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Guilty, by Default

“Men are not hanged for stealing horses, but for that no horses may be stolen.¹” Words uttered during England’s bloody code which seem alien and cruel to us. Since the introduction of the adversarial system the concept of innocent until proven guilty has flourished. Today, it is oft considered wrong to convict an innocent person, and rightly so. Many constitutions have legislated the requirement for due process in order to properly establish guilt prior to prolonged imprisonment. Furthermore, Habeas Corpus legislation has long protected people from unjust imprisonment. Yet there has been a shift back to guilty by default in recent decades.

The concept of guilty by default has long been an element of dictatorships where, to this day, people are imprisoned either without trial or after a mere drumhead trial. The concept of innocence until proven guilty is unknown in these states. For that reason such countries should no more be included in this current discussion.

It is those democracies which imbue force of will by claiming respect for human rights which are relevant. Take, for example, the United States bill of rights which demands a trial by an impartial jury² and protection against seizures and searches without probable cause.³ The Dutch constitution states that “no-one may be deprived of his⁴ freedom unless under jurisdiction of legislation.⁵⁶” This shows an inherent belief in establishing a reason for imprisonment, a belief which bears at least some relation with the concept of innocence until proven guilty. Nevertheless, in at least the Dutch case it is possible to introduce laws which allow long-term imprisonment without establishing guilt.

It is important to establish what defines innocence until proven guilty. Firstly, any guilt must be proven, beyond reasonable doubt, that a person indeed committed the crime with which they’re charged. Furthermore, any investigation may only be started when a crime has demonstrably been committed and must consequently be conducted without undue prejudice against any person. Ultimately, those who are truly innocent can be at ease and not afraid of persecution or prosecution as long as they are truly innocent. This latter is, of course, impossible to completely implement in any legal system. The main goal should be to limit these miscarriages of justice. Eventually, it could be said it is better for one hundred criminals to roam the streets than one innocent man to be imprisoned; especially as the latter would make society itself criminal.

In spite of their lofty ideals, many governments have turned to continually assure the innocence of its citizens. Through the use of, for example, closed-circuit television cameras it has become possible to track everyone’s movements at any time. The use of this technology implies a belief in every person’s guilt of a yet-to-be defined crime. The technology does allow investigation without prejudice but also investigation prior to demonstrable crimes being committed.

¹George Savile

²Amendment VI

³Amendment IV

⁴The Dutch constitution consistently uses the masculine pronoun

⁵The Netherlands uses civil law meaning as much as possible is legislated

⁶Article 15.1: Buiten de gevallen bij of krachtens de wet bepaald mag niemand zijn vrijheid worden ontnomen.

The question arises whether this pre-criminal investigation is problematic as, incorrectly⁷, it is assumed crime-rates are reduced. The problem with such surveillance is that laws constantly change and that which is not a crime at this moment may soon be.⁸ As such, perfectly legal acts caught on camera may suddenly cause a person to be arrested and prosecuted. Furthermore, the sheer amount of cameras, especially in cities like London, has made it impossible for any person to adequately assure the data is handled appropriately; *quis custodiet ipsos custodes?*

Closed-circuit television is clearly intended for surveillance but other technologies can be used equally well, some of which have been adopted by the population at large instead of forced upon them. Those which are forced upon the population are systems like the Oyster card, surveillance using drone aircraft, deep-packet inspection,⁹ and others. Some of these systems can be powerful but none are as powerful as Facebook and Google. In order to provide its inherent functionality Facebook must store everything which is posted on it which includes private conversations.¹⁰ Google has the ability to store every search query made from a specific computer. It is unclear to what extent such private information is handled appropriately and to what extent it is used in investigation prior to criminal action.

A final problem with current surveillance techniques is the possibility for false positives in case of committed crimes. Surveillance allows patterns to be identified which may eventually cause prejudice in investigation. When, for example, a person parks his car every Thursday at two before the same shop in order to visit someone in the hospital and then stops on the exact day that shop is raided the investigator, having an established pattern at his disposal, may unduly lead the investigation into the former's direction instead of properly investigating.

It is clear that surveillance infringes on the concept of innocent until proven guilty by investigating virtually everyone prior to an actual crime being committed. Moreover, by allowing patterns to be identified it can cause investigations to become unduly biased towards a certain person. Ultimately, everyone becomes a permanent suspect and is, thus, always considered to be guilty of a crime yet to be committed. In the case of technologies forced upon us, such as Oyster card-like systems, the best we can do is try and avoid it as long as possible. In the case of Facebook, Google, and other ways in which we allow surveillance ourselves the best way to prevent such surveillance is, of course, to not use them. If one does use them one should always be sceptical about these systems.

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⁷*CCTV and crime displacement: A quasi-experimental evaluation* – Ana Cerezo showed only a marginal decrease in crime-rates. Only some types of crime were less common. *To CCTV or not to CCTV?* – Rachel Armitage showed that CCTV is only temporarily effective

⁸Not to mention of the potential possibility of laws to be retro-actively instituted.

⁹A system used to determine how a person uses the internet.

¹⁰“Now the police dreams that one look at the gigantic map on the office wall should suffice at any given moment to establish who is related to whom and in what degree of intimacy” *The Origins of Totalitarianism* – Hannah Arendt. Although Arendt's discussion dealt with the totalitarian police force the fact that such a system is now implemented and accepted by the population at large is at least curious.