

The Freedom Not To Think

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To readers—This draft is still in a very early stage, and it has very few citations. This is partly because of the kind of piece it is—abstract and analytic—and partly because I am still compiling sources. On that front, thoughts are most welcome.

I apologize also for what might seem like an overgrowth of flourish toward the end. However it comes off now, it felt appropriate at the time.

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Introduction

Surveillance is often criticized on the grounds that it frustrates “free thought.”¹ When activity is monitored—the logic goes—people watch what they say; unpopular groups disband; pluralism withers; repression reigns. To be monitored is to be *disciplined*; monitoring is a constructive restraint on one’s ability to find and create meaning in the world. In this sense, surveillance interferes not only with privacy, but also with expressive autonomy.

Accept this diagnosis, and a clear remedy follows. We should work to create spheres, in Neil Richards’ phrase, of “intellectual privacy”: spaces in which individuals can partake of the “inquiry” and “experimentation” necessary for expressive autonomy. Expression is, of course, a touchstone of First Amendment values.² But before ideas can be expressed, they

¹ See, e.g., Neil Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408-12 (2008); *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1934-37 (2013); Bryan Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 544-45 (2013); David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 73-78 (2103); Marc Blitz, *The Where and Why of Intellectual Privacy*, 87 TEX. L. REV. SEE ALSO 15 (2009).

² See, e.g., Seanna Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011) (arguing that “thinking” is the best conceptual mechanism for reconstructing First Amendment principles).

must be *incubated*. And the incubation of ideas, lest it fall prey to self-censorship, must be insulated from public scrutiny.³ This view can claim strength from nearly a century of constitutional law.⁴ In what follows, I refer to it as the “surveillance-as-chill” critique. The reasoning is very familiar:

Axiom one: freedom of thought requires (certain kinds of) privacy;

Axiom two: surveillance corrodes (those kinds of) privacy;

Conclusion: surveillance interferes with freedom of thought.

This logic is appealing for three interconnected reasons. *First*, it supplies a readymade account of the harm in nightmarish policies like dragnet NSA surveillance. *Second*, it links that harm to a clear tradition of political theory, enshrined in the First Amendment and beyond—Neil Richards, for example, feels comfortable marshaling the entire “Western tradition” to his cause.⁵ *Third*, it characterizes the harm in a way that manages to circumvent the question of whether privacy has intrinsic value, by emphasizing its collateral benefits; privacy matters, the argument goes, because its absence would imperil expression. This has the benefit of, among other things, rendering the position sympathetic to those who would otherwise brush aside pleas for privacy as vestiges of a bygone age. When privacy is posed in opposition to “cutting-edge imperatives [such as] national security, efficiency, and entrepreneurship,”⁶ privacy tends to lose. But cast privacy in “intellectual” terms—connect it to free thought—and suddenly, the rhetorical deck no longer seems stacked. Even the shamans of big data—from Palo Alto to Washington—cower at the loathsome specter of “chill.”

The trouble with defensive arguments, however, is that they tend to yield pyrrhic victories. In what follows, I argue that existing criticism has frequently gotten the normative point right, but the analytic point wrong. The notion that surveillance can menace expressive autonomy seems undeniable. The question is how to characterize, and thus how to counteract, the menace. In my view, the more perspicuous view is that surveillance is troubling because it *compels* intellectual activity; when we are monitored, either by the state or by private entities, we are forced to think constantly—relentlessly—about the way our speech, action, and ideation appear to the outside world. In many circumstances, one natural byproduct of this state of affairs is expressive chill, just as existing critiques have identified. But chill is a symptom, not the underlying malady. The fundamental problem is not the erosion that expressive autonomy that accompanies privacy violation. It’s privacy violation *as such*. Until our conceptual vocabulary incorporates this point, it will be forced to back-peddle, and call privacy violations something other than what they are. This solution

³ See *supra* note 1. There is a whole strand of scholarship applying this logic to reading practices in particular. See Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689 (2013); BJ Ard, *Confidentiality and the Problem of Third Parties: Protecting Reader Privacy in the Age of Intermediaries*, 16 YALE J. L. & TECH. 1 (2013); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 942 (2014) (“The freedom to think for oneself requires the freedom to read unobserved.”).

⁴ See Andrew Tutt, *The New Speech*, 41 HASTINGS CON. L. Q. 235, 291-92 (2013) (detailing examples from Holmes and Brandeis).

⁵ Richards, *Intellectual Privacy*, *supra* note 1, at 408.

⁶ Julie Cohen, *What is Privacy For?*, 126 HARV. L. REV. 1904, 1904 (2013).

would not be troubling if it were sustainable: if it provided a way to rename—but still to capture—the normative stakes of privacy in an age of hypertrophied data. My argument is that it does not.

The analysis proceeds as follows.

Part I explores the formal difference between two paradigms of autonomy: freedom *of* thought and freedom *from* thought. These are distinct ways of thinking about the harm that results from social monitoring, and I argue that “freedom from thought” better captures the normative project of our day.

Part II uses Dave Eggers’ recent novel, *The Circle*, to further gloss the “freedom from thought” paradigm. Adducing fiction as evidence might seem odd, even inappropriate, in this setting. Yet sometimes—as I hope the analysis itself will bear out—the exploration of counterfactuals can shed more light on present reality than directly studying the latter can hope to convey. In this particular case, there is also some question as to whether the counterfactual is, in fact, so counter.

Part III concludes by suggesting that all of the foregoing—which might at times appear like wordplay—is centrally connected to the deterioration of our representative institutions. The facts have not gone unnoticed, but the proposed has, in many instances, been exactly backwards. Theorists have sought relief in *expression*, the traditional wellspring of democratic health. But we are converging on an era in which expressive values will erode rather than facilitate democratic life, because they will end up dismantling democracy’s fundamental unit—the individual who enjoys, in Julie Cohen’s phrase, “breathing room” from the social world. This problem cannot be cured by the First Amendment values that currently hold sway in our courts, and among their handmaidens. In fact, those values only exacerbate the problem. We are witnessing today the beginning of a clash that pits our representative institutions against the very values that used to underpin their legitimacy. Short of a conceptual sea change—which is probably not forthcoming—it will not end well.

I. Freedom of Thought and Freedom From Thought

Surveillance-as-chill theorists often adduce 20th century totalitarianism as evidence—loosely speaking—of what can happen when free thought disappears.⁷ The examples are certainly evocative. But are they well aimed? In my view, the essence of totalitarianism is actually best characterized as a *surfeit*, not a deficit, of thought. What makes totalitarian conditions totalitarian is that force people to think unceasingly. Under the watchful gaze of Big Brother, subjects must monitor every action and utterance—for fear of terrible repercussions if they do not. Importantly, the dynamic persists even as the repercussions lessen in severity. For Winston, the potential consequences of deviance—or *perceived* deviance—were astronomical: incarceration, torture, even death. In the contemporary United States, the equivalent consequences are far less drastic. But the *nature* of the privacy harm—the way that fear of repercussions circles back to erode individual autonomy—is very much the same.

⁷ See, e.g., Richards, *Dangers of Surveillance*, *supra* note 1, at 1934 (citing 1984, *Minority Report*, and *The Lives of Others* as examples).

So far, I've advanced no claim—I don't think—that surveillance-as-chill theorists wouldn't independently make. I'm certainly using the words "thought" and "thinking" *differently* than they typically do: by "thought," they have in mind the "freedom to explore, develop, and test ideas,"⁸ while I mean to convey a more general meta-awareness of how one comes off to the surrounding world. But both meanings track everyday parlance,⁹ and the surveillance-as-chill critique offers a clear conception of how the two meanings relate. Namely, when I say that totalitarian conditions force people to think, I have in mind an act of *conformity*: expending intellectual energy—thinking—to ensure that one's words and actions arouse no external suspicion. And this certainly *does* take "thought"; but it's not the sort of "thought" that expressive autonomy cares about. In fact, the "compulsory thinking" produced by totalitarian conditions is exactly what the surveillance-as-chill theorists mean to *decry*. They call it "normalization": the notion that conditions of excess publicity—those that accompany totalitarian movements, as well as certain corporate practices¹⁰—tend to normalize behavior. Yet we already knew that. All that my analysis really suggests, then, is that from an internal, cognitive viewpoint, normalization involves "thinking." Once again, though, it's not "thinking" in the sense that First Amendment principles, and that our traditions of expressive autonomy more generally, mean to safeguard. It's "thinking" directed toward conformist rather than creative ends.

This is all fair enough. The question is what happens when "thinking" in the *other* sense—the kind of thinking that expressive autonomy cares about—is foisted relentlessly upon us. Does that vitiate intellectual privacy? If so, how must the surveillance-as-chill be modified?

To get hold of this question, imagine a different sort of dystopia than *1984*. In the near future, the state (or more likely, a large company) begins keeping medical profiles of every citizen, complete with robust genomic and biometric data—like 23andme, but on hyperdrive¹¹—which it uses to run predictive analytics about health outcomes. Call the program "Health Map." And let's assume that the data is securely maintained, and used only for intended purposes; in other words, freestanding privacy concerns—for example, about "data spills"—are off the table. Everyone is issued a device, much like a pedometer, that keeps track of physical activity, dietary behavior, substance use, and so on—all of which is constantly fed into a database and measured against genomic and biometric data. Throughout the day, the device sends users real-time messaging about "optimal health decisions" (and pretty much every decision, it turns out, can be characterized as a health decision). For example, when someone is at the lunch counter, the device reminds you how many calories you've been consuming lately; when deciding whether to walk or take public transit home from work, the device informs you that exercise would be good for you; when deciding whether to have sex with your spouse or go to sleep, the device launches into an explanation of latter's neurochemical benefits. The device also keeps a detailed (in fact, automated, so impeccable) archive of your recent behavior, which it periodically displays for you, and helps brainstorm ways that your behavior might be improved.

⁸ David Anderson, *Privacy and Fictitious Contracts*, 87 TEX. L. REV. SEE ALSO 11, 12 (2009).

⁹ The first is discernible in expressions like "lost in thought," or "thinking out loud," while the second appears in phrases like "what a thoughtful gift," or "think before you answer." Other examples?

¹⁰ See, e.g., Richards, *Intellectual Privacy*, *supra* note 1, at 408 (describing "freedom of thought" as one that bears on one's relationship to "an employer, a friend, or a spouse" as much as it bears on one's relationship to "government officials"); Owen Fiss, *Why the State?*

¹¹ Article about 23andMe

Or, similarly imagine the same basic situation, but with respect to *moral* decisions, not health decisions—a “Moral Map” program. Instead of providing users with information about the medical implications of their everyday decisions, the program prompts users to think more carefully about ethical implications. It would be like the touch-screens at the drug store that prompt you, when checking out, with questions like, “Do you want to donate \$1 to fight hunger?”—except universalized. Whenever you went to make a relatively large purchase, an interface would come up on the device—forcing you to work through a Socratic series of questions about opportunity costs, and so on—before you could finish the transaction. (Extensions can be imagined *ad infinitum*—an interface for when the user is tempted to tell a lie, an interface for when the user has committed a terrible act and is not sure when to confess, and so on.)

These hypotheticals may seem far-fetched. (In a world of effusive enthusiasm toward “optimization,” I actually don’t find them terribly far-fetched—but the response would be lucid.) Irrespective of their practical plausibility, however, I think the hypotheticals put the surveillance-as-chill critique into an illuminating bind. As it’s traditionally conceived, the critique would seem to have little to say about the “Health Map” and “Moral Map” programs. For the programs do not *chill* anything. Indeed, they seem exactly to encourage users to think *more*, and more carefully, about individual decisions—everyday kinds of decisions that might be (and in practice, often are) quite mindless. At the same time, it also seems like programs like “Health Map” or “Moral Map,” at least in their more totalizing incarnations, would subvert intellectual privacy. Their ubiquity would interfere with the people’s ability to claim their own cognitive space; it would strip us of the “breathing room” on which coherent subjectivity, and political participation, depends.¹² But this requires us to—slightly but crucially—rework our understanding of intellectual privacy. The occlusion of thought is not the only thing to avoid; the *exercise* of thought, when compulsory, becomes troubling as well.

To sharpen the point, consider three objections to the similarity I’m drawing between traditional forms of nefarious monitoring (like *1984*), and gentler and more productive forms of monitoring (like the “Health Map” and “Moral Map” programs)—both of which seem troubling on the grounds that they *compel thinking*. I’ll address the objections in ascending order of analytic severity.

The first objection would be that, unlike NSA surveillance (much less a *1984*-style police state), it would be easy to ignore the “Health Map” or “Moral Map” programs. Sure, the programs might be irritating—and might be bad policy—but that hardly means they *compel* self-monitoring in the same sense that having government agents ominously looming in the background of everyday life compels self-monitoring. The former is a matter of choice; the latter, of necessity. Let’s call this the “voluntariness” objection.

The second objection would be that the “Health Map” and “Moral Map” programs are only troubling insofar as they *normalize* user behavior. If the programs are nefarious, it’s because they would induce greater convergence of behavior; they would cajole users (or shame them) into following the herd rather than thinking for themselves. But this concern is just a shined up version of the “normalization” concern that surveillance-as-chill theorists already express! No re-characterization of the underlying interest is necessary to arrive at that normative result. Let’s call this the “redundancy” objection.

¹² *Cohen*, supra note 6.

The third objection is that self-monitoring has importantly different consequences in each case. In a police state—and perhaps under conditions like the NSA surveillance program, though in a more attenuated way—self-monitoring effectively means self-censorship. Fewer creative works are produced, and ideological pluralism vanishes. By contrast, self-monitoring in response to the “Health Map” and “Moral Map” programs would result, if anything, in *more optimal* decisions. It abuses the imagination to equate the horrors of Orwellian groupthink with the—admittedly paternalistic—benefits of “nudging” initiatives. Let’s call this the “consequentialist” objection.

A) The Voluntariness Objection

The problem with the “voluntariness” objection is that it doesn’t respond to reality. Specifically, it fails to take seriously the reality of how difficult it can be to disengage from social reality—a difficulty that legal categories, and liberal conceptions of subjectivity, often have trouble imagining. In some sense, this has always been true; and its general truth can’t possibly vitiate voluntariness, or else nothing would be voluntary. But in a world where mobile devices are increasingly starting to interact (“interact”) with *one another*, without any action on the part of their human stewards, a world where it becomes increasingly customary—and for many activities, including many jobs—mandatory to have computers with us at all times, the notion that one can opt out is, frankly, absurd. One can volunteer to live on a secluded mountain. But this is not the sort of thing around which sensible legal regimes are built.

As David Anderson puts the point:

It is the fiction that contract law governs our surrender of information to financial institutions, health care providers, employers, insurers, online merchants, utility companies, and the countless other entities with whom we are obliged to deal. We simply cannot participate in modern life without routinely checking the “I accept” box. Our options are to acquiesce or forgo the service or product.¹³

In fact, the picture is even starker than this. Being immersed in data streams is increasingly becoming requisite for gaining access to certain kinds of opportunities—most importantly, jobs. It’s a safe bet that once the equivalent of the “Health Map” or the “Moral Map” programs were produced, they would become a source not just of individual value, but also of *social* value. The programs—like all programs these days—would come along with ranking mechanisms. People would be “rated” or “scored” along whatever dimension the program operates. Insurance companies, surely, would be interested in such scores. Employers as well. Probably landlords too. And creditors. And so on.

In fact, the social impetus toward *ratings*—cataloguing and assigning value to previous experiences and transactions, whether as an individual on OKCupid or a proprietor on Yelp—already prefigures the logic of my more fanciful hypotheticals. The point is that it becomes very difficult to call these kinds of tracking-and-rating systems “voluntary” once they begin, as in practice they’ve already begun, to generate reliance interests in a given market. Once it becomes an *expectation* for firms to keep Yelp profiles—or for individuals to keep “Moral Map” profiles—the language of voluntariness ceases to track reality. Former CIO of Google, Douglas Merrill, recently founded a new company, Zest Finance, on the

¹³ Anderson, *supra* note 8, at 13-14.

premise that “all data is credit data.”¹⁴ Let us hope not—no doubt for many reasons, but in particular because a world where “all data is credit data” is a world where the decision to opt out of certain data streams will effectively disable one from participating in consumer debt markets.

B) The Redundancy Objection

Okay—the surveillance-as-chill theorist might say—but even conceding the voluntariness point, what you mean when you call these practices non-voluntary is that people feel socially compelled to participate, and once participating, to behave in certain ways. That sounds just like our “normalization” complaint! When monitored, people tend to think, speak, and act the way they think others want them to. This is exactly what we mean by “chill.”

The problem with this objection is that conflates *normalcy*, measured in terms of behaviors, with *thoughtlessness*, which refers to a cognitive process. In fact, thinking very often leads to convergent behavior. We take it as basically axiomatic, for example, that people who *think* about whether to use heroin decide not to. Imagine the following program. Clever social entrepreneurs determine that teenagers are far more likely to try hard drugs for the first time when they are away from their core friend group. I.e., when hanging out with close friends, kids are unlikely to try new drugs—it’s when they go to parties alone, or are introduced to drugs by an older sibling, etc., that kids tend to experiment. So the entrepreneurs devise a system that encourages kids to keep live-tweeting about their lives even after social groups disband; a “keep your friends in the loop” campaign, though presumably with a catchier brand, which creates incentives for kids to stay virtually connected to their core friend group. It’s as though your friends are with you all the time. And lo and behold, kids try fewer drugs.¹⁵ In the shadow of social monitoring, they make better choices.

This is just a hypothetical; I have no idea if something like this would actually counteract experimentation with illicit drugs. (Though it certainly seems plausible.) Analytically, the point is that it would be strange to call the program “normalizing.” It’s certainly true that social monitoring exerts influence over individual choices; it’s because their private time is suddenly accountable to their close friends, even when those friends are not present, that kids why away from experimenting with drugs. But the idea is not, as “normalization” conveys, that kids simply begin following the herd, robbed of their capacity for autonomous decision-making. Actually, just the opposite: the purpose of social monitoring here is that would inspire kids to *think more carefully* before trying drugs; monitoring is supposed to counteract the—very unfortunate—norm of experimenting with drugs. Suppose Joe goes to a party. He’s doesn’t know anyone. He’s uncomfortable. A bunch of other kids decide to try heroin. So Joe decides to try it, too. If anything, *this* is the kind of fact pattern that involves “normalizing” dynamics—and it’s exactly the sort of fact pattern that the live-tweeting program is trying to avoid. Indeed, the goal of the program could be described exactly as using social accountability to induce thought.

Ultimately, this is a very basic point about accountability, one that we are familiar with from everyday life. Sometimes, having to account—being socially monitored—makes us overly

¹⁴ See <http://www.zestfinance.com/>.

¹⁵ I reserve the question of whether obsessively using one’s smart phone at all hours of the day is analogous to substance abuse.

responsive to the whims and desires of others, instead of thinking for ourselves; hence “normalization.” Other times, social monitoring causes us to take a step back and think more critically about our own actions. Psychotherapists (and self-help gurus) have a name for the latter phenomenon: mindfulness. There are many things that can make us more mindful. Social accountability is one of them.

C) The Consequentialist Objection

The last objection, the “consequentialist” objection, is less a criticism of my logic than a recapitulation of the opposing view. If we see privacy in instrumental terms, that is, in terms of the outcomes it catalyzes, traditional surveillance bears no resemblance to mechanisms of optimization and self-improvement that I’ve been discussing here. But that is just the point. I think we conceptualize privacy in intrinsic, not instrumental, terms. The reason is simple: privacy harms operate at the level of individual psychology and experience. What we lament when we lament privacy violations is how they reshape phenomenology. This is what makes the panopticon such a haunting metaphor for surveillance practices. It renders literal the possibility always at play in the felt experience of privacy violation: that it doesn’t matter whether the person (or people) monitoring you are nefarious, indeed, it doesn’t even matter if anyone is *actually monitoring you*. The mere possibility of being-monitored can be enough to transform—indeed, radically transform—the way you interact with the world.¹⁶

Taking this phenomenological aspect of privacy seriously leads inexorably, I think, to the conclusion that the value of privacy cannot hang on the precarious mantle consequentialist reasoning. Nor can we settle for a *je ne sais quoi* account of why privacy matters. We must be precise about what interest privacy serves, lest privacy get posed, as Julie Cohen has written, against “a powerful general imperative that relates to the value of information and information processing: more information is better.”¹⁷ Indeed, she writes,

Failure to challenge the information-processing imperative leaves privacy theory in an epistemological double bind. When it accedes to unrestricted flows of personal information, privacy theory exposes itself to the changes of Luddism and censorship. Failure to confront the assumptions on which those charges are founded amounts to an effective concession that privacy is at odds not only with markets but also and more fundamentally with innovation and truth.¹⁸

This problem has led Cohen elsewhere to argue that privacy regulations should focus on “maintaining” the “interstitial spaces within information-processing frameworks.”¹⁹ In other words, privacy is about keeping the external world at bay—giving individuals a bulwark against the onslaught of social forces that frustrate the development and flourishing of individual identity—or, in her lovely phrase, “breathing room.”²⁰ This should sound

¹⁶ See, e.g., David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 76 (2013) (“Government surveillance (or its possibility) causes people to internalize the notion of being watched, even if it is not actually happening.”). As evidence for this proposition, Gray and Citron literally cite to 1984. *Id.* n. 88.

¹⁷ JULIE COHEN, CONFIGURING THE NETWORKED SELF 116 (2012).

¹⁸ *Id.*

¹⁹ Cohen, *supra* note 6, at 1906.

²⁰ *Id.*

familiar; it's quite similar to my point about the way in which *thinking*, even “productive” forms of thinking, can become a source of oppressive when imposed relentlessly from without.²¹ In fact, “breathing room” is a good description of what I seek to recover by shifting emphasis away from the alluring but ultimately insufficient paradigm of freedom of thought, toward an overlapping but distinct paradigm of freedom *from* thought. The former emphasizes privacy, and corresponding autonomy, only insofar as they yield certain kinds of intellectual activity. The latter emphasizes privacy, and corresponding autonomy, *as such*.

To be sure, even if my intrinsic defense of privacy is accepted, in many cases it will *also* be the case that privacy protections yield socially desirable behavior—and so have normative benefits quite apart from individual experience. But this, it seems clear, is not their only benefit; in fact, I don't even think it's their primary benefit. We should be able to affirm the value of privacy even when it is not directed toward socially valuable ends—say, intellectual and creative pursuits. And to the extent that existing frameworks lack the conceptual vocabulary for such affirmation, it's the frameworks, not our privacy regulations, that need to change.

To the point somewhat glibly: whereas in the “freedom of thought” paradigm, the keyword is “thought,” in the “freedom from thought” paradigm, the keyword is “freedom.”²² And this means freedom not just from traditionally nefarious types of monitoring—Big Brother and his corporate doppelgangers—but also certain types “beneficial” monitoring that aim to make our markets more efficient, and our lives more optimized, by helping us to understand more, to think more, about our dazzlingly information-rich world. It's time to abandon the formalist commitment to thought, expression, and knowledge—the great forbearers of big data—and to look carefully at the world we are actually creating.

II. “Privacy is Theft”

The best book of 2013 about privacy—and the social disintegration that would result from its absence—was a novel: *The Circle*, by Dave Eggers.²³ At least, it was marketed as a novel. But the book is also, perhaps primarily, a blistering work of social theory.

The Circle imagines interconnectivity gone haywire, at the behest of an eponymous fictional company, The Circle, which has subsumed Google, Facebook, and every other social media platform, and now performs all of their functions and more. We enter the world of The

²¹ Where I differ from Cohen is in my skepticism about abandoning the liberal conception of subjectivity, in favor of a “de-centered,” Foucauldian model. I suspect this effort is fated, if anything, to *decrease* the favor of privacy in the eyes of the political mainstream. See COHEN, *supra* note 22, at 128-48.

²² In practice, of course, one natural consequence of such freedom is that individuals can engage in intellectual experimentation. And that, there can be no doubt, is a wonderful thing. It turns out if we let people be, they tend to create. In case there was any doubt about this postulation, the digital age has rendered it unassailable—it turns out that human beings are even more driven to create, and more prolific in their creative ventures, than many of us had previously imagined. But to say that freedom from enforced thinking is conducive to the kind of intellectual activity prized by surveillance-as-chill theorists is *not* to say that “free thought” is the correct normative touchstone. It's simply to identify a benefit that, under certain conditions, accompanies the real source of normative value—the freedom *not* to think.

²³ DAVE EGGERS, *THE CIRCLE* (2013).

Circle through the book's protagonist, Mae Holland, a sharp but callow recent college graduate, elated to have landed a job at the world's most desirable company. "My God, thought Mae. It's heaven." That's the book's first line—and, of course, it adumbrates the finale that every reader suspects. In fact, *The Circle* turns out to be hell.

Mae's newfound employment coincides with an inflection point in the company's business. Just as she joins *The Circle*, it releases a new flagship product, dubbed SeeChange: micro-cameras that can be planted anywhere, including being worn around one's neck, so that every minute detail of life—twenty-four hours a day, seven days a week—can be recorded and broadcast to the world. The goal, as articulated by the company's higher-ups, is very simple. They want to "close the circle," a grandfatherly euphemism for mapping, in real-time, everything happening everywhere, all the time, for everyone. The project has a Borgesian flavor. It's the natural endpoint of the epistemology underpinning "big data" culture: the drive to know as much as possible; and by knowing, to predict; and by predicating, to control.

The decision to wear a SeeChange camera around one's neck is known as "going transparent." First, politicians do it—pledging fealty to the cause of "accountability"—and then civilians join in, too. Mae is the first such civilian: the company's guinea pig. She "goes transparent" during the second half of the book, to the foreseeable detriment of relationships with her family and friends. But this doesn't faze Mae. Like an addict, she's beholden to *The Circle*. She lives by it and for it, having disappeared into vortex of unrelenting participation and vacuous interconnectivity that the company exalts as the next stage of civilization. Mae becomes estranged from her parents; a childhood friend ends up having a terrible accident; and she ceases to have—indeed, ceases even to desire—meaningful human contact. In short, Mae unravels as a subject, as the artificial sociality of *The Circle* colonizes the last corners of the social world. And in the age of big data, Mae's unraveling is allegorically our own.

Heavy-handed? Absolutely. Void of much real character development? Check. But *The Circle* is also an inspired and incisive meditation on data privacy. On this front, three aspects of the novel are of particular interest.

The first is that power is everywhere in *The Circle*—the disciplining power of asymmetrical observation; the normalizing power of crowd-sourced information; the psychological power of approval and opprobrium—but the state is absent. The novel unfolds in Silicon Valley, far off from every regulatory apparatus. The point is both geographically accurate and cleverly symbolic. All that Mae ever hears of public power are stories—never corroborated, but presented as plausible—about politicians who try to counteract *The Circle*'s efforts by proposing privacy reforms, and whose careers mysteriously go up in smoke. This is regulatory capture on steroids, intensified to the point that changes in governance are no longer even necessary. The message is clear: in a dystopia that centers on big data, the culprit will not be the regulatory state.

The second noteworthy aspect of the book is that once Mae "goes transparent," the ambiguity explored in the last Part—that social accountability can both chill thought and induce *greater* thought—sets in for Mae psychologically. On the one hand, Mae begins to feel the weight of "normalization." She starts obsessing over how her audience, which includes both members of *The Circle* community and members of the general public, is responding to her tastes and preferences. This makes her circumspect—looking to please rather than looking to act out her authentic choices. On the other hand, Mae also begins to think more carefully about her own choices. The narrative device that Eggers uses to make this point is alcohol consumption. Mae certainly doesn't have a drinking problem, but she enjoys having a few glasses of wine every night. At least, before going transparent she does. Once her

actions are broadcast to the whole world, Mae begins to think twice about this daily ritual. Crucially, however, she actually *thinks* about it. The concern is not that people will judge were; she doesn't drink too much, so there's no reason they would. But the omnipresence of social accountability in her formerly-private life—the knowledge that others are monitoring her, even if they aren't judging her—makes her monitor herself more carefully. It stops her from just going through the motions. Instead of grabbing a glass of wine by reflex, Mae asks herself if she actually *wants* the wine. It turns out the answer is often no. Thinking triumphs.

The third noteworthy aspect of the book—most important for our purposes—is the ideological stance that The Circle's higher-ups, and their followers, strike toward privacy. I'm not sure Eggers is exactly right about where the ideology leads in practice; that's what makes it a work of fiction. But the conceptual slip that Eggers envisions—the small but momentous way that an entire culture comes to reimagine the relationship between human beings and their data—is masterful. It's summarized in a simple slogan, repeated at various junctures, often in connection with the “going transparent” initiative:

“Privacy is Theft.”

This is the mantra The Circle seeks to inculcate. Mae and her peers adopt it without protest. Analytically, the mantra resolves into a simple proposition: the failure to make once-private information available for social use deprives us of a good—shared phenomenology—to which we're all collectively entitled. On this model, one's private experiences are no longer one's own. They're effectively the property of others—not of any *particular* other, but of everyone. And refusal to share and participate becomes tantamount to conversion—or more simply, to theft.

The mantra is clever—and diagnostically acute—because it amounts, *in concept*, to little more than a flipping of default rules; the kind of small tweak one might casually pontificate about at a conference. But with this tweak comes manifold consequences. For privacy to qualify as theft does not just mean that traditional rights of privacy have disappeared. It means that the directionality of rights has *inverted*: the traditional notion of a right of privacy, held by individuals who want to shield certain data about their lives from the world, has given way to a “right of publicity,” as it were, held by those who want access to the data.

The interesting thing about this “right” is that involves no right-holder in the usual sense. Rather, the right is held by everyone equally. It's not any particular interest group, but the *general welfare*, that stands to benefit from the dissolution of traditional public-private boundaries, and from the circulation, accumulation, and mining of information. This is, of course, a highly believable account of the ideology that drives “big data” culture, because it's essentially the ideology that we've already internalized. The promise of big data is not that it will benefit a particular group of people, but that it will benefit *all of us*—once the infinite reservoirs of human knowledge and experience, so long untapped, are finally put to use.

In this sense, criticisms of big data that focus on capture by private interests—the concern that information that “belongs” to individuals is being siphoned off into proprietary databases and other corporate silos—exactly miss the point.²⁴ Big data proves difficult to corral not because of compartmentalization by private interests; but precisely because the data is imagined as a *public* resource. Which means that the very same people who might assert a traditional right of privacy against data collection—i.e., users—are also part of the general class that stands to benefit *from* data collection. Reenter *The Circle*. The maxim “privacy as theft” does not just mean that someone who refuses to give up private

²⁴ Put in cites

information deprives others of its use. It also means that, in the same swoop, she deprives *herself* of its use. This logic is insidious. It causes autonomy-driven objections to the publicizing of once-private information to collapse under their own weight. For the very interest that creates the basis for objecting—I want to know more about my world! I want to experiment intellectually! I want to think!—is vindicated by the practices of data collection being objected to.

Of course, the slogan “privacy is theft” is part of Eggers’ fictional world, not our actual world. The concern, however, is that we end up in the same intellectual cul-de-sac by conceiving of autonomy in terms of freedom to think. In the preceding Part, I argued that it puts strain on the surveillance-as-chill critique when data is aimed toward optimization and self-improvement, since those goals tend to *facilitate* expressive autonomy, not to undermine it—making it hard to raise expressive autonomy as an objection. But this is exactly where the slogan “privacy is theft” leads as well. In fact, the notion that “privacy is theft” is entirely *compatible with*, and indeed reinforces, the “freedom of thought” paradigm of expressive autonomy—once “thought” is understood to encapsulate productive uses of information. To be free to think is to hold an entitlement to the fruits of collective knowledge, of which big data is the contemporary frontier.

In other words, the point is not simply (as I argued in Part I) that the surveillance-as-chill critique has difficulty accounting for self-monitoring practices that encourage thinking. It’s that such practices can easily cause the surveillance-as-chill critique to short-circuit. The interest offered up as a justification for enhanced privacy regulations—chill—becomes a argument, simultaneously, for the *absence* of privacy regulations. This is not to say, of course, that no privacy regulations are viable under the surveillance-as-chill critique; the whole point of the critique is to support privacy regulations. But it would turn the question into one of balancing—an empirical question about which direction the “chill” concerns run strongest. However palatable that option might seem in theory, we know what it means in practice. It means privacy gets cast as the enemy of progress.

III. Democracy Lost

The “freedom of thought” paradigm is seductive. It spins a tale of virtually universal appeal—who, after all, opposed its core virtue?—and one that harmonizes easily with familiar categories of political concern, all the while fitting neatly into a landscape of win-win, big data capitalism. Tech companies may be the main *pecuniary* beneficiaries of this system, but fear not: all of us share in its non-pecuniary spoils. Simply put, the more information, the better. It’s a technocrat’s delight.

Yet there is also something quaint, something almost melancholic, about the “freedom of thought” paradigm, and about scholars’ fixation on “chill” as a source of legal and political alarm.

[S]urveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance of people when they are thinking, reading, and communicating with others in order to make up their minds about political and

social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas.²⁵

Does this lament echo our political reality? Can the problem today be characterized as one of too little experimentation, too few ideas, a general drought of creative output? Can the problem even be characterized as the *danger* of these things?

These queries are not rhetorical. Chill and censorship are easy monsters to slay—almost effortlessly easy. The question is whether they are the right ones to chase. Invocations of chill are beset with some irony today, as we try to navigate a world positively *overflowing* with speech and expression. If the Internet, particularly in the last decade, has demonstrated nothing else about human nature, it's that our collective appetite to create is far vaster and wider than many of us had imagined. Lower the barriers to entry, and it turns out that almost all of us are artists, writers, and critics—creators of every kind.²⁶

I'm not saying, of course, that the risk of chill and censorship has somehow vanished from our political world. These risks are perennial; just as the risk of, say, erecting death camps is perennial. But world-building is a question of context, not formalistic anxieties. I worry that First Amendment principles, increasingly formalistic as they are, provide increasingly poor guidance in a world where greater and greater amounts of information are thrust upon us in the name of self-improvement and optimization—a world in which we are made to think constantly, relentlessly, about everything from the most banal details of personal life to the minutiae of Wall St. and Washington to now, apparently, the personal convictions of corporate executives. In a world such as that, the exigent task becomes fashioning a conceptual vocabulary that helps create space, again in Julie Cohen's phrase, for the "breathing room" that makes political subjectivity viable. Without that, I'm afraid we are lost. Not because we can no longer think, or no longer experiment intellectually; but because—to repurpose a metaphor from the world of big data—we no longer have the collective "bandwidth" to do anything *but* think.

In his recent book, *The Harm In Hate Speech*, one point that Jeremy Waldron makes very convincingly is that it's an error (even if a very widespread one) to ignore the *material* and *spatial* dimensions of expression.²⁷ We are accustomed, he argues, to thinking of speech as something that differs ontologically from, and transcends, the strictures of the object-world. Words are not like sticks and stone; they are in a different category. Waldron wants to complicate this picture, with hate speech as his example. We often think of hateful expression (like all expression) as momentary—someone on a soapbox spews vile rhetoric about other races; someone writes a blog post expressing anti-gay vitriol; and so forth. But one of the harmful things about hateful expression, Waldron argues, is precisely that it's *not* momentary. Hateful expression sticks around, both literally—in the case of billboards, websites, and other artifacts—and figuratively—in the sense that hateful expression has the power to create a social environment of ongoing exclusion and hostility.

Normatively, Waldron's purpose in emphasizing the material endurance of hate speech is to overcome the old First Amendment refrain that, under normal circumstances, no one forces listeners to listen—if you object to the expression of others, you are free to express opposing views, but you are also free, more simply, to tune the speaker out. Waldron's point is

²⁵ Richards, *Dangers of Surveillance*, *supra* note 1, at 1935.

²⁶ See, e.g., Mark Lemley, *Is the Sky Falling on the Content Industries?* (summarizing the shifts in creative methods and explosion of content that accompany the advent of the internet)

²⁷ JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012), in particular Chapter Four.

precisely that this is not always possible; or maybe more exactly, that the abstract possibility of not listening is not much help when it comes to designing a legal regime. Hate speech has world-shaping power; we ignore this feature of it at our own peril.

Whether Waldron is correct about the implications of his insight, the insight itself is apt. Even when expression draws to a close—the speech act is uttered, the blog post is published, and so on—the effects of expression linger. Especially when expression is totalizing and limitless, it has the capacity to overtake the world it inhabits. For a certain stripe of First Amendment thinking, this has always been an uncomfortable observation, for it’s profoundly—constitutively—an illiberal sentiment.

When Waldron makes this claim about hate speech, we look on skeptically.²⁸ When MacKinnon made the same kind of claim about pornography, she was unable to find traction in the courts. And when the point is made about data culture today, I suspect the response will be much the same. Julie Cohen is among the only people who *acknowledges*, much less who is willing to embrace, the profoundly illiberal nature of this critique. And Cohen is a privacy theorist, not a First Amendment partisan. In the latter camp, much of the theory—and certainly the work of the federal courts—has hewn the other way.²⁹ The state of affairs is particularly perverse when the champions of expression believe themselves to be *rescuing* our representative institutions, not the other way around; when they can earnestly (and accurately) invoke the deep bond, in the history of Western democracy in general and in the United States in particular, between liberal values and political health.

But things have changed. Today, we are inundated with information—an incoherent chorus of viewpoints and trends and tips and analytics. This reality, which will only increase in scope and intensity, rapidly disables the possibility of sustained political engagement, while at the same time enabling an ever-greater outpouring of viewpoints and opinions and ideas. Our representative institutions certainly bear the imprint of these developments. So do our private lives, marked as they are by the grace of more knowledge, more raw information, than our ancestors could possibly imagined, and by an insuperable anxiety about optimizing—well, everything.

This is the world that we are creating; the world we’ve already created. It’s a world in which institutions exhibit a comparatively pure form of plutocratic, low-attention-span politics, and in which individuals enjoy nearly boundless freedom to think.

²⁸ See Michael McConnell, “You Can’t Say That,” in N.Y. TIMES (June 22, 2012).

²⁹ Examples; the literature is enormous. *But see* Tutt, *supra* note 4, at 286-93.