

## The Right to Privacy Is Tocquevillean, Not Lockean: Why It Matters

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Primarily as a result of recent leaks about several large-scale NSA surveillance projects by intelligence contractor Edward Snowden, the debate over the right to privacy has experienced a new life in American public discourse. Public figures in the pro-privacy movement, such as Glenn Greenwald, Edward Snowden, and Julian Assange, often appeal to Anglo-Saxon liberal rights theory, that is, to a political tradition originating with the Levellers in the British Civil War and continuing with John Locke and the American framers, that understands the function of government as that of defending – and refraining from violating – certain legally delineated rights. “Negative” rights like these, exemplified in the American Bill of Rights, are actively infringed through coercion – preventing the publication of controversial writing, prohibiting religious expression, imprisoning citizens or seizing their property without due process – and passively neglected through a failure on the part of the state to prevent coercion by foreign and domestic aggressors. Such rights are intended to protect liberty. Although the right to privacy is often framed by its contemporary defenders as analogous to the former rights, it is telling that the right to privacy receives little explicit mention in the tradition of thought to which they appeal.

A much better context and foundation for the right to privacy, one sometimes also alluded to by the same advocates, is in the French political tradition, particularly in the political philosophies of Alexis de Tocqueville and Michel Foucault. This latter worldview views freedom not primarily as something demarcated by legalistic rights and characterized by the absence of coercion, but rather as something defined by the absence of the state in the details of life – that is, a lack of state observation and subtle state control. The right to privacy is not fundamentally concerned with the liberty to do what one wants, but with security against observation, possibly even while doing what one wants. I argue that the right to privacy should be understood as freedom from observation, but furthermore, as freedom from *accusatory* observation.

Presenting a case for the right to privacy in terms of the intellectual tools provided by this French tradition is advantageous for four closely related reasons. In the first place, such a presentation is more intellectually precise, in that it captures the intuitive repulsion many people feel toward accusatory state observation, as a phenomenon overlapping with but not identical to state coercion. In fact, a political orientation against such state observation in some contexts clashes with a traditional rights-based worldview, because, at least in theory, the more closely the state observes its subjects with an eye to preventing coercion by non-state parties, the more precisely it can protect against rights violations by foreign and domestic aggressors.

It is true both that the right to privacy can conflict fundamentally with the role of the state to precisely enforce just laws, and, as history of twentieth century totalitarianism plainly taught us, that a substantial sphere of privacy is essential to human flourishing. It is precisely this political paradox that gives a mood of unresolvability to the portraits of politics presented by Tocqueville and Foucault. This conflict is nowhere more evident than in the case of citizenship itself: the undocumented immigrant, in contrast to the registered citizen, lives an utterly under-the-radar existence, but cannot safely appeal to the state for protection or enforcement of contracts. To some extent this conflict is also exemplified in the case of government surveillance for anti-terrorism purposes.

Second, framing the argument in this way also illuminates connections between popular opposition to the mass surveillance apparatus and that toward over-policing of government housing projects inhabited by racial minorities, another current controversy which, although not typically spoken of in this way, largely concerns the right to privacy. In this case, I argue, there is not such a stark conflict between rights-enforcement and privacy, because the simple prevention of crimes against person and property would be a much less invasive approach than the currently prevailing law enforcement strategy in these neighborhoods.

Thirdly, such an intellectual packaging of the right to privacy captures an aspect of the experience of oppression by minority groups that is neglected by the traditional rights-based worldview – the experience of the oppressive gaze of the dominant majority and its institutions. Finally, such a presentation touches on a universal human need deserving of political respect which is highlighted in the minority experience: all people need spheres of their lives that are invisible to the state. The commonness and scope of such spaces determines where a society lies on a spectrum between, on the one hand, merely efficient and effective modern government, and on the other, totalitarianism.

This mischaracterization of the right to privacy – that it is a matter merely of the absence of coercion – is not just the mistake of a few recent public figures; it is also established in international law. The United Nations Special

Rapporteur, a title given by the U.N. Human Rights Council to individuals mandated to conduct fact-finding missions concerning human rights abuses, conducted a global investigation last year of state mass surveillance systems.<sup>1</sup> The conclusion of the investigation was that such systems as currently operated violate the individual right to privacy, as codified, most importantly, in the International Covenant on Civil and Political Rights.<sup>2</sup> This is a treaty that Security Council members and many other UN parties signed in 1966, which codifies various “negative” liberties. Both positive and negative liberties concern the ability to live one’s life as one wants, in the traditional liberal sense. But the modifier “negative” indicates that these are rights against coercion, as opposed to “positive” liberties, codified in a separate document called the International Covenant on Economic, Social, and Cultural Rights, which concern entitlements to material resources.<sup>3</sup> In reality, the right to privacy fits neatly into neither of these categories.

The Special Rapporteur’s decision was, for obvious reasons, lauded by American privacy advocates, including *The Intercept’s* Glenn Greenwald, the well-known civil libertarian journalist and lawyer who acted as Edward Snowden’s media contact for the NSA spying leaks.<sup>4</sup> Snowden, in a different context last year, depicted the right to privacy as a negative right in the same category as freedom of speech and other rights defined in terms of an absence of coercion.<sup>5</sup>

But people feel an intuitive repulsion toward being observed in an incriminating way, as something theoretically distinct from being coerced. It is true that state observation often either follows on the coattails of coercion (prisons closely observing the behavior of citizens arrested for non-violent drug offenses), or leads to coercion (the state using information obtained

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<sup>1</sup> “UN Report on Human Rights and Terrorism – The Intercept.” *The Intercept*. 15 Oct. 2014. Web. 11 May 2015. <<https://firstlook.org/theintercept/document/2014/10/15/un-report-human-rights-terrorism/>>.

<sup>2</sup> “International Covenant on Civil and Political Rights.” United Nations – Office of the High Commissioner for Human Rights. Web. 11 May 2015. <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

<sup>3</sup> “International Covenant on Economic, Social and Cultural Rights.” United Nations – Office of the High Commissioner for Human Rights. Web. 11 May 2015. <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>.

<sup>4</sup> Greenwald, Glenn. “UN Report Finds Mass Surveillance Violates International Treaties and Privacy Rights - The Intercept.” *The Intercept*. 15 Oct. 2014. Web. 11 May 2015. <<https://firstlook.org/theintercept/2014/10/15/un-investigator-report-condemns-mass-surveillance/>>.

<sup>5</sup> “‘Hostile to Privacy’: Snowden Urges Internet Users to Get Rid of Dropbox.” *RT News*. 12 Oct. 2014. Web. 11 May 2015. <<http://rt.com/news/195244-snowden-rid-dropbox-privacy/>>.

through surveillance to imprison people providing indirect support to ideological enemies of the government). However, coercion and observation are still two different phenomena.

Not all cases of accusatory state observation are at the same time cases of coercion. If the police loiter in or near the lobby of a state-run apartment complex, causing residents to feel that their behavior is constantly being evaluated, this is not in itself coercion against residents, even if such observation may sometimes be accompanied by actual coercion. More generally speaking, not all cases of such objectionable observation, by the state or by non-state actors, are simultaneously coercive. A peeping Tom does not coerce his victims; nor do bigots who gawk at same-sex couples or at individuals of a different race or gender expression. In short, the human need for privacy deserves its own separate treatment in political thinking, because the oppression of observation is different from the oppression of force.

The concept of a right to privacy thus conceived, as distinct from coercion, received its first and most eloquent exposition in several works of the French philosopher and anthropologist of nineteenth century America, Alexis de Tocqueville. Tocqueville's life straddled the line between the pre- and post-revolutionary worlds; he thus witnessed the transformation of a haphazardly and intermittently regulated feudal society into a modern bureaucratic society, in which efficient, comprehensive, and equally applied law began to become the ideal of politics. Such an ideal is integral to democracy, but as he observed, it also presents the danger of an omnipresent government arising to achieve a precise enforcement of the laws. Tocqueville was a democrat, but a hesitant one; he was aware both of the profound injustices of feudalism and the inevitability of its demise, but also wary of the new dangers presented by modernization, which included the possibility of totalistic observation and control.

In Tocqueville's view, democratic society places men "shoulder to shoulder, unconnected by any common tie," thus orienting subjects in a position of vulnerability and isolation before the power of the state.<sup>6</sup> This is in contrast to medieval society, where individuals found their place in socially embedded chains of authority and within a patchwork of substate communities. He argues that the Catholic Church and the aristocracy, in the course of defending their traditional privileges and immunities, prevented the uncontrolled expansion of government power and preserved a general spirit of independence and freedom from the state during the Ancient Regime.<sup>7</sup> He also speaks approvingly of the widespread medieval phenomenon of local

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<sup>6</sup> De Tocqueville, Alexis. *Democracy in America: And Two Essays on America*. Trans. Gerald Bevan. (London: Penguin, 2003). Volume 2, Part 2, Chapter 4.

<sup>7</sup> De Tocqueville, Alexis. *The Old Regime and the Revolution*. Trans John Bonner. (Mineola: Courier Corporation, 2012). Book 1, Chapter 2.

self-rule, made possible by the inattentiveness of state authority, in which villagers “held property in common ... elected their own officials and governed themselves on democratic lines.”<sup>8</sup> In Tocqueville’s assessment, freedom in medieval society was extralegal, existing in certain scattered contexts as a result of the medieval state’s limited power to enforce laws and the resulting intermittent and scattered presence of the state in society. This is in sharp contrast to what he views as the politically regimented, or what we would call now the totalitarian, nature of revolutionary France.

He foretells the twentieth century phenomenon of totalitarianism, in which the dependence of asocial subjects on the governing bureaucracy rather than on a diversity of substate communities and loyalties worsens until government “remove[s] from [its subjects’ concerns] entirely the bother of thinking and the troubles of their life.”<sup>9</sup> To Tocqueville, totalitarianism is an extreme to which a society with a modern bureaucratic democracy is prone, as opposed to its political opposite – an insight as prescient as it is counterintuitive to modern democrats.

Totalitarianism is an extreme of what Yale political scientist James C. Scott calls “legibility,” the state-imposed regularity and visibility of people and places that permit the efficient administration of bureaucratic tasks.<sup>10</sup> Phenomena like social security numbers, government identification cards, and numbered streets laid out in grids are all examples of commonplace and often non-harmful instruments of legibility in modern democracies. We might say that state surveillance like that recently exposed involves an excess of legibility. Of course, as the feudal age taught us, there is also such a thing as a deficit of legibility, as oppression and violence can emerge within the gaps in the state’s visibility.

That the right to privacy tends to lie at the periphery of the state’s ability or willingness to efficiently administer law, perhaps explains why the attempt to delineate the right to privacy has such a confused history in U.S. jurisprudence: it is possible the law may simply be a poor tool for protecting a typically extralegal freedom. This might be better accomplished by trying to lessen the enforcement of existing laws, or by citizen initiative to attain anonymity, through, for instance, the online anonymous communication software, Tor.

But one more certain source of the problem is that there is no explicit guarantee of a right to privacy in the United States Constitution, which itself

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<sup>8</sup> *Ibid.*, Book 1, Chapter 3.

<sup>9</sup> De Tocqueville, Alexis. *Democracy in America: And Two Essays on America*. Trans. Gerald Bevan. (London: Penguin, 2003). Volume 2, Part 4, Chapter 6.

<sup>10</sup> Scott, James C. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. (New Haven: Yale UP, 1998). p. 2.

hints at the inadequacy of the Anglo-Saxon, liberty-oriented political tradition in this respect. In contemporary jurisprudence, the right to privacy is regarded in some contexts as a substantive due process right – a non-procedural liberty that is supposed to be constitutionally protected despite not being enumerated in the Constitution. The modern way of handling the right to privacy both implicitly concedes the absence of a generalized right to privacy in the thoughts of the framers and leaves the right to privacy essentially undefined. Historically, this right has only been artificially inserted through creative constitutional interpretation within the last century, and has been defined, when at all, with some, but not thorough exploration of the separateness of freedom from observation and freedom from coercion.

Pro-privacy American jurisprudence's earliest attempts implausibly inferred a generalized right to privacy from tenuous analogies to other rights or from the practical requirements of other constitutional rights. Justice Brandeis, before authoring a famous dissenting opinion asserting a right to privacy in *Olmstead v. United States* in 1928, wrote a paper in which he reasoned that if such a right were to exist, it would have to be theorized as something distinct from a right against physical invasion of person or property, from a right to contract, and from a right to intellectual property.<sup>11</sup> Invasions of privacy, for example, in the case of the unpermitted publication of the contents of another's diary, do not amount to physical invasions of any sort. Violations of the right to privacy do not necessarily amount to a breach of economic agreement, because a party who has not consented to a confidentiality agreement may in various circumstances nevertheless come into possession of the personal information of another. This point is even more relevant in the age of the Internet and of metadata, where networks of third-party engagements are common and complex. And the right to privacy is not an intellectual property right, because it prohibits not the unauthorized profiteering off of already publicized information, but its publication in the first place.

But the insightfulness of this analysis extends mostly to his explication of what the right to privacy is *not*. When it came to describing the right itself, he remarked only that it ought to fall in the same legal category as already existing legal rights against psychological and emotional damage, and that it philosophically amounts to what he vaguely but not objectionably terms a "right of an inviolate personality," and a "right to be left alone." He reproduced these elements of this description in his dissenting opinion in *Olmstead*, a case concerning the constitutionality of unwarranted wiretapping

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<sup>11</sup> Warren, Samuel and Louis Brandeis. "The Right to Privacy." *Harvard Law Review* 4.5 (1890): 193-220. JSTOR. The Harvard Law Review Association. Web. 20 July 2015. <<http://www.jstor.org/stable/1321160>>.

of conversations on a private telephone<sup>12</sup>.

Jurisprudential progress for the right to privacy achieved a major milestone later with *Katz v. United States* in 1967, which ruled that the Fourth Amendment protected an individual whose arrest was based upon incriminating evidence obtained through an unwarranted wiretap of a public telephone.<sup>13</sup> In *Katz*, U.S. jurisprudence made one significant and correct philosophical development concerning the right to privacy. It recognized that it does not necessarily have anything to do with the right to property: invasions of privacy can take place against a person directly. The majority ruled that the right to privacy, in the specific context of the Fourth Amendment, protects not just invasions of external property, as a narrow reading of the Fourth Amendment might suggest, but personal invasions as well, as in the case of the government listening to a phone conversation without a state agent entering the booth. However, the Supreme Court denied in this case the existence of any generalized constitutional right to privacy.

The 1965 ruling in *Griswold v. Connecticut*, a case concerning the right to purchase and use contraception, established nothing new philosophically about the right to privacy. It propounded the legal doctrine, largely abandoned since then by the courts, that because certain amendments to the Constitution require individual privacy as “peripheral” or “penumbral” rights that in various situations enable and support those specifically enumerated rights, these amendments generate “zones of privacy” that in the aggregate amount to an unwritten right to privacy in the Constitution, applying to cases outside of those particular penumbras.<sup>14</sup> What is much more philosophically interesting for our purposes is the legal scholar Robert Bork’s well-known criticism of that ruling at the time.

In the course of his criticism of the concept of “penumbral” privacy rights, Bork notes that because these proposed “penumbras” protect rights such as those guaranteed by the First Amendment, which concern both private and public behavior, a right to privacy does not adequately characterize the emanating buffer zone supposed to couch these rights. What would better characterize these buffer zones, he argued, is a general right “to be free of regulation by law.” It is impossible, he argues, that the Constitution would stipulate, through law, a right to be free of law.<sup>15</sup>

His criticism of the particular legal argumentation in question in favor of a constitutional right to privacy, is partly correct. The penumbral right to

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<sup>12</sup> *Olmstead v. United States*, 277 U. S. 438 (1928).

<sup>13</sup> *Katz v. United States*, 389 U. S. 347 (1967).

<sup>14</sup> *Griswold v. Connecticut*, 381 U. S. 479 (1965).

<sup>15</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. (New York: Simon and Schuster, 1990). pp. 95-100.

privacy does not apply to speech, such as that of a politician, designed to publicize the speaker. But not all public behavior should be so disqualified from privacy considerations. What of protests on public property? The decision to broadcast one's views to a citizen audience on a sidewalk or in a public park, does not amount to an invitation to police scrutiny, in person or remotely, of a demonstration as a whole or of individual participants. Constitutionality aside, there is an important philosophical difference between, on the one hand, invited observation by a citizen audience, whether that audience is in agreement or in opposition, and on the other hand, the accusatory supervision of police.

And, to stray a bit from Bork's focus, disqualification of the non-penumbral application of right to privacy in opposition to the incriminating surveillance of minority neighborhoods by police, would surely exhibit a class bias. Many of the petty drug offenses committed in and around public housing projects are identical to behavior confined to the domestic sphere of wealthy citizens who can afford to conceal this behavior in a space traditionally regarded as private.

Bork's accusation that advocacy of the right to privacy suggests a claim to the legitimacy of an unaccountable extra-legal sphere, is actually a perceptive characterization of the freedom in question, but should be complemented by specifying that this includes freedom from both state investigation and state coercion. A claim to the right to freedom from accusatory observation amounts to a claim to a right to some significant degree of unaccountability to public institutions. The pro-privacy argument in the case of NSA data collection is that the state should be less involved in sorting out the acceptable from the unacceptable in private online behavior. Surveillance should be specifically targeted rather than generalized, initiated solely in the context of particular, warranted investigations into violent crime as opposed to being characterized by the systematic scanning of bulk-collected data. This would make the behavior of the general population of internet users more opaque to accusatory observers.

The real problem with heavy-handed mass surveillance, a lesson that we learned mostly from the extreme example of twentieth century totalitarian societies, is that being observed by the state too much of the time is an intimidating and oppressive experience. This experience will be familiar to anybody who has ever felt uncomfortable as a result of the implicitly incriminating presence of police pacing in one's neighborhood or at the periphery of peaceful public assembly. It is also familiar to all citizens who are aware that the government is constantly viewing easily accessible information about their online behavior. That various means of electronic communication in modern democracies are subject to secret and arbitrary review by state authorities with vaguely defined intelligence goals is a likely cause of some anxiety, fear, and paranoia directed toward the public and private institutions

that cooperate in mass surveillance.

As a separate but also important matter, surveillance also stifles more traditional liberties by encouraging withdrawal from the expression and communication of controversial political ideas, out of wariness over the possibility of state investigation. *The Washington Post*, in reviewing the NSA data collections leaked to the paper by Edward Snowden, found that the NSA had collected private exchanges, irrelevant to anti-terrorism, that discussed “love and heartbreak, illicit sexual liaisons, mental-health crises, political and religious conversions, financial anxieties and disappointed hopes,” among non-targets whose communications happened to have been captured in the surveillance dragnet.<sup>16</sup> Plausibly, citizens who use private means of internet communication – e-mail, Skype, instant messaging – to speak to one another candidly about matters of personal, political, and metaphysical significance, feel comfortable doing so under the assumption that their communications are invisible to political authorities scanning for suspicious behavior. The likelihood of such a response to NSA spying on internet activity is supported by early research at MIT, suggesting that, since the Snowden leaks, internet users have become less likely to Google keywords that they believe are likely to get them into the trouble with the United States government.<sup>17</sup> A recent Pew Research poll shows that a large minority of American adults have changed their internet habits to protect their privacy from the NSA.<sup>18</sup> A 2014 Human Rights Watch report recounted that journalists at many prominent news outlets feel a reticence unprecedented in recent history about reporting on issues of national security, intelligence or law enforcement. Journalists covering these issues have commonly radically altered professional practices to avoid government observation and report that the specter of government prosecution of whistleblowers has made securing sources much more difficult in recent years.<sup>19</sup>

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<sup>16</sup> Gellman, Barton, Julie Tate, and Ashkan Soltani. “In NSA-intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are.” *Washington Post*. The Washington Post, 5 July 2014. Web. 11 May 2015. <[http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322\\_story.html](http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html)>.

<sup>17</sup> Marthews, Alex and Catherine Tucker. “Government Surveillance and Internet Search Behavior,” unpublished paper. March 24, 2014. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412564) (accessed July 9, 2014)>.

<sup>18</sup> Rainie, Lee and Mary Madden. “Americans’ Privacy Strategies Post-Snowden.” Pew Research Centers Internet American Life Project RSS. Pew Research Center, 16 Mar. 2015. Web. 18 May 2015. <<http://www.pewinternet.org/2015/03/16/Americans-Privacy-Strategies-Post-Snowden/>>.

<sup>19</sup> “With Liberty to Monitor All: How Large-Scale US Surveillance Is Harming Journalism, Law, and American Democracy.” Human Rights Watch. 28 July 2014. Web. 11 May 2015. <[http://www.hrw.org/sites/default/files/reports/usnsa0714\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf)>.

The tendency of state surveillance to violate a different sort of freedom than that against coercion has been noted by Greenwald and alluded to in a different way by Assange. Although Greenwald's public advocacy typically portrays the right to privacy as a constitutional right and groups it with negative rights secured in the Constitution, he does not always depict it in this way. To an audience at a book tour, Greenwald presented the case for Tocquevillean privacy, remarking, "We all need places where we can go to explore without the judgmental eyes of other people being cast upon us. Only in a realm where we're not being watched can we really test the limits of who we want to be. It's really in the private realm where dissent, creativity and personal exploration lie."<sup>20</sup> In other words, to use Scott's terminology, we need spheres of our lives that are "illegible" to the state. Citing Orwell, Assange also elaborates the unique status of the right to privacy:

It is not, as we are asked to believe, that privacy is inherently valuable. It is not. The real reason lies in the calculus of power: the destruction of privacy widens the existing power imbalance between the ruling factions and everyone else, leaving "the outlook for subject peoples and oppressed classes," as Orwell wrote, "still more hopeless."<sup>21</sup>

Public insights like these from the movement's most prominent figures indicate that the pro-privacy movement could go two ways: it might retain a legalistic, anti-coercion-based worldview, or it might focus more on the positive, creative side of a life more opaque to state observation.

An ideological shift toward an anti-observation worldview would enable a connection in political advocacy between criticism of the unwieldy mass surveillance state and the over-policing of state housing projects. The latter is conducted in pursuit of a panoply of minor criminal infractions and has resulted in a police culture of frequent bad arrests and intrusive over-enforcement of trivial laws, largely pertaining to drug use. One cause of popular opposition to New York's Stop-and-Frisk policy, and to policies like it in other American cities, is surely the large-scale coercion entailed. However, part of the controversy is also over the police omnipresence itself,

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<sup>20</sup> Miles, Kathleen. "Glenn Greenwald On Why Privacy Is Vital, Even If You 'Have Nothing To Hide'." The Huffington Post. TheHuffingtonPost.com, 19 Dec. 2014. Web. 11 May 2015. <[http://www.huffingtonpost.com/2014/06/20/glenn-greenwald-privacy\\_n\\_5509704.html](http://www.huffingtonpost.com/2014/06/20/glenn-greenwald-privacy_n_5509704.html)>.

<sup>21</sup> Assange, Julian. "Who Should Own the Internet?" The New York Times. The New York Times, 3 Dec. 2014. Web. 11 May 2015. <[http://www.nytimes.com/2014/12/04/opinion/julian-assange-on-living-in-a-surveillance-society.html?\\_r=0](http://www.nytimes.com/2014/12/04/opinion/julian-assange-on-living-in-a-surveillance-society.html?_r=0)>.

and the oppressive effect of being made constantly aware of the watchful eyes of the suspicious state. The burden of such constant surveillance is exacerbated in some cities by the existence of “stop-and-identify” laws, which, in stipulating penalties for not displaying government identification to a police officer, combine the oppression of force with the oppression of surveillance.<sup>22</sup>

The police need to be less present in certain minority urban neighborhoods. Police intervention should be focused on preventing serious crimes of violence against person and property. The same minority neighborhoods notorious for constant police surveillance are also well-known for low homicide-clearance rates. A Scripps study found that clearance rates in some cities with poor black enclaves are as low as 20, 30, or 40%, significantly lower than the clearance rate for cases with white victims.<sup>23</sup> This finding suggests that the accusatory gaze of the state upon these urban neighborhoods primarily serves to aid the punishment of petty, non-violent offenses, many related to drug use. And the distrust that this forced comprehensive lifestyle transparency breeds may in fact hinder investigations of more serious crimes by fostering a culture of non-cooperation with police. In this case, respect for privacy does not conflict significantly with the enforcement of negative rights, because it is likely that a strictly rights-based law enforcement approach would be less intrusive and more effective.

Generally speaking, the incriminating gaze of the dominant majority is a perpetual issue for any marginalized minority group. The twentieth century French philosopher Michel Foucault saw that in the modern world, this accusatory watchfulness is the essence of minority groups’ experience of oppression. Foucault noticed that the dominant majority marginalizes certain groups through the subtle act of creating labels and classifications for people, imposing identities on the basis of behavior and characteristics that would otherwise be incidental.<sup>24</sup> Oppressed groups can find themselves trapped in these categories, appealing to them even in attempting to oppose their own marginalization – people who are attracted to others of the same sex advocate for “gay rights,” even though before the gaze of modern psychiatry, there was no such identity as “homosexual” that one was pressured to wear as an alienating badge. Such is the condition of other groups marginalized on the

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<sup>22</sup> Riggs, Mike. “Yes, Police Can Arrest You for Failing to Identify Yourself.” City Lab – From The Atlantic. 25 Feb. 2014. Web. 11 May 2015. <<http://www.citylab.com/crime/2014/02/yes-police-can-arrest-you-refusing-identify-yourself/8485/>>.

<sup>23</sup> Hargrove, Thomas. “Murder Mysteries.” *Scripps Howard News Service*. 2010. Web. 20 July 2015. <<http://projects.scrippsnews.com/magazine/murder-mysteries/>>.

<sup>24</sup> Foucault, Michel. *The History of Sexuality*, Vol. 1. Trans. Robert Hurley. (New York: Pantheon Books, 1978). p. 48.

basis of, for instance, gender or race categories invented to serve the powerful.

Foucault believed that such manipulation through observation by dominant institutions is, more generally, the condition of the modern individual, and that the modern phenomenon of state observation is closely related to the state's task of enforcing rights. He noticed, like Tocqueville, that the unregulated freedom that arose intermittently in the medieval world as a result of the gaps in the overlapping and uncoordinated enforcement of various localities was replaced in the modern world by a much more precise and detailed manner of state control demanded by the task of enforcing individual rights, particularly, he thought, the right to property. Ironically, he argued, our very conception of ourselves as autonomous individuals is a creature of modern law, which aspires to monitor and control the behavior of all individual subjects, as opposed to monitoring in a less comprehensive way the conduct of families, fiefdoms or localities as a whole.<sup>25</sup> Foucault also believed that surveillance was poorly captured by a legalistic model, and tended to persist in the form of a "discursive" power, maintained through complex networks of interaction that obscured the distinction between oppressed and oppressor.<sup>26</sup> Operating within the framework of Foucaultian sociology, the modern field of surveillance studies, and, most prominently, David Lyon, has done important work establishing implications of modern surveillance beyond the mere violation of privacy, concerning various intricate means of social control.<sup>27</sup>

In demonstration of Tocqueville and Foucault's analysis regarding the conflict between privacy and negative rights, defenders of NSA surveillance tend to frame its purpose as that of defending individual citizens' rights against coercion by terrorists. In doing so, they invoke a calculus of security of rights, a conflict between the state's responsibility to abstain from actively violating rights and to adhere to its duty to defend its subjects' rights against domestic and foreign aggressors. This presents a conundrum that a privacy advocate with the traditional negative rights worldview cannot easily resolve in a way that does justice to our intuitive repulsion toward constant and intrusive observation. Contemporary privacy advocates often try to resolve this dilemma by arguing that state surveillance, in fact, does not catch terrorists, and thus does not serve our rights against coercion. This is certainly an arguable position – as former senior intelligence official and NSA

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<sup>25</sup> Foucault, Michel. *Discipline and Punish*. Trans. Alan Sheridan. (New York: Random House: 1977). pp 82-87.

<sup>26</sup> Foucault, Michel. *The History of Sexuality*, Vol. 1, *op. cit.* pp. 11, 48.

<sup>27</sup> Lyon, David. *The Electronic Eye: The Rise of Surveillance Society*. (Minneapolis: U of Minnesota, 1994). pp. 179-198.

whistleblower William Binney has contended, too much intelligence can be a hindrance because it gives the state too much information to sort through.<sup>28</sup> The call for more targeted surveillance is also a compelling evasion of this conflict of values. And as we further noted, surveillance may stifle the traditional negative right of freedom of expression, suggesting that the right to privacy may be compatible with negative liberty in the manner of what the Supreme Court has called a “penumbral right.” But even if an intrusive surveillance measure happens also to yield some anti-terrorism gains, it can still be an instance of the oppression of observation. Justice in cases like these is not a matter of balancing state violations and protections of rights against coercion, but of balancing our freedom from observation and our right against coercion by non-state parties.

To avoid the pointless difficulty of balancing a vague calculus of negative rights, privacy advocates would do well to invoke Tocquevillean freedom. This particular intellectual contextualization of the right to privacy clarifies the true depth of this debate. The debate is not fundamentally about locating the correct proportion between the defense of people’s rights through protection from non-state coercion and through abstention from state coercion. Rather, this debate is one instance of a larger and less easily resolvable divergence at the heart of the clash between statist and libertarian worldviews – a disagreement over whether we should have lives of monitored, controlled predictability, or more loosely regulated lives of spontaneous and sometimes risky creativity.

In short, framing the right to privacy as a problem of incriminating supervision, rather than simply a problem of coercion, is not just more intellectually precise and compelling. Such an understanding also has the potential to illuminate our common cause, across race, gender, and other categories, in the struggle for freedom to think, create, and interact in unwatched spaces, whether those spaces be city neighborhoods or online communications. Important connections can be drawn between those extreme cases of oppressive observation of minority groups and the general condition of the individual at the hands of the modern bureaucratic state, in both totalitarian and democratic forms. Framing the right to privacy in this way also broaches a deeper inquiry regarding the possibility of a philosophical framework for systematically ordering the value of negative rights and of privacy.

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<sup>28</sup> Angwin, Julia. “NSA Struggles to Make Sense of Flood of Surveillance Data.” *WSJ*. Wall Street Journal, 25 Dec. 2013. Web. 11 May 2015.  
<<http://www.wsj.com/articles/SB10001424052702304202204579252022823658850>>.

