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## The New State of Surveillance: Societies of Subjugation

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# The New State of Surveillance: Societies of Subjugation

Khaled Ali Beydoun\*

## *Abstract*

*Foundational surveillance studies theory has largely been shaped in line with the experiences of white subjects in western capitalist societies. Formative scholars, most notably Michel Foucault and Gilles Deleuze, theorized that the advancement of surveillance technology tempers the State's reliance on mass discipline and corporal punishment. Legal scholarship examining modern surveillance perpetuates this view, and popular interventions, such as the blockbuster docudrama *The Social Dilemma* and Shoshana Zuboff's bestseller *The Age of Surveillance Capitalism*, mainstream the myth of colorblind surveillance. However, the experiences of nonwhite subjects of surveillance—pushed to or beyond the margins of these formative discourses—reflect otherwise.*

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*By disrupting surveillance theory and pushing it beyond the white subject and the West, this Article introduces the “society of subjugation” as a rebuttal. First, society of subjugation theory demystifies the colorblind presumption that advancements in surveillance technology humanize the State’s administration of it by diminishing reliance on mass discipline and punishment. Second, this unchecked deployment of digital surveillance in authoritarian states is intended to subjugate minority groups marked as oppositional, a form of collective discipline and punishment that supersedes social control—as critical scholars examining racialized surveillance in the United States have argued. Through its focal case study of Uyghur surveillance in China, this Article analyzes how state administration of digital surveillance blurs the mandates of mass control, discipline, and punishment into a state ensemble of subjugation.*

*Further, this Article builds on surveillance literature by arguing that the salient locus of state surveillance may be racial identity, but, depending on the political context, may fixate on other forms of subaltern identity such as religion, sexual orientation, gender, and their intersections. In turn, this expands scholarly analysis and attention to other groups stigmatized by the rising tide and deepening gaze of digital surveillance—a phenomenon unfolding on a global scale.*

### Table of Contents

INTRODUCTION .....	771
I. SURVEILLANCE SOCIETIES.....	780
A. <i>On Punishment, Discipline, and Control</i> .....	781
1. Technology’s Humanizing Effect?.....	782
2. Surveillance Society Stages .....	784
B. <i>Racialized Surveillance</i> .....	790
C. <i>Building on Browne and Blackness</i> .....	793
II. SOCIETIES OF SUBJUGATION .....	796
A. <i>Definition</i> .....	797
B. <i>Theory</i> .....	800
C. <i>Distinctions</i> .....	803
III. (UN)MADE IN CHINA .....	806
A. <i>Uyghur Identity and Society</i> .....	807
1. A Muslim Minority .....	807
2. Han Supremacy .....	810

B.	<i>From Criminals to Terrorists</i> .....	813
1.	“War on Terror” Interest Convergence.....	813
2.	“Strike Hard on Terror” .....	816
3.	Engineering Subjugation .....	820
IV.	DIGITAL ARCHITECTURES OF SURVEILLANCE .....	823
A.	<i>The Digital Panopticon</i> .....	823
1.	“Smart City” Policing .....	824
2.	Facial Recognition Software .....	827
3.	Smartphone Tracking .....	830
4.	Beyond Chilling .....	833
B.	<i>China’s Global Surveillance Footprint</i> .....	836
1.	Uganda and Sexual Minorities .....	836
2.	Egypt and Its Dissidents.....	839
C.	<i>Beyond Subjugation, Subordination and Control</i> .....	842
	CONCLUSION.....	844

## INTRODUCTION

*Every breath you take,  
Every move you make . . .  
Every step you take,  
I’ll be watching you.*

The Police<sup>1</sup>

“I was arrested on 22 May 2017. The statement says that I’m a terrorist.”<sup>2</sup> Before her arrest, the state tracked every terrestrial and virtual footstep Jelilova Gulbahar left behind.<sup>3</sup> Every online purchase and social media exchange, every phone conversation and checkpoint stop, supplied the state with a fluid stream of data; data fed into a policing algorithm that led to

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1. THE POLICE, EVERY BREATH YOU TAKE (A&M Records 1983).

2. Julia van den Muijsenberg, *Uyghur Camp Survivor: ‘The Chinese Guards Laughed, Checking Our Naked Bodies. We Couldn’t Even Cry’*, INT’L ANGLE (Jan. 9, 2020), <https://perma.cc/W4CP-MLQ5>.

3. See Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://perma.cc/C5LP-VY5W> (“[D]ocuments and interviews show that the authorities are also using a vast, secret system of advanced facial recognition technology to track and control the Uighurs, a largely Muslim minority.”).

Jelilova's identification as a "terrorist."<sup>4</sup> Like millions before her and the millions more that will follow, "the yellow square around her face on the screen indicated that she had . . . been deemed a 'pre-criminal.'"<sup>5</sup>

Immediately after her arrest, Jelilova was taken to a concentration camp.<sup>6</sup> There, she learned that more than one million people were detained inside of China's network of 1,200 prison camps.<sup>7</sup> The inner sanctums of these camps were theaters of mass discipline and ghastly punishment, which, for Jelilova, began with the removal of her hijab.<sup>8</sup> Prison guards cackled as they replaced the Islamic headdress with a freshly shaven head.<sup>9</sup> After that initial "dignity taking," Jelilova was escorted into a cell where she met other women arrested on terror charges.<sup>10</sup> The majority of them were Uyghur; all of them were Muslims.<sup>11</sup>

Days in the prison blended together until they blurred into one. "In the morning we had one minute each to use the bathroom. If we used it longer, we got punished," she shared.<sup>12</sup> Following the bathroom drill, Jelilova and the other inmates

4. Muijsenberg, *supra* note 2. See DARREN BYLER, *IN THE CAMPS: CHINA'S HIGH-TECH PENAL COLONY* (2021) [hereinafter *IN THE CAMPS*] for a trenchant examination of the cutting-edge technologies the Chinese Government currently employs to persecute the Uyghur and other ethnic Muslims in China.

5. *IN THE CAMPS*, *supra* note 4, at 11.

6. *See id.*

7. Nick Cumming-Bruce, *U.N. Panel Confronts China over Reports that It Holds a Million Uighurs in Camps*, N.Y. TIMES (Aug. 10, 2018), <https://perma.cc/V279-72AA>. The number of Uyghur and ethnic Muslims imprisoned in Chinese camps could be as high as two million. Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELS., <https://perma.cc/7BXC-FGSD> (last updated Mar. 1, 2021, 7:00 AM) (providing the number imprisoned); Sheena Chestnut Greitens et al., *Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang*, 44 INT'L SEC., Winter 2019, at 9, 10 [hereinafter *Counterterrorism and Preventive Repression*] (providing the number of concentration camps).

8. Muijsenberg, *supra* note 2.

9. *Id.*

10. *Id.* See Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796, 817 (2016), in which the author defines a "dignity taking" as the stripping of humanity that accompanies the taking of property.

11. Muijsenberg, *supra* note 2.

12. *Id.*

were forced to sing Communist Party jingles: “Long live the Communist Party” and “I love China.”<sup>13</sup> After weeks, the Mandarin lyrics rolled from her tongue and muted the native Uyghur she was restricted from speaking.<sup>14</sup> These imposed disciplines were designed to treat the “illness,” and systematically “wash clean the [captives’] brains” of it.<sup>15</sup> Their ailment?<sup>16</sup> The very ethnic and Muslim identity that defines who Jelilova and fourteen million Uyghur in Xinjiang are and, in a surveillance society designed to subjugate them, struggle to remain.<sup>17</sup>

But the middle-aged Uyghur woman and the vast majority of the prisoners were no *terrorists*. That word was stripped of its meaning and deployed by the State to suppress a people long cast as oppositional and subversive.<sup>18</sup> The State deployed counterterrorism law to intensify its crackdown on the Uyghur—behind the curtains of the camps and the digital walls

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13. *Id.*; see David Stavrou, *A Million People Are Jailed at China’s Gulags. I Managed to Escape. Here’s What Really Goes on Inside*, HAARETZ (Oct. 18, 2019), <https://perma.cc/BS5G-KCZ6>.

14. Muijsenberg, *supra* note 2.

15. Adrien Zenz, “Wash Brains, Cleanse Hearts”: *Evidence from Chinese Government Documents About the Nature and Extent of Xinjiang’s Extrajudicial Internment Campaign*, J. POL. RISK (Nov. 24, 2019), <https://perma.cc/2DJY-DAJ7>.

16. Sigal Samuel, *China Is Treating Islam Like a Mental Illness*, ATLANTIC (Aug. 28, 2018), <https://perma.cc/YQT4-MZHB>.

17. See Maya Wang, “Eradicating Ideological Viruses”: *China’s Campaign of Repression Against Xinjiang’s Muslims*, HUM. RTS. WATCH (Sept. 9, 2018), <https://perma.cc/C5L8-V3SG>. Xinjiang is also referred to as “Xinjiang Uyghur Autonomous Region.” See *Xinjiang Uyghur Autonomous Region*, AMNESTY INT’L, <https://perma.cc/9ZYF-X37E>. For purposes of brevity, this Article will refer to the disputed territory as Xinjiang. For a comprehensive history of the territory, see JAMES A. MILLWARD, *EURASIAN CROSSROADS: A HISTORY OF XINJIANG* (2007).

18. See Jean Seaton, *Why Orwell’s 1984 Could Be About Now*, BBC (May 7, 2018), <https://perma.cc/88R9-A6S7> (“[T]he greatest horror in Orwell’s dystopia is the systematic stripping of meaning out of language. The regime aims to eradicate words and the ideas and feelings they embody.”).

that surrounded Xinjiang.<sup>19</sup> Eventually, Jelilova confessed to the charge of terrorism.<sup>20</sup>

The global War on Terror legitimized that charge and intensified the “Han” supremacist campaign to suppress and stamp out the Uyghur.<sup>21</sup> Supplemented by domestic counterextremism laws and the regime’s “Strike Hard on Terror” campaign, Xinjiang has been reengineered into a postmodern Panopticon that tracks every breath and mines every move of its Uyghur Muslim captives.<sup>22</sup> The new policing technologies that extend Beijing’s eyes into every facet of Uyghur life are the building blocks of China’s new state of surveillance, where the threat of incarceration looms alongside a society characterized by total “e-carceration”<sup>23</sup>—a society in which predictive algorithms, tracking software, and facial recognition cameras are planted throughout the province, and

19. See Khaled A. Beydoun, *Exporting Islamophobia in the Global “War on Terror”*, 95 N.Y.U. L. REV. ONLINE 81, 93–96 (2020) [hereinafter *Exporting Islamophobia*], for an examination of how the American War on Terror facilitated the Chinese regime’s crackdown on the Uyghur under the banner of counterterrorism.

20. See Muijsenberg, *supra* note 2 (“For a day and a night, they interrogated while I was locked in this chair. Then they forced me to sign a false confession.”); see also GEORGE ORWELL, 1984, at 232 (1949) (“He became simply a mouth that uttered, a hand that signed whatever was demanded of him. His sole concern was to find out what they wanted him to confess, and then confess to it quickly, before the bullying started anew.”).

21. See *infra* Part III.B.1. The Han are the largest ethnic group in China, comprising roughly 91 percent of the population. See *Who Is Chinese?: The Upper Han*, ECONOMIST (Nov. 19, 2016), <https://perma.cc/22EN-8ABW>.

22. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF A PRISON 205 (1975) (describing the Panopticon as a “cruel, ingenious cage”). A “Panopticon” is form of prison designed to maintain continual surveillance of the captives. JEREMY BENTHAM, PANOPTICON 60–64 (1791); see Ross Andersen, *The Panopticon Is Already Here*, ATLANTIC (Sept. 2020), <https://perma.cc/N3ZJ-ZYPX> (examining President Xi Jinping’s use of A.I. technology to police Xinjiang’s Uyghur). For an accessible account of the establishment and expansion of the Chinese surveillance state across the country, see KAI STRITTMATTER, WE HAVE BEEN HARMONIZED (2020).

23. Legal scholar Chaz Arnett defines “e-carceration” as “electronic correctional surveillance, such as electronic ankle monitors” that “seeks to encapsulate the outsourcing of aspects of prison into communities under the guise of carceral humanism: the repackaging or rebranding of corrections and correctional programming as caring and supportive, while still clinging to punitive culture.” Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 645 (2019) [hereinafter *From Decarceration*].

rooted inside the devices that accompany the Uyghur wherever they go.<sup>24</sup>

Far more than cogs of a novel “surveillance capitalism” machine,<sup>25</sup> these surveillance technologies form the prevailing architecture of policing in Xinjiang—and societies beyond—where modern policing is remaking new orders of digital surveillance.<sup>26</sup> These digital tools form the new surveillance sites where punishment, discipline, and control ominously blur into one.

\* \* \*

On January 26, 2020, Netflix premiered *The Social Dilemma*.<sup>27</sup> The docudrama highlighted the dangers posed by surveillance capitalism and, specifically, the Artificial Intelligence (A.I.) technology that drives it.<sup>28</sup> The film sounded an alarm against the enveloping impact A.I. has on modern life and, even more piercingly, its capacity to reshape human behavior.<sup>29</sup> Through A.I., “surveillance intermediaries” like Google and Facebook have remade our smartphones into “one way mirrors” that mine our data for capital ends.<sup>30</sup> They then

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24. China has an estimated 200 million surveillance cameras throughout its territory, “four times as many as the United States.” Paul Mozur, *Inside China’s Dystopian Dreams: A.I., Shame and Lots of Cameras*, N.Y. TIMES (July 8, 2018), <https://perma.cc/DP2J-T38H>.

25. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

26. See Paul Triolo & Kevin Allison, *The Digital Silk Road: Expanding China’s Digital Footprint*, EURASIA GRP. (Apr. 9, 2020), <https://perma.cc/7C7X-TCN3>.

27. THE SOCIAL DILEMMA (Netflix 2020).

28. See Devika Girish, *‘The Social Dilemma’ Review: Unplug and Run*, N.Y. TIMES (Sept. 9, 2020), <https://perma.cc/6V73-MZX8> (explaining that the movie reveals how social media companies engage in “manipulation of human behavior for profit”).

29. See *id.*

30. ZUBOFF, *supra* note 25, at 80–81. Legal scholar Alan Z. Rozenstein defines “surveillance intermediaries” as “companies like Apple, Google, and Facebook that dominate digital communications and data storage and on whose cooperation government surveillance relies.” Alan Z. Rozenstein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 99 (2018).



(re)make us, with phones in hand wherever we go, into addicted engines that drive the new surveillance capitalism economy.<sup>31</sup>

Digital surveillance is more threatening for over-policed groups, like Black or Muslim communities, whose collected data is frequently resold to government agencies for the purpose of surveilling them.<sup>32</sup> Further, police departments are adopting these technologies to make law enforcement more “efficient,” particularly in already-over-policed communities.<sup>33</sup> The mining technology driving “Big Data Policing” is *predictive* and being rapidly mainstreamed into the policing strategies of law enforcement departments in the United States, China, and countries beyond and in-between.<sup>34</sup>

However, in China and other states trending toward authoritarian-style policing, Big Data Policing is far more than a novel frontier of surveillance with designs of deepening social control. It is a system of *subjugation* wielded by the state to deepen its authority and eliminate its opposition. The objective is more sinister and supersedes the end of controlling citizens—by eliminating subjects. This Article probes the human costs associated with emerging surveillance technologies

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31. See ZUBOFF, *supra* note 25, at 81 (describing Google’s enabling practices that access behavioral data).

32. For example, the U.S. military purchased the data of 98 million Muslim users of a popular prayer app for counterterrorism purposes. See Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, VICE NEWS (Nov. 16, 2020, 10:35 AM), <https://perma.cc/A2UM-KZJM>.

33. See Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. (forthcoming 2022), for a comprehensive analysis of how algorithm-driven policing disproportionately harms poor communities of color and excludes these communities from the enterprise of designing policing algorithms. See Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503 (2018), for an analysis of how pre-trial algorithms are used to assess the flight risk of defendants and are disproportionately enforced against defendants of color, and Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017), for an examination of how sentencing judges use algorithms to determine a defendant’s eligibility for a non-prison sentence.

34. For a comprehensive account of “Big Data Policing,” which is the use of modern technology to facilitate criminal policing, see ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017) [hereinafter *THE RISE OF BIG DATA*]. See Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015), for an analysis of how law enforcement departments employ algorithms to forecast and assess criminality.

that target subjects living beyond the shield of privacy and its buffer of constitutional protection.<sup>35</sup> Moreover, this Article asks: what are the risks when the subject being mined of her data is Jelilova in Xinjiang instead of Jennifer in Palo Alto?<sup>36</sup>

By introducing a new theoretical framework for understanding surveillance within “societies of subjugation,” this Article grapples with these and other questions tied to race, religion, identity, and emerging fronts of digital surveillance designed to persecute subaltern groups.<sup>37</sup> Further, theorizing surveillance from the vantage point of non-white identity challenges longstanding presumptions that render minority experiences marginal or invisible and builds on legal scholarship examining the impact of “Big Data” policing on communities of color by thinking about its enforcement beyond race.<sup>38</sup>

First, society of subjugation theory demystifies the colorblind presumption that advancements in surveillance technology humanize state administration by diminishing reliance on mass discipline and punishment. Second, this unchecked deployment of digital surveillance in authoritarian

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35. For a critical assessment of modern surveillance in the United States, see Henry A. Giroux, *Totalitarian Paranoia in the Post-Orwellian Surveillance State*, TRUTHOUT (Feb. 10, 2014), <https://perma.cc/C9XA-AXA3>. See generally Jeffrey L. Vagle, *Furtive Encryption: Power, Trust, and the Constitutional Cost of Collective Surveillance*, 90 IND. L.J. 101 (2015) (cautioning against the constitutionality of post-9/11 mass surveillance).

36. See Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 127 (2017) (“Data mining is the use of machine learning techniques to find useful patterns and relationships in data. It works by exposing a machine learning algorithm to examples of cases of interest with known outcomes.”).

37. “Societies of subjugation” are a type of surveillance society in which the state wields sophisticated technology to form a digital surveillance architecture designed to persecute, and then stamp out, an oppositional group. Societies of subjugation are distinct from what French philosopher Gilles Deleuze dubs “societies of control” in which corporations like Google and Facebook are the principal makers of surveillance and social control. Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3, 5–6 (1992).

38. For a definition of “Big Data,” see Kurt Iveson & Sophia Maalsen, *Social Control in the Networked City: Datafied Dividuals, Disciplined Individuals and Powers of Assembly*, 37 SOC’Y & SPACE 331, 332–33 (2018), which defines it as “data that are being produced at scales and rates previously unseen and which can only be analyzed algorithmically and underpinned by a rationale of increased efficiency and cost-effectiveness.”

states is intended to subjugate minority groups marked as oppositional, a form of collective discipline and punishment that supersedes social control—as critical scholars examining racialized surveillance in the United States have argued.<sup>39</sup> Through its focal case study of Uyghur surveillance in China and of China’s expanding digital footprint beyond Xinjiang, this Article analyzes how state enforcement of digital surveillance blurs the mandates of mass control, discipline, and violence into a state ensemble of subjugation.

Beyond race and racism, the disciplinary and punitive effects of digital surveillance are determined by the character of the state and the policies it enacts against targeted groups to justify that surveillance. By theorizing beyond the prism of whiteness and the West, this Article builds on surveillance literature by arguing that the salient locus of state surveillance *may* fixate on race and racism, but, depending on context, turns to other “subaltern identities” including religion, sexual orientation, gender, political affiliation, social group, and their intersections.<sup>40</sup>

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39. Simone Browne describes racialized surveillance as “a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race and exercise a power to define what is in our out of place.” SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 16 (2015) (internal quotations omitted). Racialized surveillance “reify[ies] boundaries, borders, and bodies along racial lines,” often producing unequal and discriminatory outcomes. *Id.* For instance, Chaz Arnett, who is widely cited in this Article, observes that “[s]urveillance must be understood as a powerful tool of control” when considering racialized surveillance against communities in the United States, using Baltimore, Maryland as a case study. Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1142 (2020) [hereinafter *Race, Surveillance, Resistance*]. This Article and the subjugation society frame demonstrate how state surveillance against minority groups in authoritarian states aims to impose harms that supersede the threshold of social control.

40. This Article defines “subaltern” as communities or groups subordinated along identity lines not only by race, but also by religion, class, sexual orientation, and more. In line with this Article’s focus on identity beyond race and racism, “subaltern” is a useful term encompassing the germane myriad of subordinated identity markers. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1298 (1991) (describing the “myriad ways” that individuals within certain identities “have been systematically subordinated”).

Legal scholars have highlighted the centrality of context in determining the scale of surveillance deployed by state actors.<sup>41</sup> This Article broadens this frame beyond race, racism, and the West to reveal how the scale of surveillance is intensified in authoritarian contexts in which the legal constraints are thin or entirely nonexistent. In addition, by examining the subjugation society in relation to a population underexamined by legal scholars, this Article builds on the Author's formative work on Islamophobia by introducing the emerging tentacle of "digital Islamophobia"—deployed variably against Muslim communities in the United States and, with the War on Terror protracting into a third decade and into new countries, Muslim populations all over the world.<sup>42</sup>

This Article proceeds in four parts. Part I analyzes formative surveillance theory and its attendant surveillance society typology. It then examines the rebuttals of critical scholars, most notably Simone Browne and critical race tech scholars, who interrogate how colorblind surveillance theory overlooks the distinct surveillance experiences of Black subjects.

Part II introduces the society of subjugation and its attendant theoretical framework as a rebuttal building on colorblind and racialized surveillance theory. It then theorizes how digital surveillance in a subjugation society capitalizes on the ensemble of punishment, discipline, and control to achieve its political objective of subjugation—a condition of collective

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41. See Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 507 (2019), for an examination of how risk assessment tools were spawned and then enforced on communities marred by structural racism, poverty, and over-policing.

42. See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 28 (2018) (defining Islamophobia "as the presumption that Islam is inherently violent, alien, and unassimilable, a presumption driven by the belief that expressions of Muslim identity correlate with a propensity for terrorism"); see also Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CALIF. L. REV. 1463, 1494–99 (2016) (examining how counter-radicalization surveillance is disproportionately enforced against poor, Black and Brown Muslim populations in the United States). "Digital Islamophobia" is the use and administration of Big Data Policing philosophy, strategy, and tools to carry national security policing, guided by the presumption that expressions of Muslim identity are presumptive of terrorism.

injury that supersedes the threshold of social control and its attendant effect of subordination on marginalized groups.

Part III turns to this Article's focal case study—the Uyghur in Xinjiang—and analyzes the political and legal mechanisms that facilitate the enforcement of total surveillance against the Muslim minority group.

Part IV turns to the digital architecture of surveillance China established to subjugate the Uyghur in Xinjiang, focusing on smart city policing, facial recognition cameras, and smartphone tracking as the principal tools of total surveillance. It then examines two additional cases studies, Uganda and Egypt, in which sexual minorities and political dissidents are the targets of subjugation-style surveillance administered by the State. It closes with the shape of subjugation society theory moving forward.

## I. SURVEILLANCE SOCIETIES

In the early 1970s, French philosopher Michel Foucault entrenched himself in the penal system.<sup>43</sup> His work focused on two prisons: the Neufchatel prison in Switzerland and Mettray Penal Colony in his native France.<sup>44</sup> The modern prison, Foucault concluded, had evolved into a structure of “surveillance” rather than a place of corporal detention.<sup>45</sup> He theorized,

[The prison] lays down for each individual his place, his body, his disease and his death, his well-being, by means of an omnipresent and omniscient power that subdivides itself in a regular, uninterrupted way even to the ultimate determination of the individual, of what characterizes him, of what belongs to him, of what happens to him.<sup>46</sup>

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43. See Roger-Pol Droit, *Michel Foucault, on the Role of Prisons*, N.Y. TIMES (Aug. 5, 1975), <https://perma.cc/C5VR-5UHG>.

44. FOUCAULT, *supra* note 22, at 293.

45. See *id.* at 249 (describing prison as a “place of observation of punished individuals”). This Article adopts David Lyon’s definition of surveillance, which he frames as “the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction.” DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 14 (2007).

46. FOUCAULT, *supra* note 22, at 197.

As such, the modern prison—a technology in and of itself—was as much a tool deployed for internal disciplining as it was a site of external confinement.

For Foucault, the lessons drawn from Neufchatel and Mettray were not limited to two European prisons or the penal system at large. His “birth of a prison” meant something far more, with implications far grander than the carceral state.<sup>47</sup> Through the prison, Foucault delineated the transition from societies of sovereignty to disciplinary societies<sup>48</sup>—a shift through which the walls and eyes of the metaphoric prison condition the individual to gradually become “the principal of [their] own subjugation” and, in the disciplinary society, an agent of their own confinement.<sup>49</sup>

This Part interrogates formative surveillance theory and the development of these grand surveillance theories that drive scholarly examination of surveillance. Section A focuses squarely on the works of Foucault and Deleuze, whose colloquy continues to inform the work of surveillance scholars in the law and beyond.<sup>50</sup> Section B surveys critical scholar Simone Browne’s introduction of race, namely Blackness, into this discourse. Browne’s theory of racialized surveillance sits at the apex of an expanding literature examining how race and racism shape the administration of surveillance, and how marginalized groups experience surveillance. The latter is the focus of section C.

### A. *On Punishment, Discipline, and Control*

This section examines the formative surveillance colloquy between Foucault and Deleuze, leading with their kindred presumption that advancements in surveillance technology

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47. *See id.* at 205 (describing prison’s numerous applications, including treating medical patients, instructing children, supervising workers, and putting “beggars and idlers to work”).

48. *See id.* at 203–04 (explaining the shift from using surveillance in prison to using it in general society). Given its tenuous link to modern forms of surveillance, this Article will not analyze the “Society of Punishment” in which the power to administer direct punishment was held by the ruling party or state. *See id.* at 9–10.

49. *Id.* at 203–04.

50. A “surveillance society” is an umbrella term for the enforcement and character of surveillance employed by the State on its polity.

humanize state administration of surveillance. It then proceeds with a careful analysis of the surveillance society stages derived from the two French theorists' formative works.

### 1. Technology's Humanizing Effect?

Foucault's work spurred the view that technology had a humanizing effect on the administration of surveillance.<sup>51</sup> For him, and proponents of Big Data Policing today, technology mutated the conventions of policing and punishment, providing the State with powerful tools to oversee its citizens—most notably, its deviant actors—without having to resort to arcane disciplinary and punitive measures.<sup>52</sup> This presumption holds that technology allays reliance on mass discipline and punishment—a view strengthened by the gradual development of new digital surveillance tools believed to optimize social control while diminishing reliance on prison walls, iron bars, and the corporal punishment inflicted between and beneath them in the gallows.<sup>53</sup>

Gilles Deleuze homed in on the digital remaking of surveillance and theorized how Foucault's disciplinary society at large was succumbing to a tech-driven *society of control*. He observed,

But what Foucault recognized as well was the transience of the model: it succeeded that of the *societies of sovereignty*, the goal and functions of which were something quite different (to tax rather than to organize production, to rule on death rather than to administer life); the transition took place over time, and Napoleon seemed to affect the large-scale conversion from one society to the other. But in their turn the disciplines underwent a crisis to the benefit of new forces that were gradually instituted and which accelerated after

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51. See Droit, *supra* note 43.

52. See, e.g., Andrew Guthrie Ferguson, *Big Data Policing in the Big Apple*, HUFFINGTON POST (July 15, 2014, 11:13 AM), <https://perma.cc/J2HZ-4S7G> (last updated Sept. 14, 2014) (discussing arguments in favor of data predictive policing, including an expected lower crime rate). This presumption is critiqued in relation to racialized surveillance in Part I.B.

53. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006), for a leading work on the history and structure of the traditional American carceral state.

World War II: a disciplinary society was what we already no longer were, what we had ceased to be.<sup>54</sup>

The coming of the “control society,” according to Deleuze, brought the disciplinary society to a close.<sup>55</sup> Reliance on mass discipline, he continued, would be rendered obsolete by the deepening, conditioning effect of technological control.<sup>56</sup> The telos of modern surveillance technologies, driven by policing or economic ends, was individual and collective control instead of the disciplining effect curated by state-controlled surveillance. Thus, discipline succumbed to the coming of control in the same way that discipline did away with punishment.<sup>57</sup>

Central to Deleuze’s theory is not only how surveillance technology changes society itself, but how systems of technological advancement change *man* within it.<sup>58</sup> In short, Deleuze contends that technology’s capacity to surveil and control tempered the violent inclinations of those in power; namely, the state.<sup>59</sup> However, like Foucault’s theory, Deleuze’s fell short by failing to see two salient points: first, how surveillance was differentially administered across identity lines, such as race, religion, or class; and second, how law—and the character of the state that enacted it—materially shaped the scale and severity of the administration of surveillance.

In large part, the theoretical development of the existing societies of surveillance are reflected in their generational technologies.<sup>60</sup> This baseline drives the theoretical conclusions drawn by Foucault and Deleuze. Technology, for both French theorists, shares an indirectly proportional relationship with

54. Deleuze, *supra* note 37, at 3.

55. *Id.* at 4.

56. *Id.* at 5.

57. *See id.* at 3 (detailing Foucault’s recognition of the historical transition from societies of sovereignty to societies of discipline).

58. *See id.* at 5–6 (“The disciplinary man was a discontinuous producer of energy, but the man of control is undulatory, in orbit, in a continuous network.”).

59. *See id.* at 3 (comparing societies of sovereignty, which “rule on death,” to societies of discipline, which “administer life”).

60. *See id.* at 6 (“Types of machines are easily matched with each type of society—not that machines are determining, but because they express those social forms capable of generating and using them.”).



the disciplinary and punitive administration of surveillance.<sup>61</sup> In short, technological advancement was said to reflect the need for more intimate, and violent, forms of regulation.<sup>62</sup> Violence and discipline, according to Deleuze, were arcane and thus aberrant forms of surveillance administration in the control society.<sup>63</sup> These conclusions, however, are anchored in *seeing* the subjects of surveillance as a unitary bloc of western and white targets, and in *unseeing* how the political context and demographic heterogeneity of the subjects of surveillance materially determines how surveillance is deployed and experienced.<sup>64</sup> With these variables missing from the colloquy between Foucault and Deleuze, their conjoined theories presume that technological advancement diminishes reliance on punishment and discipline. This presumption, in turn, humanizes surveillance.

It is this “progressive arc of surveillance” that undergirds the pages of Foucault’s *Discipline and Punishment* and Deleuze’s *Postscript on the Societies of Control*.<sup>65</sup> It is a conclusion that rises from a narrow focus on white subjects in western capitalist societies, which renders the experiences of nonwhite beings absent from analysis. Consequently, their conclusions fixate too strongly on the tools of surveillance and overlook the heterogeneity of the subjects and political geographies in which these tools are being administered.

Before delving fully into the critique of these conclusions in the coming section, a closer analysis of the colloquy between Foucault and Deleuze that forms this colorblind arc of humanized surveillance is necessary.

## 2. Surveillance Society Stages

Foucault’s transition from “sovereign societies” to “disciplinary societies” centered on modern structures of

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61. See, e.g., *id.* at 7 (describing the substitution of the new technology of ankle monitors for incarceration in the prison system).

62. *Id.*

63. *Id.*

64. Rozenshtein, *supra* note 30, at 99.

65. “Progressive arc of surveillance” is the presumption, formed by the colloquy between Foucault and Deleuze, that advancements in surveillance technology humanize the State’s administration of surveillance, which in turn retrenches reliance on discipline and punishment as regulatory regimes.

congregation.<sup>66</sup> For Foucault, these structures were prisons, schools, hospitals, factories, the family, and any and every unit that enclosed the individual and divided her from others.<sup>67</sup> The prison was simultaneously the principal unit of analysis and a metaphor for these disparate disciplinary structures.<sup>68</sup> Prisons stood as an architectural model that outlined the bounds of the disciplinary society and its unprecedented capacity to surveil the actions of those within them without having to resort to corporal punishment.<sup>69</sup> For Foucault, the prison was the cutting-edge technology that transformed state regulation and surveillance.<sup>70</sup>

Jeremy Bentham's *Panopticon*, the English philosopher's eighteenth-century template of the ideal prison, served as Foucault's prototype.<sup>71</sup> Foucault labeled Bentham's schematic, with an all-seeing watchtower at its center and tightly walled cells surrounding it, a "marvelous machine" that "produces homogenous effects of power."<sup>72</sup> The ubiquitous gaze of the boss, the schoolteacher, the parents, or the prison warden, all of which embody the surveillance state, make the subject perpetually aware that she is being surveilled.<sup>73</sup> This knowledge of being watched, Foucault continued, had a *disciplining* effect, conditioning the subject to obey state authority without having to dispense of the physical punishment that characterized the previous society of sovereignty.<sup>74</sup> The coming of the disciplinary

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66. See FOUCAULT, *supra* note 22, at 200–01 (listing the structures used in disciplinary societies).

67. *Id.*

68. Foucault himself shared, "If Bentham's project aroused interest, this was because it [the Panopticon] provided a formula applicable to many domains" in society. MICHEL FOUCAULT, *The Eye of Power: A Conversation with Jean-Pierre Barou and Michelle Perrot*, in *POWER/KNOWLEDGE* 146, 154 (Colin Gordon ed., 1980).

69. FOUCAULT, *supra* note 22, at 249.

70. See *id.* ("The theme of the Panopticon—at once surveillance and observation, security and knowledge, individualization and totalization, isolation and transparency—found in the prison its privileged locus of realization.")

71. See BENTHAM, *supra* note 22, at 4–12.

72. FOUCAULT, *supra* note 22, at 202.

73. See *id.* at 205.

74. *Id.*

society, theory holds, rendered punishment unnecessary and aberrant.<sup>75</sup>

Further, the disciplining effect of surveillance *automates* the individual to regulate herself. Even when she was not being watched, the design of the Panopticon and its centralized gaze made her feel like she was continuously being monitored.<sup>76</sup> This conscious belief of always being watched conditions the surveilled subject to abide by the prison's orders to avoid punishment.<sup>77</sup> This makes her a master of her own subjugation, and ultimately, according to Foucault, renders the plainly understood violence once relied on by the State unnecessary and, ultimately, obsolete.<sup>78</sup>

As a result, the disciplinary society converted the surveilled into its *co-surveillant*, simultaneously serving the master and collaborating in her own confinement.<sup>79</sup> In conversation with Foucault's conclusion that the surveilled are themselves bearers of this disciplinary surveillance, legal scholar Tawia Ansah finds that these inmates are "both subject and object of surveillance, with similar effects of power produced in both by the broader operation of the discourse."<sup>80</sup> This double consciousness of surveillance, whereby the surveilled believes that she is perpetually being monitored by the State, disciplines her behavior—gradually and lastingly—to behave within the lines of state regulation.

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75. *Id.* at 206.

76. *Id.*

77. *See id.* (describing the psychological effects of surveillance on the surveilled).

78. *See* FOUCAULT, *supra* note 22, at 202–03

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection. By this very fact, the external power may throw off its physical weight; it tends to the non-corporal; and, the more it approaches this limit, the more constant, profound and permanent are its effects: it is a perpetual victory that avoids any physical confrontation and which is always decided in advance.

79. *See id.* at 201.

80. Tawia Ansah, *Subject to Surveillance: Genocide Law as Epistemology of the Object*, 3 WASH. U. JURIS. REV. 31, 59 (2010).

The control society, the subsequent stage of societal surveillance introduced by Deleuze, accelerated the automation of the individual as a master of her own subjugation.<sup>81</sup> This is particularly the case today, when predictive algorithms serve as the lifeline of the “surveillance economy.”<sup>82</sup> Writing in 1992, Deleuze foresaw how enclosed structures of disciplinary surveillance would no longer become the exclusive sites of state power.<sup>83</sup> Nonstate surveillance intermediaries, including Google, Amazon, Facebook, and other big tech actors that burrow through their users’ information for endless streams of data, are the makers of this societal frontier.<sup>84</sup> The private character of the principal agents of surveillance marks a notable distinction from the (preceding) disciplinary society in which the State served as the central protagonist of surveillance.<sup>85</sup> In control societies, the State grows reliant on the expertise of *corporations*—the more efficient producers of surveillance technology—for access to coveted data.<sup>86</sup>

Another notable distinction is the *subject* of surveillance. The control society is one that regulates *data*, rather than corporal bodies, through the process of “datafication,” in which human habits detected by algorithms provide tech corporations with a continuous pool of data to be regulated for commercial gain.<sup>87</sup> Deleuze theorizes that through a “[n]umerical language

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81. See Deleuze, *supra* note 37, at 7.

82. “The entire logic of this capital accumulation is most accurately understood as *surveillance capitalism*, which is the foundational framework for a surveillance-based economic order: *a surveillance economy*.” ZUBOFF, *supra* note 25, at 94.

83. See Deleuze, *supra* note 37, at 6 (“The family, the school, the army, the factory are no longer the distinct analogical spaces that converge towards an owner—state or private power—but coded figures—deformable and transformable—of a single corporation that now has only stockholders.”).

84. See CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 98 (2016) for an examination of how Amazon uses collected data to identify “recidivist” consumers.

85. See, e.g., *id.* at 161–78 (describing the invasive collection of data by private insurance companies through employee wellness programs).

86. See *id.* at 84–85 (describing law enforcement’s use of privately created predictive crime models).

87. See Iveson & Maalsen, *supra* note 38, at 333 (“Consciously or unconsciously, urban inhabitants leave a digital trace of themselves and their

of control” that is “made of codes that mark access to information, or reject it[,] [w]e no longer find ourselves dealing with the mass/individual pair” of the disciplinary society, but a “dividual” who submits “masses, samples, data” to the surveilling technology.<sup>88</sup>

Thus, bodies of data are the subjects of surveillance in control societies—not corporal bodies. The individual is the producer of that data, conditioned and controlled by the seductive pull of ads, likes, engagement, images, and entertainment that push individuals to keep feeding their devices with data.<sup>89</sup> By surrendering that data, the (in)dividual submits her very freedom to the controlling device. With a learning machine at its core, the device tightens its grip on the user as it becomes more familiar with her interests and desires,<sup>90</sup> then systematically mines as much data as possible from the dividual engaging with it.<sup>91</sup>

Digitally-driven control, according to Deleuze, not only diminishes reliance on traditional prisons, but *is the new prison*. Beyond the smartphone, these mobile, digital prisons are most starkly manifested by e-carceral technologies like the ankle-monitor, which legal scholar Chazz Arnett writes, “still cling[s] to punitive culture” that is disproportionately imposed on Black subjects.<sup>92</sup>

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activities every time they interact with digital devices and infrastructure that are increasingly taken-for-granted technologies of everyday life in cities . . .”).

88. Deleuze, *supra* note 37, at 5.

89. See Iveson & Maalsen, *supra* note 38, at 333 (“At the individual level, the datafication of our daily habits creates datasets from which curated content is developed—services, news and entertainment, fitness and well-being—which is fed back to us in a self-affirming loop of our habits.”).

90. See Selbst, *supra* note 36, at 127 (describing how machine learning algorithms “find useful patterns and relationships in data” to predict outcomes).

91. See, e.g., *id.* at 128 (describing data mining by companies such as Twitter and Facebook).

92. Arnett, *supra* note 23, at 645. Arnett further articulates how the disproportionate enforcement of e-carceration on Black subjects “only perpetuates the role that the criminal justice system plays in entrenching a marginalized second-class citizenship,” rebutting the colorblind presumption that advancements in carceral technologies have a humanizing effect on the subject. *Id.* at 653.

For Deleuze, the physical walls of the prison are replaced by digital walls that control.<sup>93</sup> The prevailing order of surveillance capitalism that *The Social Dilemma* and Shoshana Zuboff's *The Age of Surveillance* cautioned against manifests the realization of Deleuze's control society.<sup>94</sup> Three decades later, the "control mechanisms" stationed throughout cities, embedded in our homes and cars, carried faithfully in our palms, and manifested by roving digital cameras convey Deleuze's prescience in writing *Postscript*.<sup>95</sup> He saw the coming of this era of surveillance capitalism decades before Zuboff articulated its ominous architecture and its embodiment within the surveillance intermediaries that propel it.

However, his colloquy with Foucault about the arc of surveillance societies, which envisions a neat transition from one order to the next—punishment to discipline to control—is itself developed through a confined scope. Foucault and Deleuze theorized surveillance within imagined societies of similarly situated, "unracialized" (white) beings.<sup>96</sup> In the process, both theorists overlooked the salience of race with regard to how surveillance was *administered* by the State and *experienced* by the subject.<sup>97</sup>

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93. See Deleuze, *supra* note 37, at 7.

94. See *supra* note 82 and accompanying text.

95. See Deleuze, *supra* note 37, at 7.

96. "Racialization" is defined as "an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle" assigned to identities in society. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (1994). White identity, in western capitalist societies, often occupies the highest rung of racial valuation. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1757–78 (1993) (discussing the property value attached to whiteness, and the legal and de facto incentives attached to passing as white).

97. In addition to the role of race, the French theorists' analysis neglected gender. See Angela King, *The Prisoner of Gender: Foucault and the Disciplining of the Female Body*, 5 J. INT'L WOMEN'S STUD. 29, 29 (2004) ("Yet despite his preoccupation with power and its effects on the body, Foucault's own analysis was curiously gender-neutral. Remarkably, there is no exploration or even acknowledgement of the extent to which gender determines the techniques and degrees of discipline exerted on the body.").

### B. *Racialized Surveillance*

“[T]he master’s tools will never dismantle the master’s house,” wrote the Black queer feminist, Audre Lorde.<sup>98</sup> She penned those words in 1984, the year in which Orwell set his dystopian novel envisioning the coming of the total surveillance society.<sup>99</sup> This “Orwellian” society, despite its *dark* outlook, imagined the people within it as homogenously white, seated in a western society remade in the dystopian image of a state of total surveillance.<sup>100</sup>

By confronting the absence of race and racism in formative surveillance theory, Simone Browne heeds Lorde’s call. Browne’s *Dark Matters: On the Surveillance of Blackness* provides vital tools to examine the impact of surveillance on non-white bodies and subaltern groups.<sup>101</sup> The established orders of surveillance, shaped by two French white men, were guided by a prism of white male normativity that, like Orwell, saw the central subjects of surveillance as white and male.<sup>102</sup> In line with that narrow worldview, Foucault and Deleuze drew high stakes conclusions about the state administration of surveillance—and even more critically, how that surveillance was broadly experienced.

While race is the salient marker of departure for Browne, Blackness—or anti-Blackness—sits at the center of Browne’s theorizing of “racialized surveillance.”<sup>103</sup> By introducing anti-Black state violence to the discourse on surveillance, Browne concludes, “[d]isciplinary power did not do away with or supplant the majestic and often gruesome instantiations of

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98. AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 112, 112 (Nancy K. Bereano ed., 1984) (emphasis omitted).

99. See generally ORWELL, *supra* note 20.

100. See Douglas Kerr, *Law and Race in George Orwell*, 29 L. & LIT. 311, 321 (2017) (“[A]ll named characters in the story seem to be white English-speaking Europeans . . .”).

101. See generally BROWNE, *supra* note 39.

102. Colorblindness presumes that systems, whether arms of the state or private, are apathetic to race or racial difference. See Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 992–96 (2007).

103. See generally BROWNE, *supra* note 39.

sovereign power,” but functioned alongside it.<sup>104</sup> Browne challenged the colorblind presumption that technological advancement invariably had a *humanizing* effect on state surveillance and softened those in power who wield it in the process. The character of the surveillance state, as Foucault and Deleuze powerfully illustrate, mattered; but so did the character of the subject of surveillance. Browne argued that advancements in surveillance technology often had the effect of inflicting *more* violence when the surveilled subjects were Black,<sup>105</sup> a conclusion that critical law scholars, whose work is examined in the coming Part, echo and build on.

In the critical race studies’ tradition, Browne uses historical examples of Black dehumanization as evidence.<sup>106</sup> Moving the subject of surveillance from the white citizen, Browne focuses on the African captive on the “maritime prison,” the enslaved woman beaten down by her oppressor before being sold on the auction block and bonded to inhuman work conditions on cotton fields, and the young Black man lynched for looking in the direction of a white woman in Antebellum Georgia—vignettes of racialized surveillance pushed beyond the bounds of the theoretical imagination of Foucault and Deleuze.<sup>107</sup> Technological advancement, for Browne and the Black bodies

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104. *Id.* at 37.

105. *See, e.g., id.* at 92 (discussing the surveillance technology of “branding not only as a material practice of hot irons on skin, but as a racializing act, where the one-drop rule was a technology of branding blackness that maintained the enslaved body as black”).

106. *See id.* at 23–24 (describing how surveillance technologies instituted during slavery “to monitor and track blackness as property” anticipated “the contemporary surveillance of racialized subjects”). Slave patrols were among the first regimes of mass surveillance in the North American colonies, and later, the United States. *See* SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 4 (2001).

107. BROWNE, *supra* note 39, at 32. *See* Khaled A. Beydoun, *Antebellum Islam*, 58 *HOW. L.J.* 141 (2015), for an examination of how slave-masters monitored the religious practices of enslaved African Muslims on plantations—a de facto prison. Legal scholar Brandon Hasbrouck echoes Browne, stating, “Since America’s founding, this assumption of dangerousness subjected free Blacks to constant scrutiny and invasion of privacy by white authorities,” and identifying how the surveillance of Blackness was spawned alongside the birth of the United States as a nation. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 *UCLA L. REV. DISCOURSE* 200, 208 (2020).



she centers, can—and systematically *did*—intensify mass punishment and discipline.

With these past chapters of Black subjugation, and the ongoing subordination of Black bodies that continues today, Browne concludes: “[B]oth formulations of power—sovereign and discipline—worked together.”<sup>108</sup> This principle of *simultaneity*—the synchronized administration of punishment, discipline, and control by state actors—forms the crux of Browne’s argument. Simultaneity is also central to this Article’s core argument, which extends Browne’s focus on Blackness to subaltern identities and, specifically, to the subjugation of the Uyghur in Xinjiang.

By interrogating the dialectic between surveillance and Blackness, Browne disrupts the progressive arc of digital surveillance proffered by Foucault and Deleuze.<sup>109</sup> Through injecting race into the surveillance narrative and centering Black subjects as the targets of surveillance, Browne unveils how advancements in surveillance technology did not temper state reliance on mass discipline and punishment but rather spurred the ensemble of the three to subjugate Black populations then, and subordinate them today.<sup>110</sup> Legal scholars continue to grapple with the colorblind theory that grips surveillance discourses, challenging the “master” discourses of Foucault and Deleuze, and building on Browne.<sup>111</sup>

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108. BROWNE, *supra* note 39, at 37. “[A]nti-Black surveillance still exists as a tool to continue those legacies of racial hierarchy through control and disruption of any efforts, demands, or movements toward racial justice.” *Race, Surveillance, Resistance*, *supra* note 39, at 1137. For a recent treatise analyzing how the entire enterprise of criminal policing in the United States reifies racial hierarchy, see Eric J. Miller, *Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy*, 89 GEO. WASH. L. REV. 1607 (2021).

109. See Megan M. Wood, Book Review, 14 SURVEILLANCE & SOC’Y 286, 288 (“*Dark Matters* should be understood as a productive disruption of theorizing-as-usual in Surveillance Studies.”).

110. See *id.* at 286 (“Browne works with an astounding amount of archival and contemporary examples to situate blackness as a primary site through which surveillance is rationalized, practiced, fixed, and resisted.”).

111. The absence of race and religion is curious, especially for Foucault, given the visible presence of Arab, African, and Amazigh inmates populating French prisons during the 1960s and 1970s that resulted from the colony-to-prison pipeline. See, e.g., Pascal Blanchard, *The Paradox of Arab France*, 21 CAIRO REV. 62, 67 (Amir-Hussein Radjy trans., 2016) (detailing the arrest of “[o]ver ten thousand Algerians” in a protest against “the imposition of a curfew uniquely for French Muslims” in October 1961). While the prisons

C. *Building on Browne and Blackness*

Simone Browne's formative work on racialized surveillance inspires scholarly interventions that probe the convergence of race, surveillance, and technology. This literature confronts the progressive arc and orders of surveillance theory by shifting the gaze away from the white subject and onto racial minority groups. This, in turn, creates inroads for new theoretical frameworks that give flesh, bone, and voice to the surveillance experiences of non-white beings.

In the spirit of Browne, Safiya Umoja Noble's *Algorithms of Oppression* contests the colorblind discourses on surveillance capitalism.<sup>112</sup> Her work identifies that the predictive technologies that drive the platforms and products we consume, while they consume *us* for data and dollars, are neither racially "neutral [n]or valueless."<sup>113</sup> Rather, Noble observes, "On the Internet and in our everyday uses of technology, discrimination is also embedded in computer code and, increasingly, in artificial intelligence technologies that we are reliant on, by choice or not."<sup>114</sup>

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and gallows are flooded with these nonwhite bodies, the racial (and Muslim) identity of inmates is absent from Foucault's analysis. *See generally* STEPHEN A. TOTH, METTRAY: A HISTORY OF FRANCE'S MOST VENERATED CARCERAL INSTITUTION (2019) (providing an archival history of the prison colony).

112. *See* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1 (2018) ("While we often think of terms such as 'big data' and 'algorithms' as being benign, neutral, or objective, they are anything but.").

113. *Race, Surveillance, Resistance, supra* note 39, at 1142. Sonia M. Gipson Rankin summarizes the prevailing view that digital surveillance is colorblind, before examining how it reifies racial inequality: "The implementation of AI in legal spaces has brought great promise. An array of legal scholars, scientists, and businesses believe that embedding AI into criminal justice reform can lead the United States to a more effective and efficient, bias-free system no longer centered on entrenched historical racism." Sonia M. Gipson Rankin, *Technological Tethereds: Potential Impact of Untrustworthy Artificial Intelligence in Criminal Justice Risk Assessment Instruments*, 78 WASH. & LEE L. REV. 647, 653 (2021).

114. NOBLE, *supra* note 112, at 1. Beyond racial bias in algorithmic coding, David Lyon observed, "all forms of communication technology have a 'bias'." DAVID LYON, THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY 23 (1994); *see also* Ifeoma Ajunwa, *The Paradox of Automation as an Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1707 (2020) (contesting the notion that algorithmic bias is a "solely technical problem").

Race is not incidental to surveillance, but rather is built into surveillance technology. Ruha Benjamin's *Race After Technology: Abolitionist Tools for the New Jim Code* positions race at the center of the discussion on technology.<sup>115</sup> She offers that race itself must be understood as a form of political technology, and, further, "the employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the systems of a previous era" must be understood.<sup>116</sup> Noble and Benjamin's texts contribute to a rising literature on Big Tech that emphasizes the centrality of race and racism, and challenges the colorblind theoretical canon that grips it.

Critical law scholars have contributed considerably to the literature on surveillance and race, particularly in the context of criminal policing. Chaz Arnett analyzes how Baltimore, Maryland, has served as "a leading experimentation lab for police surveillance technologies" incubated in the heart of the city's predominantly Black communities.<sup>117</sup> Further, Arnett's work ties digital strategies of community policing to the punitive outcomes of e-carceration, arguing that digital surveillance of Black subjects exchanges traditional forms of incarceration for "electronic correctional surveillance, such as electronic ankle monitors," which inflicts novel forms of mass violence and social subordination on Black subjects.<sup>118</sup> Jessica Eaglin examines how actuarial risk assessments bring about longer sentences for offenders of color.<sup>119</sup> This subordination and maintenance of Black second-class citizenship is not limited to criminal offenders. As Justin Hansford and Etienne Toussaint observe, law enforcement officers extend this subordination to Black activists by viewing their First Amendment activity through the racialized prism of criminality and by regularly abridging such

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115. See generally RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE* (2019).

116. *Id.* at 5–6. Benjamin notes how "race itself is a kind of technology," designed and legally deployed to "separate, stratify, and sanctify the many forms of injustice experienced by members of racialized groups." *Id.* at 36.

117. *Race, Surveillance, Resistance*, *supra* note 39, at 1105.

118. *From Decarceration*, *supra* note 23, at 645.

119. Jessica Eaglin, *Constructing Recidivism Risk*, 67 *EMORY L.J.* 59, 96 (2017).

activity.<sup>120</sup> This policing has pivoted from traditional public forums to social media platforms through the enforcement of Black Identity Extremism (BIE) online to crackdown on Black activists on Facebook, Twitter, Instagram, and other sites of virtual advocacy and political organizing.<sup>121</sup>

Echoing Noble in the context of criminal policing, legal scholar Ngozi Okidegbe distills how policing algorithms deepen existing racial inequities.<sup>122</sup> Challenging the notion that “technology provides a [race-neutral and] evidence-based assessment of an individual’s statistical risk” of committing a crime, Okidegbe surveys how novel policing strategies powered by algorithms developed by white designers, but deployed against communities of color, cause the disproportionate racial inequities that they were believed to cure.<sup>123</sup> Arnett, Eaglin, Okidegbe, Bennett Capers, and a burgeoning cohort of other legal scholars are deftly demystifying the notion that algorithms, unlike their human predecessors tasked with making high stakes policing determinations, are in fact neutral or colorblind.<sup>124</sup> Rather, through design choices made by predominantly white designers, algorithms stand as innovative new tools that perpetuate the same old racism.<sup>125</sup>

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120. See Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 704 (2018); Etienne C. Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 139 (2020).

121. For an examination of how the FBI surveils Black Lives Matter (BLM) activists as putative security threats, see Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 B.U. L. REV. 1151, 1179–84 (2020).

122. Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and the Practice of Criminal Law*, 29 KAN. J.L. & PUB. POL’Y 329, 334 (2020).

123. *Id.* at 330; see *id.* at 330–35.

124. See I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241 (2017) (providing an analysis of how race retools the use of surveillance technology on non-white communities); I. Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 495 (2018) (examining the impact of cutting-edge surveillance technology on modern law enforcement). See generally THE RISE OF BIG DATA, *supra* note 34.

125. “Because the racial effects of currently employed algorithms are not endemic to the technology and stem from a series of design choices, it is worth considering whether we could redesign algorithms against the reproduction of the current racial status quo,” Okidegbe observes. Okidegbe, *supra* note 122, at 334. She proposes including members of overpoliced communities in algorithmic design teams. *Id.*

While it is rapidly developing, the legal literature examining digital surveillance focuses predominantly on race in the American experience. Reflecting the disproportionate injury inflicted on Black and Brown communities, this legal literature probes the dialectic between modern fronts of policing and race in over-policed communities of color in the United States. Recent events—most notably the Black Lives Matter (BLM) Movement, the murders of unarmed Black women and men, and the collateral developments spawned by police violence—have ignited scholarly focus on racialized surveillance. In the American experience, race and racism are the loci of state surveillance and policing, and oftentimes, the key variables that determine their scale of enforcement.

This Article builds on this literature by examining the administration of digital surveillance on communities stigmatized along lines beyond race: lines of subaltern *identity* at large. Race and racism are salient, but do not tell the whole subaltern story of surveillance, particularly in societies where race is not the principal marker of subordination. As illustrated in my previous work examining War on Terror policing and the Islamophobia it spawns, surveillance is also deployed along lines of religious identity, and, in the United States, it encroaches on the Free Exercise of Religion liberties of Muslims and on associated First Amendment activity.<sup>126</sup> In a society of subjugation, where the shelter of constitutional protection is pale or nonexistent, the injuries wrought by digital surveillance are more penetrating and perilous. These injuries are the products of a surveillance order that simultaneously inflicts punishment, discipline, and control.

## II. SOCIETIES OF SUBJUGATION

Grand theories are rooted in real places. These places *can* determine these theories' intellectual reach, spaces of relevance, scope of resonance, and, most notably, their blind spots. This is

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126. For an examination of how counter-radicalization policing infringes on the free exercise of religion, speech, and assembly rights of Muslims in the United States, see Amna Akbar, *Policing "Radicalization"*, 3 U.C. IRVINE L. REV. 809, 868–82 (2013). For an analysis of how counter-radicalization runs counter to the spirit of the First Amendment's Establishment Clause, see Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012).

particularly true for grand surveillance theories. While the Mettray and Neufchatel prisons in western Europe inspired Foucault's development of the disciplinary society, this Article is inspired by the digital architectures of surveillance constructed in Xinjiang, China—the homeland of the Uyghur. These surveillance technologies, which Chinese President Xi dubs the “sharp eyes” of the State, penetrate deep into previously unreachable spaces and corners of Uyghur life and society.<sup>127</sup> The use of cutting-edge digital surveillance tools to police targeted minorities is unfolding on a global scale.<sup>128</sup> Despite legal scholarship prioritizing its administration in the United States, societies like China host omniscient policing mechanisms inflicted by authoritarian rule that is bent not only on control but also on the accompanying designs of mass discipline and punishment.<sup>129</sup>

This Part introduces societies of subjugation into the legal literature, providing a new theoretical framework to guide scholarship grappling with the reach of new surveillance strategies and architectures. Section A begins with a definition, followed by a theoretical framework in section B, which situates the societies of subjugation within the surveillance societies typology.

#### A. Definition

The society of subjugation is a type of surveillance society in which the State wields surveillance technology to form a policing architecture designed to police, persecute, and then stamp out an oppositional minority group. Through an ensemble

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127. “In 2015, China’s National Development and Reform Commission launched a program called Sharp Eyes with the goal of achieving 100 percent video coverage of ‘key public areas’ and ‘key industries’ by 2020.” DOMINIC J. NARDI, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, RELIGIOUS FREEDOM IN CHINA’S HIGH-TECH SURVEILLANCE STATE 2 (2019), <https://perma.cc/UFM6-LEFR> (PDF).

128. See *Ethnic Minorities at Greater Risk of Oversurveillance After Protests*, PRIV. INT’L (June 15, 2020), <https://perma.cc/EC3K-HF8W> (describing over-policing of minority communities in the United States, the United Kingdom, and Sweden).

129. See NARDI, *supra* note 127, at 5 (noting that the government’s surveillance of religious behavior, houses of worship, and specific religious minorities has left many Muslims in Xinjiang afraid to attend prayer services in mosques); IN THE CAMPS, *supra* note 4.

of punishment, discipline, and control, the State administers its digital surveillance tools against an oppositional group. In so doing, the State blurs the lines of the prevailing orders of surveillance societies to achieve its political aim of subjugation.

Further, the subjugation society is driven by “strategic surveillance,” through which the State aims to shore up its authority by tracking and then repressing elements believed to challenge its authority.<sup>130</sup> This definition rests on Lawrence Lessig’s baseline view that technologies “do not *naturally and inevitably* tend,” but are “architectures [that] *tend* as we choose.”<sup>131</sup> Thus, like their preceding surveillance orders, societies of subjugation capitalize on the myriad of surveillance tools as “political technolog[ies].”<sup>132</sup> Namely, they capitalize on tools wielded to achieve desired political aims, chief of which is bolstering state power by subjugating minority groups the State marks oppositional.

Political context is key. Authoritarian regimes or states with authoritarian aspirations engineer societies of subjugation.<sup>133</sup> Thus, the State—*not* the corporation—is the principal spearhead of surveillance in a subjugation society. By contrast, the Deleuzean control society is administered by corporate management of technologies that reduce citizens into “dividuals,” simultaneously mined for data while bonded to the digital platforms that lord over them while planted in their palms.<sup>134</sup> However, there is often no meaningful private-public divide in most authoritarian states, where the rule of law (or the lack thereof) enables the authoritarian regime to wield surveillance technology in line with its repressive aims.<sup>135</sup> In

130. Sociologist Gary T. Marx defines the “conscious strategy to gather information” from an adversarial group as “strategic surveillance.” Gary T. Marx, *Surveillance Studies*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 722, 735 (James D. Wright ed., 2015).

131. Lawrence Lessig, *On the Internet and the Benign Invasions of Nineteen Eighty-Four*, in ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE 212, 220 (Abbott Gleason et al. eds., 2010).

132. FOUCAULT, *supra* note 22, at 205.

133. Oppositionality could be a bona fide threat, or alternatively, perceived or fabricated by the state to achieve its political objective of subjugation.

134. Deleuze, *supra* note 37, at 5.

135. See, e.g., Dorottya Sallai & Gerhard Schnyder, *What Is “Authoritarian” About Authoritarian Capitalism? The Dual Erosion of the Private-Public Divide in State-Dominated Business Systems*, 60 BUS. & SOC’Y

addition, collection of the individual's data is often a bridge toward seizing his or her body in the subjugation society, in turn, removing the corporal divide between control and disciplinary societies.

Again, regulation in control societies is produced by remaking *citizens* into endless pools of data. This data is funneled to corporations for the prime purpose of maximizing profits.<sup>136</sup> Conversely, in societies of subjugation, technology is used by state agencies to extend the State's reach into the private quarters and minds of the *subject* to further the regime's control—or “hypercontrol”—over her.<sup>137</sup> The legal literature examining digital surveillance and Big Data Policing focuses predominantly on control societies, and specifically the American control society, where the State collaborates with private actors to devise modern policing strategies.<sup>138</sup>

In the subjugation society, the State is the principal protagonist of surveillance and maker of policy, enabling unfettered authority over the administration of surveillance, its scale, and its reach into the lives of targeted subjects.

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1312, 1335–36 (2020) (noting how “institutionalized” corruption allows the government to use the surveillance tools embedded in bureaucracy for repressive ends, eroding the boundary between public and private).

136. ZUBOFF, *supra* note 25, at 71–97 (describing corporations' discovery that citizens “are less valuable than others' bets on [their] future behavior”).

137. See William Bogard, *Welcome to the Society of Control: The Simulation of Surveillance Revisited*, in *THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY* 55, 60 (Kevin D. Haggerty & Richard V. Ericson eds., 2003)

[N]ot merely “efficient,” it is “prefficient,” that is, it eliminates problems *before* they emerge, absolutely, before they even have the chance to *become* problems. This is hypercontrol, an ultimate resolution to the problem of efficiency, with all the techno-determinist, totalitarian, racist, imperial images associated with the phrase. It is the pre-emptive strike . . . : reaction precedes reacting, precession of reaction, finality of reaction.

138. In the western democratic context, Big Tech corporations are wholly independent of the State. See Tom Wheeler, *A Focused Federal Agency Is Necessary to Oversee Big Tech*, BROOKINGS INST. (Feb. 10, 2021), <https://perma.cc/F22L-TMN7> (“Oversight of the dominant digital platforms' broad effects on society is not possible within the existing federal regulatory structure.”). Today, they hold a competing and increasingly tense relationship with the State. See *id.*



B. *Theory*

Populations in authoritarian societies are not monolithic. Like any place else, they are diverse along racial, ethnic, religious, and converging lines. Shaping a new theoretical frame that builds on the work of Foucault, Deleuze, and Browne must begin with this acknowledgement. While the latter homed in on racial heterogeneity in the United States as a marker of difference of the surveilled subject, societies are diverse along lines that supersede race alone. This is fundamental to subjugation society theory, which holds that the State might administer the surveillance mandate of subjugation along lines of religion, sexual orientation, political affiliation, another subaltern identity, or a matrix of several markers.

Against this heterogeneity, authoritarian regimes are collectively wed to the aim of attaining the “compliance” of *everybody* in the land.<sup>139</sup> These are societies in which the State seeks to remake the polity into an undifferentiated mass of subjects. However, authoritarian societies like Egypt, Uganda, or China are more demographically heterogeneous than their presiding regimes choose to convey.<sup>140</sup> Often, this heterogeneity stands against the regime’s aim of flattening the polity into an indistinguishable mass of subjects that are disciplined to sing its praises, while groups that resist are cast as “oppositional,” “pariahs,” “terrorists,” or worse.<sup>141</sup> These indictments are the means that enable the State’s surveillance designs of subjugation.

This authoritarian project of singling out minority segments that resist the State project of homogenization gives

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139. This Article defines “compliance” with the Deleuzian principle of control, whereby the State effectively submits the polity to its will through disincentives, most notable of which are the threat of mass disciplinary and punitive action. For a detailed analysis of the deployment of surveillance as a tool of social control, see Christian Fuchs, *Surveillance and Critical Theory*, 3 MEDIA & COMMUN 6, 6–8 (2015).

140. See, e.g., *Chinese Ethnic Groups: Overview Statistics*, UNC, <https://perma.cc/W8PY-4AUB> (last updated Sept. 3, 2021) (noting fifty-six different ethnic groups in China, making up about 8 percent of China’s population).

141. See, e.g., Nathan Ruser, *Documenting Xinjiang’s Detention System*, AUSTRAL. STRATEGIC POLY INST. (2020), <https://perma.cc/8529-8BDA> (PDF) (identifying over 380 detention or “reeducation” camps that target Uyghurs and other Turkic Muslim nationalities in Xinjiang in Western China).

rise to the narrower subjugation society aim: deploying surveillance technologies to isolate groups marked as oppositional and then subjugate them until the State attains their compliance. In western democracies, like the United States or Canada, the protections that arise from citizenship buffer the harm caused by digital surveillance.<sup>142</sup> These buffers may be thinning for marginalized groups, as many of the scholars highlighted in Part I.C note, but they prevent the scale of disciplinary and punitive harms inflicted on vulnerable populations in authoritarian states.

Building on Browne and legal scholars probing modern forms of racialized surveillance, the subjugation society theory analyzes the ways in which digital surveillance is enforced to collectively discipline and punish groups because of their affiliation with an oppositional group.<sup>143</sup> While race is germane to this Article's focus, it is only one of five forms of *collective identity* that determine how the State deploys surveillance technologies against a targeted group.

Digital surveillance, and its subjugation designs in authoritarian states, is administered along identity lines that include but supersede race alone. Subaltern identity, for purposes of subjugation society surveillance, encompasses five attendant categories: (1) race or ethnicity; (2) religion; (3) nationality; (4) political opinion or affiliation; and (5) membership in a social group.<sup>144</sup> These classifications derive from refugee and asylum law, and society of subjugation theory

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142. See Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 261–65 (2018) (stating that undocumented immigrants, as noncitizens, are more vulnerable to the harmful effects of surveillance in the United States).

143. See BROWNE, *supra* note 39, at 128–29 (concluding that modern forms of surveillance and use of biometric information track with historical commodification of Blackness).

144. Christopher C. Malwitz, *Particular Social Groups: Vague Definitions and an Indeterminate Future for Asylum Seekers*, 83 BROOK. L. REV. 1149, 1149 (2018). The “membership in a particular social group” is the most indeterminable category of the five set forth in refugee and asylum law. *Id.* at 1151. American courts have struggled to accord on one consensus definition, in turn, burdening petitioners with the task of demonstrating belonging to a group persecuted on grounds of its social stigmatization. See *id.* at 1157–58. This Article embraces the ambiguity of the term as a point of potential flexibility. See *id.* for a review of the category's definitional ambiguity.

follows the logic of linking persecution to one (or more) of these categories:<sup>145</sup> the State imposes its digital surveillance capacity against a target on grounds of their membership with that group.

Groups targeted in subjugation societies often meet several of these five identity-based categories. Legal scholar Kimberlé Crenshaw famously theorized how “subordinate identities” frequently overlap and “intersect.”<sup>146</sup> This intersection exposes those with overlapping subordinate identities to the prospect of pronounced surveillance and pronounced harm.<sup>147</sup> Uyghur Muslim identity in China, examined closely in Part III.A.1, meets at least three (ethnicity, religion, and imputed political opinion) of the five grounds and, depending on the trier of fact, all five (social group and nationality).<sup>148</sup>

Thus, authoritarian regimes committed to maintaining power generally single out groups along one, or more, of these categories. Identity, then, is tied to some political charge that the State levies on the targeted group to justify surveillance: it may brand them unassimilable, dissident, threatening, subversive, or, in the global War on Terror, terrorists.<sup>149</sup> In most cases, the State will adopt the most expedient charge to justify

145. See 8 U.S.C. §§ 1158, 1101 (“To establish eligibility for asylum or refugee status under U.S. law, you must provide that you meet the definition of a refugee.”). The five asylum categories provide an instructive framework to formally think about oppositional groups. However, I am not advancing this as the lone framework, but as one of many ways to conceive of oppositional groups.

146. Crenshaw, *supra* note 40, at 1241.

147. *Id.* at 1252.

148. See SEAN ROBERTS, *THE WAR ON UYGHURS: CHINA’S CAMPAIGN AGAINST XINJIANG’S MUSLIMS* (2020), for a popular book examining the PRC’s crackdown on the Uyghur. See Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575 (2002), for a widely cited analysis of the post-9/11 racialization of Muslims.

149. See DAVID LYON, *SURVEILLANCE AFTER SEPTEMBER 11* (2003) [hereinafter *SURVEILLANCE AFTER 9/11*], for a leading treatise examining how the 9/11 terror attacks spawned wholesale formulation and enforcement of surveillance on a global scale. Further, the War on Terror merely readapted the violent tropes ascribed to Muslims and, more specifically, Muslim masculinity; the baselines of these tropes were hardly novel, as law scholar Sahar Aziz notes. “The September 11 terrorist attacks [and the War on Terror that followed] finalized a transformation of Muslim identity that had been in the making for decades and was grounded in European Orientalism.” SAHAR AZIZ, *THE RACIAL MUSLIM* 6 (2022).

the cardinal “myth of surveillance,” which holds that surveillance of the entire group is vital for national security.<sup>150</sup> This is illustrated by the War on Terror mandate to profile and police Muslims in the United States as potential terrorists, a baseline adopted by China to implement a regime of “total surveillance”<sup>151</sup> on the Uyghur in Xinjiang.<sup>152</sup>

### C. Distinctions

In addition to shifting attention away from the West, and the United States in particular, the subjugation society expands scholarly understanding of digital surveillance in four fundamental ways. First, as introduced above, this resetting reveals how identity markers beyond race may serve as the principal basis of surveillance in other nations, such as Uganda, where sexual minorities are the principal subjects of surveillance.<sup>153</sup> In Egypt, a majority-Muslim country, the Sisi Administration has focused its digital surveillance regime against the Muslim Brotherhood, a transnational political movement oriented as the regime’s greatest rival.<sup>154</sup> Both of these cases are closely examined in Part IV.B of this Article. While race stands as the focal identity variable that often

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150. See Marx, *supra* note 130, at 738.

151. Total surveillance is the optimal state of surveillance whereby a regime holds capacity to monitor every dimension of a subject’s life.

152. See SURVEILLANCE AFTER 9/11, *supra* note 149, at 109 (noting the globalized impact of the United States’ “War on Terror”).

153. See *Uganda: Stop Police Harassment of LGBT People*, HUM. RTS. WATCH (Nov. 17, 2019, 9:00 PM), <https://perma.cc/DK6B-W3JR>. Anti-homosexuality laws and surveillance have collaterally impacted heterosexual communities as well, based on stereotypical and arbitrary presumptions of homosexual activity, further feeding the hysteria off which Ugandan President Museveni feeds. *Id.*

154. The Muslim Brotherhood are a longstanding political movement, rooted in Egypt with deep ties throughout the Muslim world, that leverages an Islamic ethos to mobilize grassroots support and build power. Barbara Zollner, *Surviving Repression: How Egypt’s Muslim Brotherhood Has Carried On*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 11, 2019), <https://perma.cc/XE7G-97HE>. Sisi designated the Muslim Brotherhood, which briefly held political power with the election of longtime Muslim Brotherhood member Mohamed Morsy following the 2011 Revolution, as a terrorist organization shortly after Sisi claimed the presidency in a military coup. Ashraf El-Sharif, *The Egyptian Muslim Brotherhood’s Failures*, CARNEGIE ENDOWMENT FOR INT’L PEACE (July 1, 2014), <https://perma.cc/DP9P-AWQJ>.

dictates how the State prioritizes who and where to dedicate its surveillance resources to in the United States, other markers may be more determinative in other contexts.

Second, the deployment of digital surveillance technologies in authoritarian states is often *intended*, and designed, as Part IV illustrates, to discriminate along identity lines—instead of merely resulting in disproportionate harms along identity lines.<sup>155</sup> Even more nefariously, the State forms partnerships with corporations to develop technologies to isolate and identify the distinct physical characteristics of ethnic minorities, such as the Uyghur, to sharpen its surveillance efficacy.<sup>156</sup> Beyond racial biases written into algorithmic code, Chinese digital surveillance tools are being specifically engineered to distinguish Uyghur, Tibetans, and minority ethnic groups from the majority Han.

Third, resistance to surveillance stands as a fundamental distinction between control and subjugation societies. In the former, activists have engaged in strategic “sousveillance,” the process whereby citizens wield their devices—mainly their smartphones—to capture and then disseminate evidence of state violence and overreach.<sup>157</sup> Darnella Frazier, the seventeen-year-old who recorded the eight minutes and forty-six seconds of George Floyd’s murder, illustrates the immense power of sousveillance in western control societies.<sup>158</sup> This mode

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155. Subjugation societies could even deepen these lines, create new ones, or shift how we think about existing racial or ethnic categories.

156. See, e.g., Drew Harwell and Eva Dou, *Huawei Tested AI Software That Could Recognize Uyghur Minorities and Alert Police, Report Says*, WASH. POST (Dec. 8, 2020), <https://perma.cc/XY2L-6NR2>.

157. See BROWNE, *supra* note 39, at 54–55 (discussing “sousveillance” in the context of runaway slaves using makeup and creating aliases to pass as white and avoid capture). Scholars have also described this activism of sousveillance as “watching [the State] from below.” Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, 2013 I.E.E.E. INT’L SYMP. ON TECH. & SOC’Y 1, 3 (2013). Journalist Jascha Hoffman defines sousveillance as a “reverse tactic: the monitoring of authorities . . . by informal networks of regular people, equipped with little more than cellphone cameras, video blogs, and the desire to remain vigilant against the excesses of the powers that be.” Jascha Hoffman, *Sousveillance*, N.Y. TIMES MAG. (Dec. 10, 2016), <https://perma.cc/YXS2-WBJH>.

158. Frazier shared, “I was the one that was recording the whole thing. I’ve seen him die. I posted the video last night, and it just went viral . . . They killed this man and I was right there. I was five feet away. It’s so

of surveillance resistance, and others including the “use of umbrellas to shield people’s faces,” “spray painting over the lenses of facial recognition cameras,” or “wearing face paint to confuse cameras,” would be met with harsh punishment in subjugation societies, and in light of this state response, are wholly avoided.<sup>159</sup> For the Uyghur in Xinjiang, the possibility of popular resistance against the Chinese subjugation society—as Part III.B illustrates—is stifled heavily by the State’s campaign of subjugation.

Fourth, the scale of harm distinguishes the outcomes of digital surveillance in authoritarian states from their deployment in democratic societies. Instead of holding citizenship and the slate of constitutional rights that emanate from it, subjects of authoritarian states are afforded very little protection from the reach of surveillance<sup>160</sup>—or, as illustrated by the experience of the Uyghur in Xinjiang, no protection at all.<sup>161</sup> While legal scholars lament the rise of authoritarian practices in democratic states, particularly during the expansion of surveillance during the global “War on Terror,” subjugation societies are uninhibited in their use of surveillance technologies to punish their opposition and entrench their power.<sup>162</sup> Democratic control societies, at least outwardly, are bound by legal and public checks on surveillance overreach. While it remains “important for the society of control to maintain the illusion of freedom,” there are no such illusions in subjugation societies.<sup>163</sup>

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traumatizing.” Celia Fernandez, “If It Wasn’t for Me 4 Cops Would’ve Still Had Their Jobs”: Teen Who Recorded George Floyd’s Arrest Defends Herself Against Online Backlash, INSIDER (May 30, 2020, 3:39 PM), <https://perma.cc/4ARX-XF9P>.

159. See *Race, Surveillance, Resistance*, *supra* note 39, at 1125–27 (outlining the distinct forms of sousveillance adopted by activists in China during the 2019 Hong Kong protests).

160. See, e.g., BROWNE, *supra* note 39, at 23–24 (describing surveillance methods used against enslaved persons and how these persons had no shelter from surveillance).

161. See generally ROBERTS, *supra* note 148.

162. See Giroux, *supra* note 35, at 14 (describing how the United States corporate-state surveillance apparatus was revealed by Snowden to be an authoritarian “turnkey”).

163. Cameron Crain, *Living in a Society of Control*, MANTLE (2018), <https://perma.cc/3SA8-VZUU>.

This distinction is critical to this Article’s theory of the subjugation society as a distinct *type* of surveillance society. Unlike in the control society theorized by Deleuze, where “we know that we are being tracked, but are encouraged not to worry about it,”<sup>164</sup> the society of subjugation weaponizes that knowledge to impose piercing forms of punishment and discipline. Such punishment and discipline include those latent forms internalized by Uyghur subjects who are conditioned to underperform and conceal their bona fide identities by “acting” less Uyghur and Muslim and more Chinese and Han.<sup>165</sup> This phenomenon is closely examined in Part IV.A.4.

This subjugation suppresses the very thought of dissidence, self-expression, and, as Chaz Arnett compellingly writes, “the possibilit[y] for resistance.”<sup>166</sup> In subjugation societies, the State mandate of control synchronizes with accompanying systems of mass discipline and violence that are designed to suffocate resistance, and, ultimately, submit the targeted group to the State’s will. State enforcement of digital surveillance, as illustrated in Xinjiang, is blended and blurred by the State until the stages of surveillance theorized by Foucault and Deleuze become an indistinguishable ensemble.

### III. (UN)MADE IN CHINA

“My brother passed away in East Turkistan [Xinjiang]. It’s been hard for us being so far away; we are completely helpless. We can’t even send money because we might put the rest of the family in danger.”<sup>167</sup>

*[Four days later]* “We just got news that they were forced to give him a Chinese funeral . . . There is no tombstone allowed.

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164. *Id.*

165. *Cf.* Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R. & C.L. L. REV. 1, 6–7 (2018) [hereinafter *Acting Muslim*] (explaining how Muslim Americans grapple with “the making over of religious identity, compelled by counterterrorism law and the fear of appearing to be Muslim”).

166. *Race, Surveillance, Resistance*, *supra* note 39, at 1125–41.

167. Direct message from a Uyghur refugee, Rima R., now living in Melbourne, Australia, INSTAGRAM (Nov. 27, 2020) (name changed to protect anonymity).

Just a number at the grave. No identity, just a number. He was #770.”<sup>168</sup>

This Article now turns to the setting that inspired the subjugation society and its attendant theory: Xinjiang. The province in northwest China is an “incubator” for the world’s most sophisticated surveillance technologies, which are deployed to subjugate, then stamp out, the Uyghur.<sup>169</sup> Before examining the digital architecture of surveillance assembled to subjugate the Uyghur, this Part examines the political and legal campaigns that sow the seeds for the subjugation society erected in Xinjiang.

As a test lab for the world’s most cutting-edge surveillance technologies, Xinjiang is the most compelling subjugation society case study and this Article’s focal case study. Further, it is an ideal place to commence continued analysis of other subjugation societies around the world.

#### A. *Uyghur Identity and Society*

This section surveys Uyghur identity and society. It examines the distinct cultural and religious customs that prompt the Chinese regime to surveil and subjugate the Uyghur.

##### 1. A Muslim Minority

Before it bore the name “Xinjiang,” the territory, home to fourteen million Uyghur in northwest China, was called East Turkistan.<sup>170</sup> The land, bordering Turkic nations like Kazakhstan and Kyrgyzstan to the west and Mongolia to the east,<sup>171</sup> sits along the ancient Silk Road—a gateway linking

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168. Direct message from a Uyghur refugee, Rima R., now living in Melbourne, Australia, INSTAGRAM (Dec. 1, 2020) (name changed to protect anonymity).

169. See Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://perma.cc/T7CD-3BUB>.

170. For a brief history of East Turkistan from a Uyghur perspective, see *Brief History*, WORLD UYGHUR CONG., <https://perma.cc/SD7Y-XYBN>.

171. “Turkic nations” are a group of states in Central and West Asia where the populations speak Turkic languages.



China to vital regional and global markets.<sup>172</sup> Xinjiang's economic importance, geographic proximity, abundant resources, and size figure heavily into Beijing's interest in the territory and, because of this, drive its mandate to subjugate and suppress the Uyghur.<sup>173</sup>

The Chinese government views Uyghur identity and culture as subversive in and of itself.<sup>174</sup> In 1944, during the Chinese Civil War between the Nationalists and Communists, the Uyghur established the East Turkistan Republic.<sup>175</sup> This independent nation-state would only last four years. In 1949, the victorious People's Liberation Army of China annexed the coveted territory and renamed it "Xinjiang"—which means "new frontier" in Mandarin.<sup>176</sup> Since then, the Uyghur have lived under the thumb of the Communist government in Beijing and remained vulnerable to its integrated campaign of ethnic, political, and religious persecution.<sup>177</sup>

Islam remains intrinsic to Uyghur identity.<sup>178</sup> The population in Xinjiang closely adheres to the faith, and Uyghur script adopts the Arabic rooted in the *Qur'an*—Islam's holy book.<sup>179</sup> Therefore, the fundamental rituals and symbols of Muslim life permeate Uyghur culture and society.<sup>180</sup> The mosque is a center of religious, social, and civic gathering; the imam<sup>181</sup> serves as a community leader beyond the mosque; and the notion of a transnational Muslim community (*ummah*)

172. See Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELS., <https://perma.cc/J3CE-FUQV> (last updated Jan. 28, 2020, 7:00 AM).

173. Matthew Moneyhon, *Controlling Xinjiang: Autonomy on China's "New Frontier"*, 3 ASIAN-PAC. L. & POL'Y J. 120, 120–21 (2002). Xinjiang comprises roughly one-sixth of China's landmass. Xinjiang also "contains huge coal and oil reserves, believed to be three times those of the United States." *Id.* at 121.

174. See generally ROBERTS, *supra* note 148.

175. *Id.* at 126–27.

176. *Id.*

177. See generally *id.*

178. See Colin Mackerras, *Ethnicity in China: The Case of Xinjiang*, 8 HARV. ASIA Q. 4, 9 (2004) (highlighting how restrictions of religious freedom in Xinjiang may have further entangled Islam and Uyghur identity).

179. See *id.*

180. See *id.* at 10–15.

181. The Imam is the spiritual head of the mosque.

figures heavily into Uyghur custom.<sup>182</sup> Beijing views these pillars of Islamic life as barriers to assimilating the Uyghur.<sup>183</sup>

Turkic ethnicity and nationhood are another cornerstone of Uyghur identity. “In addition to religious affinity, Uighur ethnicity resembles and overlaps with that of its Central Asian neighbours, such as Kyrgyzstan, Kazakhstan, and other countries populated with predominantly Turkic peoples.”<sup>184</sup> Shared ethnicity and history breeds affinity among the Uyghur with neighboring Turkic societies, while linguistic ties bridge greater political solidarity and cultural exchange.<sup>185</sup> Naturally, the Han-controlled government looks on these ties with great suspicion. Beyond Uyghur aspirations for self-determination, Beijing also fears transnational unity among the (Turkic) Central Asian states that orbit Xinjiang.<sup>186</sup> After all, Bishkek and Tashkent, the capitals of the Turkic nations of Kyrgyzstan and Uzbekistan, are far closer to Xinjiang than the major Chinese cities along the coastline.<sup>187</sup>

Physical appearance is another unifier between the Uyghur and their Turkic neighbors. Uyghurs look more Turkic than Han, differentiating them phenotypically from the ruling Han.<sup>188</sup> This marks another divide that the State seizes on to root its campaign of subjugation and push its program of Han

182. For a survey of Uyghur religious life, and the salience of Islam to Uyghur culture and society in Xinjiang, see GARDNER BOVINGDON, *THE UYGHURS: STRANGERS IN THEIR OWN LAND* (2010).

183. *See id.* at 51–58.

184. Khaled A. Beydoun, *China Holds One Million Uighur Muslims in Concentration Camps*, AL JAZEERA (Sept. 13, 2018), <https://perma.cc/2NDT-DE68>.

185. For a comprehensive history of the Uyghur of Xinjiang’s historical ties with its neighboring Turkic societies, currently formed into nation-states, see Kwang-tzuu Chen & Fredrik T. Hiebert, *The Late Prehistory of Xinjiang in Relation to Its Neighbors*, 9 J. WORLD PREHISTORY 243 (1995).

186. *See* Paul Kubicek, *Regionalism, Nationalism and Realpolitik in Central Asia*, 49 EUROPE-ASIA STUD. 637, 638–41 (1997) (identifying factors promoting cooperation and possible integration between Central Asian states including Kazakhstan, Uzbekistan, Kyrgyzstan, Turkmenistan, and Tajikistan).

187. *Id.*

188. *See* Brent Crane, *A Tale of Two Chinese Muslim Minorities*, DIPLOMAT (Aug. 22, 2014), <https://perma.cc/U9F3-M7RY> (explaining that the Uyghurs “are as distinct in appearance from the Han Chinese as Native Americans are from their Caucasian counterparts”).

supremacy. *Looking* Uyghur, in addition to practicing Islam and the cultural customs that emanate from their distinct ethnicity and religion, clashes with the Han supremacist aspirations of the state.<sup>189</sup>

## 2. Han Supremacy

The racial dimension of Beijing's persecution of the Uyghur is central to understanding China's subjugation society. The Han, the majority ethnic group that holds power, view the Uyghur as an obstacle to its Sinicization effort.<sup>190</sup> While China remains "an incredibly diverse nation with fifty-six recognized" ethnicities, the Han are keen on flattening Chinese identity into a mold made exclusively in their image.<sup>191</sup> Akin to white supremacy, Han supremacy is built on the belief that its customs, traditions, and ideals are superior to those of minority ethnicities and that Chinese society should be engineered in its image.<sup>192</sup> This ethnic supremacy is expedited by Communism, which blends the aim of political homogenization with the campaign of imposed (ethnic and cultural) assimilation.<sup>193</sup>

The claim of Uyghur indigeneity to Xinjiang stands as a threat to this state project. A leading Chinese official declared, at a United Nation's Permanent Forum on Indigenous Issues hearing, that "China has no indigenous people," confirming the State's dismissal of Uyghur claims of indigeneity and claims of

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189. See Hannah Beech, *If China Is Anti-Islam, Why Are These Chinese Muslims Enjoying a Faith Revival?*, TIME (Aug. 12, 2014, 5:30 AM), <https://perma.cc/4F8X-RGEY> (eliciting this assertion through a comparison between the Hui Muslims, who live in China's interior, and the Uyghur Muslims, who predominantly live in Xinjiang).

190. See Brennan Davis, *Being Uyghur . . . with "Chinese Characteristics": Analyzing China's Legal Crusade Against Uyghur Identity*, 44 AM. INDIAN L. REV. 81, 87 (2019) (noting a long history of Han feelings of superiority, and the persecution of minority groups by the ruling government).

191. *Id.* at 83.

192. See *id.* at 85 (explaining that after the establishment of the Republic of China, the government stressed that "the country was home to only one people, the Chinese people, and that the supposedly distinct groups of the republic were merely subvarieties of a common stock" (citation omitted)).

193. *Id.* at 86–88.

independence.<sup>194</sup> Further, the statement manifests the Communist regime's rewriting of Chinese history to align with its political interests and exposes the telos of the digital surveillance campaign enforced against the Uyghur.<sup>195</sup> For the Communist regime in Beijing, *Chinese equals Han*, and Han "blood" stands as the marker of racial superiority.<sup>196</sup>

The perseverance of Uyghur nationhood in Xinjiang conflicts with Beijing's assimilatory project. China's Sinicization campaign is an "inherently imperial project" that seeks to punish the expression of Uyghur identity along ethnic, religious, and political lines.<sup>197</sup> It embodies the full-scale "barbarism" delineated by postcolonial thinker Aimé Césaire, whereby colonial subjects are commodified into objects that satiate the imperial power.<sup>198</sup> While elements among the Uyghur remain committed to the restoration of an East Turkistan, the state of subjugation has eliminated virtually all forms of resistance within Xinjiang.<sup>199</sup> Again, this stands as a fundamental distinction between the subjugation society and the control society, where sousveillance and other forms of collective actions against state surveillance are not only possible but, as Arnett

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194. Statement by Counsellor Yao Shaojun of the Chinese Delegation at the 15th Session of the Permanent Forum on Indigenous Issues (May 10, 2016), <https://perma.cc/U7YG-44EA>.

195. See MARGARET HILLENBRAND, *NEGATIVE EXPOSURES: KNOWING WHAT NOT TO KNOW IN CONTEMPORARY CHINA* (2020), for a critical examination of China's strategic disavowal of past events and incidents to further the regime's political aims.

196. See MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 5 (1993) (arguing that as a moral ideal, nationalism justifies the "use of violence in defense of one's nation against enemies, internal or external").

197. Michael Clarke, *China and the Uyghurs: The "Palestinianization" of Xinjiang?*, 22 *MIDDLE E. POL'Y*, Fall 2015, at 127, 128 [hereinafter *Palestinianization*].

198. AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 47 (2000). Aimé Césaire theorizes how colonialism degrades the colonizer and its "soul," and through its pillaging and plunder of colonized peoples, reduces it to barbarism. See generally *id.*

199. See Austin Ramzy & Chris Buckley, "Absolutely No Mercy": *Leaked Files Expose How China Organized Mass Detentions of Muslims*, *N.Y. TIMES* (Nov. 16, 2019), <https://perma.cc/FJ9U-NUVT> (detailing the extent of China's subjugation of Uyghurs and the crackdown on all forms of resistance to this policy, even within the government).

documents, formidable.<sup>200</sup> Today, Uyghur resistance predominantly takes place outside China, rising from Uyghur diaspora groups in countries like Australia, England, and the United States.<sup>201</sup> Resistance against the Chinese subjugation society has been rooted firmly beyond the borders of Xinjiang, and far from the bounds of China.

Stamping out dissent and resistance among the Uyghur in Xinjiang is part of the broader project of subjugation. Within this landscape of total surveillance, visible expressions of Uyghur identity are often interpreted as an affront to Chinese authority.<sup>202</sup> As detailed above, Uyghur identity is most visible through the practice of Islam—by way of dress, grooming, and the myriad forms of “acting Muslim” in a surveillance state where even benign expression triggers suspicion.<sup>203</sup> Religious exercise, therefore, is how Beijing often fixates its subjugation strategy on the Uyghur.<sup>204</sup> With Islam standing as the lifeline of Uyghur society, China has turned its surveillance campaign toward the faith, and its cornerstone practices, to subjugate the Uyghur.<sup>205</sup> This aim was already in process before 9/11, but it was accelerated by the global War on Terror—an American “imperial” project that emboldened crackdowns on Muslim populations across the world—that followed.<sup>206</sup>

200. *Race, Surveillance, Resistance*, *supra* note 39, at 1125–27.

201. See Shafik Mandhai, *Uighurs Marking “Independence Day” Call for International Help*, AL JAZEERA (Nov. 13, 2018), <https://perma.cc/VUF7-3BX6>.

202. See Maizland, *supra* note 7 (“The Chinese government has come to characterize any expression of Islam in Xinjiang as extremist . . .”).

203. See *Acting Muslim*, *supra* note 165, in which the Author defines “acting Muslim” as the process by which Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterrorism policy.

204. “Where the Soviets broke you, made you confess to invented charges, and then killed you, the Chinese wanted to remake its citizens.” Phil Tinline, *How Orwell Foretold the Remaking of Xinjiang*, NEW STATESMAN (July 29, 2020), <https://perma.cc/8JNA-BDX8> (last updated Sept. 9, 2021, 2:14 PM).

205. See Mackerras, *supra* note 178, at 10–11.

206. “[The War on Terror] is best understood, in its myriad and ever-changing manifestations, as rooted in empire. Thus, Muslims’ inclusion within an imperial system that presides over war, genocide, and tortures does little to dent racism.” DEEPA KUMAR, ISLAMOPHOBIA AND THE POLITICS OF EMPIRE 8 (2021).

### B. *From Criminals to Terrorists*

This section examines the modern arc of state surveillance against the Uyghur in Xinjiang. It begins by analyzing the political and legal means leveraged by the State to persecute the Uyghur that preceded the development of the digital architecture of surveillance that deepens their subjugation today.

#### 1. “War on Terror” Interest Convergence

“September 11, 2001 was a world event but it was also a globalized event,” observed surveillance scholar David Lyon, pointing to how the ensuing War on Terror developed into an international crusade to conquer “Islamic terrorism.”<sup>207</sup> Nearly a month after 9/11, President George W. Bush landed in Beijing to enlist China as a War on Terror ally.<sup>208</sup> Standing alongside (then) President Jiang Zemin, Bush stated, “[w]e have a common understanding of the magnitude of the threat posed by international terrorism,” after meetings in which Zemin briefed Bush about the “security” concerns posed by the Uyghur.<sup>209</sup> With Beijing’s interest of subjugating the Uyghur converging with the pressing American mandate of combating global terrorism, the stage was set for an accelerated crackdown on Uyghur life in Xinjiang.<sup>210</sup>

The “War on the Uyghur people” was commenced in the days after Bush’s visit.<sup>211</sup> In line with American War on Terror speak and strategy, Beijing instantly conflated Uyghur identity with terrorism after 9/11, exchanging the labels of “criminals”

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207. SURVEILLANCE AFTER 9/11, *supra* note 149, at 109.

208. See Phelim Kine, *How China Hijacked the War on Terror*, POLITICO (Sept. 9, 2021, 7:06 PM), <https://perma.cc/2HZR-6Y32> (Sept. 10, 2021, 1:34 PM) (noting that President Bush praised the United States and China’s “joint anti-terrorism focus”).

209. Robin Wright & Edwin Chen, *Bush Says China Backs War on Terror*, L.A. TIMES (Oct. 18, 2001, 12:00 AM), <https://perma.cc/YV23-DJRR>.

210. See Akbar Shahid Ahmed, *China Is Using U.S. “War on Terror” Rhetoric to Justify Detaining 1 Million People*, HUFFPOST (Dec. 2, 2018, 9:07 PM), <https://perma.cc/MQM7-TGER> (explaining that while the United States is the leading critic of China’s Uyghur policy, it also “[laid] the groundwork for it to succeed”).

211. See generally ROBERTS, *supra* note 148.

and “subversives” for “terrorists.”<sup>212</sup> State police began to openly associate benign expression of faith with terrorism.<sup>213</sup> Islamic institutions and leaders were linked to foreign terror groups.<sup>214</sup> Beijing’s strategy behind this structural “Islamophobia”<sup>215</sup> was *not* counterterrorism but to exploit counterterrorism and its War on Terror vocabulary to legitimize its preexisting Sinicization and Han supremacy campaigns.<sup>216</sup>

The State’s reframing from criminals to terrorists also marked a strategic shift: religion, more potently than ethnicity, became the locus of Beijing’s surveillance strategy. Reversing the direction of Derick Bell’s “interest convergence” theory toward spurring human rights regress instead of civil rights progress, 9/11 and the War on Terror aligned with Beijing’s preexisting suppression of the Uyghur.<sup>217</sup> More ominously for the Uyghur, the War on Terror handed the state virtual *carte blanche* to intensify its campaign under the guise of combating Islamic terrorism.<sup>218</sup> As a result, Chinese Islamophobia rose considerably, spurred by the global War on Terror and the

212. “China tapped into the prevailing anger at Islamic extremists Thursday by calling for international backing for its effort to quell Muslim [Uyghur] separatists in the western region of Xinjiang,” Chinese officials stated during President Bush’s meeting with President Zemin on October 18, 2001. Wright & Chen, *supra* note 209.

213. See generally Michael Clarke, *China’s “War on Terror” in Xinjiang: Human Security and the Cases of Violent Uyghur Separatism*, 20 TERRORISM & POL. VIOLENCE 271 (2008) [hereinafter *War on Terror*] (examining the credibility of Chinese allegations of the Uyghur “terrorist” threat).

214. See Beina Xu et al., *The East Turkestan Islamic Movement (ETIM)*, COUNCIL ON FOREIGN RELS., <https://perma.cc/AQE2-F74D> (last updated Sept. 4, 2014, 8:00 AM) (noting that China has linked ETIM, among other Uyghur groups to al-Qaeda and the Taliban, despite those groups denying any connection).

215. Islamophobia is “the presumption that Islam is inherently violent, alien, and inassimilable. Combined with this is the belief that expressions of Muslim identity are correlative with a propensity for terrorism.” Khaled A. Beydoun, *Islamophobia: Toward A Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 111 (2016) [hereinafter *Islamophobia*].

216. See Davis, *supra* note 190, at 87 (highlighting the broader history of the Chinese government’s long-term project to reinforce Han supremacy).

217. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (theorizing how the global geopolitical current shapes domestic policy).

218. See *Exporting Islamophobia*, *supra* note 19, at 93–96.

state-sponsored Islamophobia the United States exported by way of war, policy, and propaganda.<sup>219</sup>

The traditional appearances and customs of the Uyghur corroborated the stereotypical images propagated by western and, subsequently, state-controlled Chinese media. This facilitated Beijing's conflation of Uyghur identity with terrorism as it made that case to the United States and its War on Terror allies.<sup>220</sup> The Uyghur, like their coreligionists in the United States, were swiftly branded putative terrorists.<sup>221</sup> Uyghur men donning beards and women wearing headscarves were branded "radicals," matched by Beijing with stereotypes disseminated by American propaganda.<sup>222</sup> This "redeployment of old Orientalist tropes" was not only a post-9/11 American phenomenon, but also one that rose to the fore in Xinjiang.<sup>223</sup> Virtually overnight, 9/11 flipped the State's formal framing of its Sinicization efforts in Xinjiang. The State shifted away from its policy of suppressing Turkic separatism in Xinjiang, instead dubbing it "the 'main battlefield' in China's fight against terrorism."<sup>224</sup> As a result, religion—and, particularly, outward expression of Muslim identity—increasingly became the focus of the State's surveillance and conjoined counterterror crackdown.<sup>225</sup>

Two decades into the War on Terror, the Chinese crackdown on the Uyghur continues to be driven by the Islamophobic trope that ascribes suspicion of terrorism to expression of Muslim identity. Wang Li, China's Foreign Minister, justified the mass discipline and violence against the Uyghur as in line with pressing global War on Terror aims, stating: "It's the necessary way to deal with Islamic or religious extremism. . . . [China's] efforts are completely in line with the direction the international

219. *See id.*

220. *See Ahmed, supra note 210* (discussing how China presented Uyghur seeking autonomy as a religious militant group based on the United States' and other countries' policies negatively affecting Muslims).

221. *See Natsu Taylor Saito, Symbolism Under Siege, Japanese American Redress and the "Racing" of Arab Americans as "Terrorists", 8 ASIAN AM. L.J. 1, 12 (2001).*

222. *See EVELYN ALSULTANY, ARABS AND MUSLIMS IN THE MEDIA (2012)*, for a critical examination of the most prominent stereotypes of Muslim men and women after the 9/11 terror attacks.

223. Volpp, *supra note 148*, at 1586.

224. *Counterterrorism and Preventive Repression, supra note 7*, at 11.

225. *See Maizland, supra note 7.*



community has taken to combat terrorism, and are an important part of the global fight against terrorism.”<sup>226</sup> With Uyghur identity tied to terrorism, the War on Terror continues to furnish Beijing with the “moral ‘blank check’ for [the] human rights abuses” against the Uyghur it long coveted.<sup>227</sup>

The transnational political mandate of combating Islamic terrorism rooted by the War on Terror was supplemented by domestic federal law. In June of 2012, the National People’s Congress of China enacted legislation that made way for the draconian Strike Hard On Terror Campaign.<sup>228</sup> The new “Counterterrorism Law of 2012” was built on the preventative and preemptive strike logic of the War on Terror.<sup>229</sup> In line with its design, which afforded the state with broad latitude to levy terror suspicion on anybody, Uyghur subjects who committed no crime at all were arrested and detained under suspicion of terror.<sup>230</sup> The Counterterrorism Law was followed by additional policing campaigns that, in the years that followed, pronounced the crackdown on Uyghur life in Xinjiang.<sup>231</sup>

## 2. “Strike Hard on Terror”

Buoyed by the global War on Terror, Beijing commenced its Strike Hard Against Violent Terrorism Campaign in 2014.<sup>232</sup> President Xi steered his administration’s focus toward “three evil forces”: separatism; extremism; and, most forcefully,

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226. Ahmed, *supra* note 210.

227. *Counterterrorism and Preventive Repression*, *supra* note 7, at 12.

228. Opinions on Several Issues on the Application of Law in Cases of Terrorist Activities and Extremism Crimes, CHINA L. TRANSLATE (June 12, 2018), <https://perma.cc/FYF6-K3X2> [hereinafter Chinese Counterterrorism Law of 2012].

229. “[Terrorism] also includes individuals preparing to carry out, or currently carrying out, terrorist activities.” *Id.* (provided in § 1(2)(4) of the law).

230. See Maizland, *supra* note 7 (noting that more than 15,000 Xinjiang residents who were surveilled for being “suspicious” were placed in detention centers).

231. For an examination of the distinct threats faced by the Uyghur during the pandemic, see Vaishnavi Chaudry, *The Impact of COVID-19 on Uyghur Muslims: An Ignored Crisis*, LSE HUM. RTS. (Apr. 23, 2020), <https://perma.cc/4R8H-SC6K>.

232. Wang, *supra* note 17.

terrorism, in line with Washington's counterterror mandate.<sup>233</sup> The Strike Hard Campaign aimed to crush separatist elements and restrict "illegal religious activities" under the banner of fighting terror.<sup>234</sup> This isolated religious expression forms the focus of the State's surveillance campaign against the Uyghur.<sup>235</sup>

The Campaign took a sharp turn in 2016, coupling the surveillance aim of control with draconian programs of mass discipline and punishment. On August 29 of that year, President Xi appointed hardliner Chen Quanguo to serve as Xinjiang's Communist Party Secretary.<sup>236</sup> Shortly after assuming that role, Quanguo ordered the mass arrest and detention of Uyghur in major cities, intensifying the preemptive counterterror mandate of the 2012 counterterror laws.<sup>237</sup> Most notably, he ushered in the rapid expansion of Xinjiang's network of concentration camps.<sup>238</sup> According to Darren Byler, a leading expert on China's total surveillance state:

[The network of concentration camps] targeted the entire Muslim population of 15 million people in Xinjiang. It precipitated a criminalization of Islamic practice and a number of Uyghur and Kazakh cultural traditions. Initially only religious leaders were sent to camps, but by 2017 the war on terror became a program of preventing Uyghurs from being Muslim and, to a certain extent, from being Uyghur or Kazakh.<sup>239</sup>

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233. Sarah A. Topol, *Her Uighur Parents Were Model Chinese Citizens. It Didn't Matter.*, N.Y. TIMES (June 22, 2021), <https://perma.cc/85JM-ZVGE>.

234. See Dana Carver Boehm, *China's Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 61, 94 (2009).

235. *War on Terror*, *supra* note 213, at 279–80.

236. See Maizland, *supra* note 7 ("Arbitrary detention became widely used by regional officials under Chen Quanguo, Xinjiang's Communist Party secretary, who moved to the region in 2016 . . .").

237. See Chinese Counterterror Law of 2012, *supra* note 228; see also Austin Ramzy & Chris Buckley, "Absolutely No Mercy": *Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. TIMES (Nov. 16, 2019), <https://perma.cc/JN47-68TX> (noting the Xinjiang leadership "settled on plans to detain Uighurs in large numbers," following Chen's order to "[r]ound up everyone who should be rounded up").

238. *Counterterrorism and Preventive Repression*, *supra* note 7, at 17.

239. *INSIDE THE CAMPS*, *supra* note 4, at 18–19.

The concentration camps thus illustrated the State's anti-Muslim fixation, which was entwined with ethnic animus but stood atop the State's matrix of determining and deploying subjugation.

Within these broad ambitions, the concentration camps became the signature programs of mass discipline and punishment against the Uyghur.<sup>240</sup> Under Quanguo, thirty-nine camps tripled in size between April 2017 and August 2018 to accommodate the incarceration of more Uyghur and ethnic Muslims.<sup>241</sup> This expansion was heavily subsidized by the federal government as “construction spending on security-related facilities in Xinjiang increased by 20 billion yuan (around \$2.96 billion) in 2017.”<sup>242</sup> As Foucault aptly observes, the concentration camp—a form of prison—is not only a surveillance technology itself, but a structure that enables continuous and unfettered monitoring of its subjects.<sup>243</sup> But, diverging from Foucault's theorizing of the Panopticon, the administration of punitive violence coexists with discipline within the camps—as graphically illustrated by the corporal and psychological torture inflicted en masse within the camps.<sup>244</sup> Punitive violence and discipline, as illustrated in this Article's vignette, are entwined surveillance strategies enforced on Jelilova and the millions of Uyghur prisoners inside the camps. Again, punitive violence is not aberrant, but operative to the state's surveillance regime.

Beijing supplemented its expanded concentration camp program by quartering spies in Uyghur homes. Since 2014, President Xi has quartered Communist Party members inside Uyghur homes to monitor and report “extremist” behavior.<sup>245</sup> This tentacle of the Strike Hard Campaign, dubbed the

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240. China restricts foreign journalists from entering the camps. Matt Schiavenna, *Why It's Difficult for Journalists to Report from Xinjiang*, ASIA SOC'Y (May 23, 2019), <https://perma.cc/T97Y-FWJ9>.

241. Maizland, *supra* note 7.

242. *Id.*

243. FOUCAULT, *supra* note 22, at 200–01.

244. *See generally* IN THE CAMPS, *supra* note 4.

245. *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, CHINA: RECOMMENDED COUNTRIES OF PARTICULAR CONCERN 4 (2019), <https://perma.cc/49C7-ZFRT> (explaining that local government workers live in Muslim households and assess the family's ideological views); *see also* NARDI, *supra* note 127, at 2.

“Becoming Family” program, diverted one million Communist Party members, overwhelmingly Han, into Uyghur homes.<sup>246</sup> The compulsory homestay program converted private homes into perpetual surveillance stations, where activities such as praying, fasting during Ramadan, speaking Uyghur, and eating halal (Islamically blessed) meat are cited as violations of the counterterror laws.<sup>247</sup> In 2016, Quanguo assigned “200,000 [more Communist] cadres from government agencies, state-owned enterprises, and public institutions” to Xinjiang to bolster the Becoming Family surveillance strand of the Strike Hard Campaign.<sup>248</sup>

The punitive effects of the Strike Hard Campaign were immediate and spectacular. Arbitrary arrests proliferated, the Islamic Holy Month of Ramadan was banned in Xinjiang in 2015, and the presence of Communist Party informants increased in religious spaces and private homes.<sup>249</sup> Another “anti-extremism” law was enacted in 2017, this time explicitly prohibiting Uyghur men from growing long beards and women from wearing hijab in public.<sup>250</sup> The new law also prohibited Uyghur from decorating their homes with Islamic emblems (like crescents and stars) or placing them atop mosques or cultural centers.<sup>251</sup> “In the eyes of Beijing, all Uyghurs could potentially be terrorists or terrorist sympathizers,” a formal state view that made every conceivable form of Islamic expression in Xinjiang suspicious to the State and ushered in heightened forms of mass discipline and collective punishment.<sup>252</sup>

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246. Wang, *supra* note 17.

247. The halal food prohibition was “heralded by government officials as fighting a fictional pan-halal trend under which Muslim influence was supposedly spreading into secular life.” *For Uyghur Muslims in China, Life Keeps Getting Harder*, FOREIGN POL’Y (Oct. 26, 2019), <https://perma.cc/3FCH-WFKD>.

248. Wang, *supra* note 17.

249. Jon Sharman, *China “Forcing Muslims to Eat Pork and Drink Alcohol” for Lunar New Year Festival*, INDEPENDENT (Feb. 7, 2019, 1:37 PM), <https://perma.cc/L3ER-P4V3>.

250. Maizland, *supra* note 7.

251. *Palestinianization*, *supra* note 197, at 130.

252. Maizland, *supra* note 7.

### 3. Engineering Subjugation

The Strike Hard Campaign mutated China's Sinicization mandate into full-scale persecution of the Uyghur. Scholars and human rights advocates have dubbed China's designs a "genocide" or "cultural genocide," while others have labeled it ethnic cleansing.<sup>253</sup> On the eve of Joe Biden's inauguration as President of the United States, outgoing President Trump's Secretary of State, Mike Pompeo, formally accused China of "committing genocide and crimes against humanity in Xinjiang."<sup>254</sup> In line with these findings, this Article echoes the cultural genocide framing to elucidate the scale of mass discipline and punishment that the state inflicts on the Uyghur.<sup>255</sup>

The concentration camps provide the starkest examples of mass discipline and punishment imposed on the Uyghur. The cornerstone of Beijing's subjugation strategy in Xinjiang, the swelling network of camps spread throughout the massive province show no sign of slowing down in scale or number of detainees.<sup>256</sup> Every stratum of Uyghur society, from rank-and-file workers to "singers, musicians, novelists, scholars, and academics" have been detained in the camps.<sup>257</sup> A staggering 11.5 percent of the Muslim population between the ages of twenty and seventy-nine currently are, or have been,

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253. Preston Jordan Lim, *Applying International Law Solutions to the Xinjiang Crisis*, 22 ASIAN-PAC. L. & POL'Y J. 90, 94–107 (2020). Erkin Alptekin, the (former) president of the World Uyghur Congress framed the crisis in terms of cultural genocide, stating, "[t]he Chinese want to replace us with their own people as colonists, and assimilate those of us who remain, wiping out our culture." *War on Terror*, *supra* note 213, at 274.

254. Bill Chappell, *Pompeo Accuses China of Genocide Against Uyghur Muslims*, NPR (Jan. 19, 2021, 4:18 PM), <https://perma.cc/UV2C-UUR7>.

255. The circumstance is fluid and could devolve into genocide if the concentration camps become sites of mass execution.

256. See Rian Thum, *China's Mass Internment Camps Have No Clear End in Sight*, FOREIGN POL'Y (Aug. 22, 2018, 9:00 AM), <https://perma.cc/4FHC-7Y47>, for a Uyghur expert's analysis of the State's intent behind the rapid expansion of the concentration camps.

257. Yasmeen Serhan, *Saving Uighur Culture from Genocide*, ATLANTIC (Oct. 4, 2020), <https://perma.cc/RA3W-WNQ7>.

imprisoned in the camps.<sup>258</sup> There is no due process, and “[m]ost people in the camps have never been charged with crimes and have no legal avenues to challenge their detentions.”<sup>259</sup> The mass surveillance, deepened by the Strike Hard Campaign, funneled droves of Uyghur into the camps by the day, where control and discipline blurred with draconian forms of violence believed to be arcane and extinct.<sup>260</sup>

Chinese surveillance also aims to break up the Uyghur family—a form of mass violence spawned by surveillance. Uyghur adults are arrested for the slightest “anti-extremism” infractions, or no infraction at all.<sup>261</sup> This often leads to incarceration in the camps and the consequent funneling of Uyghur children into Xinjiang’s string of brainwashing centers disguised as orphanages or kindergartens.<sup>262</sup> These centers are where children are isolated from their parents, subjected to Communist drills tailored for youth, and sometimes enlisted to monitor their parents (and siblings) when reassigned to their homes.<sup>263</sup> The number of these “kindergartens” doubled in 2017, in line with Quanguo’s expansion of the camps.<sup>264</sup>

The mosque, the institutional symbol of Muslim life, is another site of mass violence spurred by state surveillance. To *further* submit the Uyghur, Xi destroyed and razed tens of

258. Editorial Board, *Opinion: China Is Creating Concentration Camps in Xinjiang. Here’s How We Hold It Accountable*, WASH. POST (Nov. 24, 2018), <https://perma.cc/6XQ9-JZ8T>.

259. Maizland, *supra* note 7.

260. See Wang, *supra* note 17 (describing the “reports of deaths in the political education camps, raising concerns about physical and psychological abuse, as well as stress from poor conditions, overcrowding, and indefinite confinement,” and “harsh punishments for disobedience in the facilities”).

261. See Chinese Counterterrorism Law of 2012, *supra* note 228 (provided in § I(3)–(4) of the law).

262. Isobel Yeung, *They Came for Us at Night: Inside China’s Hidden Wars on Uighurs*, VICE (June 29, 2019, 10:54 AM), <https://perma.cc/663L-5BU2>.

263. See Sigal Samuel, *China’s Jaw-Dropping Family Separation Policy*, ATLANTIC (Sep. 4, 2018), <https://perma.cc/9N9E-6RBU> [hereinafter *China’s Family Separation Policy*] (“China’s crackdown has some Uighurs in Xinjiang worried that their own children will incriminate them, whether accidentally or because teachers urge kids to spy on their parents.”).

264. See Nicole Bozorgmir & Isabel Yeung, *Uighur Parents Say China Is Ripping Their Children Away and Brainwashing Them*, VICE (July 1, 2019, 11:56 AM), <https://perma.cc/Q25L-6KJ5> (“[B]etween 2016 and 2017 the number of kindergartens more than doubled to 1,265 from 481.”).

mosques in Xinjiang.<sup>265</sup> Many of these mosques were longstanding shrines, destroyed to sever the Uyghur from vital spaces of spiritual and civic congregation and erode the practice of Islam among the Uyghur.<sup>266</sup>

The mosques that still stand have not been spared. Under Quanguo, Xinjiang police have “installed video cameras over mosque doorways to monitor worshippers” who frequent individual mosques.<sup>267</sup> Additional cameras were planted inside mosques to monitor individuals who choose to maintain their spiritual observance against standing policy.<sup>268</sup>

In addition to the mass discipline and punishment outlined above, reports of women being sterilized to prevent Uyghur births are widespread.<sup>269</sup> Han men are incentivized by the State to sleep with and marry Uyghur women.<sup>270</sup> The harvesting of Uyghur organs sold on global black markets further illustrates the macabre nature of mass violence inflicted by Beijing on the Uyghur.<sup>271</sup>

Chinese Studies scholar Joanne Smith Finley observes, “[S]tate counter-terrorism becomes terrorism when it fails to

265. Thirty-one mosques and two major Muslim shrines were destroyed between 2016 and 2018 in Xinjiang. Amy Gunia, *China Destroyed Mosques and Other Muslim Sites in Xinjiang, Report Says*, TIME (May 7, 2019, 3:17 AM), <https://perma.cc/Q6NC-EUGA>. Of the thirty-one, fifteen were “completely or almost completely razed.” *Id.*

266. *Id.*

267. See Topol, *supra* note 233. “Authorities have installed surveillance cameras both inside and outside houses of worship to monitor and identify attendees.” NARDI, *supra* note 127, at 1.

268. NARDI, *supra* note 127, at 2.

269. See *China Forcing Birth Control on Uighurs to Suppress Population, Report Says*, BBC NEWS (June 29, 2020), <https://perma.cc/42MS-D7ZS> (finding that Uyghur women were involuntarily fitted with IUDs, “coerced into receiving sterilization surgery,” and “threatened with internment in camps for refusing to abort pregnancies that exceed birth quotas”); Adrian Zenz, *China’s Own Documents Show Potentially Genocidal Sterilisation Plans in Xinjiang*, FOREIGN POL’Y (July 1, 2020, 10:38 AM), <https://perma.cc/DH59-VSWW> (discussing China’s strategies to “suppress minority birth rates”).

270. See *Xinjiang Authorities Push Uighurs to Marry Han Chinese*, RADIO FREE ASIA (Sept. 2017), <https://perma.cc/55X5-WVTD> (“[The]Uyghur-Han Marriage and Family Incentive Strategy . . . gave 10,000 yuan to Uyghurs and Han Chinese couples who intermarried.”).

271. Will Martin, *China Is Harvesting Thousands of Human Organs from Its Uyghur Muslim Minority, UN Human-Rights Body Hears*, BUS. INSIDER (Sept. 25, 2019, 7:33 AM), <https://perma.cc/SG5S-YZAR>.

distinguish between the innocent and the guilty, it is highly disproportionate, and it aims to terrify or intimidate the wider population or a particular community into submission.”<sup>272</sup> The State aim to subjugate and submit the Uyghur, which has produced ghastly displays of mass discipline and punishment by way of the global War on Terror and domestic policy, is further accelerated by the digital architecture of surveillance constructed in Xinjiang.

#### IV. DIGITAL ARCHITECTURES OF SURVEILLANCE

“With millions of cameras and billions of lines of code, China is building a high-tech authoritarian future” designed to subjugate the Uyghur in Xinjiang.<sup>273</sup> This new architecture of digital surveillance enables the State to track phone activity, online purchases, social media engagement, personal networks, and real time movement of the Uyghur in Xinjiang under the banner of fighting Islamic terrorism.<sup>274</sup> “Digital Islamophobia”—the deployment of digital surveillance and Big Data Policing to single out and subjugate the Uyghur on grounds that their identity is presumptive of terrorism—forms the architecture of digital surveillance in Xinjiang.<sup>275</sup> This Part first examines how digital surveillance drives the subjugation society in Xinjiang, then turns to case studies that examine China’s export of the digital architectures of surveillance it is perfecting in the province.

##### A. *The Digital Panopticon*

Section A will survey the chief components of the subjugation society in Xinjiang, focusing on chief components of the digital panopticon constructed in Xinjiang: (1) Smart City

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272. Joanne Smith Finley, *Securitization, Insecurity and Conflict in Contemporary Xinjiang: Has PRC Counter-Terrorism Evolved into State Terror?*, 38 *CENT. ASIAN SURV.* 1, 15 (2019) (internal citations omitted).

273. Mozur, *supra* note 24.

274. See Chinese Counterterror Law of 2012, *supra* note 228 (provided in § I(3)(3) of the law); Dahlia Peterson, *How China Harnesses Data Fusion to Make Sense of Surveillance Data*, *BROOKINGS INST.* (Sept. 23, 2021), <https://perma.cc/VRD5-R482>.

275. This definition adapts the author’s formative definition of Islamophobia. See *Islamophobia*, *supra* note 215, at 116.



Policing; (2) Facial Recognition Software; and (3) Smartphone Tracking.<sup>276</sup> It closes with an examination of how these digital surveillance tools function jointly to suppress collective Uyghur identity expression and compel the minority group to comply in their own subjugation.

### 1. “Smart City” Policing

The logic behind the “smart city” is the urban planning of cities around surveillance technology.<sup>277</sup> The infrastructural design of smart cities is tailored to facilitate data collection, sensory tracking, and visual surveillance mechanisms implemented by the State.<sup>278</sup> Further, it is geared not only to surveil everything that takes place within its bounds, but also to serve the broader policing aims of the State by (1) collecting data from its residents and visitors; (2) tracking their movement; (3) limiting their movement with “digital enclosures”; and (4) maintaining a fluid mine of data stored by the state to progressively further its tracking capacity.<sup>279</sup>

Smart city design powers the new infrastructure of surveillance in Xinjiang. With priority on the territory’s largest cities, Kashgar and the capital, Urumqi, Xi’s focal aim is to remake these urban spaces as the primary sites of total surveillance.<sup>280</sup> The first step was reconfiguring the surveillance governance of cities and towns in line with Beijing’s total surveillance mandate:

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276. While other forms of Big Data Policing, which are mentioned in the following sections, are employed in Xinjiang, this Article homes in on the cornerstones of the architecture of digital surveillance in the province.

277. The “smart city” is the infrastructural replanning of cities around an assemblage of technology that simultaneously monitors and mines data from individuals within it. ANTHONY M. TOWNSEND, *SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA* 273–76 (2013).

278. See Simon Marvin & Andrés Luque-Ayala, *Urban Operating Systems: Diagramming the City*, 41 *INT’L J. URB. & REG’L RSCH.* 84 (2017) for an analysis of civil design of cities in line with surveillance and sensory technology.

279. Darren Byler, Essay, *The Digital Enclosures of Turkic Muslims*, *SOC’Y & SPACE* (Dec. 7, 2020) [hereinafter *Digital Enclosures*], <https://perma.cc/7YJZ-2LMH>.

280. See Josh Chen & Clément Bürge, *Twelve Days in Xinjiang: How China’s Surveillance State Overwhelms Daily Life*, *WALL ST. J.* (Dec. 19, 2017, 10:58 PM), <https://perma.cc/5H8R-QV7U>.

Xinjiang was placed under a grid-management system, . . . in which cities and villages were split into squares of about five hundred people. Each square has a police station that closely monitors inhabitants by regularly scanning their identification cards, taking their photographs and fingerprints, and searching their cell phones.<sup>281</sup>

By integrating cutting-edge technologies into the urban planning of Xinjiang, Beijing extended its capacity to surveil Uyghur life and “violat[ed] religious freedom” far beyond traditional limits.<sup>282</sup>

The smart city also enables the State to track the movement of the Uyghur in Xinjiang. Those who travel from city to city within the province are forced to carry a “convenience contact card,” which includes the phone numbers of local police stations, their landlords, family members, employers, and more.<sup>283</sup> While this policy covers all residents, it is disproportionately enforced on Uyghur and ethnic Muslims. In 2018, Beijing introduced the “smart card,” a digital update of the convenience contact card that embedded a GPS locator with broader types of data.<sup>284</sup> The smart card communicates with surveillance technologies planted in the smart city architecture, optimizing the State’s ability to monitor the physical and virtual footprints of everybody inside their digital enclosures.<sup>285</sup>

A.I. forms the nerve center of Xinjiang’s regime of digital racial profiling. It coalesces the disparate streams of data mined from smartphone tracking, facial recognition cameras, and biometric and DNA information into neat codes to measure “degrees of suspicion.”<sup>286</sup> “According to experts, the Chinese government’s use of artificial intelligence to track Uighurs and Tibetans is the first known example of a government intentionally using A.I. for racial profiling.”<sup>287</sup> Currently, Uyghur residents entering Xinjiang’s public spaces can be

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281. Maizland, *supra* note 7.

282. NARDI, *supra* note 127, at 2.

283. Topol, *supra* note 233.

284. *Counterterrorism and Preventive Repression*, *supra* note 7, at 19. “Identification cards are also needed to buy knives, gasoline, phones, computers and even sugar.” Buckley & Mozur, *supra* note 169.

285. *Digital Enclosures*, *supra* note 279.

286. See Andersen, *supra* note 22.

287. NARDI, *supra* note 127, at 3.

identified by matching (captured) images with an “ocean of personal data” stored by the State.<sup>288</sup> This matching is done in rapid real time, and has accelerated the swelling arrest and detention rates during the Strike Hard Campaign.<sup>289</sup>

After installation of the cameras, arrests in Xinjiang proliferated to account for 21 percent of the nation’s aggregate number of arrests in 2017.<sup>290</sup> This marked a 731 percent increase from the previous year, and is especially staggering given that Xinjiang’s population (26 million) comprises only 1.8 percent of China’s total population (1.4 billion).<sup>291</sup> These figures illustrate how smart city profiling has enabled the efficient detection of Uyghur travel through the province and instantly accelerated arrest and detention rates.<sup>292</sup>

However, the deep machine learning capacity of Beijing’s A.I.-powered surveillance has yet to reach its full potential. Huawei, the Chinese telecommunications giant, signed a contract with Beijing in 2018 to help Xinjiang police analyze and improve A.I. data.<sup>293</sup> When a person passes through a checkpoint and presents their smart card, police have access to an endless supply of personal data.<sup>294</sup> Data sets are designed, with Huawei’s expertise, to identify individuals who participated in a Quran discussion group on WeChat, purchased an Arabic language book online, or engaged in a social media exchange with somebody outside of the country<sup>295</sup>—activity that alone, and especially combined, could trigger state suspicion and

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288. Andersen, *supra* note 22.

289. See *China: Big Data Fuels Crackdown in Minority Region*, HUM. RTS. WATCH (Feb. 26, 2018, 7:00 PM), <https://perma.cc/DTB2-MYK7>.

290. *Criminal Arrests in Xinjiang Account for 21% of China’s Total in 2017*, CHINESE HUM. RTS. DEFS. (July 25, 2018) [hereinafter *Xinjiang’s Annual Reports*], <https://perma.cc/G25T-6FT9> (citing TIANSHAN NET; *Xinjiang People’s Procuratorate Annual Work Reports* (2014–2017); SUPREME PEOPLE’S PROCURATORATE ANNUAL WORK REPORTS (2013–2017)).

291. *Id.*

292. The aggregate number of arrests in the Uyghur-heavy province was 27,404 in 2016, 35,568 in 2015, and 27,164 in 2014. *Id.*

293. Buckley & Mozur, *supra* note 169.

294. Andersen, *supra* note 22.

295. *Id.*

feed the Uyghur into the “electronic surveillance pipeline” that ends at the camps.<sup>296</sup>

## 2. Facial Recognition Software

Technology that can distinguish the distinct phenotypic characteristics of the Uyghur, and identify outward expressions of Muslim identity such as the hijab or beards, is built into the design of the primary surveillance tool used by the State.<sup>297</sup> Powered by A.I., “[f]acial recognition technology has been integrated into much of [the] surveillance network and trained to identify” Uyghur facial characteristics.<sup>298</sup> The technology has been designed to home in on the Uyghur and other minority groups that the Chinese government seeks to suppress.<sup>299</sup> This facial recognition profiling is not the outcome of policy or decisions made by state agents manning checkpoints, but the intended outcome of surveillance tools designed to single out the Uyghur.<sup>300</sup>

China’s facial recognition technology is designed by Chinese tech giants. The State collaborates with domestic companies, including Hangzhou Hikvision, to plant facial recognition cameras throughout the province.<sup>301</sup> In 2019, Hangzhou Hikvision installed cameras to monitor 967 mosques in *one*

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296. I adopt the term coined by Arnett, who defines it in relation to racialized policing in the United States as:

the various new technological surveillance strategies and devices that comprise the surveillance regime of control primarily promoted in community-correction models. Offenders enter the continuum through risk assessment instruments and algorithmic formulas that measure worthiness for surveillance, and then are exposed to myriad community-based surveillance technologies that monitor and manage offenders as a net-widened extension of incarceration.

*From Decarceration, supra* note 23, at 651 n.30.

297. Andersen, *supra* note 22.

298. NARDI, *supra* note 127, at 3.

299. Chinese tech companies have also filed patent applications for designs that identify the Muslim minority. Avi Asher-Schapiro, *Chinese Tech Patents Tools that Can Detect, Track Uighurs*, THOMSON REUTERS FOUND. NEWS (Jan. 14, 2021, 5:50 PM), <https://perma.cc/JSZ7-BBP9>.

300. See Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://perma.cc/8Y95-QUXP>.

301. See Buckley & Mozur, *supra* note 169.

county in southern Xinjiang.<sup>302</sup> This technology enables state police to lock in on individual subjects entering or inside a Xinjiang mosque and collect real-time images of activity that are instantly fed into a central database.<sup>303</sup> Further, this scope of coverage in a single county in Xinjiang, which is divided into sixty-one distinct counties, illustrates the vast scale of surveillance.<sup>304</sup>

Facial recognition cameras are also stationed in cities and at municipal checkpoints throughout Xinjiang. Similar to toll stations on American highways, this network of checkpoints serves as the digital walls that envelop the modern Chinese municipality.<sup>305</sup> The checkpoints also keep real-time tabs on the movement of residents within their home cities:

When Uighurs reach the edge of their neighborhood, an automated system takes note. The same system tracks them as they move through smaller checkpoints, at banks, parks, and schools. When they pump gas, the system can determine whether they are the car's owner. At the city's perimeter, they're forced to exit their cars, so their face and ID card can be scanned again.<sup>306</sup>

When Uyghurs travel beyond their hometowns, digital checkpoints use “algorithms to predict the likelihood of ‘extremism’ in individuals and sort them for imprisonment, indoctrination, or surveillance.”<sup>307</sup> In Urumqi, Xinjiang's

302. NARDI, *supra* note 127, at 3. In 2019, the Trump Administration considered barring Hikvision from buying American technology. Buckley & Mozur, *supra* note 169.

303. See *Digital Enclosures*, *supra* note 279.

304. See *Xinjiang: Prefectural Divisions*, CITY POPULATION (Feb. 20, 2022), <https://perma.cc/UB24-UNR4>.

305. The system that connects this network of checkpoints is the Integrated Joint Operations Platform (Ijop), “a regional data system that uses AI to monitor the countless checkpoints in and around Xinjiang's cities. Any attempt to enter public institutions such as hospitals, banks, parks or shopping centres, or to cross beyond the boundaries of . . . local police precinct[s], would trigger the Ijop to alert police.” Darren Byler, *China's Hi-Tech War on Its Muslim Minority*, GUARDIAN (Apr. 11, 2019, 1:00 AM), <https://perma.cc/D3FK-9QR4>.

306. Andersen, *supra* note 22.

307. James Millward & Dahlia Peterson, *China's System of Oppression in Xinjiang: How It Developed and How to Curb It*, BROOKINGS INST. 5 (Sept. 2020), <https://perma.cc/QBV8-GPU3>.

capital, a staggering six million identifications were made at the city's 10,000 checkpoints in twenty-four hours' time.<sup>308</sup> The vast majority of those identified and stopped were Uyghur, which demonstrates the profiling efficacy of the technology.<sup>309</sup> Chinese tech titan Alibaba advertises that its products can "detect the faces of Uighurs and other ethnic minorities within images and videos."<sup>310</sup> These "Uyghur analytics" tools work alongside DNA mining and matching at city checkpoints, where "Uighurs frequently have their DNA collected and their eyes scanned."<sup>311</sup>

In 2018, Beijing tasked Alibaba to create an A.I. facial recognition software called "City Brain."<sup>312</sup> The project includes technology that is "capable of detecting Uighurs by their ethnic features."<sup>313</sup> Beyond facial recognition, this surveillance tool enables the State to lock in on anonymous members of the Uyghur population, distinguish them from Han and other ethnic groups, and arrest members of the targeted Uyghur.<sup>314</sup> Currently, the State has "face signatures," which capture the facial expressions of individuals from a series of strategic angles, of the majority of Uyghur residents of Xinjiang.<sup>315</sup>

Fixed facial recognition cameras are accompanied by roving surveillance technologies in Xinjiang. As of 2019, Chinese tech companies "began making networked facial-recognition helmets for police, with built-in infrared fever detectors, capable of

308. Buckley & Mozur, *supra* note 169.

309. "Under the pretext of 'counter-terrorism,' 'anti-separatism,' and 'de-extremism' efforts, Chinese authorities have greatly increased the number of arrests and prosecutions in Xinjiang, which will have disproportionately affected Uyghur Muslims. The government has abandoned any appearance of maintaining judicial review or respecting due process rights in these 'strike hard' campaigns." *Xinjiang's Annual Reports*, *supra* note 290.

310. Raymond Zhong, *As China Tracked Muslims, Alibaba Showed Customers How They Could, Too*, N.Y. TIMES (Jan. 20, 2021), <https://perma.cc/V4NP-6UBJ>.

311. ALINA POLYAKOVA & CHRIS MESEROLE, EXPORTING DIGITAL AUTHORITARIANISM: THE RUSSIAN AND CHINESE MODELS 5 (2019), <https://perma.cc/QRG5-86PU> (PDF). Uyghurs stopped at checkpoints "may [also] be forced to install spyware on their phones that tracks all of their online activity." *Id.*

312. Andersen, *supra* note 22.

313. *Id.*

314. *Id.*

315. Darren Byler, *Ghost World*, LOGIC (May 1, 2019), <https://perma.cc/43D5-A6AL>.

sending data to the government” in real time.<sup>316</sup> In 2018, police and informants began to use facial recognition glasses.<sup>317</sup> In addition, “spy bird” drones equipped with video and facial recognition cameras hovering above, disguised as doves, expand the terrestrial space the State can surveil.<sup>318</sup> While American cities, like Baltimore, are still in the process of implementing aerial surveillance to monitor Black spaces in the city, this technology is firmly in place in Xinjiang.<sup>319</sup>

The smart city synchronizes facial recognition tracking with other cogs of the surveillance architecture. Facial recognition cameras communicate with the State’s collection of Uyghur biometric and DNA data to identify, then match, a subject with a stored profile.<sup>320</sup> Xinjiang residents between the ages of twelve and sixty-five must submit to medical examinations that collect blood samples, eye and iris imaging, voice recording, and fingerprints.<sup>321</sup> This information is stored by the State and continually updated with new data.<sup>322</sup> Collaborating with Chinese tech companies, like iFlytek Co., Beijing continuously refines its aptitude to pair this biometric data with terrestrial image capture and recording.<sup>323</sup> The placement of facial recognition cameras is a potent deterrent on free movement and expression that also disciplines the Uyghur from being and believing in line with their authentic selves.

### 3. Smartphone Tracking

In this era of surveillance capitalism, the first item that comes to mind when uttering the word “surveillance” is the smartphone. In Xinjiang, the smartphone doubles as a “digital

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316. Andersen, *supra* note 22.

317. Mozur, *supra* note 24.

318. Andersen, *supra* note 22.

319. See *Race, Surveillance, Resistance*, *supra* note 39, at 1108.

320. NARDI, *supra* note 127, at 3.

321. *Id.*

322. *Id.*

323. *Id.* iFlyTek Co. “specializes in speech and speaker recognition and produces an estimated 70 percent of all speech-recognition technology in China. . . . In advertising material, the company claims that its systems can handle minority languages, including Tibetan and Uighur.” *Id.*

Swiss Army knife” of monitoring and mining possibilities.<sup>324</sup> In a world where the smartphone has evolved into a bodily appendage that accompanies the surveilled subject wherever they go, it is the ideal digital surveillance tool.

Installation of malware into Uyghur smartphones is a standard tracking practice. Hackers authorized by Beijing use “phishing and fake app-stores” to distribute and seed the malware, turning smartphones into nonstop tracking and “listening devices.”<sup>325</sup> In addition to monitoring vocal communication, specific software is also designed to detect Arabic script and written Uyghur.<sup>326</sup> Smartphone tracking is *responsive*, meaning that it aims to monitor the activity of the target. However, *extractive* software, which mines data from Uyghur smartphone users, is also embedded.<sup>327</sup> This extractive software intercepts data from the smartphones of Uyghur, including photos, recorded communications, texts, browsing history, and other items tied to Uyghur culture or Islam.<sup>328</sup>

Installation of “nanny apps,” software that monitors smartphone use, is a growing practice in Xinjiang.<sup>329</sup> These “apps use algorithms to hunt for ‘ideological viruses’ day and night,” homing in on Islamic practices.<sup>330</sup> “They can scan chat logs for Quran verses, and look for Arabic script in memes and other image files.”<sup>331</sup> This gives the State a penetrating, and permanent, presence in the lines of communication,

324. Tim Bjarin, *The Smartphone Is the Swiss Army Knife of Gadgets*, TIME (Nov. 18, 2013), <https://perma.cc/ZAL8-LQFV>.

325. Sean Lyngaas, *Chinese Mobile Surveillance of Uighurs More Pervasive than Previously Thought, Researchers Say*, CYBERSCOOP (July 1, 2020), <https://perma.cc/ATW2-WT9P>.

326. The World Staff & Carol Hills, *How China Uses Malware to Track Muslim Uyghurs, Even if They've Fled Their Country*, WORLD (July 2, 2020), [hereinafter Hills] <https://perma.cc/5U49-RJ4T>.

327. See Paul Mozur & Nicole Perlroth, *China's Software Stalked Uighurs Earlier and More Widely, Researchers Learn*, N.Y. TIMES (July 1, 2020), <https://perma.cc/Y39P-Q2CB> (last updated Jan. 19, 2021) (describing the Chinese hacking campaign against Uyghurs).

328. See Hills, *supra* note 326 (“[H]ackers created tools disguised as third-party apps to tap into phones in Xinjiang, which then allowed for the ability to record and export information.”).

329. Andersen, *supra* note 22.

330. *Id.*

331. *Id.*



entertainment, and everyday engagement conducted on the smartphone.

For example, nanny apps track and store interactions on WeChat, a central artery of communication, social media engagement, and commerce in China.<sup>332</sup> Abstaining from platforms like WeChat is no simple task for the Uyghur, given that it holds a “surveillance monopoly” in Xinjiang.<sup>333</sup> The platform is far more than a communication app—it is China’s most popular site for purchasing daily needs.<sup>334</sup> Further, WeChat’s vitality rose immensely during the coronavirus pandemic, when Internet retail giants became the lone platforms for purchasing groceries and other basic necessities.<sup>335</sup> This compelled the Uyghur to knowingly use a platform that monitors and mines their data.

Beyond digital data, real-time conversations by phone are also tracked and stored.<sup>336</sup> The character of the person on the other side of the line, in addition to the content of the conversation, determines the scale of state suspicion. “Any kind of contact from a non-Chinese phone number, though not officially illegal, can result in arrest.”<sup>337</sup> This is particularly true if the caller is from a Muslim-majority state or a Uyghur caller outside China.<sup>338</sup>

Uyghurs in Xinjiang are universally aware that their smartphone activity is being surveilled.<sup>339</sup> This knowledge, and the stigma associated with it, has reshaped the Uyghur relationship with the smartphone, disincentivizing routine use of the smartphone and disciplining the Uyghur, en masse, to engage with smartphones in line with the narrow confines

332. See Steven Millward, *7 Years of WeChat*, TECHINASIA (Jan. 20, 2018), <https://perma.cc/VJ2Z-TVFX> (providing a history of “China’s most essential app”). The Chinese tech giant Tencent launched WeChat in 2011. *Id.*

333. See generally POLYAKOVA & MESEROLE, *supra* note 311.

334. See Rita Liao, *WeChat Advances e-Commerce Goals with \$250B in Transactions*, TECHCRUNCH (Jan. 19, 2021, 10:23 AM), <https://perma.cc/W39R-9KDG> (providing statistics and analysis of WeChat users’ shopping patterns).

335. *Id.*

336. Isobel Cockerell, *Inside China’s Massive Surveillance Operation*, WIRED (May 9, 2019), <https://perma.cc/4QJ8-LQW5>.

337. *Id.*

338. Topol, *supra* note 233.

339. *How Mass Surveillance Works in Xinjiang, China*, HUM. RTS. WATCH 3–5 (May 2, 2019), <https://perma.cc/7WS2-X5R5>.

imposed by the State. For instance, it is not uncommon for family members to disconnect entirely from loved ones or cease using the smartphone as a communicative device altogether.<sup>340</sup> A Uyghur man currently living in Washington, D.C., shared,

I still have family in Xinjiang, and I desperately want to talk to them. But I know if they get a call, a text or even a note from me I can put them in danger. I am here [in the United States], and that all by itself is reason for the [state] police to take action against them. So, even though I want to more than anything, I do not try to contact them to keep them safe . . . . The phone [altogether] has become a sight of worry.<sup>341</sup>

However, nonuse is no cure for smartphone surveillance. Abstaining from phone use, and “irregular” phone use, can also give rise to suspicion,<sup>342</sup> converting the smartphone—technology so deeply entrenched into Uyghur daily life—into the perfect tool of subjugation society surveillance. This makes the smartphone a tool of mass control and discipline that, as illustrated by the violence wrought on the street and in the camps, invites the violent hands of the State.

#### 4. Beyond Chilling

While scholars focus heavily on the chilling effect of digital surveillance, the impact on the Uyghur in Xinjiang is far more than chilling. The impact of digital surveillance transcends the suppression of speech, assembly, and other core liberties extended, albeit in a stratified way, in western control societies. With no constitutional protections or civil liberties to speak of in China, Xinjiang’s digital architectures of surveillance—by design—have a mass subjugating effect that supersedes the effect of marginalization, subordination, or, more technically, the erosion of “substantive citizenship.”<sup>343</sup> Again, it is critical to

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340. See Topol, *supra* note 233, for a case involving a Uyghur mother who intentionally ceased telephone communication with her daughter, living in Sweden, for fear of state retribution.

341. Interview with Abdul N. (Oct. 14, 2020) (name changed to protect anonymity).

342. Tanner Greer, *48 Ways to Get Sent to a Chinese Concentration Camp*, FOREIGN POL’Y (Sept. 13, 2018, 10:40 AM), <https://perma.cc/57ZN-48F5>.

343. See LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMA OF CONTEMPORARY MEMBERSHIP 31 (2006) (“[T]here is often a gap between

remember that members of the polity in authoritarian states are more *subjects* than *citizens*—a critical distinction with regard to rights.<sup>344</sup>

The pervasiveness of targeted surveillance in Xinjiang drives the Uyghur to underperform their cultural customs and guise their bona fide identities. The regime’s digital omnipresence pushes the Uyghur to elect out of religious exercise, cultural expression, communal assembly, and travel. This conditions “identity performance” in line with Beijing’s Sinicization program among the Uyghur, and reperformance of Uyghur identity in line with Han supremacist benchmarks. In turn, Uyghur “covering,” or full-fledged “concealment,” becomes a mandate for survival in Xinjiang.<sup>345</sup> The digital bounds of surveillance condition the Uyghur to continuously moderate their every action—off- and, especially, online.<sup>346</sup>

Examining the effect of subjugation through the prism of identity performance, and distinguishing it from the subordination that results in control societies, is instructive.<sup>347</sup> Erving Goffman’s concept of “stigma” is lucidly demonstrated in Xinjiang by the Uyghur response to digital surveillance.<sup>348</sup> The

possession of [formal] citizenship status and the enjoyment or performance of citizenship in substantive terms.”).

344. See generally Maximilian Koessler, “Subject,” “Citizen,” “National,” and “Permanent Allegiance”, 56 YALE L.J. 58 (1946).

345. See Dan Levin, *Uighurs’ Veils Signal Protest Against China’s Restrictions*, N.Y. TIMES (Aug. 7, 2014), <https://perma.cc/YEL2-5PH3> (describing the experience of a Uyghur woman “torn between her professional ambition and her outrage toward official restrictions targeting the Uighur way of life”).

346. See Greer, *supra* note 342.

347. Identity performance involves the public negotiation of one’s expression of self in line with incentives and disincentives. Behavioral psychologist Erving Goffman developed this theory. See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1956). Identity Performance theory has been influential among critical law scholars, particularly those examining how subordinated identities—including gender, sexual orientation, and race—stand as stigma that spur identity performance in line with positive incentives. For a leading treatise on reperformance of sexual identity, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

348. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 103–04 (1963) (“[C]overing . . . is an important . . . ‘assimilative technique[]’ employed by members of a minority ethnic group[] . . . to restrict the way in which a known-about attribute obtrudes itself into the center of attention . . .”).

state stigma ascribed to Uyghur and Muslim identity, so ominous for the Uyghur, not only incentivizes them to “conceal Islam” and their cultural practices, but also conditions them to partake in the state project of removing associated practices and traits through conditioned discipline and reperformance.<sup>349</sup> In turn, the Uyghur—as a population mass within Xinjiang—are disciplined through the threat of arrest, detention, or worse to reperform an identity that aligns with sanctioned Han custom but is against the linguistic, cultural, and spiritual expression central to Uyghur life.

This campaign of mass discipline, deepened by the State’s penetrating gaze enabled by digital surveillance, is reactive and productive. In addition to concealing native customs and Islamic practice, Uyghur seeking to stave off punishment condition themselves to speak Mandarin, express allegiance to the State and the Communist Party, and take on Han cultural customs and practices. The digital architecture of surveillance fixating on the Uyghur has this potent two-way disciplining effect in addition to mere control. Consequently, it blurs the lines between control, discipline, and the corporal punishment looming over Xinjiang.

This negating effect of digital surveillance in Xinjiang even pierces spaces surveillance does not reach. As Paul Mozur of the *New York Times* observed, “For technology to be effective, it doesn’t always have to work.”<sup>350</sup> Knowledge that the State has exerted immense resources to surveil Uyghur life, alongside the penetrating surveillance technology, is itself debilitating. Echoing Foucault, the Uyghur subject becomes a “principle of [her] own subjection” within Xinjiang, always believing she is being watched even when she is not.<sup>351</sup> The looming presence of the smartphone, routinely seated near the subject and *always there*, stands as an ever-present reminder that the State can see what the subject is doing. It is more than the optimal digital tool for *controlled* entertainment; in the subjugation society, it is an ever-present embodiment of the State’s omnipresent gaze.

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349. “‘Concealing Islam’ is the process whereby a Muslim American actor trades in his or her Muslim identity for a non-Muslim identity within a specific setting.” *Acting Muslim*, *supra* note 165, at 15.

350. See Mozur, *supra* note 24.

351. See FOUCAULT, *supra* note 22, at 203.

### B. *China's Global Surveillance Footprint*

The subjugation society is not confined to China. Nor is it exclusively devised to subjugate and stamp out the Uyghur. China's expanding global influence, fueled in part by its digital surveillance expertise, is pushing subjugation society surveillance into new contexts.<sup>352</sup> As Steven Feldstein observes in *The Rise of Digital Repression*,

Chinese technology used for repressive purposes has proliferated worldwide. Major Chinese firms, such as Huawei, ZTE, Hikvision, Dahua, Meiya Pico, Sensetime, and others, are building safe city surveillance projects, peddling high-tech censorship tools, and supplying advanced social media monitoring capabilities to countries around the world.<sup>353</sup>

Demand for Chinese companies' digital surveillance tools is especially high among authoritarian regimes with designs to subjugate and stamp out their own oppositional groups. This section examines two of these case studies: (1) the violent crackdown on sexual minorities in Uganda; and (2) the persecution of dissidents in Egypt.

#### 1. Uganda and Sexual Minorities

Uganda is trending toward a subjugation society. The target in the African nation: sexual minorities. The State steers its violent crackdown onto sexual minorities to deepen its popularity. Serving as president of the African nation since January of 1986, President Yoweri Museveni strengthened

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352. China is unabashed about its global tech ambitions. President Xi is positioning China to achieve global AI supremacy by 2030, surpassing the United States as that market's biggest player. This target, among other economic aims tied to shoring up Chinese digital surveillance hegemony, is integral to its Belt and Road Initiative (BRI)—a global infrastructure development strategy devised in 2013 to invest in seventy nations and leading international organizations. This initiative will build inroads to export Chinese surveillance technologies, which will influence how surveillance is administered in authoritarian and non-authoritarian states globally. See Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELS., <https://perma.cc/Y939-M66R> (last updated Jan. 28, 2020, 7:00 AM).

353. STEVEN FELDSTEIN, *THE RISE OF DIGITAL REPRESSION: HOW TECHNOLOGY IS RESHAPING POWER, POLITICS, AND RESISTANCE* 48 (2021).

relations with China to modernize Uganda's digital surveillance state, deepening his stranglehold on power.<sup>354</sup>

Ushered into Uganda through the Digital Silk Road project (DSR), China heads the assembly of a subjugation society in Uganda. Huawei, the Chinese tech giant, is the on-site architect of the African nation's modern surveillance architecture<sup>355</sup>—an ambitious vision comprised of cutting-edge assemblage of monitoring and mining tools that target Museveni's political opponents, chief of which are the nation's persecuted LGBTQ communities. This surveillance technology is poised to increase homophobic dragnets and witch hunts, which play out violently against sexual minority groups in Uganda.<sup>356</sup>

Powered by the smartphone tracking technology used in Xinjiang, Ugandan police carry out mass arrests that blur the lines between punishment and control.<sup>357</sup> On November 17, 2019, *Human Rights Watch* reported, “[Ugandan] police [in Kampala] carried out two mass arrests on spurious grounds, abused the detainees, and forced at least 16 to undergo anal examinations. Such examinations violate their right to bodily integrity and freedom from torture and ill treatment.”<sup>358</sup> These sweeps are not uncommon in Uganda and are arbitrarily commenced on the slimmest of suspicion.<sup>359</sup> Often initiated on no suspicion at all, they are staged to incite homophobic hysteria that nets political points for Museveni and his regime.<sup>360</sup>

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354. See Joe Parkinson et al., *Huawei Technicians Helped African Governments Spy on Political Opponents*, WALL ST. J., <https://perma.cc/EY27-JBFJ> (last updated Aug. 15, 2019, 3:21 AM) (“The deal with Huawei is a survivor strategy to consolidate power. . . . It’s an all-out assault.” (internal quotation omitted)).

355. See *id.* (“Technicians from [Huawei] have, in at least two cases, personally helped African governments spy on their political opponents . . .”).

356. Anti-homosexuality laws and surveillance have collaterally impacted heterosexual communities as well, based on stereotypical and arbitrary presumptions of homosexual identity performance. *Uganda: Stop Police Harassment of LGBT People*, HUM. RTS. WATCH (Nov. 17, 2019, 9:00 PM), <https://perma.cc/WT8M-J4SM>.

357. *Id.*

358. *Id.*

359. *Id.*

360. For an account of homophobia and its popular and legal dimensions in Uganda, see Lydia Boyd, *What’s Driving Homophobia in Uganda*, CONVERSATION (Nov. 20, 2019), <https://perma.cc/VZ6K-PXF8>.

Like counterterror surveillance in Xinjiang, this punitive policing has a sharp disciplining effect on sexual minorities in Uganda. Digital surveillance chills and deters same-sex relationships, pushes sexual minorities to “cover” their bona fide sexual identity, and incentivizes them to reperform their behavior in line with societal views of heterosexuality.<sup>361</sup> In some instances, these overpoliced communities undergo violent conversion therapy—which renders lasting psychological and physical harm on survivors.<sup>362</sup> In sum, sexual minorities are stripped of “human dignity” and subjugated by state-sponsored homophobic zeal that blends discipline, control, and corporal violence.<sup>363</sup>

With no viable threat to Museveni’s dictatorship, the longstanding autocrat instrumentalizes state-sponsored homophobia as an authoritarian tactic to raise his popularity and deepen his authority. To further digitize this strategic and structural commitment to homophobia, Museveni completed a \$126 million deal with China to introduce facial recognition surveillance software.<sup>364</sup> Modeled after the strategy in Xinjiang, Huawei is building a system of interconnected CCTV cameras through Ugandan cities, starting with the capital, Kampala, that identify sexual minority activists and leaders, among other “political opponent” groups.<sup>365</sup> President Museveni himself tweeted in celebration of the first installation of facial recognition cameras at Kampala police headquarters on November 28, 2019, updating the nation and his two million followers about the Huawei project.<sup>366</sup>

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361. See Yoshino, *supra* note 347, at 769.

362. See Khatondi Soita Wepukhulu, *Anti-Gay “Therapy” Offered at Uganda Health Centres Run by Aid-Funded Groups*, OPENDEMOCRACY (June 30, 2021, 10:56 AM), <https://perma.cc/HU33-9XMA>.

363. Justice Kennedy’s emphasis on human dignity drove his opinion upholding same-sex marriage rights on Fourteenth Amendment substantive due process grounds. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

364. See Elias Biryabarema, *Uganda’s Cash-Strapped Cops Spend \$126 Million on CCTV from Huawei*, REUTERS (Aug. 15, 2019, 4:48 AM), <https://perma.cc/54L2-CTZN>.

365. *Id.*

366. Yoweri K. Museveni (@KagutaMuseveni), TWITTER (Nov. 28, 2019, 1:34 PM), <https://perma.cc/7G4D-Q824>.

The installation of Chinese facial recognition surveillance in Uganda will unfold in phases. “In the second phase, which started rolling out [in early 2020], 20 facial recognition cameras are expected to be installed and connected to 107 monitoring centers at different police stations within 2,319 mapped countryside municipalities and major towns.”<sup>367</sup> This gives Ugandan police deeper reach into LGBTQ political organizing and private life. The state of surveillance is made possible by the digital authoritarianism exported through the DSR, whereby China is reengineering Uganda into the sort of submission society it piloted in Xinjiang.<sup>368</sup>

## 2. Egypt and Its Dissidents

The iconic images of Egyptian revolutionaries occupying Cairo’s Tahrir Square live on. The faded pictures of an “Arab Spring” testify to the possibility of democracy, crumbled by another authoritarian regime that presides over the African nation today.<sup>369</sup> These images stir the fears of Abdel Fattah el-Sisi, Egypt’s current autocrat, who rose to power on the back of a military coup on July 3, 2013.<sup>370</sup> In eight years, Sisi has restored the authoritarian rule of the dictator (Hosny Mubarak) whom Egypt’s historic revolution ousted in 2011, making Sisi a “modern-day pharaoh” who, unlike fallen tyrants, is propped up by sophisticated Chinese surveillance technology.<sup>371</sup>

Repressing the dissidents who unseated Mubarak is the catalyst behind rising Egyptian-Sino relations. China and its

367. *Huawei Infiltration in Uganda*, PRIV. INT’L (June 25, 2020), <https://perma.cc/MBW5-WVJV>.

368. See Jonathan E. Hillman & Maesea McCalpin, *Watching Huawei’s “Safe Cities”*, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 2019), <https://perma.cc/85QF-RY6S> (analyzing the introduction of seventy-three “Safe City” agreements for surveillance products and services in fifty-two countries).

369. The “Arab Spring” was the string of revolutions that began in 2010, which included the Egyptian revolution of 2011. For a critical political history of the Egyptian Revolution, see NEIL KETCHLEY, *EGYPT IN A TIME OF REVOLUTION: CONTENTIOUS POLITICS AND THE ARAB SPRING* (2017).

370. For a succinct account of Sisi’s rise to power, see Dieter Bednarz & Klaus Brinkbaumer, *The Swift Rise of Egypt’s Sisi*, SPIEGEL INT’L (Sept. 2, 2015, 12:26 PM), <https://perma.cc/SJ98-MPSA>.

371. See Elie Podah & Elad Giladi, *With Sissi, Egypt Sees a Return of the Pharaohs*, HAARETZ (Aug. 17, 2018), <https://perma.cc/CHK7-YYK5>.



private tech giants are at the center of reconstructing an Egyptian surveillance state that aborts the very possibility of another popular revolution. To neutralize the milieu of identity groups that spearheaded the 2011 Revolution, Sisi first directed Chinese State Construction (CSC) to build a new national capital thirty miles outside Cairo.<sup>372</sup> The remote and tightly guarded New Administrative Capital, which will cost Egypt \$40 billion, will distance the state buildings from urban population centers.<sup>373</sup> It will thus prevent the popular mobilization and protests that spurred the 2011 uprising. Municipal planning, as highlighted in Xinjiang, is the first step toward making a new state of surveillance. The massive “new capital” project has opened the door for “more than 1,500 other Chinese firms [that] are currently registered in Egypt,” including telecommunications, facial recognition, and surveillance technology companies ready to wire the new capital and surrounding areas with the most cutting-edge monitoring machinery.<sup>374</sup> With Chinese tech and expertise, Sisi is building the “smart capital” for purposes of digitally deepening his rule, identifying dissidents, and avoiding another popular revolution.

Sisi sees Islamic elements in Egypt as the principal threat to his rule. Already backed by the Kingdom of Saudi Arabia, a regional authoritarian power, Sisi has also forged relations with China along kindred lines of mistrust toward Muslim movements. While Egypt is a predominantly Muslim country,<sup>375</sup> modern Egyptian autocrats have been deeply mistrustful of Islamic political and grassroots movements,<sup>376</sup> most notably, the Muslim Brotherhood, which Sisi vowed to disband a year after

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372. See Eric Olander, *A New Chinese-Built Egyptian Capital Is Rising Out of the Sand Near Cairo*, CHINAFRICA PROJECT (Oct. 13, 2020), <https://perma.cc/B4AV-KHNE>.

373. Mustafa Menshawy, *Why Is Egypt Building a New Capital?*, AL JAZEERA (July 5, 2021), <https://perma.cc/2LM9-2ZWU>.

374. John Calabrese, *Towering Ambitions: Egypt and China Building the Future*, MIDDLE E. INST. (Oct. 6, 2020), <https://perma.cc/GL7D-2YJF>.

375. The Egyptian population is 90 percent (Sunni) Muslim, and 10 percent Coptic Christian. U.S. DEP'T OF ST., EGYPT 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT (2019), <https://perma.cc/E753-Z5B7> (PDF).

376. See Adam Lammon, *Why the Muslim Middle East Supports China's Xinjiang Crackdown*, NAT'L INT. (Oct. 24, 2020), <https://perma.cc/6AFQ-9PCL>.

claiming power.<sup>377</sup> The Muslim Brotherhood are a longstanding political movement rooted in Egypt, with deep ties throughout the Muslim world, who leverage a Pan-Islamic political ethos to mobilize grassroots support and build power.<sup>378</sup>

Sisi designated the Muslim Brotherhood, which briefly held power in Egypt with the election of Mohamed Morsy as president in 2011,<sup>379</sup> as a terrorist organization in 2014.<sup>380</sup> The new head of state then pivoted to co-opt the centers and central figures of Islamic authority in Egypt, most notably Al-Azhar University, to cast out the Muslim Brotherhood on blurred political and religious grounds.<sup>381</sup> Shrouded by the endorsement from the leading Islamic centers in Egypt and billion-dollar surveillance projects with China, Sisi is shoring up his authoritarian hold on power through state opposition to the Muslim Brotherhood.

Sisi's surveillance campaign against the Islamist group mixes punitive violence with digital control. Even before the development of Chinese surveillance and smart-city projects in Egypt, the Sisi regime furiously cracked down on known and perceived members of the Muslim Brotherhood. *Human Rights Watch*, alongside Egyptian human rights partners, revealed,

The Interior Ministry's regular police and its National Security Agency have used widespread arbitrary arrests, enforced disappearances, and torture against perceived dissidents, many of them alleged members or sympathizers of the Muslim Brotherhood, al-Sisi's primary political opposition. The Egyptian Coordination for Rights and Freedoms (ECRF), an independent human rights group, has identified 30 people who died from torture while . . . [i]n 2016, the ECRF reported that its lawyers received 830

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377. See *Egypt's Sisi Vows Muslim Brotherhood 'Will Not Exist'*, BBC NEWS (May 6, 2014), <https://perma.cc/4XM9-CPKR>.

378. See CARRIE ROSEFSKY WICKHAM, *THE MUSLIM BROTHERHOOD: EVOLUTION OF AN ISLAMIST MOVEMENT* (2015), for a modern political history of the group and movement.

379. See Ashraf El-Sharif, *The Egyptian Muslim Brotherhood's Failures*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 1, 2014), <https://perma.cc/7P38-JVTM>.

380. See David D. Kirkpatrick, *Is the Muslim Brotherhood a Terrorist Group?*, N.Y. TIMES (April 30, 2019), <https://perma.cc/DMH9-XS JL>.

381. See Khalil Al-Anani, *All the Dictator's Sheikhs*, FOREIGN POL'Y (July 20, 2020), <https://perma.cc/49LM-6RR4>.

torture complaints, and that another 14 people had died from torture in custody.<sup>382</sup>

Egypt's commitment to digitizing its surveillance state, powered by Chinese know-how and tech, centers on subjugating the Muslim Brotherhood in particular and Egyptians suspected of being sympathetic to the movement and its ideas more broadly.<sup>383</sup>

This suspicion, enforced selectively by the Sisi police state, deters members of society from speaking freely on political matters, attending specific mosques, and wearing a beard or hijab—among other forms of benign expression the State associated with the Muslim Brotherhood.<sup>384</sup> After all, Muslims are the first and familiar target for these Chinese surveillance technologies, which were engineered to track the Uyghur in Xinjiang.

### C. *Beyond Subjugation, Subordination and Control*

During the inaugural *Race, Law, and Technology Convening* on November 11, 2022, Chaz Arnett asked, “Is it possible to conceive of the United States becoming a subjugation society?”<sup>385</sup> This was not the first time this query was posed, particularly given the volatile surveillance moment that this Article was born into. Arnett’s question, focusing on how digital surveillance and policing tools have been deployed in overpoliced communities of color in the United States, highlights the salience of subjugation society theory—a salience that, with the rapid expansion of Chinese digital surveillance products and the aggregate advancement of these tools, signals

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382. HUM. RTS. WATCH, “WE DO UNREASONABLE THINGS HERE”: TORTURE AND NATIONAL SECURITY IN AL-SISI’S EGYPT 1 (2017), <https://perma.cc/3M6A-MH8K> (PDF).

383. See Barbara Zollner, *Surviving Repression: How Egypt’s Muslim Brotherhood Has Carried On*, MALCOLM H. KERR CARNEGIE MIDDLE E. CTR. (Mar. 11, 2019), <https://perma.cc/B97B-ZF8B>.

384. “Soldiers on the street stop and ask me sometimes, ‘are you in the *Akhwan*?’ (the Arabic name for the Muslim Brotherhood) . . . or if my friends are part of it. . . . I think they stop me because I wear hijab.” Interview with Sawsan H. (Apr. 3, 2020) (name changed to protect subject’s anonymity).

385. Professor Chaz Arnett, Remarks at *Race, Law, and Technology Convening* (Nov. 11–12, 2021). The convening was held virtually over Zoom and organized by Jessica Eaglin, Chaz Arnett, and Margaret Hu.

the deepening of, at minimum, subjugation society tactics on the domestic front.

This Article crystallizes how the administration of surveillance is materially shaped by political context and the identity of the surveilled. Thinking about the United States as a democratic control society, where democratic safeguards and the singular objective of control unravel in overpoliced communities of color, reveals liminal sites of surveillance. These liminal sites, between the orders of control and subjugation, are where the ensemble of violence, discipline, and control are jointly administered against Black people in the name of criminal policing, against immigrant Muslim communities in furtherance of the War on Terror, or against urban enclaves populated with Latinx communities to regulate immigration through the heavy presence of Immigration Customs and Enforcement (ICE).<sup>386</sup>

Per Arnett's question, what distinguishes these heavily policed American geographies—and the communities that pull these surveillance technologies in—from the subjugation societies described above? What laws, or lack thereof, stifle foreign and domestic vendors of surveillance from equipping American law enforcement with the digital tools to reach deeper into the lives of targeted communities, which are often followed by the punitive violence inflicted on city streets or in prisons?

This Article may not provide clear answers to these questions. But it provides a theory that unveils how erased subjects of surveillance shine light on liminal sites of surveillance previously unseen and, thus, undeveloped. Currently, the (thinning) constitutional protections in even the most overpoliced spaces in the United States, where mass subordination has not yet devolved into the subjugation we see in Xinjiang, stands as the principal distinction between these more ominous sites of the American control society and the subjugation society.

Perhaps the subjugation society framework, which makes sense of surveillance targeting subaltern groups beyond the confines of race, will inspire additional theorizing that develops distinct, liminal, or additional surveillance societies. Or,

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386. See Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, CENTURY FOUND. (Dec. 21, 2017), <https://perma.cc/G2GK-G9QV>.

perhaps, the digital surveillance technologies of tomorrow, developed in American labs or exported from Beijing, will dissolve the lines that currently stand between the two.

Theory is, after all, a technology. For it to make sense of the law and the world it creates, theory should emulate the dynamism and constant forward momentum of the digital surveillance tools described within and beyond the four corners of these pages. If it fails to do so, it falls short of seeing everything and everyone for what they are—particularly in the darkest corners where the most vulnerable dwell.

#### CONCLUSION

*At night she kept looking at her son's picture and  
crying.  
Since the guards could see this on the camera,  
They yelled at her over the speaker,  
"If you look at your son's picture and cry again,  
We will take it away."*

Darren Byler<sup>387</sup>

"Does technology favor tyranny?" probed a *Foreign Affairs* headline, atop a portrait of a Chinese policeman scrutinizing the smart ID card of a young Uyghur man in Kashgar.<sup>388</sup> This question grapples with Lawrence Lessig's view that technologies "do not naturally . . . tend" toward tyranny, or democracy for that matter.<sup>389</sup> While pressing, the more important question for overpoliced and subaltern groups may be: *how does surveillance technology reshape the spaces of society that I call home?* These intimate spaces, which were once isolated from the gaze of the State, today dissolve the need for hardened bars and the theoretical bounds that separate surveillance society orders.

The development and mainstreaming of digital surveillance have led legal scholars to grapple directly with this latter question. By doing so, a burgeoning literature investigating the racialized administration of digital surveillance, and its deeply

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387. IN THE CAMPS, *supra* note 4, at 31.

388. *Does Technology Favor Tyranny?*, FOREIGN AFFS. (Feb. 12, 2019), <https://perma.cc/R5VU-YWPK>.

389. Lessig, *supra* note 131, at 220.

racial effects, challenges colorblind theorizing that presumes that policing technologies, in and of themselves, are inherently neutral. This scholarship, centering the American experiences, swells during a time when “recent advances in surveillance technology are increasing the power of police, at the same exact time that avenues for regulating police misconduct and overreach are becoming weaker.”<sup>390</sup>

Trenchant in their analysis and timely in their critique, critical scholars have revealed how Big Data Policing is mounting police power while leaving marginalized communities more vulnerable to police overreach. This Article joins the scholarly movement that proclaims, emphatically, that the tyrannical capacity of policing technology rests largely on the identity of its target and the political geography where it is being administered. By looking beyond race and the western control society, the society of subjugation reveals how digital surveillance is wielded against subaltern groups that authoritarian governments are bent on persecuting. This objective supersedes the aim of control, synchronizing surveillance that facilitates mass discipline with punishment as tentacles of that campaign.

Prevailing surveillance theory draws rigid lines that are traced along white and western contours. In turn, it overlooks the rich color between and at the margins where subaltern groups experience surveillance at sites where punishment, discipline, and control converge frequently and furiously. Subjugation society theory centers these erased experiences and overlooked sites, creating a new frame where digital surveillance draws lines on the very top of communities marked as oppositional on account of how they look; where they worship; what sexuality they identify as; and why they continue to clench, desperately, onto cultural traditions. It is here, “*beyond the walls of intelligence, [where] life is defined,*”<sup>391</sup> and where the existence of subaltern bodies is closely surveilled and theoretically erased.

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390. *Race, Surveillance, Resistance*, *supra* note 39, at 1105.

391. NAS, MEMORY LANE (Columbia Records 1994).