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# In defense of privacy

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**In defense of privacy**

by

**Jacob Wilson**

A thesis submitted to the graduate faculty  
in partial fulfillment of the requirements for the degree of

**MASTER OF ARTS**

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Program of Study Committee:  
Dirk Deam, Co-major Professor  
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Stephen Schmidt

The student author, whose presentation of the scholarship herein was approved by the program of study committee, is solely responsible for the content of this thesis. The Graduate College will ensure this thesis is globally accessible and will not permit alterations after a degree is conferred.

Iowa State University

Ames, Iowa

2019

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No face which we can give to a matter will stead us so well at last as the truth. This alone wears well. For the most part, we are not where we are, but in a false position. Through an infinity of our natures, we suppose a case, and put ourselves into it, and hence are in two cases at the same time, and it is doubly difficult to get out. In sane moments we regard only the facts, the case that is. Say what you have to say, not what you ought. Any truth is better than make-believe. Tom Hyde, the tinker, standing on the gallows, was asked if he had anything to say. "Tell the tailors," said he, "to remember to make a knot in their thread before they take the first stitch." His companion's prayer is forgotten....

- Henry Thoreau: Walden

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## ACKNOWLEDGMENTS

Every action, every deed, every word declared, or written reveals a small bit of who we are. In these moments of distinction, we lay bare intimations of the things that constitute our character; friends, family, our inspirations. This thesis is a product, not only of my own academic work, but also of the many people, family and friends, who have formed me into who I am. I would like to thank my committee members, Dr. Dirk Deam, Dr. Alex Tuckness, and Dr. Stephen Schmidt, for their guidance throughout the course of my collegiate career and in the process of authoring this thesis. They have provided me with the direction needed to find a place to stand, and, while I won't go as far as Archimedes, my hope is that I will move a few minds. In addition, I would also like to offer my great appreciation to my friends and the Political Science department faculty and staff for making my time at Iowa State University a wonderful experience. I owe a great amount of gratitude to my colleges in the Political Science department of the Graduate College. Their discussion and debate was enlightening and provided a refreshing reification. Finally, I wish to express my immense gratitude to my family, whose support for my education has made this thesis possible.

**ABSTRACT**

There is no shortage of threats to an individual's privacy in the contemporary world. At any time, it is possible for any citizen to be subjected to an invasion of their personal privacy in a number of different ways. In this thesis I outline three differing perspectives from which society can view issues pertaining to individual privacy. Using differing political theories as advocates of each perspective, I analyze the logical results and the effects each perspective has on society at large. Whichever perspective we adopt has great influence over legislative discretion, legal rules, and executive authority when issues of privacy arise. The influence a society has when adopting one perspective of privacy permits and restricts certain government actions. For example, our contemporary perspective of privacy as an interest that is only valuable to the extent that it can be sold, illustrates to authorities that all that is required to invade someone's privacy is sufficient compensation. Through my analysis, I find that the perspective of privacy viewed by the Classical Republican tradition is best in most circumstances, and that it is best for any society to maintain the broadest political view.

## CHAPTER 1. INTRODUCTION

There is no shortage of threats to an individual's privacy in the contemporary world. It is possible for any citizen, at any time, to be subjected to a number of different types of invasions, including, but not limited to, the recording of phone calls and email content, collection of information regarding internet, shopping, or library history, tracking of geographic location, and even more physical and present invasions by the police such as those referred to as "stop and frisk" searches. There is also a great possibility that actions taken on the part of private corporations would be considered invasions of privacy and are just as ubiquitous as the invasive actions of the state. Many of these private entities maintain a prodigious influence over the general population, simply because of the way navigating life in modern society is so dependent upon technologies created by private enterprise. Examples of this include building and maintaining online profiles, not only of those who participate willingly, as well as listening in on private conversations and electronic messages whether on an individual's phone, computer, or novel, in-home "virtual assistants."

Today, many people dismiss any claim about the detriments of invasions of privacy, especially when the threat of invasion or insurgency is posed by the government. For some unlucky few, those detriments become unignorably painful. Take the case of Xiaxing Xi. Xi is a Chinese-born American Citizen and former chair of Temple University's Physics Department.

While conducting research at the University, Xi “managed nine government research projects and more than a million dollars in federal funding, including grants from the National Science Foundation.”<sup>1</sup> Additionally, he was responsible for working collaboratively with Chinese scientists. That is, until the FBI covertly surveilled his online interactions in his research. Information gathered without a warrant led to a suspicion that he was “scheming to obtain groundbreaking American technology” and passing those trade secrets on to scientists in China.

The pounding on his front door was so intense that Xiaoxing Xi opened it without being fully dressed. In the early morning light on the other side, a dozen armed FBI agents, clad in bullet-proof vests, barged into Xi's home with their guns drawn. They pushed him against a wall and handcuffed him as his wife and daughters looked on, frightened and confused. They had a warrant for his arrest, the agents explained, but did not tell him why. Instead, they whisked him away to an FBI field office where they eventually told him he faced charges related to economic espionage...<sup>2</sup>

In addition to the severe charges against him, Xi's reputation was ruined, as he was quickly labeled an international spy by the media, stripped of his research responsibilities and shunned from his work and colleagues. What the FBI thought they had surveilled Xi doing, giving away valuable trade secrets, is considered “economic espionage”, and a federal offense. After enduring weeks of stress and the looming threat of life-ruining charges against him, the government dropped the case against Xi after the defense was able to easily prove that his actions were not espionage at all. In fact his cooperation with his Chinese colleagues was harmless and actually part of his mandate from the National Science Foundation. The charges were entirely baseless, but they cost Xiaying Xi immensely.

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<sup>1</sup> Brit Farmer, “The Spy Who Wasn't,” 60 Minutes, August 26, 2018, <https://www.cbsnews.com/news/the-spy-who-wasnt/>.

<sup>2</sup> Farmer.

Intrusions into privacy such as this case were sanctioned and continue to happen not least because of value judgements about privacy. Modern evaluations of privacy indicate that in many cases privacy is considered to be unimportant, superfluous, or negligible. The objective of this thesis is to show that there are many ways in which we can evaluate privacy and that some of our contemporary evaluations are inadequate.

One cannot refute that privacy and privacy rights were, at one point, a defining characteristic of Western society. It seems that recent events and revolutions have shifted our perspective. For example, because of the 2001 attack on the World Trade Center, Americans have adapted and changed many aspects of their lives out of fear. The repercussions of that tragic event have impacted every American in some way. Decisions were made and policies have been put into action to ensure, as least as much as humanly possible, that another similar attack never again takes place on American soil. In order to better protect and respond to the threats of terrorism we created the Department of Homeland Security to keep watch of our borders, upgraded and enhanced the strategies of the National Security Administration and the Federal Bureau of Investigation, and adopted new foreign policies that announced to the world that any nation that supports terrorist organizations is an enemy of the United States.

Legislative acts and executive orders were designed and carried out with the objective of keeping Americans safe from terrorists and reducing crime. However, the policies have had a very unfortunate side effect in that many of the provisions passed are dubious as to their constitutionality and many individuals believe that they represent a rather large government overreach into the realm of infringement upon civil liberties. With support from a vast majority of the legislature and the President's executive orders,

government agencies produced new programs that would surveille amazing portions of internet and telephone communications and collect enormous amounts of data, not just apropos to suspicious foreign targets, but everyone.<sup>3</sup>

Convinced of the need for greater information about potential threats, US government agents have spied, eavesdropped, hacked, infiltrated, seized, maimed, and tortured, all on behalf of the American people. Many of these techniques have been aimed at Americans themselves for fear of criminals, terrorists, and terrorist sympathizers hiding amongst the general population. Thanks to whistleblowers within government agencies, people who believed many of the actions carried out to be a violation of rights and an affront to morality, we now know that the NSA collects nearly all electronic data including phone calls, website visits, and email content. It employs an unknown number of super computers and data collection experts to collect, sift, and sort through all of the data,<sup>4</sup> without a warrant and previously unbeknownst to the individual user. We also know that any action taken online or with a connected device is subject to scrutiny and recording.<sup>5</sup> We know that police can stop any person on the street and begin an investigation into their history and that the concept of probable cause is on the verge of dissolution.<sup>6</sup>

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<sup>3</sup> Michael Kirk, "United States of Secrets," *Frontline* (Arlington, VA: PBS, May 13, 2014), <https://www.pbs.org/wgbh/frontline/film/united-states-of-secrets/>.

<sup>4</sup> David C. Gray, *The Fourth Amendment in an Age of Surveillance* (Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2017), 4.

<sup>5</sup> Gray, *The Fourth Amendment in an Age of Surveillance*.

<sup>6</sup> Justice Sonia Sotomayor, *Dissenting Utah v. Strieff*, 136 S. Ct. 2056 (U.S. Supreme Court 2016).

What is unknown to us is how much more secure Americans are because of the heightened level of surveillance, how many attacks have been stopped, how many lives have been saved thanks to our government's willingness to "take the gloves off"<sup>7</sup> and do what is necessary to protect its citizens. However, we can evaluate the perspectives of government officials and those Americans who support the maintenance and use of their sweeping security program. Upon evaluation, laws like the Patriot Act, the USA Freedom Act, or private corporate policies that delve into the thoughts and relationships of individuals, may be found to steal away the privacy rights of every American before we've had the chance to fully understand the effects of what we are doing.

An examination of modern government policies has illuminated the lengths that we are willing to go to create a sense of security and realized what were once extreme hypothetical circumstances.<sup>8</sup> General public trends show a lack of concern towards the protection of privacy and civil liberties and, instead, a greater concern for public safety. These trends and policies reveal a critical necessity to effectively and rightly weigh the importance of privacy. There are many ways in which we can view privacy. The fervent decent that arises before the passage of public policies regarding privacy is a testament to that fact. The primary question in contention in this thesis then is, which theoretical perspective is best for evaluating privacy issues?

The following work is neither an argument against the governments duty to protect its citizens, although arguments have been made as to legal and moral limits on

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<sup>7</sup> Andrew Buncombe and Anne Penketh, "Rumsfeld 'Told Officers to Take Gloves off with Lindh,'" The Independent, June 10, 2004, <http://www.independent.co.uk/news/world/americas/rumsfeld-told-officers-to-take-gloves-off-with-lindh-731644.html>.

<sup>8</sup> Charles Fried and Gregory Fried, *Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror* (New York: W.W. Norton & Co, 2010), 23.

the measures that may be taken against an insurrection or foreign enemy,<sup>9</sup> nor is it a defense of criminal or terrorist activity. Rather, it is a statement about the importance of individual privacy in every person's life, and in every society. My objective is to show that there are many ways in which we can evaluate privacy and that the contemporary lens through which we view issues of privacy is inadequate. There is a better perspective.

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<sup>9</sup> "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Title 9, Chapter IV of United Nations Treaties. vol. 1465 (1987).

## CHAPTER 2. A METHOD FOR REDISCOVERING THE PRIVATE REALM

In order to carry out an investigation into which theoretical perspective is best, it will be necessary to examine the works of philosophers and policy proponents who hold vastly different perspectives of privacy. Therefore, this work will discuss a political debate that encompasses arguments made by several political philosophers including Hanna Arendt, Charles and Gregory Fried, Alan Westin, Jeffrey H. Reiman, Richard Posner, and H. Mark Roelofs. A few of these philosophers have made great attempts to carry the meaning of privacy from the ancient world that established our political foundations into the modern world. Delving into the debate that is illustrated by these philosophers will reveal the foundations of a conflict that is a fundamental part of our history as a democracy. It is a conflict that stems from competing values at the core of Western culture. The arguments made by a number of these philosophers will reveal a greater meaning within privacy than what is often understood, and why privacy should remain an important aspect of citizenship in a Western Democracy.

All the works presented in this thesis were chosen because they offer unique points of view. Some focus specifically on privacy, others simply provide an account of social phenomena that implicates individual liberties. No two arguments are the same. Many of the works used to support these arguments were selected because they are viewed as seminal works on privacy, like Alan Westin's *Privacy and Freedom*. As a former President of the Center for Social & Legal Research, Westin lends a unique and nearly comprehensive view of privacy in the 1960's. The book has been cited in thousands of related articles and was influential in persuading legislative enactments following its publication.

Because Westin's book is so comprehensive, it begins with a discussion of evidence for privacy that can be found in animal biology and the study of pre-civilized man. Westin then transitions into descriptions of privacy in increasingly modern societies. It is this section in which he begins to cite the accounts of academics who have studied the philosophies of ancient societies such as Greece and Rome in order to get a better understanding of their view of privacy. Westin cites Hannah Arendt and H. Mark Roelofs, among others, as prominent scholars in this field.

A parallel reading of both Arendt and Roelofs shows that they share a similar account of Greek and, to some extent, Roman society. From this account I have derived what I would call an ancient understanding of privacy and the principles regarding it. In order to compare and contrast perspectives that are different from this ancient account, I searched for literature that makes arguments about privacy, independent of the influence of ancient traditions; arguments that can only be perceived as reflective of the morals and values of the time and society in which they were written.

One volume of an academic journal appeared continuously throughout my search for moral arguments regarding privacy; that is the summer volume of *Philosophy & Public Affairs*, 1975. In this journal three philosophers give their accounts of why privacy is important and make compelling arguments against each other's interpretations. These three articles also meet the demands required to be supportive of the arguments made here, in that all of them support reasons for why they believe privacy is important without reference to earlier accounts of privacy, and they are widely regarded as arguments that are difficult to refute; accepted as veracious accounts of privacy and the principles concerning it.

In juxtaposition, none of the accounts mentioned here hold privacy in the same esteem or consideration as much of modern society. What I mean here is that portions of American society can clearly be perceived as holding privacy to be an unimportant principle to say the least, and a simple proof of that can be found in legislation and court rulings about privacy. If the considerations of the court were entirely outlandish, or legislation passed by congress was considered to be overbearing or egregiously ineffective, those public policies would not stand long in a representative political system. Consequently, I set out to find academic, credible accounts of this contemporary understanding of privacy, accounts that match up well and defend the stance on privacy rights that is taken by modern public policy. In doing so, Author and Judge Richard Posner came to my attention several times as an advocate of national security and law enforcement schemes that seem to hold privacy in this light. Posner's book *Not a Suicide Pact*, while not his most famous publication, addresses this balance between security and privacy most directly.

Finally, the last accounts I'd like to mention are those of former U.S. Attorney General John Ashcroft and former Intelligence Director Michael Hayden. In their publications, there is a vivid and real account of the balancing act that policy makers must take on when maintaining national security. Taken together, they reveal the values and judgments that have be weighed and present a cohesive argument for their beliefs about privacy and why contemporary policies regarding privacy look the way they do.

Accordingly, a reading of the literature in this manner supposes three apparent theoretical perspectives about privacy. In light of this realization, I have grouped similar appeals together so that they form a cohesive argument for each perspective. We can then

evaluate each perspective based upon the appeals made by its supporting theorists. The first perspective I will call the Participatory Democratic perspective. It is defended by particular comments and sections of Arendt and Roelofs works regarding civic life in ancient democracies. Their works were chosen because they represent the best arguments for a view of privacy as important for a vibrant public and a plurality of ideas. They write from an approach that stresses the importance of civic virtue, as well as the importance of the traditional understanding of republicanism. A second perspective is defended by late modern philosophers, such as Westin and Rachels who were writing in response the newly rediscovered question of privacy and liberty in the 50's and 60's. Their perspective I will call the American Liberal perspective. These works were chosen because of the logical appeals they make for the importance of privacy for the individual. They make compelling arguments that are opposed to the Participatory Democratic perspective and are different, in that their focus is on the individual rather than the public as a whole.

As we will see, these accounts both stand in contrast to the third perspective, the Contemporary account of privacy. Current government officials and policies do not reflect an espousal of the view of privacy that was held in foundational Western thought or in traditional Liberal thought. The major advocate of this perspective in the following work is Justice Richard A. Posner. His appeals were chosen to defend the Contemporary perspective because he is a zealous advocate of many public policies that maintain a similar evaluation of privacy, and his publication on the topic offers clear and compelling arguments for his view of privacy issues in the modern world.

Although the invasions of privacy that are asserted here take place in the contemporary world, they are exemplary of an ancient debate, at least as old as the

concept of democracy, between the individual and the nation, between order and freedom, and between security and liberty. The debate about the correct interpretation of the meaning of privacy, or its importance, is a theoretical one. It cannot be won by a survey of public opinion, nor can the value of any one perspective be evaluated through statistical analysis. Thus, the methodology for examining each philosophical aspect of privacy must remain philosophical. The technique used for unraveling this conflict between security and privacy is historical prescription, a logical technique given that the conflict itself has been handed down through our inheritance of Western Culture. The examination here mirrors the traditionalist approach of its predecessors, Roelofs and Arendt, who in turn have searched for solutions to this, and similarly persistent problems, in the wisdom of philosophers who have come before.

There are many questions implicated in this investigation that are extremely difficult or impossible to answer. While we can look at differing theories about the importance of privacy, this thesis does not answer questions about the effectiveness of modern security policies. Not only are questions of this sort out of the scope of my thesis, but they would require more information than is available, considering the secretive nature of national security information. Additionally, questions of constitutionality are not within the scope of this thesis. For reasons which I will explain, our scope in the investigation is much wider.

### CHAPTER 3. LITERATURE REVIEW

The circumstances that bring contention to this debate take place within the sphere of American public policy, but privacy protections have been, historically, a source of dispute far before the inception of America. Any academic work discussing the right to privacy in the United States will likely begin with a similar statement as “the US Constitution makes no mention of a right to privacy.” Some may even use this observation to support an argument that there is no right to privacy there, or that any claims Americans have to a right that may well look like privacy are really rooted in private property rights and claims to ownership and possession.<sup>1</sup> However, I dispute this argument, and I believe that this portion of the privacy debate is settled. Americans do, in fact, have a right to privacy and, although not always protected by judicial interpretations of their Constitution, rights to privacy are recognized and enforced by a number of government institutions.

The Supreme Court made no mention of a right to privacy until 1965<sup>2</sup>, but moral standards for protecting individual privacy can be found in laws dating back to revolutionary America. According to Daniel J. Solove, a prominent legal scholar on privacy, “Even in the early days of colonial America, there was some limited legal protection of privacy,” citing the English law against eavesdropping.<sup>3</sup> He also provides that, in 1782, Congress passed a law prohibiting the opening of mail by unassociated

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<sup>1</sup> Judith Jarvis Thomson, “The Right to Privacy,” *Philosophy & Public Affairs* 4, no. 4 (1975): 299. Thomson’s thought provoking discussion attempts to narrow what exactly privacy is, and, while helpful, misses a defining point, as I will note in an impending paragraph.

<sup>2</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>3</sup> Daniel J. Solove 2006. “A Brief History of Information Privacy Law,” In *Proskauer on Privacy*, 1-46. (New York City: Practicing Law Institute), 4.

persons.<sup>4</sup> In 1891, the Supreme Court ruled that courts cannot compel individuals to submit their bodies for intrusion by surgical examination, creating a common law to protect the “inviolability of the person.”<sup>5</sup> And, in modern times they have laws protecting a person’s financial identity, as well as their health records, and even the marks earned in grade school. All of these point to a legitimate regard for respecting an individual’s privacy without any appeal to a constitutionally guaranteed right, and so, to make the statement that Americans do not have a right to privacy, simply because the constitution does not articulate one, would be unfounded.

It is also unfounded to say that privacy is simply an extension of property rights; a common argument. I agree with American Philosopher Thomas Scanlon that privacy rights are not “a cluster of diverse rights [...] each of them in fact a right of some other kind, e.g. a right of ownership,” rather they are individual claims against some particular circumstances of feeling a certain violation, all with a common foundation in the interests we have in “being able to be free from certain kinds of intrusions.”<sup>6</sup> As the following discussion will illustrate, while it is easy to settle a debate about whether or not we have a singular specific right to privacy, it is much more difficult to define or conceptualize what exactly privacy is.

Another common introduction to an academic work regarding privacy in the United States is to begin with an allusion to the work of Justices Lewis and Brandeis, published in the *Harvard Law Review* 1890.<sup>7</sup> It was, and continues to be, hailed as a touchstone of privacy law in America, and the article, coupled with his famous dissent in

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<sup>4</sup> Solove, “A Brief History of Information Privacy Law,” 6.

<sup>5</sup> *Ibid.*, 9.

<sup>6</sup> Thomas Scanlon, “Thomson on Privacy,” *Philosophy & Public Affairs* 4, no. 4 (1975): 315.

<sup>7</sup> Samuel D. Warren, Louis D. Brandeis. “The Right to Privacy,” *Harvard Law Review* 4, no. 5 (Dec. 15, 1890): 193-220.

*Olmstead v. United States*, 277 U.S. 438 (1928), has caused many legal scholars to dub Brandeis the father of American privacy law. Titled *The Right to Privacy*, the review is periodically recalled as a reminder that the law ought to grow to meet the unpredictable circumstances of human life, and as a reminder that, while many aspects of our lives stretch beyond the tangible world, the law ought to, in accordance with the virtue of justice, seek to remedy even those transgressions which cannot be said to leave a physical impression.

In making the case for the protection of the individual, the authors provide moral reasoning against invasions of privacy that are difficult to refute:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>8</sup>

The article provides a more than adequate argument for a change in tort law in the US, and it is probably not as abrasive towards the offenses of “the refining influences of culture” as many modern invasions of privacy would justify. Without detracting from the work of Lewis and Brandeis, it is important to note that the Justices did not create a right to privacy in the US; privacy predates them. Nor did they necessarily refer to the same particular type of privacy that is pertinent here. Rather, they reproofed the courts because, as it so often does, the law failed to keep up with the necessities of human affairs. In making this observation they have dichotomized the right to privacy so that we may recognize, not only forced intrusions by the government, but intrusions made by

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<sup>8</sup> Warren and Brandeis, “The Right to Privacy,” 196.

individuals, the former made culpable in the United States by the Bill of Rights, the latter by the evolution of tort law.

This dichotomy of privacy law, laws that protect Americans from invasions made by private individuals and those made by state institutions, make up the entirety of privacy protections in the US. Contemporary policy makers, like Richard Posner, who argue on behalf of the powers of government will often attempt to trivialize these rights to privacy. They will state that the right to privacy is nothing more than, “constitutional rights, created by the Supreme Court without any basis in constitutional text, to use contraceptives, to have an abortion, and to engage in homosexual sex.”<sup>9</sup> In the contemporary world, the heightened perception of threats to public safety and national security make it very easy to discount perceptions that greatly value privacy.

However, an understanding of privacy as simply an amalgam of reproductive rights is a far too narrow conception for our discussion here, so too is an understanding of privacy that would halt at the protection of one’s filing cabinet or brief case or familiar conversations. Understandably, these may be small individual parts of one’s conception of privacy, however, as we will see, it is often thought to be so fundamentally intertwined with the concept of individual liberty that an attempt to list the circumstances in which a person may be afforded some degree of privacy would be endless; because, simply put, “the right to be let alone is indeed the *beginning* of all freedom.”<sup>10</sup>

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<sup>9</sup> Richard Posner, *Not a Suicide Pact* (Oxford University Press, 2006), 127.

<sup>10</sup> Justice William O. Douglas, *Dissenting*, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (U.S. Supreme Court 1952): 451. Emphasis added

### The Participatory Democratic Perspective

For those who are familiar with her work, it would seem quite contradictory to wish to define a perspective of privacy and begin with Arendt. *The Human Condition* is most often used as the scripture for political action, mankind's life in the public. However, Arendt commences her inquiry into the roots of contemporary politics through etymological analysis, a common method among philosophers, and a useful tool to decipher meaning. Her process leads her to make several distinctions in political philosophy, so as to distinguish what are original meanings from those attributed in the synthesis of language, to define and refine what our specific concept is not, so all that is left is, what is. In her distinctions between the public life and the private life, and labor, work, and action, a glimpse into the ancient understanding of privacy may be revealed. In order to make clear these distinctions, Arendt exemplifies the ancient political life of the Greeks who, during the short life of their Athenian democracy, immortalized themselves through politics alone.

Arendt's account of Aristotle tells with historical accuracy that the original Greek understanding of politics has been deformed and partially lost in translation. As she states, "the early translation of Aristotle's *zōon politikon* by *animal socialis*, [is] already found in Seneca, which then became standard translation through Thomas Aquinas: *homo est naturaliter politicus, id est, socialis* (man is by nature political, that is, social)."<sup>1</sup> Her reasoning is that if we are to understand the origin of our values it will be important to know how our ancestors in the Western world felt about them. The forefathers of our Western philosophy have innocently misused the word "social" in this context, because as Arendt reminds us, the Greeks had no word for the concept. In their quintessential

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<sup>1</sup> Hannah Arendt, *The Human Condition*, 2nd ed (Chicago: University of Chicago Press, 1998), 23.

archetype for Western Democracy, the political life, rather than a social life, for the Greeks, *bios politikos*, was the life par excellence.

The political life for the Greeks, according to Arendt, is characterized as the realm in human life where action and speech take place, a public realm, “the realm of human affairs,” called such because action and speech were regarded as the “highest of all human capacities,” and capacities that are *distinctly* human.<sup>2</sup> These capacities necessitate a political realm, that is, a plurality of men, insofar as neither speech nor action can be done in solitude. In contrast, all other capacities that can be performed by humans, are either not distinctly human, meaning they are not unique to our species, such as procreation or nourishment, or they can be done in solitude, such as contemplation. Action and speech are elevated to this level of dignity because they constitute a way of life that is free of all biological necessity or animalistic dependence.<sup>3</sup> In Arendt’s understanding of the Greek political culture, the political life within the public realm represented an opportunity to rise above the necessities of biological life, and the prepolitical despotism of family life, to a life of greater meaning in purely, free human action.

Standing in direct contrast to, and the only concept reaffirming the existence of, the political life, is the private life; the diametrically corresponding form of living that is rooted in the household and the family. If we hold that the truly defined requirement for the existence of a public realm is a plurality of men, then it logically follows that its opposite, the private realm, should be defined by a lack of this plurality. The fact that the

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<sup>2</sup> Arendt, 24–25.

<sup>3</sup> Arendt writes of other human capacities such as labor, the capacity to work the soil in order to fulfill the biological need for nourishment, and work, the process of fabrication and creation, which is not connected to biological necessity but can be done in isolation.

word “private” quite literally means “to be deprived” strikes Arendt as significant, as she says, “to live an entirely private life means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes from being seen and heard by others.”<sup>4</sup> Given the plurality of men necessary to form the public realm and the individual perspectives that each one holds, the public realm carries within it a peculiar ability to continuously reaffirm the reality of the world for those who share and participate in it. “Since our feeling for reality depends utterly upon appearance [...] something that is being seen and heard by others as well as ourselves – constitutes reality.”<sup>5</sup> These defining characteristics were true of the public and the private in their original understanding and continue to hold true today.<sup>6</sup>

If the public realm reaffirms the reality of our world in common, then the private realm offers an escape from it. As Arendt describes it, the private realm offers men “their place in the world [...] their private home, where they once felt sheltered against the world and where [...] even those excluded from the world [women and slaves] could find a substitute in the warmth of the hearth and the limited reality of family life.”<sup>7</sup> The organization of ancient gens into a citizenry of the city-state was the impetus for the rise of the public realm. However, the significance of this newly founded public life did not destroy the necessity for a primordial private life, rather it reaffirmed it.

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<sup>4</sup> Arendt, *The Human Condition*, 58.

<sup>5</sup> *Ibid.*, 50-51.

<sup>6</sup> The reality affirming qualities of a public can be observed in the modern remaking of a public where a plurality of individuals and their unique perspectives are presented with full publicity. A simple allegory for this idea is the process of scientific verification. Science, the attempt to understand the true nature of world, allows for the assertion and defense of a multitude of individual perspectives. With the common pool of these perspectives, individuals within the scientific community, under the full publicizing view of their peers, attempt to test and defend the ones they believe to have the most merit, and then submit them back into the community so they may be verified, and reverified, and rereverified, until the nature of what is true or real is agreed upon.

<sup>7</sup> *Ibid.*, 59.

The private area of life in an ancient Democracy was considered sacred, and a respect for it led to the creation of a physical structure<sup>8</sup> that protects men from the sterilizing light of unwanted publicity while simultaneously anchoring them to a fixed place in the world of human affairs. Within this sacred arena, free of public supervision or outside intrusion, each man ruled in absolute based on the hierarchical regime of the family. Arendt alludes to a man's ability to master his own life and decide for himself what will be done because of "the power with which the *paterfamilias*, the *dominus*, ruled over his household of slaves and family."<sup>9</sup> The ancient regimes of the private world and of the public world are thus exactly opposites, a diametric relationship important for our understanding because no concept can be understood without observation of its opposite.

The home has one singular ruler, under whom is a man's wife, slaves, and children. The household was characterized as a single unit that shared the identity of the patriarch and was indistinguishable from him. Being devoid of freedom, household members did not deviate from a patriarch's perception. The household was also characterized as safe, comfortable, and knowable; a side effect of the strict hierarchy of power and the lack of freedom for the individual household member.<sup>10</sup> Conversely, a public has no such hierarchy, rather it is made of a select few equals who, each representing their own unique perspective, are individuals and distinguished their individuality through acts of free will and the performance of great deeds.<sup>11</sup>

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<sup>8</sup> Arendt, *The Human Condition*, 63–64. As she describes it, the law in Ancient Greece would have served to organize, very specifically, the space and shape of the city-state. "The law of the city-state was neither the content of political action nor was it a catalogue of prohibitions, resting, as all modern laws still do, upon the Thou Shalt Nots of the Decalogue. It was quite literally a wall, without which might have been an agglomeration of houses, a town, but not a city, a political community."

<sup>9</sup> Arendt, 27.

<sup>10</sup> Arendt's characterization of the private household can be found in comments made in a footnote on page 26, as well as those made in the text on pages 27-37, and again in pages 58-65.

<sup>11</sup> This comment is supported throughout *The Human Condition*; however, it is best supported on page 41.

Arendt supports a theory that a strong political realm, where great deeds can occur, requires a protected private realm. An example of such support is her discussion of the ancient idea of private property, which “played at least formally, more or less the same role as the chief condition for admission to the public realm and full-fledged citizenship.”<sup>12</sup> In the ancient world, a private place of one’s own, that is recognized and respected by all others, is a necessary precursor to, not only the individual’s citizenship, but also, because the public realm is made entirely of individual citizens, to the existence of a public realm.

A satisfied private life is a necessary precursor to an individual’s public life because, as Arendt says, “our private possessions, which we use and consume daily, are much more urgently needed than any part of the common world”<sup>13</sup> and later goes on to state,

from the beginning of history to our own time it has always been the bodily part of human existence that needed to be hidden in privacy, all things connected with the necessity of the life process itself, which prior to the modern age comprehended all activities serving the subsistence of the individual and the survival of the species.<sup>14</sup>

In the ancient world and leading up to the Middle Ages, those who did not have a private life that was properly satisfying were considered to be no more than a slave.<sup>15</sup> Because the part of life that takes place in one’s private home is meant to fulfill the biological necessities of human life, when it does not, man is required by nature, *enslaved* by nature, to spend his time with work and toil in order to sustain himself. In spending this time, he has none left to participate in public life, to experience the most dignified of human capacities, or to know the freedom that is realized in fulfilled citizenship.

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<sup>12</sup> Arendt, *The Human Condition*, 61.

<sup>13</sup> Arendt, 70.

<sup>14</sup> *Ibid*, 72.

<sup>15</sup> *Ibid*, 65.

The concept of a fully rewarding citizenship is the subject of analysis for H. Mark Roelofs, Professor Emeritus of New York University and co-founder of the Caucus for a New Political Science. In a similar vein to Arendt, Roelofs attempts to find meaning in an examination of the ancient societies that inspired Western Democracy and seeks the original meaning of citizenship in order to “erect a new, more adequate exposition and defense of the concept.”<sup>16</sup> He finds his desired meaning, not in the definition of the word citizenship, but in the emotions that it elicits. His observation of the word tells us that, beyond its purely descriptive content, we often attribute greater meaning to citizenship because it connotes feelings of pride, loyalty, and defiance. These extra-descriptive meanings each make up a different part of Citizenship, but all three form its conception in Western Democracy. Roelofs’ examination reveals that each emotional meaning is rooted in a traditional understanding of what citizenship meant to one of the individual societies that are the progenitors of our democracy, the foundations of our modern concept of citizenship.

Roelofs, like Arendt, also begins with an examination of Ancient Greece. In his understanding, the root of our pride in citizenship arises from its connection to the Greeks and the Periclean Ideal. Pride is probably the easiest emotion to relate to the word citizenship in the U.S. As Roelofs states, “we can imagine a man saying proudly, ‘I am a citizen’ and meaning by that ‘I am the kind of person who is and ought to be an active participant in the important affairs of my society’ [...] He demands from us respect.”<sup>17</sup> If we remember in Arendt’s analysis that, for the Greeks public life was the crux of all living activity towards which there was no greater purpose, the emotion of pride may be

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<sup>16</sup> H. Mark Roelofs, *The Tension of Citizenship: Private Man and Public Duty* (New York: Rinehart & Company, Inc., 1957), Preface: ix.

<sup>17</sup> Roelofs, 9.

easily understood. It is exemplified in their use of lot to guarantee each citizen's service in a public position and the short tenure for those positions, so that each one would serve the body as a whole and not be allowed to occupy any position long enough to serve personal interests. The Greeks levied fines for inattendance and strongly believed that the greatest function of the city-state was justice, in that it served to make men good. The Greek ideal of citizenship was pride in participation. Roelofs supports this saying, "unlike the subject, and the kingdom to which subjects must be loyal, the citizen seeks not only to be a member of his community but also to make it especially his own by sharing in its government."<sup>18</sup>

This not to say that citizenship, for many, does not connote a feeling of loyalty. Especially at times when one would consider their nation to be under threat, citizens perceive a call to action and submit themselves in service to the state. This cannot be said to stem from motivations of pride, rather it must be loyalty. It is true from the simple fact that because citizens are prideful members of their community and they jealously hold their status as citizens, that the service they volunteer would be very different from the type of service of other members of the community, such as slaves or aliens. Roelofs proves the point well saying, "the slave must serve always and without question. The subject must be dutiful. And the alien may well do only that which is specifically required of him by the authorities, and no more."<sup>19</sup> Only a citizen can truly display loyalty to the community, because only he can freely volunteer in his choice to serve.

Roelofs believes that the meaning of loyalty conferred to our idea of citizenship comes from our civic heritage in the Hebrew nation. It is well known that the first

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<sup>18</sup> Roelofs, 41–42.

<sup>19</sup> Roelofs, 14.

Americans largely chose to settle there because they sought religious freedom. So a Christian, and thereby Hebrew, ethic was passed along through Western history and became implanted in the social values of most Americans. Roelofs notes that “the Hebrew contribution to modern social theory, especially to the modern democratic conception of the citizen, is immense.”<sup>20</sup> It is important to remember, while the ideas and morals passed on to us are part of this immense contribution, they are not explained explicitly as those in translations of Greek texts, rather they are found mostly in readings of the Old Testament.<sup>21</sup>

Professor Roelofs begins his assessment of the Hebrew contribution to citizenship by providing an understanding of the Hebrew culture in its original context. He shares that the Hebrews viewed every idea or object as a totality, exemplifying the word “nephesh” which translated can mean “man”, “soul”, “body”, “character”, “appearance”, or “experience.” When the Hebrews used the word, they meant any and all of these concepts at once. All of this is to show that a concept of community for the Hebrews was viewed, in its own time, as a whole; a Hebrew man, the Hebrew nation, Hebrew law, religion, and God all existed at once, as one concept. From this we can gather that all of the “Thou’s” of the Ten Commandments do not necessarily refer to individual actions but, instead command a whole community. This community was, as characterized by its own people, chosen by their own god; Yahweh. They, believing themselves to be the chosen people, entered into an enduring covenant which “placed upon them an enduring

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<sup>20</sup> Roelofs, 61.

<sup>21</sup> Suffice it to say that in early America, by and large, the only text available for people to read, if they did so at all, was the Bible. The Old Testament more than coincidentally made up the entirety of the legal doctrine of the ancient Hebrew nation and was available for a majority of Europeans and European-Americans to study.

burden of rights and duties, of service.”<sup>22</sup> Thus in the Hebraic community one became and remained a citizen as long as he remained loyal to the covenant that defined them.

If, in our description of citizenship, citizens can choose to loyally volunteer their service, they ought to also be able to decline submitting themselves to service. If a citizen’s pride in his citizenship, rather than affirmatively joining in the voluntary sacrifice of some private interest, instead causes him to reel and turn away from the authority of the community, he will have defied the pressures of a relationship with the community in order to keep some portion of sovereign authority for himself. “Defiantly, he is proclaiming the viability and sufficiency of himself.”<sup>23</sup> This defiance makes up the third part of Roelofs’ triad of meaning in the word Citizenship. He believes that it stems from individuality that arose in the Roman-Christian world and thus defiance was also passed through history and political thought into the Western concept of citizenship.

Because of the massive expanse of the empire, and the fact that all free persons were citizens in Ancient Rome, those who lived among the communities of its periphery, communities enveloped by the empire, were stripped of their local citizenship and became subject to a government that was very far away. This distance could be characterized not only by physical separation, but also cultural separation. The societal and political trends within in the increasingly Christian empire very much isolated individuals from any communal ideals or objectives that we can more easily point to in our Greek or Hebraic examples.

Drawing inspiration from Roman politics, American society created its own republic, modeling its government in similar fashion, and conveying ideas of the ideal

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<sup>22</sup> Roelofs, *The Tension of Citizenship: Private Man and Public Duty*, 74.

<sup>23</sup> Roelofs, 12.

citizen. This was a citizen who lived a dual life, in part loyal to a far-away governing authority, and in part loyal to more personal and nearer aspirations. It was a citizen who sent a representative to appear and secure his interests in government so that he may contend with his private interests. The founders undoubtedly imagined their ideal citizen to be of the same group of people who heard the teachings in The Sermon on the Mount, that

when thou prayest, thou shalt not be as hypocrites. For they love to pray standing in the synagogues and on the corners of the streets, that they may be seen by men. Verily, I say to you, they have their reward. But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father in secret; and thy Father who sees in secret shall reward thee openly.<sup>24</sup>

Knowing that they shared a culture of fervent religious freedom, the founders designed a government where the influence of authority was limited, so that each man could live how he believed God had willed him to. And, they imagined citizens who took an interest in their community, remained loyal to those whom they would call their brethren, and, through the benefits of this organized community, could establish and maintain those individual and private aspirations. In Roelofs' conclusion a Western Democracy is made up of citizens who seek to balance these three demands; pride in participation, loyalty in service, and privacy in defiance. Privacy is then understood to be, not only a fundamental part of human life, but also a fundamental part of citizenship in a Democratic nation.

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<sup>24</sup> Matthew 6:5-6

### The American Liberal Perspective

Thus far we have examined privacy in what it meant at its foundation, in the earliest forms of Western society. We have seen in what ways privacy became a fundamental part of human life and a part of citizenship in a nation. A differing perspective can be found the early period of American society.

In its inception, America gained from the liberalism of its founding ideals a unique form of individualism. This is evidenced blatantly in The Declaration of Independence.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.<sup>1</sup>

This Lockean declaration established a new form of government that would be built upon consensual agreements made by equal individuals and would go no further. America's classical liberals envisioned a society of truly *private* individuals, individuals who were the proprietors of their own being, their own will, and independent of any other persons or any claims to authority over them, and could join together in a public when the common interest that they each shared in protecting their own private lives necessitated cooperation. This individual spirit lasted throughout the first century of the nation's existence. It is the cause for most every declaration of what the state shall not do in the Bill of Rights; an American's last line of defense of his own private life.

The classical liberalism which lead to an American lifestyle that was suited towards private interests did not last long into the twentieth century. The Great

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<sup>1</sup> "The Declaration of Independence" (Second Continental Congress, July 4, 1776), <https://www.archives.gov/founding-docs/declaration-transcript>.

Depression killed it. From this defining event in American history the point was proved in spectacular form that one's private acts to serve private occupations must be justified by their effects on society. It became quite clear that society's pressures in the increasingly modern world would not maintain "the tension between public and private."<sup>2</sup> Thus in American society the meaning of privacy withered so that it was kept as an important part of human life but held far less value in terms of citizenship in the nation.

Failing to maintain the tension between public and private after the great depression, society in the US has gradually shrunk an individual's realm of privacy out of fear of the effects of his private aspirations. As Charles and Gregory Fried state, "a fear here cuts both ways: a fear of persons and a fear of governments."<sup>3</sup> This simplifying statement reveals an American society that has shifted its perspective, from a once great fear of over-bearing government, to a biocular inspection of both over-bearing government and misbehaving neighbors. In their book, *Because It Is Wrong*, Fried and Fried defend a thesis that invasions of privacy are morally wrong, although not absolutely wrong. By this they mean that in some cases invasions of privacy may be justifiable if a person's loss or injury in the invasion is outweighed by a greater risk or danger to society. The defense of this thesis and common support for it requires a very tightly knit moral argument, an argument that, in their book, focuses entirely on how invasions of privacy offend the individual.

Fried and Fried argue that the core of privacy interests are two separate claims. "One is the concern about how [...] information will be used to threaten other interests

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<sup>2</sup> Roelofs, *The Tension of Citizenship: Private Man and Public Duty*, 175.

<sup>3</sup> Fried and Fried, *Because It Is Wrong* (New York: W.W. Norton & Co., 2010), 96.

[...] second is what might be called pure privacy interest.”<sup>4</sup> To clarify, in their view, invasions of privacy are morally wrong because revealing information that is normally protected by privacy leaves an individual vulnerable to threats of other interests, and because acts insecuring that information are injurious to the individual in and of themselves. These views, while certainly a strong defense of individual privacy, are focused mostly on the negative outcomes for one person. They tend to examine how individual privacy makes us feel and how we can use privacy to protect other private interests. Their arguments ultimately fail to defend an idea of a government or a community that cherishes its respect for privacy and sees the right to privacy as an essential characteristic of a society.<sup>5</sup>

The point that privacy came to be valued only in terms of its function for individual men, but no longer citizens, in the United States is supported by a reading of the language used by the Supreme Court in landmark decisions about privacy. We can see that in many cases in which the court is asked to interpret privacy rights, they are entirely focused on what privacy means to the individual, rather than what privacy means to a Democratic form of government. For example, the Court in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891), referred to the individual’s right to the possession and control of his own person, stating,

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body or to submit it to the touch of a stranger without lawful authority is an indignity, an assault, and a trespass, and no order of process commanding such an exposure or submission was ever known to the common law in the administration of justice.<sup>6</sup>

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<sup>4</sup> Fried and Fried, 95.

<sup>5</sup> It should be noted that, although these arguments would have greatly supported their thesis claim, defending privacy from the point of view of a citizen in a Western Democracy was not their objective.

<sup>6</sup> *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (U.S. Supreme Court 1891).

Nowhere in this case do the Justices refer to the consequences of law that would ensue had they decided in favor of the appellant here; consequences that would serve to make powers for the Court that are capable of enslaving the faculties of the citizen. The law would then serve to violate the most fundamental of liberties upon which American democracy was founded, making any citizen subject to physical intrusion of the body and person by government authority, and elevate the authority of the state to a degree equivalent to totalitarianism.

The point may be examined further in *Griswold v. Connecticut*, 381 U.S. 479, a case in which the Justices decided that the various guarantees of the Bill of Rights “create zones of privacy.”<sup>7</sup> In this case the majority opinion calls great attention to Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, but is more reserved in referencing Justice Douglas’ dissent from the same case. The former of these opinions finds contention in the laws effect on the liberties of the individual, and the latter finds contention in the outcomes of the law for the American form of government. Contrast the first opinion, Justice Harlan’s, which is recorded to have greatly affected the concurrence in *Griswold*, with the second, Justice Douglas’, hardly referenced in the recording of the case.

1. “...it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect; here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious; if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.”<sup>8</sup>

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<sup>7</sup> *Griswold v. Connecticut*, 381 U.S. 479 (U.S. Supreme Court 1965) at 484.

<sup>8</sup> *Poe v. Ullman*, 367 U.S. 497 (U.S. Supreme Court 1961) at 551.

2. “The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility. Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.”<sup>9</sup>

Again, using the Court as a mouth piece to describe the collective morality of American society, these references support the point that privacy came to be valued only in terms of its function for the individual, but no longer for the citizen. On these grounds, we must ask to what purpose or function does privacy serve for an individual human being?

In his seminal book, *Privacy and Freedom*, Alan Westin, Professor Emeritus of Public Law & Government at Columbia University, describes “The Functions of Individual Privacy.”<sup>10</sup> In his view, man’s privacy serves four overlapping functions. The first is “Personal Autonomy”, which is described as man’s need for maintaining social processes that safeguard his individuality and protect him from manipulation and domination. Westin reports that privacy is believed to protect an individual’s personal autonomy by hiding their most intimate secrets and personality. Without privacy, Westin states, a man is left “naked to ridicule and shame and would [be] under the control of those who knew his secrets.”<sup>11</sup> The existence of manipulation through invasions of one’s privacy is the greatest threat to self-ownership.

Westin’s second function of individual privacy is “Emotional Release.” From this section we can gather that Westin believes, as the social scientists that he cites, when a man leaves his home in the morning and goes out into the world he immediately falls

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<sup>9</sup> *Poe v. Ullman*, 367 U.S. at 518.

<sup>10</sup> Alan F. Westin, *Privacy and Freedom*, Second Printing (New York: Atheneum, 1967).

<sup>11</sup> Westin, 33.

under certain pressures to act in a certain way, to behave, and to fulfill the role that he has agreed to play in society; father, husband, employee, etc. Yet, as Westin provides, it is impossible for any man to go on playing one or any number of roles indefinitely, and, in light of this reality, privacy offers each of us a moment of respite, however brief, from daily social pressures.

His third function of privacy, Westin calls “Self-Evaluation.” Sensibly named, the self-evaluation function of privacy allows individuals to process large amounts of information and reflect upon how they will let the information affect their actions and thoughts. This private time is when many of us are most forward thinking, creative, reflective, and evaluative. For many of these intellectual processes, the presence of others is only inhibitive.

“Limited and Protected Communication” is the final function of privacy reported by Westin. Here, he tells us that privacy safeguards civilized life by allowing one to have confidences and shared intimacies. Privacy allows us to set necessary boundaries and cognitive separation between our most honest thoughts and feelings and who should be aware of them. Privacy essentially allows us to form relationships and maintain relationships in different forms and types. This is because all relationships are based on how close or far we set these boundaries, and what information and honest expression we allow others to observe.<sup>12</sup>

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<sup>12</sup> Westin, 32–39. Privacy and Freedom is an immense work, both in terms of size and scope. Although I have made a small attempt, what I have reported here does not do the book justice.

Each of Westin's four functions of privacy is touched upon in some way by a widely cited edition of the journal *Philosophy & Public Affairs* from 1975. James Rachels, in his article in the journal, provides an eloquent defense of the limited and protected communication function of privacy. He says

there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have, and that is why it is important to us.<sup>13</sup>

Again, this provides an account of the functions of privacy, showing why it is important for an individual's human life and relationships and supports the necessity of privacy as a private concern.

Rachels and the other authors who wrote in this issue of *Philosophy & Public Affairs* inspired a large response in their attempt to show exactly why privacy is considered to be so important. Rachels' theory is that, as was stated, privacy is necessary and important in forming human relationships. One of the most widely cited responses to this theory is one that supports Westin's first function of privacy; personal autonomy.

In the article, titled *Privacy, Intimacy, and Personhood*, Jeffrey Reiman points out inadequacies in Rachels' theory of privacy while supporting his own thesis that "privacy is a social ritual by means of which an individual's moral title to his existence is conferred." Reiman says that privacy is a necessary precondition of "personhood" or a concept of a "self." This is because a person is believed to require autonomy, proof that the capacities of his body are entirely his and of his own volition. Without this proof there can be no person, no self. An individual denied it would have been enformed in a society of totalitarianism in the truest sense, a society "in which individuals do not own

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<sup>13</sup> James Rachels, "Why Privacy Is Important," *Philosophy & Public Affairs* 4, no. 4 (1975): 326.

their bodies.”<sup>14</sup> Autonomy, and social rituals respecting it, allow for the discovery of the necessary proof. Reiman offers the following example.

As I sit among my friends, I know this body is mine because first of all, unlike any other body present, I believe – and my friends have acted and continue to act as if they believe – that I am entitled to do with this body what I wish. Secondly, but also essential, I know this body is mine because unlike any other body present, I have in the past taken it outside of the range of anyone’s experience but my own [privacy], I can do so now, and I expect to be able to do so in the future.<sup>15</sup>

Some may try to shortcut this logic by simply acknowledging that a person’s body can only be their own because it houses only *their* consciousness. However, this view fails to recognize the loss of personhood that is inherent when a person loses ownership of their body, like in cases of imprisonment or enslavement, where individual consciousness is not interrupted; however, the volition over the capacities of one’s own body are subject entirely to outside forces.

With the understanding presented above, Justice Louis Brandies’ famous dissent in *Olmstead* takes on the full meaning that he would have conferred to a right to privacy. While this philosophy of privacy may seem fundamentally important, and while many of the philosophies reported in this section have been influential within several fields of academia, society at large has come to accept a far different notion of the importance of privacy. What American society thought of privacy in its beginnings is no longer held dear. What do Americans think of privacy now?

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<sup>14</sup> Jeffrey H. Reiman, “Privacy, Intimacy, and Personhood,” *Philosophy & Public Affairs* 6, no. 1 (1976): 26–44.

<sup>15</sup> Reiman, 42.

### The Contemporary Perspective

“Who cares if they record internet activity? I have nothing to hide.” “Well I don’t really like the idea, but if it helps catch the bad guys...” These are common sentiments of the contemporary perspective of privacy. Many people are often pragmatic about the collection of their personal information or communications and trusting of governments and organizations to handle the balance of privacy with care and consideration. Judge Richard Posner is not shy about voicing his support for this pragmatism. As he says in person at a symposium held by the Justice Department’s Criminal Division,

Trying to keep your passwords and social security number and all that secret, that’s protecting yourself entirely in a legitimate way. But much of what passes for the name of privacy is really just trying to conceal the disreputable parts of our conduct [...] Privacy is mainly about trying to improve your social and business opportunities by concealing [some] sorts of bad activities.<sup>1</sup>

His opinions expressed on the topic agree that individuals should have some degree of protected privacy, but Posner does not agree it confers upon individuals a concurrent right to seclusion or secrecy, rather he believes these are interests that are often counterbalanced. “I don’t see how it can outweigh national security concerns [...] I think we glamorize privacy and are not realistic about what it’s really about [...] I also think that privacy interests really should have very little weight when you’re talking about national security. The world is in an extremely turbulent state, very dangerous, and I think national security has transcendent significance.”<sup>2</sup> Posner goes on to say that he believes it to be perfectly acceptable for the NSA to “vacuum” up all of the bits of information that are flowing through the internet because it serves the transcendent government interest of public safety.

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<sup>1</sup> David D. Cole et al., “Cybercrime and the Fourth Amendment,” § Cybercrime Symposium (2014), <https://www.c-span.org/video/?323068-3/discussion-cyber-crime-fourth-amendment&start=6>.

<sup>2</sup> Cole et al.

As he said, Posner believes that we often times glamorize privacy and that it's not as important as proponents might want it to seem. This is because the US Constitution does not protect what he considers to be legitimate privacy interests but rather interests that Americans have in "sexual and reproductive freedom."<sup>3</sup> Supporters of the contemporary view often support a similar conception to what Posner expresses as legitimate and illegitimate privacy concerns. In his book *Not a Suicide Pact*, Posner discusses what he considers to be two legitimate interests most people have in privacy. These are seclusion, meaning the freedom to go about one's business without outside intervention, and secrecy, meaning freedom from the adverse effects of previously disclosed personal information.<sup>4</sup>

Despite his comments regarding the glamorization of privacy, Posner finds the form of privacy that creates seclusion to be legitimately important. Individuals need the freedom to communicate in private and to be able to communicate freely without intervention. "Solitude fosters individualistic attitudes; conversely, the constant presence of other people or the sense of being under constant surveillance enforces conformity."<sup>5</sup> However, in his opinion our interest in national security and public safety heavily outweigh any individual's interest in solitude. Posner also finds the form of privacy that creates secrecy to be legitimately important. This can be understood as the interest that we all have in keeping some things secret; bank account information, health records, the things we keep in our closets, etc. But he believes that these interests are even more easily outweighed by security concerns given the "blasé" manner with which many

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<sup>3</sup> Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Inalienable Rights Series (New York ; Oxford: Oxford University Press, 2006), 127.

<sup>4</sup> Posner, 141.

<sup>5</sup> Posner, 140.

people yield their personal information in modern society.<sup>6</sup> It's clear from his writing that Posner would prefer to designate these as privacy interests rather than rights.<sup>7</sup> Interests are more easily arbitrated against. To call them rights would lend them more weight in an effort to balance privacy against security and safety concerns. The main argument of his book is that a society must be willing to accept curtailment of civil liberties in order for their government to effectively keep them safe.<sup>8</sup> It is even easier to accept a curtailment of privacy if it is only regarded as a set of interests, rather than absolute rights.

A curtailment of privacy, along with other interests or rights, is believed to greatly assist in combating terror and the most extreme forms of criminal activity. Posner refers to this as “altering the balance.”<sup>9</sup> He and many other national security advocates believe that if citizens are not willing to yield some civil liberties to pressure, the doctrine supporting them may break. He offers a new balance of privacy interests as an example.

I have said both that people value their informational privacy and that they surrender it at the drop of a hat. The paradox is resolved by noting that as long as people don't expect that the details of their health, love life, or finances will be used to harm them in their interactions with other people, they are content to reveal those details to strangers when they derive benefits from the revelation. As long as intelligence personnel can be trusted to use their knowledge of such details only for the defense of the nation, the public will be compensated for the costs of diminished privacy in increased security from terrorist attacks.<sup>10</sup>

In this pragmatic approach to addressing privacy concerns, privacy does not carry the same weight as it does in other perspectives. Additionally, the slight weight that is granted to privacy is fair based on how people are often thought to value their individual interests in privacy and private information, and what they do with it.

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<sup>6</sup> Posner, 141.

<sup>7</sup> Ibid, 138.

<sup>8</sup> Ibid, 5.

<sup>9</sup> Ibid, 148.

<sup>10</sup> Ibid, 144.

Posner and those who support a pragmatic approach to addressing the balance of privacy issues hold that the sanction of state actions to surveil and collect information are the right decision because they do not violate anyone's rights and because the public receives just compensation for the lost interest they have in privacy. His discussion of privacy concerns itself very little with possible invasion made by private entities, such as technology companies, internet service providers, and social networks. However, we can assume, based on the sentimentalities in his writing, that Judge Posner would consider many trespasses into areas of private information to be fair as long as those who were observed or surveilled were adequately compensated.

This assumption is supported by Posner's proposed rebalancing of privacy interests above and a self-admittance in the belief that Courts and Judges are not really the best place to settle issues of privacy. In his opinion, neither is well equipped to make a fair decision in matters of information technology or privacy, and many of these matters are better off attempting a resolution before any question of justiciability arises.<sup>11</sup> Thus, I believe we may assume that fair compensation, followed by continued use of a service or technology signals, to policy makers that share the same sentiments as Posner, a resolution to any qualms about privacy has arisen before legal authorities need become involved.

It is also supported by a closer look at how the pragmatic policy maker would view the functions of privacy for individuals in the modern world, especially when so much of our lives have become more and more connected online. It may seem that most

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<sup>11</sup> David D. Cole et al., "Cybercrime and the Fourth Amendment," § Cybercrime Symposium (2014), <https://www.c-span.org/video/?323068-3/discussion-cyber-crime-fourth-amendment&start=6>.

of us willingly allow private entities to eat away at the edges of our privacy. As observed by Criminal Justice Professor Keith Logan,

When people are concerned about what the government may intercept when agencies gather digital data from the internet, they must first ask if that data is truly private. Let us consider some of the privacy we lose with our cell phones. First, we have service providers who have records of who we call, when we call, where we call, how long we call, and our basic finances. Then the providers cross reference all that information with data provided by other sources. Consider zip code demographics, home values, and the taxes we pay. We unwittingly agree to let the providers share a lot of information about us, usually because our knowing consent is lost in reading the 15 page contract for services.<sup>12</sup>

There are areas of policy which currently parallel Logan's reasoned appeal to a "realistic" approach to privacy concerns. One recent policy decision involves the collection of private information by internet service providers, or ISP's.

The congressional debate considered strict regulation by the FCC of ISP's and removal of legal permissions to collect, aggregate, and sell private user information. The debate would ultimately lead to abandonment of the regulations.<sup>13</sup> They were voted down by congress in large part because access to the private information of users helps to keep the costs of internet service low for customers.<sup>14</sup> A more simple explanation is to say that ISP's were allowed this intrusion and use of the private information because those same users are continuously compensated with low-cost internet service. This is one example of the pragmatic approach to privacy issues that characterizes the Contemporary perspective of privacy.

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<sup>12</sup> Keith Gregory Logan, ed., *Homeland Security and Intelligence*, Second Edition, Praeger Security International Textbook (Santa Barbara, California: Praeger, An Imprint of ABC-CLIO, LLC, 2018), Epilogue.

<sup>13</sup> Sen. Flake, "Congressional Disapproval of a Rule Submitted by The Federal Communications Commission," Pub. L. No. 115-22, Chapter 8, Title 5, United States Code (2017).

<sup>14</sup> Brian Fung, "Republicans Voted to Roll Back Landmark FCC Privacy Rules. Here's What You Need to Know." *The Washington Post*, March 28, 2017, sec. The Switch, [https://www.washingtonpost.com/news/the-switch/wp/2017/03/28/republicans-are-poised-to-roll-back-landmark-fcc-privacy-rules-heres-what-you-need-to-know/?utm\\_term=.445f50957228](https://www.washingtonpost.com/news/the-switch/wp/2017/03/28/republicans-are-poised-to-roll-back-landmark-fcc-privacy-rules-heres-what-you-need-to-know/?utm_term=.445f50957228).

Another good example is the collection of amendments that were made to California Senate Bill 1822 in 2004.<sup>15</sup> The bill was originally proposed by Senator Figueroa of California in response to Google's announcement of updates to their Gmail services. The new service allowed them to scan the content of their customer's emails and send them links to relevant advertisements. While some found this to be a violation of privacy, akin to phone companies listening to phone calls, the bill was amended and passed with the understanding that the information would not be stored.

If, in the perspective of the Contemporary understanding of privacy, the interest that one has in keeping private information secret can be outweighed by cheaper and more convenient information technology services, like ads marketed specifically to you, then those interests should be even more easily outweighed by a government that is concerned with guarding national security. As Judge Posner says in his book, "the government has a compelling need to exploit digitization" of personal information in order to increase security, because information "privacy is a terrorists best friend, and the terrorist's privacy has been enhanced by the same technological developments that have made both data mining feasible and elicited vast quantities of personal information from innocents."<sup>16</sup> Former U.S. Attorney General John Ashcroft agrees with this for a persuasive reason. At a hearing before the Senate Judiciary Committee, where questions were raised as to the infringement upon civil liberties by the PATRIOT Act, Ashcroft testified that "terrorists are told how to use America's freedom as a weapon against us. They are instructed to use the benefits of a free press [...] to exploit our judicial process [...] to lie about who they are, to lie about what they are doing [...] to concoct stories of

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<sup>15</sup> Figueroa, "Privacy: Online Communications," Pub. L. No. 1822, Title 1.81.15 California Civil Code (2004), [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=200320040SB1822](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200320040SB1822).

<sup>16</sup> Posner, *Not a Suicide Pact*, 143.

torture and mistreatment [...] to take advantage of any contact with the outside world.”<sup>17</sup>

Both Ashcroft and Posner reflect on the fact that although everyone needs some measure of privacy and, although our principles of individual liberty and protection of private endeavors are what makes America distinct from most of the world, those same privacy protections also make us more vulnerable.

There are people within the government who are faced with this inherent contradiction quite often, most notably the American Intelligence Community. For them, maintaining the balance between privacy interests and security is a constant struggle, and a struggle that is almost always evolving based on growing and changing threats. Many believe that the increased threat that exists, in an age when one man can take the lives of thousands, requires extraordinary preventative measures. According to John Ashcroft, the American Intelligence Community required severe overhaul to keep up with the threats that now exist in the modern world, and the events of September 11<sup>th</sup> made spectacularly clear the veracity of that claim.<sup>18</sup>

However, those extraordinary measures are often criticized by the public who are not able to perceive the constant threats and are not privy to information regarding the successes of the intelligence community. Former NSA and CIA Director Michael Hayden has expressed the difficulty experienced by those whom are tasked with keeping America safe. “American political elites feel very empowered to criticize the American intelligence community for not doing enough when they feel endangered, and as soon as we’ve made them feel safe again, they feel equally empowered to complain that we’re

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<sup>17</sup> John D. Ashcroft, *Never Again: Securing America and Restoring Justice*, 1st ed (New York: Center Street, 2006), 190.

<sup>18</sup> Ashcroft, chap. 10 "Tearing Down the Wall" p.143-162.

doing too much.”<sup>19</sup> General Hayden perceived the criticisms of the Joint Inquiry Commission prior to 9/11 to be condemning of the NSA. Failures to “connect the dots”<sup>20</sup> were believed to be caused by “gaps in the NSA’s coverage of foreign communications and the FBI’s coverage of domestic communications.”<sup>21</sup> As a result of those criticisms Hayden and others working in intelligence developed what was considered to be a “logical response.”<sup>22</sup> The surveillance programs that followed would be far more aggressive and admittedly closer to crossing the line of legality.<sup>23</sup>

The aggressiveness of surveillance tactics has led to criticism from the public and members of congress and led to whistleblowing within agencies like the NSA. However, those who support these tactics believe that they are justified and also that they are not as aggressive as they could be.<sup>24</sup> Champions of the surveillance tactics, like General Hayden believe that they have a more than saving grace and that they are actually morally laudable.

Using computers and bots to collect and surveil all data and communications without human interference is thought to be the best way to find threats. The automated systems signal to human analysts without providing identifying information. If it is determined that the communication is irrelevant, the data is deleted, leaving the

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<sup>19</sup> Kirk, “United States of Secrets.”

<sup>20</sup> Ashcroft, *Never Again*, 156.

<sup>21</sup> “Report Of The Joint Inquiry Into The Terrorist Attacks Of September 11, 2001,” Congressional Joint Committee Report (The House Permanent Select Committee On Intelligence and The Senate Select Committee On Intelligence, December 20, 2002), Declassified p. 36, [https://fas.org/irp/congress/2002\\_rpt/911rept.pdf](https://fas.org/irp/congress/2002_rpt/911rept.pdf).

<sup>22</sup> Michael Vincent Hayden, *Playing to the Edge: American Intelligence in the Age of Terror* (New York: Penguin Press, 2016), 67.

<sup>23</sup> Hayden, 70–71.

<sup>24</sup> Ashcroft, *Never Again*, 178–79.

individual anonymous and their privacy intact.<sup>25</sup> Hayden and others have touted the NSA's ability to prevent attacks and keep people safe using this useful tool.

Likewise, private information technology companies have used similar tools in the past to provide better services. In a meeting with California State Senator Figueroa, Google executive Sergey Brin provided an explanation of Google's email tool, which reads what users type, and provides ads and links that are relevant to the conversation. The tool is analogized to "a robot [that] went into your home and read your diary and read your financial records, read your love letters, read everything, but before leaving the house, it imploded. That's not violating privacy... nothings kept. Nobody knows about it."<sup>26</sup> Presumably while the robot was in your home it was providing useful services with the information that it had found.

Surveillance and information collection tools, such as those used by the NSA and Google, allow those entities to have more information and to know more about us than any other information collection effort in history. The ability to know so much has been granted by to the growth of two separate impending forces, the social pressure that pushes modern society to put so much stock into online interaction, and the increasing threat of massive damage to a nation at the hands of a terrorist. As Judge Posner puts it, the environment has changed.<sup>27</sup>

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<sup>25</sup> Hayden, *Playing to the Edge*, 24.

<sup>26</sup> Yasha Levine, *Surveillance Valley: The Rise of the Military-Digital Complex* (New York: Public Affairs, 2018) 163.

<sup>27</sup> Posner, *Not a Suicide Pact*, 145.

#### **CHAPTER 4. EVALUATING CONFLICTING PERSPECTIVES**

Many cases and issues that arise throughout the course of our human experience require cooperation or the formation of a government and many of those issues necessitate the creation of a policy area that governs privacy. Each imponderable event differs in the amount of privacy that is necessary. There are also issues where too much privacy is dangerous. Examples may include the regulation of pornography for considerations of decency, preemption of political speech for considerations of threatening or radical ideas, and surveillance of conspiratorial activity for consideration of criminal or terrorist activity. When faced with questions such as these, a society may need to view privacy from a different perspective. The perspectives of privacy reported here each give deference to privacy, either as an important interest, or as an intrinsic right. Although they each value privacy, the perspectives differ in the value they ascribe to it, and for different reasons.

Now that we have a better definition and understanding of each perspective of privacy issues, we can analyze and evaluate each one. The perspectives each have arguments for and against, and different goals for the society that they ultimately strive to achieve. These can be the most individualistic society, the most cooperative society, the most safe society, or any number of goals. In order to evaluate each of our three perspectives of privacy one ought to compare the advantages and disadvantages that arise from utilizing each one and their goals. Let's begin with the American Liberal perspective.

For the American Liberal, protection of individual autonomy and liberty is the primary concern. This is clear from Westin's "Functions of Individual Privacy." A society that values privacy for the purpose of protecting the liberty of the individual, would also "protect him from manipulation and domination." In this sense, it is probably the perspective that leads to what we would imagine as the most freedom. Every issue viewed through the American Liberal perspective would permit the individual, to the greatest extent possible, to maintain and manipulate the information society knows about them. The information that makes up their personality, their characteristics, their reputation, and their secrets would be owned, and majority controlled by that individual.

More privacy protections would mean fewer pressures from society, and less shame and anxiety about behavior and expression. Time not spent in the public would be time spent in complete domination of one's own actions, behavior, and thoughts, no matter how absurd they may seem. There are many simple examples to explain this idea. Rachels chooses to illustrate it in his article using an excerpt from John Barth's novel *The End of the Road*.

The narrator of the story, Jake Homer, is with Joe Morgan's wife, Rennie, and they are approaching the Morgan house where Joe is at home alone:

"Want to eavesdrop?" I whispered impulsively to Rennie. "Come on, it's great! See the animals in their natural habitat."

Rennie looked shocked. "What for?"

"You mean you never spy on people when they're alone? It's wonderful. Come on, be a sneak! It's the most unfair thing you can do to a person."

"You disgust me, Jake!" Rennie hissed. "He's just reading. You don't know Joe at all, do you?"

"What does that mean?"

"Real people aren't any different when they're alone. No masks. What you see of them is authentic."

.... Quite reluctantly, she came over to the window and peeped in beside me.

It is indeed the grossest of injustices to observe a person who believes himself to be alone. Joe Morgan, back from his Boy Scout meeting, had evidently intended to do some reading, for there were books lying open on the writing table and on the floor beside the bookcase. But Joe wasn't

reading. He was standing in the exact center of the bare room, fully dressed, smartly executing military commands. About *face!* Right *dress!* "Ten-*shun!* Parade *rest!* He saluted briskly, his cheeks blown out and his tongue extended, and then proceeded to cavort about the room-spinning, pirouetting, bowing, leaping, kicking. I watched entranced by his performance, for I cannot say that in my strangest moments (and a bachelor has strange ones) I have surpassed him. Rennie trembled from head to foot.<sup>1</sup>

A society with an American Liberal perspective of privacy would make it very dangerous to invade someone's privacy in the way described and even more dangerous to share anything that was seen. Thus, any person would feel free to act and express themselves in their behavior and feel no shame in their private actions because of the knowledge that the rules of their society protect them from unwanted observation, as well as embarrassment and shame.

In a similar way, our thoughts and opinions would be less available for public scrutiny and leave more availability to self-evaluation. One example is more individual freedom, and simultaneously less social pressure, to evaluate and form political and ideological beliefs. Each person would be left to themselves to decide their political preferences, if they want to be communistic, fascist, democratic, racist, tolerant, socially conservative, fiscally liberal, and militaristic, their religiousness, orthodox, progressive, or atheistic, and which groups they want to be a part of; unions, church groups, clans, or book clubs. In the American Liberal perspective each person would be free to take on or shirk a greater number of roles that we each play in society, and additional privacy protections leaves more decisions about appropriate behavior up to the individual. Less pressure from society and more opportunities for introspective thought leads to a greater

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<sup>1</sup> John Barth, *The End of the Road* (New York, 1960) 57-58. Found in James Rachels, "Why Privacy Is Important," *Philosophy & Public Affairs* 4, no. 4 (1975): 323-333.

diversity of ideas and more honest expression of opinions. As John Stuart Mill knew in 1859,

society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.<sup>2</sup>

Thoughts and behavior in any of life's circumstances, free of societal pressures, lend great weight to a person's own perceptions of morality in their choices. These societal pressures challenge our roles and choices, from our choice of occupation, to family planning choices, to the propriety of a piece of art.

This same control over who, how, and when, others may scrutinize or even know about information about us, would allow us to customize and manipulate how meaningful our relationships are with others; how honest they are, how real they are. "The man who is generous with his possessions, but not with himself, can hardly be a friend, nor – and this more clearly shows the necessity of privacy for love – can the man, who either voluntarily or involuntarily, shares everything about himself with the world indiscriminately."<sup>3</sup> Thus in a society that maintained the American Liberal perspective as socially valuable, personal relationships would be less public, and may, for that reason, be more intimate. And, the individuals in that society would feel less pressure from the possible consequences from revealing acts of what others would call indecency or inappropriate.

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<sup>2</sup> John Stuart Mill et al., *On Liberty*, Rethinking the Western Tradition (New Haven: Yale University Press, 2003), 76.

<sup>3</sup> Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Harvard University Press, 1970), 142.

The 2015 film *Welcome to Me* probes the personal dangers of over-publicizing relationships. The main character, Alice, has a difficult personality disorder, 86 million dollars that she has just won from the lottery, and dreams of having her own TV show. While Alice is perfectly comfortable revealing every detail of her personal life to an audience, the friends and family she extemporaneously interviews on her show are not. The film illustrates the self-obsessed, and ultimately isolating, world of someone who lives their entire life with an audience. As Alice's mother tells her in one of her interviews, "not everyone is an emotional exhibitionist."<sup>4</sup> A society that has a greater respect for privacy allows interpersonal relationships to flourish and values the real connections that are required for those relationships over the interceding mediums of the digital age.

A society with this perspective of privacy would also likely foster support for economic competition and innovation through the greatest protections of individual, private aspirations. It's no coincidence that the society that valued this perspective the most is characterized by the laissez-faire economics of pre-industrial America and extreme protectionism in its foreign affairs. The ethic of individualism inherent in newborn Capitalism meshed well with the ethic of individualism inherent in American Protestantism. Their values mutually reinforced each other in a purposefully logical manner: humility is to thrift, as service is to hard work, as predestination is to financial success in a very unpredictable market. "...the freedom of the market place was chiefly valuable as providing opportunity for each man to test the moral fiber of his soul. Money was success, but this was no crass materialism, for success was a victory of the spirit."<sup>5</sup>

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<sup>4</sup> Shira Piven, *Welcome to Me*, Comedy, Drama (Gary Sanchez Productions, 2015).

<sup>5</sup> Roelofs, *The Tension of Citizenship: Private Man and Public Duty*, 173.

Conversely, a society that feared this unpredictability in the market, or sought to coerce certain outcomes in the market for the benefit of societal goals, would place greater restrictions on business practices, subsidize and reward acceptable endeavors, and even outright ban some types of business. A society's perception about the public effects of individual enterprise might cause it to prohibit a farmer from growing a certain amount of crops on his own land<sup>6</sup>, or provide bailouts and subsidies to an automobile manufacturer to keep it afloat, or ban the production and sale of liquor.

If a community were to hold the value of privacy in the manner described by the American Liberal, it would attract individuals from other communities who may feel that there is too much intrusion into their lives. Immigrating to an American Liberal type society may mean greater opportunities to practice controversial religious beliefs, to love whom you choose and how you choose, to express your artistic point of view, or chase your entrepreneurial dreams.

An American Liberal perspective of privacy does have disadvantages, however. Greater individual freedom to make one's own choices without societal or governmental pressures leads to a great amount of uncertainty. Just as the uncertainty of the free-market in laissez-faire economies led to the unpredictable booms and busts of the early 20<sup>th</sup> century, political and ideological beliefs, left unchecked by social pressures, may become dangerously radical. Increased privacy inherently means more secrecy amongst individuals and a greater difficulty in trusting your neighbor.

As human beings, our sense of security is entirely subjective. The things that make us feel secure in our homes, and in our persons, differ from person to person. Some feel more secure with a second lock on their door, some feel more secure when carrying a

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<sup>6</sup> Wickard v. Filburn, 317 U.S. 111 (Supreme Court 1942).

firearm, and some feel the most secure when they are with friends. Nevertheless, one thing that makes everyone feel more secure is increased knowledge about possible threats. In a society of great individual freedom and the most respect for individual privacy, knowledge about the beliefs and intentions of others is at its lowest.

Much of the uncertainty present in a society that values privacy from this perspective is caused by the respect for freedoms that stand in direct opposition to what are considered the police powers of the state. In this society, an individual would be free to think and act as they please and the state's power to legislate those freedoms would be extremely limited, enfeebled. The State may be barred from intervening in most cases of private affairs except "where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity."<sup>7</sup> With so much of an individual's privacy protected, they are free to write radical political pamphlets, organize demonstrations, advocate racism, compose a lewd book on sex, personally identify with a gender of their choosing, amass a stockpile of firearms, or preach the supremacy Sharia Law.

This uncertainty about the lives and intentions of our neighbors is the direct target of many advocates of the Contemporary perspective of privacy. For the society that views privacy issues with this Contemporary perspective, attaining and analyzing the most information is the primary concern. As was concluded in the review of the literature surrounding this perspective, having the most information available is paramount for two reasons. First, having the most information reduces uncertainty regarding potential threats to a community and its society. More information helps to delineate serious threats from idle ones, and it helps to identify the source of the threat and often to identify the best

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<sup>7</sup> Munn v. Illinois, 94 US 113 (Supreme Court 1877) at 145.

preemption or response. Second, having the most information increases the efficiency and quality of goods and services. Better and more detailed information about the online interactions of consumers has led to a rapid revolution in almost every corner of commerce and enterprise.

It is important not to forget the seriousness of the possible threats to modern societies and the significance of more information in protecting people from those threats. Do not allow the first reasoned support of the Contemporary view to be undercut by an assumed triviality of the second. The airline hijackings that took place on September 11, 2001 were committed by a group of 19 individuals and resulted in the deaths of nearly 3,000 Americans. The attack also transformed national security policy in the United States, which found the greatest fault in its own severe lack of information.<sup>8</sup>

A society that holds the Contemporary view would value some aspects of individual privacy but believes that its value to individuals within the society can essentially be paid off through efficient and effective services, either from the state or from private corporations. Concomitantly, the individuals in this society that wished to volunteer or monetize their own personal information would find it easy to do so. This is indicative of the relative importance of information over privacy in the Contemporary view. More information helps individuals get what they want faster. In the post 9/11 world, what we often want is a sense of security. Terrorism, crime, disease, cyber espionage are all very real and present threats.

If a society were to view privacy issues from the Contemporary perspective, it would likely be the most prepared to provide an answer to these security threats, thereby ensuring the continued survival of that society. This society would likely rely on its

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<sup>8</sup> "Report of The Joint Inquiry Into The Terrorist Attacks of September 11, 2001."

institutions to responsibly use the information provided and address popular concerns. Relinquished medical information would enable better responses to possible epidemics and cures for serious disease. More easily accessible information about privately owned weapons, and volatile substances would allow a society to better analyze the possible sources of catastrophic events. Crime and Terrorism are often effectively quelled by delving into financial information, and attacks on information technology infrastructure necessitate information regarding its traffic and practices.

The perception of a major threat to society can cause many to wish to volunteer these types of information, and, over time, become more comfortable with doing so if they believe the information is used responsibly to address the threat. This reaction also has a propensity to indirectly cause social pressures that enforce cooperation.<sup>9</sup> The presence of a major security threat causes a society to be far less tolerant of subversion and differing politics. The Contemporary perspective emphasizes the importance of cooperation, conformity, and loyalty, especially in response to threats.

Posner, and others of the Contemporary perspective, remind us that, in the modern world, we are so rarely alone, either in our conversations or in what may be considered private affairs, even in our own homes. The sense of security we often get from having someone or something watch over us, leads to a compulsion to welcome with open arms many novel forms of surveillance. In this society we become complacent in the complete absence of solitude.

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<sup>9</sup> Elizabeth Stoycheff, "Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring," *Journalism & Mass Communication Quarterly* 93, no. 2 (June 1, 2016): 296–311, <https://doi.org/10.1177/1077699016630255>.

[...] publicity, not merely as a curb on the arrogance of [the ruling class] but as a condition in which the members of society are brought into a maximum of contact with each other. Favoring the exposure of practically every aspect of life, it is uneasy in the presence of those who appear to be withholding something. It is not always tolerant, and its occasional intolerance derives in large part from the alarm over folds and convolutions in the fabric of society in which might lie hidden unknown dangers, temptations and disruptions.<sup>10</sup>

The social pressures of modern society and the digital age create a maximum of interconnectedness of everyone's entirely personal issues, even if the connections are only superficial. Having a viewership or interested observance, however shallow, then becomes valued, because it is trendy, because it can be paid for by new and flashy apps, and because it makes us feel safe. Thus, the constant presence of surveillance, government or otherwise, not only has a strong precedent, but it is gratefully accepted as a perfectly normal compulsion to be involved in another's personal affairs. The only difference between Barth's snooping character Jake Homer, and an officer of the Stasi secret police, is that one has been granted permission by the government.

A society that is comfortable in the Contemporary perspective of privacy, values privacy the least. Furthermore, there is a more palpable risk to individuals in a society that accepts the Contemporary perspective as the norm. In our review of the literature surrounding this perspective we learn that citizens yield a great amount of information to authorities in exchange for security. However, this exchange only remains beneficial to both sides "as long as intelligence personnel can be trusted."<sup>11</sup> The propensity for an abuse of power once authorities have permission to carry out tactics of surveillance and intelligence gathering is not only entirely possible but has happened several times in the history of the United States. The most notable cases include the Justice Department's

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<sup>10</sup> Edward Shils, *The Torment of Secrecy: The Background and Consequences of American Security Policies* (Chicago: Ivan R. Dee, 1996), <http://public.eblib.com/choice/publicfullrecord.aspx?p=1158617>.

<sup>11</sup> Posner, *Not a Suicide Pact*, 144.

treatment of members of the IWW in the early part of the 20<sup>th</sup> century<sup>12</sup>, illegal wiretapping of Dr. Martin Luther King Jr.<sup>13</sup>, and illegal operations carried out by the CIA to surveil and monitor members of the press and people who were opposed to the war in Vietnam, published in the New York Times' *Family Jewels* reports<sup>14</sup>.

Wrongful or irresponsible use of information gathering powers entrusted to a large institution is not unique to government authorities either. Many private organizations that were once highly trusted have been found acting egregiously irresponsible with private information. Examples of this could be the Equifax scandal<sup>15</sup>, or the novel trend in the software and mobile application industry to use “opaque language” in user agreements.<sup>16</sup> Entrusting any institution, public or private, with personal information is a large risk, especially in the digital age, when the information environment changes rapidly and security is never assured. As professor Xiaying Xi agonizingly recalls, “I was charged for things that were just normal collaborations. If all these normal activities could be seen as criminal activities, then the environment is quite frightening.”<sup>17</sup>

Our analysis of the two perspectives addressed thus far illustrates how they exist at either end of the privacy spectrum. The Contemporary perspective takes a hard stance

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<sup>12</sup> Shils, *The Torment of Secrecy*, 95–95.

<sup>13</sup> John Pastore, “U.S. Senate: Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities,” Final Report, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm#Investigation>.

<sup>14</sup> “The CIA’s Family Jewels,” The National Security Archive, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB222/index.htm>.

<sup>15</sup> “A Brief History of Equifax Security Fails,” Forbes Magazine, <https://www.forbes.com/sites/thomasbrewster/2017/09/08/equifax-data-breach-history/#36e07ca0677c>.

<sup>16</sup> “Your Apps Know Where You Were Last Night, and They’re Not Keeping It Secret,” *The New York Times*, December 10, 2018, sec. Business, <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html>.

<sup>17</sup> Mara Hvistendahl, “In the Cross Hairs: US Accuses Chinese-American Scientists of Spying,” *South China Morning Post*, 5 May 2018, <https://www.scmp.com/magazines/post-magazine/long-reads/article/2144652/spying-charges-against-chinese-american>.

on the necessity of information to protect communities from emerging threats, and the American Liberal perspective denies that there is any greater purpose other than the protection of individual liberties. In essence, each perspective is simply a greater elaboration on the traditional privacy vs. security debate, and it seems we may have come full circle. However, there is one final perspective of privacy issues upon which we can further elaborate. Perhaps the Participatory Democratic perspective presents a compromise between the other two perspectives, an escape from a choice between the lesser of two evils.

In the Participatory Democratic perspective, the goal is to create a society that fosters a vibrant and diverse public realm. Through a better understanding of the foundational ideals of Western society and a modern application of those ideals to current politics, the Participatory Democratic society would create a space for public action. It would honor a citizen's contribution to the nation above all else.

In order for this society to reach its noble goal, it would likely make stark distinctions between which parts of human life belong in the public and which parts belong in the private. Strict normative rules regarding public and private life are necessary in order to prevent decay of the private realm and a loss of the individual perspectives that are necessary for the vibrant public that the society strives to protect. This is because individual perspectives and the sharing of opinions, the essence of politics itself, are what constitute a "plurality of men". "In the experience of the polis, which not without justification has been called the most talkative of all bodies politic [...] to be political, to live in a polis, meant that everything was decided through words and

persuasion.”<sup>18</sup> Without this plurality, there is no space for action or distinction in the public realm and all attempts at such would be lost in the swallowing banality of mass society.

Individuality is a necessity for the condition of plurality, “the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live.” The idea of plurality as a requisite of politics is an appeal made by Arendt to the longstanding philosophy of the marketplace of ideas.

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>19</sup>

If we are to fill the marketplace, as it were, with competing ideas, each vying for acceptance, we need a private realm free of manipulation; free to create and think at freewill, a space to observe the world through a lens unclouded by another’s eye.

The main point of contention for the Participatory Democratic perspective is that it does not value the increasingly social parts of modern mass society. The perspective of privacy is antithetical to a social realm that bleeds into and amongst what was traditionally considered public or private. Arendt’s perception of the modern world is one in which we have blurred the lines between the public and the private realm, shrunk those realms to the point that they are no longer identifiable, and now live most of our lives in an increasingly social world. A social world filled with pressures and subconscious manipulation of ideas and their expression. Brought on by a loss of individuality that is

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<sup>18</sup> Arendt, *The Human Condition*, 26.

<sup>19</sup> *Abrams v. United States*, 250 U.S. 616 (Supreme Court 1919) at 630, Justice Holmes Jr. dissenting.

slowly swallowed by mass society, the social realm may be described as a growing infatuation with consumable wealth, “the absorption of the family unit into corresponding social groups,” an expansion of government into Bureaucracy, “the most social form of government,” and an exclusion of the possibility for independent human action.<sup>20</sup>

This obvious account of society can be observed in our daily conditions, when we embark the train for our daily commute, a once bustling and energetic opportunity for interaction, we can now experience the serene, uninterrupted, rhythmic sound of nothing more than the shuffling of feet. We rehearse the current political formula that has shrunk all individual perspectives into one of two boxes and ardently precludes any social disagreement.<sup>21</sup> And the media, once the grand source of information needed for the formulation of relevant and plural opinion, is now the source of a singular mind-interning sermon of the one and only truth.

We live amongst a singular mass society that inspires simply nothing but complete conformism. We became “social beings and unanimously followed certain patterns of behavior,” “those who did not keep the rules could be considered to be asocial or abnormal.”<sup>22</sup> The Participatory Democratic perspective holds dear the necessary components of human action, the doing of great deeds, and so as a society must respect and protect the conditions that allow us to create a plurality of men.

Acts of invasion or surveillance then stand in opposition to this protection of the private realm in that they batter down the door of our private world, grab hold of our individuality by the nape, as a castigating father to a child, and drag it out into the searing

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<sup>20</sup> Arendt, *The Human Condition*, 40.

<sup>21</sup> Lilliana Mason, *Uncivil Agreement: How Politics Became Our Identity* (Chicago, Illinois ; London: The University of Chicago Press, 2018).

<sup>22</sup> Arendt, *The Human Condition*, 42.

light of publicity. Similarly, the knowledge of a continued policy of surveillance serves only to intimidate any further acts of individuality, so that our behavior, in our most intimate moments, is restrained, chilled, and dispirited. Acts that invade privacy then, very much do constrain the individual liberty of the person and serve to do so even before those liberties could be conceived. As Mill once declared, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion."<sup>23</sup>

The necessity of respect for the private aspects of our lives is foundational in honoring the contributions that a truly political individual could make to their nation, the great deeds they could accomplish through pure politics. Without a private world to provide both a subjective and objective foundation, the public world loses its character of triumph over necessity and opportunity for true freedom. "A life spent entirely in the public, in the presence of others, becomes, as we would say, shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense."<sup>24</sup> A society that ardently adopts the goal of a flourishing public realm recognizes the importance of the private. It would also recognize the importance of protecting the physical space and the lives of men that comprise the public realm. This perspective of understanding the necessary balance between security for the public and a respected private space means that Participatory Democratic perspective fits well in the middle of our privacy continuum.

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<sup>23</sup> Mill et al., *On Liberty*, 100–101.

<sup>24</sup> Arendt, *The Human Condition*, 71.

The unique goal of the Participatory Democratic society to dedicate itself to a flourishing public realm reflects a broad deference to privacy when compared to our other perspectives. It values individual privacy for different reasons than the American Liberal perspective, reasons that are less vain and more centered on public goals and the solidarity of a loyal community. Physical protection of the public space is recognized as a necessary requisite for the politics of a flourishing public realm. At times, drastic measures may be required in response to immense threats. This society's dedication to the survival and continuation of the public would allow it to band together in times of crisis and voluntarily yield some privacy interests in defense of the whole. In fact, a public that functions true to Arendt's model would likely contravene the compulsion to seek out national intelligence policies that strive to create a sense of security. A vibrant public realm filled with political interactions and unhindered expression would mean better interconnected relationships among members of the same community and less uncertainty. The easiest way to perceive the intentions of one's neighbor is to go and talk to him, participate in your community alongside him, and engage him politically.

Additionally, without a plurality of men dedicated to the lasting continuation of a vibrant public realm, there is no room left for citizens to express sincere loyalty to the nation that is truly theirs. As Roelofs reminds us, the citizen in a Participatory Democratic society "seeks not only to be a member of his community but also to make it especially his own by sharing in its government." Loyalty to one's own community is easier to perceive in a society that allows its citizens to make the choice between dedicating part of themselves to the public goals of the nation and refraining from participation. Loyalty to public goals is often impossible to perceive in the Contemporary

perspective, when citizens are compelled to participate in public programs, or worse, when the governing authority simply takes the information it needs and leaves its citizens oblivious.

If the Participatory Democratic perspective has any disadvantages, one may be the extent of the public's dedication to political participation in the society that the perspective ultimately hopes to achieve. Its citizens must be courageous enough to participate in a space that is inherently publicizing and to sacrifice some private interests in the name of cooperation. A society dedicated to each citizen's life in the public would require immense cooperative effort and an equal sharing of that effort. This cooperation is less effective when participation is low. In a Participatory Democratic public, political engagement and acknowledgement of public interests are the most important foundational values. Broad recognition of those values in turn confers greater legitimacy to governing authorities. Such a government would truly be a government of the people. In order to create it, its people must be dedicated to participation.

## CHAPTER 5. CONCLUSION

In the imponderable world of political affairs, questions of individual privacy will arise, and a society with the broadest perspective will be best equipped to understand and address the issue. A broad perspective of privacy allows a society to evaluate every side of the matter and come to political agreement about a proper response. Thus, the Participatory Democratic perspective of privacy is the best perspective that is analyzed here. The Participatory Democratic perspective offers more benefits to viewers of privacy issues and avoids the costs of the Contemporary perspective.

During WWII, under the perception of immense threat of subversion and rebellion from Japanese-Americans. Those individuals were interned in “relocation centers” in California from the year 1942 to 1945. This created a sense of security for Americans at the great expense of a few. Modern American society is stuck in its Contemporary view of privacy issues, striving to create a sense of security. It values information for addressing threats to public safety over all other interests and it forces cooperation, rather than allowing for true loyalty, so that each citizen forcibly contributes to the preservation of the community unknowingly, and without consent. The United States has built up the arsenal of its intelligence apparatuses,<sup>1</sup> provided impetus largely by the collapse of the World Trade Center and the instigation of the War on Terror. The nation, now infinitely more aware of the dangers that exist to its way of life, has lived the last 17 years in the scramble for a sense of security.

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<sup>1</sup> Logan, *Homeland Security and Intelligence*, chap. 2. At the time this book was written, the authors are able to report that there are 17 government agencies that make up the “intelligence community” in the United States; many of which have legal authority to conduct domestic intelligence operations.

It was the case following September 11<sup>th</sup>, 2001 that Americans perceived a greater sense of security from their government because of the promises made by authorities to keep them safe and a palpable increase in measures of counterterrorism. It also continues to be the case that the new norm is a devaluation of privacy. This is seen in the adoption of similar valuations of privacy among private corporations. The commonality of government invasions of privacy has opened the door for technology producers and service industries to take a similar view. The marketplace of ideas in the United States has been diminished and is increasingly more hostile to diverse political thought. Government efforts to increase security are coercive and back handed.<sup>2</sup> The outlook is far worse when considering the cause for viewing privacy issues through the Contemporary lens. America declared a war on terror, a nebulous concept to define, and a victory nearly impossible to imagine. If it is always on the lookout for threats of terrorism, a society will view issues of privacy from the Contemporary perspective indefinitely. The maintenance of this narrow perspective of privacy issues has led to social intolerance and a diminished public.

At the outset of this investigation, I sought to identify the theoretical perspective that is best for evaluating issues of privacy. In analyzing the costs and benefits of each perspective we can conclude that the benefits of the Participatory Democratic perspective make it the best perspective of the three. The breadth of this perspective allows society the political flexibility to address any issues of privacy that arise, whether those issues implicate one individual, such as issues regarding the regulation of pornography, or entire nations, such as issues in eliminating funding for terrorist groups. Because the Participatory Democratic perspective views a diverse and flourishing public realm in the

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<sup>2</sup> Doe v. Gonzales, 546 U.S. 1301 (U.S. Supreme Court 2005).

highest regard, someone who maintains this perspective of privacy would not be forced to abandon it when severe threats to the public arise or when individuals begin to fear encroachment into their private lives. The same cannot be said for the other two perspectives of privacy.

The Participatory Democratic perspective also lacks some of the severe detriments that are present in the other two perspectives. In comparison, the American Liberal perspective is far too focused on the positive aspects of privacy for the individual. While the best perspective of privacy ought to acknowledge the importance of privacy for the human beings, the American Liberal perspective fails to recognize the importance of privacy for the nation and also fails to recognize the growing danger that lurks in the uncertainty of life in a modern world; a world where technology and anonymity continue to grow in their capacity to wreak havoc and do real, physical harm in civilized society.

On the other side of the debate, the Contemporary perspective severely underestimates the importance of privacy. This perspective views privacy as a threat and an impediment to public safety. It also fails to recognize the importance of deference to privacy in a Western Democracy. The ability for a society to adapt its deference to privacy in response to the issues that arise in the world of human affairs, allows it to address those specific issues appropriately. In the United States, a loss of flexibility in addressing privacy issues has been caused by a clenching of the severe weight of the threat of terrorism. The nation's political affairs have failed to avoid binding doctrines that limit its perspective and its evaluation of the costs of the Contemporary perspective.

Although this work has been limited in scope by the unavailability of information regarding national security, and the relative successes or failures of security policies in

effectively keeping Americans safe, we have been able to evaluate the perspective from which American society perceives privacy. If it can regain its balance, and adopt a different theoretical perspective of privacy, America may begin to recover from the detriments of prolonged perception from the Contemporary perspective. If it already had, we can conclude that things would be very different for Professor Xiaxing Xi and others like him.

There are areas within this investigation that would benefit from further research. Being that there are only three differing perspectives outlined here, further identification and analysis of other perspectives would help to inform the conclusions made and may even change them drastically. Additionally, case studies into specific areas of privacy may reveal the effects of the perspectives and show, in greater detail, the benefits and detriments of adopting a particular perspective. Any future work that analyses different privacy perspectives will likely be informed by data and information that is made available by intelligence communities and so affected by the declassification and release of such information. Finally, this work has been limited by its author's experience of conditions provided by the time and place in which it written.

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