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# Control of Digital Information: Why Privacy Violations Reduce Our Freedom

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Control of Digital Information:  
Why Privacy Violations Reduce Our Freedom

An Honors Thesis

Presented to  
The Faculty of the Department of Philosophy  
Bates College  
In partial fulfillment of the requirements for the  
Degree of Bachelor of Arts

By  
Stephanie Wesson

Lewiston, Maine  
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Dedication

To my sisters

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## Abstract

Privacy often bears an assumed connection to political freedom, but the nature of that connection is underdeveloped. I take a control definition of privacy: to be in a condition of privacy is to have control over who has access to your information. Violations on the distinctive right to privacy occur when one reneges on the social obligation to respect this condition in particular contexts. I argue that our intuitions are correct: such violations are essentially wrong because they are freedom-reducing. Philosophers of freedom debate whether a positive or negative conception of freedom is best, whether freedom is specific or “overall,” and whether one’s freedom can be measured. I defend a concept of negative, overall freedom that can be approximated and compared from person to person. Since under the negative conception one is free to the extent one lacks constraints on action, I then identify the constraints imposed by privacy violations in two contexts: commercial data collection and government surveillance. The nonconsensual nature of most digital information transactions marks a privacy violation, for the quantity of information exchanged is too great to be controlled and violators have incentives to uphold secrecy. These violations reduce our freedom by imposing constraints on individual control.

## Introduction

In June of 2013, the British newspaper, The Guardian, first published the story of a whistleblower's leak of National Security Agency (NSA) documents.<sup>1</sup> The article revealed how the Foreign Intelligence Surveillance Court (FISA) granted the U.S. government permission to extract millions of telephone records through Verizon in the form of "metadata." The Washington Post<sup>2</sup> and The Guardian exposed the PRISM program the next day, publicizing for the first time the secret government program that uses data from the most powerful and wide-reaching digital information giants in the U.S., including Google, Facebook, and Apple. In the following days, the international extent of NSA surveillance was revealed in the form of the Boundless Informant, a tool that tracks NSA metadata mining of suspicious countries,<sup>3</sup> and 29-year-old Edward Snowden came out of secrecy as the whistleblower behind the leaked files. When confronted with the personal risk he assumed by going public, and the "comfortable life" he would have to leave behind, Snowden replied: "I'm willing to sacrifice all of that because I can't in good conscience allow the U.S. government to destroy privacy, internet freedom, and basic liberties for people around the world with this massive surveillance machine they're secretly building."<sup>4</sup>

The reaction to the NSA surveillance was and continues to be one of outrage, shock, and debate. Incriminating files leaked out for months after June, with more and more information about the companies that fed the surveillance machine, the variety of foreign and domestic

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<sup>1</sup> Glenn Greenwald, "NSA collecting phone records of millions of Verizon customers daily," *The Guardian*, June 5, 2013.

<sup>2</sup> Barton Gellman and Laura Poitras, "U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program," *Washington Post*, June 7, 2013.

<sup>3</sup> Glenn Greenwald and Ewen MacAskill, "Boundless Informant: the NSA's secret tool to track global surveillance data," *The Guardian*, June 11, 2013.

<sup>4</sup> Glenn Greenwald, Ewin MacAskill, and Laura Poitras, "Edward Snowden: the whistleblower behind the NSA surveillance revelations," *The Guardian*, June 9, 2013.

targets, the circumvention of privacy protections,<sup>5</sup> and the disturbingly conscious efforts by the government to preserve the entire operation's secrecy.<sup>6</sup> Snowden's comment above resonates with many Americans who felt deceived and invaded by their government's actions. But his comment simultaneously raises numerous questions. The data collected by the NSA was in the possession of many telecom and Internet companies for years—how did our privacy then change when the government shared in that possession? Despite the NSA surveillance taking place, citizens used the Internet in the same way they always had. It was not as if we were suddenly unfree to do the things we were used to doing; why, then, did so many people agree with Snowden's warning that the program “destroy[ed]... Internet freedom”? Even if we found out some freedoms were closed off in response to the surveillance, can we really say that we suffered from a loss in general freedom, or freedom *tout court*? What “basic liberty” was attacked, which rights were violated? The difficulty in pinning down solid answers to these questions illuminates the major gap between the clarity of our disapproving intuitions and the cloudiness of our conceptual grasp of privacy and freedom.

This thesis sets out to bridge that gap. Is it a mere coincidence of intuition that we so often speak of privacy and freedom in the same breath? Or is there some conceptual connection lurking behind this instinct? I address these questions by navigating the major debates in the concept of privacy and the concept of freedom, and making a conceptual argument throughout. Philosophy is well-known for its unforgiving scrutiny of even the most obvious concepts. Its fame is sometimes notorious: conceptual work is accused as dry, unnecessary, and counterproductive, and may be especially feared when applied to our beloved concepts of

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<sup>5</sup> James Ball, Julian Borger, and Glenn Greenwald, “Revealed: how US and UK spy agencies defeat Internet privacy and security,” *The Guardian*, September 5, 2013.

<sup>6</sup> The FISA court that is often cited as a judicial check on the NSA was actually used to justify warrantless surveillance. In other words, the mechanism set up to ensure transparency was used to ensure the exact opposite. Glenn Greenwald, “Fisa court oversight: a look inside a secret and empty process,” *The Guardian*, June 18, 2013.

privacy and liberty. Analysis of beautiful things, as E.B. White said, is like dissecting a frog: “few people are interested and the frog dies of it.” But in the age of CCTV, Internet conglomerates, and the NSA, it is clear that the frog is already dead. Or at least, he is very sick. Dissection is not only acceptable, but necessary to diagnose the illness and resurrect what we value. We must demystify beloved concepts so we can articulate why they matter and whether they are worth preserving. In other words, before identifying violations and prescribing rectifications we must face the concept in its nakedness, so we can be sure we love it itself and not just the clothes it wears.

I do not mean to suggest that after analyzing the concepts of privacy and freedom, the American public will come to an agreement as to how these values should be weighed against others. Conceptual work is important in case of disagreement, too. Political disagreements can often be reduced to conceptual discrepancies; it is better to agree on a concept and let the real point of departure—what we think *about* that concept—be the focus of political debate.

I argue that when we talk about privacy, we are talking about control—specifically control over who has access to one’s information. This is a well-contested definition. Many argue instead that when we talk about privacy we are talking about access. What matters for access theorists is that others have a certain amount (quality or quantity) of your information. The problem that the NSA outrage reveals is that the kind of information shared does not always matter: there is nothing particularly “private” about metadata, and yet, the discomfort that we have lost privacy remains. Quantity of information, I will argue, is more important, but not for the reason access theorists will posit. Quantity of information matters because as the degree of information expands, the likelihood of losing control is drastically increased. I have not lost privacy when I share a secret; I have, rather, preserved it by choosing to share access in a

particular way. Broadly, the access theorist's concerns are contained within the control definition of privacy, and the control definition better describes our intuition in cases where we feel privacy is diminished.

If the conceptual debate over privacy is contentious, then the one over freedom is war. Philosophers of freedom have proposed numerous ways of understanding the concept, though the two most resilient concepts are the positive and negative ones. The positive concept defines freedom by the actions one is able to exercise; the negative concept defines it by the absence of constraints on action. I argue for the negative concept but reject the political views that tend to flow from it. A nuanced version of the negative concept that recognizes the various kinds of constraints will allow us to better identify actions we are free to do versus those we are unfree to do.

The primary reason I choose the negative conception is not for the benefit of identifying specific freedoms (in fact, I argue that the positive and negative concepts are two sides of the same coin in that task). Instead, I choose it because it is the preferable concept for the task of measuring *overall* freedom. Implicit recognition of the difference between specific and overall freedom is pervasive in reactions to the NSA. When Snowden says that Internet freedom is destroyed, he surely does not mean we are unfree to do a great many specific things on the Internet. When he says the NSA destroys basic liberties, he refers to something other than the specific liberty to not-be-freaked-out-by-the-NSA. His comment implicitly uses a concept of *overall freedom*. We can arrive at overall freedom by determining a way of measuring it out of the specific freedoms. This process is a tricky one: how do we know how much a specific freedom contributes to our overall freedom? While many standards for discrepancies have been proposed, the best one judges a specific freedom by no other value than its impact on the

exercisability of subsequent freedoms. This standard clashes directly with several other proposals that suggest weighing freedoms according to their desirability or contributions to human welfare. The primary reason I reject these is the same reason I think it is important to discuss freedom at all: the unpredictability of individual choice renders external judgment impossible, and that unpredictability is in part what makes freedom so fundamental and so interesting. Freedom is important not primarily as an instrument for achieving other benefits, but as a thing in itself.

We clarify the concept of freedom by reminding ourselves why we are interested in the concept at all; this suggests that often conceptual and normative work may be integrated rather than chronologically separated. Although I think conceptual work can stand on its own, I also believe in its value to contribute meaningfully to our understanding of the political problems our world faces. I thus include normative considerations throughout, including a discussion on the right to privacy and a definition of a constraint on freedom as something for which one holds moral responsibility. Finally, I apply these arguments to recent controversies surrounding digital information. I am interested in both the NSA and commercial digital information collection.

It is not at all obvious to me that privacy and freedom are *more* important in the digital age than they were in the industrial or pre-industrial age. But it does seem increasingly clear that age-old threats to privacy and freedom such as domination, paternalism, and control by the powerful find in technology new opportunities to assert themselves. If the digital age's features of pervasive documentation, expanded quantity and mobility of information, and increased possibilities to monitor and steal render more and more informational transactions nonconsensual, then we can confidently point to not only diminishments of privacy and freedom, but violations. Even if the values themselves have not gained in importance, enhanced threats to them warrant enhanced analytic and political attention. In expending this attention, we will be

better equipped to face the next set of questions on how we construct a political world that protects the things we value.

## A Definition of Privacy

When we talk about privacy, we mean something different than the *right to* privacy. We are talking about being in a state of privacy, and what the condition of privacy entails. We are not yet concerned with what constitutes a violation. Pinning down this definition of privacy itself has inspired much disagreement and debate. A common definition of the condition of privacy is having control over access to information about oneself. I think this view is the best of the many definitions, a claim I defend here. In order to sidestep the issue of violation altogether, I discuss whether privacy is diminished in cases where information is collected justly or information is given voluntarily. I then show why objections to the control definition are unconvincing.

Let's imagine the most restrictive case—the case where the least appears to be lost. I share a piece of private information with you on the condition that you do not share it with anyone else (or maybe on the condition that you share it with only people I specify). You agree to this and do not violate it. What, if anything, do I lose in this case? I lose my special position as the “sole knower” of information. This is undoubtedly true, but we may have other reasons for not wanting to equate privacy with this condition. For example, what would we say about information whose content is my relationship to another person? If the nature of the information precludes the possibility that I am the sole knower of it, do I lose privacy by having this relational fact be true of me? It is intuitively strange to think that I do. If I lose privacy in this case of giving information, then it cannot be for the reason that I am its “sole knower.”

So, people can possess information about me if they are *part* of that information and I will not have lost privacy. Are there other cases where others possessing information about me does not seem to diminish my privacy? Thomson gives the example of a passerby who overhears

a domestic argument.<sup>7</sup> Have the quarrelers lost privacy? Surely, if later they were informed that neighbor X had been walking by and had overheard the whole thing, they would be embarrassed and feel a sense of discomfort. This discomfort could stem from a few things. Maybe it stems from a moral judgment—that it was somehow *wrong* of the neighbor to be there without them knowing, because they were deceived (i.e. they thought no one was there). This would maybe be true if the neighbor was poking through their house undetected at the time of overhearing the fight, but if there is a moral judgment in *this* passerby case it is certainly unwarranted. The point is: no violation has occurred, and yet discomfort remains.

Maybe the discomfort stems from the fact that the argument is particularly embarrassing because it suggests the couple's difficulty conforming to social norms of domesticity. This is likely true in some sense. Parent says that for the possession of personal information by others to constitute diminished privacy, the personal information must be of a certain sort; that is, what counts as "personal information" is temporally, culturally, and individually defined.<sup>8</sup> If the neighbor had simply heard the sounds of footsteps and washing dishes, then I doubt the couple would feel the same level of discomfort. The content of the private information, then, is perhaps

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<sup>7</sup> Judith, Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 296.

In Thomson's example, the passerby stops to listen. This detail isn't relevant here, because I am not talking about violations yet, only the condition of privacy.

<sup>8</sup> W.A. Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12 (1983): 270.

To prove that this information is temporally defined, he mentions how in 10 years, people will be less concerned about the spread of their personal facts of sexual orientation, marriage status, and drug use. The information must be individually defined as well, he says, because a fact such as height is easily sharable for some and not for others. I have a separate problem with how Parent applies this to his overall definition of privacy, which holds that privacy is the state of not having undocumented information about oneself published. If a person had embarrassing information once published in a newspaper, and years later a reader came across it and choose to disseminate it widely, Parent says that we should not "accuse [the reader] of invading... privacy" (p. 271). While he conflates violation with diminished privacy here, it become clear later that he means that we should *also* not say that the person's privacy has been diminished, because "the information revealed was publicly available" (p. 271). This supposes, though, that once information has been made public by some standard (apparently, news publication), that all the privacy one holds in respect to that information is instantly lost. This does not seem right. If my embarrassing story is published in a local paper, I am still in a position to lose more privacy with respect to that information if that story was then broadcast on national TV. It seems to me that "the public" is not a monolithic, identifiable unit, but rather, exists in degrees, measured by concentric circles of intimacy.

a necessary but not sufficient piece of their condition of diminished privacy. But to disprove this, we would just need a counterexample where the content of the information does not fit even Parent's definition and a feeling of discomfort results nonetheless.

Suppose that, before learning that their neighbor had overheard their footsteps and dishwashing, they had not realized that their footsteps could be heard from the street. This new knowledge that they had all the while been exposed to a group of people (passerbys) without realizing it would likely result in some level of discomfort. If this is not convincing (some may believe it more likely that the couple would say, "hmm, interesting," and move on without any discomfort) there are similar cases that will be less disputed. Imagine your government were, without your knowledge, collecting data on things like phone call records (imagine!). Even if I am only making phone calls in the "safest" way according to social norms—calling my mother weekly and my friends often and expats never, of course—I would still feel deeply uncomfortable upon the realization of my government's actions.<sup>9</sup> In other words, it is not always the content of the information that makes people feel like their privacy has diminished, but the fact that any information was collected. That the content of information fits Parent's definition is not a necessary condition for diminished privacy (that it does not constitute a sufficient condition, either, will be discussed later).

What is similar in the passerby case 1 (overhears an argument), the passerby case 2 (overhears footsteps), and the government case is the knowledge of the information-holder with respect to the information-collector. Importantly, what are *not* similar are the actions of the collectors; the passerby does not seem to be doing anything wrong and the government arguably

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<sup>9</sup> One objection might be that it is our expectations of a representational government that makes this seem wrong, not the particular action or transfer of information. But surely a similar feeling would result if it were my friends collecting this information, or a perfect stranger... and surely the feeling would result even if they collected it "just because," with no reason or intention to harm.

is, but it does not matter—we have not yet relied on a definition of violations. In each case, though, it is true that the holder does not know the collector has information about them. We can express this in a few ways: the holders are surprised to find out that the collectors have the information; the holders presume that the collectors do *not* have the information.

If this presumption were altered, it would be absurd to claim the discomfort remains in the same way. It could be altered originally: so, when the couple moves in to the house their real estate agent says “footsteps in this house can be heard from the street.” It can also be altered later: the couple open their windows or amplify sound coming from their house to ensure that passer-bys will hear them, or, the couple argues in front of the passerby because the passerby is a marriage counselor and they give her permission to hear them. In this case illustrated above where the couples argue unknowingly, though, the holders did not grant the collector access to the information. They presume the collector does not have it, and so they feel uncomfortable upon learning the collector does have it. A simpler way of saying this is that the condition of privacy is having control over who has access to information about oneself.

This definition is not originally mine, but I think given the discussion above, it is the best at explaining what is lost in situations that vary in terms of the kind of information transacted. The fact that situations with many kinds of information all involve diminished privacy precludes a definition of privacy that appeals to the nature of the information. What about situations that vary in terms of the choice of the information-holder? Parent’s criticism of control definitions is provided through a counterexample that addresses this question: a person shares all sorts of intimate information about herself to a wide audience of her own choice. Parent thinks she has lost privacy, or more specifically, “relinquished” it.<sup>10</sup> It is interesting that Parent thinks personal

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<sup>10</sup> Parent, “Privacy,” 273.

information is so contextually defined,<sup>11</sup> and simultaneously thinks the free-sharer loses privacy.<sup>12</sup> Is it not true that the free-sharer simply doesn't think *any* information is important, and so, her sharing very intimate facts is equivalent to me sharing, say, facts about my height? We have to say either that privacy is lost in both or neither cases. I think it is lost in neither.

Parent's counterexample of the free-sharer is indicative of a popular definition of privacy: privacy as access. This conception holds that we can measure privacy by measuring the access other people have to our personal information. The free-sharer is thus in a state of quite diminished privacy by virtue of the sheer amount of information shared with others. The hermit is in a much preserved state by virtue of his solitude. Privacy as access is widely used, and for good reason: it has great intuitive strength. This is why constitutional accounts of privacy have so often cited the "right to be let alone," (a phraseology that Thomson conclusively discredits)<sup>13</sup>—it is intuitive that something is wrong about someone having access to all of our information, or a great deal of it. I will argue that this intuition is better explained by the fact that most people would not *choose* to share this much of their information, particularly with actors like a government, and not by the fact that at some absolute amount of shared information is the threshold at which privacy is lost.

In his discussion of the various definitions of privacy, Shoeman offers what he calls a counterexample to the control definition: A person shipwrecked on an island has plenty of privacy, but does not have any control over who has access to information about him.<sup>14</sup> I think that this is not a counterexample. It is the unfortunate (or perhaps hopeful) circumstances of the

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To be clear, I do not think there is a real difference between my use of the term "lost" and his use of the term "relinquished." I use "lost" generally—anything that was once had and then is no longer is lost. Since we are not yet talking about violations, there is no need to distinguish between things stolen and things given away.

<sup>11</sup> Ibid, 270.

<sup>12</sup> Ibid, 273.

<sup>13</sup> Thomson, "The Right," 295.

<sup>14</sup> Ferdinand D. Shoeman, ed., *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984), 3.

person shipwrecked that he does not know who has access to his information. He might, upon first arriving on the island, presume neither his seclusion nor the presence of company. Under this presumption of uncertainty, he will look around (hoping) to find others. Eventually, (we can guess from Shoeman's use of the example) he decides that there is no one around, and has a new assumption: that no one has access to his information. If he is wrong, and the islanders have cameras in the trees or watch him from behind bushes, then we might say he loses privacy. We would say this not because more people access his information, though, but because the presumption of solitude instilled in him a certain expectation with which he acted in accordance, thus possessing some degree of control.

Shoeman's shipwrecked man does not show that control has no place in our understanding of privacy; what it *does* show is that some privacy is to be had in a case with very minimal control. But having a reasonable understanding of who does have access to information about you is a kind of control; if the shipwrecked man discovered cameras in the trees, he would have the control to alter his watched actions, for example. Control need not only be expressed by the selective sharing of information. It can be expressed by more subtle actions, such as controlling the kinds of information the collector gains. Of course, we would want to say that the man has diminished privacy (from the degree he enjoyed in his pre-shipwreck house, for instance) even if he changes his actions to control what the cameras see. But he surely has lost *more* privacy if he does not even know the cameras are there. The possession of control is inversely related to the degree of privacy lost.

Does control—the control to restrict access—need to be exercised to bear this relationship to privacy? This would mean that the free-sharer, by refusing to exercise her control of restriction, still loses privacy to the degree she shares information. A good formulation of the

control definition would insist, though, that privacy is not the sort of thing one can lose voluntarily. Maybe instead, the free-sharer forfeits her right to privacy. But that is very different than losing privacy itself. More likely, I think, the free-sharer loses her privileged position of the sole-knower of personal information, and this position, as we've discussed, is not tantamount to the condition of privacy. The personal information she shares can be of any sort, and the fact that it is of Parent's sort, even (temporally, culturally, individually relevant) is not a sufficient condition for its disposal constituting a loss of privacy. If we agree with Parent, then we assign ourselves an especially difficult task: determining what kind and level of information is relevant to privacy. And the task becomes not only empirically difficult, but logically impossible if we think the condition of "individually-defined" relevance is important. If individuals are part of the "final say" of what information is relevant, then whenever we opt for an access definition we set it in the context of individual control—control over defining what kind of access would be wrong. An access definition that acknowledges the need for (even partially) individually-defined "private information" *is* a reformulation of the control definition.

# The Right to Privacy

## I. Introduction

There are two approaches to the concept of privacy. The first is to look at the condition of privacy—what it is to be in a state of privacy. This condition, as previously discussed, is best described as having control over who has access to one’s information. Many people think that this condition of privacy is protected by an individual’s right. Focusing on the right to privacy is thus the second approach. Understanding this right to privacy has two parts: what the right protects (the condition of privacy) and what the right protects against. The first part of this is obviously controversial, but I think the previous discussion provided good reason to believe that to be in the condition of privacy is to have control over who has access to information about oneself. I believe that if there is a right to privacy, then it is a right that protects this control.

Privacy can be diminished in two ways: through violations or infringements. Recall that the free-sharer does not lose privacy because she shares her information voluntarily; these are therefore the *only* two ways privacy can be diminished. When we talk about a right to privacy, we are talking about a normative force that protects *against* violations. What the right to privacy protects against is the focus of most privacy discussions, for this is what prompt defenses of rights in law and in ordinary life. The other way the condition of privacy is diminished is when a person forfeits his right to privacy, or in other words, when an intervention constitutes an infringement but not a violation. In surveying literature on the right to privacy, I want to outline the conditions under which the right is violated and distinguish those from the conditions under which the right is merely infringed.

## II. Violations of the Right to Privacy

The law is a particularly good place to look for society's conception of violations and the rights that protect against them. Warren and Brandeis wrote an influential legal paper that sought to clarify how the right to privacy fits into the existing legal rights framework. They begin with a characterization of rights in general: rights protect people from wrongs committed against them. They think rights are enumerated by a society to protect people from certain interferences.<sup>15</sup> Rights expand as societies develop, meaning, the kinds of things we protect people from are increasing.<sup>16</sup> While originally the only rights we had set up protected people from interferences like assault, we have rights to protect people against less tangible harms. Warren and Brandeis say that legal protections against privacy violations are in this latter group of addressing intangible harms.

The control definition of privacy might correspond directly to a right: individuals have the right to control who has access to their information. Warren and Brandeis say that the law has generally respected this idea—the right to control “to what extent his thoughts, sentiments, and emotions shall be communicated to others”—but they struggle to accept this as the right to privacy because it is not clear to them what lies at its root; that is, what the right actually protects. In many cases, it seems correct to say it is a right of property that is at the root of this broader right.<sup>17</sup> But the right to property does not explain what is protected in the case of prohibiting the publication of private letters and thoughts which have no economic value.<sup>18</sup> This case, they say, is “an instance of the enforcement of the more general right of the individual to be

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<sup>15</sup> Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy [the implicit made explicit],” in *Philosophical Dimensions of Privacy*, ed. Ferdinand D. Shoeman (Cambridge: Cambridge University Press, 1984), 75.

<sup>16</sup> *Ibid*, 76.

<sup>17</sup> *Ibid*, 79.

<sup>18</sup> *Ibid*, 81.

let alone.”<sup>19</sup> Laws against defamation represent another set of cases that, rather than protecting people from emotional harm, protect people from the concrete harm of reputational tarnish.<sup>20</sup>

Warren and Brandeis want to explain the wrongness in all of these cases as violations of the right to privacy. However, I think it weakens the concepts of privacy and of the right to privacy to do so.

In the discussion of the concept of privacy, I responded to Shoeman’s counterexample of the shipwrecked man on a desert island to show that diminished control over who has access to your information always causes a condition of diminished privacy. The man can have some level of control over his information on the island even if his only means for control is through the deliberate restrictions of his own actions. So, *knowing* the full extent of violations occurring—that the islanders have cameras everywhere watching him—grants him a certain level of control he would not have if he were completely ignorant. It is clear that losing control will always diminish the condition of privacy one enjoys.<sup>21</sup> But this loss can be mitigated by the presence of the *knowledge of losing control*. In other words, the combined loss of control and absence of knowledge of that loss is always going to result in less privacy than the same loss of control paired with some level of knowledge of one’s level of control. The point here is that expectations matter. What we expect to be true about who has access—out of our control or our wishes—to information about ourselves directly influences our level of control over the information they access. How would this notion be expressed in law?

Warren and Brandeis believe that the right to privacy has been expressed in particular cases as protection against “an alleged breach of an implied contract or of a trust or

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<sup>19</sup> Ibid, 82.

<sup>20</sup> Ibid, 78.

<sup>21</sup> Or, the condition of *potential* privacy one enjoys.

confidence.”<sup>22</sup> Contracts and confidence can be thought of as versions of the control thesis, but the connection requires some explanation. When I make a contract, I expect to provide something (e.g. services, abstention, etc.) in return for something (e.g. goods, help, etc.). When I have confidence in a person, I expect with some reason that they will act in a certain way somewhat due to that confidence. What we expect to happen in contracts and confidence is explicitly agreed upon, codified. But put generally, we can say that the involved parties have a *legitimate expectation* of what behavior will occur. While Warren and Brandeis argue that laws addressing breach in contracts and confidence cannot explain what is wrong in most privacy cases, I argue that the important aspect of these things—that a legitimate expectation is violated—can explain a violation of the right to privacy even in cases where no explicit contract or confidence situation occurs.

Warren and Brandeis cite several cases where the recipient of information violated privacy through subsequent distribution of the information. For example, an observer in a lecture later publishes the lecturer’s ideas without permission. In cases like this, the court ruled that an initial, implicit, contract had been violated. This implies that somehow the conditions under which the information was given were deceitful. But the authors think this is too narrow.<sup>23</sup> They think that protection of contracts cannot explain the wrongness of situations where the information is never *given*, but is instead intentionally obtained, such as is the case in the example of a photograph that was snapped sneakily. In such cases, they say of the contract argument, “this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger.”<sup>24</sup> But they are only right if we limit our thinking to a defense via contracts *specifically*. Breaching contracts is wrong because legitimate

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<sup>22</sup> Ibid, 83

<sup>23</sup> Ibid, 84.

<sup>24</sup> Ibid, 85.

expectations are violated, which means people do things they would not, with complete knowledge, have done. A broader understanding of violated expectations could yield a right to privacy that protects people from violations in cases where information is not given, but “sneakily obtained,” even by strangers.

The wrongness of one case that seems to be an obvious violation of privacy can be illuminated by putting it in terms of contracts. Let’s say we have made a contract that you have access to my medical records as long as you pay for medical treatment. I will continue to go to the doctor under the condition that I know when you are accessing the medical records (so, if I paid for a visit out-of-pocket, I assume you will not access that record). What is wrong about a situation where you read my medical records *anyway* is that the conditions under which I made the visit were deceitful; I acted *because* of an expectation of privacy that was legitimate, and turned out to be incorrect.

Even though every situation cannot be perfectly put in terms of contracts, this same basic wrong still present where no contract or confidence is violated. Consider the case where a stranger stumbles across my diary, and knowing it is a private diary, reads it anyway. Let’s assume the diary was well-hidden (i.e. this doesn’t amount to negligence on my part) and that the reader comes across it anyway for good reason (i.e. he does not violate a norm in accessing the diary to begin with). There is a strong social norm against reading diaries, and everyone in the society agrees on this norm; by this I mean, everyone knows that it is in fact a norm. Furthermore, everyone knows that everyone agrees on this norm, which grants each person control over their information. Like the man on the island, we can control which information we outwardly express and how we express it *because* we know about this social norm. Expectations about people following the social norm are legitimate because of what it means to be a social

norm. When a social norm is violated, we are able to sense that violation in the same way we sense a violation of contracts and confidence.

Warren and Brandeis decide that the right to privacy cannot be explained in terms of contracts.<sup>25</sup> I agree with this, but I think we can identify the wrongness of violations of the right to privacy by looking at the wrongness of breaches of contract or confidence. In all three of these cases, a legitimate expectation of what will happen grants control, and so, when that expectation is purposely misleading or deceptive, control is lost. So far this has equated circumstances of people obtaining information with a diminished condition of privacy according to the control conception. Furthermore, in cases where information is “stumbled upon,” the receiver has a choice between violating or respecting the expectations of the holder. When the receiver makes a choice to violate the norm, they in doing so violate the right to privacy which consists in the control we derive from holding legitimate expectations.

### III. What Kind of Information Does This Right Protect?

Privacy is violated when our reasonable expectations are violated purposefully. In this sense, privacy violations are somewhat socially-determined. Here, I argue that even if we adopt a view of violations as socially-determined, we can still be committed to a view of private information—information that the right to privacy protects—that is individually-defined.

Warren and Brandeis liberally mention the variety of information protected by the right, but then they limit the kind of information the right to privacy protects as “those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection

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<sup>25</sup> Ibid, 86.

with his fitness for a public office.”<sup>26</sup> In other words, because of their legal focus they want to ensure the press some freedom to inform people of the relevant facts about the private life of public officials. Their legal approach is especially apparent when they distinguish between the kinds of things the law on privacy should restrict and the kinds of things the right to privacy protects: “it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.”<sup>27</sup> While this limitation is reasonable in the legal world, it is peripheral to the question at hand, which is not about what rights the law should protect, but rather, what rights there are and when they are violated.

In the section on the condition of privacy, Parent’s concept of “personal information” was discussed. Personal information is defined by the individual, culture, and time period. When privacy is diminished, it is this personal information that leaked into the wrong hands. I think this information is defined solely personally—i.e. the individual has the “final say”—although the legitimate expectations that shape our understanding of when a violation has occurred are socially constructed expectations. This means that an individual chooses which of her information is protected by the right to privacy, but any information that would be socially considered private would also be protected.

The reason we might not want to expand the definition of private information to this extent is because we do not want to say that a person loses privacy if she does not consider information about, for instance, height to be “private” and someone finds out her height. We might, in other words, have reasons to limit “private information” to personally-defined private information. But under the control definition, we start with a right to control *all* personal information—all information about which we are the subject—and lose privacy according to our

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<sup>26</sup> Ibid, 88.

<sup>27</sup> Ibid, 88.

loss of control. Including personally and socially defined information here, then, serves to match the liberal quality of the control definition. A person can hide the fact of her height by omitting it on certain forms and avoiding physical appearances in public, but her privacy is only violated if the information is somehow stolen, or accessed against her will. If she constructs appropriate barriers to protect the information about her height, and against her expectations those barriers are violated, then she has lost privacy even though height is not generally the sort of thing society deems as private. This works in the reverse way, too. The violation of legitimate expectations is the best way to identify a violation of privacy, but we must recognize that we have expectations for how others will act even when we would *prefer* that they'd act differently. If a person disagrees with society's categorization of nudity as private, we would want to say that the nudist still loses privacy when a Peeping Tom watches him walk around nude in his own house. This is because the nudist expects that society treats nudity as private, even if he would not himself consider it to be so. These distinctions are thus complicated, for the way we express which information is private must conform to certain social norms.

Imagine a Muslim woman residing in a predominantly, say, Christian community who chooses to wear the *niqab*, fully covering her head and most of her face. It would be an obvious violation of her privacy if a stranger on the street ran up and tore the veil away—it is a violation even though that culture does not consider the face to be private information. That there are other violated expectations at play (e.g. the expectation that one will not be assaulted, or the expectation that one will not be stripped of clothing)<sup>28</sup> certainly contribute to the wrongness of this act. But the woman's choice to wear the *niqab* broadcasts her choice to expand the range of personal, physical information to which she desires to restrict others' access. From this case we can assume that individuals have the prerogative to construct barriers protecting what they deem

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<sup>28</sup> Cummiskey, comment.

private—publicizing the fact that they extend their right to privacy over this particular piece of information. It would not be fair for the same woman to walk around in public expecting that no one look at her. The personal nature of private information must be asserted in ways congruent with the socially constructed nature of privacy violations.

A recent decision by the highest court of Massachusetts that defends the legality of “upskirting,” the secret snapping of pictures up women’s skirts in public, demonstrates the complication of what kind of information the right to privacy protects. The relevant statute was Massachusetts law §105 (b) which prohibits the surveillance of a “nude or partially nude” person when the person expects to not be surveilled and the surveiller has not been given permission.<sup>29</sup> At first glance this law seems to take a control definition of privacy—it emphasizes consent and expectations. But the court ruled that the man “upskirting” had not violated the law. Why? Because the women photographed were clothed. They did not fit the “nude or partially nude” criterion in the law, and even though the court agreed that women using public transport have “a reasonable expectation of privacy in not having a stranger secretly take photos up her skirt,” it interpreted the law as restricted to the nude or partially nude.<sup>30</sup> The court’s decision demonstrates the influence of the access definition of privacy. The criterion of nudity was presumably included because legislators thought nakedness was of the kind of information that should be private—once *this* information is accessed, then we can definitively point to a violation of privacy. Of course, this is not always true, and the stipulations of nonconsensual access show the legislature’s sensitivity to the access definition’s limitations; a woman who chooses to have someone take those same photos has *not* lost privacy. But the stipulation of nudity narrows the law’s conception of privacy too far. When people wear clothes, they intend to restrict access to

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<sup>29</sup> Massachusetts General Law, part IV, Title I, Chapter 272, Section 105 (b).

<sup>30</sup> Commonwealth vs. Michael Robertson, SJC-11353, 467 Mass. 371 (2014).

their body. Outrage over the Massachusetts court's decision indicates that this is not an idiosyncratic preference, but a widely-held expectation. Recognizing the prerogative to construct socially-understandable barriers to restrict access preserves the authority of individuals to define what information is private.

Another kind of information that must be specified in terms of its relation to privacy is *false* information. In addition to arguing that the right to privacy encompasses the right to property (publishing an individual's intellectual or artistic creation without their consent) and that it protects one from emotional damage (publishing/ reading a diary), Warren and Brandeis want to say that the right to privacy also protects people from slander and libel. For this reason, they also explicitly include *false* information about one's private life as protected by the right to privacy.<sup>31</sup> This is interesting, because up until this point my control definition has assumed that the information is *true* information about a person. This stems from my intuition that for information to be in fact information *about* you then it must be true, otherwise it is not your personal information at all. Warren and Brandeis want to prohibit things like slander and libel under the right to privacy, and they say that these inclusions entail "the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."<sup>32</sup> Of course, this is difficult because its dependence on a relative term automatically limits it to a particular society; what counts as "private life" is socially and temporally dependent. The individualistic definition of the information protected by the right to privacy afforded by the control definition was attractive for this purpose—it allowed for a right to privacy that is not restricted to any particular time or place.

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<sup>31</sup> Warren and Brandeis, "The Right to Privacy," 89.

<sup>32</sup> *Ibid*, 89.

Do we want to say that cases like slander and libel violate the right to privacy? At first glance they seem like obvious cases of the right being violated. When false gossip is spread about us, we certainly feel harmed and violated, but I don't think we feel *invaded* in the way we would if our diaries were read by a stranger. To feel invaded is to feel as if someone has entered the circle we draw to outline our personality without permission—to feel as we would if someone entered our house through the window even though it was locked. This is a different feeling than if someone were to point to another house entirely and declare incorrectly that it was ours. We are wronged, but it something else—our reputation, perhaps—besides our privacy that is violated.

It is important to restate once again that Warren and Brandeis are concerned with what kinds of violations law should prohibit; it is reasonable that they specify that both slander and privacy violations are prohibited. But in the context of defining the limitations of the right to privacy,<sup>33</sup> they say: “the truth of the matter published does not afford a defence [against alleged violation].”<sup>34</sup> It can thus be reasonably assumed that they do mean to include slander and libel as specific instances of the general right. My objection to this inclusion, then, is not vacuous even though we have different goals (theirs being to outline what the law should prohibit). But our conceptions of privacy do not entirely evade each other. In some sense, even though false information is not my personal information in the same way true information is, I am still the *subject* of that information. Furthermore, even though spreading false information does not strip me of control of *it* directly (it would be odd to say we possess control over every possible false fact about us) it does undermine the control I have over my *actual* (true) information.<sup>35</sup> Because of the importance we assign to reputation, slander often puts people in coercive situations where

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<sup>33</sup> Ibid, 86.

<sup>34</sup> Ibid, 89.

<sup>35</sup> Cummiskey, comment

they feel they must disprove the gossip with some true personal information. You may not want to publish the truth about being at the Laundromat last night unless an accusation arises that you were at the bar when a fight broke out. That slander sometimes coerces people to use their control of information in certain ways to mitigate reputational harm suggests an (indirect) way by which slander violates privacy. Importantly, it does not constitute a violation for the reasons Warren and Brandeis provide; i.e. it is not because we have some right against the “depict[ion]... [of private life]... at all.”

#### IV. Waiving and Infringing the Right to Privacy

The kind of information protected by the right to privacy is individually-defined. But this does not mean that anytime someone loses control of their information we should say that the right to privacy has been violated. Under some circumstances, individuals *waive* the right to privacy; under others, the right is *infringed*. The kind of information is only one of several criteria useful to determine the conditions under which the right to privacy is waived or infringed.

One possible distinction among relevant *kinds* of information recognizes information that is publicly demanded. This is tricky, because of course we do not want to say that any information the “mob” demands, no matter how trivial, is not protected by the right to privacy. There are instances, though, where a suspect possesses information about the location of a bomb or his whereabouts on the night of a crime, and surely there is a legitimate demand for those pieces of information. I would argue, though, that there is a difference between those two cases. Information about a weapon’s location is not information about oneself in the same way one’s whereabouts is. This is the difference between holding public information and holding self-

incriminatory information. The right against self-incrimination in the Fifth Amendment seems to implicitly recognize this distinction, and the resilience of the right to privacy to protect the latter. So, we may be obliged to give up the location of a weapon but not obliged to give up our whereabouts; this does not help us understand the conditions under which the right is waived or infringed, but merely the conditions under which we are right to consider privacy at all.

Perhaps one's position in society holds some bearing on their right to privacy. Warren and Brandeis say that certain, public individuals have forfeited their right to privacy on certain, private matters.<sup>36</sup> In cases where the right is forfeited and, say, the private fact that Mary is irresponsible with money is made public as she runs for office, Warren and Brandeis think that no right is violated. Similarly, it is often agreed that part of serving a prison sentence includes giving up one's privacy. This suggests that criminals are of the sort of people whose right to privacy cannot be violated. Like the public official, though, it does not seem correct to say that the right can *never* be violated. The difference between the public official and the criminal and the ordinary person is that the former have some information that is not protected from violation, while for the latter, all their information is protected. The public official and the criminal have forfeited some strength of their right to privacy by virtue of their position within society.

One might object that these situations are not different than that of the free-sharer. If we agree that it is a choice to run for office and to commit a crime, and that individuals know of the resulting loss of privacy, then haven't they simply signed away their right in the same way I sign away my medical privacy to insurance companies? Under the control definition, I do not lose privacy when I freely give up information. But the public official's and criminal's situations are considerably different from the free-sharer's. Privacy *is* diminished in their cases because the information-holders do not exercise their control over individual pieces of information, choosing

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<sup>36</sup> Warren and Brandeis, "The Right to Privacy," 88.

to share it with the public. Instead of rejecting the language of privacy altogether, then, we would say that the right is forfeited by virtue of their moral responsibility—i.e. they can be held responsible for their choices.

Why, then, would we not say that their right is infringed? A right is infringed when it can be outweighed by a more pressing need or right. If I am not a public official or a criminal, my information can be taken under some circumstances without violating my right to privacy. If, say, hijacking my personal email would stop a horrible terrorist attack, then my right to privacy has been overridden by national security interests (or, society's right to national security). In this case, my right is justifiably infringed, even though no choice of my own invited the intervention. When a choice *does* invite the intervention, as in the case of the public official or criminal, then the right has been forfeited instead. If committing a crime or running for office was not a choice, and the person was coerced somehow, then they would not forfeit their right. Their right may, instead, be infringed—outweighed by the public's demand for their private information.

Other actions besides free choice can similarly render would-be violations mere infringements. Negligence on the part of the information-holder opens them up to a range of infringements. Consider again the quarreling couple from the previous chapter. There is a difference between the situation where they are talking quietly in their room and the passerby overhears because of the weak construction of the house, and the situation where they are shouting at each other with open windows and the passerby overhears. The passerby has done nothing differently, but in the latter case we are inclined to say that the couple deserved to be heard, or they were not seriously wronged by the situation if they are overheard. The justification for this limitation is not that it is a choice, for rarely could negligence be said to be consciously

chosen. The justification instead is that the person fails to acknowledge and respect the boundaries set up by their own and others' legitimate expectations.

Negligence can be applied not only to the information-holder, but also the recipient. Consider again the person who stumbles across my diary without violating any norm (let's say that this time, he does not choose to read it). If I was not negligent in leaving it out and he did not intend to find it, there is nothing to blame except chance. But I still have lost control over that information (again, because he does not read it, we are talking about the information that I have a diary at all), and so we still want to say that I have lost privacy. This would also amount to an infringement—not one that is justified by some competing right, but one that is accepted as unfortunate but non-violating by an instance of chance.

## V. Conclusion

The condition of privacy explained by the control definition is violated when that control is lost. The control is lost when one's legitimate expectation for social behavior is violated, for one acts, creates information, and shields information according to those expectations. The kind of information the right to privacy protects is anything internally or externally defined as private. To clarify what these expectations for protection do *not* entail, we looked at the conditions for non-violating interventions. One condition is when an individual makes a choice to forfeit the protection of certain aspects of their normally private information by choosing to occupy a special role within society's structure—roles which require sharing certain private information. Forfeiting the right is different than sharing information willingly, for the relevant act of consent is to a loss of control in some area by virtue of the societal role chosen, and not consent to someone accessing particular information. Another non-violating intervention is when a more

pressing right, such as security, temporarily overrides an individual's right to privacy such that an infringement is justified. Finally, when an individual is negligent, where normal boundaries that define legitimate expectations for behavior are disregarded, a would-be violation merely infringes. A clear idea of what constitutes a violation versus a waiver versus an infringement is important to give shape to the vague expectations that direct our social interactions. Enjoying true control over personal information requires a well-mapped theory about how others will act, what norms exist, and how one expresses "private" information.

Now that violations have been defined and distinguished from non-violations, we can turn to the question of freedom. I will argue that the reason we feel like privacy violations are so wrong is that we lose control—since privacy is control—and therefore lose freedom. Moving forward, then, I will defend a conception of freedom that recognizes the important feature of individual control.

# A Concept of Negative, Overall Freedom

## I. Introduction

Conversations about privacy and conversations about freedom tend to go hand in hand. We must “protect privacy” to “protect our freedom,” we have “lost freedom” when our privacy is violated. Ideas like these circulate the media, political speeches, and everyday life; the connection between the two is apparently obvious or intuitive, and we make it often without question. But how would one prove the connection between privacy and freedom? In the case where privacy has been violated, how would one prove the resultant loss of freedom? One would need a consistent theory of specific freedoms, and a way of measuring overall freedom. This chapter embarks on that task so that we can measure freedom, and eventually, say that privacy violations actually *do* reduce our freedom; indeed, their freedom-reducing feature explains much of our intuitive discomfort about privacy violations.

## II. What is Freedom?

Philosophers used to think of freedom as the ability to do what one desires. In 1958 Isaiah Berlin pointed out a problem with this: if freedom is the ability to do what one desires, then we need only shrink our desires to expand our freedom.<sup>37</sup> He then famously distinguished between two ways we can think of freedom. One way—the negative conception—says freedom is noninterference; i.e. to be free to do an action is to not have anyone restricting you from doing it. According to the negative liberty theorist, you are free to do anything other people do not prevent you from doing. The positive conception says that freedom is exercisability; i.e. to be

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<sup>37</sup> Isaiah Berlin, “Two Concepts of Liberty,” an inaugural lecture delivered before the University of Oxford on 31 October 1958 (London: Oxford University Press, 1958).

free is to actually be able to exercise actions. To the positive liberty theorist, if you lack the means to act, then you are just as unfree as you would be if you were restricted from acting.

Gerald MacCallum offers a definition of freedom that mediates the interaction of these two conceptions: freedom is a triadic relation between an agent *X*, constraints *Y*, and an action *Z*.<sup>38</sup> His theory clarifies the debate by showing that the real difference between negative and positive theorists is what variables they focus on: the negative conception takes *X* and *Y* to define freedom, and the positive conception takes *X* and *Z*. I will take MacCallum's view here, and argue that disagreements between holders of each conception can be reduced to disagreements on the extension of each of these variables.

MacCallum's definition and both the negative and positive definitions all attempt to do two things. First of all, they speak about specific freedoms. The uncontroversial way to speak of freedom is that we have the freedom to do *specific things*; I have the freedom to drink my coffee, leave the building, and practice my religion. The second thing, though, is that these conceptions are used to speak of "overall freedom." The concept of overall freedom is what motivates us to judge government policy as "freedom-reducing," or to make claims such as "Americans are more free than Albanians." The connection between one's concept of specific freedom and one's concept of overall freedom will be a central part of this chapter.

Each conception of liberty sets the groundwork for its subscribers' broader political ideals. Berlin points out that negative liberty theorists such as John Stuart Mill reflect their conception of freedom in their conception of the state. Mill and others, Berlin says, want to reduce the functions of the state to the "functions of a night-watchman or traffic policeman."<sup>39</sup> In other words, for the negative liberty theorist the state is there to prevent the potential

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<sup>38</sup> Gerald C. MacCallum, Jr., "Negative and Positive Freedom," *The Philosophical Review* 76 (1967): 312-334.

<sup>39</sup> Berlin, "Two Concepts," 11.

interferences of others. Positive liberty theorists, on the other hand, are committed to aligning personal will with objective rationality. To address the problem that one could desire away less freedom, or more precisely, “choose-away” less freedom, the positive liberty theorist defines freedom by the actions you are left able to do. This allows them to justify restrictions on those seemingly paradoxical choices—i.e. restrictions those choices do not reduce freedom. As Berlin says, “Freedom is obedience, but ‘obedience to a law which we prescribe to ourselves,’ and no man can enslave himself.”<sup>40</sup> This conception assigns the state a much more active role, where it can impose restrictions on the pursuit of irrational choices and still be a freedom-protecting state. The point is that while each conception is limited to specific freedoms, their defenders want to make claims about the kind of society we would have under each conception, and whether it would be free or unfree.

Despite their serious differences evidenced by the wildly divergent political views they tend to inspire, the two concepts of liberty *do* refer to the same thing—they simply arrive there through different methods. While negative liberty theorists focus on constraints imposed and define freedom by whatever is left, the positive liberty theorist fixates on the non-exercisable actions and whatever is left constitutes freedom. The question becomes: which method for reaching specific freedom is cleaner, more precise, and therefore more likely to allow us to construct a cogent theory of overall freedom? I will argue that MacCallum’s triadic concept is always applicable—we can always put freedom in his terms. The benefit of doing so is that it allows us to capture much of what drives both groups of theorists to their own concepts. But to stop there would be to retain all of the problems with navigating the conceptual dichotomy in the first place. In other words, we are left with the task of further specifying the extensions of each variable. The goal is to specify to such a degree that no confusion about freedom remains, and

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<sup>40</sup>Ibid, 21.

that can be done either by specifying the *Y* variable *or* the *Z* variable *or* both. Since only one specification is sufficient, we just need to choose which variable is best to specify.

I think we are better off selecting the *Y* variable for a few reasons. Most important is the fact that there are simply fewer things that will count as a constraint on action at any given point in time than things that will count as a possible action at any given point in time. It is a less burdensome task to specify the conditions under which something is a constraint if the scope of things that may be constraints is narrower. A serious problem in measuring overall freedom that will be discussed later is how we determine the extent to which a specific freedom contributes to overall freedom. The problem, in short, is that if every freedom contributes equally we run into problems, but there is no good metric for assigning relative values. If we use a positive conception in enumerating specific freedoms, we encounter these same problems, but earlier. The actions that “count” will have to satisfy some kind of standard, either a “rational-person” standard (e.g. an action that contributes to human welfare) or a preference-based standard. If we think individuals have any sway over how this standard applies particularly to them—i.e. if we think it is ever *controversial* which actions matter—then we should see the inevitable bias in any metric for defining actions and opt to define constraints instead. Of course, the problem of pluralism infects this enterprise as well (e.g. if I have a weaker will a constraint on me may not be one on you) but to a much lesser extent. Therefore, here I defend specifying the *Y* variable as the method for understanding the concept of specific freedom. I will tag throughout the points at which people may be tempted to veer toward positive conception, and show that they would be better off remaining on the path of negative liberty.

### III. Specifying Constraints: The Negative Conception of Freedom

What counts as a constraint? Several possibilities have been suggested. I divide these possibilities into four key areas: the impossibility thesis, the moral responsibility thesis, the internal constraint thesis, and the republican thesis. Some of these theses are exhaustive (i.e. the impossibility thesis says that *all* constraints must render actions impossible) while some are merely inclusive (i.e. the internal constraint thesis specifies that both internal and external constraints should count). I think each of these views adds something important to our understanding of constraints.

#### *A. The Impossibility Thesis*

Steiner develops a libertarian view of constraints. He sets out to determine whether there is a difference in the extent to which offers and threats impact our freedom to do an action, responding to the intuition that threats reduce freedom but offers do not.<sup>41</sup> He notes that threats and offers have a different relationship to the baseline norm: threats make you either worse off if you comply with the proposal or *much* worse off if you do not comply, offers leave you at the norm or make you better off if you comply. But this, he argues, is not the relevant distinction; the relevant distinction to the question of whether you are free to do an action is whether complying with the proposal is more desirable than not complying. Since they are equal in terms of the relevant distinction, we cannot say that threats diminish liberty while offers do not. The remaining question is whether either of these types of proposals can diminish liberty. Steiner concludes that neither of them does, for all they are able to do is alter the desirability of actions, not the freedom to do actions. Desirability and freedom are, Steiner insists, two very different things. But if neither threats nor offers count as constraints for Steiner, what does? Only physical

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<sup>41</sup> Hillel, Steiner, "Individual Liberty," *Proceedings of the Aristotelian Society* 75 (1974-1975): 37.

impossibility renders one unfree to do an action, for, according to Steiner, to exercise freedom is to “occupy particular portions of space and to dispose of particular material objects including... one’s own body.”<sup>42</sup> With this theory Steiner separates himself from the majority of negative liberty libertarians who argue that legal restraints are constraints on freedom. His view might be characterized as the extreme libertarian view.

### *B. The Moral Responsibility Thesis*

Steiner’s theory conflicts with some of our most basic intuitions; it is not difficult to disagree with him on many levels. Miller, in constructing his own view of what constitutes a constraint on freedom, contests Steiner’s definition. Miller divides his argument into two parts: the first part defines what kind of thing counts as a constraint and the second part determines the extent a constraining thing must go to count as a full constraint.<sup>43</sup> First, he specifies that we are not considered unfree to do everything we are unable to do; we are unfree to drive through a red light but we are not unfree to fly to the moon, we are merely incapable. Speaking the language of freedom presupposes attention to the actions—the interferences—of other agents.<sup>44</sup> By working toward heart of this intuition Miller arrives at the conclusion that if and only if another agent is morally responsible for an obstacle we are rendered unfree. This moral responsibility may take three forms: “Y may have imposed the obstacle intentionally, he may have imposed it negligently, or he may have failed to remove it despite having an obligation to do so.”<sup>45</sup>

Miller takes particular issue with Steiner’s extreme view of what counts as a constraint. If you are only unfree to do what is impossible, then, Miller argues, we have undermined the whole

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<sup>42</sup> Steiner, “Individual Liberty,” 47.

<sup>43</sup> Miller, David. “Constraints on Freedom.” *Ethics* 94 (1983): 70.

<sup>44</sup> *Ibid*, 69.

<sup>45</sup> *Ibid*, 72.

purpose of talking about freedom versus preferences.<sup>46</sup> A man in a cage is unfree to move out of it to the same extent that a man in an outlined box is unfree to move out of it if a gun will fire at him if he does so.<sup>47</sup> Miller says, "...it is true that in the second case the mechanism of confinement depends on the captive's aversion to being shot; yet this is not some idiosyncratic taste of his, but rather a well-entrenched feature of any normal person's psychology."<sup>48</sup> Miller's response is surely reasonable, but the libertarian would be quick to remind us that the slope is slippery. At what point is a preference no longer "well-entrenched"? Theorists such as Olsaretti have attempted distinctions here, between threats that render non-compliance *unacceptable* versus those that render non-compliance merely unfavorable. The difficulty in all preference-based accounts will be discussed later.

The moral obligation thesis may be question-begging. If it is wrong to infringe on freedom because it is independently valuable, then how are we to determine whether the constraint is acceptable or if it runs against a moral obligation? Here Miller makes a final, important contribution. When a constraint is imposed under his definition, we cannot assume that no justification for that constraint can be provided. Rather, the obstacle is automatically in need of justification—the resulting unfreedom can either be justified or unjustified.<sup>49</sup>

Finally, a moralized conception of freedom may be criticized for doing too much work. If we want to use the concept of freedom to argue for what is right—e.g. if we want to say "situation A is preferable because it increases freedom and freedom is good"—then we cannot have already depended on a value-laden concept in defining freedom, which we do when we adopt the moral responsibility thesis of constraints. The idea behind this criticism is that morals

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<sup>46</sup> Ibid, 76.

<sup>47</sup> Ibid, 76.

<sup>48</sup> Ibid, 76.

<sup>49</sup> Ibid, 72.

can only be introduced at one stage of a theory. While I think this idea is attractive for its neatness, it is not required for a logical theory and it detracts from the enterprise altogether. First, it is not required because from the moral responsibility thesis it does not follow that all freedom-reductions are unjust, and therefore freedom is valuable. Instead, as explained above, restricting acts can be either justified or unjustified, and the fact that they violate some moral responsibility does not necessarily condemn them altogether. Additionally, recall that freedom is a triadic relation between an agent  $X$ , constraints  $Y$ , and an action  $Z$ . The problem with moralized concepts of liberty is mostly directed at moralized restrictions of the  $Z$  variable: the range of actions. Miller's definition moralizes the  $Y$  variable. This avoids the problem of saying that one is not free to do evil things; we can agree with Bentham, for example, that one has the liberty to do evil.<sup>50</sup> Second, the idea that we need a completely neutral definition detracts from the enterprise of defining and understanding freedom. The idea that freedom is one sort thing and *other* things are ascribed values fails to acknowledge that the concept of freedom that is similarly embedded in a valued, moralized world.

### *C. The Internal Constraint Thesis*

The standard libertarian conception is that constraints are only external. If negative liberty theorists similarly want to support a certain political end where government interference is minimal, they need to prove that individuals are capable of making their own choices to such an extent that they never need to be protected from themselves. The desperate worker, then, cannot lose his capacity to make a choice over his employment situation; the minimum-wage-less, labor law-less society is justified. The nature of addiction cannot restrict the addict's choice to continue using; the government's ban on narcotics is unjustified. But it is very difficult, I

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<sup>50</sup>Cited in Berlin, "Two Concepts," 33.

think, for the libertarian to sell these views to anyone who does not similarly fetishize individual choice. The possibility for internal constraints must be considered.

According to Taylor, we cannot agree with negative theorists because moral psychology is much more complicated than they admit. It is simply not the case, he contends, that individuals never experience internal constraints such as fears or false consciousness (or possibly addiction or desperation) that can misguide their assignment of value and therefore, invalidate their choices. As evidence of this, he points to the distinction between first-order and second-order desires.<sup>51</sup> First-order desires are desires about ordinary things, such as food, friends, or success. Second-order desires are desires about desires; the desire to desire adventure, for example, is a second-order desire. We can imagine many cases where one's first-order desire obstructs a second-order desire: I (first-order) desire dessert, but I (second-order) desire that I did not desire dessert. That sometimes our second-order desires fail to be expressed in action is a well-known fact. This incongruence between what we desire to desire, what we actually desire, and what we actually do shows that our actions are not perfect expressions of will. Will itself cannot be so simply characterized. Furthermore, this incongruence shows that we fail to align our desires and actions with our higher purposes, and thus cannot be trusted to make the judgment on what actions are valuable—even what actions are valuable-to-us.

Using this analysis on the nature of will, Taylor argues that our choices can reduce our welfare and even our freedom. He develops a positive conception of freedom from this: given that our internal confusion leads us to choose-away our freedom, paternalism can be freedom-enhancing. But Taylor's concern can be put in terms of the negative conception if we identify that internal confusion as internal constraints—it is possible, in other words, that we constrain

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<sup>51</sup> Charles Taylor, "What's Wrong With Negative Liberty," in *Philosophy and the Human Sciences*, by Charles Taylor (Bath: Cambridge University Press, 1985), 220.

ourselves, perhaps with our first-order desires, from acting in ways that render us most free. A theory of negative liberty can incorporate this idea to say that one's addiction constrains one's possible actions in the same way a persuasive or threatening outsider constrains one's actions. If we agree with Taylor's illustration of human psychology we are not compelled to follow him to a theory of positive liberty, but only to develop a more nuanced negative conception of freedom.

#### *D. The Republican Thesis*

Steiner has exhibited the extreme libertarian view of impossibility, and the mainstream libertarian view of constraints being only external has been addressed. There is a final, interesting libertarian view of freedom that adds a new dimension to the discussion on constraints. Many people—including many libertarian theorists—agree that legal restrictions are constraints on freedom. When we consider this following the above discussion on constraints, it seems immediately questionable. First of all, legal constraints rarely, if ever, render sanctioned actions impossible. Additionally, though, they are usually retroactive—they apply only after the action has been committed; in most cases, they do not seem to impede on my ability to perform an action at all. Yet, the belief that laws restrict *particular* freedom is widely held.

What is the basis of this belief that laws restrict freedom? Analyzing a debate between socialist philosophers about the effect of property law on freedom can illuminate this. G.A. Cohen has a famous example of the property rights protecting rich Mr. Morgan's yacht. I, a non-owner, am unfree to use the yacht (and so, property rights serve to eliminate particular freedoms). A response to Cohen is that the property rights to Mr. Morgan's yacht only prevent interference if Mr. Morgan actually stops me from using the yacht. But this is not the best way to think about interference. As Jeremy Waldron argues, all legal restrictions are contingent upon actualization, but they are still restrictions insofar as they increase the potential of actual

restriction, which the actor has to consider in making a choice to act.<sup>52</sup> Legal restrictions impact freedom in the way threats impact freedom: neither needs to be actualized to make its impact.

Many people think it is the case that laws restrict particular freedoms, and I agree. To explain why this is, a third conception of freedom is often introduced. Beyond the usual negative/positive distinction, the republican conception (technically the “civic republican conception”) of freedom has been developed. When considered in terms of constraints on negative freedom, the republican conception expands the referent of “interference” to include instances of domination and dependence. Pettit defines domination as “one agent’s having the capacity to interfere on an arbitrary basis in the affairs of another” paired with “a shared awareness on the part of the individuals or groups that this capacity exists.”<sup>53</sup> Skinner defines dependence as the relation where one’s actions, livelihood, happiness, property, etc. are subject to the will—or goodwill—of another. Skinner, for instance, claims that negative liberty theory distinguishes (1) freedom and (2) security of freedom so that restrictions on (2) are not restrictions on (1).<sup>54</sup> The republican theorist rejects this distinction, or would at least say that restrictions on (2) are restrictions on (1). For example, take “freedom” to refer to the specific freedom to go downtown, and “security of freedom” to mean the assurance that one will consistently be able to go downtown whenever one desires. A slave may enjoy the freedom to go downtown if his master allows him to do so, but he does not enjoy the security of that freedom by virtue of his power position. The republican theorist criticizes the negative theorist to say that no freedom is lost in the slave case, for his lack of security of freedom does not impact his

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<sup>52</sup> Jeremy Waldron, “Mr. Morgan’s Yacht,” in *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, ed. Christine Sypnowich. (Oxford: Oxford University Press, 2006) 158.

<sup>53</sup> Philip Pettit, “The Republican Ideal of Freedom,” in *The Liberty Reader*, ed. David Miller, (Boulder: Paradigm Publishers, 2006) 231.

<sup>54</sup> Matthew H. Kramer, “Liberty and Domination,” in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor, (Malden, MA: Blackwell Publishing Ltd, 2008) 33.

freedom. Under the republican conception, on the other hand, one's overall freedom is significantly diminished if freedoms are contingent upon the goodwill of a dominant actor. Such contingent freedom is unreliable, and actively changes the opportunities we *feel* that we have with that freedom.

There are important merits to this conception. First of all, it explains the unfreedom in situations such as enslavement, where one may be free to do any particular action, but lives under the constant threat of losing that freedom. The slave with a benevolent master, for example, is still unfree to do many things; certain actions might set the master off, causing him to restrict many other freedoms. In other words, the freedoms granted are precariously enjoyed. Exercises of some precarious freedoms may lead the master to become suddenly less benevolent with his control. It is evident to me that security of freedom impacts the experience of freedom; when a dominant force can strip your freedom at any moment, your expression of that freedom will be tentative, and you will *feel* significantly less free.

In some cases where the republican conception seems attractive, the unfreedom can be explained by internal constraints instead. The *feeling* of unfreedom is certainly part of what the republican theorist has in mind when she talks about the security of freedom. If I am deliberately taught by a malicious door-keeper that the door is locked, in such a way that I never have the chance to test this until I am completely certain it is locked, I am as unfree to leave the room as I would be if the door actually was locked. The internal constraint prevents me from trying to open the door, which is a prerequisite to the action of actually opening it. This is one way of expressing dominance: the dominated, by internalizing the reality of that power relation, will feel that many options are closed and as a result, many prerequisite options actually will be.

A second benefit is that the republican conception is able to explain the unfreedom resulting from laws that do not render actions impossible. While we are maybe more free to perform a punishable action than an impossible action, we are still significantly less free to do that than we are to perform an action that is not punishable. Just as security of freedom can be reformulated as the absence of an internal constraint, so legal freedom can be reformulated as absence from an implicit threat. The slave with the benevolent master will not do mischievous things to disturb the master because of the implicit threat (perhaps a threat that exists by virtue of the power relation) that the master will retaliate with less benevolent control over the slave. It is important to realize, though, that the threat is the operative feature here, not the power relation *per se*.

The intention of translating security of freedom into the language of internal constraints and translating legal freedom into the language of threats is not to deny philosophy of freedom a variety of interesting concepts; indeed, I think we gain much by retaining the republican conception in the same way the negative concept is strengthened by the positive concept. The republican conception reminds us that power relations often shape the background against which threats and offers are proposed and manipulation occurs—sometimes these power relations are the requisite conditions for the possibility and effectiveness of coercive proposals. But despite these virtues, many have taken issue with the republican conception of freedom—so much that it is rarely considered seriously as a distinctive conception. Kramer, for instance, argues that the difference between the negative conception and the republican conception is really only directed at *particular* freedom; a concept of “overall” freedom dissolves this distinction. For this reason, overall freedom is the concept I turn to next. But first, what has developing the different theories

of constraints illuminated about the connection between negative freedom and particular political philosophies?

#### V. Negative Freedom and Political Philosophy

The negative conception is often characterized as a libertarian concept that serves to rationalize a world where all contracts are considered “free,” and thus, no government intervention is justified. But G.A. Cohen, a socialist, negative liberty theorist, indicates that there is nothing inherently libertarian about the negative conception of freedom. Rather, MacCallum’s definition shows us that the difference in political philosophy attached to negative freedom versus positive freedom is a contingent occurrence; for instance, it does not follow from any feature of negative freedom that it is libertarian. We have seen that the debate over what constitutes constraints explains differences in political philosophy much more than negative or positive conceptions do.

The same action in the world can often be interpreted as either absence of means or interference. If a mother lacks the money to send her child to a good school, is she unfree to send her child to a good school? Generally speaking, the libertarian would say “no” and the socialist would say “yes.” What is the basis of their disagreement? On one view the difference is in their concept of freedom. The libertarian sees that no one is interfering with her ability to send her child to school, and so she is free to send him—she is merely *unable*. The socialist notices that she lacks the means to do so, and so she is effectively unfree. But if we trace her financial situation back further, I think it likely we find some interference. Her poverty may be built on an exploitative, dominative system, for instance. According to Miller’s moralized definition of constraints, this would count as interference. He notes explicitly that constraints need not be deliberately imposed; a series of individual actions without the intention for obstruction can still

count as a constraint imposed by that entity.<sup>55</sup> If I habitually assent to a system of private property built on unjust institutions such as slavery and racism, for example, I am a constitutive part of the injustice, and thus hold some moral responsibility for the resulting poverty.

Libertarians who see a different source of poverty—such as work ethic or life decisions—would contest that any interference has occurred. But it is important that one need not rely on a notion of ability-as-freedom or positive liberty to explain the unfreedom of the impoverished.

But why choose any one conception at all? Is it not better to acknowledge the merits of both, and use them to emphasize different things? Maybe, but in that case privacy is best understood under the negative conception, anyway, for all the reasons discussed in the process of selecting the *Y* variable over the *Z* variable for specification. But furthermore, it is important that theorists on both ends of the political spectrum speak of freedom under the same terms; this allows for the root of their disagreements to clash rather than terminological incongruence to confuse the debate. Finally, it is important to specify a conception of specific freedom because we want to eventually measure sets of specific freedoms, rank them, and make judgments about cases that render us more or less free. This cannot be done with two conceptions working simultaneously.

This section has defended a theory of specific freedoms through the negative conception. While MacCallum's triadic relation expresses—I think accurately—freedom as a relationship between an actor, constraints *Y*, and possible actions *Z*, we need only choose one of the latter two groups to specify in order to have a complete theory. I chose constraints because there are fewer and because the problem of pluralism is less serious here. Several attempts have been made to define what constitutes a constraint on specific freedoms: Miller thinks moral responsibility is a necessary condition, Taylor's concern with first and second order desires motivates a concept of internal constraints, and republican theorists point out the special constraints imposed by

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<sup>55</sup> Miller, "Constraints," 81.

dominative relations. I have argued that the negative conception can adjust to account for these three ideas. A conception of constraints narrowed to the scope of moral responsibility but widened to the scope of internal barriers and unrealized threats reflects our intuitions about specific freedoms.

#### IV. A Concept of Negative, Overall Freedom

It seems to me that anyone interested in freedom ought to be interested in making the jump from specific freedoms to overall freedoms. A concept of overall freedom is what allows us to say that prisoners are less free, that a policy is freedom-reducing or freedom-protecting, that we want a more free society, etc. Kramer defines overall freedom by the “range of the combinations of conjunctively exercisable opportunities available.”<sup>56</sup> If doing action *A* eliminates or restricts future opportunities, then freedom to do *A* does not contribute to overall freedom as much as action *B*, which adds future opportunities.<sup>57</sup> The freedom to jump off a bridge does not contribute as much to overall freedom as does the freedom to get an education, for example. Kramer establishes this definition in the context of the republican conception; if one is dependent on another, then his overall freedom decreases even if few particular freedoms are restricted in the immediate.<sup>58</sup> This is because a state of dependence limits the range of conjunctively exercisable opportunities. Kramer’s view is useful, for it provides a metric for discriminating among freedoms in terms of their contribution to overall freedom. This will be the central task in developing a concept of overall freedom.

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<sup>56</sup> Matthew H. Kramer, “Liberty and Domination,” in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor, (Malden, MA: Blackwell Publishing Ltd, 2008) 34.

<sup>57</sup> *Ibid*, 34.

<sup>58</sup> *Ibid*, 35.

Even if we agree with Kramer, there are remaining questions to tackle. Is there anything to measure when we seek to measure opportunity ranges? Ought we to even be interested in measuring overall freedom? And is it possible to measure it? These three questions motivate Carter, a negative liberty theorist who has taken a special interest in defining overall freedom. He sees the debate over the concept divided into three parts corresponding to these questions: first, there is an ontological contention that contests whether there is anything over and above specific freedoms; second, there is a normative contention that there is no point in measuring overall freedom; third, there is an epistemic contention that even if it exists and would be good to measure, that it would be impossible to do so.<sup>59</sup> Carter argues for overall freedom in all areas.<sup>60</sup>

#### *A. The Ontological Contention*

First, Carter argues for an ontology that includes overall freedom. Oppenheim has argued that since freedom is a relation, we cannot refer to it as an independent thing; this would yield, as Quine says, an “over-populated universe.”<sup>61</sup> It is true that Oppenheim’s rejection of overall freedom makes sense by atomist ontology—it is not a particular thing. And it is not a relational thing supervening on particular features in the way being tall is.<sup>62</sup> But still, it is a relational property we can compare from person to person, because some relational properties are still properties a person possesses, such as being a father.<sup>63</sup> So, Carter’s view on the ontological question is that freedom is relational, an attribute, and a quantitative attribute (i.e. there can be more or less of it).<sup>64</sup> This argument is required to ground the enterprise of measuring overall freedom: first, one must agree that there exists something to be measured.

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<sup>59</sup> Ian Carter, *A Measure of Freedom* (New York: Oxford University Press, 1999), 22.

<sup>60</sup> *Ibid.*, 24.

<sup>61</sup> *Ibid.*, 26.

<sup>62</sup> *Ibid.*, 27.

<sup>63</sup> *Ibid.*, 27.

<sup>64</sup> *Ibid.*, 30.

## *B. The Normative Contention*

The next question Carter addresses is whether we have any good reason to measure it. Normatively, he argues that if freedom is a fundamental value (as it is for many liberals) then it is also a non-specific value, and this is true whether or not it is intrinsically, instrumentally, or constitutively valuable.<sup>65</sup> This means that people not only should be interested in measuring overall freedom, but that they may have a right to a certain measure of freedom.<sup>66</sup> Berlin also responds to the idea that freedom is merely specific: people who are enslaved desire freedom from their chains, even if they do not have any particular actions in mind that they would like to do.<sup>67</sup> Carter thinks this intuition really refers to a notion of overall freedom, and that we have two reasons to care about measuring it. First, if one believes in this kind of non-specific value, then overall freedom is important. Second, measuring overall freedom is an important part of making other judgments in social science.<sup>68</sup> We therefore have several reasons to measure overall freedom.

## V. The Epistemic Contention: Problems with Measuring Overall Freedom

Perhaps the most threatening objection to the concept of negative freedom is that it is impossible to measure. It would seem that we need a way of discriminating among options in terms of their contribution to overall freedom, while simultaneously evaluating one's freedom independent of what one would do with it.

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<sup>65</sup> Ibid, 31.

<sup>66</sup> Ibid, 31.

<sup>67</sup> Ibid, 32.

<sup>68</sup> Ibid, 33.

The way to judge opportunity independent of what is chosen (or should be chosen) is what Sugden calls “the pure-quantity approach.”<sup>69</sup> This approach simply counts up individual options in a given option-set in order to rank the set against others. Sugden describes several rational-choice models developed for measuring opportunity by this approach. The most interesting of these is the model proposed by Carter, who suggests that freedom is a ratio of what one is free to do over all options—i.e. over the sum of those one is free to do and those one is unfree to do.<sup>70</sup> To determine each component of the numerator sum and the denominator sum, he uses a spatial method of defining opportunity: “the more units of matter are redistributed [by taking an action] the greater is the quantity of action performed.”<sup>71</sup> This means that if an action involves an individual moving his body, his matter multiplied by the spatial measurement of the movement determines the “size” of the action. This theory works well with Steiner’s idea of constraints as physical impossibility and, thus, freedom as physical possibility.

This approach allows us to measure and value freedom independently of what is done with that freedom—a theoretical feature that, as I’ve discussed in the context of Mill, we should be very interested in preserving. But as Sugden and others have pointed out, there are several problems with this pure-quantity approach. First is the issue of preference-independence. Sugden criticizes the ability of most pure-quantity proposals to model the world without injecting preferences into the model. Carter’s method, for instance, requires we “cut up the world,”<sup>72</sup> but in a particular, spatial way. Even though it may be objective in how we do this (measure the distribution of matter), Sugden notes that it is a preference-based choice to choose physical distinctions over, say, a biologist’s distinctions or an artist’s.

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<sup>69</sup> Robert Sugden, “Opportunity as a Space for Individuality: Its Value and the Impossibility of Measuring It,” *Ethics* 113 (2003): 797.

<sup>70</sup> *Ibid.*, 799.

<sup>71</sup> Sugden, “Opportunity,” 799; citing Carter, “A Measure,” 169.

<sup>72</sup> Sugden, “Opportunity,” 801.

Second is the issue of infinite, meaningless choice. If a prisoner has infinite options of toothpaste from which to choose, we probably would not say that he is freer than the person with control over their social experiences and career decisions, etc. While often the kinds of differences that exist between toothpaste options and career options are explainable by spatial measurement, this seems like a purely contingent fact, and not one the pure-quantity approach can reliably rest on. The implication of this is that the pure-quantity approach—and, at first blush, Kramer’s theory—leaves open a pressing problem: what to do about specific freedoms that seem to vary not in the range of subsequent opportunities they afford, but in their intrinsic value. In other words, we need a way of discriminating among opportunities; some options will be more important to freedom than others.

Taylor constructs a defense of positive liberty out of this problem. When a traffic light is put up, Taylor says, we do not think we have made a trade-off with freedom, whereas when restrictions are placed on the practice of religion, freedom seems to be very much reduced.<sup>73</sup> A good theory will be able to explain this intuitive distinction. To distinguish these opportunities as freedom-reducing and not-freedom-reducing, we just need to say that one action (driving through an intersection whenever you want) is not as valuable as another action (practicing your religion whenever you want).<sup>74</sup> Taylor says that the negative conception is incapable of making this distinction; it condemns us, when measuring freedom, to count up actions indiscriminately and as equals. This is because it is only concerned with the extension of the *Y* variable, not the scope

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<sup>73</sup> Taylor, “What’s Wrong,” 218.

<sup>74</sup> One way of thinking about the difference here is that being stopped at a traffic light is necessary to achieve the far more important end of getting where you want to go; the cases are thus much closer than we might think (although still probably not equal). Traffic lights remove traffic congestion, making them freedom-enhancing. But it is still true that one action is restricted—the particular action of driving through the intersection at a particular time. An analogous case would be private property restrictions that prevent you from trampling my farm but ensure us all the freedom to eat and survive in doing so. One *can* say that some particular actions, when removed from our set of options, increase freedom. But to do so presupposes a way of measuring freedom, which is what we have yet to determine.

or rankings of possible Zs. There would be two possible ways of making the discrimination: A) leave it up to the individual, or B) determine it externally. Taylor thinks that both avenues depend on a positive conception at some point.

First, let's entertain the notion that we can leave the task of distinguishing among Zs to individual preferences. Most proponents of negative liberty support this possibility. They tend to "define freedom tough-mindedly," a product, according to Taylor, of the influences of natural science and materialism.<sup>75</sup> This kind of definition generally leads such theorists to limit constraints on freedom to physical, external ones, which upholds the view that what is valuable to a person can only be determined through her self-actualization—i.e. she must figure it out for herself. Taylor contests the possibility for an individual to do this, citing the existence of second-order desires: desires about desires (as opposed to first-order desires about ordinary things). If we can have second-order desires, then we acknowledge the limitations of free choice as an expression of will. Taylor thinks that the imperfection with which we ascribe value to things renders us incapable of trusting our preferences. We should therefore opt for a positive conception of freedom, where specific actions are valued according to their alignment with human rationality and welfare *for us*, irrespective of what we would choose.

But I think one can accept Taylor's diagnosis of unreliable individual preferences without following him to the prescription of positive liberty. His contention is essentially an argument for a concept of internal constraints, which, as previously discussed, is consistent with a concept of negative liberty. Positive theorists think constraints can be internal, which necessitates the view that an individual's ability to determine her own freedom is constricted. But a negative theorist can also acknowledge internal constraints. Taylor's objection, then, is not an objection against

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<sup>75</sup> Taylor, "What's Wrong," 214.

negative liberty, but against a theory of measurement dependent on discriminating among actions through individual preferences.

What is the alternative? If individuals cannot make evaluations about their own actions and therefore their own freedom, who can? Taylor does not want to say some external authority will be *better* at making these calls for individuals, but he is committed to the idea that we can come to some agreement on the purpose of human beings, and that by following principles of rationality we can determine which actions align and which actions do not. There is some possible compromise between the extreme negative view, where we are restricted to count actions equally or wrongly, and the extreme positive view, where a paternalistic authority places all values in order to “save us from ourselves.” The compromise Taylor offers is that the negative concept (what he calls the “opportunity-concept”) depends on the positive concept (or, the “exercise-concept”).<sup>76</sup> For our choices to be expressions of freedom, we must first distinguish options that align with rational purposes and those that do not. The problem, according to Taylor, is that it is impossible for individuals to do this consistently—when we do it correctly, it is incidental that we do.

Sugden shares Taylor’s concerns with the pure-quantity approach, and, like Taylor, develops an alternative: the “potential-preference approach.”<sup>77</sup> Sugden says that preferences are in part based on *given* properties (such as fears or faculties that are biologically/psychologically given) and in part based on will.<sup>78</sup> The eventual choosing of one option within an opportunity set is an act of free will,<sup>79</sup> but even prior, the formation of preferences is in part an act of free will.<sup>80</sup> In order to use the potential-preference approach, then, we need to identify preferences before a

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<sup>76</sup> Ibid, 213.

<sup>77</sup> Sugden, “Opportunity,” 792.

<sup>78</sup> Ibid, 790.

<sup>79</sup> Ibid, 790.

<sup>80</sup> Ibid, 791.

choice is made. It is important to clarify the way Sugden uses a few terms. Options, he thinks, may or may not contribute to opportunity. Opportunity is what we are measuring—a set of options, or an “opportunity set” may grant the individual very little or great amount of opportunity. Another way of thinking about it is that a set of specific freedoms will grant a certain amount of overall freedom. Preferences are an “all-things-considered reason” to choose something. If there is an “all-things-considered reason for that individual to choose” option  $x$  from opportunity set  $A$ , then “ $x$  contributes to the range of opportunity offered to an individual by an opportunity set  $A$ .”<sup>81</sup> This serves to rule out options that would never be chosen from a measurement of opportunity. So, how can we ascribe preferences to individuals—in order to rank option-sets by their alignment with preferences—*before* any option has been chosen?

One approach is to rank an option set higher if it aligns with a preference ordering *potentially* held by the individual.<sup>82</sup> The potential preferences can be determined in one of two ways: (1) it can be compared to what a “reasonable” preference list would be for a person in those objective circumstances—this requires a theory of the good that outlines qualities of a good life; or (2) it can be empirically based on preferences of a person in those same objective circumstances.<sup>83</sup>

Another approach is to rank an option set higher if it is ranked highly in an individual’s *actual preferences*. By “actual preferences,” Sugden means that an individual need not have any actual choice, or any control linking her will to an outcome.<sup>84</sup> If the option ranked highest according to an individual’s preferences actualizes by random miracle, or another’s will, for instance, the individual has the same amount of opportunity. Another term for this is “effective

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<sup>81</sup> Ibid, 793.

<sup>82</sup> Ibid, 792.

<sup>83</sup> Ibid, 794.

<sup>84</sup> Ibid, 790.

freedom,” used by Sen, who argues that to be free is to have everything you would have chosen, “no matter who controls the levers of operation.”<sup>85</sup>

Sugden argues that a preference-based approach to measurement is not antithetical to a Millian conception of opportunity. Measuring opportunity by the extent of the “scope within which to exercise... free will” follows the Millian value of opportunity because of the exercise of will. Since preferences are (in part) willed, measurement of opportunity by actual preferences is a measurement based on will, and is therefore Millian at its root.<sup>86</sup> This argument reconciling Mill and the preference-based account is unconvincing, though. Even though preferences are in part willed, how those preferences manifest in particular options is not clear or predictable. Furthermore, that secondary choice of how we will manifest our preferences in particular options is important to freedom: we often hold various preferences at once, so the relevant choice is often not “what things do we have preferences for” but “what value will we prioritize in each case.”

The problem in the pure-quantity approach that drives some of us toward the preference-based approach is that we are left without a way of dealing with specific freedoms that vary in their intrinsic value.<sup>87</sup> It is probably true that specific freedoms *do* vary in this way—practicing religion *is* likely more intrinsically valuable than jumping up and down—but to think that a difference in value is the difference relevant to measuring overall freedom is a distraction. We can agree that preferences will determine the value of different freedoms and disagree that we must judge contribution to overall freedom on that basis. What is valuable about Kramer’s

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<sup>85</sup> Ibid, 790.

<sup>86</sup> Ibid, 791.

<sup>87</sup> Kramer specifies that this need not always be an intrinsic feature, and that what we are really concerned with is “content-dependence”—whether the content is intrinsically, constitutively, or instrumentally valuable is particular to each case.

Matthew H Kramer, *The Quality of Freedom*, (Oxford: Oxford University Press, 2003) 430.

standard is that it restricts the freedom-relevant features of a particular action to its relationship to subsequent specific freedoms. How does this apply to the freedom to practice religion case? The phrase “practicing one’s religion” is incredibly value-laden and context-dependent. When we strip it of all embedded assumptions, we are left with a series of—apparently mundane—actions: go to a particular building at a particular time of day, dress in a particular way, say particular things along with many other people, refuse certain activities, etc. Taken together, these actions compose a quite significant range that extends into nearly every moment of everyday life. It is for that reason we can say that the freedom to practice religion contributes more to overall freedom than the freedom to jump up and down. This is closer to the pure-quantity approach, but recognizes that the path toward a measurement of overall freedom is in part an “evaluative” process,<sup>88</sup> requiring a distinction between the fact of a freedom and its worth.<sup>89</sup>

## VI. Freedom as Control

Sugden’s “actual preference” approach to measuring opportunity runs together with Sen’s theory on effective freedom. Sen develops his theory in response to the idea that to be free is to have control over decisions.<sup>90</sup> His view of power-based liberty is important for its contributions to the difficult and ongoing task of reconciling liberalism and social efficiency and justice. Here, it is important not only for how it fits into the epistemic debate, but for defending the negative conception in a much broader sense. First, I explicate and build the view of liberty he targets. Second, I discuss his criticisms. Third, I construct my responses in defense of the initial view of liberty. Lastly, I address anticipated objections.

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<sup>88</sup> Ibid, 441.

<sup>89</sup> Ibid, 446.

<sup>90</sup> Amartya Sen, “Liberty as Control: An Appraisal,” *Midwest Studies in Philosophy* 7 (1982): 207.

### *A. Liberty as Control*

The view of liberty as control, according to Sen, is the basis of the constraint view and the negative conception that has been defended so far. The control view defines liberty as the control one has over “decisions in certain specified spheres,” while the constraint view focuses on barriers to this control.<sup>91</sup> The most salient difference between liberty-as-control and liberty-as-power (the view Sen takes), is that the former is “procedure-sensitive.”<sup>92</sup> In other words, according to liberty-as-control, it does not matter what the outcome is, but how that outcome is attained; liberty-as-power holds that some determining force must affect the outcome,<sup>93</sup> but it can be exercised in many ways. In defending the control view here as a way of preserving the more specific constraint view employed elsewhere, I specify individual choice as the means by which an outcome is attained.

### *B. Sen’s Major Criticisms of Freedom as Control*

The primary criticism from Sen is that outcomes, not only the procedure by which they come about, are important for liberty.<sup>94</sup> The first of Sen’s criticisms I’ll discuss can be framed as a paradox in the attempt to measure overall freedom. Surely it is not always true that the addition of an option increases freedom—if one values the absence of the hassle of many options, then additional choices reduce “the freedom to do the things [one] would like to do.”<sup>95</sup> More broadly, though, Sen uses this paradox to argue that there are situations in which we lack control and gain freedom through its absence, or at least situations in which control is not required for the preservation of freedom. Instead of “freedom as control,” we should opt for a conception of

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<sup>91</sup> Ibid, 207.

<sup>92</sup> Ibid, 209.

<sup>93</sup> Unclear whether he even goes this far...

<sup>94</sup> Ibid, 216.

<sup>95</sup> Amartya Sen, “Freedom, Agency, and Well-Being,” in *Inequality Reexamined*, by Amartya Sen (Oxford: Oxford University Press, 1992), 63.

“effective freedom.” To do this, we ought to be concerned not with control, but with the presence of *indirect liberty* and *actual preferences*.

He uses the example of lacking control over epidemic prevention to illustrate this claim. People have the desire to be free from epidemics, and the desire for policies that deal with the intricate task of disease-prevention.<sup>96</sup> In such a case,

the *control* will be in other hands, but the [preventer] will be doing what I would, counterfactually, have done... Whether he is following my direct instructions, or *knows* what my instructions *would have been if sought*, is not a matter of great importance here, in judging what freedoms I really do have.<sup>97</sup>

This demonstrates the difference between “freedom as control” and “effective freedom.”

Broadly, Sen says that “control... is too limited a notion to serve as the basis of so general a concept as liberty.”<sup>98</sup> It simply does not explain the resulting freedom of the control-less people in the epidemics case.

In the epidemics case, the people also possess what Sen calls “indirect liberty.” “Indirect liberty” refers to the idea that those who may exercise the “levers of control” in a given situation can enhance the control-less person’s liberty by directing outcomes the person *would have* chosen. This, Sen thinks, is consistent with liberty-as-power, for if the controller is swayed by the person’s counterfactual choice, then the control-less person has *power* over the outcome.<sup>99</sup> In the case of the epidemics, the people have power over the outcome (a society free from disease) even if they lack control over the means of disease prevention. In this way, they have exercised indirect liberty.

Another way the epidemics case can be explained is by appealing to “actual preferences.” If it is my actual preference to be free from disease, then *if* I were to take control over prevention

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<sup>96</sup> Ibid, 65.

<sup>97</sup> Ibid, 65.

<sup>98</sup> Sen, “Liberty as Control,” 207.

<sup>99</sup> Ibid, 216.

*then* I would instruct the same actions the prevention team makes. This idea is similar and not wholly distinct from the previous idea of indirect liberty. But, in order to analyze Sen in the context of Sugden above, it is important to note that both theorists fall to the “preference-based” side of measuring opportunity.

The upshot of Sen’s positive view is that one is free if one is able to do whatever one would desire the outcome of a decision to be *if* given the choice. Sen’s definition of freedom, then, does not depend on the ability to make any choices at all, but rather, merely the counterfactual situation in which choices would be made. I will next argue that this view, while possessing the merits of neatness in addressing the complications with measuring overall freedom discussed above, does not seem to be a view of *freedom* at all.

### *C. New Defense of Liberty as Control*

Sen is concerned that control is too limited a concept to support the robust concept of liberty. But he likely thinks this because *his* concept of liberty is in one sense quite narrow, and in another sense, too broad. Importantly, it is in response to this perceived narrowness that he introduces the concept of “indirect liberty” as the explanation behind the concept of “effective freedom.” First, there is no good reason to exclude the concept of “indirect liberty” from the control view of freedom; in this sense, his definition is too narrow. The kind of control the control theorist has in mind is not control over the means of disease prevention, for instance, but control over connecting will to outcome. This connection comes in the form of having options and then making meaningful choices that are respected; importantly, it is not equivalent to the incidental convergence of will and outcome. I have the same amount of (freedom-relevant) control when I choose to be free from disease and *am*, as I do when I choose to be free from disease, *and* control the means by which this happens, and experience being free from disease.

But I do not have the same amount of freedom-relevant control when I just happen to be free from disease. If I never am presented with the choice, then something important to freedom is lost.

Sen would perhaps say in response that skipping the middle step means we can equate this situation of indirect control under the negative conception to one where a counterfactual choice is attributed to the person. For example, he might say that my choice to be free from epidemics without direct control contributes the same amount to freedom as my being free from epidemics because someone (the government, perhaps) assumed I *would* choose to be healthy.

But in this sense his concept is too broad—counterfactual control is not control at all!

Counterfactual choice is, similarly, not choice at all. Even if Sen is right that some counterfactual choices “are very easy to guess,”<sup>100</sup> (because they align with the rationally-determined “actual preferences”) such as the counterfactual choice to be free from disease, it seems odd to say that when the counterfactual choice is *actually* presented and chosen, the amount of freedom remains the same. It is one thing to say that in two cases where I am given no choice, I am *freer* in the case where the outcome incidentally aligns with what I *would* have chosen. But it is another thing entirely to say that my freedom is the same whether or not the choice is presented.

There is an empirical problem with counterfactual choices, too: rarely are choices so simply presented as they are in the epidemic case. It is far more likely that multiple values are presented at once: in this case, say, the authorities of disease-prevention need access to my medical records in order to form a database that will be used to prevent epidemics. In this case, there is a considerable, if still predictably clear, trade-off to be made. Surely *some* people will at least hesitate to make the choice. This bolsters the previous idea that presenting the choice always increases freedom. Even if one takes the effective freedom view where freedom is

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<sup>100</sup> Sen, “Freedom, Agency, and Well-Being,” 66.

measured by outcomes only, we should be able to agree that in some situations the best outcomes are impossible to identify externally. The act of presenting *real* choices—not guessing “counterfactual” ones—is an important mechanism for determining the most valued outcomes. And if there is some experiential value in choosing—we confirm our values, we reject unworthy options, we exercise moral responsibility—we have a positive reason to present the choice. In sum, we cannot “skip the middle step,” for the middle-step act of choosing, and not the final-step outcome, is the operative one to an individual’s freedom.

The idea that counterfactual choice can serve as a tool for ensuring indirect liberty (which I’ve argued, is just regular liberty) is flawed for a final reason. Sen once again narrows his concept too far. It is true that I would choose to be protected from disease, but it is also true that I would choose to be presented with the choice to trade-off medical records for prevention. The question, then, is whether Sen’s counterfactual applies only to the lowest-level choice (give medical records for prevention) or if it applies to a higher-level choice (the choice to have choice to make trade-off).

This response relates also to Sen’s initial paradox: the addition of the specific freedom from making many choices should increase freedom. The only way adding this specific freedom can add to overall freedom is if we take individual preferences into account. Sen uses this as a motivation for his support of the positive conception of freedom. But the paradox need not drive us toward the positive conception if there is another way to deal with it, and I think there is. It is better to simply say that freedom *is* diminished when that specific freedom is added. It is acceptable to say that a person does not value freedom, and it is counter-intuitive to say that a person is more free if they desire to be—and are—less free. The Millian analysis discussed in the previous section is relevant here. In order to be interested in the enterprise of measuring freedom

at all, we need to maintain interest in the choices-not-taken. Freedom consists in the act of choosing—the control we exercise in connecting our will and the outcomes of a situation. When there are barriers in the way of that connection (constraints) we are made less free.

Kramer's standard for judging how much a specific freedom contributes to overall freedom is also useful here. The only satisfactory, preference-independent way to make these necessary judgments is to order specific freedoms by the range of conjunctively exercisable opportunities they afford. Under this metric, the specific freedom to be free from making many choices obviously does not contribute very much; in fact, it actively detracts from overall freedom. Other preferences—which Sen thinks are valuable to realize—will contribute significantly. The specific freedom from disease allows one to engage in a diverse range of opportunities, such as going to work, meeting people, moving about freely, etc.

A person can choose to trade-off his freedom for some other good. Much of Sen's criticism is motivated by the concern that control is too limited to encapsulate the grand value of freedom. But I think it strengthens, rather than weakens, the concept of liberty to acknowledge its limits. In short, Sen's concept of control is at once too narrow and too broad: it is too narrow in that indirect liberty should be included in a good concept of control, and too broad because it wrongly includes counterfactual choice as a real choice. This problem, paired with the concept of freedom that is too broad to account for trade-offs we can sometimes make for other valued goods, renders Sen's view unconvincing. And there is a clear benefit to the control definition; we can explain the difference in freedom in two cases identical in their outcomes: the case where there is choice has more freedom.

#### *D. Anticipated Objections*

*Objection one:* If control is the connection of will to outcome, do we not return to the problem that motivated Berlin in his two concepts of liberty—that freedom is based on what we desire, and we can increase our freedom by reducing our desires? The control definition, I argue, is not a reformulation of that problem. If one takes the control theory from the negative conception of liberty, then any restriction on control would diminish freedom. That one is free is not dependent at all on what one’s will is or how much one desires to do; it is instead dependent on what one is *restricted* from controlling. This means the counterfactual desire is just as relevant as the actual desire, and we cannot expand our freedom by reducing our desires.

*Objection two:* If someone’s decision-making capacity is crippled by an internal restriction (which I have conceded is possible), then under the control definition of freedom can they not just choose the “wrong” option and thus, choose to make themselves less free? First, in most of these cases, it makes more sense to say that the person has traded off well-being for freedom. There might be other reasons to restrict that initial choice, but they need not be reasons based in the value of freedom; freedom can be justifiably restricted for the benefit of other values.

Second, we can approach this problem from another direction, where we concede that sometimes we can ascribe counterfactual choices to individuals, but we do so under the guidance of principles of optimizing freedom anyway. For example, the field of medical ethics has developed the “substituted judgment standard” to guide the behavior of medical professionals in providing treatment to the decisionally-incapacitated.<sup>101</sup> Medical professionals consider the previously expressed preferences of the patient, along with their objective situation, in order to

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<sup>101</sup> Suggestion from Cummiskey.

presume consent of the patient.<sup>102</sup> It is important to note that substituted judgment standard is driven by the importance of consent—even consent by proxy—and not primarily considerations of objective welfare. This demonstrates the influence of the principle of patient autonomy in medical ethics.<sup>103</sup> When preferences are vague or unknown, it is generally acceptable to make the choice that would allow the patient to, in the future, make her own choices again. The point is, again, that an option’s relevance to freedom can only be measured by its effect on the exercisability of subsequent choices. On the other hand, if a person is not decisionally-incapacitated, but just tends to make decisions differently than the average person, as is the case for both individuals with permanent mental disorders or unrelenting hard-line political views, we probably should defer to the idiosyncratic tastes of the individual and allow the choosing of choices we might find disappointing.

I think it is a chilling political world that ascribes counterfactual choices to individuals (“you would have chosen this, anyway”) or second-order desires to individuals (“you may desire privacy, but you surely desire that you did not desire privacy as much as X”). Because choice is valuable independent of what is chosen and because freedom is not the only political value worth protecting, Sen’s conclusion must be wrong: freedom *is* very much about control; to be free is to lack constraints on the control of oneself and, as will be argued next, one’s information.

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<sup>102</sup> Michael Ardagh, “Resurrecting Autonomy during Resuscitation: The Concept of Professional Substituted Judgment,” *Journal of Medical Ethics* 25 (1999): 375.

<sup>103</sup> *Ibid*, 376.

# Why Privacy Violations Are Freedom-Reducing

## I. Introduction

In the previous chapter, we dove into the intricacies of the debate on positive and negative freedom, discussed what constitutes constraints on one's freedom, explored the concept of overall freedom and the problems associated with its measurement, and finally, outlined a theory of negative freedom as control. Here, I will more fully develop the control definition of freedom and show that privacy violations are freedom-reducing. I argue that it is essentially this feature that explains the wrongness of violating privacy.

## II. What Is It That We Control?

Under the control definition of freedom, we are free to the extent that we lack restrictions on our control of ourselves. But this requires further specification. First, what constitutes "us"? One definition is limited to our bodies. This would align with a Carter/Steiner conception of possible actions defined by the distribution of matter. Most accounts of personhood, though, would contest the idea that who we are is limited to our bodies; we are also our pasts, our dispositions, our memories, our preferences, etc. All of these aspects can be included under the idea of our information—the control of our personal information, then, is central to the realm of what we must control to be free.

Secondly, what constitutes control? It has been discussed that, for information, control consists in the deliberate choice of who has access to that information. This follows from the nature of information (it is shared when accessed) not control. But is control always relational? The proponents of the positive conception may think that it is not—that to have control is to have certain capacities, or means, to determine an outcome. Negative liberty theorists, on the other

hand, will interpret control as a function of constraints. Rather than specifying all the possible outcomes we can control, the negative theorist specifies what would count on a constraint on control.

### III. The *Y* Variable: What Counts as a Constraint?

There are two ways the *Y* variable can be understood in the context of privacy. First, we need to specify the kind of restricting action; second, we need to specify the kind of restricting actor. Let's turn to the first of these tasks. In chapter one, we distinguished between privacy forfeits, infringements and violations. The right is forfeited when someone makes a free choice to take a position in society that denies them the right. Privacy is merely infringed (justifiably or not) when either a competing right or interest overrides *or* negligence on the part of the information holder or recipient fails to respect legitimate expectations. Privacy is violated when legitimate expectations are violated. This last occurrence can take place either after the information is obtained by the recipient (i.e. the recipient goes off to share the information with others) or in the process of information extraction (i.e. the information is sneakily obtained, e.g. through hidden cameras).

This definition of privacy violations amounts to Miller's definition of constraints requiring moral responsibility. One cannot accidentally violate another's privacy; it must be a choice to violate the social norm. Miller's (individually sufficient) conditions for moral responsibility are intentionality, negligence, or failure to fulfill an obligation.<sup>104</sup> The choice to violate a social norm satisfies intentionality. Failure to fulfill an obligation can apply to both the social obligation to abide by legitimate norms, and the specific, interpersonal obligation to take

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<sup>104</sup> Miller, "Constraints," 72.

care of information with which one is entrusted. The criterion of negligence Miller outlines does not apply to privacy violations because, as the third chapter discussed, accidental violation amounts to mere infringement. So although negligence is satisfied when someone is trusted with confidential information and is negligent of who accesses it, we should not say he has violated privacy. Yet because Miller's criterion is satisfied, we are still compelled to (and ought to) say that some freedom is lost. That infringements, as well as violations, on privacy reduce freedom does not contradict my argument here.

An added constraint on privacy is the absence of knowledge of a constraint. Recall the man on a desert island. If he is at least aware of the cameras in the trees, he can adjust his expression of personal information. He has not lost *as much* privacy, then, if he can at least control that flow of information. This pinpoints something important about the nature of constraints in the context of privacy: when those constraints are imposed in secret—when the constrictor is intentionally deceptive—the violation is much worse. This is true for the case of privacy because of the nature of personal information; in a “live” situation, its *expression* can be somewhat controlled, for individuals can withhold expression according to the knowledge of who perceives their expression. But is this true for the case of freedom in general?

When constraints on freedom exist without the individual's knowledge, freedom is still reduced. Take the standard case: the door is locked without my knowledge; am I free to leave? No, I obviously am not—one does not need to nuance a conception of constraints beyond Steiner's impossibility thesis to conclude this. However, we would not say that the violation is somehow worse in virtue of its secrecy in the case of freedom, where we would in the case of privacy.

Beyond the kinds of actions that count as constraints, we need to specify the kinds of actors that can do the constraining. There are multiple dualities at play: individuals versus collectives and close ones versus strangers. Both individuals and collectives, under Miller's definition, are eligible for moral responsibility. The friend who spills your information without permission violates your right to privacy just as a corporation who sells your information without permission violates it. It is comparably clear that both close ones and strangers can be morally responsible; we may have different obligations to our close ones than we do to strangers, but we have obligations that can be upheld or denied. To our close ones, we have a personal obligation to not harm them, to be kind toward them, and possibly to protect them or put their needs first. To strangers we have similar obligations, but their needs are not prioritized above any other person's, as our friends' needs are. The obligation to respect another's control over their information is applied to close ones and strangers probably equally—whether a violation by a close one or a stranger is worse depends on the details of each situation.

Whether the constraining actor is a government also impacts the kind of constraint imposed. Governments are unique in their ability to impose legal sanctions. Legal sanctions are best understood for our purposes as biconditional, credible threats. If you do *A* the government will punish you; if you do not-*A* the government will not punish you (for that reason, at least). These threats are credible because they are backed by the government's monopoly on the use of violence-enforced coercion (generally speaking). As discussed in the previous chapter, legal sanctions are considered constraints by most political theorists, regardless of their position on the spectrum. If a government violates its people's privacy through spying, for instance, the constraint is intensified not necessarily because the sanction is somehow worse, but because the likelihood of imposing the sanction is increased. The more the government knows about you, the

more likely you are to be caught and punished for breaking the law. But a government that violates privacy may also be uniquely disposed to expand the scope of actions it punishes. The spying of the American government during the Red Scare was in part motivated by its aim to punish communists, but it also indicated a kind of paranoia that is often associated with less discriminate punishments. When subject to a government of this sort, and the imposition of these kinds of sanctions, we become unfree in virtue of these constraints. Let's turn to the constrained actions next to approach the problem from a different direction.

#### IV. The Z Variable: What Kinds of Actions are Restricted?

If we want to say that privacy violations are freedom-reducing, with the negative conception we need only specify the *Y* variable. MacCallum's triadic relation, however, recognizes that approaching freedom in two directions can be methodologically preferable given the complexities of the actual world. For this reason, I now turn to possible actions restricted when privacy is violated. The point of this is to support not only the claim that we are free to perform *more* actions before a privacy violation has occurred, but that we enjoy more freedom in the overall sense.

The obvious specific freedom that is removed when privacy violations occur is the freedom to present oneself in a certain way. The act of sharing our private information is a cord that links our true selves to our appearances according to others. When the levers of control over that cord change, the presented outward self also changes. Since measuring freedom cannot be restricted to the pure-quantity approach, and we also need to make reasonable judgments about how much specific freedoms contribute to overall freedom, we can further characterize this specific freedom as a relatively important one. The choice of what parts of us we wish to express

is a phenomenologically meaningful experience, and an important part of the process of self-creation. We choose to express who we are and, in turn, our expression informs who we are. It is no small specific freedom lost in cases where privacy is violated.

The fact that one specific freedom is lost, though, will not convince anyone interested in proving that *overall* freedom is diminished when privacy is violated. There are three ways overall freedom is diminished: through a reduction of freedom of choice, through the threat to the security of freedom, and through altering perceptions on freedom.

#### *A. Privacy and Freedom of Choice*

Carter argues for a distinction between freedom and freedom of choice. This distinction serves to address the problem of using preferences as axioms for measuring freedom—instead of navigating that messy territory, Carter divides the issue into two separate questions. If we are interested in having freedom, we are interested in whether we lack constraints on the performance of an action.<sup>105</sup> If we are interested in having choice, then we are interested in lacking constraints on “the reasoned selection and performance of one or more actions on an action-menu.”<sup>106</sup> The implication of this is that we are necessarily free to do anything we have no choice but to do, but we lack choice until we have two options from which we can make a “reasoned selection.” Freedom of choice is a constitutive part of overall freedom.

Of course, what counts as a choice requires, as Sugden discusses, a decision about how to “cut up the world.” It seems strange to say that the prisoner’s infinite toothpaste options give him robust freedom of choice. So, while this element of overall freedom assigns important attention to the quantity of options available, freedom of choice is dependent on criteria such as variability

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<sup>105</sup> Ian Carter, “Choice, Freedom, and Freedom of Choice,” *Social Choice and Welfare* 22 (2004): 68.

<sup>106</sup> *Ibid.*, 68.

of options.<sup>107</sup> I think the best metric for measuring choice is Kramer’s standard—if one’s options vary in the subsequent freedoms they afford, then one has more freedom of choice.

When specific freedoms are lost, freedom of choice is diminished; so, when the specific freedom to present oneself in a certain way is lost through privacy violations, freedom of choice has been reduced. Importantly, there are the other, everyday actions that have been removed from the action-menu besides this specific freedom. In the previous section the possibility of legal constraints—imposed by governments—was discussed. A spying government indicates that certain actions that were once freely performed are now punishable. Even more importantly, it is usually true that citizens will not know *which* actions are now punishable—this follows from the government’s need to spy, rather than promulgate a new law. So, in the mind of each actor, an undefined and indiscriminate range of actions now falls into the category of “punishable actions.” The actions-menu from which we can choose freely has been substantially restricted.

### *B. Privacy and Security of Freedom*

The reduction of freedom of choice depends on the condition that the watchers know they are being watched. But this, we know, is not always the case when it comes to privacy violations. The republican conception (that we have interpreted through the lens of negative liberty) counts things such as dependence and domination as constraints; these things restrict freedom because they restrict the security of freedom—their presence casts doubt on the resilience of the current state of *actual* freedom enjoyed. How does privacy impact the security of freedom? The deception (previously discussed) that is usually associated with privacy violations means that there is an asymmetry of information: the watcher knows much about the watched, but the watched is not aware of—even the existence of—the watcher. This asymmetry of information is

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<sup>107</sup> The ways in which we might measure freedom of choice is peripheral to our interests here, but for a theory of possible ways see: *Ibid*, 61-81, and specifically p. 63.

accompanied by an asymmetry of freedom insofar as their relationship amounts to one of domination. The republican conception of freedom allows us to express the wrongness of this kind of relation in terms of its negative impact on the security of freedom. It is the nature of domination that one party is able to take from the other. So long as an individual is subordinate in this way, her freedom is not secure, and that insecurity is a constraint in itself.

Some have said that what the republican conception really gets at is the perception of implicit threats, not the experience of domination or dependence *per se*. But I think it is also true that even if the person has no knowledge of the asymmetrical power relationship or asymmetry of freedom, she still loses freedom when her privacy is violated. If she has no knowledge of the expanded legal constraints she is no less susceptible to them and has reduced freedom of choice. Even though the arguments in these two sections are different, they are not contradictory; instead, they respond to an even-if scenario. Privacy violations reduce freedom by diminishing security of freedom when the asymmetrical distribution of control is known; even if this phenomenon is not known, through, privacy violations reduce freedom by diminishing freedom of choice.

### *C. Privacy and Perceptions of Freedom*

One might object that these examples of the spying government are not instances of *privacy violations* impacting freedom, but rather, examples of expanded, unjust sanctions reducing freedom—privacy violations are part of the conditions required for the constraint (imposing the new sanctions), but not part of the constraint itself. But I think the privacy violation *itself* is a constraint for a further reason. Say the veil of deception is punctured—the citizen now knows he is being watched. Even if there are never any legal (or extralegal) sanctions imposed, it seems that we still want to say the freedom of the individual is reduced.

Why? Can this be explained in terms of our triadic relation, or is it an unsupported feature of our intuitions?

If internal constraints exist, then there is no reason, I think, that changes in the perception of freedom cannot count as constraints on freedom. Again, if I am systematically inculcated with the belief that the door is locked when it is, in fact, open, the action “leave the room” is equally absent from my action-menu as it would be if it were actually locked, for I am prevented from taking the action of *trying* to leave the room. Freedom may not require conscious knowledge of that freedom, but it demands at least the absence of the (true or false) belief that the freedom does not exist. Furthermore, all the impacts of security of freedom discussed previously grow more potent when one, in perceiving an asymmetrical power relation, perceives of the implicit threat to future freedoms.

## V. The Difference Between Privacy and Freedom

While we have been able to draw several connections between the control definition of privacy and the control definition of freedom, some important differences are worth clarifying. The first is the role of knowledge. In the case of privacy, I argued that when violations are kept secret, an additional constraint has been introduced, for the individual loses the ability to control who accesses their information through restricted expression of the information, as they would if they were aware of the circumstances. This deception does not seem to be equally damaging to a state of freedom, though. If there is value in the act of choosing—and so, in the choices-not-taken—as I have argued, then this deception may actually *increase* freedom. If in both the case where I know the door is locked and the case where I do not know I would choose to remain in the room, in the latter case I experience choice-making, whereas in the former case I do not.

What difference does it make, if the choice is not taken either way, whether it was possible to ever take it? To say one is in a state of freedom and to say one is in a state of privacy is not to say the same thing. Although both may be defined in terms of control, the divergent ways deception impacts their degree raises an important difference.

The second important difference is the role of voluntariness. In the first chapter, I argued that one cannot willingly lose privacy. The condition of privacy is achieved so long as the individual maintains control of his information. This means that even Parent's free-sharer does not lose privacy, for her choice to share her personal information with everyone still amounts to her control of that information. But one can, I think, willingly lose freedom. The free choice to lock oneself in a room that prevents one from doing a range of other things is freedom-reducing by Kramer's standard. One can desire to trade-off freedom for some other good; Sen gives the example of the person who desires freedom from making many choices. While he argues that this person becomes freer when this desire is actualized, I would say instead that they have simply chosen to become less free—they have chosen that some other value is more important than freedom. If, in making such a choice, they expose themselves to many future constraints, then we do not strengthen the concept of freedom in saying the individual has maintained it anyway; we weaken it via over-expansion.

# Technology, Privacy, and Freedom

## I. Introduction

In the discussion on freedom, I argued for the negative conception of liberty because of its conceptual clarity and inclusiveness. Subsequently, I connected it to the control definition of freedom, which Sen and others classify as the broader version of the negative conception. While this means we only need to specify constraints (of which privacy violations are an instance), it is helpful to note that the action being constrained is control over one's information. Both concepts of privacy and freedom are thus enhanced through focusing on control—control over information in the case of privacy and control over a broader sense of self-determination through choice in the case of freedom. Here, I argue that the ability to maintain control—and thus, privacy and freedom—in the modern world is significantly mitigated by the digitization of information technology allows.

Advancements such as the Internet, databases, communication devices, and global positioning systems seem to expand our freedom—they remove barriers and open up the world to us in unprecedented ways. In turn, we are opened up to the world: personal information is increasingly documented. No longer are our experiences personal, fleeting, or unknown; they are recorded, remembered, shared. The vastness and the variation of technology makes it a daunting focal point for a discussion on privacy and freedom, but technology lurks behind all modern discussions of these values, and furthermore, is often the instigator behind privacy-related grievances. Technology also has fundamentally changed the way information is organized and presented in our world. In light of this, it is even more important to apply our concepts of privacy and freedom through control to the modern context. Advancements in technology, particularly the Internet, threaten this control by drastically expanding documentation of and access to

information. Here I discuss two areas of technological changes: in commerce and in government surveillance. The technology itself does not necessarily vary among these areas—what varies is the recipient of the information and the particular constraints imposed on the information subjects’ control. Much of the analysis of commercial use of technology will also apply to the governmental use of technology; not only did we learn in June that the government depends on commercial informational practices, but the same principles—for instance, that coercive situations restrict freedom—will be applicable to both. By detailing how technology is used in two contexts, I identify the constraints imposed on the information subjects’ freedom, the motivations and goals of the violators, and draw conclusions about how informational privacy and freedom are not wholly distinct from each other.

## II. The Contextual Integrity Approach

Taking an analytic approach to technology and privacy is not new or particularly unique. Many writers are concerned with the implications technology has on our privacy, and have conducted deep conceptual and empirical investigations of the phenomenon. One philosopher of technology, Helen Nissbaum, has argued thoroughly that privacy violations in today’s world are dangerous because of their impact on social structure. Most of technology itself, she says, is socially-directed: it is meant to connect people together or regulate relations among people. She begins with the premise that different technologies are embedded in different contexts. To maintain privacy in the technological world, Nissbaum argues, is to preserve contextual integrity. What she means by this requires some explanation.

Nissbaum’s argument aligns with—but advances—most of the theories discussed so far: our privacy is violated when something goes wrong in the transmission of information. More

specifically, though, she says that we sense a violation when a *context-specific informational norm* is violated. These norms are defined by contexts, actors, attributes, and transmission principles.<sup>108</sup> “*Context*” refers to a highly specific environment solidified over time; an example of context is “private” versus “public,” but Nissbaum says that these are crude categories, and in reality our world is organized by much more nuanced contexts. *Actors* are divided into senders of information, recipients of information, and subjects of information.<sup>109</sup> “*Attributes*” refer to information types—medical information and romantic information, for example, will each be appropriate to transmit in some contexts, to some actors, and not to others. Lastly, Nissbaum defines transmission principles, which are “constraint[s] on the flow of information from party to party in a context.”<sup>110</sup> Transmission principles that reign in different contexts may include confidentiality, entitlement, desert, reciprocity, need, etc. Information transmission in friendship is usually regulated by the transmission principle of reciprocity, whereas in a criminal investigation *need* might regulate, and in a therapy session *confidentiality* rules.

The transmission principle aspect of Nissbaum’s theory is most relevant to our discussion, because this is where it overlaps with the control definition. Importantly, Nissbaum thinks control is a contingent, not necessary, part of privacy:

Control...remains important in the framework of contextual integrity, as one of the transmission principles... [but] it is but one among many possible transmission principles, which in turn are but one of the parameters determining whether informational norms have been respected. Accordingly, whether or not control is appropriate depends on the context, the types of information, the subject, sender, and recipient.<sup>111</sup>

Does the contextual integrity approach require us to dispose of the control definition? Do the implications of technology force us to abandon control as a requisite condition to privacy? I will

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<sup>108</sup> Helen Nissbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life*, (Stanford: Stanford University Press, 2010), 140.

<sup>109</sup> *Ibid*, 141.

<sup>110</sup> *Ibid*, 145.

<sup>111</sup> *Ibid*, 148.

use Nissbaum’s detailed argument as a launch point and a baseline for a discussion of privacy, technology, and the impact on freedom. Her contextual integrity argument is extremely valuable and propels conversation forward to new levels of analytic clarity; but I think it is implicitly set in a presumption of control that Nissbaum ignores. As we maneuver through two contexts—and two sets of informational norms—I will show how control must be integral to analyzing privacy violations. Indeed, even in the complicated cases technology creates, reduction of freedom is at the basis of the wrongness of privacy violations.

### III. Privacy and Commerce

Advancements in technology have revolutionized commercial enterprise. Instead of walking by a storefront, peering through the window, and making a decision to walk freely by, companies have websites instead of storefronts, they record how long you peer in from outside, and when you decide to scroll or click, your information is extracted in exchange.<sup>112</sup> That kind of information—which things catch the eye, which things make people linger—has become so valuable that a market for extracting that information *alone* has emerged. Web search companies such as Google are among the top providers in this market due to the ease by which their business model *incidentally* extracts mass consumer information.<sup>113</sup> This information is sold to (and also collected by) “descriptive and predictive” information collecting companies, who can sell access to massive databases of consumer information to companies that benefit from knowing consumer patterns.

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<sup>112</sup> Analogy taken from Nissbaum, “Privacy in Context,” 28.

<sup>113</sup> Nissbaum says of these incidental features: “in many instances, however, monitoring and tracking, particularly the mode we call dataveillance, is not the direct aim by an inadvertent consequence of some other goal for which a given system was originally designed.”

Ibid, 24.

Is privacy violated? Privacy is *prima facie* violated if person *Y* acts to constrain *X*'s control of *X*'s information. A defender of digital data collection might say that control remains in the hands of the subject; one can choose *not* to use tools of information collection. The subject can also be careful about which pieces of information are provided to whom. This, however, is simply not true. In order to show that privacy is violated, I will show that there is no real control by bringing digital data collection through MacCallum's three variables in the triadic relation of freedom. The *Y* variable in particular will illuminate the ways control is deliberately disrupted, why there is a reduction in freedom because of it, and therefore, why privacy is in fact violated.

#### *A. Freedom to Act: the Z Variable*

We have to first look at what actor *X* is rendered more or less free, what constraint *Y* may be introduced, and what action *Z* actor *X* has become unfree to do. The actor is the subject of the information—if privacy is violated, then it is the subject's privacy in question, if freedom is reduced, it is the subject's freedom. The action in question might be specified by contemplating the purpose of the Internet. We tend to think of the Internet as a radically freedom-increasing and freedom-enhancing tool. If this is true, then it does so primarily by increasing our freedom of choice, which, as discussed previously, is a constitutive part of overall freedom. This is because it exposes us to a world of information by bringing everything closer—the usual barriers we experience (such as time, distance, or money) are dissolved by the Internet's speed, vastness, and cheapness. This means that in choosing which pieces of information to take in, we used to have 20 options (maybe we own 10 books and then have 10 places we could go at that time to take in information directly), and now we have 20,000. This is of course an extremely crude characterization of changes in options, but the principle is relatively undisputed: the Internet has expanded our options for accessing information nearly infinitely. The action in question, then, is

what Carter calls “choosing”: “making a reasoned selection... of one or more items in an action-menu.”<sup>114</sup> He tends to use the action of “choosing” in a more general sense—i.e. we always are choosing among *all* possible actions we are free to do. I mean “choosing” in a slightly different way here. We are not choosing among all possible actions, but among all the possible pieces of information to access on the Internet. While I realize that Internet experience is somewhat impoverished, lacking much of the phenomenology of “real” life, it is an important enough venue of modern activities that I am comfortable narrowing the relevant “action-menu” to accessing online information, and still saying there is some significant freedoms in question here.

Why is freedom of choice on the Internet still a significant freedom? First of all, the Millian concept of freedom as opportunity contends that the act of choosing is significant to the discovery and expression of individuality. By having robust<sup>115</sup> option-sets, we affirm our choices—and ourselves—via rejection of other options. Secondly, the nature of the Internet enhances the force of this kind of argument. Maneuvering the sheer vastness of opportunity on the Internet is a unique experience; one can discover entire new fields of information by following inklings and intuitions through the never-ending network of sites. Discovering something new through self-directed wandering is not an experience unique to the Internet—the wonderfulness of that experience has been felt in bookstores, schools, and travels for centuries. What I think is primarily wrong about “descriptive and predictive” information collection is that it runs against one’s ability to achieve that experience of discovering radical newness. The conditions under which a person swerves randomly are not valuable to sell—the *patterns* their swerving produces *are*. The incentive of “descriptive and predictive” information collectors is to detect patterns in consumer behavior in order to (sell it, in order for other companies to—) create

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<sup>114</sup> Ian Carter, “Choice, Freedom, and Freedom of Choice,” *Social Choice and Welfare* 22 (2004): 68.

<sup>115</sup> “Robust option-sets” refer to the satisfaction of Kramer’s principle of measurability: an option-set is more valuable (or, one’s opportunity is greater) if the unrestrained actions either preserve or create future actions.

conditions that replicate those patterns, thus strengthening the predictive force of that information. The purpose of descriptive and predictive information collection is to induce and sustain a cycle of activity that affirms its own value.

*B. Freedom from constraints: the Y variable*

One might object by saying there is no real *constraint* present here: people *can* still randomly discover, swerve, and explore on the Internet even if information is being collected about their digital movements. It is true that this is still physically possible, but as discussed in chapter three, we should not limit our conception of constraints to those things that render actions impossible. In order to specify which constraints may exist, we should look to the interests and motivations of information collectors.

First is the more specific interest in collecting information for the purpose of predicting behavior—predicting the creation of future information, in other words. More general is the interest in profiting from this prediction by altering business models to fit the predicted popular behavior. Recall Miller’s definition of moral responsibility: we are unfree to perform an action only if another agent is morally responsible for an obstacle. Moral responsibility may be an obstacle imposed intentionally, an obstacle imposed negligently, or failure to remove an obstacle despite having an obligation to remove it.<sup>116</sup> Arguments could be made for the recording and selling actions of information collectors fitting each of these categories. This connection to Miller’s moral responsibility thesis will come out of analyzing the method by which information is collected. If it is collected, as is the case for some sites, in *exchange* for use of the site’s resources or access to the site’s information, then there is some coercion present in the method of extracting information. Most would agree that actors have an obligation against unnecessary

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<sup>116</sup> Miller, “Constraints,” 72.

coercion, or at least coercion imposed for their own advantage. Coercive information extraction falls into Miller's moral responsibility thesis.

Coercion is not a term to be tossed lightly; it implies that a person had *no choice* but to do something. In the case of digital information collection there is certainly some exchange taking place, but only in some cases will the exchange be coercive. If, say, the person had no reasonable choice but to access a site that takes their information, then the exchange is coercive. Coercion is used by the coercer to induce actions in the coerced that he would otherwise have avoided. Is there an element of coercion in these informational transactions? Auerbach suggests that there is, and says: "Given the choice, most consumers would prefer that their information not be collected and aggregated. And so advertisers and data aggregators have treated them like the proverbial boiling frog: enticing them into an indispensable social or technological network, then slowly eliminating their choices."<sup>117</sup> We experience coercion—the absence of alternative, acceptable choices—without even realizing it. What is worse, Auerbach points out, is that the result of that initial coercion is sustained vulnerability to the slow reduction in freedom of choice.

But do we have reason to say that the action of using the Internet—and therefore using sites that extract information—is an action we have no choice but to make? I think updating our idea of society's infrastructure can answer this. In past eras, societal infrastructure was largely physical; we interacted in physical ways, moving in and out of private and public spaces. Authorities learned how to design this infrastructure to direct people toward their desired ends. After the barricading of the 1848 revolution in Paris, Parisian authorities rebuilt the city streets considerably wider, to prevent future barricades and facilitate police surveillance. Could Parisians avoid this surveillance by refusing to use the streets? It seems unreasonable to say they

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<sup>117</sup> David Auerbach, "You Are What You Click," *The Nation* 296 (2013): 33.

could, and that the increased surveillance was not a reduction in freedom. I would argue that the way Parisians used the streets in the nineteenth century as integral venues of everyday interaction is not unlike the way the Internet is used today. We use the Internet to connect, to participate in markets, to communicate and to create. To say that individuals who object to information collection can reasonably opt-out is to ignore the realities of the Internet age. A definition of freedom should maintain conceptual integrity, but without sacrificing the flexibility to interact with the demands of real life.

There is also legal precedent for this conception of coercion. In *Henningsen v. Bloomfield Motors, Inc.*, the New Jersey court ruled that the car manufacturer was responsible for the plaintiff's injury caused by malfunction, even though the contract of sale specified that they will take no responsibility. They ascribed blame to Bloomfield Motors, Inc. with the reasoning that "in a society such as ours where the automobile is a common and necessary adjunct of daily life... the manufacturer is under a special obligation in connection with the construction, promotion, and sale of his cars."<sup>118</sup> In his analysis of this case, Dworkin explains the court's decision as the result of reasoning that invokes legal principles that compete with legal rules. While legal rules are "all-or-nothing," legal principles are reasons for an outcome without requiring that outcome.<sup>119</sup> Legal principles are *prima facie* reasons for one decision over another. Even if a legal rule technically protects Bloomfield Motors, Inc. from legal responsibility, there are principles that inform the court's enforcement of legal rules. The court referenced obligations to "refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly

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<sup>118</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>119</sup> Ronald M Dworkin, "The Model of Rules," in *Philosophy of Law*, 4<sup>th</sup> ed., ed. Joel Feinberg and Hyman Gross, (Belmont, CA: Wadsworth, Inc., 1980) 145.

taken advantage of the economic necessities of other.”<sup>120</sup> The use of moralized words like “unjustly” shows how legal rules are constrained by moral obligations. Similarly, the technical understanding of coercion should be constrained by the circumstances of real life decisions.

Does Dworkin’s defense of legal principles, when applied to our case, entail Nissbaum’s theory of contextual integrity? In one sense, the idea that a society’s “economic necessities” change what counts as a coercive action aligns with her idea that what information transmission principles apply to a situation depends on the “highly-specific” context. Her theory is helpful to the extent that it reminds us that the particular features of a situation inform the result of applying a principle. This, however, does not mean that *which* principles we apply depends on those features. Control should be a transmission principle in all contexts, but what counts as control may change depending on the particular features of that context. Coercion is a constraint on having freedom through control. What *Henningsen* shows us that whether an action counts as coercion depends on the context within which that action takes place—it does not at all suggest that coercion is irrelevant in some contexts. Adopting the crucial part of Nissbaum’s theory does not require us to, as she suggests, dispose of the control definition. Instead, it simply informs the application of a control definition of privacy and the corresponding control definition of freedom.

There are also many cases in which it is not clear which principles should apply to guide transmission, even when we study the contextual nuances of the case. The nature of the relationship between modern consumers and producers is in many ways alien to us; it deviates from our explanations of the rest of the social world. Warner and Sloan provide a compelling illustration of this. They liken “pay-with-data” exchanges to a game of Chicken played “under

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<sup>120</sup> Ibid, 144.

conditions that guarantee [the customer] will always lose.”<sup>121</sup> This is because advertisers have warped preferences. While the ordinary person’s first choice in Chicken is to have the other person swerve and the second choice is to have them both swerve and avoid a collision, advertisers have a first choice that the customer swerve and collision as the second choice.<sup>122</sup> In real terms, this means that the customer would prefer the company to “swerve” to conform with their privacy preferences in exchange for using the website, but the company would prefer to first, extract the information as they wish, but second, simply not have the customer use the site if they refuse the information-extracting policy. Our usual rational-choice models for understanding behavior are strained to fit the modern consumer-producer relationship.

Warner and Sloan’s analogy has interesting implications for Nissbaum’s contextual integrity. They say: “unfortunately, pay-with-data exchanges are one of a number of situations in which rapid advances in information-processing technology have outrun the slow evolution of norms.”<sup>123</sup> Nissbaum argues that we can evaluate when privacy violations have occurred by looking at whether norms guiding social behavior have been disrupted; but in the case of digital data-extracting exchanges, it is not clear where we should look. Common business ethics fail to account for the magnitude of corporate responsibility, especially when we look to companies like Google, with its unprecedented access to consumer information. Norms on information transmission do not exist to regulate these exchanges; we have to speculate as to what norms we would like to exist. In these cases where the process of using contextual integrity to pick out norms is particularly daunting, deferring to the information transmission norm of subject control looks especially attractive.

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<sup>121</sup> Richard Warner and Robert H. Sloan, “Behavioral Advertising: From One-Sided Chicken to Informational Norms,” *Vanderbilt Journal of Entertainment & Technology Law* 15 (2012): 49.

<sup>122</sup> *Ibid.*, 50.

<sup>123</sup> *Ibid.*, 50.

Another possible way the method of extraction makes the collector morally responsible is if it is deceptive. If the subject is not aware of the recipient's conditions (e.g. the condition "if you use the website then certain data will be collected"), then the recipient holds some moral responsibility. Not only can ignorance be a serious internal constraint—as discussed in the freedom chapter, if I believe absolutely that the door is locked, I am as unfree to leave as I would be if the door actually was locked—but worse, this ignorance is not incidental; it is induced. Privacy policies are articulated in confusing language that obscures the real exchange taking place.<sup>124</sup> The founder of Disconnect, a tracking prevention tool, echoes this concern: "We're trading information we don't even understand for Internet products. If we don't even know what's happening, it's hard to assess the risk."<sup>125</sup> It is generally agreed that an uninformed choice is not a free choice—but according to the moral responsibility definition of constraints, only deliberately imposed misinformation or confusion can cause unfreedom. The incentives surrounding digital information collection and the propensity to deceive fulfill even this more demanding requirement.

Other features of this kind of information collection, particularly *mobility* and *quantity*, indicate the very limited control in the hands of the subject. Even if I know that I have willingly shared data with one site's intelligence, it can very easily spread elsewhere against my will. Nissbaum refers to this as a change in information *mobility*—not only is more data collected about more people in general because of technology, but the recipients of that information form an expanding and indiscriminate pool. For instance, "runaway data" refers to "personal information collected under one privacy policy" that is distributed elsewhere, becoming

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<sup>124</sup> Auerbach, "You Are," 33.

<sup>125</sup> Cited in *Ibid*, 33.

impossible to withdraw or destroy.<sup>126</sup> Information can also be matched from multiple sources in order to yield “new” information that the subject never agreed to share. This is how data is deanonymized: by matching up data sets, a company can determine the actual identity of the subjects of initially “anonymous” information.<sup>127</sup> Plenty of incentives exist for companies to use this method. Credit agencies have expanded into “fourth bureau” credit agencies that are not bound by usual regulations; they can therefore use a wider pool of data to make ratings—and not tell you about the data they use.<sup>128</sup> Health insurance companies can deduce a great deal about your personal health from the things you “like” on Facebook, the things you buy on Amazon, the things you search on Google, and the Internet sites you visit.<sup>129</sup> So not only does the ease of digital mobility render us mostly unable to control our information, but the sheer amount of digital information is enough for simple computer programs to produce *more* information—*new* information that we never meant to release.

### C. “Nudging” and Free Will

Companies have profit incentives to use these features of mobility and quantity to their advantage, by accessing and aggregating great amounts of data for individuals and entire groups. This enables companies to adjust their own targeting practices. But they also have incentives to shift the desired change onto the consumer, and use that data to “nudge” consumers toward particular choices. I argue here that the unpredictability of our behavior is an important part of freedom. But predictability is profitable. Moreover, certain predictions are more profitable than others.

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<sup>126</sup> Ibid, 32.

<sup>127</sup> Ibid, 33.

<sup>128</sup> Ibid, 32.

<sup>129</sup> Ibid, 32.

Let's start with the first of these ideas: unpredictability is important to freedom. Understanding this requires a brief excursion into the metaphysical debate on free will. If actions can be perfectly predicted, then they are generally thought to be determined; determinists hold, then, that this is true about our world. The classic problem of free will is whether and how we can act of our own free will (and, in many accounts, be held responsible for actions) in a deterministic world. There are two concepts of free will, both intimately connected with the notion of control, used to address this problem. One idea of free will is that in order to have control over actions, one must be able to choose between alternatives; this importantly requires the presence of alternatives and the possibility of choosing them.<sup>130</sup> At any particular moment there must be more than one possible future, and an agent is able to control which of them is realized. Another idea of control over action simply requires the individual to be the "ultimate source" of her actions.<sup>131</sup> To be the ultimate source of action is to have the necessary conditions that bring about action originate in the individual. This differs from the previous notion of free will because it does not require the presence of alternatives, nor does it hold those alternatives to be sufficient components for free will.

What does it mean for actions to be unpredictable? Another way of putting this would say that actions are not determined ahead of time, for only determined actions could be perfectly predicted. Some have argued that even if actions are determined, one of these notions of free will can survive. This is the general position of compatibilists. Classical compatibilists have generally tried to show that the ability to do otherwise is not incompatible with determinism, thus defending the first notion of free will and rejecting a determinism defined by the inability to act otherwise. Classical compatibilist adopt the strategy to frame these alternative actions as

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<sup>130</sup> Michael McKenna, "Compatibilism," *The Stanford Encyclopedia of Philosophy*, Winter 2009, accessed March 11, 2013, <http://plato.stanford.edu/archives/win2009/entries/compatibilism/>, 2.1.

<sup>131</sup> *Ibid.*, 2.2.

conditionals; e.g. *if* I had wanted to move, I could have moved.<sup>132</sup> The problem is that “conditional statements sometimes yielded the improper result that a person was able to do otherwise even though it was clear at the time the person acted, she had no such alternative.”<sup>133</sup> More specifically, the problem is that our desires often could not have been otherwise; they are in part psychologically determined. This is important because the failure of the conditional analysis suggests that we cannot have free will if our actions are determined.

But there have been several other compatibilist responses beyond this classical one. Dennett’s contemporary response to incompatibilists is particularly relevant here because of his focus on the predictability of determined actions. Dennett’s theory says that we can take “stances” toward individual things, and that multiple stances can be taken at once. One is the intentional stance, which supposes the thing is an intentional being with beliefs, desires, etc. Whenever it is utile to adopt this stance (i.e. whenever it helps us predict behavior and interact) we adopt it.<sup>134</sup> Similarly, we ascribe moral responsibility to creatures (thus, adopting the “personal stance”) if it “pays off” to do so.<sup>135</sup> Determinism, for Dennett, is represented by the “physical stance,” which observes systems by their physical components. But it is not as utile to take the physical stance toward extremely complicated systems, such as human beings, and it is more utile to take these higher stances. It is important to note that Dennett’s compatibilism is indicative of his broader, methodological compatibilism: he thinks philosophy and science work alongside and with each other to pursue truth about the world. His approach to free will thus engages with evolutionary theory. Given the pressures of evolution, he argues, human beings evolved to have minds with free will and morality; again, only because it was utile to have these

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<sup>132</sup> Ibid, 3.

<sup>133</sup> Ibid, 3.3.

<sup>134</sup> Ibid, 5.2.1.

<sup>135</sup> Ibid, 5.2.2.

abilities.<sup>136</sup> To put it very simply, if we are completely determined and our actions are perfectly predictable, other beings would always know our next move, and that is not conducive to survival in a competitive world. He thus presents a contemporary compatibilist view.

How does this relate to digital information collection? The incentive to nudge actions toward whatever is predicted by a pattern presents itself in descriptive and predictive information collection. These collectors—companies whose business *is* the collection—not only extract information to predict behavior, but to make it more likely the original prediction will come true—i.e. they use it to manipulate conditions to play into the predispositions the data patterns reveal. Importantly, the goal is not any action in particular, but instead any kind of action that would be predicted. If Dennett is right about freedom existing to grant us unpredictability, even if determinism does not necessitate our unfreedom, we are still left with significantly damaged freedom simply because of the “nudged” predictability of our actions.

Not only is predictability in general profitable, but certain predictions are more profitable. This is why advertising companies then purchase aggregated information from these collectors. There are three types of activities in which they may then engage, which I will call “welfare-tracking,” “preference-tracking,” and “mis-tracking.”<sup>137</sup> These each describe tracking for the purpose of “nudging” consumers toward a particular set of actions. Welfare-tracking would, theoretically, nudge people toward actions that are good for them—healthy nutrition, maybe, or fulfilling careers. This is not particularly likely to happen, as profit-driven companies have no incentive to do this. Preference-tracking would nudge people toward actions they would like to do; it might, for instance, connect the means to achieve a desired action to the right actor by suggesting certain items or opportunities. This method would strengthen predictability (you are

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<sup>136</sup> Daniel C. Dennett, *Freedom Evolves*, (New York: Penguin Group, 2003), 13.

<sup>137</sup> This idea of distinctions is from Cummiskey.

more likely to do something that has some basis in desires) and can also be used to make specific products or actions more appealing. Finally, mis-tracking would misidentify preferences and target consumers incorrectly. This happens all the time, when Google searches do not reflect preferences, but instead random whims.

How we feel about each of these tracking types may differ, but should not differ because of changes in freedom. Sen might say that welfare-tracking or even preference-tracking enhance, rather than diminish our freedom. But this assumes that we can rank an action's contribution to freedom by some metric other than freedom itself; this, as we saw in the freedom chapter, is not a feasible task. Even though mis-tracking is annoying to the recipient and futile to the provider, if the information is collected by the same action of the collector it must reduce freedom to the same extent as the other kinds of tracking do. Advertising techniques that use descriptive and predictive information collection impact freedom to the same extent, regardless of the convergence of outcome and preferences.

If preference-tracking adjusts options so that the advertiser's preferred option for a consumer is more likely to be taken (again, this is likely true, because you are not likely to choose the outcome of mis-tracking), we might even say that, according to the nudging analysis, preference-tracking reduces freedom to a greater extent than mis-tracking. But this is not because of the difference in preferences. It just so happens that when options align with our preferences we are more likely to choose them. The real reason we would draw this conclusion is because we think nudging is harmful for freedom; that in this case nudging is more effective because of its use of preferences is a contingent fact.

One objection to this argument that digital information collection reduces our freedom may hold that there is nothing unique about these changes in advertising techniques—since

advertisers could choose the shows during which they bought commercial time, companies have targeted particular audiences with the intention of making favorable market behavior more likely. This is certainly true, but also not a reason against my criticism here. If there is something wrong with an action at one degree, and whatever is wrong is intensified and expanded at the second degree, then it can still be condemned. In other words, the non-uniqueness of digital information collectors is not a reason to absolve them of the problems they worsen by their tactics. Furthermore, though, the primary problem I've identified with these information collectors is not even advertising's persuasive element, but instead, its combined predictive and manipulative element that seeks to both read ahead to and write an agent's next page.

The problems with nudging through data collection are emblematic of problems with capitalism in general. The economic system "for the free" rewards those with the sense to manipulate preferences according to what is optimal. Desires for profit, efficiency, and short-cuts become the only ones recognizable—desires for the inefficient, for the altruistic ("why would anyone help the aged, the sick?") become deviant, unexplainable by the capitalist paradigm. The false belief that we have found a way to optimize freedom by inventing an idea of property and selling it endlessly to one another is the self-imposed constraint-that-keeps-on-constraining. Capitalism's expansion of freedom of choice contributes to overall freedom to the extent the prisoner's infinite toothpaste options render him free. What is worse—we are perpetually nudged to believe the eventual selection ("Crest!") is some meaningful expression of will. The fact that the newest tool in the capitalist's toolbox is to violate privacy, to collect absurdly massive amounts of behavioral data, in order to control what we desire and what we do, should not be surprising development, but a logical next step.

#### *D. Conclusion*

Technology has enabled dramatic advancements in commercial enterprise, including the power to target advertising at particular customers using wide-reaching consumer data. This data collection, I have argued, violates privacy. To prove this, I showed how private companies have profit incentives to take over the control of personal information by either coercion or deception. These tactics serve to make it impossible for individuals to maintain control of their information. Furthermore, the “descriptive and predictive” nature of these information collectors makes subjects less free as a result of their collection. Invading privacy is profitable for them because in doing so, the unpredictability of human freedom can be circumvented—they can get inside people’s heads and direct them toward certain decisions they otherwise would not have made. The freedom of choice, and thus, the development of individuality, afforded by the Internet is a liability to Internet companies, and so that freedom of choice is chipped away—narrowed to a convenient selection of choices where a decision can be predetermined. Privacy protects this freedom, and so, companies that want to control our “choices” have every incentive to violate privacy. When respected, privacy protects our personal information—including our preferences—so it cannot be used against us to control our choices. By violating privacy, descriptive and predictive data collection serves to usurp this control.

#### IV. Privacy and Government Surveillance

The incentives regulating behavior in the commercial sphere are profit-seeking. Predictable choices have inflated value, so freedom of choice is restricted to increase accuracy of predictions and the profitability of those predicted actions. The incentives regulating behavior of

government agencies are quite different. Government agencies have incentives to maintain order and security, usually through enforcing the rule of law, but not always.

*A. Background: Government Tracking and How It Is Used*

The U.S.'s privacy protections are often criticized internationally—especially by the European Union—for being too weak.<sup>138</sup> The EU can point to the Universal Declaration of Human Rights, where in Article 12 privacy is included among human rights.<sup>139</sup> In what ways does the U.S. lag behind international standards on privacy? Its legal infrastructure regulating information transmission is underdeveloped. Auerbach says that this deficit leaves “self-policing” as the only order, “which is to say there’s no order at all.”<sup>140</sup> Regulations are generally left to individual companies in establishing privacy policies, and individual users are left to navigate these policies for themselves. This contrasts with EU policy, which imposes certain privacy restriction that individuals cannot opt out of.<sup>141</sup> It is not clear we should consider these kinds of restrictions as privacy-protecting under the control definition. To be in a state of privacy, one must be able to *choose* how much information another accesses. If these restrictions address the kinds of coercive situations discussed previously, though, then they would be privacy-enhancing. But more interesting than the way the government uses coercive legal power to affect information transmission between private parties is how it itself interacts with these parties in extracting information for its own use.

Tracking devices have opened up interesting questions concerning the relation between technology, privacy, and the law. Some car companies build in systems that monitor speed, seatbelt use, and breaks of a car, which have been controversial when they are used in courts to

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<sup>138</sup> Anita Allen, *Unpopular Privacy: What Must We Hide?* (New York: Oxford University Press, 2011), 159.

<sup>139</sup> *Ibid.*, 159.

<sup>140</sup> Auerbach, “You Are,” 34.

<sup>141</sup> Allen, “Unpopular,” 158.

assign blame.<sup>142</sup> When government officials in D.C. tracked a man's car with a global positioning system without a warrant, the Supreme Court ruled that the government had violated the Fourth Amendment, which protects citizens from "unreasonable searches and seizures" and has been interpreted more broadly to protect the "reasonable expectation of privacy."<sup>143</sup> Justice Scalia's majority opinion cites the evolution of interpretation of the Fourth Amendment beyond a mere physical transgression, to less visible invasions, such as those through wiretapping telephone calls.<sup>144</sup> But judicial action can only restrict a government that gets caught. The recent blow-up of the full extent of the NSA surveillance program will be the focus of this section. What exactly does the NSA do that has inspired such discomfort and outrage?

The NSA's means of information collection is inextricably tied to the previous discussion on commercial advertising. Snowden's leak provided the details on three NSA programs (although the basis of these had been known to some extent before his leak). The first takes "telephony metadata" from telecommunication companies, which does not include content but does include much information about "callers' identity, location, and social networks."<sup>145</sup> Secondly, the PRISM program takes information from companies such as Google and Facebook, and includes data from "audio and video chats, photographs, e-mails, documents, and connection logs."<sup>146</sup> Third, XKeyscore offers analyst resources for interpreting this metadata.<sup>147</sup> "Fusion centers" are set up around the country, where the government and private companies can collaborate over their data collection.<sup>148</sup>

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<sup>142</sup> Nissbaum, "Privacy," 26.

<sup>143</sup> *United States v. Jones*, 132 S. Ct. 949, (2012).

<sup>144</sup> *Ibid*, 5.

<sup>145</sup> David Gray and Danielle Citron, "The Right to Quantitative Privacy," *Minnesota Law Review* 98 (2013): 64.

<sup>146</sup> *Ibid*, 64.

<sup>147</sup> *Ibid*, 64.

<sup>148</sup> *Ibid*, 67.

How exactly this data is used is still a matter of much speculation. This, however, should not imply the data is not or cannot be used in the ways speculation has imagined. The feared implications of this kind of government data collection can be divided into two groups. The first is comprised of concerns for equality. Lanier discusses the possibility for “targeted repression” where certain people, because of their political affiliation, national origin, or race, are targeted.<sup>149</sup> The real danger, for this group, is not only whose privacy the government finds it acceptable to invade, but after widespread invasion, whose actions the government finds it necessary to repress. The second group of implications is comprised of liberty concerns, where I will focus. First, I look at how programs like PRISM invade privacy, and second, how these invasions impact freedom.

### *B. Impact on Privacy*

Privacy is lost when the subject loses control of her information. The way technology expands the quantity, mobility, and aggregation of personal information collection exacerbates the wrongness of ordinary privacy violations, as discussed in the commercial section. In the context of the government’s use of these same tools—where we have changed the nature of the information recipient—it helps to view the issue through the lens of the Constitution. Gray and Citron, in analyzing the *Jones* case, note that at least five justices made their decision in part because “citizens possess a Fourth Amendment right to expect that certain quantities of information about them will remain private, even if they have no such expectations with respect to any of the discrete particulars of that information.”<sup>150</sup> In other words, it is not necessarily *what* information is (wrongly) accessed that determines the extent of the privacy violation, but

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<sup>149</sup> Jaron Lanier, “The Meta Question: What is the National Security Agency doing with your metadata?” *The Nation* 297 (2013): 23.

<sup>150</sup> Gray and Citron, “The Right,” 68.

*how much* information is accessed. The work of Grey and Citron mostly responds to this argument, specifying how quantities of information can be determined as surpassing the acceptable limit of the Fourth Amendment. They notice that the Fourth Amendment is invoked whenever the government seems to have intervened “too much.”<sup>151</sup> Since the information obtained is nearly impossible to quantify, in order to draw a bright line we ought to look at *how* the information is obtained.<sup>152</sup> Because of its capacity for “broad and indiscriminate surveillance,” they argue that technology is a reliable indicator of Fourth Amendment violations.<sup>153</sup> Our “reasonable expectations of quantitative privacy” are breached.<sup>154</sup>

Privacy violations can be somewhat inferred and measured by the quantity of information to which the government gains access. Perhaps this conclusion would lead one to opt for an “access definition” of privacy: we have lost privacy when a certain amount of information is accessed. But I think the control one still holds more explanatory power. We have not lost privacy by the fact that the government has information on us, for our family or phone companies might have that information, and we would not feel invaded. The quantity collected impacts privacy because it is nearly impossible to maintain control when such a large amount of information is first, recorded, and second, distributed. The quantity of information technology deals with *indicates* a problem; it does not present a problem *itself*. Turning next to the impact on freedom I show that significant control has been lost, and that this is what is primarily wrong.

### *C. Impact on Freedom*

As we have previously, in order to understand the unfreedom resulting from government surveillance we have to identify the relevant *Y* and *Z* variables from MacCallum’s triadic

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<sup>151</sup> Ibid, 71.

<sup>152</sup> Ibid, 71.

<sup>153</sup> Ibid, 72.

<sup>154</sup> Ibid, 72.

relation. First, is there any constraint *Y*? One way to find it would be to identify moral responsibility on the part of the government. As was true for corporations, the government's moral responsibility becomes apparent at the point that it deceives citizens with *secret* surveillance programs. Richards, in enumerating what he views as necessary changes to government surveillance, includes as a condition that it cannot be secretive.<sup>155</sup> That knowledge of a program increases the privacy of those subject to it is consistent with and supported by the control definition—we lose some additional control if we do not know our information is being accessed. Recall from the first chapter the man on the island. The reason the control definition of privacy prevails over competing definitions is that the man preserves more privacy when he is aware of the island's ubiquitous surveillance. He has gained marginally more control over the situation, and therefore is able to maximize his privacy within his unfortunate context.

More obviously, perhaps, the constraints governments impose are legal sanctions. In our case, this can be understood as the ability to punish the watched for certain actions revealed during surveillance. Evidence suggests that exercising the power of legal punishment is a primary motivation in conducting extralegal surveillance. In *Jones*, for example, the government tracked Jones in order to collect evidence about his drug dealing. If there is any unfreedom resulting from subjection to legal sanctions (even prior to their actualization), then there is a reduction of freedom here, for sanctions are much more likely to occur when one's every move is being watched. But many freedom theorists would not say that the legal sanctions reduce freedom, presumably because there is no moral responsibility on the part of the government in imposing punishment in defense of a publicly declared law. However, I would say that if the

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<sup>155</sup> Neil M. Richards, "The Dangers of Surveillance," *The Harvard Law Review* 126 (2013): 1935.

means of exacting punishment—even at the level of collecting information for trial—is deceptive, then the resulting punishment is unjust.<sup>156</sup>

The republican conception of unfreedom as domination and dependence also helps characterize the nature of the constraint in the case of government surveillance. Even if no legal sanctions are ever imposed using illegally collected evidence, the constant threat that they *can* be imposed renders the subject unfree. This, however, presupposes that the subject possesses some knowledge of the domination. But this is usually true in cases of mass surveillance—subjects hear rumors of the broad program, even if they are left in the dark about details. This seems to get at what one concern in the “equality” group raises: that privacy violations are essentially wrong because of the “power dynamic between the watcher and the watched,” which is risky because it enables discrimination, or, the “selective enforcement” of law.<sup>157</sup> This concern is not wholly separate from concerns in the “liberty” group—the threat of selective enforcement constitutes a constraint according to the republican conception of freedom.

Since explanation via the republican conception presupposes knowledge of surveillance, one might object here that I cannot have it both ways: I cannot say that the government imposes a constraint on action through its moral responsibility for deception which renders the subject unfree, *and* that the government imposes a constraint on action through its moral responsibility for intimidation. Deception is wrong because it very obviously diminishes our control. When we are deceived we are instilled with a certain set of expectations because they are false—the

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<sup>156</sup> This expresses the same message as the distinction between criminal justice and procedural justice (Cummiskey, comment). We have one interest to catch the guilty and punish them accordingly, but a separate and often competing interest to catch them in a just manner. The Fourth Amendment, by codifying this latter interest, constrains the pursuit of the former. The difference between an access and a control conception of privacy is analogous to this distinction. The access definition is concerned with outcome; we are in a state of privacy if others’ access to a certain amount of information is restricted. The control definition is concerned with process; we are in a state of privacy when we maintain control over the ways others gain access to our information, regardless of how much access they eventually obtain.

<sup>157</sup> Richards, “The Dangers,” 1935.

deceiver is given more room to act because we have lost control over the situation by acting according to false expectations. On the other hand, intimidation is wrong because it coerces us to present our information in certain, strategic ways that disallow the expression we would ordinarily desire. Both are wrong in these cases because of their impact on control; it is not as central to my argument that I choose which one of these constraints is present more often. Moreover, the reality of government surveillance is often that both features of deceit and intimidation are present at once. People may know the government is collecting information, but be in the dark as to *how*. They are intimidated and lose security of freedom *and* are deceived and lose control of information precisely because of the vagueness of their knowledge.

What actions *Z* do we lose freedom to perform? If one thinks legal sanctions following extralegal violations reduce freedom, then one becomes less free to do illegal things in a watching state. More importantly, though, the feeling of domination “chill[s] the exercise of our civil liberties.”<sup>158</sup> This “chilling effect” is widely referenced in literature about surveillance. There are many other reasons why the chilling effect is harmful—it reduces the intellectual diversity of a pluralist society, for instance—but it seems to me that it is primarily wrong because “chilled” people are unfree to do a great many things. The extent and importance of those things may not be measurable, but it is perhaps for that very reason that we sense a severe violation. The difficulty in ordering *Zs* by value was thoroughly discussed in the freedom chapter; here, I suggest further that it is this difficulty itself that ought to propel us to condemn such government surveillance. This is not a new idea, but instead, a re-articulation of what is expressed every time someone defends the range of things we refer to as “civil liberties.” The result of indiscriminate data collection by the government is a threat of pernicious discrimination and a significantly repressed sense of overall freedom.

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<sup>158</sup> Ibid, 1935.

#### *D. Objections*

There are a few possible objections to this argument that surveillance limits control. The first appeals to preferences, and might apply to the commercial section as well: perhaps people prefer fewer choices, or perhaps they prefer security. If they prefer the benefits of being watched to the benefits of being let alone, then can we really say they have lost freedom? I think we can, because it *is* possible to desire less freedom. First, people can choose to sacrifice freedom for other values, such as security, but freedom is indisputably traded-off in such cases. Second, there is a significant difference between preferring an outcome and having control over whether that outcome is brought about. This connects to the earlier discussion on Sen's contention with the control view of freedom. Control is not necessary for freedom, he says, because often we can give others control of the means by which our decision is actualized. According to Sen, this is indirect control, which cannot be included under the control conception of freedom. To this I responded: that person has lost some freedom by choosing to lose control of the means of actualizing their decision, but they are not wholly unfree because they did have control at a higher level.

This brings me to the second objection: people can choose to be susceptible to tracking, or vote to grant their government the right to surveillance, or maybe—because increasingly it is democratically elected governments doing the watching—the mere fact of democracy precludes the possibility that freedom is reduced. I have two responses. First, as we saw in *Henningsen*, not all “free” contracts are really free. There is a distinction to be made between freedom of contract and fairness of contract. Some contracts are made freely, i.e. parties “sign” on non-fraudulently, but not fairly. One condition for unfairness is if the context of the signing is coercive, as it was determined to be in *Henningsen*. It is clear to me that democratic choices can be coerced. Say,

for instance, a government devotes much propaganda to instilling fear of terrorism into the populous. In that case, the populous may feel as if it has *no choice* but to trade-off their freedom for security. It is important to specify why we tend to care about consent. If one holds the belief that consent only changes the justness of a situation because it indicates what the consenting party desires, then recognizing that desires can be manipulated or coerced compels one to say that the same is true of a “free” decision. But more importantly, there is a difference between consent and control. Consent is an initial expression of control, but “control” refers to a much more sustainable state of preserving a consensual existence. True control requires periodic and continuing affirmation of consent. This is not to say that consent does not contribute to freedom; rather, it contributes to a minimal amount of freedom, and control contributes something else.

#### *E. Conclusion*

Governments, like corporations and with their help, violate our privacy and in doing so, reduce our freedom. But they do so in ways distinct from the private sphere. Some of the constraints imposed are more awful because it is a government imposing them. Deception, for example, is wrong in general, but particularly wrong for a democratic government, for most people agree that democratic governments are bound by some obligation to transparency—if not in all matters of national security, then at least in domestic surveillance. The unique power of the government to impose legal sanctions raises the costs of targeted repression, which is facilitated by widespread surveillance. This kind of constraint also targets our security of freedom, for the experience of intimidation chills civil liberties.

## V. Conclusion

Nissbaum might say that a government, in conducting secret surveillance, violates the contextual integrity of the situation given the roles of a government, the nature of metadata as private information, and a certain transmission principle. Even if the transmission principle is “consent”—i.e. in order to preserve contextual integrity consent of the subject of information must be respected—something is missing from this approach. When Nissbaum says “whether or not control is appropriate depends on the context,” she presupposes that those involved are aware of the informational norms regulating the particular context. But as we have said, that awareness is a kind of control. Just like the man on the desert island, the people keep more control—and more privacy—if they are aware of the cameras in the trees, the recordings taken of their Internet behavior. In other words, the context definition Nissbaum offers is set in a presumption of control in both the commercial and surveillance cases.

The way we interpret and condemn commercial data extraction cannot be wholly separated from our approach to government surveillance, for the power of the Internet and digital information ties the two together. Outrage over the NSA programs exploded when people learned how private companies were handing over huge quantities of consumer information to the NSA. The controversy seemed not so much about whether it was wrong, but which party was more to blame. This chapter has aimed to articulate why it is that both parties are eligible for considerable blame, for distinct but related reasons. Whether motivated by profit or power, the goal is to usurp control that rightly belongs in the people—over their information, over their choices.

## Conclusion

Months after the first NSA leak, citizens everywhere continue to question the security of their rights and freedoms under democratic governments. The intuitive reaction we feel is powerful; it spurs new articulations of old political problems. Many of these questions are directed at the competing values at stake and when privacy and freedom should take priority. It is by no means clear how various reactions should be reconciled, or how diverse interests should be weighed. While this work has brought conceptual shape to amorphous intuitions, and developed the justification behind a *prima facie* reason to protect privacy, it does not pretend draw conclusions about how this reason interacts with other compelling ones.

As a consequence of these limitations, several considerations remain. Is there any level at which Americans should accept the NSA's domestic surveillance? When do our interests for security outweigh our interests for privacy and freedom? When do our interests for online convenience outweigh? Certainly, it does not follow from any of these conceptual arguments that we should place privacy *or* freedom on an untouchable pedestal. Just as the threats and opportunities of the digital age assign philosophers with the responsibility to rework and reapply old ideas and concepts, so do they require a reworking of principles guiding moral decision-making. For instance, while I have discussed a conceptual understanding of an infringement (as opposed to a violation), I have not developed a method for identifying one. In many cases where I have spoken of a violation, additional work on the competing principles at play may reveal it to be a justified infringement. I anticipate this additional work on informational rights will, in the wake of the NSA leaks, be highly contentious—indicative, then, of the nation-wide debate.

The very fact that these questions are difficult should remind us of the importance of doing the prior, conceptual work. Moreover, though, that fact lends additional support to the

control conceptions of both privacy and freedom. The access definition of privacy measures it by the degree to which others access your information. How does one measure how much a piece of information contributes to privacy? How does one determine how these pieces add up, and at what point privacy is lost? If we believe that the owner of personal information has some role in answering these questions, we cannot simultaneously hold the access definition without contradiction. The difficulty in judging the NSA violation, evidenced by national dialogue, indicates that there is no way to externally catalog the importance of different kinds of information. Whenever we assign individuals any “say” in this, we are automatically working within the control definition.

Similarly, how do you determine how much an action contributes to freedom? We have seen theorists, such as Sen, suggest that we can measure this by metrics like well-being. But then what would distinguish freedom from other values? The reason it is interesting to have a concept of freedom at all is because we do not know what individuals will do with it. To be free is to be able to take actions according to a diverse set of values—sometimes messy, mutually exclusive values—and in doing so, both express and discover what is important. This can only be measured by the absence of constraints on the control of action, for no measurer will be able to decide which actions there are and which ones matter more. Even if they could, they would then be measuring something else altogether, and they will have left freedom far behind.

In applying conceptions of privacy as control and freedom as control to informational transactions, we indicate agreement with Nissbaum that context is important. Indeed, the force of her claim seems to lie behind the desire to apply our concepts to the digital realm at all. I have insisted, though, that when we say that contextual principles are important, what we intend to say is that knowledge of contextual principles is important. The knowledge that a context has

changed things—that when I use the Internet, for instance, my consent to information extraction is presumed—grants me crucial control. Transparency in the NSA is a requisite quality for a government that respects privacy and freedom, for deception strips citizens of control in the most basic sense. This fundamental loss of control drives our instinctive outrage. One cannot say that a government with an identical, but transparent, program would have committed the same violation, and this is the absurd conclusion the access definition yields. Even if under the NSA programs we were able to carry on with all the actions we desired—and all the actions any reasonable person would desire—it is clearly strange to say there is no diminishment in our sense of overall freedom. Only a nuanced theory of negative liberty that accounts for the variety of possible constraints can explain this well-perceived reduction in freedom.

This brings me to a final point. Why is it important to talk about the connection between privacy and freedom now? In one sense, we might say that because of the tumultuousness of informational norms in the digital age we would be well-advised to wait, and return to these issues with the benefit of hindsight guiding conceptual clarity. But I think there is no reason that philosophy cannot be cutting-edge; and there are compelling reasons for it to be. Most obviously, I have argued for why conceptual work enables us to think about and solve serious political and ethical problems. More specifically, though, the problems over privacy and informational rights are of an especially pressing sort. Privacy violations take something that cannot be given back—the damage is, by definition, irreversible. If I am right that there is a deep connection between privacy and freedom, and violations in privacy are wrong for their destruction to freedom, then the threat is self-sustaining. As we undergo privacy violations, the freedom we could have used to improve our unfortunate state is narrowed to a frightening slice of what it was. For this reason

there could not be a greater imperative to think about privacy and freedom, and choose what we want to defend.

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