

THE INTERNET AND INEQUALITY: A COMMENT ON THE NSA SPYING SCANDAL

*Shannon Gilreath**

INTRODUCTION

In this Essay, I have three principal aims. First, I reconceptualize what is really at stake in the debate over the collection and storage of the personal information of Internet users, particularly in the context of the large-scale surveillance of Americans by the U.S. government, recently revealed by former National Security Agency (“NSA”) contractor Edward Snowden.¹ I

* Associate Professor of Law and Associate Professor of Women’s, Gender, and Sexuality Studies, Wake Forest University. This Essay is an expanded version of remarks prepared for two live events, “Regulating Privacy on the Internet,” held at Wake Forest University, from which this symposium issue of the *Wake Forest Law Review* emerged, and “Being Social: The Effects of Social Media on Our Lives,” held at the University of Quebec at Montreal. Before the Wake Forest symposium, it had not occurred to me to write about the question of inequality, which I have been writing about for some time, from this perspective. I thank Professor Alexander Tsesis, (Loyola-Chicago law school) for inventing this symposium and for inviting me to contribute to it. I am particularly proud that Wake Forest could give it a home. In addition to my fellow scholar-participants, from whom I have learned a great deal about the mysteries—and power—of the Internet, I would like to thank Linda Boss and Doug Winn, the *Wake Forest Law Review*’s symposium editors, for the terrific job they did coordinating the event and the published issue. I am also grateful to Sébastien Jodoin (Yale University) and Mélanie Millette (U. Quebec at Montreal) for inviting me to speak at the event in Canada. Thanks, as always, to the staff of the Wake Forest University law library, especially Liz Johnson and Kate Irwin-Smiler for research assistance, and to my student research assistants Chris DiGirolamo and Kevin Flanigan.

1. The information about U.S. government spying at home and abroad, with which Edward Snowden absconded, has been made public serially, primarily by the journalist Glenn Greenwald in publications for the *Guardian*. See, e.g., Glenn Greenwald, *XKeyscore: NSA Tool Collects “Nearly Everything a User Does on the Internet,”* THEGUARDIAN (July 31, 2013, 8:56 AM), <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>; Glenn Greenwald & Spencer Ackerman, *NSA Collected US Email Records in Bulk for More than Two Years Under Obama*, THEGUARDIAN (June 27, 2013, 11:20 AM), <http://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorized-obama>; Glenn Greenwald & Ewen MacAskill, *Boundless Informant: The NSA’s Secret Tool to Track Global Surveillance Data*, THEGUARDIAN (June 11, 2013, 9:00 AM), <http://www.theguardian.com/world/2013/jun/08/nsa-boundless>

am suggesting in this Essay that privacy is not an adequate paradigm for understanding what is at stake in the question of government electronic surveillance. Instead, I believe what is really at stake, if the NSA spying program goes unchecked, is nothing short of the American commitment to equality itself.² Second, I endeavor to frame the risk, thus identified, in terms of a historical and continuing technologization of oppression in the name of national security. Finally, I outline some strategies for intervention and resistance. While I use the particular dangers posed to Gays³ (the people about whom and for whom I always write) to prove my argument, the insights I provide here are relevant to all vulnerable minorities, all of whom have much to lose as the State's oppressive capabilities increase exponentially via the Internet.

I. WHY THE PRIVACY PARADIGM IS AN INADEQUATE COMPREHENSION OF THE RISK

It is of course quite right to say that a massive spying program waged against American citizens by their own government compromises a commitment to privacy that most Americans believe "We the People" share. Americans grow up believing that we are

-informant-global-datamining; Glenn Greenwald & Ewen MacAskill, *NSA PRISM Program Taps in to User Data of Apple, Google and Others*, THEGUARDIAN (June 6, 2013, 9:00 AM), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

2. So far, little effort has been taken to roll back NSA excesses. See Ken Dilanian & Michael A. Memoli, *House Defeats Bid to Curtail NSA's Collection of Phone Records*, L.A. TIMES (July 24, 2013, 4:32 PM), <http://www.latimes.com/news/politics/la-pn-nsa-phone-records-20130724,0,4189767.story#axzz2meFcxOIs>. As this Essay goes to press, and as a direct consequence of the public attention generated by Edward Snowden's disclosures, President Obama has announced his intention to make some changes to surveillance practices. Obama's proposed changes amount to little more than cosmetic adjustments, and they dramatically downplay the risks inherent in NSA surveillance. Principally, the President's changes apply only to limiting access to phone data and changing some of the rules with regard to how foreigners are surveilled. Most NSA programs remain unaltered. See, e.g., Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. TIMES, Jan. 15, 2014, at A1; Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES, Mar. 24, 2014, at A1. The proposed reforms fall far short of even those suggestions made by The President's Review Group on Intelligence and Communications Technologies. That group, whose members were appointed by President Obama, suggested more sweeping changes, which the President has ignored. See THE PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMM'NS TECHN., OFFICE OF THE PRESIDENT, LIBERTY AND SECURITY IN A CHANGING WORLD 24-42 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf. Various congressional proposals are also taking shape. See Savage, *supra*, at A1.

3. As has been my convention for some time, in this Essay, I capitalize the word Gay, because I believe the word refers to more than simply sexual orientation. It refers to a people with a history and a culture.

entitled to a personal life. Because a personal life can only be had in private, at least to some degree, we also grow up believing that we have a right to our privacy. And all of us have some vague notion, quite early on, that there are legal guarantees that ensure that privacy. The reality in this country is that the law does not do very much to thwart an aggressive and often irresponsible press from pursuing the private lives of individuals.⁴ But Americans generally do not care about such things unless they themselves are intruded on. Whatever may be the case with the press, most Americans believe that the government—especially the government—is not and should not be tapping their phone calls or reading their mail. That is fascist or communist, or both. It is decidedly un-American. Americans, among the most voyeuristic of the world's peoples,⁵ value our privacy.

In this Essay, however, I am suggesting that privacy is not at all adequate in terms of understanding what is really at stake in the question of electronic surveillance by the government. In doing this, I in no way intend to cast aspersions on the work of those scholars writing about privacy exclusively in the context of the Internet. I think this is a problem that must be attacked from multiple angles. I am, however, saying that focusing on privacy only in this context is to see privacy, and a normative commitment to it, operating as it

4. For an illuminating look at the development of privacy as a matter of tort law galvanized by the increasingly intrusive habits of the popular press, see Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 995–97 (2012). Given the fact that many courts now apparently believe that one's homosexuality is always a matter of public concern, Gay people are particularly vulnerable to the abuses of the press—even when they go to great lengths to compartmentalize their lives in the way straight society demands for purposes of Gays' survival. See, e.g., *Sipple v. Chronicle Publ'g Co.*, 154 Cal. Rptr. 665, 666–68 (Cal. Ct. App. 1984) (affirming summary judgment for the defendant in an action for invasion of privacy). The *San Francisco Chronicle* had published the fact that Oliver Sipple, who had saved President Ford from an assassination attempt, was Gay. *Id.* at 666. This national disclosure of Sipple's sexual identity cost him, among other things, his family, who had not known that Sipple was Gay. *Id.* at 667. The court agreed with the newspaper that Sipple's sexuality was “newsworthy,” thus defeating his tort claim. *Id.* at 668; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting) (“Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label ‘homosexual.’ That label, even though unseen, communicates a message that permits exclusion wherever he goes.”); *Hayes v. Smith*, 832 P.2d 1022, 1026 (Colo. App. 1991) (holding that the defendant’s accusation that plaintiff was homosexual, made to her employer in a conservative Christian community, could not be defamation per se).

5. Since Americans have made a television game show called “Big Brother” into a sixteen-season hit, I really believe my assertion here is a truth as close to being “self-evident,” to borrow Jefferson’s immortal phrase, as any. Nevertheless, in the spirit of the law journal citation fetishism to which we have become accustomed, see Patrick Niemeyer, *A Few Thoughts on American Voyeurism*, BERKELEY POL. REV. (Mar. 14, 2011), <http://bpr.berkeley.edu/2011/03/a-few-thoughts-on-american-voyeurism/>.

always does in legal discourse: as a shade, a mask, a distraction behind which the real, and really dangerous, issues of hierarchy and majoritarian power are in operation.⁶

If you look at the problem as a question of privacy only, you get a defense of NSA spying that goes something like this: “[T]his is just metadata. There is no content involved.”⁷ So Senator Dianne Feinstein (D-California) said, invoking the apparently talismanic properties of the very word metadata as some assurance that the government is not overreaching in its blanket surveillance of the phone calls and Internet activity of American citizens.⁸ (It is harmless, you see!) Senator Feinstein appears to believe that this thing she calls “metadata” is devoid of content. If that were really true, of course, the government would not want it.

It seems to me that most people do not know what metadata is or to what insidious uses it can be put. A combination of history and librarianship provides us an answer. First of all, exactly what is metadata? Metadata, in fact, precedes the gross electronic age. It is the descriptive term librarians, and later programmers, have used for the data that describes a particular document or record it is linked to. Linguist Geoff Nunberg describes it this way:

6. There is much feminist literature on this. In the context of Gay lives, I have put it this way:

The private, as best understood in the American tradition, has generally been where power is left alone with itself. . . . The injuries worked by the public-private distinction are subtle (to those who never experience them) and therefore must be teased out. . . . [T]ransgressing the boundary into the public has different consequences depending on the group to which one belongs. The status and prerogative of straight people in public still authoritatively constitute the definition of citizenship. For straight people on their own terms, the terms of an individual exercising nearly unfettered liberty (power), the private is a shelter. For Gays, it can be a prison where the deepest deprivations of personhood take place. Privacy rights are prime exemplars of individual rights—the mantra of both conservatism and liberalism converging in a vortex. Privacy rights can be exercised only on an individual basis, even when you are assigned to the private based on your group identity. It is a matter of no small significance, then, that the very conduct by which Gays are defined—homosexual sex—is considered, socially, politically, legally—quintessentially—private.

SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 9–10 (2011).

7. Ed O’Keefe, *Transcript: Dianne Feinstein, Saxby Chambliss Explain, Defend NSA Phone Records Program*, WASH. POST, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/06/transcript-dianne-feinstein-saxby-chambliss-explain-defend-nsa-phone-records-program/> (last updated June 6, 2013, 12:29 PM).

8. James Ball, *NSA Stores Metadata of Millions of Web Users for Up to a Year, Secret Files Show*, THE GUARDIAN (Sept. 30, 2013, 12:35 PM), <http://www.theguardian.com/world/2013/sep/30/nsa-americans-metadata-year-documents>.

It's the data you find on a card in a library catalog, or the creation date and size of a file in a folder window. It's the penciled note on the back of a snapshot: Kathleen and Ashley, Lake Charles, 1963. Or it could be the times, numbers and GPS locations attached to the calls in a phone log.⁹

By its very definition, then, metadata is used to define and to track. It is hardly devoid of content.

This essential function of metadata—what defines it as such—makes it problematic in the context of the privacy concerns most generally voiced but also with regard to the commitment to equal protection lying at the heart of the Fifth and Fourteenth Amendments.¹⁰ And the more metadata is technologized—the more dangerously efficient it becomes—the greater the risk that it will be exploited for the purpose of rendering certain targets unequal. In this Essay, then, I am interested in the Internet in relation to what I am calling the technologization of oppression—in other words, the way in which technology can be used to create inequality. For the connection of technology to inequality, we can look to history and to the literature of the history of oppression.

II. THE TECHNOLOGIZATION OF OPPRESSION AS HISTORICAL PROCESS

A. *The First Circle*

It is a single phone call—a single interaction with technology—that prompts most of the action in Aleksandr Solzhenitsyn's *The First Circle*.¹¹ State Counselor Second Rank Innokenty Volodin faces an agonizing decision: Should he place a telephone call to warn a family friend, Professor Dobroumov, that Dobroumov is under suspicion for espionage? In a real sense, Volodin is the antihero to Orwell's Big Brother-obsessed people of Oceania—whose children watched their parents night and day for the slightest hint of unorthodoxy and did not hesitate to turn them over to the Party for

9. Geoff Nunberg, *Fresh Air: Calling It 'Metadata' Doesn't Make Surveillance Less Intrusive* (Nat'l Pub. Radio broadcast June 21, 2013), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=193578367>.

10. U.S. CONST. amend. V, cl. 4; U.S. CONST. amend. XIV, § 1; see also *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (noting that the Fifth Amendment's Due Process Clause implicitly contains a prohibition against depriving an individual of equal protection). It is not only the Fifth Amendment that is relevant here. The federal government is now colluding with states and exploiting federal surveillance powers for the benefit of state and local prosecutions. See Hanni Fakhoury, *DEA and NSA Team Up to Share Intelligence, Leading to Secret Use of Surveillance in Ordinary Investigations*, ELECTRONIC FRONTIER FOUND. (Aug. 6, 2013), <https://www EFF.org/deeplinks/2013/08/dea-and-nsa-team-intelligence-launders>.

11. ALEKSANDR SOLZHENITSYN, *THE FIRST CIRCLE* 4 (Thomas P. Whitney trans., Northwestern Univ. Press ed. 1997) (1968).

discipline.¹² In an age of bureaucrats and apparatchiks, in an age of nearly total suppression and surveillance, Volodin has retained his ability for compassion. He has not become an automaton—at least not entirely. Had the indictment lying on his desk named any other professor of medicine, Volodin admits that he would not have thought twice about trying to warn him.¹³ It is the fact that Dobroumov so solicitously treated Volodin's mother when she was ill, and, especially, that he made Volodin feel special—smart, even—when he was young and insecure, that triggers in him a nostalgic loyalty.¹⁴ And so Volodin seals his fate.

Volodin recognizes, of course, that Dobroumov's telephone is probably tapped by the state security police.¹⁵ So Volodin goes to a phone booth.¹⁶ He makes the call in what he believes is anonymity.¹⁷ "Could there possibly be a way of identifying a person speaking over a public telephone—if one wasted no time and hung up and left quickly? Could they recognize a voice over the phone? Surely there was no technique for that."¹⁸

Volodin is careful. He leaves his office, takes a taxi, selects the perfect phone booth, where his back is against a wall and he can survey everything going on around him through the glass.¹⁹ Then, the unexpected happens: It is not Professor Dobroumov, but an unidentified woman—the professor's wife?—who answers the phone.²⁰ She refuses to allow Volodin to speak to the professor.²¹ "Listen to me! Listen! I have to warn him about a danger!"²² The woman becomes obstinate now.²³ She doubts Volodin is telling the truth?²⁴ He is frenzied.²⁵ He forgets and drops the affected accent he had used initially to disguise his voice.²⁶

"Listen to me, listen!" he cried in desperation. "When the professor was in Paris on his recent trip, he promised his French colleagues he would give them something! Some kind of medicine. . . . He must not do it! He must not give the foreigners anything! It could be used as a provoca—"

12. GEORGE ORWELL, 1984, at 177 (Oxford Univ. Press 1984) (1949).

13. SOLZHENITSYN, *supra* note 11, at 2.

14. *Id.*

15. *Id.*

16. *Id.* at 4.

17. *Id.*

18. *Id.* at 2.

19. *Id.* at 3–4.

20. *Id.* at 4.

21. *Id.*

22. *Id.* at 5.

23. *See id.*

24. *Id.*

25. *See id.*

26. *Id.* at 4–5.

"But—" There was a dull click and then total silence, without the usual buzzing or ringing on the line.

Someone had broken the connection.²⁷

Everything that is to come in *The First Circle* revolves around—is catalyzed by—Volodin's original assumption that technology is not capable of voice printing. Volodin's whole life is ordered around this principle. Volodin is wrong. In another world, called Mavrino, the Gulag where scientists are detained as political prisoners, scientists are at work to perfect technology to aid the total omnipresence of the security state—the very sort of technology Volodin denies is, in fact, being developed.²⁸ At the risk of spoiling a gorgeous work of literature, which, I believe, is not read often enough by enough people, Volodin is captured.²⁹ The telephone is central to his undoing. He is recorded over it twice more, in order that his voice might be compared with that of the original, forbidden phone call.³⁰ In *The First Circle*, Kate Millett explains, "Technology is of the essence."³¹

It is what distinguishes modern from earlier despotic conditions. Technology completes, even perfects the powers assumed by government, brings them toward an omnipotence previously imagined only in connection with the deity. The state now aspires to the condition of divine power, as its citizens, every day more subject, are inspired to fear and accept it with the unquestioning awe they once felt for God.

Omnipresent, God hears everything. How can this be translated into technological surveillance? The telephone is not without possibilities—given the power inherent in the control of transportation, information, and communications. Telephone records can be made available to the state that list all numbers called in or out, combined with the capacity to tap or listen in and record telephone conversations. If one were to add to this a means of identifying voices scientifically, as is the case with fingerprints, then powers of surveillance and therefore power itself would be much increased.³²

Millett, musing on *The First Circle* twenty years ago now, could not have imagined the degree to which the Internet would amplify the power of the state. Power hierarchy is exponentially expanded and perfected through technology.

27. *Id.* at 5.

28. *See id.* at 170–86.

29. *Id.* at 521–27.

30. *Id.* at 339.

31. KATE MILLETT, *THE POLITICS OF CRUELTY: AN ESSAY ON THE LITERATURE OF POLITICAL IMPRISONMENT* 27 (1994).

32. *Id.* at 27–28.

B. *Technology and the Holocaust*

Just slightly less than seventy years before Senator Feinstein, a Jew, dismissed metadata as harmless,³³ another Jew was noting its destructive powers. In December 1944, Rudolf Cheim, a Dutch Jew interned at Bergen-Belsen concentration camp, was assigned to work in the camp's Labor Service Office (*Arbeitsdienst*).³⁴ The Labor Service Office was the nerve center of the camp. What happened there was literally life and death. What happened there involved metadata, the technologization of oppression, and the direct investment of the American company IBM. IBM sold the Nazis the custom-made punch cards and tabulating machines (precursors to the modern computer) necessary to identify and track Jews for their efficient exploitation and eventual systematized murder.³⁵ Edwin Black, who first documented the IBM-Nazi nexus, summarized the system Rudolf Cheim described first-hand:

Every day, transports of slave laborers were received. Prisoners were identified by descriptive Hollerith cards, each with columns and punched holes detailing nationality, date of birth, marital status, number of children, reason for incarceration, physical characteristics, and work skills. Sixteen coded categories of prisoners were listed in columns 3 and 4, depending upon the hole position: hole 3 signified homosexual, hole 9 for anti-social, hole 12 for gypsy. Hole 8 designated a Jew. Printouts based on the cards listed the prisoners by personal code number as well.

Column 34 was labeled "Reason for Departure." Code 2 simply meant transferred to another camp for continuing labor. Natural death was coded at 3. Execution was coded 4. Suicide coded 5. The ominous code 6 designated "special handling," the term commonly understood as extermination, either in a gas chamber, by hanging, or by gunshot.

As the trains and trucks rolled in from Belgium, France, and Holland, thousands of punch cards were examined, processed, and the information fed back to the Department of Statistics at the SS Economics Office in Oranienburg. The numbered men and women were compared to a list of work needs at Bergen-Belsen and other camps. "Never a name," Cheim remember[d], "only the assigned numbers." . . . That December 1944, some 20,000 prisoners were registered; 50

33. O'Keefe, *supra* note 7 and accompanying text.

34. EDWIN BLACK, *IBM AND THE HOLOCAUST* 20 (2001). The papers of Rudolf Cheim are available. See generally RUDOLF MARTIN CHEIM, *PAPERS OF RUDOLF MARTIN CHEIM* (on file with Joodsche Raad Voor Amsterdam (Jewish Counsel of Amsterdam)). In much of the following discussion of the technologization of the Holocaust, I rely on the work of Edwin Black, which cites the translated version of Cheim's papers extensively.

35. BLACK, *supra* note 34, at 21–22.

deaths per day, on average, were recorded on the punch cards.³⁶

[T]o discover the occupational make-up of a prisoner group, each inmate's individual punch card was fed into the mechanical sorter. Then the dials were adjusted to isolate certain professions, labor skills, age groups, or language abilities needed for work battalions. If prisoners were selected for work, their names appeared on a Hollerith printout for transport to nearby sub-camps, factories, or even local farms.³⁷

Cheim detailed a system in which “[h]undreds of thousands of human beings were being identified, sorted, assigned, and transported by means of the Hollerith system. Numbers and punch cards had dehumanized them all, he thought. Numbers and punch cards would probably kill them all.”³⁸ Cheim did not understand, of course—could not have known—that the Hollerith punch card system was designed by IBM and leased to the Nazis. He could not have known that IBM provided monthly service for this system so integral to the anti-Jewish infrastructure; he could not have known that IBM trained Nazi personnel to operate the system or that the company kept back-up records in case the field system faltered and some or all of the data that ensured the efficient administration of genocide was lost.³⁹ What he did know, intimately, what he observed first-hand, was the destructive potential of metadata when leveraged by a lethal totalitarian regime against those targeted for oppression and annihilation.

III. CONTEMPORARY CONNECTIONS

I think the recent NSA surveillance quagmire should really get us asking a basic question: What is a question of inequality a question of? Rendering the Jews subhuman was not simple. Anti-Semitic persecution did not begin with the Nazis. Europe had been

36. *Id.* at 21. In 2002, Black issued an updated version of this book, with additional, stronger evidence that IBM's U.S. headquarters directly controlled the Hollerith operation. In the updated version, Black claims that IBM set up a special Polish subsidiary for the sole purpose of servicing the needs of the Nazis there and that, after the war, “IBM recovered all its Polish profits and machines.” EDWIN BLACK, *IBM AND THE HOLOCAUST* (2d ed. 2002). The revelations from Black's investigation led to legal action against IBM by Holocaust survivors. See MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 302 (2003); see also Anita Ramasastry, *A Swiss Court Allows Gypsies' Holocaust Lawsuit to Proceed*, CNN (July 8, 2004, 12:55 PM), <http://www.cnn.com/2004/LAW/07/08/ramasastry.holocaust.ibm/>.

37. BLACK, *supra* note 34, at 21. This was part of the Nazis' “Extermination by Labor” program. Literally, it meant working Jews to death. Only after a Jew had outlived her usefulness would she be sent to the death camps to be gassed to death.

38. *Id.* at 22.

39. *Id.*

plagued by a long history of anti-Jew pogroms and tyranny from Czarist Russia to the British Isles.⁴⁰ Jews in Germany had been subject to persecution and particular governmental regulation and restrictions since at least the fourth century.⁴¹ Occasionally, there were respites—tastes of freedom. When Napoleon conquered Germany, he freed the Jews.⁴² His defeat, however, brought the return of restrictions and new repressions.⁴³ History, then, provides the answer to the question: What is a question of inequality a question of? It is a question of identity, and of identity's legal corollary: identification.

Larger-scale emancipations of Prussia's Jews in the middle and late 1800s, coupled with the extraordinary social and demographic upheavals of World War I, provided Germany's Jews an important tool for survival: dissociation.⁴⁴ The popular mythology of the Holocaust has created two very different, equally untruthful accounts of what happened to European Jews. The most sinister is that the Jews went willingly to the ovens, like sheep to the slaughter.⁴⁵ The other, in my view, is nearly as sinister. This is the account that makes every Jew a martyr, willingly giving himself or herself in the name of Jewry, like some Old Testament character insisting on being thrown into Nebuchadnezzar's furnace. Most Jews were neither innocent enough nor dumb enough to be martyrs.⁴⁶ In fact, by the time of the Nazi onslaught, many Jews were outright converts to Christianity for political reasons.⁴⁷ Others observed their Jewishness in private, while outwardly maintaining Christian identity.⁴⁸ Others had simply drifted away over generations, blithely unaware of their heritage or believing that they did not have enough Jewish parentage to render them vulnerable to the new wave of anti-Semitism portended by Hitler's rise.⁴⁹ Assimilation was the key to surviving and thriving both.⁵⁰

40. See generally WILLIAM I. BRUSTEIN, *ROOTS OF HATE: ANTI-SEMITISM IN EUROPE BEFORE THE HOLOCAUST* 49–72 (2003).

41. BLACK, *supra* note 34, at 53.

42. *Id.*

43. *Id.*

44. Gays, of course, know it, too. Dissociation in the Gay vernacular has a particular metaphor: the Closet. Dissociation's political corollary—assimilation—is also well-travelled terrain for Gays.

45. See Samuel P. Oliner, *Jewish Heroes and the Wilhelm Bachner Story*, in 20 *THE HIDDEN CHILD* 19–20 (2012).

46. *Id.*

47. BLACK, *supra* note 34, at 53–54.

48. See *id.*

49. *Id.*

50. Common wisdom holds that so many Polish Jews died because they only spoke Yiddish and could not “pass” as non-Jewish. Maybe the combination of census data and Hollerith technology made the final outcome unavoidable; but—theoretically, anyhow—Aryan-seeming, German Jews who had assimilated to German culture had a better chance at surviving. I think the

None of this mattered to the Nazis, of course, for whom Jewishness was less about religious practice and more about bloodline.⁵¹

Thus, the Nazis faced a problem of identifying the Jews before they could be degraded socially and legally and, ultimately, murdered. The data collection and, more importantly, the data processing made possible by the IBM-Hollerith punch card system made identification not only possible, but also lightning fast and efficient.⁵² Those lists—so infamous to all of us as part of the Holocaust story—posted in town squares, and containing the names of identified Jews who must report to the train depot the following morning, did not materialize out of thin air.⁵³ They were made possible by the metadata technology supplied to the Nazis by IBM. In 1934, Willy Heidinger, the founder of Dehomag, a German technology company absorbed in the 1920s as a subsidiary of IBM, put it this way:

current political strategy of the mainstream Gay movement, although such is never admitted, tracks a reading of the Holocaust experience. Survival, certainly, and some measure of formal equality depend upon assimilation and nondifferentiation—on blending in. North American Gays are in the same position as the Weimar Jews, caught in the paradox of Western equality theory that is theirs to bear. Equality is defined in the Enlightenment tradition as self-respecting. But self-determination is exactly what the German Jews, and now American Gays, had to give up in order to gain equality by the standards the perpetrators of inequality have set for them. Victims learn to adapt to the oppressor's definition of equality without questioning who will be allowed, ultimately, to meet the standard. Unquestioned adherence is what is demanded. Obey or not, the end result is the same: existential annihilation. For a contextual discussion, see GILREATH, *supra* note 6, ch. 7.

Catharine MacKinnon, reading the experiences of German Jews under the Nazi regime, puts it as follows:

Such equality does nothing about the annihilation machine itself, so long as it sorts likes from unlikes accurately. It may mean survival for some under unequal conditions, but do not call it equality. Such equality means conceding the standards under which one is measured, monitoring only their recognition without irrational distinction. One can understand trying to construct an equality principle to ensure survival under conditions of genocide; yet this is very close to conceding genocidal conditions in the construction of the equality principle, with the result that, so far as the equality principle is concerned, we will never live under any but genocidal conditions.

Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 83, 105 (Stephen Shute & Susan Hurley eds., 1993).

51. BLACK, *supra* note 34, at 54.

52. *Id.* at 82.

53. *See id.*

The physician examines the human body and determines whether . . . all organs are working to the benefit of the entire organism. . . . We . . . are very much like the physician, in that we dissect, cell by cell, the German cultural body. We report every individual characteristic . . . on a little card. These are not dead cards, quite to the contrary, they prove later on that they come to life when the cards are sorted at a rate of 25,000 per hour according to certain characteristics. These characteristics are grouped like the organs of our cultural body, and they will be calculated and determined with the help of our tabulating machine.⁵⁴

And so anti-Semitic rhetoric became anti-Semitic discipline.

[B]y cross-sorting the Jews revealed in Column 22 row 3 with Polish speakers identified in Columns 26 and 27 row 10, the Reich was able to identify who among the Jews would be its first targets for confiscation, arrest, imprisonment, and ultimately expulsion. The so-called *OstJuden*, or Eastern Jews, primarily from Poland [and primarily post-WWI arrivals], would be the first to go.⁵⁵

Metadata became the necessary and efficient means to the perpetration of the anti-Semitic horrors of the Nazi period.

Certainly, analogies to the Holocaust present their own problems. They can be used, of course, in totally insensitive and unscrupulous ways, as in Senator Ted Cruz's faux filibuster of the Affordable Care Act, in which he referred to those, apparently members of his own Republican party, who refused to join him in his filibuster efforts as akin to WWII-era Nazi sympathizers.⁵⁶ My own previous efforts at using the Holocaust to explain the real dangers of so-called hate speech in the United States have not been universally appreciated.⁵⁷

I have some sympathy with the point of view that overuse of the Holocaust as an explanatory paradigm for the dangers of oppression can run the risk of turning the Holocaust into a political cliché. But there is risk in not invoking it and analyzing the relevance of this period to our modern lives. What happened in Europe, sixty-odd

54. *Id.* (first and fourth alteration in original).

55. *Id.* at 59.

56. Tom Kludt, *Cruz Likens Obamacare Defunding Skeptics to Nazi Appeasers*, TALKING POINTS MEMO (Sept. 24, 2013, 3:30 PM), <http://talkingpointsmemo.com/livewire/cruz-likens-obamacare-defunding-skeptics-to-nazi-appeasers-video>.

57. See Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 493 (2009) (citing Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech, 44 WAKE FOREST L. REV. 557 (2009)) (rejecting my invocation of the Nazi-era analogy).

years ago, did not happen that long ago. And it did not affect Jews only. Homosexuals, among other groups, were systematically hunted and exterminated by the Nazis in the project that has come to be known universally as the Holocaust.⁵⁸ Refusing to understand the lessons of the Holocaust for modern people is to risk assigning the Holocaust to a position bordering on religious fanaticism—something so sacred that it cannot be interrogated or critically analyzed. To do so is to rob subsequent generations of the lessons necessary to stop something like it from happening again. As Guy Hocquenghem put it in an April 1980 interview in the magazine *Christopher Street*, “As long as gay genocide [in the Holocaust] is not officially acknowledged, it *could* happen again.”⁵⁹ Specifically, Hocquenghem continued as follows:

This is not to say that it *will* happen, but that somehow the political forces against us can keep it in mind. Perhaps I sound like a doom-sayer. But if you put these two ideas together—gays having become “visible” in American society without having acquired any significant political protection or status, and this new role of “scapegoat,” in which gays seem to have replaced the traditional scapegoat, the Jews—you cannot be unaware of a dangerous trend. If there really is a social crisis beginning, gays are in a position similar to that of the Jews in pre-Nazi society. They are suspected of being a powerful and secret “conspiracy,” supposedly rich—or at least luxury consumers—and the most advanced innovators of the capitalist economy. Just the right image to make us scapegoats both for public immorality and for inflation.⁶⁰

Any sort of suggestion along these lines is today met with disbelief.⁶¹ And yet these same ideas about Gays are today expressed by members of the United States’ highest Court.⁶²

58. Mark Blasius, *Interview: Guy Hocquenghem*, CHRISTOPHER STREET, Apr. 1980, at 40; see also RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS 13–14 (1988).

59. Blasius, *supra* note 58.

60. *Id.*

61. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 404–05, (3d. ed. 2011) (quoting Shannon Gilreath, “*Tell Your Faggot Friend He Owes Me \$500 For My Broken Hand*”: Thoughts on a Substantive Equality Theory of Free Speech, 44 WAKE FOREST L. REV. 557 (2009)). Professors Eskridge and Hunter ask whether “playing the ‘Nazi card’” is a “persuasive analogy” in light of what may be a “social context different in a material way.”

62. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“[Gays are] a politically powerful minority,” etc.). Scalia begins his dissent in *Romer* with this immortal sentence: “The Court has mistaken a *Kulturkampf* for a fit of spite.” *Id.* His invocation of the *Kulturkampf* is, I think, extraordinarily revealing for anyone with a cursory knowledge of world history. Literally translated from the German, it means “culture war.” But *Kultrukampf* is not the sort of foreign word one uses conversationally in

Likewise, it is not outside the realm of possibility that people with Nazi-style ideas about Gays could get power in this country. American evangelicals have been involved in a long-secret, but now publicized, lobbying effort to make homosexuality a capital offense in more benighted areas of Africa.⁶³ Even liberal political leaders, like President Obama, are cowed by their influence in the United States, claiming to support Gay rights but nevertheless attending national functions orchestrated by these same anti-Gay forces.⁶⁴ An apparently viable Republican presidential candidate, Mike Huckabee (he won the Iowa caucus), has said publicly that Gays, particularly those with HIV, should be quarantined.⁶⁵ Recently, Glenn Beck, who gave a bizarre performance at the 2013 Value Voters Summit, in which he claimed that the Holocaust was actually an effort aimed at persecuting Christians, asked his audience to guess what color badges homosexual internees at concentration camps had to wear for identification purposes. When he revealed that the badges were pink, his audience—folks who largely set the agenda for Tea Party hopefuls—erupted into laughter, making mock at the mass murder of Gays by the Nazis.⁶⁶

And, since this is a symposium about the Internet and its destructive powers, I challenge readers of this Essay to input the search terms “gays need to” into the Google search engine. What you will find among the auto-filled search terms supplied by Google, based on the most frequent searches beginning with the phrase “gays need to,” are variations on “gays need to die.”⁶⁷ These are facts. Again, to say that these things are reality and that, thus, Gay people could be oppressed in the ways Hocquenghem identified is

English, and certainly not in a legal opinion. It is not like other foreign words that have become, effectively, English words: *tete-a-tete*; *rendezvous*; etc. Thus, it would be exceedingly odd for Justice Scalia to have dropped it, casually, in its literal sense. For Germans—and for Americans familiar with German history—*Kulturkampf* is a pointed reference to a specific event in time, during which the German government persecuted the Roman Catholic Church in parts of Germany for opposing mounting German nationalism. Therefore, its presence in an opinion in which Justice Scalia repeats the same sort of propaganda once circulated by the German government about the Jews makes it not only bizarre but also exceedingly creepy.

63. See Jeffrey Gettleman, *After U.S. Evangelicals Visit, Uganda Considers Death for Gays*, N.Y. TIMES, Jan. 4, 2010, at A1.

64. See Cathleen Falsani, *Analysis: Controversy Looms Again for National Prayer Breakfast*, USA TODAY (Feb. 2, 2011, 12:29 PM), http://usatoday30.usatoday.com/news/religion/2011-02-02-prayer_protest_obama_01_ST_N.htm; *Obama Criticizes Ugandan Anti-Gay Bill at Prayer Breakfast*, CNN (Feb. 4, 2010, 10:05 AM), <http://www.cnn.com/2010/POLITICS/02/04/obama.prayer/>.

65. See Dana Bash & Evan Glass, *Huckabee Refuses to Retract '92 Remarks on AIDS Patients*, CNN (Dec. 10, 2007, 6:42 PM), <http://www.cnn.com/2007/POLITICS/12/10/huckabee.aids/>.

66. FRCAction, *Glenn Beck at Values Voter Summit 2013*, YOUTUBE (Oct. 12, 2013), <http://www.youtube.com/watch?v=evDc4Hm0IK8#t=17>.

67. This was the case as of December 2, 2013.

not to say Gay people *will* be thusly oppressed. Rather it is simply to be honest about the reality of politics and the role politics plays in shaping what is possible.

I think, too, that there is something about contemporary reality that makes the position of Gays even more chilling, at least in terms of the potential for oppression, than Hocquenghem could have understood. Guy Hocquenghem's most important contribution to the Gay movement, in my estimation, was his work on Gay history. Hocquenghem was an important voice calling for a concerted effort at historicizing Gay life. In many ways, what Hocquenghem lamented—that Gays do not have a history in a structural sense—is still very much the case, despite the literature on the subject that he helped to catalyze.⁶⁸ As a people, historically speaking, we are deficient. But this is to speak about history only in the way social scientists do. In another way, we are quite a long way from the world Hocquenghem pondered in his 1980 interview. The “silence” Hocquenghem found so problematic⁶⁹ is, in fact, impossible today. Hocquenghem said that when “you don't have a direct and very obvious, visible way of transmitting the gay idea, it just stops. An isolated person is *not* a gay person.”⁷⁰ He is absolutely right, of course. And what he had to say on that point is still relevant to the fact of an as-yet deficient Gay historical and cultural memory. But, in terms of the everyday—the minutia of everyday life—Hocquenghem, dead now for more than thirty years, could not have imagined the impact of the Internet on our daily lives.

Surely, the Internet has been an important tool. It has meant, for instance, that the Gay teen isolated in the rural South has found himself instantly in touch with other Gays across the globe.⁷¹ The

68. On this issue, I am particularly excited about some emerging scholarship, specifically the work of Hassan El Menyawi. See generally HASSAN EL MENYAWI, *THE GREAT REVERSAL: HOW NATIONS IN THE MUSLIM WORLD WENT FROM TOLERATING SAME-SEX PRACTICES TO REPRESSING LGB PEOPLE 1750–2010* (forthcoming) (on file with author). Menyawi's current project, entitled *The Great Reversal*, confronts the inaccuracy of much liberal, mainstream LGBT scholarship, for example that of Foucault, Katz, Eskridge, which suggests that LGBT identity is a relatively modern “invention” (indeed, Hocquenghem also makes this error). *Id.* at 18–21. Menyawi's painstaking historical scholarship documents homosexual identity among Muslim cultures as early as the Middle Ages. *Id.* Indeed, this work has the power to shake the very foundations of many in vogue postmodern, culturally relativist defenses of antigay brutality in the modern Muslim world—particularly those coming from liberal gay intellectuals. Menyawi's ability to see space for—and to *do*—new and relevant work in the area of LGBT studies is refreshing, urgent, and essential.

69. Blasius, *supra* note 58, at 39–40.

70. *Id.* at 39.

71. See, e.g., GLSEN, *OUT ONLINE: THE EXPERIENCES OF LGBT YOUTH ON THE INTERNET* 13–14 (2013). Of course, the Internet also exposes Gay youth to horrendous incidences of bullying and harassment on account of their sexual

Internet has been important for grass roots, civil rights organizing, here and abroad, by Gays and other oppressed groups; but the degree of the Internet's intrusiveness into virtually every aspect of our daily lives also means that "silence" and "isolation" are effectively impossible. For example, recently, I did intensive research on Gay male pornography.⁷² What I began to notice was the amount of unsolicited, clearly targeted interaction I began to have with pornographers: e-mail advertisements, inexplicable Facebook postings offering more and newer pornography, curious Google search returns making pornographic content the return for virtually every conceivable search. Clearly, the work I had been doing on pornography, making use, as any modern researcher would, of the Internet, was amassed as metadata and used in a very targeted fashion. The metadata gathered about me, because of my interest in pornography for purposes of my research, was coded into a profile that was highly specific, if not entirely accurate. It would have been all the same, of course, had I been using the pornography in the way it is intended to be used. The point is, others knew about it. And that knowledge has significant political and social ramifications.

For most of our history, Gays have operated with a more or less singular political strategy. We venture out; we agitate. If and when things get too bad, we can simply return to the Closet. Regardless of the extent to which that was ever really possible, it is not possible at all now.⁷³ The total anonymity of the Closet is *totally illusory*. Every one of us has left a Hansel-and-Gretel-style digital trail from whence we came. There is scarcely a moment when we are not being watched. The data gathered about us, often surreptitiously (and certainly put to surreptitious uses), is at work.⁷⁴ Profiles about where we go, what we do, what we read, *who we are*, are being constructed.⁷⁵ As Rudolf Cheim observed, the ends to which these metadata profiles can be employed are as limitless as they are potentially sinister.⁷⁶

Thus, it is not entirely accurate to say that Hocquenghem *could not* have imagined this development. Of course, Hocquenghem did not have the benefit of Edwin Black's revelations. But did he need them? After all, Orwell understood. He described the contemporary

identity. *Id.* at x–xii; see also Richard Delgado & Jean Stefancic, *Hate Speech in Cyberspace*, 49 WAKE FOREST L. REV. (forthcoming 2014) (manuscript at 10–14).

72. The research was the basis for Chapter 5, entitled "Pornography/Death: The Problem of Gay Pornography in a Straight Supremacist System." GILREATH, *supra* note 6, at ch. 5.

73. See generally Joel Reidenberg, *The Data Surveillance State in the United States and Europe*, 49 WAKE FOREST L. REV. (forthcoming 2014).

74. *Id.* (manuscript at 3–9).

75. See *id.*

76. See BLACK, *supra* note 34, at 20–22.

American situation with an eerie precision, in his now-classic *1984*.⁷⁷ We have imported the telescreen⁷⁸ into our lives. Its influence is now so strong that few of us functioning in this modern world could imagine giving it up. In a very real sense, as I observed recently to my doctor concerning the legally required digitization of my medical records—against my will and supremely foolishly in light of the greater risk digitization poses for compromise and exploitation—we do not even have that choice.⁷⁹ The fact that the concentration of all of this information about our lives and habits has moved from its heretofore central site of focus, corporate retailers, to the government is what makes all of this positively Orwellian.⁸⁰ The “architecture of oppression,” as Edward Snowden called it, is firmly in place.⁸¹ It is in light of this understanding that I hear Hocquenghem’s voice most strongly:

You know, there was a gay community in Germany before the Nazi period which had all the characteristics of the community we have now—including community centers, balls, newspapers, a scientific research institute—everything. I am struck by the ignorance among gay people about the past—no, more even than ignorance: the “will to forget” the German gay holocaust. That we forgot about these hundreds of thousands of people and about the fact that out of one hundred years of gay life, in thirty of them we had a virtual vacuum—that we forgot in such a *radical* way is, I think, something of a warning. This has happened to no other minority. Even the Armenian genocide was remembered, at least by the Armenians. But *we* aren’t even the only ones who remember, *we don’t remember!* So we find ourselves beginning at zero in each generation. Our lesson from history, then, is that we can’t be sure we won’t be suppressed.⁸²

77. See ORWELL, *supra* note 12, at 157–58.

78. *Id.* at 157. In *1984*, the telescreen is a means of thought disruption and mind control. The protagonist Winston Smith describes it as “an oblong metal plaque like a dulled mirror which formed part of the surface of the . . . wall [in every home].” *Id.*

79. See 42 U.S.C. §§ 17901–02 (2012); see also *Health Information Privacy: HITECH Act Enforcement Interim Final Rule*, U.S. DEP’T OF HEALTH & HUMAN SERVICES., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/enforcementrule/hitechenforcementifr.html> (last visited Feb. 9, 2014).

80. See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004), for a particularly lucid look at the privacy problems posed by the Internet in the commercial context.

81. Interview by Glenn Greenwald, Ewan MacAskill & Laura Poitras with Edward Snowden in H.K., China (June 9, 2013), available at <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>. Snowden uses the phrase “architecture of oppression” at 6:58 into the interview. *Id.*

82. Blasius, *supra* note 58, at 40.

IV. LED TO SLEEP, IF NOT TO THE SLAUGHTER⁸³

My devotion to Hocquenghem aside, many Gay intellectuals with whom I have discussed this topic believe that what I am describing here is so outside of the bounds of reality as to be academic only. Maybe this reaction simply proves Hocquenghem's point about Gays' historical deficiencies. But, to be fair, Gays are not the only Americans whose engagement with their own history can only be fairly described as amnesiac. It seems to me that the extent Snowden has been dismissed or trivialized has been because many Americans believe in American exceptionality. Whatever we may be, we are not *them*—those other regimes where suppression of dissent is the rule. At bottom, many Americans simply do not believe that America is oppressive.

Simply because a government is not acting despotically at any given moment, however, does not mean that it does not have the capability to act in such a way. This is, I think, what Edward Snowden meant by his carefully intelligent description of the "architecture of oppression." And, on that score, Snowden's observations are hardly new. In 1975, and specifically in reference to a predigital NSA, Senator Frank Church warned: "I know the capacity that there is to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss."⁸⁴ To Edward Snowden's contemporary iteration of that warning, President Obama has responded that the NSA surveillance programs are necessary for national security and specifically for the apprehension or thwarting of terrorists.⁸⁵ Americans are thus soothed because they think they

83. This phrasing is that of Alice Walker. See ALICE WALKER, *WE ARE THE ONES WE HAVE BEEN WAITING FOR: INNER LIGHT IN A TIME OF DARKNESS* 61 (2006).

84. Daniel Ellsberg, *Edward Snowden: Saving Us from the United Stasi of America*, THEGUARDIAN (June 10, 2013, 6:30 PM), www.theguardian.com/commentisfree/2013/jun/10/edward-snowden-united-stasi-america (quoting Sen. Church) (The "Stasi" were communist East Germany's secret police.) Senator Church also warned that U.S. intelligence gathering "at any time could be turned around on the American people and no American would have any privacy left." *Id.*

85. *Transcript: President Obama's August 9, 2013, News Conference at the White House*, WASH. POST (Aug. 9, 2013), http://www.washingtonpost.com/politics/transcript-president-obamas-august-9-2013-news-conference-at-the-white-house/2013/08/09/5a6c21e8-011c-11e3-9a3e-916de805f65d_story.html ("[P]rograms . . . offered valuable intelligence that helps us protect the American people, and they're worth preserving. . . . [T]he fact . . . that the programs are operating in a way that prevents abuse, that continues to be true without reforms."); see also *Obama on NSA Surveillance: Can't Have 100% Security and 100% Privacy*, RT (June 7, 2013, 4:30 PM), <http://rt.com/usa/Obama-surveillance-nsa-monitoring-385/> (quoting President Obama defending the NSA programs).

know what terrorists look like.⁸⁶ Terrorists—today, anyway—are almost always aliens and always Muslim, or at least infected by fanatical Muslim ideology. The definition of “terrorist,” however, is grounded on sands every bit as shifting as those upon which liberty rests. President Reagan, for example, once called opponents of apartheid in South Africa “terrorists.”⁸⁷ A terrorist by one man’s definition is as likely to be another man’s hero as he is certain to be another man’s son. In this, as in all things, history matters.

A. *The National Security State: American History*

U.S. involvement in World War I began an unprecedented militarization of the nation that has continued unabated.⁸⁸ With this militarization also came the surveillance state.⁸⁹ In 1917, intelligence personnel for the entire military amounted to just two officers.⁹⁰ By the end of the war, there were more than 300 uniformed officers and some 1,000 civilian intelligence personnel.⁹¹

86. They do not, of course. Even applying the preferred stereotype of the moment, at least some Americans could not spot a Muslim “terrorist” on the ground, so to speak. Some Americans began attacking American Sikhs in the weeks after 9/11, mistaking them for Muslims. Chris McGreal, *Sikhs Say Attacks on Community Are “Collateral Damage” of 9/11*, THEGUARDIAN (Aug. 6, 2012, 6:38 PM), <http://www.theguardian.com/world/2012/aug/06/sikj-abuse-america-911>. The closer one gets to power, apparently, the more oblivious one becomes. In a 2001 speech, then-Attorney General Ashcroft said,

Let the terrorists among us be warned, . . . [i]f you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.

Peter Irons, *“The Constitution is Just a Scrap of Paper”: Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1085 (2005) (quoting John Ashcroft from prepared remarks for the U.S. Mayors Conference (Oct. 25, 2004)). Everyone who overstays a visa is now a terrorist? Of course, despite Ashcroft’s assurances here, we also know that the Bush administration used illegal means of prosecuting its “War on Terror.” See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

87. See Justin Elliot, *Reagan’s Embrace of Apartheid South Africa*, SALON (Feb. 5, 2013, 11:01 AM), http://www.salon.com/2011/02/05/ronald_reagan_apartheid_south_africa/.

88. One could reach further into U.S. history for examples of extra-legal executive spying, but beginning with World War I, as a marker of the “modern” era, is sufficient for my purposes in this Essay.

89. See generally Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451 (2004), for an excellent historical scholarship on the connection between militarization and the surveillance state by Professor Wells, from which the short sketch I provide here is principally indebted, especially Subpart I.C, “Government Information Gathering.”

90. *Id.* at 468.

91. *Id.*

The modern Federal Bureau of Investigation ("FBI") also has its roots in World War I, at which time the Bureau of Investigation ("BI") expanded to three times its former size.⁹² It is unsurprising, I suppose, that the new investigative powers were soon put to unscrupulous uses. Professor Christina Wells has noted that "[m]ilitary intelligence agents participated in a wide range of dubious activities, which involved a wholesale system of spying on civilians that would be unmatched until the late 1960's. . . . [Sometimes the surveillance extended to] targeted politicians and judges because of political or judicial decisions that seemed too 'radical.'"⁹³ The intelligence apparatus was also used to harass unions.⁹⁴

The end of World War I saw the United States' entrenchment in the manufactured conflict that was to define American existence for nearly the entire twentieth century: the fight against communism. The "Red Scare," kindled by a series of anarchist bombings in 1919, put the United States at war with the phantom menace of communism.⁹⁵ Rather than isolated acts of terrorism, the 1919 bombings were propagandized as part of a Soviet backed conspiracy to overthrow the U.S. government and became the catalyst for an extraordinary power grab by then Attorney General A. Mitchell Palmer who convinced Congress to grant him vast new resources to combat the imminent danger of communism.⁹⁶ Aliens were the primary targets. In 1919–1920, tens of thousands were rounded up and deported without due process of law.⁹⁷

The surveillance culture that took root in this period has been long lasting, as has been its machinery and methodology. In 1919, FBI Director J. Edgar Hoover created an index of "radicals, their organizations, and publications."⁹⁸ The index had increased three-fold by 1921.⁹⁹ As with today's surveillance by the NSA, the FBI could point to no real accomplishments as a result of its massive intrusion into civilian lives, yet it nevertheless collected reams of data, including transcriptions of speeches, newspaper articles, and writings by targeted individuals.¹⁰⁰ Sources of intelligence expanded exponentially in 1936, when the newly reorganized FBI

92. *Id.*

93. *Id.* at 469 (quoting ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870–1976, at 110 (rev. ed. 2001)) (first alteration in original).

94. *See id.*

95. *See id.* at 470.

96. *Id.*

97. *Id.*

98. *Id.* at 471.

99. *Id.*

100. *Id.*

began “physical and technical surveillance, mail openings, and ‘black bag jobs’ (i.e., burglaries).”¹⁰¹

Throughout World War II and the Cold War, U.S. government surveillance powers continued to increase, despite occasional attempts by Congress to curtail abuses.¹⁰² Generally, power-hungry executives found ways of increasing surveillance capabilities.¹⁰³ In 1981, for example, Ronald Reagan issued an executive order in which he allowed the FBI ever more intrusive domestic surveillance powers, including electronic surveillance and warrantless searches.¹⁰⁴ Once the Cold War ended and the American national security state no longer had Godless, heartless communism to justify its existence, it was the beneficiary of a stroke of justificatory luck most likely the product of its own ineptitude: the September 11, 2001 terrorist attacks sparked the “War on Terror.”

At this point, things turn from Orwellian to Kafkaesque. Everything is secrecy, not because the executive branch is breaking the law and hiding it, but because the executive now has the power, by authority of the Congress, to act in nearly total secrecy. In October 2001, Congress passed the USA Patriot Act, expanding governmental surveillance powers.¹⁰⁵ The Act provides for surveillance and data collection as long as a standard—less than probable cause—is met.¹⁰⁶ The standard provides for the evasion of Fourth Amendment guarantees. Compounding this power, the Act also prohibits any person or entity from whom this information has been gathered from disclosing that the FBI has sought it.¹⁰⁷ In a collusion between the executive and judicial branches not seen since the twilight of Weimar, the U.S. Supreme Court has used this very shroud of secrecy entrenched by the recent legislation to deny

101. *Id.* at 472.

102. When widespread abuse became public, Congress enacted, in 1978, the Foreign Intelligence Surveillance Act (“FISA”), in order to curtail federal wiretapping authority in some foreign intelligence investigations. 50 U.S.C. §§ 1801–11 (2012). This is the law the George W. Bush administration violated in 2001, when it secretly eavesdropped on the international phone calls of Americans citizens without a warrant. Rather than act to curtail these abuses, Congress amended the 1978 Act that authorized much of what Bush had been doing—until that point—illegally. See FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2463 (codified as amended in scattered sections of 50 U.S.C.). See Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, THEGUARDIAN (June 18, 2013, 7:36 PM), <http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy>, for an illuminating look at the law in operation, as well as lack of oversight provided by the secret FISA court the Act establishes.

103. See generally Exec. Order No. 12,333, Fed. Reg. 59941 (Dec. 4, 1981).

104. *Id.* at 59949–51.

105. See USA Patriot Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified at 50 U.S.C. § 1861).

106. *Id.*

107. *Id.*, 115 Stat. at 288.

plaintiffs, who doubtlessly have been surveilled, access to the courts.¹⁰⁸

B. 1984: Here, Again, Now and How

It is fair to say that most Americans would consider themselves quite far removed from the shadow world of politically motivated suppression of dissent that I have just described. It existed—and exists—and, yet, many Americans remain unpersuaded of any danger. Maybe this is because of what Gore Vidal once described as the “Mickey Mouse” approach to history that most Americans share.¹⁰⁹ (Here, again, Hocquenghem’s prescient warning is reformulated—and, again, largely ignored.) Or, perhaps, millions of Americans believe they simply are not important enough to be in danger of government surveillance in any way that is more than an abstract annoyance. These Americans likely also believe that having their e-mail captured by the NSA is quite remote in the realm of possibility. And, even if it is possible, if you are not doing anything wrong, why should you care? This sort of naiveté is dangerous, principally because “wrong,” much like “terrorist,” is entirely within the power of the government to define.

In June 2008, Susan Clements-Jeffrey, a fifty-two-year-old substitute teacher, living in Springfield, Ohio, was startled by an aggressive knocking at her door.¹¹⁰ Susan, on the phone with her boyfriend Butch Smith, at the time, heard a loud male voice announce, “This is the police.” Susan froze. In Susan Clements-Jeffrey’s world, this unknown male voice, claiming to be the police, was immediately associated with a man Susan believed was stalking her, including leaving her messages physically at her home. She did not want to open the door. “We can get a warrant,” the voice continued. “You need to open this door or we will gain entry.”¹¹¹ The cop claimed to smell the odor of marijuana coming from Susan’s

108. In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147, 1150, 1152–53 (2013), the Court held that Amnesty International and other plaintiffs lacked standing, in part, because they could not prove they were being spied upon. Of course, since they were denied access to the discovery a court challenge would have provided them, that was only inevitable.

109. Gore Vidal, *Mickey Mouse, Historian*, in *THE LAST EMPIRE: ESSAYS 1992–2000*, at 357, 358–59 (2001).

110. Susan Clements-Jeffrey’s ordeal, the subject of a lawsuit, *Clements-Jeffrey v. City of Springfield*, 810 F. Supp. 2d 857 (S.D. Ohio 2011), is discussed in great detail in NATE ANDERSON, *THE INTERNET POLICE: HOW CRIME WENT ONLINE—AND THE COPS FOLLOWED* 73–81, 261 (2013). Anderson’s discussion quotes verbatim from the deposition of Clements-Jeffrey (docket no. 65). While I have examined the materials (on file with author), the details and excerpts from the trial documents in this section are those highlighted in Mr. Anderson’s book. Accompanying citations are thus made to that work.

111. ANDERSON, *supra* note 110, at 74.

apartment.¹¹² Susan told Butch she would call him back. She opened the door. Local police officers Geoffrey Ashworth and Noel Lopez stood outside. Ashworth and Lopez were at Susan's house attempting to locate a stolen laptop. "Are you Susan?" Ashworth asked. "Yes, I am," Susan replied. "We need to see . . . [your] laptop now." Ashworth continued.¹¹³ Susan complied, and the officers determined that the laptop had been stolen from the local school district. They noted that the serial number had been partially scratched off the bottom. Susan told the police that, indeed, she had purchased the used laptop from a student at the school where she had been substitute teaching. She had paid \$60 for it, but did not think that price was suspicious, since it was not working at the time she bought it. She had to have the laptop repaired before it was usable.¹¹⁴ So far, so good, right? The cops have located the stolen property, and Clements-Jeffrey seems—at least should seem to a thirteen-year veteran cop trained to read people, as Ashworth was—credible.

Then this minor theft investigation took an utterly bizarre turn. Officer Ashworth produced a folder containing screen captures of Susan. In some of them, Susan was partially nude and in sexual poses.¹¹⁵ Somehow, the police had screen captures of Susan's sexually explicit chats with her boyfriend, Butch Smith, who lived in another state.¹¹⁶ In a deposition, Susan described how Ashworth laughed at her, and "told me I should have known better, you know, than to, you know, be on my webcam."¹¹⁷ Ashworth claimed that he had Susan under surveillance by another officer in Milwaukee for more than two weeks.¹¹⁸

Ashworth and Lopez arrested Susan for receiving stolen property and took her to the police station in handcuffs. At the police station, the sexual assault on Susan Clements-Jeffrey continued.¹¹⁹ In a deposition, she described what happened.

112. *Id.* at 82. A criminal defense attorney I greatly admire once told me that "In reality, cops smell marijuana wafting from private, enclosed spaces about as often as they spot a unicorn in the real world—kind of the way they are always hearing that 'excited utterance.'"

113. ANDERSON, *supra* note 110, at 74.

114. *Id.*

115. *Id.* at 74–76.

116. *Id.*

117. *Id.* at 75.

118. *Id.*

119. I am not going too far here. What Susan Clements-Jeffrey suffered was a sexual assault at the hands of Officer Geoffrey Ashworth. Susan herself said that she experienced flashbacks to "what I call rape." I think there is significant reason to believe that Geoffrey Ashworth was getting a sexualized power thrill out of what he did to Susan Clements-Jeffrey. Why would he show up with those explicit photographs, which were, of course, in no way relevant to the case? Even if he had thought they were relevant initially—maybe Susan was going to deny owning a laptop—Susan's admission that she had the laptop

[Officer Ashworth] sat down next to me, again lectured me, saying, "You're a school teacher; right?"

"Yes, I am."

"You're so stupid that you don't know better than what you got yourself into. Don't you know what happens on the Internet, on webcams on the Internet?" And I said no. And he said, "You don't get on a webcam doing what you're doing. You should know better than that."

I said, "I am in the privacy of my own home. I am a grown woman. I should be able to do what I want in the privacy of my own home" . . .

[Officer Ashworth] had the dossier sitting in his lap. Then he opened it up to show more pictures . . .

. . . "The judge isn't going to be very happy looking at this kind of activity coming from a teacher," [he said].

[Susan responded], "You aren't going to show that to the judge. I know you can't."

[Officer Ashworth replied], "I don't know. It will depend how you cooperate." . . . "I might cut it out, but I'm leaving Butch's on there."¹²⁰

Susan saw more photos of herself and Butch, and also the content of instant messages and e-mail between the two. At the end of this process, Susan describes herself as "hysterical."¹²¹

Obviously, this was a case of egregious police overreaching. It was also a case, although denied by Officer Ashworth, of misogyny as a police practice.¹²² The local prosecutor quickly dropped the

and explanation of how she came to possess it surely made subjecting her to sexualized humiliation little more than an exercise of sexual sadism on the officer's part. He also knew enough to recruit a female officer, Noel Lopez, to provide some cover. Lieutenant Lopez served in the capacity of what Mary Daly has described as a "token torturer," her female presence adding a veneer of routine and propriety to Ashworth's misogynistic assault. The unusualness—and I would argue the blatant sex-based discrimination—of the Clements-Jeffrey arrest is highlighted by the fact that a similar case, in which another stolen laptop was recovered from a local man by this same Officer Ashworth, ended in a dramatically different way. Its ending is completely banal. Ashworth arrived at the man's residence and asked to see the laptop in question. The man complied. *Id.* at 83–84. We do not know, of course, whether Ashworth had similarly explicit photos of this male subject; but if he did he certainly did not find them relevant to his investigation. Ashworth informed the man that the laptop was stolen property and confiscated it. The man told Ashworth that he had purchased the computer on eBay. He was not arrested. *Id.*

120. *Id.* at 75–76.

121. *Id.* at 76.

122. In a deposition, Susan's lawyer asked Ashworth, "You didn't consider that it would potentially be an emotional trauma for this woman to be

case. Susan Clements-Jeffrey, however, could not so easily forget. Susan felt constantly watched and utterly dehumanized. Here is how she described the long-term effect of her encounter with a seemingly omnipresent and omniscient police force:

I cannot sleep . . . I feel worthless. I cannot socialize like I used to, and in the past I was a very social person. I was in many clubs, professional [sic]. I could leave the house, I could shop for food. I could do things that now I cannot do. I cannot necessarily shop, go out of the house. My heart's palpating [sic]. I can break out in a sweat when I see a police car . . . I cannot obtain work. . . . It's degrading to me. It's humiliating to me.¹²³

The analogy to 1984 looms large. Never knowing when or if she was actually being watched changed the way Susan experienced her relationship to the State. It destroyed that part of her that had believed the police were there to protect her rather than to control her. When she later bumped into one of the arresting officers at a local gas station, Susan was even more convinced that the police were constantly surveilling her.¹²⁴ "It's anxiety ridden," she said, "I never had to lock my bedroom door or put a lock and do all these things before or call [the] cable [TV company] every two minutes because I'm assuming somebody's spying through my TV or listening to the clicks on my telephone thinking I'm wiretapped."¹²⁵ In 2010, Susan filed a federal lawsuit alleging "grossly excessive search and seizure of sexually explicit images" from her computer.¹²⁶ "I don't know what to believe," she testified later. "[The police] stalked me in my house. They told me they were watching me surf on the net. They could be doing anything. Obviously they're capable of doing anything."¹²⁷

What does this "new" 1984 reality mean, generally, for a citizen's relationship to the state? Susan Clements-Jeffrey's experience caused her to ascribe improbable powers to the state and to alter her whole life on account of this new perception. She began life as Volodin, never dreaming that the state had the sort of technological power necessary to accomplish such a perfect violation of her privacy. She ended up living as reality the story of Winston Smith, 1984's protagonist, wondering if there was ever a moment

presented by you with photographs of her in sexually explicit positions that she had no intention that anybody else would see other than Mr. Smith?" Ashworth replied, "No, sir." *Id.* at 81–82, 261.

123. *Id.* at 76–77 (third alteration in original).

124. *Id.* at 76.

125. *Id.* at 77.

126. *Clements-Jeffrey v. City of Springfield*, 810 F. Supp. 2d 857, 867 (S.D. Ohio 2011).

127. ANDERSON, *supra* note 110, at 77.

when she was not being watched.¹²⁸ In 1984, whether or not the state happened to be exercising its power of omnipresence at any given time, citizens behaved as if it was—because it could.¹²⁹ This is the danger Edward Snowden described for us. The fact that the government may not be acting despotically at any particular moment in time does not mean that *the fact that it can* will not profoundly alter citizens' relationships to the government. The presence of the "architecture of oppression," experienced as the government's ability—if not immediate practice—to reach so deeply into our electronic communications, and thus our private thoughts, substantially alters our relationship to the State. It is a profoundly disturbing thing to realize that, in order to observe us privately, the government no longer needs to break into our homes to plant a bug; it needs simply to install a remote administration tool ("RAT") in our computer.¹³⁰ As Susan Clements-Jeffrey put it, "They could be doing anything. Obviously they're capable of doing anything."¹³¹ That changes how we think about ourselves and our government. Imagine for a moment that we are mistakenly swept up in a suspicion of aiding terrorists. The government has our sexually explicit electronic communications. Maybe they reveal formerly undisclosed homosexual affairs. Maybe an affair with a married person. What can we be made to admit or to accept in order to avoid exposure of this kind of secret?¹³²

It is tempting, of course, to believe that the federal government—and this is, after all, an essay focusing on the abuses of the NSA—is too savvy and too sophisticated to take part in the kind of disgraceful conduct engaged in by the Springfield, Ohio police. The federal government is not, after all, investigating petty crime. And the President of the United States has assured us repeatedly that the software used to monitor electronic

128. See ORWELL, *supra* note 12, at 158. ("There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.")

129. *Id.* ("You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every moment scrutinized.")

130. This is, in fact, how the Springfield, Ohio police, with the help of a private company in Milwaukee, found Susan Clements-Jeffrey and gained the content of her chats and e-mail.

131. See ANDERSON, *supra* note 110, at 77.

132. It was precisely on this basis that Gays were denied U.S. government security clearances for decades. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 576, 578 (9th Cir. 1990) (upholding the denial of clearances, based, in large part, on the Department of Defense justification that Gays would be highly susceptible to blackmail on account of their homosexuality), *abrogated by SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (holding classifications based on sexual orientation are subject to heightened scrutiny).

communications and phone calls does not intrude into the privacy of the ordinary citizen.¹³³ We could be forgiven for thinking that the billions of our tax dollars spent on the security state would make it function significantly more efficiently than the Springfield, Ohio police department. We would be wrong.

The federal spying apparatus does not have a good track record. There seems to be no clear way, on such a massive scale, to capture only “traffic,” in the sense of sender/recipient addresses only.¹³⁴ “Because of the way Internet protocols split up transmissions, the first few packets of an e-mail might contain the sender’s and receiver’s addresses—but they might also include bits of the subject line or even the start of the message itself.”¹³⁵ “Even making a good-faith attempt to grab only a user’s ‘addressing’ information might result in the FBI accidentally ‘opening the envelope’ and taking a peek at the first few lines of the letter inside.”¹³⁶ In context, it would appear, despite the platitudes, that there is nothing particularly “meta” about metadata itself.

At this point, let us be generous. Despite what we know about the historical abuses of information control and surveillance from the American past, let us assume that the government is not acting despotically or even irresponsibly. It is pursuing arguably relevant goals, nearly always couched in national security justifications. We still *know* that innocent citizens have been invaded by the state spying power. In a 2000 effort to apprehend Osama bin Laden, the U.S. government set up an electronic spying machine, nicknamed “Carnivore,” on an as yet unidentified Internet provider.¹³⁷ In documents finally released in 2002, there is ample evidence that Carnivore gobbled up far too much information. One FBI internal e-mail explains:

The software was turned on and did not work correctly. The FBI software not only picked up the E-Mails under the electronic surveillance of the FBI’s target [REDACTED] but also picked up E-Mails on non-covered targets. The FBI technical person was apparently so upset that he destroyed all

133. *Transcript: President Obama’s August 9, 2013, News Conference at the White House*, *supra* note 85 (“I want to make clear once again that America is not interested in spying on ordinary people.”).

134. See ANDERSON, *supra* note 110, at 96.

135. *Id.*

136. *Id.*; see also Charlie Savage, *Broader Sifting of Message Data by N.S.A. Is Seen*, N.Y. TIMES, Aug. 8, 2013, at A16 (explaining that it would be difficult to search communications “without first gathering nearly all cross-border text-based data” and officials acknowledge “inadvertent overcollection”).

137. See ANDERSON, *supra* note 110, at 97. CARNIVORE had existed since the late 1990s. *Id.* at 93. The hunt for Bin Laden made it seem, well, purposeful. Newer surveillance apparatuses, including PRISM and MUSCULAR, have eclipsed it.

the E-Mail take, including the take on [REDACTED] . . . no one from the FBI [REDACTED] was present to supervise the FBI technical person at the time.¹³⁸

The revelations in this snippet of an e-mail are fascinating and chilling. These were e-mail “searches” actually conducted pursuant to a warrant. In other words, they were searches conducted under some semblance of recognizable criminal procedure—a system of bare-minimum checks that two administrations now have openly resented. Even these warranted searches became immediately unwieldy, infringing the privacy of people not even suspected of criminal activity. The bureaucrat in charge, whose name was also redacted from the version of the e-mail finally released in 2002, seems far more distressed over the FBI “technical person” who refused to countenance such a gross invasion than about the utter failure of the spying program. Now, of course, the NSA has not only this “front door” access pursuant to the legally secret, congressionally authorized process, but they have been revealed by Snowden to be secretly breaking into the main communications links that connect Google and Yahoo data centers around the world.¹³⁹ According to a January 9, 2013 report in the *Washington Post*, the NSA had collected and processed 181,280,466 new records in a single month.¹⁴⁰ The material captured included not only “metadata,” in the sense of sender/recipient e-mail addresses, but also more traditional content, in the form of text, audio, and video.¹⁴¹

What Edward Snowden has revealed to us—what, paradoxically, thanks to the Internet, can be shared with the world in an electronic second—is that the mechanism which would allow the United States to repeat the steps to the Gulag or to the camps with an efficiency and precision heretofore unimaginable is in place. The road to the camps and to the Gulag, as both the German and Russian experiences tell us, “was laid down with legal method,”¹⁴² but it was also part of a process of technological innovation that has, perhaps, reached its zenith in the Internet’s potential for an omnipresent government eye—Orwell’s science fiction made fact. It is in this light that we must assess Snowden’s understanding that an expansive power exercised in the name of an emergency—the threat of terrorism—cannot reasonably be expected to be exercised

138. This e-mail, originally sent April 5, 2000, was obtained by EPIC, a consumer privacy group, pursuant to a Freedom of Information Act request. *FBI Memo on “FISA Mistakes,”* ELECTRONIC PRIVACY INFO. CENTER (Apr. 5, 2000), <http://epic.org/privacy/carnivore/fisa.html>.

139. Barton Gellman & Ashkan Soltani, *NSA Taps Yahoo, Google Links*, WASH. POST, Oct. 31, 2013, at A1.

140. *Id.*

141. *See id.*

142. MILLETT, *supra* note 31, at 52.

by the government in a circumscribed fashion—or even at all—in a way that is responsive to civil libertarian norms, however entrenched we think those norms may be. As Robert Higgs put it so succinctly, “National emergency—war or a similarly menacing crisis—answers the political class’s crucial question more effectively than anything else because such a crisis has a uniquely effective capacity to dissipate the forces that otherwise would obstruct or oppose the government’s expansion.”¹⁴³

Mass confinement, denial of judicial process, and even torture have all been practiced by the modern American State in the name of the emergency of terrorism.¹⁴⁴ This reality required a host of special enabling legislation and the creation of special governmental powers (or claim to *a priori* powers), all of which have the potential to undo, or in fact are actively undoing, centuries of libertarian effort thought integral to the American political identity. Rules intended—thought necessary—to keep American citizens safe from our own government have been broken and bent in the name of keeping us safe from an enemy the populace has, more or less, accepted as real.¹⁴⁵ The temptation for most Americans is to believe that these new powers are powers confined in their exercise to the exigencies that called them forth. Edward Snowden is asking us to think, however, in terms of a simple axiom that most of us learned in an elementary school science class: once an experiment has been conducted it can be repeated. Obviously, the legal equivalent of this observation is that precedent, once created, can be expanded.¹⁴⁶

143. ROBERT HIGGS, *DELUSIONS OF POWER: NEW EXPLORATIONS OF THE STATE, WAR, AND ECONOMY* 54 (2012).

144. See, e.g., Scott Shane, *U.S. Practiced Torture After 9/11, Nonpartisan Review Concludes*, N.Y. TIMES, Apr. 16, 2013, at A1.

145. See, for example, Justice O’Connor’s (writing for the Court) suggestion that a presumption in favor of the government’s evidence, and consequently a shift of the burden to a U.S. citizen to prove that he is not an enemy combatant, comports with due process. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

146. Kate Millett makes this observation brilliantly in the context of the Holocaust itself:

“One cannot . . . read Göring’s famous letter to Heydrich at the end of July 1941, charging him in two paragraphs to proceed with the ‘final solution,’ and examining that document, consider that everything is clarified. Far from it. It was an authorization to invent. . . . In every aspect of this operation, invention was necessary. Certainly at this point, because every problem was unprecedented.” . . . How do you kill that many people and keep it a secret? Always it is the scale of things, the overwhelming numbers; millions are now involved. How do you even deal with their clothing? Their corpses? “That was their great invention,” says Hilberg, “and that is what made the entire process different from all others that had preceded that event. In this respect, what transpired when the ‘final solution’ was adopted—or, to be more precise, bureaucracy moved into it—was a turning point in history.” *Once precedent is created, it can be referred to, even built upon; it is axiomatic that any experiment can be repeated.*

Once the bureaucracy and the technology necessary for widespread surveillance propagandized as necessary to prosecute the War on Terror is in place, why should we believe that it will not be used in other contexts? In any event, the simple facts of our situation should disabuse us of any hope in a self-restrained executive power.¹⁴⁷

In general, I think Americans do not want to acknowledge what Snowden disclosed as posing any serious threat because to do so would be to accept exactly to what degree the rule of law exists at the sufferance of the ruling political class. For minorities and other historically disadvantaged people, the power of the state to inflict serious harm—when not being, in fact, used to inflict serious harm—is understood as always merely in abeyance.¹⁴⁸ The fact that it is sheltered behind a façade of due process provides some small comfort and, in few cases, real aid. Our violence and murder rates in this country are first in the First World; and, yet, instead of criminalizing the culture of private violence that is the direct creation of the gun lobby, we decriminalize guns and instead criminalize marijuana. There are now nearly two million American adults in prison, and this is to say nothing of those on probation or on parole or of those among us marked early for a life of incarceration and funneled into a broken juvenile justice system.¹⁴⁹ Approximately a quarter of those imprisoned are in for drug offenses, and of those a disproportionate number are racial minorities.¹⁵⁰ As Gore Vidal once observed, “No other society has ever done so deadly a thing to its people and on such a scale.”¹⁵¹ This is not a question of criminal justice reform only; this is a question of power—of inequality.

MILLETT, *supra* note 31, at 53 (emphasis added) (quoting Raul Hilberg).

147. See, e.g., Barton Gellman, *NSA Broke Privacy Rules Thousands of Times per Year, Audit Finds*, WASH. POST (Aug. 15, 2013), http://articles.washingtonpost.com/2013-08-15/world/41431831_1_washington-post-national-security-agency-documents; Ellen Nakashima, *Administration Had Restrictions on NSA Reversed*, WASH. POST, Sept. 8, 2013, at A4; Ellen Nakashima et al., *NSA Broke Privacy Rules for 3 Years, Documents Say*, WASH. POST, Sept. 10, 2013, at A1.

148. As James Baldwin once put it, we have seen, “spinning above the thoughtless American head, the shape of the wrath to come.” JAMES BALDWIN, *NO NAME IN THE STREET* 195 (1972).

149. See E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2012: ADVANCED COUNTS 1* (2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

150. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 98–99 (rev. ed. 2012). In some states, as much as 80% to 90% of drug offenders sentenced to prison have been African American, despite the fact that their contact with illegal drugs (selling and/or using) is less than that of their white counterparts. *Id.*

151. GORE VIDAL, *DREAMING WAR: BLOOD FOR OIL AND THE CHENEY-BUSH JUNTA* 174 (2002).

Closing one's eyes to such conditions is an essential part of the ideology of militarism that is promoted by—because it is essential for—a national security state like ours.¹⁵² The enemy—whoever it might be at the moment, whether it turns out to be a foreigner or the American people themselves—must be apprehended. Naturally, as President Obama suggests, some tradeoffs in privacy are necessary for greater security and protection from terrorists, domestic or foreign.¹⁵³ Such logic is the very substance of the ideology of militarism. If we are to have a fully intelligent discussion of Internet privacy, and of the ramifications of that problem for equality, it must be in light of the American experience as it really is, not as it is propagandized to be. We must start asking the question: “What will become of all the information surreptitiously amassed about citizens by the government when or if democracy gives way to despotism?”

V. STRATEGIES FOR RESISTANCE

To some extent, one struggling against the surveillance State feels as if he is in the position of “shouting against the wind.”¹⁵⁴ The sense of futility is often as great as the sense of urgency. How does one, in the face of seemingly overwhelming governmental power, do anything? At the most basic level, this Essay is one form of resistance. Speaking out in protest is resistance that is real. From this perspective, Edward Snowden is a hero. Given the blasé attitude of many Americans toward the government's ever-expanding powers in the name of national security, and given the government's unquestionable ability to annihilate the individual protestor, Edward Snowden was shouting against the wind and knew it. Why do not more people speak up? Why do not more people resist the “turnkey tyranny” Snowden exposed? One reason is that much of the population does not believe that they are affected by it in any significant way. Beyond that, the ways in which those of us in the “Land of the Free” are conditioned to obey authority become palpable and important.

Lawyers, as a group, seem to me particularly brainwashed by the thing they call, with all of the majesty they can muster, “the rule of law.” Too often the “rule of law” is simply the metaphor used to

152. In this context, I can think of no better definition for militarism than that posited by Professor Ann Scales: “By ‘militarism’ I mean the pervasive cluster of forces that keeps history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that.” Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 26 (1989).

153. Michael Pearson, *Obama: No One Listening to Your Calls*, CNN (June 9, 2013, 8:26 PM), <http://www.cnn.com/2013/06/07/politics/nsa-data-mining/>.

154. MILLETT, *supra* note 31, at 305.

explain allegiance to power without the burden of a guilty conscience. Blind adherence to the rule of law meant that lawyers and judges could make the Nazi tyranny seem, well, legal.¹⁵⁵ And American lawyers and jurists are certainly not immune from the seductiveness of the rule of law. U.S. Supreme Court Justice Stephen Breyer has cited, as evidence of the magnificence of the rule of law, the reaction to the decision in *Bush v. Gore*,¹⁵⁶ the 2000 decision in which a 5-4 vote of the Supreme Court, along ideological lines, handed the presidency to a man who had not actually been elected.¹⁵⁷ There was no resistance, no rioting, no blood in the streets. Contrasting this with the 1958 Supreme Court decision of *Cooper v. Aaron*, in which the Court's integration decision had to be enforced in Arkansas by federal troops, Justice Breyer concludes that the system works.¹⁵⁸ But is the fact that Americans have had the will to protest bled out of us really a good thing? We are, after all, a country born from revolution. At the moment *Bush v. Gore* came down, a moment as notorious as any in Supreme Court history—a moment in which the Supreme Court effectively appointed a president of its choosing—there was no resistance. That is a rather remarkable thing, really. As Professor Ann Scales once observed, "Perhaps we should worry about how little it takes for the legal system to command so much . . . dedication. Perhaps we have been bamboozled."¹⁵⁹

Of course, the seeming inevitability of authority can convince people to accept much more than a judicial decision. The "rule of law," understood simply as an uncritical obedience to authority, has chilling implications for the reality of power and its abuses. In Stanley Milgram's now classic work, *Obedience to Authority*, college students, assigned the role of "teacher," in an experiment on

155. For a discussion, see LON. L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). Also, I believe this is what Hannah Arendt was getting at in her now classic work *Eichmann in Jerusalem*. Arendt, who chronicled Eichmann's trial before an Israeli court for Nazi atrocities he committed during the Holocaust, believed that Eichmann had essentially only been obeying orders as a natural-born follower. According to her, his actions were not, in fact, motivated by anti-Semitism. It is this work from which we get the (now famous) assertion that evil is merely "banal." I have always thought Arendt was incredibly dim about all of this; after all, did she expect Eichmann to admit Jew-hate in a Jewish court while on trial for his life?! It is true, however, that Nazi atrocities, including Eichmann's, were legal, at least within the meaning of German law at the time. Surely, Nazi-made law was not not law simply because it was immoral. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT OF THE BANALITY OF EVIL* at xii, 252 (Penguin ed. 2006).

156. 531 U.S. 98 (2000).

157. Stephen G. Breyer, *After Dinner Remarks*, 41 INT'L LAW. 1007, 1008-09 (2007).

158. *Id.*

159. See ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY* 26-27 (2006).

learning, administered massive amounts of electroshock to other students, assigned the role of “student,” simply because a scientist told them to do it.¹⁶⁰ In a 1973 article about his study, Milgram said that most of the subjects delivering the shocks to fellow students did so out of a “sense of obligation.”¹⁶¹ This observation led Milgram to agree with Hannah Arendt’s characterization of evil as “banal,” meaning that the capacity for evil does not require any special personal predisposition. “That is perhaps the most fundamental lesson of our study,” Milgram wrote, “ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources to resist authority.”¹⁶² It is absolutely critical, then, that we have those resources—that we work to develop them.

160. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 18 (1974).

161. Stanley Milgram, *The Perils of Obedience*, HARPER’S, Dec. 1973, at 62, 75.

162. *Id.* at 75–76. To miss Stanley Milgram’s revelation is to miss much in regard to “the rule of law” and, certainly, in regard to the Internet surveillance crisis. By missing it, many well-regarded legal scholars of the Internet, including Professor Neil Richards, who joins this Symposium, also, in my opinion, underestimate the risk posed by the NSA program. Professor Richards writes, “[F]ew critics of government surveillance such as the NSA wiretapping program . . . would suggest that these programs are directly analogous to the evil regime depicted in Orwell’s dystopia.” Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945 (2013). I suppose, then, that I am one of the “few.” “Evil” is banal; it is also only given content by virtue of experience. I am reminded of a scene from *Star Wars* in which, as the Emperor takes over the galaxy, with promises of security and prosperity, the assembled leaders cheer and applaud. Only later is the depth of their shortsightedness revealed. I must admit that I have been a bit amused to read law professors arguing over the best literary metaphor for conceptualizing “Big Data,” see, for example, Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087 (2006) (reviewing DANIEL J. SOLOVE, *THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE* (2004)), which is itself, of course, a metaphor. I will say, here, however, that I think neither of them has gotten it quite right. Contemporary surveillance analogies to Orwell are obvious. They have been around at least since Al Gore invented the Internet. I have made them in this Essay, and they will, doubtlessly, be made again. Of course, much of what Orwell imagined has now for us real relevance. And, yet, the Orwell metaphor, seductive as it may be, can only take us so far. The truths about human nature revealed in Milgram’s work, in fact, make Orwell’s insights of limited usefulness. Literary explanations of the threats posed to us in an age of ever-increasing technological integration and ever-shrinking expectations of privacy must also, if we are to draw a lesson from literature on the state of our modern lives, include Aldous Huxley’s *Brave New World*. *Brave New World’s* essentiality to a metaphoric understanding of the Internet surveillance problem is best explained in Professor Neil Postman’s contrasting of Huxley’s and Orwell’s classics:

In many respects, I think the resources necessary to resist the surveillance state track those Kate Millett identified in her marvelous book, *The Politics of Cruelty*, as necessary to combat the pervasiveness of torture.¹⁶³ Torture is a natural outgrowth and inevitable practice of the national security state, so it is only natural that the steps necessary to resist surveillance and torture share important inflections.¹⁶⁴

Huxley and Orwell did not prophesy the same thing. Orwell warns that we will be overcome by an externally imposed oppression. But in Huxley's vision . . . people will come to love their oppression, to adore the technologies that undo their capacities to think. . . . Orwell feared that the truth would be concealed from us. Huxley feared the truth would be drowned in a sea of irrelevance.

NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS*, at vii (1985). The tepid response of most Americans to our government's blatant intrusion, with impunity, into the privacy of our e-mail and Internet usage proves Huxley's truth. And, anyhow, maybe whatever protests we can muster will be rendered irrelevant because the government's obvious, and to date unaltered, surveillance of our communications and Internet usage will be said to deprive us of that "reasonable expectation of privacy" essential to a viable claim for an unconstitutional violation of the "right to privacy." A cynic might wonder whether that has been a central part of the government's agenda all along.

163. See MILLETT, *supra* note 31, at 301. Millett does not attempt to define steps to resist torture in a linear sense. Still, these important principles can be extrapolated from the conclusion to her brilliant book-length essay on torture: (1) exposure; (2) transcendence over nationalism; (3) use of the law. See *id.* at 296–314.

164. Back in 2009, I read an editorial by Professor Jack Balkin in the *New York Times*. Balkin's editorial is actually what made me reread—after many years—Kate Millett's *The Politics of Cruelty*. Balkin begins his op-ed with this question:

In the past eight years, our government has tortured people and spied on its own citizens. Administration lawyers created a series of secret laws to justify these activities. The Justice Department has been riddled with scandals alleging corruption, illegality and incompetence. What should the next administration do about these practices? Do we punish wrongdoing or discover the truth?

Jack M. Balkin, *A Body of Inquiries*, N.Y. TIMES, Jan. 11, 2009, at WK11. Millett ends her book on torture with a strikingly similar question: "One of the ways we discuss torture is ask the question: what to do with the torturers when dictatorial regimes give way to democracy? The torturer remains in the midst of those he has wronged. Shall he be accosted, accused, or judged? . . . If not justice, then truth?" MILLETT, *supra* note 31, at 296, 298. It is so interesting to me that both Millett and Balkin opt for truth instead of reprisal (for various reasons). Balkin was writing in the heady aftermath of President Barack Obama's election. There was reason for Balkin and the rest of us who longed for progressivism in our approach to national security to be hopeful. It seems clear to me today, however, that we have been had.

A. *Step 1: Exposure*

Exposure is critical. The populace must know what is happening to them—why and how. In his book, *A Miracle, a Universe: Settling Accounts with Torturers*, Lawrence Weschler asserts, in the context of the state that has tortured, that “[a] military which would be shown—not just known, but *shown*—to have indulged in such systematically dishonorable, disfiguringly dishonorable activities . . . [might not only lose its respect and honor, but even] the populace’s suspended disbelief in that fiction.”¹⁶⁵ One possessed of such knowledge, Weschler says, the populace possesses “potentially *magic truths*,”¹⁶⁶ necessary to understanding, finally, “the [security State’s] tutelary power over the wider population.”¹⁶⁷ Once these magic truths are disclosed to us, moreover, “[t]he meaning and future of militarism itself might be at stake.”¹⁶⁸ These are high stakes. Consequently, we must not underestimate how far the government will go to keep the truth from being said. We must demand that whistleblowers, like Edward Snowden, be treated as such—not as enemies of the American people.

In 2008, Daniel Ellsberg, who famously leaked the Pentagon Papers exposing many governmental crimes and lies regarding the war in Vietnam, wrote the foreword to a fascinating book by Ann Wright, Colonel, U.S. Army, Ret., and Susan Dixon, profiling numerous George W. Bush administration officials who acted as whistleblowers or otherwise resigned in protest of the administration’s lies and illegalities associated with the Iraq War. Ellsberg had this to say, specifically about whistleblowers:

Whistleblowers are few and isolated in any walk of life, but there have been, until very recently, many more of them outside the national security establishment than within it, though remarkably, this book has gathered together more of the latter than would have been possible even a few years ago. No doubt that is because whistleblowers in industry or civilian agencies, though they generally suffer greatly in their advancement, careers, and personal lives, do not have to face the possibility of prosecution or the almost-certain charge, however misdirected and unfounded, that they have hurt national security, allegedly endangered troops, shown disloyalty and lack of patriotism, or (more factually) broken

165. LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE* 217 (1990).

166. *Id.*

167. *Id.*

168. MILLETT, *supra* note 31, at 297.

promises to keep secrets on which their clearances and access were based.¹⁶⁹

Surely, the Obama administration's decision to pursue Snowden for espionage, and to render him effectively stateless, proves the truth of Ellsberg's assertion. But, critically, people like Snowden and other government whistleblowers take an oath to uphold the Constitution. That oath is not to the President or Commander-in-Chief. It is an oath to "We the People." On account of that fiduciary relationship, we, citizens, ought to insist that avenues be available for those working in the "national security" apparatus to expose governmental crimes and lies. No such mechanism existed under the Bush administration. Shockingly, no such mechanism exists now.

It is worth noting that it was Vladimir Lenin who first used charges of domestic espionage to silence government criticism from the inside.¹⁷⁰ Section 6 of article 58 of the Soviet Criminal Code (1923, 1926) used espionage to create

an apartheid of official secrecy and public ignorance that would become a model in many other places under the same rubric of "national security." It also introduced a potent xenophobia whereby contact with or interest in any outside place was in effect criminal. The labels of "terrorist" and "terrorist interests" were given their first blanket use, terms of great convenience, now worldwide.

This description of Leninist and Stalinist despotism in the name of "national security" seems stunningly relevant to the United States at this moment in light of the "terrorism" furor ignited in the West on September 11, 2001, and, in particular, with regard to the treatment of insider dissenters. The degree to which Stalin used article 58 to quash free speech is also eerily resonant.¹⁷¹ It takes a tremendous degree of courage to do what Snowden did. And the government has responded in a fashion that unequivocally tells us it will not tolerate—that it will crush—the will to courage. The bottom line here is that, if we care about keeping our constitutional order alive, we must defend the men and women inside the government who want to speak out. As pervasive and invasive as the NSA surveillance program has been revealed to be, we may not yet have the full picture.

169. Daniel Ellsberg, *Foreword to DISSENT: VOICES OF CONSCIENCE* vii, ix (Ann Wright & Susan Dixon eds., 2008).

170. See MILLETT, *supra* note 31, at 40–41.

171. See *Here & Now: CPJ Report: Obama Administration Has Had "Chilling Effect" on Journalism* (Nat'l Pub. Radio radio broadcast Oct. 14, 2013), available at <http://hereandnow.wbur.org/2013/10/14/cpj-obama-press> (transcript on file with author).

B. Step 2: Transcend Nationalism

We cannot effectively resist the national security State unless and until we transcend our particular brand of American nationalism. So much that is, in fact, damaging to our own security and safety as citizens is bound up in what we think it means to be an American "citizen." Nationalism makes the national security State possible and its arrogation of more and more power excusable by security "necessities" that the exigencies of nationalism—threats from without and, when convenient, from within—call forth. In the propaganda of the so-called War on Terror, nothing short of American citizenship itself is at risk. In this context, and on account of the increasingly polarized vision of what American citizenship is and what it entails—the "us versus them" mentality of American foreign policy and, indeed, of domestic relations—citizenship takes on not only a cumulative meaning at the popular level but also, at the level of government, real force.¹⁷² In the paradox that is the national security State, the rights of citizens must be suspended (in fact abrogated) in order to protect citizens. Kate Millett reminds us (and, remember, Millett is writing before the Internet):

The term "citizen"—which historically followed the term "subject," a new term once and full of a sense of "rights" and "prerogatives"—now often serves to remind us how these entitlements have wilted under the state's greater and greater amassment of power in modern centralization of control, technically facilitated with computer-like speed: records, files, information itself becoming a hand closing over the arm of any one of these citizens.¹⁷³

Mostly this denigration is accomplished without resistance; the truth of what is happening is camouflaged behind the ever-growing propaganda of national security, of military necessity, of counter-insurgency. What follows is "nationalism at the popular level, and on the level of government itself. . . . As long as we identify culture and language and love of place with nation and national government, we are vulnerable to patriotic manipulation; as government's power increases, there is a concurrent increase in manipulation. To have any effect on state power, even to see and apprehend it, one must, as a first step, transcend nationalism."¹⁷⁴ Vigilance, not luck of birthplace, is the price of freedom. We cannot go on leaving unanswered—in fact, uninvestigated—in the name of patriotism, assertions of national security necessity or of benign surveillance.

172. See MILLETT, *supra* note 31, at 306.

173. *Id.* at 307.

174. *Id.* at 306–07.

C. Step 3: The Law

I have criticized obedience to the rule of law as a convenient cover for excessive use of power. Certainly, I believe this to be true in many cases. But the law is also—perhaps unfortunately—the best shot we have at dealing with immediate problems. I echo the late Ann Scales, who once said that “my heart need[s] the world to change in more immediate and more enforceable ways than [are] observable from nonlegal political activism.”¹⁷⁵ I certainly do not advocate abandoning the law as an instrument of change. Such is the work of postmodern theory, mostly the luxury of academics, and also, generally, a university-subsidized collection of “familiar if fancier reasons for doing nothing.”¹⁷⁶ As lawyers, we have to continue to use the law, as we know it, and as we invent it, to respond to governmental anti-equality intrusions into the everyday lives of citizens. One grassroots possibility would be to pressure Congress to change the Communications Assistance for Law Enforcement Act of 1994, which, as written, requires telecommunications companies to build their networks in ways that make government surveillance of Internet activity possible, including the interception of e-mail and web traffic.¹⁷⁷ Many of the contributions to this Symposium provide a range of other possibilities.¹⁷⁸

CONCLUSION

Part of the problem of doing anything about the problem of the Internet and inequality is not only that we are dealing with power perpetuating itself—and power is a serious thing—but also that we are dealing with notions of reality with which people have become comfortable or, at least, in which they have largely surrendered in their protest. In this sense, technology itself is a panopticon. Its ubiquity is transforming society in its image, as well as the rule of law.¹⁷⁹ At stake, now, in our new—or at least newly revealed—

175. SCALES, *supra* note 158, at 159 n.23.

176. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 710 (2000).

177. 47 U.S.C. §§ 1001–10 (2012).

178. See, e.g., Olivier Sylvain, *Failing Expectations: Fourth Amendment Doctrine in the Era of Total Surveillance*, 49 WAKE FOREST L. REV. (forthcoming 2014).

179. A recently released Gallup poll revealed that U.S. Internet users are now less concerned about the government “tapping” into their Internet and e-mail activities than they were in 2000, even after the September 11, 2001 attacks and Edward Snowden’s NSA revelations. See Art Swift, *U.S. Internet Users Less Concerned About Gov’t Snooping*, GALLUP POL. (Oct. 24, 2013), http://www.gallup.com/poll/165569/internet-users-less-concerned-gov-snooping.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Politics. I think it is a fair assumption to make that people now care less because they now believe they

“United States of Surveillance” is nothing less than a democratic ideal, that is to say how a free society (however arbitrary that meaning may be) makes decisions about governing itself and dealing with the rest of the world. Any intelligent response must include the ingredients sketched in these remarks: a seriousness about the problem; a knowledge of history; a healthy skepticism regarding “national security” justifications for increasing governmental power; and a determination to change the present situation for the better. Beyond these, I leave you with an exhortation. In 1995, my heroine, the late Andrea Dworkin, gave a speech that she entitled “Remember, Resist, Do Not Comply.”¹⁸⁰ That is exactly what I am asking you to do with regard to the technologization of oppression and the NSA Internet surveillance program as an extension of that historical process: remember, resist, do not comply.

have less of a legitimate expectation of privacy in the first instance. The conditioning the Internet works is powerful and obvious.

180. Andrea Dworkin, Speech, Remember, Resist, Do Not Comply (1995), in ANDREA DWORKIN, *LIFE AND DEATH: UNAPOLOGETIC WRITINGS FROM THE CONTINUING WAR AGAINST WOMEN* 169–75 (1997).
