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The headlines remind us almost daily that privacy is endangered, but there are times when our commitment to privacy endangers public health and public safety. Frequently, the common good is neglected to protect privacy. Good societies carefully balance individual rights and social responsibilities, autonomy and the common good, privacy and concerns for public safety and public health, rather than allow one value or principle, to dominate. Once we accept the concept of balance, the question arises as to how we determine whether our policy is off balance and in what direction it needs to move, and to what extent, to restore balance.

In Fourth Amendment cases, courts often rely upon the criteria articulated in *United States v. Katz* to determine reasonable expectations of privacy by the defendant and by society.<sup>(1)</sup> In this court case, the defendant, a gambler who made calls from a public phone booth, won on the grounds that he had a reasonable expectation of privacy that his phone calls would not be intercepted by the police or FBI agents and that society shares this expectation.

To one untrained in law, and especially to a sociologist, this twin criterion is difficult to comprehend, let alone to apply. How, for instance, is a court to determine if a person who grows marijuana on his private property, concealed by some bushes, has a "reasonable" expectation of privacy, say, when a police helicopter flies overhead? Is it legitimate for police to search a person's street-facing porch when no public good is served, just because the person and his community may have no, or only a low expectation of privacy there?<sup>(2)</sup> A leading lawyer, in a private conversation, referred to the criteria articulated in *Katz* as "bizarre." Another pointed out that *Katz* is tautological: once the Supreme Court rules that there is an expectation of privacy regarding a certain area of conduct, there is such an expectation--whether or not it existed prior to the ruling.

Rather than drawing on pseudo-sociology of expectations, four criteria should guide the analysis of the public policy areas from ethical, social, and legal perspectives.

First, a well-balanced, communitarian society will take steps to limit privacy only if it faces a well-documented and macroscopic threat to the common good, not merely a hypothetical danger. Is there a compelling need for corrective action? Or are we about to recalibrate privacy unnecessarily? Tampering with ethical, social, and legal traditions--and with the public philosophies that underlie them--endangers their legitimacy because once tradition is breached it is difficult to prevent it from unraveling, a phenomenon often referred to as the slippery slope problem.<sup>(3)</sup> Changes, therefore, should not be undertaken unless there is strong evidence that either the common good or privacy has been significantly neglected.

After determining that the common good (or privacy) needs shoring up, the second criterion examines whether that goal can be achieved without recalibrating privacy. Or, conversely, can privacy be enhanced without recalibrating the common good? For instance, when medical records are needed by researchers and epidemiologists, the data are collected and utilized in a communitarian society as much as possible without identifying individuals. Because such measures often entail changes in mores, institutions, or habits of the heart rather than laws or constitutionally protected rights, I refer to them as "second criterion treatments."

Third, to the extent that privacy-curbing measures must be introduced, a communitarian society makes them as minimally intrusive as possible. For example, many agree that drug tests should be conducted on those directly responsible for the lives of others, such as school bus drivers. Many employers, however, resort to highly intrusive visual surveillance to ensure that the sample is taken from the person who delivers it when in fact the less intrusive procedure of measuring the temperature of the sample immediately after delivery would suffice. To distinguish these kinds of measures--often undertaken by the government, and typically entailing changes in legal doctrine--from second-criterion treatments, I refer to them as "third-criterion interventions."

Lastly, measures that treat undesirable side-effects of needed privacy-diminishing measures are to be preferred over those that ignore these effects. These measures are required both to protect people from unnecessary injury and to sustain public support for the needed policies. Thus, if more widespread HIV testing and contact tracing are deemed necessary to protect public health, efforts must be made to enhance the confidentiality of the records of those tested.

Application of the four balancing criteria helps ensure that correctives to a society's course are both truly needed and not excessive. True, even when these criteria are applied, one cannot pinpoint with complete precision the proper or optimal course to follow. Societies have rather crude guidance mechanisms,<sup>(4)</sup> and may need constantly to adjust their course as they oversteer first in one direction and then in the other. However, the criteria do provide a basic measure of the extent of the imbalance between privacy and the common good, and the direction and nature of the necessary corrections.

Moreover, although the criteria for corrective action have been introduced with examples in which the public good may need to be given priority over privacy, it should be stressed that the same criteria also provide guidance when the societal balance has tilted too far in the opposite direction, that is, when privacy is endangered and the concern for the common good must be scaled back.

Far from being mutually exclusive, treatments and interventions can often complement one another. For instance, self-regulation has been urged on private actors such as marketers on the Internet (a second-criterion treatment) as a way to protect privacy of consumers. Corporations have been urged to post their privacy policy on their web sites. Critics argue that self-regulation has little effect because there is no way to ensure compliance. Champions of self-regulation responded with suggestions that such sites could be audited (a second criterion treatment), but also they also have agreed that corporations that violate their posted policies may be considered to have engaged in fraudulent business practices and will be subject to legal claims (a third criterion intervention).<sup>(5)</sup> Many other examples come to mind in which it is better to consider combining treatments and interventions rather than view them as stark alternatives.

In what may be called the "privacy paradox", most civil libertarians and many other privacy advocates keep railing about third criterion alternatives, as they view Big Brother--the government--as the enemy of privacy. As Justice William O. Douglas stated, in *Osborn v. United States*, that "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from the government."<sup>(6)</sup> I have found, however, that to the extent that privacy is grossly and wantonly violated in contemporary American society, more often than not it is violated by privacy merchants rather than by Big Brother government. As a result, privacy advocates have sought to stop massive and encompassing privacy violations by these profiteers--by drawing on new legislation--that is, on the government.<sup>(7)</sup>

The tendency to allow privacy considerations to take precedence over concerns for public safety and public health is not accidental. It reflects fundamental conceptions deeply imbedded in our civic culture, public policies, and jurisprudence. What is needed is a different conception of privacy, one that accords it equal standing with the common good, without privileging either value.

To reconceptualize privacy, a highly revered right, may seem offensive, almost sacrilegious. We traditionally view individual rights as strong moral claims with universal appeal--that is, we perceive them as inalienable rights. While we realize that individual rights have been formulated in a given historical period, we tend to conceive of these formulations as truths rather than mores fashioned for a given time that are open to amendment as conditions change.

I argue in the following pages that privacy is a contingent concept. While some vague notion of privacy exists in most, if not all, societies,<sup>(8)</sup> the specific way we treat privacy in our law and culture is a recent phenomenon, and one that has already been recast at various times. In other words, it is hardly a near-sacred concept that cannot be reformulated.

The also show that the governing formulation of privacy, as I have tried to show in the preceding cases, often treats privacy as an unbounded good, prioritizing it over the common good. This conception was, as I will show, well-suited to the socio-historical conditions that prevailed from the formulation of privacy as a legal concept until roughly the 1960s. However, in the wake of the rise of radical individualism between 1960 and the 1990s, a new conception of privacy is called for, one that does not privilege privacy over the common good but rather is open to balance this right with concerns for social responsibilities, a communitarian concept.<sup>(9)</sup>

## **I - PRIVACY ARGUMENTS REEXAMINED**

A reexamination of the often-told legal history of privacy in American society helps to illuminate the nature of the arguments used to "extrapolate" privacy as a right from the common law and Constitution.

In examining the arguments that were used to formulate the legal doctrines that support privacy in American law, I discuss three stages of development: pre-1890 (utilizing principles derived from property rights to protect privacy); 1890 to 1965 (generally considered the era during which a right to privacy was developed, largely as a part of tort law); and post-1965 (which saw a major expansion of the right to privacy, particularly with regard to its constitutional basis). While my discussion focuses on legal concepts, I cannot stress enough that, as the preceding case studies show, these concepts have parallels in civic culture and play a major role in the decisions of policymakers.

### **1.1 The development of American Privacy Law**

Before 1890, American society, like many others, had a vague social concept of privacy, albeit one that was not ensconced in a distinct legal doctrine or constitutional right.<sup>(10)</sup> While there were several legal cases defending some aspect of what later would be called privacy, these relied upon the well-established right to private property.<sup>(11)</sup> For example, harming a person's reputation through the revelation of private details was deemed legally redressable because it was thought to do damage to something one owned (i.e., one's reputation), rather than because it was viewed as an invasion of privacy.<sup>(12)</sup>

The right to private property was, in turn, treated as semi-sacred: a reflection of a natural law, an inalienable right, and an unbounded, or at least strongly privileged, good. John

Locke, who heavily influenced American thinking on these matters at the time, wrote that property is based in "an original law of nature" that "still takes place" even though societies "have made and multiplied positive laws [laws created by humans] to determine property."<sup>(13)</sup>

Classical liberals did recognize that the rights of an individual could be asserted only up to the point where such exercise intruded on the liberties of others, and thus were, in a sense, "limited." But such limitations were not, as a rule, considered for the common good. It was thus typically assumed that property owners were free to do with their property as they deemed fit, unless and until their actions plainly impinged on the rights of others. Even then, the burden of proof fell on those who would limit the use of private property, and no principled concessions were recognized to serve a socially-formulated conception of the good.

The next marker in the legal history of privacy was an 1890 essay by Samuel D. Warren and Louis D. Brandeis,<sup>(14)</sup> which served as the basis for hundreds of legal cases in the century that followed and is considered "the most influential law review article ever published."<sup>(15)</sup> In it, Warren and Brandeis advance the novel claim that the right to privacy is conceptually distinct from other freedoms, particularly the right to private property. (As others have observed, the authors were far more explicit in rejecting the notion that privacy is derived from other rights than they were in articulating any specific legal foundation for privacy.<sup>(16)</sup>)

Warren and Brandeis frame their argument in terms of "the right to be let alone," a right the two assumed to be self-evident. Indeed, at one point, Warren and Brandeis refer to the "precincts of private and domestic life"--implying the capability to isolate oneself from public spheres and the community--as "sacred,"<sup>(17)</sup> a term typically employed to designate values or precepts of the highest authority, ones that should not be touched, let alone reigned in. It is indicative of the reverence of rights in general and of privacy in particular that the term sacred is frequently employed by people who otherwise draw on no religious images, terminologies, or beliefs.<sup>(18)</sup> As invoked, the right to be let alone stands supreme and apart from other considerations; it presumes that all people can be left alone as much as they desire--completely if they so prefer--without restricting other persons' abilities to similarly exercise their right to be left alone to the fullest extent. Nor is there any apparent recognition that if the members of a community exercise this liberty in full, the common good will be shortchanged.<sup>(19)</sup>

Later, authorities referred to privacy as an "inalienable right,"<sup>(20)</sup> thereby connoting its powerful claim and trump standing. (Trumps are defined as "reasons that can be played against any and all ethical concerns."<sup>(21)</sup>) Indeed, as Justice Holmes stated: "Rights tend to declare themselves absolute to their logical extreme."<sup>(22)</sup> As the right to privacy is viewed as an inalienable right, it does not yield to the common good. "Moreover," William Lund observed, "any citizen who manages to get an interest wrapped in the cloak of a right appears to have an absolute claim against other considerations."<sup>(23)</sup> Louis Henkin has made the communitarian point that "consideration has focused on defining the private right of privacy, with little regard to our other balance, the competing 'public good.'" He added that although this lack of balance characterizes applications of the Bill of Rights generally, the public good have been given particularly short shrift in the area of privacy.<sup>(24)</sup>

Moreover, there has been a strong tendency to treat privacy either as a cardinal element of autonomy (or liberty), or to treat these concepts as if they were synonymous with privacy, further extending the reverence for privacy. Charles Fried adds that "men feel that invasion of that right injures them in their very humanity" and in regards to respect, love, friendship, and trust, "without privacy they are simply inconceivable."<sup>(25)</sup>

Others have claimed that privacy is intimately associated with our most profound values, our understanding of what it means to be an autonomous moral agent, capable of self-reflection and choice; and that its violation is "demeaning to individuality, is an affront to personal dignity," that is, its violation offends the core of Western values.<sup>(26)</sup> Jean Cohen adds that "a constitutionally protected right to personal privacy is indispensable to any modern conception of freedom."<sup>(27)</sup>

All of these arguments paint a picture of fairly unbounded, at least privileging, claims in the name of privacy. Indeed, few individualists (a term used here to refer to civil libertarians, libertarians, classical liberals, and contemporary classical liberals) even broach the question of whether there can be excessive privacy. Avishai Margalit, for instance, simply states that "The institutions of a decent society must not encroach upon personal privacy,"<sup>(28)</sup> recognizing no principled situations where the common good may require some limitations on privacy. Glen O. Robinson points out, in "controversies over regulating communities and community activities, most legal scholars and judges start with a [classical] liberal bias."<sup>(29)</sup> This legal approach is particularly well summarized by Stanley I. Benn:

The liberal . . . claims not merely a private capacity--an area of action in which he is not responsible to the state for what he does so long as he respects certain minimal rights of others; he claims further that this is the residual category, that the onus is on anyone who claims he is accountable . . . There is room for a good deal of disagreement about the extent to which considerations like those of general economic well-being, social equality, or national security justify pressing back the frontiers of the private, and thus holding men responsible for the way they conduct their daily business. For the liberal, however, every step he is forced to take in that direction counts as retreat from a desirable state of affairs, one in which, because men may please themselves, what they are about is properly no one's business but their own.<sup>(30)</sup>

The third stage of the development of the legal foundations of privacy is commonly recognized as commencing with cases such as *Griswold v. Connecticut*,<sup>(31)</sup> *Eisenstadt v. Baird*,<sup>(32)</sup> and *Roe v. Wade*,<sup>(33)</sup> all dealing with reproductive choices. These cases have been discussed so often and so extensively that I shall focus only on those points relevant to our thesis. Basically, if one uses the early 1960s as a baseline, the period in which the cases that lay the foundations of a constitutional right to privacy were decided, one sees that then prevailing conceptions of the common good were very strongly privileged and left little room for considerations of privacy and autonomy. Thus, the use, distribution, and sale of contraceptives was outlawed even for married couples. Abortion was banned by law in most states, it was allowed only to save the life of the mother.

*Griswold*, which was the first of these reproductive rights cases, is commonly credited with establishing a general constitutional right to privacy. In *Griswold*, the Supreme Court ruled that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy. Thus, overnight, behavior that had been banned (as far as the law was concerned) was transformed into one married couples could engage in without limitations. Privacy was now honored. (To note that no limitations were set on this new right is not to suggest that they should have been set, but rather to highlight the dramatic nature of the reversal of the previous position.)

This new right was soon extended. In *Eisenstadt*, the Court went further and invalidated a ban on the distribution of contraceptives, even to unmarried couples. In a subsequent case, *Carey v. Population Services International*,<sup>(34)</sup> limitations on the sale of contraceptives to minors were removed.<sup>(35)</sup> In these cases, too, the Court did not introduce or explicitly acknowledge any qualifications or limitations on the liberty in question. Protection for privacy

had become almost absolute. As Louis Henkin observes, "the Court paid virtually no attention to the State's possible purpose or motive in outlawing contraception."<sup>(36)</sup> And while *Griswold* was limited to the use of contraceptives by married couples, *Eisenstadt* created a new, much broader, conception of privacy, that of the individual, which a person could and did carry with her any place so to speak, a freedom which would no longer be confined simply to one's bedroom or house.<sup>(37)</sup>

To reiterate, I am not suggesting that the various prohibitions on use and sale of contraceptives or abortions should have been allowed to stand. My argument only points to the unbounded nature of the position embraced. No limits on the right to privacy in the name of some other consideration--for instance, respect for community values or special considerations for parents' responsibilities for minors--were allowed to stand.

In *Roe v. Wade*, the Court further expanded the right of privacy by striking down bans on abortions. This case, however, was arguably somewhat less comprehensive than the others. While the Court did not let stand any limitations on terminating pregnancies, it explicitly stated that it rejected the unbounded approach and formulated some criteria under which states could ban abortions. Justice Harry Blackmun wrote:

[S]ome amici argue that the woman's right is absolute and she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.<sup>(38)</sup>

The Court ruled that the states may override a woman's decision "whether or not to terminate her pregnancy" if the state's interest is "compelling."<sup>(39)</sup> And the court, by introducing distinctions among the trimesters of pregnancy, indirectly legitimated more regulation of the third than the second and of the second than the first.

Whether one sides with those who believe the court should have allowed the bans on abortion to stand, or with those who hold that the ruling was too restrictive, does not alter the observation about the structure of the argument at issue here: *Roe v. Wade* is an important case in which a behavior that had previously been controlled by the state was freed to be subject to personal choice.

In short, the approach to privacy that evolved first in tort law and then in Supreme Court decisions concerning reproductive choice cases treats privacy as an unbounded good. In its more moderate form, this approach lays the burden of proof on those who seek consideration for other claims, thus treating the common good at best as secondary.

## **1.2 Historical Context for the Privileging of Privacy**

The nature of these individualist arguments is best understood in the historical context in which they arose. The extrapolation of a legal right to privacy from common law cases, from newly fashioned arguments, and ultimately from the Constitution, took place late in the long development of legal individual rights, a process that was itself an indication of the growing value accorded to individual dignity and liberty. Indeed, one can read the writings of John Locke, Adam Smith, and some of those of John Stuart Mill, as arguments for individual rights and liberty that were formulated in authoritarian and excessively communal historical ages, as arguments for rolling back extensive and oppressive societal controls imposed by both the state and the community. Not surprisingly, social philosophers whose societies faced these highly restrictive conditions did not concern themselves with the danger of building excessively strong legitimacy for individual rights--no more than one is concerned about

over-using a town's water supply in the depths of the rainy season, after decades of more than ample rainfall, indeed flooding.

Historically, the formulation of privacy is actually a late addition to the long list of rights. Its development followed by several generations the first recognition in American law of the rights to free speech, freedom of association, and freedom of worship, among others. In fact, Warren and Brandeis are explicit about this point in their 1890 article. They open their renowned essay with a discussion of their belief that it was time for the common law to "grow to meet the demands of society," much as it had done on previous occasions when social circumstances had shifted.<sup>(40)</sup> The same basic approach is reflected in the work of T.H. Marshal, who viewed Western history as a relentless march toward increasingly expansive spheres of rights, growing from legal, to political, to socio-economic rights, with little concern or suggestion that rights might be over-extended or intrude on other common goods.<sup>(41)</sup>

### **1.3 The Same Arguments--In a New World**

Contemporary champions of privacy often still employ arguments that either treat privacy as an unbounded good, or at least privilege it over all other social goods. Though they may recognize that rights in general, and privacy in particular, are significantly better protected in contemporary America than they were in the 1890s and earlier, contemporary individualists nonetheless marshal arguments similar to those of their ideological forbearers because they continue to fear that the state is, or may grow to be, overbearing. Moreover, these individualists are concerned that new technological and social developments may lead to the diminution, if not the destruction, of privacy. We frequently hear statements like the following: "The dossier and computer bank threaten us with victimization and persecution by unscrupulous, intolerant, or merely misunderstanding officials." "[T]rade-offs where privacy has been sacrificed are now so common that, for all practical purposes, privacy no longer exists."<sup>(42)</sup>

Treating privacy and other individual rights as sacrosanct, however, has had negative consequences that have been largely ignored by those who draw on legal conceptions fashioned in earlier ages. As has been demonstrated by Robert Bellah and his associates, Mary Ann Glendon, and myself, American society after 1960 entered an era of growing individualism and neglect of the common good, in which expressive individualism (of the counter-cultural variety) was followed by instrumental individualism (of the sort championed by Margaret Thatcher and Ronald Reagan and other laissez faire conservative thinkers).<sup>(43)</sup> The realms of rights, private choice, self-interest, and entitlement were expanded and extended, but corollary social responsibilities and commitments to the common good were neglected with negative consequences such as the deterioration of public safety and public health. The new socio-historical context, as we saw it, called for greater dedication to the common good and less expansive privileging of individual rights.<sup>(44)</sup>

## **II - THE QUEST FOR A COMMUNITARIAN BALANCE**

There is no agreed-upon or even widely accepted communitarian conception, let alone, definition of privacy. I suggest that a sound communitarian treatment of privacy views it as the realm in which an actor (a person or a group, such as a couple) can legitimately act without disclosure and accountability to others. Privacy thus is a societal license that exempts a category of acts (including thoughts and emotions) from communal, public, and governmental scrutiny.<sup>(45)</sup> For instance, contemporary American society largely exempts from scrutiny most acts that occur inside the home, especially the bedroom, and to a lesser extent those that occur within the automobile. Exceptions include child abuse, domestic violence, and illegal drug use. Even in these situations, respect for privacy typically requires that the

state act only after the consequences of acts that took place in the home or auto have become visible outside the space exempted from scrutiny; for example, when a violent fight inside a house is heard from the outside or when a child comes to school or a physician's office showing clear signs of abuse.

In addition to legitimately exempted action,<sup>(46)</sup> privacy encompasses behavior that members of a particular social entity are positively expected, by prevailing social mores or laws, to carry out in ways that ensure these acts will not be readily scrutinizable (for instance, defecating is expected or required to take place out of sight in many societies). Such privacy aims to shore up the common good or certain social virtues (modesty, for instance), rather than individual autonomy. Mandated privacy is reflected in the so called "moral laws" that prohibiting people to bath nude on many public beaches, limit public drinking in some communities, and so on. This is a topic rarely treated and not developed here but deserves much additional study for those who are concerned about the good, and not merely a civic, society.<sup>(47)</sup>

In many societies, public spaces are scrutinized to ensure that the conduct and acts characterized as private will be carried out in privacy. For example, the moral squads of Iran's police ensure that women's hair and bodies are exposed only at home. In America, some communities prohibit public consumption of alcohol and most prohibit nudity in communal spaces. This kind of privacy ought to be referred to as "mandated" or positive privacy.

Considering its normative nature, mandated privacy is, on the face of it, not a right but a social obligation. This kind of privacy is at issue when, for instance, the subject of bans on nudity on beaches is explored; however, the way it is typically treated is as a protection of the right to be nude rather than of the social requirement to be clothed. Given the prevalence of rights talk, one should not be surprised to find that positive privacy rarely is mentioned, let alone studied, in the vast literature on legal privacy.<sup>(48)</sup> Mandated privacy is a topic that deserves a treatment all of its on.

Many discussions of privacy ignore the normative component and simply define privacy empirically as an avoidance or absence of surveillance, the kind of protection a wall or curtain provides.<sup>(49)</sup> In contrast, the definition of privacy provided here has a normative element because it includes an exemption from scrutiny, and, in some instances, the requirement to curtail visibility and audibility elements that are considered normatively appropriate or inappropriate by the relevant society. At issue, then, is not merely whether there are or could be barriers that block visibility and audibility, but also which barriers are considered legitimate and which are not. The concept of privacy, at least implicitly, denotes the existence of legitimate barriers; those that are illegitimate are seen as fostering concealment or secrecy, terms that imply illicit, if not illegal, behavior. That is, both the scope of privacy and the nature of the specific acts that are encompassed (e.g., sexual behavior, voting) versus excluded (e.g., office mail including e-mail, private lives of public figures) reflect a society's particular values. I discuss the implications of this point later.

I will draw on a critical distinction in the following pages between accountability (matters the government is/is not entitled to "watch") and control (the "decisional" realm, choices the government is/is not entitled to make).<sup>(50)</sup> But let us look first at the roots of this suggested definition of privacy in communitarian thinking and in the sociohistorical context.

## **2.1 Roots in Responsive Communitarianism**

The definition of privacy I advance here reflects a particular brand of communitarian thinking sometimes referred to as responsive (or new) communitarianism.<sup>(51)</sup> Responsive

communitarians seek to balance individual rights with social responsibilities, and individuality with community. They differ from early communitarians such as Ferdinand Tönnies and contemporary Asian communitarians who celebrate community and authority but ignore (at best) individual rights.<sup>(52)</sup> Responsive communitarians do not view community or social harmony as an unbounded or privileged good, but rather treat social formulations of the common good as values that need to be balanced with concerns for individual and sub-group autonomy.<sup>(53)</sup>

The responsive communitarian approach, on which this examination of privacy draws, reflects historical circumstances decidedly different from those Warren and Brandeis faced in the 1890s. It evolved in response to the American historical context of the period between 1960 and 1990, a time when American society shifted dramatically toward egoism after decades of strong communalism and even a measure of authoritarianism (especially in the treatment of minorities and women). It led communitarians such as Robert Bellah and his associates, Mary Ann Glendon, Michael Sandel, and Michael Walzer to stress the importance of communal factors. During the 1960s, America experienced various social movements that emphasized many previously neglected rights, particularly in the areas of race and gender. Such movements also placed new limitations on police powers (e.g., with the Miranda ruling in 1966 and the introduction of guidelines limiting the FBI in the 1970s) and glorified counter-cultural expressions of self, which often involved the flouting of traditional communal mores. These movements were followed by the celebration of self-interest during the 1980s. What started as an individualistic correction of excessive communalism led to strong individualism, wanton manufacturing of presumed rights such as a right to a credit card or a right to use the men's room if there is even a small queue in front of the women's room,<sup>(54)</sup> neglect of social responsibility, and of the waning of commitments to the common good. If society was to move toward a state of equilibrium, it required a communal shoring up--hence the rise of the communitarian movement in the early 1990s.<sup>(55)</sup>

The simple image of a bicycle rider who must constantly adjust her balance captures the essence of the responsive communitarian public philosophy: The rider pulls the bicycle back to the center when it tilts too far to the left or to the right.

It follows that the necessary societal adjustments in the scope and specific nature of any right--in the case of privacy, how much and what kinds of conduct are legitimately exempted from social scrutiny--are deeply influenced by the socio-historical context in which they occur. Consequently, privacy is not treated in this paradigm as an unbounded good, let alone as a good one seeks maximize in and of itself.<sup>(56)</sup> Privacy cannot be extended to the point that it undermines the common good; conversely, duties set to maintain social order cannot be expanded to the point that they destroy privacy. Thus, policymakers and active citizens who advocate the communitarian ideal of equilibrium between privacy and the common good may seek to limit privacy when doing so will yield major gains in public safety and health, and no viable alternatives are available. By the same token, people who live in societies where their mail is reviewed by the police, their phones are tapped without warrant, and files are kept about their sexual proclivities, may (and should) legitimately fight to expand the scope and protection of privacy. Moreover, within the same society and time period, achieving balance may necessitate better protection of privacy in some social spheres (for instance, acting to stem the disclosure of sensitive medical information to employers), while curtailing it in others (e.g., requiring individuals who have the lives of others directly in their hands, such as school bus drivers, to be drug tested).

Fred Cate puts it especially well:

Privacy is not an absolute. It is contextual and subjective. . . . Moreover, the privacy interests at stake in any given situation may vary from the profound to the trivial, and that valuation will depend significantly on who is making it. For example, if privacy protects the combination to my safe or the location of a key to my house, it is extraordinarily valuable to me and, in most circumstances, to society more broadly, which shares my interest in avoiding theft and other criminal conduct. . . . If, however, privacy permits me to avoid paying taxes or obtain employment for which I am not qualified, it may be very valuable to me, but extremely costly to society as a whole. It is clear, therefore, that neither privacy values nor costs are absolute. . . . What is needed is a balance, of which privacy is a part. Determining what that part is in any specific context requires a careful evaluation of subjective, variable and competing interests.<sup>(57)</sup>

Alan Westin observes:

Each individual must, within the larger context of his culture, his status, and his personal situation, make a continuous adjustment between his needs for solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure."<sup>(58)</sup>

While the detailed justification of each balancing act is, by necessity, complex (as we shall see below), the basic approach is straightforward: privacy is not treated as an unbounded or privileged value, but rather as one that needs to be balanced with concerns for the common good, and the question of which core element needs shoring up depends on the socio-historical context.

## **2.2 Sources of Legitimacy for Privacy: Alternative Public Philosophies**

The responsive communitarian public philosophy has strong foundations in social science and social philosophy. It builds on the sociological observation that while ideologies can be structured around a single organizing principle--like liberty, or a particular social virtue--societies must balance various values that are not fully compatible.<sup>(59)</sup>

Second, the communitarian position at hand reflects the finding that the scope and legal standing of privacy, like that of private property, is contingent on sociohistorical context.<sup>(60)</sup> The right to private property, the initial basis for the legal concern with privacy, fails to provide a strong or privileged ground for privacy because we now understand property as a social construct rather than as a natural or innate quality of objects.<sup>(61)</sup> Different societies define different objects and spaces as legitimate subjects of private--as opposed to public--ownership. In the early kibbutzim, all property, even the shirt on one's back, was considered communal. When members of kibbutzim started to harbor coffee cups in their rooms, this prompted grave ideological debates and condemnation. In this context, the onus rested on those who sought an exception from the prevailing rule to justify the right to privately hold an object. And certain countries define land, certain minerals, and beaches as inappropriate for private ownership. Large parts of the land in Israel are owned by the state or the Jewish National Fund, and can be leased for 49 years with an option to extend for another 49, but cannot be owned outright.<sup>(62)</sup> All these examples make clear that the definition of property itself is based on socio-economic facts and upon that which the society considers legitimate,

and hence cannot be simply an expression of some overarching, universal "nature." It should be noted that, in line with the approach followed here, reference is not merely to socio-historical facts, but also to that which is considered legitimate. In short, relying upon private property rights to serve as a legal basis for privacy hardly provides this right with the privileged standing individualists claim for it.<sup>(63)</sup>

Turning now to Warren and Brandeis's fashioning of privacy as a legal concept, it is reported that they created its rationale in response to an increasingly intrusive press that was spreading gossip to large groups.<sup>(64)</sup> As for the post-Griswold era, it is commonplace to note that privacy is not even mentioned in the Constitution; rather, it was derived from "penumbras" and "emanations" of the specifically detailed guarantees of the Bill of Rights.<sup>(65)</sup>

Carl Schneider put it so effectively that I quote him at length:

The case [Roe] turns on the constitutional "right to privacy," a right inferred from the fourteenth amendment's provision that no state may deprive a person of life, liberty, or property without due process of law. Since little in the language, structure, or intent of the clause establishes the nature or limits of that right, since the Court has never defined those limits, since the right has little to do with "privacy" in the colloquial sense, and since the right of privacy is a "greedy" one, the right has long seemed menacingly capacious. The Court in Roe opens its discussion of the right to privacy with a sentence that acknowledges that the Constitution mentions no such right. In its next two sentences, the Court attempts to identify the origin of the right:

In a line of decisions . . . going back perhaps as far as . . . [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . .; in the Fourth and Fifth Amendments . . .; in the penumbras of the Bill of Rights . . .; in the Ninth Amendment . . .; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . .

After this disjunctive jumble of precedent (which may establish no more than "the roots of that right"), and after adding that the right has "some extension to activities relating to" various family law issues, the Court closes its attempt to define and defend the right, having established neither the principle that justifies nor the principle that limits it.

Nevertheless, the Court next says, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Why that right is "broad enough" the Court does not say. The Court does follow this sentence with a list of "detriments" a woman would suffer who could not have an abortion, and one may infer that it is the severity of the detriments that gives rise to the right. But while the Court cannot mean

that "detriments" create rights--since all statutes impose "detriments," and since most "detriments" do not give rise to a legal right--the Court does not say why detriments create a right here, or why these particular detriments create this particular right.<sup>(66)</sup>

Others have used harsher terms in describing the Court's finding of a constitutional right to privacy. Hyman Gross, for instance, declares that the right of privacy defined in *Griswold* was "a malformation of constitutional law which thrives because of the conceptual vacuum surrounding the legal notions of privacy."<sup>(67)</sup> Indeed, Justice Douglas's reasoning reportedly provoked "not only giggles but guffaws" by clerks in the office of concurring Justice Goldberg.<sup>(68)</sup>

It is often suggested that Douglas went through such legal contortions simply to avoid the charge that he was engaging in substantive due process--the original sin of constitutional interpretation. Indeed, Douglas takes great pains at the beginning of his opinion to distance his reasoning from this discredited doctrine.

The lack of a clear basis for an absolute or "natural" right of privacy brings us again to the idea that privacy varies with context. Social scientific comparative studies leave no doubt that the scope of what is considered a matter of privacy varies greatly not only across societies but also within a given society over time, including democratic societies.<sup>(69)</sup> In Britain, for example, privacy is much more restricted in many social domains than it is in America. Surveillance of public spaces by the use of cameras and searches of one's person and belongings are carried out much more readily there than in the US. At the same time, Britain protects privacy to a greater extent in the domain of libel law.<sup>(70)</sup> On the continent, people are routinely required to carry some form of identification, and to identify themselves at police request, without any special cause. In short, privacy is a highly contingent right, whose scope and standing varies sharply with the sociohistorical context.<sup>(71)</sup>

### **III - THE FOURTH AMENDMENT AS THE CORNERSTONE FOR PRIVACY LAW**

The communitarian conception of privacy advanced here is founded not on a stretched interpretation of a curious amalgam of sundry pieces of various constitutional rights, but instead rests squarely on the legal conception contained in the Fourth Amendment. In this Amendment, the Constitution provides a clear and strong foundation for acts that serve the common good and that take precedent over privacy considerations, by establishing a whole category of legitimate, "reasonable" searches. In effect, this Amendment (though, by some interpretations, the Second as well) is the only one containing an explicit qualification on the right at issue. To stress this point, one should contrast the texts of the First and Fourth Amendments. If the Fourth were to be written in the same strongly privileging language as the First, it would read "Congress shall make no law . . ." legalizing searches and seizures.

The extent to which the Fourth Amendment is not as privileging of privacy than the texts examined earlier is open to interpretation. A straight reading of the first clause seems balanced between a privacy-favoring ban on unreasonable searches and a common good-favoring legitimization of reasonable searches. The Fourth Amendment's further requirement that "no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized," can be read merely as providing a mechanism for sorting out when searchers are unreasonable versus reasonable, rather than further restricting them. Admittedly, if one applies the criterion of original intent, there can be little doubt that the Fourth Amendment was constituted as one of a list of rights, meant to protect individuals from an overpowering government. The same holds for a fair number of historical interpretations and even a larger

number of court cases, which very much tended to put the burden of proof on those who sought to limit privacy rather than the other way around. However, the changed historical conditions we currently face, the rise of radical individualism and the erosion of authority,<sup>(72)</sup> have already led to a much more even-handed interpretation of the Fourth Amendment. There are more and more legal searches for which neither warrants nor even specific suspicion are required. Examples include drug testing, screening gates in airports, and field sobriety checkpoints.<sup>(73)</sup> This is a trend one might argue could and perhaps should be further extended to make future interpretations of the Fourth Amendment more even-handed, although obviously one should not automatically favor every single case that points in this direction.

All said and done, one can argue whether current interpretations of the Fourth Amendment are even-handed or simply less privileging of privacy than other governing texts. But in either case, it is closer to a balanced approach than a jurisprudence that grows out of the reasoning of Warren and Brandeis on the reproductive cases. This, I suggest, is what a communitarian position calls for.

The Fourth Amendment is mentioned as an afterthought in many earlier discussions of the evolution of the legal doctrines of a right of privacy,<sup>(74)</sup> and even those that are dedicated to analyzing the Constitutional basis of privacy either give it short shrift or do not mention it at all.<sup>(75)</sup> The focus instead is on the cases involving reproductive choices because, it is stated repeatedly, the Supreme Court cases preceding *Griswold* did not treat privacy as an independent right. Rather, the decisions in those earlier cases treated privacy concerns through other rights, with different rights supporting the claim in different cases.<sup>(76)</sup> In *Boyd v. United States*, for instance, the Court held that the Fourth and the Fifth Amendments protected papers as within a person's "zone of privacy," but did not treat privacy as a distinct right.<sup>(77)</sup>

The question may be asked why the Supreme Court, when it did turn to fashion a constitutional right of privacy in *Griswold* and in the reproductive right cases that followed it, did not rely squarely on the Fourth Amendment, and only on it? Without inquiring into either the scholarly and normative motives of those involved or the institutional and doctrinal constraints upon them, a compelling reason stands out on the face of it: a straightforward reliance on the Fourth Amendment would not have led to free choice, the right of a person to control her reproductive life that the Court was evolving in *Griswold*, *Eisenstadt*, and *Roe*. The Fourth Amendment view of privacy is one of legitimate avoidance of being subject to public scrutiny, of being "watched" by the government--not the right to control the action at stake, to make the driving decisions. Searches make public what heretofore was kept in privacy, in the sense of being protected from disclosure. They help determine whether or not that which was deliberately or unwittingly kept from scrutiny is a matter of subordination, concealment, or even illegal secrets, and therefore no longer subject to privacy rights. Thus, if a person is suspected of having purchased a stolen painting, a search (based on a proper warrant) will help determine whether or not this suspicion is valid. The question as to who has a right to own (to control) this painting will be resolved by other means and considerations.<sup>(78)</sup>

Usually, the chief criticism of *Griswold et al.* is that reproductive rights are poorly founded on privacy grounds (or, that there are no such rights); the argument advanced here runs the other way: that a concept of privacy fashioned to suit reproductive rights is not soundly crafted. I will justify this statement after making several more points about the public philosophy that emanates from the Fourth Amendment; here I would add only that I favor

reproductive rights but join others who hold that these rights would be much better protected if they were based on different legal grounds than those currently used to support them.

My examination of the Fourth Amendment seeks to make one observation and one observation only: that the Fourth Amendment provides a conception of privacy that does not privilege it. The discussion does not seek to explore the numerous important other issues that arise when one studies the specifics of the relationship of the Fourth Amendment to privacy. This would entail examination of the text, the intentions of the founding fathers,<sup>(79)</sup> and Supreme Court interpretations of the amendment, specifically in *Boyd*,<sup>(80)</sup> *Olmstead v. United States*,<sup>(81)</sup> and *Katz*.<sup>(82)</sup> A fine place to start would be the many law review articles on privacy and the Fourth Amendment.<sup>(83)</sup> There is only one observation, however, that I wish to make here about the Fourth Amendment: It provides a balanced conception of privacy.<sup>(84)</sup>

The public philosophy that emanates from the Fourth Amendment is an enormous subject that can be visited only briefly here. Although the jurisprudence evolved by Warren and Brandeis and those that build on them focuses on a privileging of the "right to be let alone," the conception reflected in the Fourth Amendment suggests that one may identify a significant category of situations in which a violation of privacy is reasonable and can serve the common good. Legal scholars stress correctly that, technically, the Fourth Amendment deals with the relations of citizens to the government and not to one another. I merely suggest that the idea of balance contained in the Fourth Amendment can also be applied to relations among private individuals.<sup>(85)</sup>

To illustrate this line of thinking, one may examine numerous situations in which one private party searches the property of another, and the question arises if this is legitimate, ethically speaking. While these are not searches in the Fourth Amendment sense because they are not conducted by the government, they clearly are searches in terms of common parlance and understanding. Cases in point are shippers who, without consent or prior notice, open packages entrusted to them by private parties, or a husband who rummages through his wife's office drawers. It seems clear that these are acts whose legitimacy ought to be judged in part on the basis of the extent of the common good served versus the extent of the violation of privacy. Thus, if the shippers seek to ensure that no explosives are being shipped (assuming there is no law requiring them to so examine the packages), and they do not unnecessarily display or disclose what they see when examining packages entrusted to them (for instance, call attention of co-workers to sexual toys included therein), such an examination would be fundamentally different from opening parcels to satisfy their voyeuristic curiosity.

A major category of person-to-person situations in which the balance idea of privacy and the common good can be applied includes the numerous situations in which the media is allowed to violate a person's privacy in order to keep the public informed and to invigorate the marketplace of ideas.

In many other situations that do not involve a direct government-citizen relationship, the common good is properly privileged over privacy, including conditions under which client-psychiatrist confidentiality can be legally set aside, mail addressed to someone else can be opened, and polygraph tests may be conducted. For example, in *Tarasoff v. Regents of the University of California*, a California judge ruled that mental health professionals have a duty to provide adequate warning if a patient threatens the life of a third party during counseling sessions.<sup>(86)</sup> But courts have staunchly protected patient-psychiatrist confidentiality in cases where such compelling interest cannot be shown, even extending such confidentiality rights to communications with social workers.<sup>(87)</sup>

Last but not least, it should be noted that the Fourth Amendment model reflects the issues raised by the tension between privacy and the common good. That is to say, it reflects profound tension between two core visions of America: the virtue and public spiritedness fostered by republicanism, and the liberty and individualism championed by classical liberalism. It is a conflict between those who see American society as a community dedicated to fostering a specific set of social virtues (or social formulations of the good), and those who see it as thriving by promoting the free choices and actions of individuals (and favor only individual formulations of the good). While each of these camps has claimed that it represents the true conception of American values, and while in some ages one or the other of these two conceptions has been stressed more, the truth is that the uneasy conjunction of the two is what constitutes the American creed, the core set of values that guides American society and nurtures its laws.<sup>(88)</sup> It follows that whenever American society tilts too far in the direction of one of these core elements, the other needs to be shored up.<sup>(89)</sup> The same holds for privacy, a balance that can be achieved by redefining what is considered reasonable versus unreasonable under the Fourth Amendment.

#### **IV - PRIVATE CHOICE V. PUBLIC CONTROL: A PIVOTAL DISTINCTION**

Making the conception embedded in the Fourth Amendment the cornerstone of the public philosophy of privacy allows one to limit privacy to matters concerning limits on legitimate scrutiny. Doing so clears away a very great amount of intellectual, normative, and legal confusion that has arisen because the Supreme Court extended the right of privacy from the right to be exempt from scrutiny to the right to make choices, that is to the right to be exempt from state control.<sup>(90)</sup> The expansion of the conception of privacy to include decisional matters has been criticized by a number of authorities, legal and otherwise, including strong supporters of reproductive rights of women, such as Ruth Bader Ginsburg.<sup>(91)</sup>

The important distinction between exemption from control (granting a freedom to choose) and exemption from scrutiny is highlighted by the very behavior at issue in the reproductive choice cases. The question is not whether couples should be expected to make decisions concerning the use of contraception, or women concerning abortions, in public view. Indeed, those who find that such behavior violates their values would be even more perturbed if such conduct were not carried out behind closed doors or if the decisions affirming such actions were publicized. What is at stake in these cases is who controls the decision--the persons involved or the state.

There is room for disagreement whether *Griswold* deals with privacy as a scrutiny issue or one of private choice. Several eminent constitutional scholars, such as Gerald Gunther and John Hart Ely, take the position that it deals with transparency.<sup>(92)</sup> Others, in contrast, see it as a matter of control. Louis Henkin, for instance, notes in reference to *Griswold* that "the issue was whether the state could bar the use of contraceptives not whether it could intrude into the bedroom for evidence of its use."<sup>(93)</sup>

True, Justice Douglas' argument in *Griswold* was not that the Court ban was unconstitutional because it sought to control what the couple does, but rather that surveillance procedures necessary to establish whether or not contraception is used would be unacceptably intrusive.<sup>(94)</sup> Note, however, that the result of the Court ruling was not to move contraceptive behavior from being conducted in public view to spaces not subject to scrutiny; the behavior was not public to begin with! The ruling did change the designation of the behavior from one that the state could control to one that was from then on a matter for individual decision. As Henkin emphasizes: "In a word, the Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation."<sup>(95)</sup> Indeed, the Douglas argument seems somewhat difficult to comprehend given that there are no particular difficulties in

devising procedures for determining if people use contraceptives without intruding on their homes. For instance, if a person regularly purchases contraceptives, and has no medical prescription for them for non-contraceptive purposes, and can offer no evidence that he or she sold them to another party or gave them away, say, as a gift, there would be strong circumstantial evidence that the person was using them. (Also, sellers of contraceptives could be judged as accessories.) Indeed, Douglas himself at one point argues in reference to Griswold that the "government purpose to control or prevent activities constitutionally may not be achieved by means . . ." the Court finds too sweeping.<sup>(96)</sup> Most important, there is no controversy that the subsequent reproductive choice cases, including Roe, dealt with control and not scrutiny issues.

In contrast, the Peeping Tom nature of the media, which purportedly prompted Mrs. Samuel D. Warren to encourage her new husband to act to curb such intrusion,<sup>(97)</sup> violates privacy but does not entail state control. Mrs. Warren feared that gossip about her would be spread widely by the press and be afforded the ostensible objectivity of appearing in print. She was not afraid that if details about her personal life were to become public she would be subject to arrest, or that her private choices would be preempted by the government.<sup>(98)</sup>

In short, the Supreme Court's expansion of the right to privacy in the reproductive rights cases conflates notions of scrutiny and control, and privacy and private choice.<sup>(99)</sup>

Once it is agreed that there is much to be gained, both in clarity of thought and judgment as well as for the communitarian balance, if the distinction between exemption from scrutiny and exemption from control is drawn, there are at least two basic ways to proceed.<sup>(100)</sup> One can either refer to the first category as "privacy" and to the second as a matter of "private choice," or, one can recognize two different kinds of privacy. The first approach makes a great deal of sense given the meaning of these terms in common parlance, and given that it evokes the appropriate intellectual and normative associations. "Private choice" correctly brings to mind unregulated economic behavior, deregulation, school choice, and reproductive choices. (Or, one can use the terms privacy and autonomy to connote the difference between being legitimately free from scrutiny and from state control.) The second approach, referring to two kinds of privacy, seems especially attractive to those who are concerned that if choice behavior is not deemed a matter of "privacy" it may lack constitutional protection until a new legal foundation can be formulated, which is a serious consideration.

In either case, each category requires, and in effect already implicitly contains, a strong and distinct rationale. While both implicate human dignity and liberty--the independence of a person within the communal context--two rather different facets are involved. The first deals with the value of being able to be legitimately different, with being able to individuate (to be an individual) without activating legal (governmental) or moral (communal) pressure: a respite from the social. A useful image here is that of a veil or cloth with which one drapes parts of one's self when one legitimately seeks to keep them invisible to others (some or all), such as one's scar from a mastectomy, the size of one's member, the depth of one's pocket. (That one lifts such veils for certain others, say a physician and a nurse, should not mean that one gives up the right to drape one's self in regards to that matter in regard to others, a key issue in recent concerns about medical privacy, as we have seen above.) The second facet concerns autonomy in the profoundest sense, the definition of the spheres in which one can legitimately direct one's life.<sup>(101)</sup>

The first category is characterized by trust, in which society deems that a person will not be under surveillance, but society does not forgo its right to act, for example in cases where a person uses his or her privacy to molest a child or make bombs. The second category is one of societal indifference and hence full individual (or group) liberty; it concerns all those

numerous matters about which the society rules that these are matters in which the individual is free to act as they deem fit, whether or not the action takes place out of sight and audibility.

The following examples serve to further highlight this pivotal distinction. The government may have a right to determine what a person cannot carry in a car (contraband, human corpses, etc.) and what a person must carry (e.g., a flare or a spare), that is, to control certain acts and choices. But the government does not have a right to examine a trunk or glove compartment without specific cause; that is, it does not have a right to scrutinize spaces cordoned off in the name of privacy.

Buying items in a supermarket is a matter of personal choice, not a state-controlled action. It is a private act, but cannot be said to implicate privacy because its commission is quite visible to the public. Generally, the advocates of the private sector and the opponents of government interventions are concerned with who controls the act rather than whether the action is visible (or audible). In contrast, preparing a tax return is legitimately carried out in privacy, but is not a matter about which one has a choice; it is required by the state, and in this sense is a public act typically carried out under the condition of privacy.

Some acts are both under the person's control and are legitimately conducted in ways that defend them from scrutiny--voting for public offices, for instance. Others, such as many criminal trials, are both expressions of government control and are carried out in full public view, even on television.

One might argue that while privacy and private choice (and publicness and public control) are clearly distinct conditions, the second presumes the first--a state that seeks to control certain kinds of behavior must be able to scrutinize them, and thus cannot allow them to take place in privacy. Yet this is not the case. Precisely in order to respect the privacy of certain acts, and yet to control them, before taking any action the state often waits until there are publicly visible consequences of behavior that took place in private. Thus, the state typically acts to rescue a child from abuse only after some signs of ill treatment are noticed at school or at a clinic, or someone files a complaint before a public authority and backs it up with evidence, rather than scanning homes preemptively to ensure that no child abuse is taking place.

There are many important matters in which the law calls for public scrutiny but not state control. Examples include the legal requirement that many meetings of elected officials, corporate stock holders, and others be held in open session, numerous disclosure requirements including data that must be revealed in annual reports of publicly held corporations, and personal financial details that people running for certain public offices must provide. (While some of the disclosures are required to enable governmental controls, audits for instance, others presume that the very exposure to the "sunshine" of the public and the press will suffice to prevent anti-social conduct, thereby precluding the need for state-controlling acts.)

Especially telling is a considerable category of laws, mores, and behaviors--typically not even mentioned in this context, at least in part because it does not fit the conflated and over-expansive conception of privacy--that refers to acts mandated by the state to be carried out in privacy! Nudity, sexual intercourse, and toilet functions all fall into this category. Those who treat privateness and privacy as synonymous, as many do, would be in the odd position of saying that these are acts which are public and private, which of course makes no sense.

Although there is certainly some initial awkwardness in drawing a distinction between privacy and privateness, and between publicness and public control, numerous issues cannot be

properly conceptualized and examined unless such a distinction is made, and separate legal rationales for both kinds of cases are provided. The particular term one uses is, of course, a less important matter. And whatever course one follows, there is a pressing socio-historical need to consider adopting in both areas the Fourth Amendment model of balance rather than privileging privacy.

## **V. MORE PUBLICNESS--LESS PUBLIC CONTROL**

At issue here is much more than an accurate definition of privacy; at the very heart of this discussion is the appropriateness of social formulations of the good, the point of contention that separates communitarians from both individualists as well as social conservatives. For individualists, who strongly oppose social formulations of the good, who believe that each person should be free to form and pursue his or her own good, and who thus seek to maximize both private choice and privacy, the distinction matters little. For social conservatives, especially religious fundamentalists who would rely on the state to enforce their values--for instance, to suppress pornography--and who are willing to curtail both private choices and privacy, the difference between these two concepts is also of limited import. In contrast, the distinction is crucial for communitarians (at least for responsive ones) who hold that important social formulations of the good can be left to private choices--provided, of course, there is sufficient communal scrutiny! That is, the best way to curtail the need for governmental control and intrusion is to have somewhat less privacy. This point requires some elaboration.

The key lies in the importance of the "third realm,"<sup>(102)</sup> one about which communitarians are particularly mindful. This realm is not the state or the market (or individual choices), but rather the community, which relies on subtle social fostering of good conduct by such means as communal recognition, approbation, and censure, processes that require the ability to scrutinize some behavior, not by police or secret agents but by friends, neighbors, and members of one's voluntary associations.<sup>(103)</sup>

Indeed, crimes are best prevented when a community abhors the behavior that is considered criminal by law makers; and, conversely, law enforcement works poorly when not supported by the community's moral and informal enforcement systems.<sup>(104)</sup> For instance, abuse of controlled substances and alcoholism are very rare in religious communities that object to such behaviors, such as in Mormon, Hasidic Jewish, Amish, and black Moslem communities, and are relatively rare in much of the Bible Belt and segments of small-town America.<sup>(105)</sup> The reason is not simply that internalized values lead individuals to avoid the behaviors in question; these pro-social values also find much support in their communities, support that entails a measure of scrutiny by others. The extent to which many professionals, such as physicians and lawyers, conform to their ethical codes is largely determined by the values their particular community upholds, and mostly by informal enforcement mechanisms, which require social scrutiny but reduce the need for government control. The same holds true for honor codes among students in military academies and select colleges.

In fact, continual efforts by groups such as the ACLU to extend the sphere of privacy paradoxically force increases in governmental interventions. We saw a sterling example in the examination of encryption. As the ACLU and other individualistic groups blocked the introduction of public key recovery, which enables the government to decode encrypted messages if proper court authorization is accorded, the government was pushed to use more invasive procedures for the same kind of criminal investigations, for instance planting microphones in the homes of suspects.

William Donahue effectively highlights these self defeating tendencies:

The ACLU is driven by an atomistic vision of liberty. It envisions solitary individuals, armed with rights and unencumbered by duties. This vision does not conform with reality. When we look at society we do not see solitary individuals. Rather we see constellations of people in associations . . . These groups arise naturally when people are left alone. This explains the great paradox of the ACLU. Its atomistic ideal is so unnatural that its realization (if possible) would require a great coercive power. Thus it is that an organization devoted solely to individual rights seeks in practice the total aggrandizement of the state.<sup>(106)</sup>

In short, if we hold constant the values involved and the level of adherence we seek, publicness reduces the need for public control, while excessive privacy often necessitates state-imposed limits on private choices.<sup>(107)</sup> Admittedly, each community and society determines the scope and content of their particular formulations of the good, the normative claims they make, and the intensity with which they foster compliance. However, once these matters are agreed upon, higher levels of communal scrutiny facilitate compliance better than higher levels of public control, and often allow that control to be kept at a lower level.<sup>(108)</sup>

It might be argued that these are not matters that concern the legal realm. Yet there are numerous laws that affect the level of communal scrutiny rather than public control. For example, laws that limit the right of the press to report scandalous behavior of public officials, corporate executives, foundation officials and others, or make it too easy to win libel suits against other citizens, raise not only First Amendment concerns, but also may extend privacy too far, diminish community scrutiny, and undermine the common good. The same holds for laws that limit the scrutiny of professionals by one another and the disclosure of ill-conduct.

## **CONCLUSION**

The conception that is expressed in the Fourth Amendment provides a solid foundation for a communitarian public philosophy of privacy, that has significant implications for our social mores, public policy, and jurisprudence, as we struggle to adapt our institutions to the cyber-age. This philosophy recognizes as justified a whole category of acts in which concerns for the common good take precedent over privacy rather than strongly privileging privacy a priori, implying that a balance between these two core values must be worked out.

Another merit of relying on the conception embodied in the Fourth Amendment, as opposed to an amalgam of various constitutional rights used to construct a constitutional right to privacy in the reproductive choice cases, is that the Fourth Amendment focuses on scrutiny rather than on control. Thus, it avoids a major conceptual and ethical confusion between privacy and autonomy (or privateness) that affects numerous matters of public philosophy, civic culture, public policy, and jurisprudence. Most important, the Fourth Amendment, by introducing the distinction between searches that are unacceptable violations of privacy and those that are justified by public needs, recognizes the need of balance between privacy and the common good rather than treats privacy as privileged under all circumstances.

Above all, a communitarian approach to privacy avoids the failings of static conceptions by taking into account historical changes in societal conditions. For instance, it recognizes that the more privacy is granted from informal social controls in a given period, the more state controls will be necessary in following years to sustain a given level of social order.<sup>(109)</sup> It follows that the best way to ward off theocratic tendencies of religious fanatics foreign and domestic, as well as authoritarianism and tyranny, is not relentless expansion of permissiveness, but endeavors to ensure that society's elementary needs for public health and public safety are not neglected.

## **ENDNOTES**

1. 389 U.S. 347 (1967).
2. For discussions of these matters by legal scholars, see Richard G. Wilkins, "Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis," *Vanderbilt Law Review* 40 (1987); Stephen P. Jones, "Reasonable Expectation of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing," *Memphis State Law Review* 27 (1997); Anthony Amsterdam, "Perspectives on the Fourth Amendment," *Minnesota Law Review* 58 (1974); Lewis R. Katz, "In Search of a Fourth Amendment for the Twenty-First Century," *Indiana Law Journal* 65 (1990); Daniel B. Yeager, "Criminal Law: Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment," *Journal of Criminal Law and Criminology* 84 (1993).
3. Frederick Schauer, "Slippery Slopes," *Harvard Law Review* 99 (1985), 361-383.
4. Amitai Etzioni, *The Active Society: A Theory of Societal and Political Process* (New York: The Free Press, 1968).
5. For a discussion of self-regulation by companies on the Internet, see Esther Dyson, "Governance," in *Release 2.0: A Design for Living in the Digital Age* (New York: Broadway Books, 1997), 103-130.
6. *Osborn v. United States*, 385 U.S. 323 (1966).
7. Jeri Clausing, "Group Proposes Voluntary Guidelines for Internet Privacy," *New York Times*, 21 July 1998, D4; Electronic Privacy Information Center, "Self-Regulation Gets Low Marks at Privacy Summit," *EPIC Alert*, 25 June 1998.
8. Barrington Moore, Jr., *Privacy: Studies in Social and Cultural History* (New York: M. E. Sharpe, Inc., 1984).
9. For an early book that laid important ground work to this way of thinking see Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967).
10. Ferdinand David Schoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992), 1-10.
11. Samuel H. Hofstadter and George Horowitz label the right of privacy a "parasite," stating that it developed "[a]nnexed to or as a part of property or contract rights or some relationship of confidence...." *The Right of Privacy* (New York: Central Book Company, 1964), 5. See also Richard F. Hixson, *Privacy in a Public Society: Human Rights in Conflict* (New York: Oxford University Press, 1987), 62.
12. A pivotal case in this regard was *Olmstead v. United States* (1928), in which the Supreme Court explicitly rejected the idea that privacy was a separate constitutional right protected by the Fourth Amendment's prohibition of unreasonable searches and seizures, but instead reasoned that protection of privacy is embedded in, and legitimated by, protection of property rights. The case involved the wiretapping of a phone by the FBI without a warrant so federal agents could gain evidence of violations of Prohibition laws. The Court ruled that since wiretapping did not involve trespassing on private property, the evidence which was gained was not an unreasonable search and seizure. See Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," *New York University Law Review* 39 (1964): 975.
13. John Locke, *The Second Treatise of Civil Government* (New York: Hafner Publishing Co., 1956), 135.

14. Samuel Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* IV (1890): 289-320.
15. Gregory and Kalven, *Cases on Torts* 883 (1959). Hixson states that due to the publication of Warren and Brandeis's article, "The legalization of privacy moved like a brush fire through this [the twentieth] century" (*Privacy in a Public Society*, 50).
16. Bloustein, "Privacy as an Aspect of Human Dignity," 970. See also Hixson, *Privacy in a Public Society*, 49-51.
17. *Ibid.*, 196.
18. See, for instance, Center for Public Integrity, "Nothing Sacred: The Politics of Privacy," Washington, D.C., 1998, and also about this point, Roger Scruton, *An Intelligent Person's Guide to Philosophy* (New York: Penguin, 1996), 112.
19. Warren and Brandeis's privileging of privacy is highlighted toward the end of their seminal essay, ironically, in a section devoted to outlining six conditions under which competing concerns should be accommodated. While the two scholars first observe that privacy may have to be curbed for purposes such as allowing the "publication of matter which is of public or general interest" and "meeting the communicative need of courts and legislative bodies" ("The Right to Privacy," 196), item five of their list establishes that privacy is violated not only by false statements but can be transgressed even by truthful publications (*Ibid.*). And item six notes that the absence of malice by a publisher who violates privacy is insufficient to afford him legal defense. Even as they seek to curb privacy, they end up extending it (*Ibid.*). Item three argues that oral communication, as distinct from written or published communication, cannot be construed to be an invasion of privacy--unless there is "special damage," which Warren and Brandeis do not define. The fourth item argues that the right of privacy cannot be asserted after an individual explicitly consents to a disclosure, or publishes private things himself, which of course does not diminish the claim the right lays on others, but only notes that it does not bind the acting self.
20. US Office of Science and Technology, *Privacy and Behavioral Research* (Washington, D.C.: US Government Printing Office, 1967), 3.
21. William R. Lund, "Politics, Virtue, and the Right to Do Wrong: Assessing the Communitarian Critique of Rights," *Journal of Social Philosophy* 91 (1997): 103. See also Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).
22. Lund, "Politics, Virtue, and the Right to Do Wrong," 104.
23. *Id.*
24. Louis Henkin, "Privacy and Autonomy," 74 *Columbia Law Review* 1410, 1429-1430 (1974).
25. Charles Fried discusses privacy as an "intrinsic" value as distinct from an instrumental one. "Privacy," 77 *Yale Law Journal* 475 (1968). To suggest that a value is unbounded puts a higher claim on it; a value can be inherently or intrinsically good, such as public safety, but not unbounded.
26. Bloustein, "Privacy as an Aspect of Human Dignity," 973.

27. Jean L. Cohen, "Rethinking Privacy: The Abortion Controversy," in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 137.
28. Avishai Margalit, *The Decent Society* (Cambridge, Mass.: Harvard University Press, 1996), 201.
29. Glen O. Robinson, "Communities," *Virginia Law Review* 83 (1997): 294.
30. Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," in *Philosophical Dimensions of Privacy*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 239-41.
31. 381 U.S. 479 (1965).
32. 405 U.S. 438 (1972).
33. 410 U.S. 114 (1973).
34. 431 U.S. 678 (1977).
35. See Michael Sandel's discussion of this case and the general development of privacy rights in American jurisprudence. (Michael Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," in *New Communitarian Thinking: Persons, Virtues, Institutions, and Communities* ed. Amitai Etzioni (Charlottesville, Va.: University Press of Virginia, 1995), 78.)
36. Henkin, "Privacy and Autonomy," 1430.
37. Cf. Michael Sandel, who sees *Griswold v. Connecticut* as distinct from later opinions asserting the right of privacy in that its basis was not the expansion of individual choice or autonomy. (Sandel, "Moral Argument and Liberal Toleration," 71-87.
38. 410 U.S. at 154.
39. The right to an abortion, as Justice Blackmun wrote, is "not unqualified and must be considered against important state interests in regulation" (Id. at 154-55).
40. Warren and Brandeis, *supra* note 15 , at 194. They then provide a considerable list of prior instances when the common law evolved to accommodate changing social arrangements by establishing new rights. For example, they point out that early on, people were secured only from physical intrusions, such as harm to their bodies. This protection was in turn extended to include their property, and eventually grew to encompass their very feelings and intellects.
41. T.H. Marshall, *Citizenship and Social Class* (London: Cambridge University Press, 1950).
42. Benn, *supra* note 31, at 239; Calvin C. Gotlieb, "Privacy: A Concept Whose Time Has Come and Gone," in *Computers, Surveillance, and Privacy*, eds. David Lyon and Elia Zureik (Minneapolis, Minn.: University of Minnesota Press, 1996), 156.
43. Robert N. Bellah, William M. Sullivan, Ann Swidler, and Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, Calif.: University of California Press, 1985); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. Amitai Etzioni, *An Immodest Agenda: Rebuilding America Before the 21st Century* (New York: McGraw-Hill Co., 1983); Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (New York: Basic Books, 1996), 58-84.

44. Marshall, *supra* note 42; Benn, *supra* note 31, at 239-241; and Gotlieb, *supra* note 43, at 156.

45. Jeff Weintraub and others have stressed the role of scrutiny, in terms of not being visible or audible to the community, in their formulations of privacy, while leaving the question of its normative standing in society--how much and in what social territories privacy is appropriate--largely unexamined. See Weintraub's essay, "The Theory and Politics of the Public/Private Distinction" in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997). In addition to the role of scrutiny, we aim to address the question of the legitimacy of a given society's commitment to and desired level of privacy.

46. Others have used location, private versus public, for their differentiation of privacy and publicness. For reasons that will become obvious shortly, I focus on action.

47. Amitai Etzioni, "The Good Society," 6 *Journal of Political Philosophy* 395 (1998).

48. However, for a remarkable and groundbreaking article on the topic, see Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," *California Law Review* 77 (1989): 957-1010.

49. Richard A. Posner's analysis ignores the inherently normative dimension in the concept of privacy ("The Right of Privacy," *Georgia Law Review* 12 (1978): 393-422). He explicitly states that he will "avoid the definitional problem" in his inquiry by focusing on "the withholding or concealment of information" (393). By this token he de facto defines privacy while skirting any assessment of whether society, or the law, deems the concealment at the core of his definition to be legitimate. Another example is provided by Richard Parker, who states that "privacy is control over who can sense us"--again without any reference to the legitimacy of that control ("A Definition of Privacy," *New York University Law Review* 42 (1967): 35). Charles Fried too limits the definition of privacy to the ability to be free from scrutiny, neglecting the notion of a legitimate exemption from such scrutiny, when he defines privacy as "not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves" ("Privacy," 482).

Cf. Carl J. Friedrich, who does keep a clear distinction between secrecy, as an empirically determined notion, and privacy, as a normative one. "Secrecy Versus Privacy: The Democratic Dilemma," in *Nomos XIII: Privacy*, eds. J. Roland Pennock and John W. Chapman (New York: Atherton Press, 1971), 105-120.

50. The legal literature draws a similar distinction between informational and decisional privacy. We shall see that referring to the decisional sphere as privacy confused the matter and suggest below that the second realm be viewed as a realm of private choice.

51. Amitai Etzioni, "The Responsive Communitarian Platform: Rights and Responsibilities" in *The Spirit of Community* (New York: Crown Publishers, Inc., 1993), 251-267.

52. See Bilahari Kausikan, "Asian versus 'Universal' Human Rights," *The Responsive Community* 7 (1997): 9-21.

53. Etzioni, *The New Golden Rule*, 34-44.

54. Glendon, *op. cit.*; Amitai Etzioni, *The Spirit of Community* (New York: Simon and Schuster, 1993).

55. See Amitai Etzioni, "Introduction," in *The Essential Communitarian Reader*, ed. Amitai Etzioni (Lanham, Md.: Rowman and Littlefield, 1998).

56. The idea is gradually gaining some currency. My first stab at it was published in *The Responsive Community* and later reprinted in *Legal Times*. Steven L. Nock reached a similar conclusion, following his own considerations. Amitai Etzioni "Less Privacy is Good for Us (and You)," 6 *The Responsive Community* 11-13 (1996); Steven L. Nock "Too Much Privacy" 19 *Journal of Family Values* 101-118 (1998).

57. Fred H. Cate, *Privacy in the Information Age*, (Washington, D.C.: Brookings Institution Press, 1997), 31.

58. Alan Westin, *Privacy and Freedom*, (New York: Atheneum, 1967) 42. Another book that leans in this direction is David Brin, *The Transparent Society: Will Technology Force Us To Choose Between Privacy and Freedom?*, (Reading, Mass.: Perseus Books 1998).

59. Talcott Parsons, *The Structure of Social Action: A Study on Social Theory and Special Reference to a Group of Recent European Writers* (New York: Free Press, 1968). See also Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992); John Gray, *Isaiah Berlin* (Princeton, NJ: Princeton University Press, 1997).

60. Cf. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Cambridge University Press, 1977).

61. In the section "Of Property" of his *Second Treatise of Civil Government*, Locke makes the claim that ownership of property derives from, and is legitimated by, the individual's expenditure of labor to acquire or transform some natural or physical entity. "Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined it to something that is his own, and thereby makes it his property " (134). As a direct consequence, legitimate ownership--a right of property--is not dependent upon social formulations, collective agreements, or other contextual factors. "Thus the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place where I have a right to them in common with others," he states, "become my property without the assignation or consent of anybody" (135). In this way Locke asserts a natural right to property, concomitantly denying that it is a social construct or grounded in collective commitment. (*Two Treatises of Government* (New York: Hafner Publishing Company, 1956).)

62. Arie Wiernik, *Israeli Business Law: An Essential Guide* (Kluwer Law International, 1996), Part 2, Chapter 11.

63. Some may argue that the concept of private property no longer plays a role in current conceptions of privacy. However, Morgan Cloud argues that a close overlap between property rights and privacy still exists. Morgan Cloud, "The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory," *Stanford Law Review* 48 (1996): 555.

64. James K. Weeks, "Comparative Law of Privacy," *Cleveland Marshall Law Review* 12 (1963): 485-86.

65. Henkin, "Privacy and Autonomy," 1421.

66. Carl E. Schneider, "Moral Discourse and The Transformation of American Family Law," *Michigan Law Review* 83 (1985): 1864-65.

67. Hyman Gross, "The Concept of Privacy," *New York University Law Review* 42 (1967): 35. Robert Bork echoes the sentiments of a fair number of conservatives when he writes unabashedly about the Supreme Court's creation "out of thin air, of a general and undefined

right of privacy." (Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996), 103.)

68. Jeffrey Rosen, "Breyer Restraint," *New Republic*, 11 July 1994, 20.

69. Herbert J. Spiro, "Privacy in Comparative Perspective," in *Privacy: Nomos XIII*, 121-148. See also James K. Weeks, "Comparative Law of Privacy," *Cleveland Marshall Law Review* 12 (1963). Cf. Alan Westin, *Privacy and Freedom*.

70. For a rather informal but insightful account by a prominent British attorney, see Geoffrey Robertson, "Privacy Matters," *New Yorker*, 8 September 1997, 38-40.

71. For further discussion, see Barrington Moore, Jr., *Privacy: Studies in Social and Cultural History* (M. E. Sharpe, Inc., 1984).

72. See Alan Ehrenhalt, *The Lost City: The Forgotten Virtues of Community in America* (New York: Basic Books, 1996).

73. For further examples of such warrantless, suspicionless searches that have been ruled permissible under the Fourth Amendment, see Michael Froomkin, "The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution," *University of Pennsylvania Law Review* 143 (1995): 824-25.

74. See, for instance, Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (Chapel Hill, N.C.: University of North Carolina Press, 1995); Richard F. Hixson, *Privacy in a Public Society* (New York: Oxford University Press, 1967), 26-51. Hixson devotes a scant three pages, which are not even indexed, to discussing the role of the Fourth Amendment in the development of privacy (48-50), while devoting almost entire chapters to Warren and Brandeis's article, William Prosser's reformulations of privacy protections in tort law, and the concept of privacy articulated in *Griswold v. Connecticut* and *Roe v. Wade*.

75. June Aline Eichbaum, "Towards an Autonomy Based Theory of Constitutional Privacy," *Harvard Civil Rights-Civil Liberties Law Review* 14 (1979): 361-84; Henkin, "Privacy and Autonomy," 1410-33; Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89 (1980): 421-71; and Sandel, "Moral Argument and Liberal Toleration."

76. There is much debate among scholars even today if privacy is a unitary right, or just a name for a bundle of other rights. We shall not join this discussion here. See William L. Prosser, "Privacy," *California Law Review* 48 (1960) and Bloustein, "Privacy as an Aspect of Human Dignity." Privacy has been considered an aspect of the Fifth Amendment's protections (particularly against self incrimination), free speech in the right to anonymity in public expression, and freedom of association.

77. 116 U.S. 616 (1886). See also *Gilbert v. Minnesota*, 254 U.S. 325 (1920), in which the court ruled that, under the First and Fourth Amendments, parents were free to teach their children the doctrine of pacifism in the privacy of their homes, and also *National Association for the Advancement of Colored People v. Alabama*, in which the court found that Alabama could not require the NAACP to publicize its membership lists under the First and Fourteenth Amendments' protection of freedom of association.

78. I discuss searches and seizures precisely because the latter are often concerned with primary control rather than scrutiny. While in some cases seizures are related to obtaining and preserving evidence, often they deal with transfer of property rights from the current

actor to the state, especially in the so-called zero tolerance cases, in which the assets of drug dealers are seized and turned over to the police for their own use.

79. Patrick Henry, for instance, argued in favor of the Fourth Amendment, stating, "The officers of congress may come upon you now, fortified with all the terrors of paramount federal authority . . . They ought to be restrained within proper bounds." That is, he saw a balance as expressed in the notion of "proper bounds," rather than ruling such interventions completely out of bounds or demanding those who seek to allow them to pass a strict security test. Quoted in Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, 35.

80. 116 U.S. 616.

81. 277 U.S. 438 (1928).

82. 389 U.S. 347.

83. See, for example, Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?" *Columbia Law Review* 94 (1994); Brian J. Serr, "Great Expectations of Privacy: A New Model for Fourth Amendment Protection," *Minnesota Law Review* 73 (1989); Mary I. Coombs, "Shared Privacy and the Fourth Amendment, or the Rights of Relationships," *California Law Review* 75 (1987); Christopher Slobogin and Joseph E. Schumacher, "Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at 'Understandings Recognized and Permitted by Society'," *Duke Law Journal* 42 (1993); Robert J. Liebovich, "Privacy Goes Camping: Staking a Claim on the Fourth Amendment," *Memphis State University Law Review* 26 (1995); and Morgan Cloud, "The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory," *Stanford Law Review* 48 (1996).

84. One may suggest that the Fourth Amendment does not treat privacy as a trump but does privilege it. Even such an interpretation would serve many of the points that need to be made; other amendments tend to leave them open to more absolutist reading. However, the Fourth Amendment can be read as not privileging privacy if one notes that prohibition on unreasonable searches is not accorded more weight than the permission to conduct reasonable searches.

85. For additional discussion see Marc Stanislawczyk, "An Evenhanded Approach to Diminishing Student Privacy Rights Under the Fourth Amendment: *Vernonia School District v. Acton*," *Catholic University Law Review* 45 (1996). Although the author refers to administrative searches, the same point might be extended further.

86. Michael A. Riccardi, "Duty to Warn Weighed by Pa. Justices," *Legal Intelligencer*, 13 December 1996, 1.

87. See discussion of *Jaffee v. Redmond* in Daniel J. Capra, "Communications with Psychotherapists and Social Workers," *New York Law Journal*, 12 July 1996, 3.

88. For an example of the argument that America is a Lockean nation, see especially Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York: Harcourt, Brace, 1955). In response to Hart, see, among others, J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Political Tradition* (Princeton, N.J.: Princeton University Press, 1975); Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth Century England and America* (Ithaca, N.Y.: Cornell University Press, 1990); and Rogers M. Smith,

"Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87 (1993): 549-66.

On the other side, Robert Bellah explains that "in Alexis de Tocqueville's *Democracy in America*, individualism was treated as a destructive tendency that needed firm restraint if American democracy was to flourish." (Robert N. Bellah, "Individualism, Community, and Ethics in the United States and Japan," *Moral Education* 4 (1995): 1-2.)

89. For additional discussion, see Etzioni, *The New Golden Rule*.

90. This important distinction has been highlighted by Michael Sandel. See Sandel, "Moral Argument and Liberal Toleration."

91. Weintraub, "The Theory and Politics of the Public/Private Distinction," 5. Cf. Cohen, "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy," 144-46. See also *supra* reference to Hyman and Bork.

92. Gerald Gunther, *Constitutional Law* (Westbury, N.Y.: The Foundation Press, Inc., 1991), 491-571. John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," *Yale Law Journal* 82 (1973).

93. Henkin, "Privacy and Autonomy," 1424.

94. See also Sandel, who accepts this argument, *supra* note 100.

95. Henkin, "Privacy and Autonomy," 1424.

96. *Griswold v. Connecticut*, 381 U.S. 479 (1965), at 485-486.

97. William L. Prosser, "Privacy," *California Law Review* 48 (1960): 383.

98. For more discussion on this point, see Etzioni, *The New Golden Rule*, especially 138-49.

99. I do not go into here the many issues raised by the fact that this distinction is much more problematic and blurred than is often assumed. Alan Wolfe also addresses the slippery nature of the distinction between the public and the private. See "Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary," in Jeff Weintraub and Krishan Kumar, eds., *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press, 1997), 182.

Using privacy as an all-encompassing concept often results in confusion and conceptual vagueness, such as one scholar's attempt to refer to freedom from scrutiny as distinct from freedom from control with the circumlocution "private right of privacy." (Henkin, "Privacy and Autonomy," 1419.)

See also Jeff Weintraub's discussion of the line between private and public. (Jeff Weintraub, "The Theory and Politics of the Public/Private Distinction.")

100. Michael Sandel in effect suggests that one should talk about two kinds of privacy that have been recognized in American jurisprudence. The first is freedom from surveillance, and was the dominant understanding of privacy up to and including *Griswold v. Connecticut*. Beginning in 1972 with *Eisenstadt v. Baird*, the Court shifted to what Sandel terms a "voluntarist," or autonomy-based, conception of privacy. In short, Sandel's thesis is that the pre-*Eisenstadt* conception is freedom from surveillance (including *Griswold*, which is often interpreted to advance a notion of autonomy), and afterwards it shifts to encompass freedom from control. While it does not matter much which words are used as long as the distinction is clearly maintained, the already established term for freedom from public control seems to

be private choices or acts, as implied in phrases such as the "private sector." See Sandel, *supra* note 36.

101. "Autonomy" does not have one precise, agreed-upon definition. I suggest, though, that it tends to evoke the right to choose while privacy evokes the right to be exempt from scrutiny. Both might be seen as elements of the right to be let alone. If this distinction is accepted, one can use this pair of concepts to denote the important difference between choice and exception from scrutiny.

102. Alan Wolfe, *Whose Keeper: Social Science and Moral Obligation*.

103. In a similar discussion, Steven Nock frames the issue in terms of *reputation*: "Reputation, I will argue, is a necessary and basic component of the trust that lies at the heart of social order. To establish and maintain reputations in the face of privacy, social mechanisms of *surveillance* have been elaborated or developed. In particular, various forms of credentials and modern ordeals produce reputations that are widely accessible, impersonal, and portable from one location to another. *A society of strangers is one of immense personal privacy. Surveillance is the cost of that privacy.*" Steven L. Nock, *The Costs of Privacy: Surveillance and Reputation in America* (New York: Walter de Gruyter, Inc., 1993). Emphasis in original. For additional discussion of this issue, see also Schoeman, *Privacy and Social Freedom*.

104. See Robert J. Sampson, "The Community," in *Crime*, eds. James Q. Wilson and Joan Petersilia (San Francisco: Institute for Contemporary Studies Press, 1995), 193-216.

105. On a related note, see Robert J. Sampson, Stephen W. Raudenbush, Felton Earls, "Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy," *Science*, 15 August 1997, 918-924.

106. William A. Donahue, "Culture Wars Against the Boy Scouts," *Society*, May 1994.

107. Ernest van den Haag, "On Privacy," in *Privacy: Nomos XIII*, 149.

108. On the question of how communities make such formulations, see Etzioni, *The New Golden Rule*, 85-159. The basic idea is that social and public decision-making is substantive and not merely procedural. See also Michael Sandel, *Democracy's Discontent: America in Search of Public Philosophy* (Cambridge, Mass.: Belknap Press, 1996).

109. I am referring to a society-wide rise in permissiveness rather than to the relation of mores in one limited area of behavior.