally cognizable and not at all speculative (cf. ACLU-NCA 2005), suggesting that legal standing can be established to overcome the burdens raised by the case of *Laird v. Tatum*, 408 U.S. 1 (1972).

Based on our reading of Cunningham (2004) and our data, we conclude that much current law enforcement surveillance is more properly conceptualized as counterinsurgency. The implementation of counterinsurgency (whose destructiveness is well-established) against a social movement (whose agenda is well known to be noncriminal) violates the fundamental protections of the First Amendment (which is the foundation of a democratic society, variously conceptualized as a marketplace of ideas, a context of free debate and dissent, or self-governance).

Our socio-legal analysis encourages a shift in the unit of analysis and litigation from individual activists and organizations to the context of diverse associational activities which make assembly possible: the social movement. If a social movement could gain standing as a class, it could include event participants who are not members of an organization, as well as dissenters who may have never taken action because of anticipatory conformity. The concept of social movements can bind overt repression, indirect interference (with fundraising, networks, etc.), and intimidating chilling effects.

We also point to the need for a legal concept which could provide the basis for complaints regarding violations of the rights of political organizations and movements. Melucci emphasizes “collective action as a social production, as a purposive, meaningful and relational orientation.” (1996, p. 386) Associational life depends on membership, donations, and access to space in which people feel comfortable engaging political ideas. Assaults on organizations that deprive them of resources and democratic space, and which burden potential participants with excessive risk, amount to what is understood on an individual level as assault or excessive use of force. If private enterprise is protected by tort law from libel, denial of service, interference with customer access to premises (tortious interference), then nonprofit organizations and civil society groups should also be protected from interference with advantageous relationships that affect their resources, capacity to mobilize them, and opportunity to compete in the marketplace of ideas.

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