

VIII. The Underlying Values and their Alignment

We have made repeated references to the liberal democratic values at stake in contemporary digital technologies. It is now time to attempt to articulate them in greater detail and, in particular, to offer accounts that might have some claim to broad, if not universal, acceptance within liberal polities. We focus initially on security, a value in any society, but distinctively construed within a liberal polity, before reviewing the ways in which strategies for assuring it may come into tension with other important liberal values – privacy, autonomy and dignity – and thus impinge on liberal identity.

Security

Both crime and terrorism threaten our security, and it is in the name of security that some of the controversial measures identified in earlier chapters have been deployed. But “security” is a slippery term. It may be individual or collective, and we need to be clearer about what is to be secured. Is it security against a physical threat, a threat to a way of life, a threat to a particular regime . . . ?¹

Background

Traditional liberal democratic political theory is nicely represented by John Locke’s *Second Treatise of Civil Government*, where he argues that human beings are endowed – by God, as he puts it – with certain fundamental rights that he characterizes as life, liberty and property.² The purpose of the *Second Treatise* is to argue that although humans should not view themselves as being under the tutelage of an absolute sovereign – a position that he had vigorously attacked in the *First Treatise* – they nevertheless still need the firm hand of central/

1 Our focus here will be on the threats to security that are posed by others – in particular as a result of crime and terrorism. Although the account we provide will highlight threats posed by these, it is not meant to exclude – and occasionally adverts to – non-personal threats to security, such as those posed by infectious disease. More generally on the ideas of individual and collective security, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004).

2 John Locke, *Second Treatise of Civil Government*, available at: <http://www.constitution.org/jl/2ndtreat.htm>. The Lockean account is usually secularized by seeing in the capacity for rational thought and action an alternative foundation for fundamental rights. There has been a lively dispute over whether Locke can be so secularized. See e.g. Jeremy Waldron, *God, Locke and Equality: Christian Foundations of Locke’s Political Thought* (Cambridge, UK: Cambridge University Press, 2002); Jeffrey Reiman, “Towards a Secular Lockean Liberalism”, *Review of Politics*, 67 (2005): 473–93. Although, for convenience, we focus on Locke, our discussion might well have started, as it does in Waldron, with Hobbes.

civil government. Locke's attempt to reconcile this with the individual rights he has been advocating takes the form of what is known as the social contract in which, in exchange for certain benefits (the ability to exercise their rights), individuals see it to be to their advantage to cede some small portion of their rights to those who will secure those benefits for them.

How so? Although the occupants of a Lockean state of nature (pre-civil society) possess basic rights to life, liberty and property, such a state of affairs offers little security. The possession of rights is not sufficient for their enjoyment.³ The rights must also be exercisable, and for this the state of nature does not and cannot provide. Those who inhabit a state of nature cannot be entirely trusted to acknowledge the rights of others, some preferring instead to aggrandize themselves in various ways. As Locke puts it, although a person in a state of nature has – by right – dominion over himself, “the enjoyment of [that dominion] is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure.”⁴

Security, in other words, is a security against *X* so that we can be secure to *Y*. This can be easily forgotten, but is implicit in debates about security and liberty. If security removes or seriously compromises liberty (and/or autonomy, privacy, and dignity) then one might wonder whether it retains its foundational value.

In social contract reasoning, to effect their security rational occupants of a state of nature would choose to enter into a “civil society” – that is, one characterized by institutions that are designed to secure for its members conditions that enable the exercise of their rights.⁵ Security is therefore no peripheral social condition but central to the prosecution of a life that is able to realize its potential. Some level of security will be needed not only to ensure the social conditions of our rights (various critical social institutions) but also to foster the conditions for our individual human flourishing (through enforceable criminal law).

3 “Enjoyment” may be a particularly apt term. The Latin term *securitas* referred, “in its classical use, to a condition of individuals, of a particular inner sort. It denoted composure, tranquillity of spirit, freedom from care, the condition that Cicero called ‘the object of supreme desire’, or ‘the absence of anxiety upon which a happy life depends’”, E. Rothschild, “What is Security?”, *Daedalus* 124, no. 3 (1995): 61.

4 Locke, *Second Treatise*, §123.

5 In the *Second Treatise*, ch. 9, Locke identifies these as legislative, judicial, and executive. The critical importance that security has for the enjoyment of rights is argued at greater length in Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, second ed. (Princeton, NJ: Princeton University Press, 1996), esp. ch. 1. The text of ch. 1 is the same as in the first edition. See also Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (New York: Cambridge University Press, 2010), chapters 1, 9 and 12, and also Seumas Miller and John Blackler, *Ethical Issues in Policing* (Aldershot: Ashgate, 2005), ch. 1.

Personal security

Henry Shue refers to personal (or physical) security as a basic right; that is, a right whose enjoyment “is essential to the enjoyment of all other rights”.⁶ If personal physical security is at risk, non-basic rights can be sacrificed in order to secure the basic right. Assault, rape, torture and murder disable us (temporarily or permanently) from exercising our rights to education or free association. Even though the right to personal security may not have in itself the rich human possibilities presaged by the rights to education or free association it is nevertheless prior to them because it is the precondition of our ability to enjoy the benefits of education and free association.

The point here is that humans are ineluctably embodied, and if their physical selves are endangered then so is everything that depends on those physical selves. Given our physicality, it is not surprising that Shue also argues for a basic right to subsistence. Shue thus draws attention to something that is only implicit in Locke (though barely below the surface), whose focus on the rights to “life, liberty, and property” may tend to obscure the underlying right to security.

Although *physical security* (against bodily harm and death) is critical to any valuable personal security, mere physical security (which Jeremy Waldron usefully designates as (pure) *safety*⁷), does not comprehend the whole of what is intended by “personal security”. As Waldron puts it, spending one’s days huddled in a bomb shelter is not the kind of security that we wish to promote or ensure.

What is envisaged in the Lockean tradition (and Shue⁸) is *individual security* – the security of fundamental rights. Although Locke sees the state as a vehicle

6 Shue, *Basic Rights*, 19.

7 Useful, though stipulative. Waldron quotes from Hobbes (ever a stickler for words): “by safety one should understand not mere survival in any condition, but a happy life so far as that it possible”, *De Cive*; see Jeremy Waldron, “Safety and Security”, *Nebraska Law Review* 85 (2006): 458.

8 Shue does not specifically align himself with Locke, though he draws attention to a very similar passage in Mill, whose overarching position is utilitarian rather than contractarian:

To have a right, then, is, we conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? We can give him no other reason than general utility. If that expression does not seem to convey a sufficient feeling of the strength of the obligation, nor to account for the peculiar energy of the feeling, it is because there goes to the composition of the sentiment, not a rational only, but also an animal element, the thirst for retaliation; and this thirst derives its intensity, as well as its moral justification, from the extraordinarily important and impressive kind of utility which is concerned. The interest involved is that of security, to every one’s feelings the most vital of all interests. All other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of anything the next instant by whoever was momentarily stronger than ourselves. Now this most

for that – primarily through the promulgation of protective laws that are impartially applied and enforced – the Lockean state does not take its eye too far off the individualistic ball. To be sure, the Lockean state is probably too individualistic, since it tends to overlook the extent to which the capacity to exercise our rights is dependent on a plethora of social institutions that sustain us in various ways. Some later liberal writers – especially those with somewhat Hegelian leanings, such as T.H. Green, D.G. Ritchie and L.T. Hobhouse – were much more communitarian.⁹

An important dimension to Shue’s discussion of the right to personal security is his claim that it should not be understood as a negative (in contrast to a positive) right. Although he does not object to talk of the negative as well as the positive features of rights such as to security (or liberty etc.) – a distinction that often tends to track the distinction between acting and omitting/refraining – the right to security is not merely a (negative) right that others not interfere with one by way of assault, rape or murder but also and just as importantly a (positive) right to be protected from assaults on and other threats to one’s person.¹⁰ It is the latter that the Lockean state provides through its law enforcement (executive) activities.¹¹

What this means is that to ensure our security we will also need to contribute in some way – either by means of taxation or service – so that the structures needed for our protection can be sustained. Without the capacity to exercise our rights they count for little, and so the right to security that is supposed to enable us to exercise our rights to liberty etc. will need to be such that it includes the means for its enforcement.

Before turning to various kinds of collective security, let us note some additional features of personal and individual security. Although dependent on physical security, individual security includes rather more than that. We talk about the security of an historical way of life and its various social, cultural and institutional supports. Thus Waldron talks usefully of a “deepening” of the

indispensable of all necessities, after physical nutriment, cannot be had, unless the machinery for providing it is kept unintermittedly in active play. Our notion, therefore, of the claim we have on our fellow-creatures to join in making safe for us the very groundwork of our existence, gathers feelings around it so much more intense than those concerned in any of the more common cases of utility, that the difference in degree (as is often the case in psychology) becomes a real difference in kind.

Utilitarianism, ch. 5: http://www.gutenberg.org/files/11224/11224-h/11224-h.htm#CHAPTER_V.

⁹ For a useful if flawed overview, see Gerald Gaus, *The Modern Liberal Theory of Man* (New York: St Martin’s Press, 1983). See also Miller, *Moral Foundations of Social Institutions*, ch. 1.

¹⁰ Shue, *Basic Rights*, 37–39. This tracks an important and longstanding debate about negative and positive liberty. See Gerald C. MacCallum, Jr., “Negative and Positive Freedom”, *Philosophical Review* 76 (July, 1967): 312–34.

¹¹ Of course, it may also violate the former right through its executive activities (as Robert Mugabe’s Zimbabwe currently illustrates).

notion of individual security to accommodate these things,¹² including freedom from fear (and provision of assurance).¹³ With the metaphor of depth, Waldron associates a metaphor of breadth to which we will return.

Because the right to security is a basic right it is a right that each human being has, insofar as human beings have any rights. It may not be a right that we value particularly for its own sake; its value may reside more in what it makes possible. Nevertheless we should not be altogether skeptical of seeing security as something that we also value for its own sake.¹⁴

True, Waldron is reluctant to move in this direction: “security is not so much a good in and of itself, but . . . something ‘adjectival’ – a mode of enjoying other goods, an underwriting of other values, a guarantor of other things we care about.”¹⁵ At the same time, he is also cautious about casting the alternatives too starkly, especially as the security in question might be seen as security in the enjoyment of our liberties.¹⁶ We believe that Waldron may slightly shortchange security by focusing too much on its “adjectival” qualities.

Insofar as security is a right and insofar as a right provides someone with a justified claim, it provides others – the state, in Locke’s case, though others may also be implicated – with a reason to address whatever is threatening their security.

National security

When political formulas such as “national interest” or “national security” gain popularity they need to be scrutinized with particular care. They may

12 “An adequately deep conception of security should aim to protect people’s individual and familial modes of living themselves, and not just the life, health, and possessions that are necessary for it.” (466). This discussion continues at length from pp. 461–73, esp. 466 et seq.

13 Waldron has a nice discussion of freedom from fear (negative) and assurance (positive) that indicates some of the complexities involved in building them into our conception of security (467–71).

14 In fact, Mill warned against valuing it (only) as an end: “A man who has nothing which he cares about more than he does about his personal safety is a miserable creature who has no chance of being free, unless made and kept so by the existing of better men than himself”, “The Contest in America”, in J.M. Robson (ed.) *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1984), vol. XXI, 141–42. This passage occurs in the context of the necessity, sometimes, of going to war (and thus jeopardizing one’s safety): “war to protect other human beings against tyrannical injustice; a war to give victory to their own ideas of right and good, and which is their own war, carried on for an honest purpose by their own free choice – is often the means of their regeneration.” (A copy of its early reprinting in *Harper’s New Monthly Magazine* (1862) from *Fraser’s Magazine* (1862) can be found at: <http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABK4014-0024-103>.)

15 Waldron, 471; cf. 458.

16 And people will fight for their survival in and for itself. Nevertheless, on pp. 472–73 Waldron offers some valuable caveats in relation to Henry Shue’s argument in ch. 1 of *Basic Rights*.

*not mean the same thing to different people. They may not have any precise meaning at all. Thus, while appearing to offer guidance and a basis for broad consensus, they may be permitting everyone to label whatever policy he favors with an attractive and possibly deceptive name.*¹⁷

What Waldron speaks of as a “depth” to security is helpfully juxtaposed with “breadth”, in which the question of *whose* security is encompassed (all equally, or some more than or at the expense of others). One of the helpful aspects of Waldron’s depth/breadth distinction is that it enables us to grapple with their connections as well as their differences. Insofar as a suitably deep conception of security embodies something we might want to call “the American way of life” or “liberal democratic values”, a “narrowed” implementation of security measures that severely disadvantages one segment of the population to ensure the security of another segment would violate the expectations of depth.¹⁸ The depth/breadth nexus gets additional discussion toward the end of his paper: we cannot separate our conception of the security that is worth having from the way in which it is distributed, as a matter of identity as well as achievement.¹⁹

The issue of breadth also provides an entrée for Waldron’s discussion of the large question – the fundamental political question, perhaps – of whether the security of a population should be construed aggregatively or distributively (or even in both ways). He takes issue with Hobbesian and Benthamite accounts that tend toward a largely aggregative conception and he leans toward an account of breadth that is underlain by a notion of “equal protection”.²⁰ He suggests that the legitimacy of a state that does not provide or seek equal protection (“or at least a minimum security for everyone”) is called into question.²¹

A review of the current debate about security indicates that the focus is not primarily on personal security. The focus is generally on some form of collective security – such as public safety or, more commonly, national security – and the latter in particular is said to justify a significant number of constraints on our individual liberty interests (including privacy). In other words, the constraints

17 Arnold Wolfers, “‘National Security’ as an Ambiguous Symbol”, in *Discord and Collaboration: Essays on International Politics* (Baltimore, MD: Johns Hopkins University Press, 1962), 147.

18 Waldron also warns about trying to build so much into depth that legitimate security measures are ruled out (463). Consider the absolutizing of freedom of speech, association, religion or privacy that would see any constraints on them as a compromise of its depth dimension. By the same token, each constraint needs to be argued for and not simply accepted because proposed by the incumbent regime.

19 Waldron, 494-502.

20 See the discussion on pp. 474 et seq. This does not mean that distributive considerations will always/necessarily trump aggregative considerations – a kind of “let justice be done though the heavens fall” position – but it gives a special weighting to distributive assumptions, sufficient to require falling heavens (and not simply conjectures about terrorist attacks and weapons of mass destruction).

21 *Ibid.*, 491-94.

on our liberty interests that are said to be justified by the need for individual security are now imposed for the sake of some collective or national security to which individual security is tied.

At first blush, that may not seem all that problematic, just because, in a *liberal* society, we can anticipate that the two will be linked in some way. It is arguable that *collective* security will generally be structured to enhance the security of the *individual*. Public safety will be correlated with individual safety. Indeed, that is the message behind Lockean social contract theory: if individual security is to be assured there needs to be a secure state to ensure it. But whether or to what extent that is the case is an issue to which we will need to return.

As presaged above, although we have said that collective security commonly translates into the language of national security, it has, in fact, a number of intermediate forms that – in day-to-day matters – might be of more critical (and certainly of more immediate) importance to individual security. There will, for example, be the collective security provided by local or state police departments or by private security organizations. National security,²² on the other hand, will tend to comprehend institutions of the larger society – the state or country. In the US, the military, National Guard and various federal agencies (e.g. FBI, CIA, DHS) will (in theory) work together to secure nationally critical institutions against outside and even some inside threats. In so doing, it is argued, such national security institutions will also secure us individually against threats.

On Waldron's account, however, collective security is not the natural complement to personal or individual security but "concerns security as among the nations of the world (or various subsets of them) determined by institutions, alliances, and the balance of power."²³ This he contrasts not only with individual security but also the security of "populations", "the people of the nation" or "whole population" (which we have included in our category of collective security). What we have referred to as national security Waldron views as the security of the state or of governmental institutions, which provide a form of security that he considers to have a somewhat problematic connection to the security of individuals and populations: "the integrity and power of the state itself as an institutional apparatus . . . is something which may or may not be related to ordinary citizens' being more secure."²⁴

22 *State* security might seem a bit more accurate, since we are usually referring to political jurisdictions rather than nations or nationalities. Sometimes, of course, a nation-state will be involved. However, as we will suggest, it is probably no accident that we speak of national rather than simply state security, since it is not simply jurisdictional integrity that is at stake but also institutional and cultural integrity. The more recent notion of *homeland* security seems to focus mainly on domestic or geographically localized threats to national security.

23 *Ibid.*, 459.

24 *Ibid.*, 460; cf., 474.

In fact, there appear to be at least three related distinctions in play here. Firstly, there is the security of the individual person in relation to other persons and collective entities, including the state. Secondly, there is the (so to speak, internal and external) collective security of a population of such persons, for example, of the members of the Australian community in relation to some of their own number (internal) and in relation to other communities and, in particular, nation-states other than Australia (external). Thirdly, there is the (internal) collective security of a population of collective entities in relation to some of their own number, for example, the community of nation-states. Note that *qua* community, the community of nation-states does not have a need for *external* collective security; there is no external collective entity (for example, invading Martians). There are, of course, transnational entities, including crime organizations, which constitute a security threat to nation-states, but these are not, in the required sense, external to the community of nation-states; rather they are to be understood as enemies within.

The differences with respect to adjectival and more substantive conceptions of security reflected in the above discussion may indicate more about where Waldron – and we – stand on the individualist–communitarian axis and on policy preferences than some difference over deep theory. True, some of Waldron’s writing is quite cosmopolitan, and we do not think he has too much time for patriotism.²⁵ Although states/governments may be quite toxic as far as the security of those who populate them (both individuals and groups) is concerned – so that national security in *his* sense is not the kind of security about which we should be primarily concerned – we tend to think that, for the time being at least, states/governments (not regimes) represent our best shot at securing what needs to be secured. We may be wrong about that. It may be that we should qualify our support for national security with some reference to accountability mechanisms that would check the state’s power (though our references to a liberal democratic state may have been idealized by presuming some system of checks and balances).

Nevertheless, there could still be a more far-reaching difference. The distinction that Waldron makes between individuals and populations may be intended to reflect the view – or at least to show some partiality toward the view – that populations are simply aggregates of individuals and have no identity over and above the individuals who make them up. If that is so then our implicit conception of collectivities as having a distinctive identity and even, perhaps, a distinctive mode of action and responsibility may differ from his.²⁶ Here we

25 Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative”, *University of Michigan Journal of Law Reform* 25 (1992): 751–793.

26 This is a large issue, some of whose outlines are traced in Marion Smiley’s *Stanford Encyclopedia of Philosophy* article, “Collective Responsibility”, at: <http://plato.stanford.edu/entries/collective-responsibility/>. For a relational account of collective action and collective responsibility see Seumas Miller, “Collective

note the possibility of relational accounts of collective action, identity and responsibility as well as the atomistic individual accounts (typically assumed to be required by individualism) and the supra-individualist accounts (typically associated with communitarianism). We are not absolutely sure about all of this,²⁷ in part because there is some ambiguity in Waldron's discussion at this point. For example, one of his complaints about the pure safety conception of security is that it is "a purely individual measure" and does not provide a basis for our "talking critically about the security of the whole community."²⁸ And he talks about "securing the security of society as a whole."²⁹ True, he notes that we should not abandon the individualistic pure safety conception for "some more amiable notion of communal solidarity",³⁰ though of course we need not think in terms of either/or; indeed, relational accounts are framed in part precisely to avoid this dilemma. Perhaps the closest he comes to a more individualistic conception is when he argues that the legitimacy of a state security apparatus is determined by its significance for individuals: "the basic theory of political legitimacy is individualistic, not collective. Its starting point is that political regimes make demands on individuals one-by-one."³¹ This probably ties in with his reluctance – near the end of the essay – to view security as a "collective good", despite his showing some sympathy for it.³² Our sense, however, is that it is better to construe his argument as one against viewing security solely as a collective good rather than it also being considered a collective good:

It would be wrong to exaggerate the communal element or pretend that it exhausted the concept. Much of the work in this Essay has sought to deepen and broaden what is called the pure safety conception of security. From the beginning, however, it has been said that it is important for the concept of security to remain anchored in the safety of individual men and women. That anchoring is irreducible and non-negotiable.³³

This is not really a point with which we disagree. However, once we begin to deepen our concept of security to encompass more than physical security, then we enter the world of collective as well as individual goods. It is not (as Waldron tends to cast it) a matter of either/or.³⁴

One possibility that Waldron canvasses – but which we do not – is that security may be viewed as a public good, something to which all are entitled, thus

Responsibility: An Individualist Account", in *Midwest Studies in Philosophy* 30 (2006): 176–93.

27 It may be the case that Waldron has elsewhere expressed himself more clearly on this matter.

28 Waldron, "Safety and Security", 462.

29 *Ibid.*, 474.

30 *Ibid.*, 463.

31 *Ibid.*, 493.

32 *Ibid.*, 500–02.

33 *Ibid.*, 501–02.

34 "... most of the complications here have attempted to show that security is a complex and structured function of individual safety, not an amiable communal alternative to it" (502).

setting aside the distributive question.³⁵ He canvasses and critiques different understandings of this option, though he concludes that even if it is a public good there remains a question about how that good is in fact distributed.

With this excursus on Waldron's valuable discussion, we return to the dominant collective idea of national security. Although often appealed to, the idea of national security has never been entirely clear cut, and a number of commentators have argued that it is "essentially contestable".³⁶ If that is so, as is likely to be the case, then its articulation is not going to be a neutrally characterizable enterprise such as might be involved in measuring the dimensions of a physical object.³⁷

In addition, national security is rarely defined in legislation or elsewhere and, when it is, it tends to be defined extremely broadly.³⁸ Traditionally and most simply – at least until the collapse of the Soviet Union – it referred first and foremost to the security of borders and to the conditions for insuring a state against conquest or serious attack. Its primary agent was a standing army ready to defend those borders against an invading army (or weapons of mass destruction). As some writers (especially those working in peacemaking studies³⁹) have put it, often as a prelude to its criticism, national security has traditionally had a militaristic ring to it.

But even in that traditional sense, national security referred to something more than merely uncontested or secure borders. There was the associated idea of an absence of *threat*.⁴⁰ That is, there was also an implicit subjective dimension – an absence of fear or, as we might put it, of a sense of insecurity.⁴¹ And the threat

35 *Ibid.*, 482–85. Miller offers this kind of account in his *Moral Foundations of Social Institutions*, chapters 2 and 9.

36 See Steve Smith, "The Contested Concept of Security", Institute of Defence and Strategic Studies, Singapore, May 2002, at: <http://www.ntu.edu.sg/idss/publications/WorkingPapers/WP23.PDF>.

37 On essential contestability, see Chapter IV.

38 Thus the US Intelligence community defines "national security" as: "The territorial integrity, sovereignty, and international freedom of action of the United States. Intelligence activities relating to national security encompass all the military, economic, political, scientific, technological, and other aspects of foreign developments that pose actual or potential threats to US national interests", see: <http://www.intelligence.gov/0-glossary.shtml>. Clearly this allows national security to cover almost anything. For other discussions of the conceptual issues, see the editorial introduction, "A Conceptual Framework", in Daniel J. Kaufman, Jeffrey S. McKittrick, and Thomas J. Leney (eds), *U.S. National Security: A Framework for Analysis*, (Lexington, MA: Lexington Books, 1985), 3–26; Robert Mandel, *The Changing Face of National Security: A Conceptual Analysis* (Westport, CT: Greenwood, 1994).

39 Such writers see development and the reduction of invidious inequalities, not the possession of strong borders, as the key to national security. To be honest, we are not sure why authors have to think – or so often tend to think – in terms of either/or, but the debate already points to contested issues.

40 The notion of a threat might well repay attention. See Daniel Lyons, "Welcome Threats And Coercive Offers", *Philosophy* 50 (1975): 425–36; Theodore Benditt, "Threats and Offers", *Personalist* 58 (1977): 382–84; Martin Gunderson, "Threats and Coercion", *Canadian Journal of Philosophy* 9 (1979): 247–59; Andrew Hetherington, "The Real Distinction between Threats and Offers", *Social Theory and Practice* 25 (1999): 211–42; Claire Finkelstein, "Threats and Preemptive Practices", *Legal Theory* 5 (1999): 311–38.

41 "Security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked": Wolfers, "'National Security' as an Ambiguous

in question was not simply to borders. It usually included the threat to a *way of life* – to institutional and cultural traditions and values.⁴² Borders do not mark out the boundaries of a sovereign state alone but also a sphere within which an historical narrative is unfolding – a richly textured institutional and cultural history, characterized by distinctive memories and myths. In other words, national security secures not only geographical borders but also a complex set of traditions and ways of living.⁴³

Territorial border issues remain significant, though for many countries they have been transformed from a concern with armed conquest to a concern with terrorism and the influx of illegal immigrants and refugees. In response, internationally recognized but porous borders have sometimes been strengthened or even supplemented by “smart borders” that do not provide a fixed or internationally recognized geographical but rather a politically expedient demarcation of territorial boundaries.⁴⁴ At the same time – indeed, as part of that transformation – the idea and element of threat has increasingly encompassed actual and potential hazards to domestic tranquility and stability other than those posed by simple conquest.⁴⁵

Threats to national *interests*⁴⁶ may take many forms and, *if sufficiently dire*, such threats may be considered threats to national *security*. Pandemic or contagious disease (both human and agricultural), environmental conditions (such as

Symbol”, in *Discord and Collaboration*, 150. Zedner also draws attention to a tradition in which a sense of security is not seen as desirable but as a form of complacency (“The Concept of Security: An Agenda for Comparative Analysis”, *Legal Studies* 23 (2003): 157).

42 Cf. Hans Morgenthau: “National security must be defined as integrity of the national territory and its institutions”, *Politics Among the Nations: The Struggle for Power and Peace*, third ed. (NY: Alfred A. Knopf, 1960), 562; and Richard Ullman: “A threat to national security is an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of the state or (2) threatens significantly to narrow the range of policy choices available to the government of a state or to private non-government entities (persons, groups, corporations) within the state”, “Redefining Security”, *International Security* 8 (Summer, 1983): 129. The last phrase in Ullman’s account strikes us as overbroad.

43 That can be true not only of free societies but also of oppressive ones. One of the volatile issues confronting Iraqis has been the preservation of the “character” of Iraqi society – no small feat in a country that encompasses at least three major traditions. Borders may change, and with the change in borders also comes internal change – sometimes like adding another patch to a quilt, at other time seeking some form of assimilation.

44 See Leanne Weber, “The Shifting Frontiers of Migration Control”, in *Borders, Mobility and Technologies of Control*, ed. Sharon Pickering and Leanne Weber (Springer, 2006), ch. 2.

45 The most influential developments seem to be associated with what is called the Copenhagen School (at the Copenhagen Peace Research Institute), primarily – though not exclusively – in the work of Barry Buzan. See B. Buzan, O. Wæver, J.D. Wilde, and O. Wæver, *Security: A New Framework for Analysis* (Boulder, CO: Lynne Rienner Publishers, 1997). Its members employ the language of “securitization” to indicate ways in which various social phenomena (political, economic, societal and environmental) are marketed as relevant to national security. (Securitization requires only the successful *portrayal* of these phenomena as threats.)

46 We consider interests to be those matters in which one has a stake, particularly the ingredients of well-being. However, there is some ambiguity here between “national interests” and what is sometimes spoken of as “the national interest”. See further, Hans Morgenthau, *In Defense of the National Interest* (New York: Alfred A. Knopf, 1951).

pollution and global warming) and extra-territorial economic circumstances and decisions (such as trade barriers and currency decisions) are now frequently spoken of as impinging on national security interests. Whether they also constitute threats to national security *simpliciter* will depend on how damaging they are. Moreover, threats to national security need not necessarily be external. Internal dissension and poverty may also rise to the level of threats to national security. Therefore, not only outside dangers posed to a national collectivity will be seen as threats to national security but also internal challenges – perhaps those arising from a failure to create or secure conditions for a significant segment of the local population.

Even beyond these considerations, national security has recently been broadened to include the establishment of or support for a variety of international initiatives – most critically, broadly democratic or rights-based polities.⁴⁷ It was the success of this expansion that enabled a switch from “weapons of mass destruction” threatening American freedom to “forces of undemocratic tyranny” threatening American freedom or, even more broadly, to honoring the “nonnegotiable demands of human dignity”. The thought here has been that national security requires, if not anything as universal as global security, then some *commonality* or *sharing* of concern for societal integrity. Thus a number of writers have tried to focus on what is called “common security” or “cooperative security”.⁴⁸ For them, national security has become, if not secondary to a broader form of interstate or international security, then equal with it.⁴⁹ These writers are concerned with what we referred to above as the internal collective security of the community of nation-states.

47 The assumption here is that such polities are less likely to threaten each other. For discussions of this old chestnut, see Matthew White, “Democracies Do Not Make War on One Another. . . Or Do They?”, at: <http://users.erols.com/mwhite28/demowar.htm>; and Per Ahlmark, “How Democracy Prevents Civic Catastrophes”, at: <http://www.unwatch.org/speeches/demcat.html>. See also the speech of President George W. Bush to the United Nations General Assembly: “In this young century, our world needs a new definition of security. Our security is not merely found in spheres of influence, or some balance of power. The security of our world is found in the advancing rights of mankind.” (September 21, 2004, at: <http://www.cbsnews.com/stories/2004/09/21/world/main644795.shtml>.)

48 Some of these have argued that national security concerns should give way to broader cooperative security arrangements. Alternatively, other writers have pushed for the replacement of a concern for national security with one for human security.

49 One other movement and countermovement should be noted. Whereas Lockean thinking places the focus of security on individuals (i.e. needing their rights secured against predatory others, leading to the formation of a protective/securing state) a number of contemporary writers have shifted their attention almost completely from the security of the individual to that of the state. The state and its interests are not seen as the sum of those of the individuals who make it up, neither is its security reducible to the security of its citizens. It has its own identity and interests, and what secures it is not determined by what secures the interests of these or those individuals who inhabit it. In the opposite direction, there have been those who believe that the state is secondary only to the individuals who make it up and who have therefore asserted the claims of what they call *human* security, in which state relevance consists simply in the fact that, in a global human order, it is the actor “with the greatest relative power” (Francisco Rojas Aravena, “Human Security: Emerging Concept of Security in the Twenty-First Century”, *Disarmament Forum* 2 (2002), at: <http://www.unidir.ch/pdf/articles/pdf-art1442.pdf>).

Tensions

Even though we shall return to it, it is appropriate at this point to note how different kinds of security may stand in some sort of tension. We have already referred to a possible tension between state security and individual security, depending on whether the individual or state is seen as security's primary object.

Another tension of particular relevance to the present project has been magnified by 9/11, and that is a tension between national and computer security. Security has become an important concern in computer technology – hackers may steal or destroy one's data and viruses may infect one's system and disable one's computer or otherwise ruin one's data. In response, devices of increasing sophistication have been developed to secure computer systems – for example, firewalls have been developed and data have been encrypted.

At the same time, however, computer technology has become a tool for terrorist activities, whether as a simple communication device or as a means of disabling target systems. National security concerns have thus come into conflict with those of computer security: at some level, the more effective computer security has become, the better it has been able to serve the purposes of terrorism: terrorists can communicate using encryption, steganography (digital camouflage) or otherwise deceptive communicative techniques; money can be electronically and covertly transferred;⁵⁰ and our increasing dependence on networked digital technology exposes ever larger portions of our infrastructure to sabotage.

In response, governmental technologies have been developed (in the name of national security) that have made our individual or personal security less secure.

The importance of national security

Salient to an assessment of the moral force of appeals to national security will be not only what is embodied in our understanding of it but also what, given that understanding, is then taken to constitute a (significant) threat to it. It is almost always in the interest of those in power to give national security the widest possible interpretation as well as to overestimate the actual threat posed by what they consider will endanger it. In the US, the communist witch-hunts of the 1950s were justified in terms of national security and, as noted previously, we have more recently seen the issue of "weapons of mass destruction" exploited

50 Online payment processing systems (OPPS) such as Paypal are making such transfers harder to trace. They allow for informal transfer of monies across the globe and, unlike the other international transfer systems (banks etc.) are subject to little or no regulation. See Holger Bürk and Andreas Pfizmann, "Digital Payment Systems Enabling Security and Unobservability", *Computers & Security* 8, no. 5 (1989): 399–416; Kim-Kwang, Raymond Choo, and Russell G. Smith, "Criminal Exploitation of Online Systems by Organized Crime Groups", *Asian Journal of Criminology* 3, no. 1 (June 2008).

to similar effect. Not only that, it is often in the interests of those in power to clothe their more partisan concerns in the language of national security.⁵¹ License may be an enemy of liberty but, because national security is often made to bear more moral weight than it can reasonably bear, it may also be its own enemy.⁵² It is important, then, in considering arguments grounded in appeals to national security, to look at both its scope and substance.

What we consider to be a particular problem in the discussion of national security is the tendency (hinted at earlier) to slide from threats to “national security interests” to threats to “national security.” Although national security is concerned with the protection of various state interests – for example, in secure borders, the preservation of cultural traditions, the perpetuation of key civil institutions – it does not follow that whenever some national interest is threatened, compromised or damaged “national security” will also be at risk. It will depend on the nature, magnitude and imminence of the threat/risk. Even *threatening* national security will not necessarily put it *at risk*. There may be those who believe that the “Great Satan” needs to be put down – at least, that is their stated ambition – but if their resources cannot match up to their desires it can hardly be argued that they place national security at risk. If national security is to be placed at risk, the risk must be *dire, imminent* and *real*.⁵³

Furthermore – and this is no small matter – we must link national security to the kind of security that figures in discussions of the conditions under which our human rights (including our liberty rights) may be expressed. Although we believe that this can and must be done there are some problems to be resolved and arguments to be made. On the one hand, we need to confront arguments for forms of cosmopolitanism that seek to diminish if not erode the significance of national boundaries for human flourishing. On the other hand, we need to address arguments that move in libertarian, anarchist or anarcho-syndicalist

51 In the run-up to the 2004 US elections, it was frequently claimed that electing John Kerry would endanger national security. Thus, Vice-President Dick Cheney stated, “It’s absolutely essential that eight weeks from today, on November 2nd, we make the right choice, because if we make the wrong choice then the danger is that we’ll get hit again, that we’ll be hit in a way that will be devastating from the standpoint of the United States, and that we’ll fall back into the pre-9/11 mind-set, if you will, that in fact these terrorist attacks are just criminal acts and that we are not really at war.” (Dana Milbank and Spencer S. Hsu, “Cheney: Kerry Victory Is Risky; Democrats Decry Talk as Scare Tactic”, *The Washington Post*, September 8, 2004, A01). Senator Kerry was not beyond such tactics himself. The Kerry campaign quickly responded with an ad featuring a close-up of 9/11 widow Kristen Breitweiser in which she says, “I want to look into my daughter’s eyes and know that she is safe, and that is why I am voting for John Kerry.” (Walter Shapiro, “With Scare Tactics Aplenty, Election Rivals Halloween: Hype & Glory”, *USA Today*, October 19, 2004, 4A). What is merely “regime security” often seeks to represent itself as “national security”.

52 It was in partial recognition of this that in *US v. Robel* the Court also affirmed that “implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart.” It would be ironic “if, in the name of national defense, we would sanction the subversion” of those liberties that make “the defense of the Nation worthwhile” (389 U.S. 258, at 264 (1967)).

53 To comment in this way courts some sort of political backlash. To ignore or downplay such threats may be to encourage their expression in increasingly effective ways. Likewise, to respond to them overactively may also strategically advantage those who make them.

directions. In other words, we need to be able to argue that for the foreseeable future human security is best achieved via national security. This is not the place to resolve such issues, but they cannot be ignored. Appeals to national security cannot be introduced as though they require no further explication or justification, including by reference to individual liberty rights.⁵⁴

Our point here is not to claim that we should stick with a simplistic or outmoded understanding of national security. The world in which we live is not the world of one hundred years ago and our national interests are not as localized as they were one hundred years ago. Even though talk of a global village takes it too far there is nevertheless a sense in which *we* (understood as a “particular people”) are now more easily impacted by events (and not just hostile armies) beyond our geographical and jurisdictional boundaries. Conflict overseas may bring pressures to accept refugees or may threaten energy supplies, and distant economies may threaten global environmental disaster. However, if national security is to be invoked as a trumping consideration, the links need to be spelled out and, if necessary, defended and quantified. Otherwise we will find ourselves on a politically slippery slope in which neither the slipperiness, the slope nor the end point will be clear. The Vietnam War was almost certainly sustained by means of a flawed argument (the domino theory) about the international spread of communism. Its mistakes are repeatable, and probably have been repeated in Iraq.

The account of security that we have so far provided views it largely as a means toward, or a precondition for, the enjoyment of our rights and other goods, not as something to be valued or sought for its own sake. This has obvious implications for the extent to which private, public and national security measures are legitimately undertaken. Should security involve significant derogations of the rights (and other goods) to which it is a justifying means then it will have been taken too far. In the article “Too Much Security?” Lucia Zedner posits and discusses six paradoxes of security. Her concern is principally with private and public security rather than with national security, though it is not too difficult to recast her discussion to apply to national security:

1. Security pursues risk reduction but presumes the persistence of crime.
2. The expansion of security has enlarged not diminished the penal state.
3. Security promises reassurance but in fact increases anxiety.
4. Security is posited as a universal good but presumes social exclusion.
5. Security promises freedom but erodes civil liberties.

⁵⁴ John Kleinig offers some reflections on these issues in “Patriotic Loyalty”, *Patriotism: Philosophical and Political Perspectives*, ed. Aleksandar Pavkovic and Igor Primoratz (Aldershot, UK: Ashgate, 2008), ch. 2. A brief account of such an argument is offered later.

6. Security is posited as a public good but its pursuit is inimical to the good society.⁵⁵

We doubt whether all these so-called paradoxes are indeed such. Nevertheless, they point to ways in which the concern for security may overreach, or imperil other values. Her discussion of (1), for example, warns us against thinking that we should try to secure ourselves against all threat. Security is concerned with *diminishing* risk, not with *eliminating* it. Even if at time t_1 we can effectively eliminate risk it is likely that new risks will appear at time t_2 . Not only is the elimination of risk a virtually unattainable goal but at a certain point it is also likely to become an unacceptably costly one. We need to make judgments about how much risk is acceptable and therefore how much security is needed. As we see from items (3) to (6), efforts to remove (or even diminish) risk may serve to undermine or compromise other values we support.

Item (3) reminds us that the *enjoyment* of our rights involves more than a bare ability to exercise them. We should be able to exercise them without undue anxiety – whether that anxiety is based on actual risk or (more problematically) on fears created by those who manage the apparatuses of security and who may have their own reasons for maintaining anxiety and creating social docility. Security measures ought not to create or exploit anxieties disproportionately to the risk involved.

Item (4) speaks to the egalitarian concerns of a liberal democratic society, and notes how the burdens of security often tend to fall more heavily – and indeed unfairly – on some groups.⁵⁶ For reasons of convenience, much profiling has the practical effect of shifting security burdens to particular ethnic groups.

55 Lucia Zedner, "Too Much Security?", *International Journal of the Sociology of Law* 31 (2003): 155–84. Though informative, we are not always persuaded by Zedner's discussion.

56 Most of us are probably not affected by the USA PATRIOT Act or other measures introduced following 9/11. Ostensibly, our security has been increased or restored, but most of us will not have borne any significant costs in return. However, there have been significant costs for some – and they have fallen disproportionately on a small segment of the population – those with Middle Eastern appearances, those with visa irregularities and those who, for some reason or other, have had governmental attention turned on them. Those satisfying certain profiles or who have appeared on various "watch lists" have borne the brunt of the costs of "our" greater security. Now, it might be argued that this is precisely how it should be, since it is from among those groups that our security has been jeopardized. This might look a bit more plausible – at least as a matter of policy – were it arguable that a high proportion of those made to bear the cost are also linked to terrorism in some active or conspiratorial way. But this is not arguable at all. Only a minute proportion of those on whom the burden of heightened security has been thrust has and has had any sympathy with – let alone constructive connection to – the cause of terrorism. They are no more morally tainted than those who have suffered no appreciable diminution of liberty (or, more significantly, abrogation of their liberties). Not only do we not gain in security from the investigation of those who pose no threat to it but, if the investigation is sufficiently ill conceived, it may actually diminish security by creating sympathy for the terrorist cause where there was previously none.

Those who speak about the relation of security to civil liberties often talk of an innocuous “balancing” of the two, but item (5) correctly notes the trade-off, derogation or sacrifice that is involved and the frequent erosion of those liberties in the name of security.⁵⁷

In (6) we can observe the ways in which the focus on security can display a lack of trust, or at least diminishes it. Insofar as a good society is one in which trust is abundant, an over-concern with security will tend to undermine it.⁵⁸

To the extent, then, that security is a means to the enjoyment of our rights it has a limited claim on our liberties and other rights.

However, security – or at least the national security that now tends to dominate our horizon – may also be valued for its own sake. If it is so-valued then it will make more sense to trade it off against those things for which it is (also) intended as the means. It is then no longer a mere means but also an end.

We are not dealing with a hypothetical possibility. National security *is* often treated as though it were something to be ensured in its own right and not merely for what it makes possible. Part of the reason for this is that many of us have come to identify with the state, nation or country of which we are a part so that securing our state/nation/country is securing something that is not only a means to our various individual (and perhaps collective) human rights but also something that has become valuable for us in its own right. The nation has become one of the associations with which we as associational beings have come to identify.

To recapitulate: the process of human growth and development is not itself an individualistic one, even if it may sometimes result in persons who are extremely individualistic. Unlike trees that have their “final form” (more or less) encoded in the DNA of their seeds, or many animals, whose nurture is more or less co-extensive with their development of survival and reproductive skills, humans come to be what we normatively represent them to be (i.e. ends in themselves, possessors of waivable rights etc.) only as the result of a fairly long process of nurture and learning, much of which is social in nature, and resulting from a

57 For critiques of the balancing metaphor, see Jeremy Waldron, “Security and Liberty: The Image of Balance”, *Journal of Political Philosophy* 11 (2) (June 2003): 191–210; James E. Fleming, “Securing Deliberative Democracy”, *Fordham Law Review* 72 (2004): 1435–76; T.M. Scanlon, “The Constitutional Essentials of Political Liberalism: Adjusting Rights and Balancing Values”, *Fordham Law Review* 72 (2004): 1477–86; Lucia Zedner, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice”, *Journal of Law and Society* 32(4) (December 2005): 507–33; and John Kleinig, “Liberty and Security in an Age of Terrorism” in *Security and Justice in the Homeland: Criminologists on Terrorism*, ed. Brian Forst, Jack Greene and James Lynch (Cambridge University Press, 2011), ch. 15.

58 See also John Kleinig, “The Burdens of Situational Crime Prevention: An Ethical Commentary”, in *Ethical and Social Perspectives on Situational Crime Prevention*, ed. Andrew von Hirsch, David Garland, and Alison Wakefield (Oxford: Hart Publishing, 2000), 37–58.

significant immersion in families, friendships, educational institutions and so forth.⁵⁹ Not only this but, for most of us, many of the activities that, as the people we have become, we subsequently value – both as means and as ends – are social in nature. They may be orchestras, social groups, religious communities, political parties, cultural traditions, national rituals, professions and so forth. Our lives, therefore, come to be partially encompassed by associative arrangements that are of both instrumental and intrinsic value to us. Included in those associations may be our state/nation/country.

This is not an uncontroversial claim. Indeed, it could be argued that friendship is the only relationship that is properly valued for its own sake,⁶⁰ whereas families and other associations are valued primarily (and justifiably) because of their instrumental value. However, we think that this is a nonviable position, in part because of what is sometimes referred to as institutional entropy – namely, the endemic tendency of institutions/associations/affiliations/relationships to decline over time. Their capacity to sustain themselves in the face of this tendency is dependent on the non-instrumental commitment of (at least some of) their members, a commitment that will sustain them during both downturns as well as prompt efforts to recuperate them.⁶¹ That, however, is not in itself sufficient to pick out nations/states/countries as appropriate associations for intrinsic valuing. There are many associations, often quite close and often valued in themselves, that are inappropriately so valued (i.e. gangs, organized crime rings, rogue states and so forth).

So why, if at all, should we value a state, nation or country – a *patria* – in such a way that its security is important to us not simply because it enables the exercise of our rights but also because of the kind of association it is? We can construct a *contingently* affirmative response, though we need to enter some brief initial caveats before providing a somewhat roundabout argument in favor of intrinsically valuing national security.

The caveats. Historically speaking, *patriae* have not been essential to human flourishing. Many humans have flourished – not, perhaps in our fashion, though in their own way – in tribal communities that it would be anachronistic to characterize as countries, states or even polities. However we may have wanted

59 Human beings (i.e. members of the species *Homo sapiens*) who lack this long period of communal nurture also come to be significantly lacking in the traits that we identify with normative personhood. See the discussions of feral children in Michael Newton, *Savage Girls and Wild Boys: A History of Feral Children* (New York: Faber & Faber, 2002).

60 We probably need to distinguish here between what are sometimes referred to as end-friends and means-friends. See e.g. Neera Kapur Badhwar (ed.), *Friendship: A Philosophical Reader* (Ithaca: Cornell University Press, 1993); idem, “Friends as Ends in Themselves”, *Philosophy and Phenomenological Research* 48 (1987): 1–23.

61 The classic discussion of this thesis is to be found in Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

to characterize their tribal and other particularistic commitments, they were not recognizably commitments to a nation, state or country. The state, or *patria*, though not entirely modern, does not have the deepest of historical roots and, moreover, does not appear to be as central to our sense of being as we may consider friends (and family and tribe) to be.

Given these caveats, however, *our* (post-Enlightenment) sense of being probably could not have been created or sustained by a merely tribal life. What *we* count as *our* flourishing is not generally something we could have conceptualized or realized had our lives remained tribally based. What *we* require as the arena for *our* growth and satisfaction has demanded much greater social complexity, involving a fairly elaborate social infrastructure along with fairly advanced technological possibilities. The point is not simply that *patria*e provide the conditions for our flourishing but that, for many of us, *our* individual *patria* is partially constitutive of *our* flourishing. Many of what constitute aspirations and possibilities for us are given through our socio-political arrangements.

We (those reading this study) are expressions of the potentiality that particular social formations have enabled, thus our conception of what it is that constitutes a good life and the social conditions for our achieving it will be significantly influenced by the social environment within which we have been formed.

At this point, at least two questions immediately arise. Firstly, to what extent does our self-conception presume the existence and maintenance of the *patria* in which we find ourselves? Secondly, might we conceive our possibilities differently within a different socio-political environment (in which our *patria* no longer existed)? Since the two questions are connected, our response will bear on both.

Liberal selves – the kind that we are considering here – are often adaptable. They are not usually wedded to a single way of living as the only or best way for humans, or even as the only or best way *for them*. We can be born and raised in the US and move to Australia or the UK without too much trauma. For many so born and raised, the US may not be critical to their flourishing (or continued flourishing). However, we might think that *some* liberal democratic *patria* is important to our way of being – the thought of relocating to or being taken over by a fascist or Stalinist regime would be highly threatening to our sense of self.⁶²

Some liberal selves might also develop cosmopolitan tendencies or even aspirations, finding themselves equally at home in Sydney, London, Paris and New York, and probably other places, without any particular (or at least strong) patriotic or national ties. That is certainly a possibility. Not all, however, will thrive in such a multicultural environment. They will retain strong patriotic

62 It is not uncommon for those who must relocate to problem regimes then to live in enclaves.

allegiances to their countries of origin because they have imbibed – and feel particularly at home in – distinctive aspects of their early culture (we think of Annette Baier refusing to give up her New Zealand citizenship and later retiring to New Zealand⁶³). Certain of its features resonate with their deepest sense of who they are. Yet other liberal selves may come to identify so strongly with the culture and ways of the country to which they have relocated that their commitments/loyalties shift. This is often – though certainly not always – the case with those who migrate to establish better lives for themselves and their children.

However, the attraction that cosmopolitans feel for a world community is, we suspect, an attraction partly because they conceive of it in fairly liberal terms. Were cosmopolitanism to have the form of a Trotskyite international communist regime or of an extended Muslim *umma wahida* (universal community), it would not be as attractive (for most of *us*, at least). For *us* it is often *our patria*, and for some *others*, *their patria*, that constitutes the expression as well as guardian of a way of life that sustains both the requisites and “vocabulary” for flourishing. It may not constitute an exclusive venue for flourishing, but insofar as there are perceived to be “forces” abroad that might and indeed want to change it radically, we may acquire considerable attachment to it and value its security. Were circumstances to arise in which our liberal democratic way of life was radically challenged, our loyalty might well prompt us to defend our particular *patria* with our lives.

There need not be anything chauvinistic or jingoistic about such patriotism and the commitment to national security that goes with it. The popular critique of loyalty generally (and of patriotism in particular), in which it is claimed that loyalty enjoins or requires a belief in the superiority of the object of one’s loyalty and/or denigrates the objects of others’ loyalty (especially their country), is misguided. Chauvinism, like many exploitations of loyalty, hijacks loyalty for nefarious purposes.⁶⁴ Just as there is no need to think that the family and friends to whom we are loyal are *ipso facto* superior to those of others, there is no need to build claims of superiority into patriotic loyalty.

Nevertheless, there is little doubt that, given a very different socio-political environment, we might conceive of the possibilities for *our* flourishing differently. In a more expansive socio-political environment than we now inhabit we might be able to conceive of possibilities for ourselves that do not currently cross our radar screen. As women and historically suppressed

63 Annette Baier, “Some Virtues of Resident Alienage”, in *Virtue*, NOMOS XXXIV, ed. John W. Chapman and William Galston (New York: NYU Press, 1992), 291–308.

64 As a side note on a theory of the virtues, almost any – if not every – virtue if taken in isolation or absolutized will lead to some form of excess. As Portia memorably observed in *The Merchant of Venice*, even justice, that pre-eminent of virtues, needs to be tempered with mercy (and probably prudence).

or marginalized minorities in liberal democracies know from their own (and historical) experience, significant socio-political changes have been required for many members of those groups to have even conceived of certain social roles and possibilities for themselves. For others, such changes have been essential to their ability to translate such broader conceptions into some sort of reality.

A *patria*, in other words, though important enough for many of us, is not deeply necessary to human flourishing. Were the conditions of our socio-political environment different from what they are, many of us might move relatively easily from one *patria* to another or into some more cosmopolitan federation of communities. Some security of our social environment would be necessary, but it might not need to be conceived of as *national* security.

We are not postulating a completely malleable conception of human flourishing. We have the biological structure we have, along with its potentialities (albeit incompletely mapped).⁶⁵ If enabled, we would anticipate that our self-conception as reasoning and responsible beings (characterizations that are, admittedly, contestable) is likely to translate itself into non-oppressive polities. Except when seen through the lens of certain ideologies (protection against which there are no guarantees), there is likely to be a desire for movement from polities that are closed to polities that are open. But that need not lead to a rejection or downgrading of patriotism and the demand for security associated with it. Patriotism is likely to be a reasonable expectation in an open society. Within such open societies, patriotism and unreasonable expressions of national security are more likely to be kept in check, and a plurality of free societies is more likely to keep each in check – but only *more* likely.

Although there are rich cultural possibilities to membership in some *patria*, especially a pluralistic one, we suspect that the deeper roots of patriotic loyalty probably lie in the desire to secure from serious encroachment or destruction the elements of a way of life with which we have come to identify, and which are components of our own flourishing. And that is risk laden.

Endangerments to our national security might be construed in largely cultural terms. We might fear and even resent the cultural changes brought about by immigration or foreign media, and even if we are not averse to cultural change – if, indeed, we welcome it – we may wish for it to occur at a pace that does not leave us feeling culturally stranded.⁶⁶ We do not want to find ourselves isolated from the social environment that has provided important elements of meaning

65 We prescind from the issue of future genetic manipulation, however, see Fritz Allhoff, Patrick Lin, James Moor, and John Weckert, “Ethics of Human Enhancement: 25 Questions and Answers”, *Studies in Ethics, Law, and Technology* 4, no. 1 (2010), doi: 10.2202/1941-6008.1110.

66 Joel Feinberg usefully addresses some of these issues in *Harmless Wrongdoing* (New York: Oxford University Press, 1988), ch. 29.

for our lives.⁶⁷ There are often historical as well as current dimensions to this *status quo* – considerable pain may be involved if one’s socio-political history is “swallowed up” in the history of another.

Also important, however, is the sorry and ongoing history of human predation. The lion, cosmopolitans need to recognize, is not yet ready to lie down with the lamb. In a world that will foreseeably remain deeply divided by inequality of opportunity, the *patria* is always “at risk” of conquest (or secession), and to assure ourselves in the event of challenge we need the patriotic loyalty of citizens who are prepared to defend a way of life they value not only instrumentally but for its own sake. Even – perhaps especially – liberal states need armies (or military alliances) and a population willing to make sacrifices for their preservation.⁶⁸ We may – and should – work to diminish some of those inequalities, but it is unlikely that we will eliminate them. Though patriotic loyalty may be an imperfect obligation, it is not dispensable.

The foregoing constitutes a fairly discursive argument for seeing national security not simply as an instrumental value but also as having a contingently intrinsic value for us. It does not, however, constitute an argument for seeing every appeal to national security as legitimate, though it may sometimes constitute an argument for seeing a potential in arguments for national security for some (limited) sacrifices of other values and liberties. We need to recognize that there are limits to this.

Because we tend to identify with our *patria* in a way that gives national security an intrinsic value, there is usually *implicit* in our loyalty a judgment that its objects are compatible with what we stand for. That is, embedded in those relationships to which our loyalty is owed are certain presumptions about the compatibility of values attributable to the objects of loyalty with those for which we stand.⁶⁹ To the extent that we learn otherwise we have a reason for taking some action – either to try to bring about change in the object of our loyalty or (in the event of failure) to abandon it (on the grounds that it has forfeited its claims to our loyalty). We have what Albert Hirschman refers to as *voice* and *exit* options.⁷⁰ Appropriate loyalty will generally encourage voice and delay exit until we have sufficient reason to think that necessary change is unlikely to be forthcoming, and that the associational object no longer expresses the values

67 This can happen on micro as well as macro levels, changing neighborhoods as well as changing societies.

68 This is a major theme in Alasdair MacIntyre’s *Is Loyalty a Virtue?* Lindley Lecture (Lawrence: University of Kansas Philosophy Department, 1984).

69 This is not to be confused – as is so often the case – with grounding our loyalty in the qualities that we presume to be implicit in the object of our loyalty. In that case we might be tempted to argue that our loyalty is to the qualities. Rather, our loyalty is to the *object of our association* – the friend, organization, or whatever. It is the *association with that object* that we value – not just the object and not just the association.

70 Hirschman, *Exit, Voice, and Loyalty*. We may, of course, as people often do, compromise our values and live with a contradiction.

we deemed essential to the relationship. Nevertheless, the loyalty we have to an affiliational object or person is not a loyalty to the particular values that are instantiated by them. The loyalty is to *the objects of an association or relationship*.

Because we identify with the objects of our loyalty, critical and often painful decisions will need to be made should we discover significant dissonance between the values exemplified by the object of loyalty and our own. If, for example, we learn that our lover once murdered someone, that our country is engaging in something close to genocide or that our university is sponsoring research into biological weaponry, we will be confronted with the possibility of severing our connection with something that has become part of us. In the case of our country, its security may no longer hold great value for us.

The metaphors of balance and trade-off

Having made a case for both personal and collective security, as well as noting their interconnections as well as tensions between them, it is appropriate at this point of transition to other values with which security is often in some kind of tension (e.g. liberty and privacy) to first explore two metaphors that are commonly employed to characterize these tensions. Waldron himself refers to the pervasiveness of the balancing/trade-off metaphors in the literature on liberty (in particular) and security (though one might link the discussion as readily with privacy as with liberty). They repay further discussion, as there are some serious inadequacies to the balancing metaphor that have political and policy implications. Waldron has himself provided some discussion of them, and though we agree largely with his critique of the balancing metaphor, we believe that he conflates it inappropriately with the trade-off metaphor.⁷¹

Balances

In considering the relations between liberty and security – how they are to be “played off” against each other – it is very common, almost standard, to use the metaphor of a scale in which liberty/privacy and (possibly national) security are placed in opposing pans, one to be “balanced” against the other in zero-sum fashion.⁷² The underlying or at least implied idea is that there is an appropriate

71 Waldron has a few comments on the metaphor in “Security and Safety”, 502–06. His main discussion, however, is to be found in Jeremy Waldron, “Security and Liberty: The Image of Balance”, *Journal of Political Philosophy* 11 (2003): 191–210.

72 Presumably the inspiration for the balancing metaphor goes back to Themis, the goddess of justice and war, holding the sword in one hand and scales in the other. However, the metaphor also pervades the language of the Supreme Court. Of course, the interests, values or rights to be “balanced” are not restricted to “liberty” and “security”. Only a few writers have challenged the usefulness or appropriateness of the metaphor.

level or balance to be achieved – one, moreover, that does not threaten the integrity of the other. Appropriate liberty⁷³ is that which balances appropriate security.

The need for such balancing is seen as an essential and pervasive feature of our social existence. Given Lockean or, even more gloomily, Hobbesian presumptions about the subjects of liberty, some constraints will always be required in order that our security can be assured. The problem, it is said, is to get the right balance, namely, one in which constraints on liberty are *appropriate* to an *appropriate* level of security.⁷⁴

(1) How balancing works

Securing the right balance is not something that can be determined in the abstract, or once and for all, but something that will change depending on the gravity of a threat and the level of risk (to security). Where the risks are small, appropriate constraints on liberty will be few, but where the risks are large and imminent we might expect liberty to be substantially, and appropriately or justifiably, diminished. An appropriate balance is also a function of the importance we attach to liberty and security. Some constraints on liberty might be seen as more important than others, though this will be complicated by the fact that people may disagree as to their importance. The level of security that we consider necessary will also offer opportunities for contestation. Some of us are more risk-averse than others, so even if the balancing metaphor works it will have to confront some complexity in its application to social life.⁷⁵

The balancing metaphor has a surface plausibility, or at least it strikes us as familiar and easy to work with. Both liberty and national security can be thought of as matters of degree – of more and less – and, on the face of it, it seems reasonable to think that where security threats are great, liberty might reasonably be contracted, and that where security threats are minimal, liberty might – indeed, ought to – be expanded. The only significant issue might appear to be one of getting the balance right – of judging the gravity and probability of risk to security accurately enough to make appropriate adjustments to liberty.⁷⁶

73 We will continue – as does Waldron – to talk about liberty (it can function as an umbrella term) even though much of our interest here is more narrowly concerned with privacy.

74 The picture involves an oversimplification in that it fails to accommodate other “values” – such as efficiency and economy – that might also need to be “balanced” against liberty or security.

75 Perhaps we will need to introduce some notion of what are reasonable risks to take – though that, of course, may not be easy to determine.

76 We are assuming that we can compute degrees of liberty in a relatively unproblematic way. That is not an unproblematic assumption. Even leaving to one side the challenge posed by the liberty/liberties distinction it is not clear how to compare the constraint on liberty constituted by a change of speed limit of 65 mph to 55 mph with a change of drinking age from 18 to 21. Are these equivalent constraints or different, and if so, which is the greater? Included in these questions are thorny distributional matters on the side of both who

Many have said that the balance changed dramatically, if not irrevocably, on 9/11; what we thought to be an appropriate balance of liberty and security was shown not to be so. An appropriate balance needed to be restored. Grave threats that we thought were theoretical and remote before 9/11 were shown to be real and imminent. To re-ensure the level of security that we valued (that is, that we considered appropriate) we would need to give up a measure of liberty.

We did not have to react in the way that we did. We might have argued that the balance was adequate as it was and that we simply needed to recognize that even an appropriate balance would not rule out every contingency. It was a cost that would need to be borne from time to time (like the occasional conviction of an innocent person despite the procedural safeguards we have instituted).

(2) Is rebalancing needed?

However we might have reacted, the invocation of a balancing argument makes certain important assumptions. One concerns the balancing metaphor – to which we will return, but other important presumptions may also need examination. Central among those is the presumption that what was lacking on 9/11 was a proper balance of liberty and security rather than *the functionality of existing mechanisms*. If, as it seems reasonable to argue, particularly in light of *The 9/11 Commission Report*, the existing mechanisms for security were dysfunctional in various ways, then what was lacking may not have been an appropriate balance of liberty and security but well-functioning security mechanisms and agencies that needed to be brought up to standard.⁷⁷ No shift in the balance might have been called for but a more efficient administration of what already existed. Alternatively, the evident requirement for greater security might reasonably be purchased not simply by greater efficiency but also by greater expenditure of resources on security. The latter alternative, like the former, does not necessarily involve any significant reduction in liberty.

(3) Problems of commensurability

Returning to the balancing metaphor, are liberty and security balanceable in the way that is suggested? The metaphor presumes that national security and liberty are commensurable values appropriately balanced against one another. No doubt, to the extent that our ethic is a straightforwardly consequentialist

bears the costs and who the benefits, questions we take up later. (Note that one constraint affects a narrower group of people than the other – this presumably will require some justification, no doubt along the lines that drinkers between the ages of 18 and 21 are disproportionately responsible for risky behavior.)

⁷⁷ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 2004, at: <http://www.9-11commission.gov/report/index.htm>. Other reports have come to similar conclusions. This is a critical consideration because, even if it were decided that the balance had been wrongly struck, any rectificatory change would be of little value were the new mechanisms not to function properly. Why should we assume that dysfunctional intelligence agencies with new powers will function any better than the same ones with the old powers?

one – that is, to the extent that our moral values are subordinate to some end, such as the greatest happiness or good for the greatest number⁷⁸ – then this will seem to be a reasonable presumption. The right balance of security and liberty will be the ratio that maximizes happiness, good and so on. For example, in the interests of security and overall social good we may no longer enter certain venues without a picture ID or without subjecting our backpacks to X-ray scrutiny. There does not seem to be anything particularly problematic about that if there is some reason to think that failure to have a valid ID shown or a backpack X-rayed would actually heighten a security risk.

However, even on straightforwardly consequentialist premises there are problems. Remember that what we have are two values that are not equally “substantial”. Constraints on liberty are likely to be more certain than risks to security. *Actual* constraints on liberty must be weighed against *risks* to security. How do you weigh an actual contraction of liberty to do X against an increase of “security” from 70% to 95% (or even from low to high)? It's not easy. It is made even more problematic by the fact that it is *notoriously* difficult to estimate levels of risk with any kind of accuracy. Moreover, the political sphere – and this is where policy is made – is highly prone to partisan taint. We need not look further than calculations of dangerousness in the criminal justice arena, in which sex and violent offenders have found themselves victims of what are barely more than ideological judgments. Risk data are very spongy, and those who make policy may be inclined to draw conclusions from the data according to their prior leanings.

However, the view that liberty and security can be balanced in some consequentialist manner is highly tendentious, both morally and constitutionally. Morally, as has already been noted, there are certain liberties – or, as we often refer to them, rights – that cannot be easily accommodated to the balancing metaphor. They function as constraints on consequentialist or maximizing doctrines. Robert Nozick spoke of such rights as *side-constraints*,⁷⁹ or considerations that should not be entered into a utilitarian calculus, and Ronald Dworkin, in his view of rights as *trumps*,⁸⁰ suggests that when utility conflicts with rights, utility must normally give way. To the extent that liberty encompasses what we may consider to be our “civil liberties” or “rights”, the simple balancing metaphor is problematic or, indeed, inappropriate. It is not,

78 Here we will have to assume that notions of happiness and good are unitary. Otherwise we get into the Millian problem of quality v. quantity (in *Utilitarianism*) or of the commensurability of different kinds of goods.

79 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 28 et seq.

80 Ronald Dworkin, “Rights as Trumps”, in *Theories of Rights*, ed. Jeremy Waldron (Oxford: OUP, 1984), 153–67.

as Nozick's and Dworkin's terminology perhaps misleadingly suggests, that values and “goods” such as national security can *never* take precedence but that, should they do so, it will not be as the result of a simple balancing process.

Civil liberties do not inhabit the realm of liberty in a purely additive way. Even though privacy, freedom of speech and freedom of association may be expanded or contracted they are not expanded or contracted as part of a continuum – for example, with the expansion or contraction of speed limits or drinking ages – as part of a more general liberty of action or movement. Privacy and the freedoms of speech and association have a special place within the sphere of liberty. Briefly, they are seen as necessary conditions – indeed, elements – of human flourishing and not merely its catalysts. Their abrogation or constriction requires a special kind of argument, not simply some consideration about greater security or efficiency or social welfare.

Americans give constitutional recognition to the special status of liberties via the Bill of Rights, in which agents of government are inhibited from engaging in maximizing reasoning. Even if it is more efficient to tap phones or enter premises at will when a murder is being investigated such invasions are not permitted unless certain stringent conditions have first been satisfied. Arguments from efficiency (utility) are not sufficient. A different kind of argument is required if we are to engage legitimately in such activities.

We might want to argue that these aspects of liberty (our liberties) are simply weightier than other parts, and that when they are constrained the security interests just have to be higher. It is certainly true – as was awkwardly recognized by their initial proponents⁸¹ – that the side-constraining and trumping effects of certain considerations, such as rights, are not absolute. Justice need not be done if the heavens will fall.⁸² But this does not leave the balancing metaphor intact. When, as in emergency situations, rights must be compromised lest disaster (and not simply some maximizing end) occur, what results is not a balance in which appropriate levels of liberty and security are secured, but a situation in which there is a *derogation* from or *infringement* of (some) liberty; it is not merely *diminished*.

The balancing metaphor – at least in the present context – will not do. It fails to capture the complexity of our moral universe.

(4) Distributive problems

The balancing metaphor, to the extent that it is seen as a weighing of commensurables, is problematic in yet another way. Appeals to the metaphor

81 See Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, 191; Nozick, *Anarchy, State, and Utopia*, 30n.

82 Though some have asserted otherwise.

suggest that what we lose in liberty we gain (or regain) in safety and security. *We*. It tends not to work that way. Most of us are probably not affected by the USA PATRIOT Act or other measures introduced following 9/11. Ostensibly, our security has been increased or restored, but most of us will not have borne any significant costs in return. However, as we noted earlier there have been significant costs for some, and these costs have fallen disproportionately on a small segment of the population – those with Middle Eastern appearances, those with visa irregularities and those who, for some reason or other, have had governmental attention turned on them. Those satisfying certain profiles or who have appeared on various “watch lists” have borne the brunt of the costs of “our” greater security.⁸³ What we may have in each pan of the scales, therefore, is increased security for the large majority on the one side and, on the other, decreased liberty for a much smaller minority.

(5) Establishing connections

In means-end reasoning of the kind that suffuses the “war on terrorism” it is important to ensure that certain conditions are satisfied if the end is to be appealed to in justifying the means. One of those conditions is that the means actually achieve the end sought (or, less stringently, make it highly probable that the end will be accomplished).⁸⁴ It is all very well to argue that, in the name of security, our liberties need to be curtailed, but we first need some assurance that such contractions *will* (likely) increase our security. More than say-so is required. If, as has been suggested, our security on 9/11 was inadequate not because more stringent controls were not available but because controls that were already in place were ineptly employed then we have no reason to think that additional controls will be correlated with greater efficiency/security. As Waldron expresses the point, it is not enough to argue that “reducing a given liberty is *necessary* for combating terrorism effectively. It may be a necessary condition, and yet – because sufficient conditions are unavailable – the terrorist threat may continue unabated.” The point is important, because there *are* significant costs to the curtailment or contraction of liberties, especially for certain members of the community – aliens, members of particular religious or ethnic groups, political dissidents and so forth. If what is done to them is to have any justification, it needs to be correlated with significant security benefits that would not otherwise have been realized.⁸⁵ The worry, of course – and this

83 Many innocents and, it would appear, not too many guilty, were scooped up in post-9/11 sweeps. See “One Man Still Locked up from 9/11 Sweeps”, *MSNBC.com* (October 14, 2006) at: <http://www.msnbc.msn.com/id/15264274/from/ET>.

84 On these different accounts, see John Kleinig, “Noble Cause Corruption or Process Deviance: Ruminations on Means and Ends in Policing” in *Police Corruption – Paradigms, Models and Concepts*, ed. Stanley Einstein and Menachem Amir, *Uncertainty Series, Vol. 4* (Huntsville, TX: OICJ Press, 2004), 129–46.

85 Waldron suspects that such contractions have more symbolic than real value because they show that the authorities “care about” or are “doing something about” a situation – like presidents visiting areas devastated by hurricanes. What is the moral worth/weight to be accorded such symbolic acts?

is why such consequentialist arguments need to be looked at carefully and realistically – is that even mild crackdowns of various kinds may contribute to social alienation and worsen the security situation.⁸⁶

A further condition for valid means-end reasoning is that unintended side-effects be taken into account. Just as profiling – even if seen as an effective law enforcement tool – may have as an unwanted effect the aggravation of historically troubled relations between different ethnic groups, so too may the constriction of liberties have unintended and undesirable side-effects. As Waldron puts it:

When liberty is understood (as it usually is) in a negative sense, it is something that cannot be reduced without increasing something else, namely the powers and means and mechanisms that obstruct or punish the ability of individuals to do what they want. Reducing liberty may prevent an action taking place which would otherwise pose a risk of harm. But it necessarily also increases the power of the state, and there is a corresponding risk that this enhanced power may also be used to cause harm.⁸⁷

The point is an obvious one but, viewed through the lens of liberalism, is also one of some importance. Liberal thought, even in its democratic version, is predicated on a distrust of concentrated power, especially power that is less than transparent.⁸⁸ Even republican liberals⁸⁹ strongly committed to the importance of governmental mechanisms believe that those mechanisms need to be carefully circumscribed through “checks and balances”. We might argue that any governmental powers exercised on “our” behalf will be exercised benevolently, but that would be overly sanguine, given the history not only of the previous US government but also of almost any other government. Government officials generally have strong incentives to err on the side of security; elected public officials in particular are rarely voted out of office for either protecting the public too vigorously or placing the safety of the majority above the liberties of a minority.

We should not forget that the boundaries of terrorism have been cast very broadly to maximize governmental flexibility: political dissent may sometimes be enough to trigger governmental attention. That is troubling enough, but in addition we have seen a number of provisions that were introduced explicitly

86 Thus, despite former Attorney General John Ashcroft’s comments (March 20, 2002) on the “voluntary” interview program initiated by the US government on November 9, 2001, that “the process of reaching out to foreign nationals and their communities fostered new trust between law enforcement and these communities” (see: http://www.yale.edu/lawweb/avalon/sept_11/ashcroft_018.htm), a great deal of ill will was created.

87 Waldron, “Security and Liberty” 204 (footnote omitted).

88 This, of course, has been one of the major complaints about the governmental response to 9/11 – the lack of access to what is going on in Guantánamo Bay, the secret handling of aliens and certain provisions of the USA PATRIOT Act.

89 See e.g. Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997.

and specifically for the “war on terrorism” now transferred to the wider “war on crime”.⁹⁰ Such measures would have been considered overly intrusive had they been intended for ordinary law enforcement purposes.

Trade-offs.

If we want a more promising metaphor to characterize the situation, we might do better with that of a trade-off. From time-to-time Waldron and others slide from the balancing metaphor to that of the trade-off as though they had similar implications.⁹¹ We think not. When we trade one value off against another, we not only acknowledge an adjustment to the balance – the restoration of an equilibrium that has been upset – but have in view a *cost* or *sacrifice* to one when the other is given priority. There is an *infringement* or *derogation* of liberties or rights when liberty is traded off for security. Naturally, as noted above, the necessity for a trade-off – if, indeed, there is such a necessity – implies that more security cannot be had without a reduction in liberty, and this, as we have seen earlier, is by no means self-evident.

A trade-off is not a trade. In a trade – at least in theory (a “fair” trade) – one value is exchanged for another and no party to the trade loses. Each party sees the exchange as being advantageous: *A* had *x* and *B* had *y*; *B* wanted *x* and *A* wanted *y*; the trade, because consensual, satisfies both. A trade-off, on the other hand, involves a tension or conflict whereby *A*, if he is to get *y*, must sacrifice *x*. If he deems it an acceptable trade-off, it nevertheless comes at some cost. *A* would have preferred to secure *y* without sacrificing *x*. In a trade-off, the key issue will be to determine whether the sacrifices can be justified or sustained, and how the costs incurred should be responded to.

If many values that we might pursue are side-constrained by our liberties or rights, national security has at least the potential to be involved in a trade-off. The courts have long recognized that even constitutionally guaranteed rights may be infringed in the name of national security or some other broad social interest (such as public safety or territorial integrity). However, such interests are not to be casually invoked. Any claim must be subject to strict scrutiny in which the interests invoked in favor of constraining the liberty in question must be specified and explicitly defended.⁹² Thus, vague references to “national

90 Most of these expansions have so far focused on financial crimes, though urban gangs are now being targeted with legislation originally designed for terrorists.

91 Waldron, “Security and Liberty”, 196–198, 203. See also Philip A. Thomas, “Emergency and Anti-Terrorist Power: 9/11: USA and UK”, *Fordham International Law Journal* 26 (April 2003): 1193 and 1208.

92 Strict scrutiny requires that “some compelling state interest” be shown. It stands in contrast with what is called a “rational relations” test, in which liberty is constrained (say, a dress code for employees or a lowering of the speed limit) and all that usually needs to be shown is that there is a plausible connection between the restriction on liberty and the purposes of the restricting body. In the broad gap between these two, a third level of scrutiny (“heightened”) is developed to secure interests that are deemed “important” but not “fundamental” (say, the interests of gay men).

security” will not do. The national security interests that are threatened will need to be specified, the ways in which they are threatened will need to be articulated, the threat will need to be quantified in some way and some reasonable case will need to be made to sustain such claims.

Security, of course, may be seen in the same way as liberty – as a right – though what is likely to be in view will not be *national* security so much as *personal* security. (The two kinds of security may be related, since national security may facilitate or provide an environment for personal or individual security.) To the extent that securing our right to personal security comes into conflict with our liberties, the tension will not be between some good and our liberties but between two rights – or, to put it in a way that encompasses a modest view of national security, between a good (national security) that secures a right (personal security) and some other rights (our liberties). How are such tensions to be resolved? Although we may use the term “trade-off”, it is a different kind of trade-off from that involved when a liberty is traded off against some communal or social good.⁹³

To a degree, we are assuming that, though the interests of both national security and individual liberty will be in some tension, they will also be mutually supportive. As with courage and discretion, generosity and caution or even justice and happiness, we expect that in the ordinary transactions of life we will be presented with choices that do not violate the demands of either. Discretion will temper courage and courage will save discretion from cowardice; caution will contribute to wise expressions of generosity and generosity will overcome the inertia of caution; justice will check the aggregative tendencies of happiness and respect for happiness will save justice from rigidity. And so we anticipate that security will enhance our freedom and that freedom will guide security. Indeed, violations of personal security typically consist in part of violations of liberty rights; slavery is perhaps the most graphic illustration of this. Accordingly, insofar as national security is taken to be in large part constituted by aggregate personal security then national security is, or ought to be, ultimately in the service of liberty rights (as well as rights to life and so forth). Were this not to be the case, our lives would be wretchedly torn. However, circumstances sometimes arise in which we are faced with what seems to be a moral necessity to give one precedence over the other – not merely a

93 The choice of term can also reflect much deeper debates within moral theory between those who view ethics as a rational system grounded in some single principle or set of compatible principles and those who claim that we are confronted by a plurality of values – either (as Alasdair MacIntyre has suggested in *After Virtue*, second ed., University of Notre Dame Press, 1984) because we have inherited fragments from competing moral schemata or because (try as we might) our human condition is such that we are confronted by a moral plurality that calls for judgment rather than calculation. Debates over deontological and consequentialist theory, or between universalists and particularists, often reflect such deeper debates. This, however, is not the place to do more than to acknowledge them. See also the symposium on conflicts of rights in *Legal Theory* 7 (2001): 235–306.

precedence that arises because one has some inherent priority over the other but a precedence that serves to compromise or undermine the other, leaving a residue of moral loss or even taint.

Judgment.

At the end of the day, there are reasons for thinking that both terms (balance and trade-off) fail to do justice to the complexity involved in clashes between security and liberty – even though the term “trade-off” comes rather closer to the mark.⁹⁴ That is also Waldron’s position.⁹⁵ What is required is judgment, and judgment is not a matter of algorithmically drawing conclusions from premises but of incrementally bringing reasons to bear on one another – point and counterpoint – until we can reach a conclusion that is defensible. This will involve the assembling of relevant considerations, prioritizing them and making determinations about whether or to what degree, in the particular case (or in respect of a particular policy, if that is the level at which we are seeking to reach a decision), one is to be sacrificed to the other. The process is one of the interplay of reasons enabling one to perhaps warrant trading off a measure of one in favor of the other. The trade-off, if any, is determined though a judgmental process. Stanley Benn puts it well:

The metaphor of ‘balancing’ or ‘weighing’, with its image of weights held in the balance or in the hands, is not altogether perspicuous when applied to arguments or claims. For one thing, weighing and balancing suggest the achievement of a state of equilibrium – equal weights – while judgment requires the determination of an outcome because some reasons ‘outweigh’ others. More important than this, however, is the consideration that judging claims and reasons generally proceeds *seriatim*. There is commonly a presumption of right, which counterclaims are then designed to override. These in turn may be undercut or overridden, as may be those adduced against them in their turn. Admittedly, deciding whether a claim has indeed been undercut or whether a counterclaim overrides may itself demand judgment, and secondary disputes employing precisely similar tactics can develop at

94 Scanlon (following Rawls) makes use of the language of “adjustment”:

To summarize this discussion: Rawls holds that basic liberties such as freedom of expression (once defined) cannot be balanced against other interests. But they need to be ‘adjusted’. The powers and prerogatives (and limits on powers and prerogatives) that define these liberties need to be specified. What is specified in this process is, among other things, the grounds on which expression may legitimately be regulated. In determining these limits we need to take various potentially conflicting interests into account. But in this process of balancing and adjustment, our interest in assuring conditions for the development and full exercise of the two moral powers has the primary role: If allowing some other interest to justify restrictions on expression in a certain way would pose a threat to the full exercise of these powers, then that justification for restriction cannot be allowed. (“The Constitutional Essentials of Political Liberalism: Adjusting Rights and Balancing Values”, 1484)

95 Waldron, “Safety and Security”, 502–06.

each point in the argument. It will always help in settling such disputes to understand precisely what kind of argument is going on. To describe it as one in which ‘considerations are being weighed’ or ‘balanced’ is not helpful, because the metaphor does not really illumine the process.⁹⁶

Privacy

As we have had occasion to note, ensuring security may come into conflict with other important liberal values such as privacy, liberty, autonomy and dignity, thus threatening the identity of persons. Trade-offs may have to be made in which, to ensure the former, the latter may be compromised in certain ways. We can see what is at stake in these trade-offs by reviewing the ways in which privacy and other values are to be construed and valued within a liberal framework. We begin with privacy.

Although occasional references to privacy can be found earlier, and the expectation of it goes back much further,⁹⁷ the modern debate about privacy was not really kicked off until Samuel Warren and Louis Brandeis published their seminal law review paper in 1890.⁹⁸ Controversially, they characterized the right to privacy as “the right to be let alone”. It captured something of what is involved – concerned as they were about the growing intrusiveness of the press, paparazzi etc. – but did not do so very well or accurately. Interestingly, it was there cast in terms that do not reflect or even presage its later appearance in US Constitutional law as a Constitutional right against governmental intrusion.

The right to privacy did not come to possess explicit (US) Constitutional status until the 1965 case of *Griswold v. Connecticut*, in which a law prohibiting the advocacy and use of contraceptives was said to have violated a “right to marital privacy”.⁹⁹ The judges had some difficulty locating such a right in Constitutional provisions and, in fact, they varied in the ways in which they sought to account

96 *A Theory of Freedom*, Cambridge, UK: Cambridge University Press, 1988, 296–97. Cf. *Science Research Council v. Nassé H.L.(E.)*, (1980) A.C. 1028 at 1067, (1979) 3 W.L.R. 762 at 771 (Lord Wilberforce).

97 Eavesdropping is a very old offense (see William Blackstone, *Commentaries on the Laws of England*, (c. 1765) vol. IV: *Of Public Wrongs* (169), (Boston: Beacon Press, 1962), 189. The derogatory notion of a “Peeping Tom” goes back even earlier. See Daniel J. Solove, “A Taxonomy of Privacy”, *University of Pennsylvania Law Review* 154 (2006): 491.

98 Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review* 4 (1890): 193–220, available at: http://www-swiss.ai.mit.edu/6805/articles/privacy/Privacy_brand_warr2.html.

99 381 US 479 (1965). The relevant statutes were 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provided: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” The latter provided: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” Estelle Griswold was Executive Director of the Planned Parenthood League of Connecticut, and the League provided information, examinations and advice on contraceptives.

for it. It was then invoked again, though much more controversially, in *Roe v. Wade*,¹⁰⁰ in which a woman's right to an abortion was defended – in part – by reference to her right to privacy under the Fourteenth Amendment's due process clause. Although the right appears to have gained a reasonably secure Constitutional toehold in the US, its meaning, scope, moral status and limits remain highly controversial.

Here, however, our primary interest will not be in the legal (or Constitutional) right to privacy but in privacy as a moral notion.¹⁰¹

Privacy and publicity are complex and multi-layered concepts, part of an even more complex domain of privateness and publicness, and here we do no more than note certain aspects of that complexity.¹⁰² As for the larger domain, consider the differences in the understanding of "private" and "public" in distinctions between private property and public property, private interests and the public interest, private officials and public officials, private goods and public goods, private meetings and public meetings, and private bathrooms and public bathrooms.¹⁰³

100 410 US 113 (1973).

101 Constitutional interpretations may develop in directions that cannot be readily accommodated by moralized accounts. Thus one might want to argue for a moral right to privacy without thinking that it should encompass abortion, even though, Constitutionally, the right to privacy does encompass abortion. Compare the debate about whether capital punishment constitutes cruel and unusual punishment. Some argue that – morally – capital punishment is cruel and unusual, though as far as Constitutional argument is concerned it is not (at present, anyway).

102 There is, in addition, a further set of overlapping distinctions between privacy and secrecy. That which we keep secret (at least with respect to *A*, *B* and *C*, though not necessarily everyone) may or may not also be private. Indeed, what we keep secret (such as criminal acts that we have committed) may be a matter of public concern and should be made public. There are some critics of privacy who maintain that we would be better off if our lives were more transparent, and that we should – more or less – eschew privacy. We would not be (as) vulnerable to blackmail and fraud, there would be less hypocrisy and deceit, and greater candor. Some would maintain that we would be healthier psychologically if we had fewer hang-ups over things we tend to treat as private (e.g. matters of sexual preference and potency, penis size and religious commitment), or that the desire for privacy is connected to shame – our having something to hide. No doubt privacy can function as a cloak for secrecy, but often what seems to be complained about is not privacy but secrecy. Secrecy – deliberately concealing information from others – is a topic in its own right, even though arguments for when it may or may not be justified will sometimes intersect with arguments concerned with privacy. See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage, 1989); Carl J. Friedrich, "Secrecy Versus Privacy: The Democratic Dilemma", in J. Roland Pennock and John W. Chapman (eds.), *Privacy*, NOMOS XIII (NY: Atherton Press, 1971), 105–20; Carol B. Warren, "Secrecy", in *The Encyclopedia of Privacy*, ed. William G. Staples, Greenwood Press: Connecticut, (2007): 482–85; C. Warren and B. Laslett, "Privacy and Secrecy: A Conceptual Comparison", *The Journal of Social Issues* (1977): 1ff; Paul B. Thompson, "Privacy, Secrecy and Security", *Ethics and Information Technology* 3, no. 1 (March, 2001): 13–19; Judith DeCew, *In Pursuit of Privacy: Ethics and the Rise of Technology* (Cornell UP, 1997), 48; Julie Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, 1992), 60ff; Michael Barkun, "Religion and Secrecy After September 11", *Journal of the American Academy of Religion* 74, no. 2 (2006): 275–301, at 277.

103 For a valuable and detailed representation of that complexity, see S.I. Benn and G.F. Gaus, "Public and Private – Concepts in Action", in *Public and Private in Social Life*, ed. S.I. Benn and G.F. Gaus (NY: St. Martin's Press, 1983), 3–27. The contrast is not always between private and public but, say, between "private (use)" and "business (use)". Moreover, what is public may also have a private dimension – the categories are not exclusive. One is entitled to privacy in a public toilet (an issue about which there have been public debates and court cases).

As a way into the discussion of privacy as we shall be mainly concerned with it here, consider the following situations, often taken to involve breaches of privacy:

- (1) A person rigs up a device that enables him to listen in on his neighbors' conversations;
- (2) Government agents use a thermal sensor to detect heat patterns in a person's home;¹⁰⁴
- (3) A passer-by stops and peers through the slightly parted shades of a lighted bedroom;
- (4) A person moves up and down the escalator of a public mall, carrying a small video camera that enables him to take up-skirt photos of young girls who are using the escalator. He posts them on YouTube;¹⁰⁵
- (5) Someone leans over to hear what a couple is saying to each other on a park bench on which they are sitting;
- (6) A company pledges not to sell personal customer information, but does so when the price is right;¹⁰⁶
- (7) A tabloid publishes the name of a rape victim;¹⁰⁷
- (8) A company markets a list of five million elderly, incontinent women; and
- (9) Security devices that X-ray through people's clothing to the skin are installed at airports.^{108, 109}

Insofar as it is agreed that there has been a breach of privacy in each of these cases, we think it is fair to say that it involves our gaining (or seeking to gain)

104 See *Kyllo v. US*, 533 U.S. 27 (2001). In this case, government agents, suspicious that Kyllo was growing marijuana indoors, used a heat sensor to determine whether parts of his house were hotter than others, consistent with the use of heat lamps to grow marijuana. After determining that some parts of the house were hotter than others, they obtained a search warrant. The Supreme Court considered the use of this device an unreasonable search, even though it could only detect variations in heat. It is interesting to compare this case with *Illinois v. Caballes*, 543 U.S. 405 (2005), in which police used a sniffer dog to check for drugs in the trunk of the defendant's car. It was argued that because the dog was trained to detect *only* that to which Caballes had no right, no violation of his Fourth Amendment rights was involved. It is also interesting to compare these cases with *Florida v. Riley*, 488 U.S. 445 (1989), in which marijuana plants growing in a greenhouse in Riley's backyard were spotted using a surveillance aircraft. Here it was argued *inter alia* that overflying aircraft had become commonplace, and that Riley had no reasonable expectation of privacy with respect to that location.

105 See, for example, *State v. Glas*, 54 P. 3d 147 (2002).

106 See *In re Geocities*, 127 FTC, 94 (1999).

107 See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

108 See Austin Considine, "Will New Airport X-Rays Invade Privacy?", *The New York Times*, October 9, 2005, TR3; also the Rapiscan website: <http://www.rapiscansystems.com/sec1000.html> and, more graphically, <http://www.electromax.com/rapiscan%20secure%201000.html>. Jeffrey Rosen has spoken of the scanning device as an "electronic strip search" in "The Naked Crowd: Balancing Privacy and Security in an Age of Terror", *Arizona Law Review* 46 (Winter, 2004): 608.

109 Airports themselves have become topics of interest in the surveillance field. See Peter Adey, "Surveillance at the Airport: Surveilling Mobility/Mobilising Surveillance", *Environment and Planning A* 36, no. 8 (2004): 1365–80.

access to or information about, or disseminating (or seeking to disseminate) information or knowledge about, others that is thought to be rightfully *theirs* to control.

So, underlying (1) there is a view that certain *spaces* are private and that what goes on in them is out of bounds and not (ordinarily) the business of any others. Within certain limits, this is irrespective of what goes on in them – whether or not it is a matter that one would otherwise see as private. Of course, because that particular space – the home – is considered private, it is also a major venue for matters that would be seen as private. Whether or not what goes on inside a home is made known to others is generally for those inside it to determine. Advances in technology enable such private spaces to be invaded without physically entering them.

The case of the thermal scanner in (2) reinforces the point about a private space – the home – but part of its interest arises from the fact that the information obtained is not verbal but, at best, probabilistic. It also raises an important question about the lengths to which *government* may go in gathering information concerning us and the extent to which it may gather and use such data.¹¹⁰ We can already observe here the particular US preoccupation with governmental infringements of privacy.

In (3), we have a further permutation on the “private domain”. Though the shades are drawn, presumably as a measure to secure privacy (while dressing or engaged in some intimate/private activity), the voyeur takes advantage of a failure in the mechanism designed to exclude the possibility of surveillance. However, the intention of the drawn shades is clear enough,¹¹¹ even though the voyeur may mean no harm beyond the harm of invading privacy.

Case (4) occurs in a public space, though one might presume that what can be seen using such a camera would be considered an intrusion into a private domain. Posting it on a video-sharing site such as YouTube would aggravate the invasion.

Although the couple on the park bench in (5) are conversing “in public”, their conversation would normally be considered a private one, overheard by others in snatches at most. Despite its being “in public”, leaning over to listen to their conversation would be a breach of privacy. As with the previous case, there has been a vigorous discussion about the extent to which one might be said to

110 Wiretapping is also an interesting case in which the government may not physically penetrate but nevertheless “invade” the home. In *Olmstead v. US*, 277 U.S. 438 (1928), wiretapping was not seen to breach privacy. However, forty years later the Supreme Court reversed this decision in *Katz v. US*, 389 U.S. 347 (1967).

111 Compare this with the case of a toilet stall whose doors leave a narrow crack through which someone could peer.

possess privacy rights in public. This discussion is often associated with the installation of CCTV cameras. Is it *activities* or *locations* that are private, or, depending on circumstances, either or both?

Case (6) is interesting in that the information may or may not be private, but the company has pledged to treat it as private by not selling it. Selling the information may expose the person to bombardment with advertising (or other approaches) or it could be purchased by a data mining company that could then integrate that information with other information; cumulatively, it could allow for more information about individuals to be available to others than those individuals would reasonably agree to.

Case (7) operates against a background of the social opprobrium or prejudice to which even rape victims are sometimes subject, making it the case that publishing the name of a rape victim – unlike, perhaps, the name of a mugging victim – constitutes a violation of privacy. This case also indicates the extent to which privacy interests are tied up with social conventions and expectations.

Case (7) also has some similarities to (8), which deals with information that people would not wish to make available to others, except on terms of their own choosing. Consider a company that delivers adult diapers by mail order. It could be tempted to sell the list to other companies with niche products. Although there are now privacy disclosure regulations for much commercially gained marketing information,¹¹² this has not always been the case, and marketing information that people would be embarrassed to have others know and that in ordinary circumstances would be deemed private can be seen as a breach of privacy.

As with (2), case (9) also raises a question about the kind of information that a government may legitimately collect about its citizens and others. As we have already seen, those who travel – at least since 9/11 – must expect that, for security reasons, special care will be taken that they do not pose a security risk to others. Given that those who pose such a risk could seek to conceal dangerous objects on their persons, officials must determine how to ensure that passengers do not exploit their privacy rights for nefarious purposes. We are now familiar with X-ray (or similar) machines for carry-on (and even checked) luggage, frames that pick up metallic objects, wands and devices that are sensitive to the presence of explosives, but as the concealment of dangerous implements has become more sophisticated so has a need developed for increasingly sophisticated detectors. Pat-down searches are sometimes used but are often claimed to be violative of privacy, and there have been moves to subject people to a type of X-ray or backscatter ray scrutiny that avoids unwanted touching. However, the base

112 One important issue in the development of these disclosures concerns “opt-in” vs. “opt-out” provisions.

machines which penetrate to the skin reveal more than most of us would care to reveal to strangers, and there has been strong opposition to them.¹¹³ On the other hand, it may be that technology can come to the rescue here by ensuring that the operators of scanning devices do not view “pornographic” images but only images of hidden metal objects and the like. If so, this would be an instance of what Jeroen van den Hoven refers to as “designing-in-ethics”.¹¹⁴ In general terms, what van den Hoven has in mind is the possibility of not having to make trade-offs between (in this case) security and privacy. We can have security with at most a very minor reduction in privacy.

There is a not-very-clear debate in the literature about whether privacy is always concerned with *information* or whether it is to be distinguished from privacy that involves *access*.¹¹⁵ Although there is a distinction of some sort between A’s reading of B’s mail and A’s peeking into B’s bedroom, in each case there is some invasion of a personal space/domain over which B should be able to exercise control. In both cases A gains access to aspects of B’s person (e.g. information concerning the terms of B’s relationships with others and what B looks like when naked) that it is preferred that A did not have (without consent). In both cases A gets information that is B’s to determine whether A has. In A’s breaching of B’s privacy, B loses some control over A – or over themselves and his/her self-presentation. However, we are not convinced that the distinction between information and access is ultimately of any great ethical significance.

Some of the foregoing cases, particularly (6) and (8), are concerned with confidentiality as well as privacy. Confidential information is information that is shared with specific parties on the understanding that it will not then be shared with others. The information in question may be private or personal, though it need not be. The person who confesses his crimes to a priest expects that the priest will not then share that information with others, even though it is not private in the traditional sense. A lawyer is bound by confidentiality expectations not to share with others information the client has provided without that client’s permission. Confidentiality is usually justified in consequentialist terms, though where the thing confided is also private there may be other considerations that tell against its sharing with others. In the case of lawyers, physicians or priests, confidentiality is justified as a means whereby certain services can be more adequately provided – clients, patients or parishioners will be more inclined to provide relevant information if they believe that it will

113 As we have seen, there are technological solutions, even if they have not been fully exploited.

114 Jeroen van den Hoven, “Computer Ethics and Moral Methodology”, *Metaphilosophy* 28, no. 3, (1997): 1–12.

115 Whether these exhaust the scope of privacy is debated. Helen Nissenbaum writes that “the scope of privacy is wide-ranging – potentially extending over information, activities, decision, thoughts, bodies, and communications”; “Privacy as Conceptual Integrity”, *Washington Law Review*, 79 (2004): 119–57. However, we think the notion of *informational* privacy is central.

not be shared with others or, in the event that it is shared, that it will be shared on an appropriately “need to know” basis. Because justification of the duty of confidentiality is largely based on consequentialist grounds, consequentialist considerations can also be appealed to in order to justify overriding it (e.g. some significant public interest). For the most part, the duty of confidentiality lapses if and when the information enters the public domain.

What is it that makes the unconsented-to gaining of access to or dissemination of information concerning oneself a breach of privacy?

At the heart of privacy is a certain notion of agency – that is, of someone’s standing as an autonomous chooser or moral agent who, by virtue of that status, warrants the respect of others.¹¹⁶ The respect that is due to agents requires that we permit them to control the conditions of their self-disclosure to others. When privacy is invaded, such agency is usually violated, and it can be violated in a number of ways:

(i) It is violated when one leans over to listen to another’s conversation on the park bench, since, when the other becomes aware of one’s presence, it alters the conditions under which the other carries on the conversation and may affect not only what the other wishes to include but also how the other says what he or she wants to. The other becomes aware that there are some things that are being said that are meant for their companion’s ears alone and that, given the presence of a further set of ears, the other no longer wishes to say them. Further, even if the other is not so worried about the content of what is being said, he/she may come to realize that what is being said to the other is being conveyed against a background of knowledge and assumptions that is unlikely to exist with respect to the eavesdropper and that it may therefore be misunderstood and misinterpreted. The other will therefore be under some pressure to put what he/she wants to say rather differently.

The control to which one is entitled as a chooser is not simply a matter of intellectual but also of emotional control. Privacy is a condition of personal wellbeing or, as Ruth Gavison puts it, of “mental health, autonomy, growth, creativity, and the capacity to form and create meaningful human relations.”¹¹⁷ Informational control concerns *how* as well as *what*.

116 That is, in the classical liberal sense of respect for persons and respect for one’s status as a person (recognition respect), not necessarily respect for the particular person one is (appraisal respect). See Stephen L. Darwall, “Two Kinds of Respect”, *Ethics* 88 (1) (1977): 36–49.

117 Ruth Gavison, “Privacy and the Limits of Law”, *Yale Law Journal* 89 (January, 1980): 442.

(ii) Privacy is violated even if one is not aware of the other person's presence and therefore does not make adjustments for it. One may not be aware of the person who is peering through the slightly parted shades of one's bedroom, but that person has still violated one's agency, since agency consists in part in determining what others may know of those matters that are appropriately deemed to be private – for example, one's naked body or one's activities in the bed. That, after all, is why one pulled the shades in the first place, even if they failed to exclude prying eyes. Being denied that power, one's agency has been compromised.

(iii) What is violated, therefore, when privacy is violated is the person as conceived of within liberal democratic theory. Liberal democratic theory arose as a reaction against hierarchical and paternalistic polities in which some were judged or thought to be inherently superior to others and were therefore appropriately accorded powers of rulership. Liberal democratic societies – in theory at least – are populated not only by equals but also by those whose capacities (at least when “of age”) fit them to be full participants in the life of the community.

It is within a social framework in which privacy is acknowledged and fostered that the kind of person well-suited to the demands and expectations of a liberal democracy is nurtured – one who is characterized by thoughtfulness, imagination, independence, courage and vitality. As Hyman Gross puts it, “respect for privacy is required to safeguard our changes of mood and mind, and to promote growth of the person through self-discovery and criticism.”¹¹⁸

(iv) A somewhat different kind of violation occurs when information that is gathered is then used to harm one in some way. For example, somebody gets one's social security number, puts that together with other information that is available about one and opens a bank account that enables one's assets to be stolen.

This suggests that there are different kinds of wrongs that may be involved when privacy is violated. Traditionally, they have been divided between deontological and consequentialist wrongs – between those that are intrinsic to breaches of privacy and those that are contingent on them but often found. The former are usually said to be more fundamental than the latter.

(a) Consider some of the deontological dimensions to the breaches of privacy enumerated above. There is, first of all, an objectification of those whose privacy is breached. The neighbors (1) or people on the park bench (4) who are eavesdropped upon and the person whose bedroom is spied on (3) are treated as objects of curiosity by others and their feelings about being overheard or viewed in that way are ignored or discounted or even deliberately ruffled. In other words, their agency is left out of account or downgraded, at least as far as

118 Hyman Gross, “Privacy and Autonomy”, in *Privacy*, NOMOS XIII, ed. J. Roland Pennock and John W. Chapman (NY: Atherton Press, 1971), 176.

the eavesdropper/voyeur is concerned. In some cases, there is also a deliberate deception involved in that those who are violated believe they are conducting their activities away from the presence of others – i.e. that their private activities are occurring “in private”.

Having privacy – that is, having a sphere of activity within which one may exercise control or express one’s status as an agent – is critical to being a person and not a mere thing. Centrally, though not exclusively, it involves being able to think for oneself without the monitoring of one’s thoughts. Almost as importantly, it involves the ability to determine (within reason) the audience to which those thoughts are expressed. Agency requires that others respect that control. Traditionally, the home and, even more particularly, certain areas of the home have been deemed private spaces within which, within broad limits, one might express oneself without the intrusions of others.

A number of writers have argued that intimacy and friendship are in some important sense dependent on and expressed through our being able to control access and information concerning ourselves to others. Intimates and friends are those to whom we make special disclosures, disclosures that not only express a certain closeness (a drawing of them within certain boundaries) but also a trust that they will not jeopardize our interests. There is some truth in that, though it is not the case, as some (for example, Charles Fried¹¹⁹) have suggested, that the value of privacy resides in its enablement of intimacy or in its power to mark out different kinds of relationships.

To the extent that we become aware of our world as one without privacy – as one in which what we wish to think, say or do is (or is vulnerable to) being monitored by others – our status as moral agents is threatened. Rather than determining the terms of the presentation of ourselves in decisions and actions, our own sense of appropriateness or inappropriateness, our presentation is determined by factors outside us. Rather than being the primary controllers of the terms of our social interactions the terms under which our social interactions take place are determined by (the scrutiny of) others.

The private sphere is not identical to, nor is it unrelated to, the sphere of self-regarding conduct about which Mill spoke and which he distinguished from other-regarding conduct. Both connect up with the idea of a person as an “individual”, a “normative agent” or a “progressive being”, and the similarities are to some extent responsible for reductionist accounts of privacy that see it simply as an aspect of autonomy.¹²⁰ Here is Mill’s account:

119 Charles Fried, “Privacy”, *Yale Law Journal* 77 (1968): 475–93; see also Robert Gerstein, “Intimacy and Privacy”, *Ethics* 89, no. 1 (1978): 76–81; and Innes, *Privacy, Intimacy and Isolation*.

120 Cf. Joel Feinberg: “The United States Supreme Court in recent years appears to have discovered a basic constitutional right suggestive of our ‘sovereign personal right of self-determination’, and has given it the highly misleading name of ‘the right to privacy’” (“Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution”, *Notre Dame Law Review* 58 (1983): 445–92, at 483). However, Feinberg is taking a swipe at

[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself; and the objection which may be grounded on this contingency, will receive consideration in the sequel. This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.¹²¹

Millian liberty is concerned with conduct rather than information, conduct in which others have no business interfering because it does not affect their interests detrimentally. Privacy, on the other hand, concerns a zone of informational control that is central to moral autonomy. Not everything that is self-regarding (in the Millian sense) is private; not everything that is private is self-regarding.

(b) The consequentialist dimensions to privacy. When people – be they individuals or institutions – obtain information that we would consider to be private to us, they may be in a position to do us considerable harm. The crime of blackmail is structured around the threat to reveal (usually) private (though sometimes just secret) information unless some “payment” is made to keep quiet about it.¹²² Although the

judicial reasoning rather than rejecting the idea of privacy. For a different reductionist account, See Judith Jarvis Thomson, “The Right to Privacy”, *Philosophy & Public Affairs* 4, no. 4 (1975): 295–314, who considers privacy rights to be reducible to, for example, property rights and right to self-ownership. For a critique, see *inter alia*, Innes, *Privacy, Intimacy, and Isolation*, 28–41.

121 John Stuart Mill, *On Liberty* (1869), see: <http://www.bartleby.com/130/1.html>.

122 As noted earlier, what is secret (e.g. the fact that we murdered someone) need not also be private.

person in possession of another's private information may choose to reveal it without the threat of penal consequences, using that threat to exact from another a payment is considered an improper exploitation of the other.¹²³

The securing of private information by other individuals and organizations may subject individuals to various forms of invasion or threat, but so may its collection by governments. Not surprisingly, given its history, much of the US debate about privacy has concerned the gathering of data by governments. Although communitarian liberals tend to have a relatively benign attitude to governmental power – seeing it as an affirmative social structure and not simply as a lesser evil than the state of nature – such liberals are still wary of collective power and the ways in which it may be misused. This was a major concern during the years of the Cold War, with governmental worries about Communist conspiracies (Orwell's *1984* was published in 1949) and various other initiatives designed to centralize governmental data on individuals, eventually leading to the Privacy Act of 1974, which was tightened after Watergate by FISA (1978). However, since 9/11, with a somewhat weakened public resolve, there has been a re-emergence of governmental data collection initiatives as part of the “war on terrorism”, along with, more recently, some half-hearted resistance to those initiatives.¹²⁴

There has always been a tendency, even among liberal democratic governments, to “do what it takes” to retain power, and information can be an important source of power.

Privacy and cultural relativity

One reason privacy has generated a lot of debate is that it appears to be culturally variable. What one person considers to be private information (e.g. whom X is going out with; one's telephone number or address) another person may think not; what one person thinks is extremely private (e.g. that she has had breast cancer) another may think only moderately so. What one culture treats as private (e.g. certain bodily parts) another may not. Some people think of those who treat certain matters as private simply as thin-skinned.¹²⁵

123 It also gives rise to the so-called “paradox of blackmail” – beloved of libertarians – whereby two acts, neither of which is illegal (making known to others the truth about someone and asking someone for money) become illegal when conjoined (cf. prostitution).

124 On August 4, 2007, Congress approved expanded surveillance powers. The Protect America Act of 2007 (see: <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01927>). For different perspectives, see James Risen and Eric Lichtblau, “Concerns Raised on Wider Spying Under New Law”, *The New York Times*, August 19, 2007; Philip Bobbitt, “The Warrantless Debate over Wiretapping”, *The New York Times*, August 22, 2007; and as follow-up to the USA PATRIOT Act, see Eric Lichtblau, “F.B.I. Data Mining Reached Beyond Initial Targets”, *The New York Times*, September 9, 2007: 1, 31.

125 Moreover, there are those who seem to have no sense of privacy and who gossip about the most intimate details of their lives in such a way that we may consider them lacking in self-respect. This has become part of the world of Facebook, YouTube and Twitter.

Although it can be argued with respect to almost any value, it is especially the case that privacy is often argued to be a value that is culturally relative. The claim can take one of at least two forms. Firstly, it can be claimed that, whereas privacy is a value in some cultures,¹²⁶ it is not valued greatly or at all in others. Were this to be the case (though unlikely) then either we might argue that privacy does not constitute a *human* (and is at best only a cultural) value and therefore a right to privacy does not constitute a human right, or we might argue (and would need to establish) that cultures that fail to recognize the importance of privacy are significantly lacking in normative resources (morally impoverished). Secondly, it can be argued that although privacy is universally valued, it is valued in different ways in and within different cultures, depending on other values (e.g. prevailing religious traditions) and social circumstances (privacy expectations on a beach may differ significantly from those on a crowded street).¹²⁷ To the extent that this is so, we will need to be careful to distinguish general claims about privacy from particular instantiations of information or access as private, and, further, to the extent that we choose to enforce a right to privacy, we will need to exercise considerable care in differentiating what is acceptably protected from what is unacceptably individual.¹²⁸

Privacy in public

It has often been said that people have “no reasonable expectation of privacy in public spaces”. If it is reported that *X* was seen cavorting with a woman not his wife in a shopping mall, can *X* complain that his privacy was being violated? Can *X* complain if others look in his direction while he is travelling on the subway? Are these rhetorical questions? What if a gay man, wishing to remain closeted in his hometown, nevertheless marches in a gay pride rally in a town several hundred miles away? Is his privacy violated if pictures of him marching are distributed in his hometown? What if the look on the subway becomes a stare? And what if *Y* cleans out her cupboards, getting rid of old medical records, bills and personal documents by tearing them in half and putting them in the garbage, from which someone “retrieves” them and then “uses” them against her? Has her privacy been violated?¹²⁹

126 For present purposes, we leave largely to one side what constitutes a “culture”.

127 See further, Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967); Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman and Littlefield, 1988); James Rachels, “Why Privacy is Important”, *Philosophy & Public Affairs*, 4 (1975): 323–33; A. Moore, “Privacy: Its Meaning and Value”, *American Philosophical Quarterly*, 40 (2003): 215–27. We are unfamiliar with what is available on privacy in the anthropological literature, though see John M. Roberts and Thomas Gregor, “Privacy: A Cultural View”, in *Privacy*, NOMOS XIII, ed. J. Roland Pennock and John W. Chapman (NY: Atherton Press, 1971), 199–225, where they talk about widely divergent “patterns of privacy” at the same time as they see privacy as a “promising cross-cultural variable”.

128 We might want to compare such debates with those surrounding what is deemed offensive. For the latter, see Joel Feinberg’s magisterial *Offense to Others* (New York: Oxford University Press, 1985).

129 No, according to *California v. Greenwood*, 486 U.S. 35 (1988). The legal argument for shredders!

The view that we have “no reasonable expectation of privacy in public spaces” is surely only part of the story. Not everything that happens in public view or in a public space is public. If *X* takes out and reads a letter on the subway, his activity, though engaged in public, is not thereby reasonably open to the close scrutiny of others. There is a moral etiquette to conduct in public that acknowledges the privacy of certain conduct that occurs in public. A public kiss should not be gawked at, and looking intently down the cleavage of a low-cut dress may be felt intrusive, even though the low-cut dress may have been worn in order to display one’s “endowments”. Sometimes people may not seem to care too much about the fact that their private affairs are being carried out in public, but that does not in itself show that they are no longer private, and it may be inappropriate for others to focus on or record them. A mother who must breast feed her baby in public is not *ipso facto* indicating that it is all right for others to stare. At the same time, those who conduct in public what are conventionally considered private affairs can sometimes seriously inconvenience or embarrass others who have such matters thrust upon them (the loud cell phone discussions, public arguments between spouses, expressions of sexual intimacy and so forth).

Privacy in public is not just a matter of activities “in plain view”. A lot of theoretically public information about us is now available in digital format, is relatively easily accessible and is able to be combined (aggregated) in ways that we would find quite intrusive. One’s address and changes of address, property transactions, purchases, dealings with the law and so forth have always been “public” in some sense, but for someone to track these and consolidate them into some sort of profile has previously involved a great deal of effort – unlikely to be made unless that person has a specific purpose and determination in doing so. The digitalization of records and their internet accessibility has changed all this. Not only that, but the development of niche marketing, credit checking, securitization and so forth have brought in their wake companies that specialize in developing dossiers on individual people which can be sold (not always to reputable people) and even demanded by security organizations.¹³⁰

Helen Nissenbaum complains that the factors/considerations that tend to bear on ordinary cases of privacy do not operate as well in the public domain (i.e. when in public or publicly available), and that we need to develop an alternative way of accommodating our privacy concerns. That is, most privacy doctrine has developed around private spaces (such as homes), sensitive information (such as medical records) or limitations on government intrusiveness (whereas most of the information in public is harvested by commercial firms).

¹³⁰ Check ChoicePoint, LexisNexis, and Axciom. A large portion of the business of some of these companies is with government agencies such as the FBI. We have already spelled out some of the dimensions of this in Chapter VII.

One thing that happens when the sorts of things that were referred to a couple of paragraphs ago occur is that a *presumption of anonymity* in public is eroded. That is, much of what we do in public we allow ourselves to do in part because – so far as others are concerned – it is done in a fleeting and anonymous way. It is part of the etiquette of conduct in public that it is (for the most part) fleeting and anonymous. Were we to be aware that we were being watched at length, that those watching knew us or that our actions were being recorded and reviewed, we would (probably) act differently (or more discreetly).

Anonymity is one of the ways in which we can conduct ourselves in public without others knowing our identity – or, sometimes more literally, our name.¹³¹ We may publish a book or article anonymously, give to charity anonymously or blow the whistle anonymously for a variety of perfectly legitimate reasons. Although a free society is generally characterized by transparency rather than secrecy, there are often good reasons – as can be seen from the kinds of cases enumerated above – for acting in a way that does not reveal our identity/name.

A degree of anonymity in public enables us to retain some of the benefit of privacy in a public setting. It provides some kind of moral freedom in public settings, a space in which we can retain some control over the information about ourselves that we make available to others. Consider the effects on conduct if it were the case that once we stepped out of our doors and onto the public street everything we did was recorded and made available to others as they wished – every look, every gesture, every word and every movement.

Helen Nissenbaum makes the case for anonymity as follows:

For situations that we judge anonymity acceptable, or even necessary, we do so because anonymity offers a safe way for people to act, transact, and participate without accountability, without others "getting at" them, tracking them down, or even punishing them. This includes a range of possibilities. Anonymity may encourage freedom of thought and expression by promising a possibility to express opinions, and develop arguments, about positions that for fear of reprisal or ridicule they would not or dare not do otherwise. Anonymity may enable people to reach out for help, especially for socially stigmatized problems like domestic violence, fear of HIV or other sexually transmitted infection, emotional problems, suicidal thoughts. It offers the possibility of a protective cloak for children, enabling them to engage in internet communication without fear of social predation or – perhaps less ominous but nevertheless unwanted – overtures from commercial marketers.

131 Anonymity is, literally, without our name. Our name, however, is just a dummy for something more – our person or identity. See the later notes on identity.

Anonymity may also provide respite to adults from commercial and other solicitations. It supports socially valuable institutions like peer review, whistle-blowing and voting.

In all these cases, the value of anonymity lies not in the capacity to be unnamed, but in the possibility of acting or participating while remaining out of reach, remaining unreachable. Being unreachable means that no-one will come knocking on your door demanding explanations, apologies, answerability, punishment or payment. Where society places high value on the types of expression and transaction that anonymity protects (alluded to in the previous paragraph) it must necessarily enable unreachability. In other words, this unreachability is precisely what it at stake in anonymity. If, in previous eras, namelessness, that is choosing not to reveal one's name, was the best means of achieving unreachability, it makes sense that namelessness would be protected. However, remaining unnamed should be understood for what it is: not as the end in itself of anonymity, but rather, the traditional means by which unreachability has been achieved. It has been the most effective way to keep others at bay, avoid ridicule, and prevent undeserved revenge, harm, and embarrassment, and so forth.¹³²

Nissenbaum focuses fairly heavily on the consequential value of anonymity, a value that has to be weighed against the value of transparency. The calculus may vary, as we know from the issue of anonymous whistle blowing. Because of the history of retaliation against those who blow the whistle – a history that is hard to reverse, given the subtleties of organizational retaliation – we have, in many cases, provided for anonymous whistle blowing. However, the provision of anonymous whistle blowing also allows for vindictive attacks on others, and whether and under what conditions anonymous whistle blowing is permitted will often reflect some sort of cost-benefit analysis. Internet anonymity is problematic for the same reason; though the child may engage with others without unwanted solicitations, others may insinuate themselves anonymously and dangerously.¹³³

But the benefits are not straightforwardly consequential. The presumption of anonymity is the condition for “being oneself” in public. For many, the possibility of anonymity is the attraction of a large urban center – and lack of anonymity is correspondingly the burden of a small community in which “everyone knows everyone and everything” and in which personal independence, particularly in

132 Helen Nissenbaum, “The Meaning of Anonymity in an Information Age”, see: http://www.nyu.edu/projects/nissenbaum/paper_anonymity.html.

133 It is instructive to think about internet anonymity in relation to the Myth of Gyges as told by Plato in the *Republic*, II 359d–360b. See e.g. http://falcon.tamucc.edu/~sencerz/Myth_of_Gyges.htm. See also “Gyges Goes Surfing”: http://www.applelust.com/one/index.php?option=com_content&task=view&id=35.

public, is very difficult to achieve. True, anonymous urban centers may also be lonely, alienating and depressing, but on the other side, though we may value the “community of care” that a small center provides, we may also be suffocated by it. The issue is one of achieving a balance.¹³⁴

The proliferation of CCTV cameras makes public anonymity much more difficult to sustain than it used to be. What was fleeting and lost in the great surge of public activity is now, with CCTV’s advent, recorded, sometimes indefinitely. It can be played back, played over and over, shared (sometimes widely) and combined with other data, all but destroying the anonymity one thought one had. For the most part, we block out the fact that much of our public behavior (in Manhattan, for example) is recorded by CCTV, for we trust that the technical possibilities will not be taken advantage of. However, if there were to be enough counterexamples, this would have a chilling effect on our behavior in public. At the moment we can generally count on recording tapes that are overplayed after several days, that are not archived or indexed in certain ways, that are consulted only in the event of some critical need, that are not coordinated and so on. But things could change along with the technology, even though there are problems in principle with the image of ubiquitous, continuous, real-time surveillance of everyone in every public space and at all times. Specifically, there are significant limits on the number of people who could be employed to do the surveillance; real-time, continuous surveillance is hugely expensive.

The presumption of anonymity in public is reflective of a larger concern that constitutes the heart of Nissenbaum’s alternative approach to privacy. If what is in the public domain is treated as “fair game”, there is a subversion of what she speaks of as “contextual integrity”,¹³⁵ which is – in her view – what constitutes a violation of privacy. If teacher *X* turns up to the cash register in the supermarket, and it is recorded – as indeed it would be – that on this particular occasion he bought, *inter alia*, three cans of Spam, two bottles of rather cheap wine, suppositories and a pack of flavored ribbed condoms – a public but anonymous act – and a copy of his purchases was then distributed to his students, this latter act could be seen as a breach of privacy, even though what *X* did was public, done in public, recorded and even viewed (albeit casually, though maybe with eyebrows raised) by those in the line behind him. If, in addition, *X* has a supermarket discount purchasing card then, over time, some patterning to his supermarket acquisitions may be developed that could be sold or used (for marketing purposes) or perhaps to suggest he has a drinking problem or a very active sex life. Once again, one might claim, as Nissenbaum might, that there had been a violation of *X*’s privacy by virtue of a violation of contextual

134 In this case it is a balance rather than a trade-off as we are seeking to determine for ourselves an appropriate level of individuality in community.

135 Helen Nissenbaum, “Privacy as Contextual Integrity”, *Washington Law Review* 79 (2004): 119–57.

integrity. Information that *X* willingly and virtually anonymously provided to the checkout worker has now been re-contextualized and given a new context that *X* could find embarrassing, threatening or otherwise unacceptable.¹³⁶

Informing the idea of contextual integrity is a recognition that our lives are constituted – in part, at least – by various arenas or spheres of activity, each of which is governed by certain norms of appropriateness, including, especially, norms relating to information acquisition and flow.¹³⁷ These spheres of activity may include those of family, workplace, religious community, friendships, medical care, local grocery and so on. There may be some overlap (say, between the spheres of friendship and family) and there is often internal complexity (“not in front of the children” might be a norm governing certain communications between parents). Allowing for such overlaps and complexity, what constitutes appropriate behavior and information sharing in one context may be inappropriate in another context. Norms of behavior that are appropriate in regard to one’s priest, doctor, banker or workmates may be inappropriate in relation to each of the others, and what is appropriately shared or communicated in relation to one may be not appropriately shared with each of the others. Contextual integrity is constituted by acting appropriately and observing certain norms of informational flow in relation to each of the contexts.

Such norms may be challenged, refined, added to or dropped over time, though one presumes, at least within relatively stable cultures, that there will be a fair degree of longevity, continuity and specificity.

Limits to privacy

While we consider privacy important, and even *a right*, it does not follow that it is absolute. That is, it is not incapable of being legitimately constrained or overridden. The important question concerns the conditions under which it may be contracted or overridden, and that presumes that we know what is at stake in privacy. There have been times when claims of privacy have been overvalued just as there have been times at which they have been undervalued. Various forms of marital or partner assault have sometimes been “secured” behind a cloak of privacy.¹³⁸ At the same time, a bomb-making factory in a home cannot claim the protections of privacy, even if a warrant to access it

136 We do not wish to argue that, just because we find something embarrassing, threatening or otherwise unacceptable, it is therefore unjustified. There may be countervailing reasons that make it appropriate that information is used in ways we would prefer that it not be.

137 The account we give of Nissenbaum’s position is – as we see it – “touched up”: we think she casts her net too widely.

138 For some examples, see James J. Fyfe, “Structuring Police Discretion”, in John Kleinig (ed.), *Handled with Discretion: Ethical Issues in Police Decision Making* (Lanham, MD: Rowman and Littlefield, 1996), 183–205.

needs to be obtained, and not even the latter may be required if police are in hot pursuit of someone who manages to run into his home. What is done “in private” need not be private, but even what is ordinarily deemed “private” (i.e. information or space) may be invaded if the stakes and probabilities are high enough. Police may apply to wiretap one’s phone if there is some appropriate level of probability that one is engaged in certain kinds of criminal activities. Here, because the stakes are not as high, a greater probability has to be shown (to a court) to override one’s claims to privacy. But maybe the probabilities do not have to be too high. One’s suitcases may be inspected at the airport, even if there is no particular reason to believe that *one’s own* bags are being used to conceal a bomb.

Privacy, in other words, may compete or come into conflict with other values. Security and public safety are major issues, but they are not the only ones. Privacy may conflict with freedom of expression, of speech and of the press, with ideas of governmental transparency, with economic efficiency and others. We draw lines – not always very satisfactorily, as we know all too well with respect to freedom of the press – and we continue to debate and sometimes revise them.

In *The Limits of Privacy*, Amitai Etzioni outlines four criteria that he believes should be invoked to determine whether privacy or some other value should be given precedence in the event of a clash. He then uses these to review the following issues: HIV testing of infants; registration and community notification of sex offenders; limits on encryption in the “war on terror”; ID cards and biometric technologies; and medical privacy. He argues that limitations on privacy can be justified only:

- (i) in the event of a “well-documented and macroscopic threat to the common good”;¹³⁹
- (ii) if there is no alternative to the invasion of privacy;
- (iii) if the invasion is as “minimally intrusive” as possible; and
- (iv) if “measures that treat undesirable side effects of needed privacy-diminishing measures are to be preferred over those that ignore these effects”.¹⁴⁰

To some extent these criteria track those that must be satisfied whenever we engage in means-end reasoning – that is, whenever we seek to secure some value that requires the employment of means that may be problematic. We have already discussed these at length. Etzioni casts his account in the communitarian

139 Amitai Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999), 12.

140 *Ibid.*, 13. For a critique of Etzioni, see Miller and Blackler, *Ethical Issues in Policing*, 92–98.

terms for which he has become the major spokesperson.¹⁴¹ His general position is that we tend to go a bit overboard on privacy, especially insofar as it applies to governmental access to information (he is more concerned with the intrusiveness of big business than big government). However, what he may underplay are not the abstract trade-offs that may sometimes be necessary but the abilities of those who may have access to private information to secure or control it in the way that they profess. Exposés of loss, hacking or unintentional disclosure of information may lead to a practical concern for privacy that might not be justified on abstract theoretical grounds.¹⁴²

Quite apart from that, there are substantial challenges to applying the criteria to particular cases. The criteria do not function algorithmically but simply begin a process of deliberation that does not have any tightly determined outcomes. What, for example constitutes a sufficiently documented and macroscopic threat to the common good? What is the common good? When it is claimed that there is no alternative to the invasion of privacy, how hard must one have looked at/for other possibilities? And what if some alternatives maintain privacy but would compromise other values? Part of the value of Etzioni's discussion – whether or not one agrees with his own conclusions – is that the chapter-length discussions of the issues he reviews indicate how complex they can be.

Autonomy

In “Privacy and Autonomy”, Hyman Gross warns against the “danger that privacy may be conceived as autonomy”.¹⁴³ What Gross has in mind (as did Feinberg in n. 120 above) is the US Supreme Court's tendency (following Warren and Brandeis) from *Griswold* on to see the appeal to privacy as a way of stopping government from regulating personal affairs rather than as a way of stopping it from getting information on them – as seeing privacy simply as a “right to be let alone”. Gross's contention, with which we are in substantial agreement, is that whereas “an offense to privacy is an offense to autonomy, not every curtailment of autonomy is a compromise of privacy.”¹⁴⁴

So what is the autonomy that violations of privacy are said to compromise? Any review of the literature throws up a cluster of cognate terms – freedom, liberty,

141 Amitai Etzioni, *The Responsive Society* (San Francisco: Jossey-Bass, 1991); *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (New York: Crown Publishers, 1993).

142 See Ragib Hasan and William Yurcik, “Beyond Media Hype: Empirical Analysis of Disclosed Privacy Breaches 2005–2006 and a DataSet/Database Foundation for Future Work”, at: http://wesii.econinfosec.org/draft.php?paper_id=37. We have heard that data for 110,000,000 people have been hacked or lost.

143 Hyman Gross, “Privacy and Autonomy”, *Privacy*, NOMOS XIII, ed. J. Roland Pennock and John W. Chapman (NY: Atherton Press, 1971), 180.

144 *Ibid.*, 181.

individuality, authenticity, independence and personal sovereignty – that are sometimes used interchangeably with autonomy and sometimes distinguished from it. Our inclination is to draw various distinctions among (at least some of) them, and what follows in the next paragraph – as a prelude to the more detailed discussion of autonomy – is a bonsai version of the central distinctions.

We see liberty as a *social* state of affairs, either an absence of external, social (human-generated¹⁴⁵) constraints on action (negative liberty) or (and probably including) certain requisites for action (positive liberty).¹⁴⁶ It may have individual and collective dimensions (often thought to be causally connected).¹⁴⁷ We tend to associate freedom (though it is frequently used generically) with a level of *personal* development. We think of it more specifically as an individual (though not isolated) achievement of maturation and learning – specifically, as a state of largely personal development in which individuals have acquired the capacity to reflect on and revise their attitudes, reasons, motives and desires and to act upon them.¹⁴⁸ With such freedom comes a measure of responsibility for what we do, both morally and otherwise.¹⁴⁹ Such personal freedom is related, though not identical, to *personal autonomy* or individuality.¹⁵⁰ Autonomy refers not

145 There may be non-social constraints on action that do not constitute limits on liberty. Gravity and our physiological structure both have some bearing on how high we may be able to jump, but they are not constraints on our liberty.

146 Debate about this distinction goes back to at least the nineteenth century, where it revolved around the question of whether liberty/freedom required not merely the absence of social constraints but also access to the wherewithal that would enable a person to make use of such negative liberty. For without such wherewithal one's (negative) liberty might not be said to be worth much. See W.L. Weinstein, "The Concept of Liberty in Nineteenth Century English Political Thought", *Political Studies* 13 (1965): 145–62. In the twentieth century, the debate was given a Cold War cast in Isaiah Berlin's influential essay, *Two Concepts of Liberty* (Oxford: Clarendon 1958). He saw in positive liberty, and the "self-mastery" he believed it implied, the seeds of a paternalistic perfectionism. For a better discussion, see Gerald C. MacCallum, Jr., "Negative and Positive Freedom", *Philosophical Review* 76 (July, 1967): 312–34.

147 It is often argued that liberty, as an absence of constraint or domination by others, is primarily individual. However, we believe this to be somewhat misleading. Individual liberty is most likely to exist in an environment of liberty – in which collective rules operate to secure individual liberty and, with it, the conditions for individual flourishing. It is the reference to securing the conditions for individual flourishing that helps to link liberty in its collective and individual aspects with freedom, in both its basic sense and its heightened autonomous expression. They are causally intertwined – with free persons developing more successfully and being better sustained in a society that is characterized by liberty. Were it not for our concern with personal freedom we would not have the interest we do in liberty. We have left the notion of human flourishing unanalysed. There is obviously much that could and should be said on the issue. Here we do no more than reference some of the discussions in a special issue of *Social Philosophy & Policy*, 16 no. 1 (1999).

148 This is not to deny a relational dimension to individual autonomy. See Seumas Miller, "Individual Autonomy and Sociality", in *Socializing Metaphysics: The Nature of Social Reality*, ed. F. Schmitt (Lanham: Rowman and Littlefield, 2003).

149 Here we shall prescind from a longstanding and important debate (going back to Plato and Aristotle) on whether this account should be supplemented by certain substantive beliefs that must be held if a person is truly to be said to be free. Elements of that debate reappear in the debate over whether liberty (or freedom) should be construed as positive or negative.

150 Although in this study we generally speak of personal autonomy, much of what we say relates more specifically to its narrower specification in moral autonomy. We also leave to one side a distinction that can be drawn between autonomy as a state and autonomy as a quality of particular acts or decisions. What we

only to a level of personal development compatible with responsibility but also to a heightened level of individual freedom – a dispositional commitment to and capacity for rational living. In Chapter 3 of *On Liberty*, “Individuality, as One of the Elements of Well-Being”, John Stuart Mill says that a person “must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision.”¹⁵¹ He is speaking here of what we characterize as autonomy. The autonomous person does more than go with the flow or conform to whatever is the prevailing fashion. In the larger passage from which the quote is taken, however, Mill makes it clear that autonomy is not simply a matter of “rational” or calculative development – it also has emotive and conative dimensions: it concerns the capacity to choose well and it involves both authenticity (whereby the reasons, feelings, attitudes and judgments one has have become one’s own – one identifies with them¹⁵²) and competence (a level of development of rational capacities and other discriminative sensibilities that secure one against systematic ignorance, self-deception and other debilitating pathologies).¹⁵³ Moreover, the development of individuality is something generally achieved in concert with others rather than in social isolation.

Some background

Like privacy, the idea of personal autonomy has clearly emerged as only a product of modernity, though traces can be found much earlier. Even today, Socrates stands in some sense as an exemplar of autonomy. But what the elders of Athens may have found threatening, contemporary liberalism tends to foster as an ideal not just for an exceptional few but for people generally. When praising the virtue of originality, Mill recognizes that that kind of creativity belongs to only a few: “The initiation of all wise or noble things, comes and must come from individuals; generally at first from some one individual. The honour and glory of the average man is that he is capable of following that initiative; that he can respond internally to wise and noble things, and be led to them with his eyes open”¹⁵⁴ – an ability that he distinguishes clearly from hero-worship.

It is often noted that the idea of autonomy has its background in political theory, where it refers to self-government, self-rule, self-determination or institutional

characterize as autonomy can be possessed as a matter of degree.

151 See *On Liberty* at: <http://www.bartleby.com/130/3.html>.

152 The notion of authenticity has generated a huge and problematic literature, some of which is referred to in John Christman, “Autonomy in Moral and Political Philosophy”, *Stanford Encyclopedia of Philosophy*, at: <http://plato.stanford.edu/entries/autonomy-moral>.

153 One of the problems often associated with Kantian conceptions of autonomy concerns its overconcern with a passionless rationality.

154 Mill, *On Liberty*, ch. 3.

independence. An autonomous individual is thus to be construed on a rough analogy with a country or institution that has charge of its own affairs and is not beholden to other powers.

Feinberg usefully suggests that personal autonomy can be understood in four closely related ways: (1) as a *capacity* to govern oneself that can be possessed to a greater or lesser degree; (2) as the *actual condition* of self-government; (3) as an *ideal of character* derived from the latter; or (4) as the *sovereign authority* to govern oneself.¹⁵⁵ While (1) is fundamental, much of the purport of autonomy, at least in liberal thought, is the authority (4) that it is intended to convey.

The capacity that constitutes autonomy refers to a level or threshold of competence reached so far as one's natural abilities are concerned – self-control, the capacity for making wise and prudent judgments, developed sensibilities and self-reflectiveness – the kinds of factors mentioned above regarding Mill's notion of individuality. We would argue that it involves not only a capacity but a disposition to govern oneself. (1) differs from (2) insofar as a person who has the capacity for self-government may be prevented from actualizing it by bad luck or powers beyond his or her control. When we speak of someone as autonomous, we are ruling out certain kinds of descriptions as applying to them – they are free from indoctrination, compulsion, manipulation or coercion.

Individuality and individualism

As we have suggested on a number of occasions, autonomy and individuality need not be thought of individualistically. It has been a common complaint against classical liberal theory, not only by those who have had more socialistic or communitarian leanings but also by recent feminists (who have adopted the vocabulary of “relational autonomy”¹⁵⁶), that liberal autonomy is framed in a way that does not have adequate regard to the social dimensions of human life. The complaint is either that autonomy is construed as a natural endowment of humans (“man is born free, and everywhere he is in chains”¹⁵⁷) or that the relational and communal aspects of mature life are underestimated.

Although we have no doubt that some classical accounts of autonomy are excessively individualistic, it does not seem to us necessary that autonomy be construed individualistically. It takes a village, so to speak, to produce

155 Joel Feinberg, *The Moral Limits of Criminal Law*, vol. 3: *Harm to Self* (New York: Oxford University Press, 1986), 28.

156 See, particularly, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (NY: Oxford University Press, 2000); see also Miller, “Individual Autonomy and Sociality”.

157 Rousseau, *The Social Contract*, at: http://www.wsu.edu:8080/~wldciv/world_civ_reader/world_civ_reader_2/rousseau.html.

an autonomous person; moreover, autonomous persons frequently find that “villages” are integral to their projects and plans. A good deal of our autonomy is realized through relational activities. The big challenge is not to choose between individualism (or atomism) and socialism (or some other relational option) but to get an appropriate balance between the individual and relational elements of our personhood.

It is easily forgotten that, in becoming the individuals we are, we acquire – and in some sense cannot shrug off – both a language, with its embedded cultural understandings, and the trappings of a broader culture and its traditions. Autonomy is not to be thought of as the absence or negation of these so much as the capacity to question or interrogate them. We may not be able to do this all at once (we are, after all, sailing on Theseus’ ship), but there may not be any aspect of our lives that is permanently shielded from scrutiny.

Sovereign authority

As noted above, it is commonly claimed by many liberal writers that personal autonomy (understood as capacity and disposition) provides a basis for according individuals autonomy in another sense (sovereignty over their personal affairs, which is compatible, it is assumed or argued, with according a similar sovereignty to others). That usually provides an argument for opposing any strong form of paternalism in which individuals are prevented from making decisions that are seriously detrimental to their own interests. Mill’s “harm principle” provides a classic statement:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one

else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹⁵⁸

As a statement this is about as absolute as you can get. Nevertheless, as Mill himself recognizes, there are hard cases.¹⁵⁹ What he sees as the hardest case is the decision to sell oneself into slavery, though the argument that he uses to back away from it is uncharacteristically opaque:

In this and most other civilized countries . . . an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.¹⁶⁰

One might question Mill's coherence on this point, or at least ask for greater clarity on why it is not (an exercise of) freedom to give up one's freedom.¹⁶¹

158 *On Liberty*, ch. 1, at: <http://www.bartleby.com/130/1.html>.

159 "If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore, (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty) he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it." Ch. 5, at: <http://www.bartleby.com/130/5.html>.

160 *Ibid.*, ch. 5, at: <http://www.bartleby.com/130/5.html>.

161 John Kleinig has tried to unravel Mill's claim in "John Stuart Mill and Voluntary Slavery Contracts", *Politics* 18, no. 2 (November, 1983): 76-83. But see also: David Archard, "Freedom Not to be Free: The Case of the Slavery Contract in J. S. Mill's *On Liberty*", *Philosophical Quarterly* (October, 1990): 453-465; Alan E. Fuchs, "Autonomy, Slavery, and Mill's Critique of Paternalism", *Ethical Theory and Moral Practice* 4, no. 3 (September, 2001): 231-51; John D. Hodson, "Mill, Paternalism, and Slavery", *Analysis* 41 (January, 1981): 60-62; Andrew Sneddon, "What's Wrong with Selling Yourself into Slavery? Paternalism and Deep Autonomy", *Critica: Revista Hispanoamericana de Filosofía* 33, no. 98 (August, 2001): 97-121 (see also: http://critica.filosoficas.unam.mx/pdf/C98/C98_sneddon.pdf); Mark Strasser, "Mill on Voluntary Self-enslavement",

More recently, a German case of consented-to cannibalism has once again pushed the limits of an absolutist anti-paternalistic stance.¹⁶² Suicide (unassisted and assisted) has elicited a great deal of discussion, though part of that discussion has concerned not intervention so much as criminalization.

What is not absolutely clear about the move from the capacity account to the sovereignty account is how it is to be understood. Is there a (non-arbitrary) threshold autonomy such that, once one has met the threshold, others may not intervene? That seems to be Mill's position and why he has to meet the self-enslavement challenge in the way he does (it is not freedom to be allowed give up one's freedom). However, given that autonomy may be a matter of degree, is it the case that the greater a person's autonomy, the heavier the burden that must be faced by those who would paternalistically intervene? Paternalism would not be ruled out but simply made increasingly difficult to justify.¹⁶³ Opposition to it may be viewed as presumptive without being absolute.

Perhaps the sovereign authority that goes with personal autonomy is not absolute but, like the political sovereignty from which the metaphor originates, simply provides a strong but not overriding reason for not intervening in the affairs of others.

Dignity

As has become clear in the foregoing discussion, lurking behind most of the concepts we have been discussing and fundamental to much of the liberal tradition has been the idea of human dignity – an idea with a long history in Western thought but with renewed prominence in post-World War Two political rhetoric. Violations of privacy and autonomy tend, at their deepest level, to be also violations of dignity.

Although Immanuel Kant has been the most influential architect of modern ideas of human dignity, he built on and extended a Renaissance tradition that included, among others, Giannozzo Manetti (1396-1459) and Giovanni Pico

Philosophical Papers 17 (November, 1988): 171-83; Ten Chin Liew, *Mill on Liberty* (Oxford: Oxford University press, 1980), ch. 7; Samuel V. La Selva, "Selling Oneself into Slavery: Mill and Paternalism", *Political Studies* 35, no. 2 (1987): 211-23.

¹⁶² See Armin Meiwes at: http://en.wikipedia.org/wiki/Armin_Meiwes. For *New York Times* articles on the case, see: <http://topics.nytimes.com/top/reference/timestopics/subjects/c/cannibalism/index.html?query=BRANDES,%20BERND-JURGEN&field=per&match=exact>. There is a useful discussion of this and other cases in Vera Bergelson, "The Right to Be Hurt. Testing the Boundaries of Consent", *George Washington Law Review* 75 (2007): 165 (see also: http://works.bepress.com/vera_bergelson/4).

¹⁶³ In such cases other factors, such as the kind of intervention (e.g. criminal, civil), the identity of the intervener (e.g. friend, state) and the intrusiveness of the intervention (e.g. seat belt laws, enforced dieting) might also be taken into account.

della Mirandola (1463-1494).¹⁶⁴ That tradition helped to transplant¹⁶⁵ an older tradition in which *dignitas* was most closely associated with social rank. This was done by universalizing a standing and bearing associated with rank. There was a raising up, not a leveling down.¹⁶⁶ The big question prompted by this universalization of dignity was, naturally: In what does such *human* dignity consist? Pico located this generalized dignity in the human power of self-transformation; that is, in our capacity as humans to be whatever we wish to be. This was innovative in more ways than one. It accorded powers to humans that many Christian theologians considered to have been radically lost when Adam and Eve rebelled against their Maker.¹⁶⁷ But its most distinctive feature was to universalize the idea of dignity.

There is much to be said for the Kantian tradition of understanding human dignity. We take as our starting point a position that is articulated in numerous recent international documents. This is the view that human dignity is not simply another value – to be traded off against autonomy and such like – but one that possesses foundational significance. Thus, in the Preamble to the UN Convention Against Torture (1987), it is affirmed that “the equal and inalienable rights of

164 See, Giannozzo Manetti, *De dignitate et excellentia hominis libri IV*; Book 4 translated by Bernard Murchland in *Two Views of Man: Pope Innocent III On the Misery of Man; Giannozzo Manetti On the Dignity of Man* (New York: Frederick Ungar, 1966); Giovanni Pico della Mirandola, *De dominis dignitate oratio*, translated as *Oration on the Dignity of Man*, by A. Robert Caponigri (Chicago: Gateway, 1956). Some see the seeds of a general idea of human dignity in Cicero or even earlier in Judeo-Christian thought. For overviews, see Izhak England, “Human Dignity from Antiquity to Modern Israel’s Constitutional Framework”, *Cardozo Law Review* 21 (May 2000): 1903-27; Charles Trinkhaus, “Renaissance Idea of the Dignity of Man”, *Dictionary of the History of Ideas*, vol. 4, 136-46 (see also: <http://etext.virginia.edu/cgi-local/DHI/dhiana.cgi?id=dv4-20>); Richard C. Dales, “A Medieval View of Human Dignity”, *Journal of the History of Ideas* 38, no. 4 (October-December 1979): 557-72.

165 We say “transplant” because, in many cases, including that of Kant, there was not so much a rejection of older traditions of rank-based dignity as the addition of a distinct kind of dignity, one attaching to all humans. This universal dignity also needs to be distinguished from another contemporary account of transplanted dignity – the dignity of each *citizen*.

166 Admittedly, there were those (e.g. Thomas Paine) who sought to *replace* the dignity of rank with the equal dignity of all, and several influential writers have spoken of this development as a “leveling up” (e.g. James Q Whitman) or an “upwards equalization of rank” (Jeremy Waldron). For the most part, though, Kant and others who wished to advocate a universal human dignity did not wish to abandon traditional forms of rank. Instead, contrary to tradition, they thought that by virtue of their humanity all possessed a dignity comparable to that associated with traditional rank. See Thomas Paine, *The Rights of Man* (New York: Anchor, 1973), 320; James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty”, *Yale Law Journal* 113 (2004): 1151-221; Jeremy Waldron “Dignity and Rank”, *Archives Européennes de Sociologie* 48 (2007), 201-37; also idem, “Cruel, Inhuman and Degrading Treatment: The Words Themselves”, New York University School of Law, Public and Legal Theory Research Paper Series, Working Paper # 08-36 (November 2008), 36 (see also: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278604).

167 Some later Christian theologians spoke of the partial restoration of this dignity, located in the *imago Dei*, “in Christ”. Nevertheless, the awkwardness of connecting dignity with some universally possessed inherent characteristic led other theologians, especially in the Lutheran tradition, to construe human dignity as an “alien dignity” – an “infinite worth” that is not constituted by qualities such as rationality but by the distinctive relationship we have with God – created in love, called in love and redeemed in love. For a useful exposition of this idea, see Karen Lebacqz, “Alien Dignity: The Legacy of Helmut Thielicke for Bioethics”, in *Religion and Medical Ethics: Looking Back, Looking Forward* ed. Allen Verhey (Grand Rapids: Eerdmans, 1996), 44-60.

all members of the human family . . . derive from the inherent dignity of the human person.”¹⁶⁸ A similar point is implicit in German Basic Law (1949), which opens with the claim that “human dignity shall be inviolable” (Art. 1) and follows with the assertion that “the German people *therefore* acknowledge inviolable and inalienable human rights as the basis of every community” (Art. 2).¹⁶⁹

In the *Groundwork of the Metaphysic of Morals*, Kant is quite explicit about what he thinks is intended by the idea of human dignity: “the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the laws he makes.”¹⁷⁰ This is an enormously illuminating understanding of human dignity, especially if abstracted from some of the more complex elements of Kantian doctrine. If we understand correctly what Kant is saying here, there are two dimensions to human dignity that are now deeply embedded in our cultural understanding of human dignity.

On the one hand, there is, as Kant puts it, the human capacity to make universal law – what he elsewhere explicates in terms of the categorical imperative. For present purposes we can leave the problems associated with Kant’s understanding of the categorical imperative aside. The important underlying point is that human dignity does not consist primarily in some idea of rationality or freedom, however important those may ultimately be to his account. It is the capacity to make universal law – that is, the capacity to bind or obligate oneself – that is central. Or, to put it a bit more generally, it is to be found in our status as normative beings whose decisions are not to be resolved in terms of simple means-end determinations but as judgments of appropriateness and inappropriateness. It is our standing as moral agents (especially), given to evaluating courses of action as a condition of determining them, that is a critical element in our dignity.

On the other hand, Kant says that the capacity to make human universal law is constitutive of human dignity only if those who exercise such capacity also subject themselves to the law that they make. Again, we do not want to get bogged down in Kantian scholarship. However, what Kant is adverting to is that there is more to human dignity than the capacity for certain kinds of decisional

168 See: http://www.unhchr.ch/html/menu3/b/h_cat39.htm. A similar ordering is found in the preamble to the UN International Covenant on Civil and Political Rights (1966):

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person . . .”

169 Grundgesetz, GG, at: <http://www.iuscomp.org/gla/statutes/GG.htm>. Additional references to – and discussion of – the internationalization of human dignity can be found in Man Yee Karen Lee, “Universal Human Dignity: Some Reflections in the Asian Context”, *Asian Journal of Comparative Law* 3, no. 1 (2008) (see: <http://www.bepress.com/asjcl/vol3/iss1/art10>).

170 *Groundwork of the Metaphysic of Morals*, translated by H. J. Paton (New York: Harper & Row, 1956), sect. II, Akad. 440.

determinations. Such determinations must also be reflected in one's own person. We must carry ourselves in a certain way if we are to be creatures with dignity. There is an expressive aspect to human dignity.

These two elements of dignity have often been sundered in discussions of dignity – to the point that dictionaries will often distinguish, as two distinct meanings of “dignity”, one that focuses on certain capacities and the other that focuses on a certain bearing or way of being. The *Oxford English Dictionary*, for example, offers as its second usage of dignity: “honourable or high estate, position, or estimation; honour; degree of estimation, rank”; and as its fourth usage: “nobility or befitting elevation of aspect, manner, or style; becoming or fit stateliness, gravity”. Although treated as distinct and separate, these two accounts really belong together as two dimensions of a single account.¹⁷¹ If we recall the roots of the current conception of human dignity as a kind of social rank, we are confronted with a person who not only had a certain status but was expected to manifest it in certain forms of social behavior. There were not two kinds of dignity – dignity of status and dignity of bearing – but a single dignity that had two dimensions.

Before moving on, let us briefly comment on what we see as the connection between the understanding of human dignity as normativity and the common identification of human dignity with autonomy or rationality – connections that are also strong in Kant. The human capacity for moral discernment and determinations – our normativity – is to an important extent premised on our capacity for rationality and autonomy. Compromise that and you threaten our normative capacity; you challenge our dignity.

If this account of human dignity is somewhere near the mark, the question that then arises is: how does it help us to understand the claim that the inherent dignity of the human person is foundational to our rights? We could worry – as Jeremy Waldron does – that such international statements might simply be expressions of pious rhetoric,¹⁷² but once we grasp the central connection between dignity and the capacity for determining the course of our lives by means of moral considerations, dignity's foundational character becomes much clearer.

We are rights-possessing creatures – that is, we are in a position to make enforceable claims on others – by virtue of our normative capacity. It is our normative capacity, our capacity to guide our lives by means of considerations

¹⁷¹ We do not mean to imply that they cannot be sundered – indeed, they have been. But we want to suggest that there goes with the first usage an expectation of the second.

¹⁷² Jeremy Waldron, “Dignity and Rank”, 235.

of appropriateness (and not mere efficacy), that undergirds our status as rights bearers, and those who act in ways that would compromise, subvert or destroy that capacity violate us.

We are not suggesting that we can directly infer from our possession of dignity what rights we should have. To be sure, Waldron attempts such an exercise by considering the accoutrements of rank as the substance of our human rights. He considers whether what those with rank were entitled to by virtue of their rank we might all be entitled to – the entitlement to vote and a voice in public affairs, a right not to be struck, a right to have one’s wishes respected in the conduct of personal life and so on.¹⁷³ Our own claim is the much more modest one that whatever others may do that jeopardizes our capacity to act as normatively determined beings *ipso facto* jeopardizes our rights.

Nevertheless, there is something else implicit in the idea of dignity that is important. Whereas Waldron focuses on the positive trappings of dignity as rank, it might be more appropriate to focus on the situation of those who lack dignity. In *The Metaphysical Elements of Justice*, Kant observes that the head of state – the chief dignitary – possesses the right to distribute “positions of dignity that are distinctions of rank not involving pay and that are based on honor alone; these distinctions of rank establish a superior class (entitled to command) and an inferior class (which although free and bound only by public law), is predestined to obey the former”.¹⁷⁴ What we may infer from this is that those lacking in dignity are beholden to others – they are not authors of their obligations but are obligated as those under authority. What our human dignity does is morally entitle us to treatment by others that acknowledges our status as normatively determining beings.

Identity

We have already looked at some of the values associated with anonymity, particularly as a means of retaining a certain measure of privacy in public and, along with that, a constituent of personal autonomy. Anonymity enables one to retain some control over one’s identity.¹⁷⁵ However, control over one’s identity is something of a two-edged sword. Although it may express and protect autonomy,

¹⁷³ *Ibid.*, 226 et seq.

¹⁷⁴ Kant, *The Metaphysical Elements of Justice*, translated by John Ladd (Indianapolis: Bobbs-Merrill, 1965), Akad., 328.

¹⁷⁵ A useful listing of reasons for anonymity, more detailed than those of Nissenbaum, can be found in Gary Marx, “Identity and Anonymity: Some Conceptual Distinctions and Issues for Research”, in *Documenting Individual Identity: The Development of State Practices in the Modern World*, ed. J. Caplan and J. Torpey (Princeton, NJ: Princeton University Press, 2001): 326, available at: <http://web.mit.edu/gtmarx/www/identity.html>.

as with Gyges' ring it also constitutes an opportunity for harm to others. The control we have may enable us to present ourselves to others deceptively, as someone other than who we are, and this possibility is made easier with the increasing use that is being made of automated transactions. This is exacerbated in large and complex societies that have made themselves responsible for the disbursement of a large number of benefits and burdens (social security benefits, banking systems, tax collections, neighborhood protection, penalties, welfare, education and so forth). The most dramatic recent expression of this has been identity theft, now numbering in the millions each year. Protection against the stealing of identities requires increasing use of increasingly sophisticated identifiers, and the increasing use of such identifiers also increases the potential for privacy violations as well as harm done to one through them. The social challenge is to secure privacy at the same time as one secures appropriate identification.

Control over one's identity is made increasingly problematic by the development of digital technologies that seek to identify one by means of certain identifiers. Among other things, many digital technologies store, move and integrate data about people. If someone was to Google John Kleinig's name, that person would find online data about him (and perhaps others of that name) at various sites that might then be integrated to create a composite that could then be used to qualify or disqualify a co-author of this study for some kind of social response. It might provide enough information to enable someone to engage in identity theft; it could provide pertinent information to a prospective employer who might, because of some posting (say, on MySpace), decide not to offer him a job; it might enable him to be targeted for certain kinds of merchandise; or it might trigger an FBI (or other governmental) investigation into his politics or sexual proclivities. There are lots of possibilities – and that is just Google. However, in addition to Google there are lots of other repositories of digitalized information about John Kleinig to which someone is able to get access by paying a fee. Alternatively, those who do not wish to pay fees to get private or personal data about John Kleinig may seek to trick him into revealing it by means of phishing.

LexisNexis¹⁷⁶ and ChoicePoint¹⁷⁷ use sophisticated search software to gain access to and combine a great deal of data about John Kleinig, much of which might be considered personal and private. Even if the discrete bits of data are not private, the composite that can be produced as a result of its integration (like a jigsaw puzzle) might be seen by him as too revealing or even as distorting.¹⁷⁸

176 See: <http://global.lexisnexis.com/us>; but see also <http://www.lexisnexis.com/gov/>.

177 See: <http://www.choicepoint.com/index.html> and also: <http://www.epic.org/privacy/choicepoint/>.

178 For example, it so happens that there are (at least) two John Kleinigs of almost the same age and same national origins who, because of certain similarities, have often been confused.

The composite in question can be sold to financial institutions, marketers, the FBI or other interested parties. In the case of the FBI, it is used in the process of compiling travel watch lists.

Sometimes, of course, it is perfectly legitimate for others to ask for some private data from one. If one wants to make an online purchase, the seller has every reason to ask for one's credit card number.¹⁷⁹ Or, as a sign of good faith with respect to some online contribution one has made, one's name and address might need to be entered. Or one's social security number might need to be provided to determine one's eligibility for some service or benefit. Some way or other, certain more or less uniquely identifying information may need to be provided.

There are two important terms/concepts that crop up in this connection – those of identity and identification:

1. The notion of *identity* is already the topic of multiple and somewhat divergent philosophical inquiries, whether it is the “identity of indiscernibles”, “personal identity” or “identity politics”.¹⁸⁰ The kind of identity that we are concerned with here is different again, though not entirely unrelated. It is closer in meaning to “identity” as we use it in talking about “identity theft”,¹⁸¹ though even that constitutes a particular take on something that has become increasingly multi-layered and elusive.

Let us start with a simple and simplified account of identity. As a particular person, John Kleinig, a co-author of this study, might be said to have a specific identity or individuality. It is constituted by certain uniquely identifying characteristics that make him the particular person that he is.¹⁸² This core identity (what makes him “him”) is likely to have some invariant features (date and place of birth, names of parents etc.) but it need not be fixed; indeed, it will almost certainly change over time as he develops, matures and declines. Sometimes we want to say of ourselves that we are no longer the persons we were: we have a different identity now from that which we once had. We sometimes find it galling that people remember us as we were and do not see us as we are. And sometimes, perhaps, we would prefer people to remember us as we were rather than know us as we have become.

179 If we are antsy about even supposedly secure sites, companies will sometimes provide a phone option (though that, too, may be less secure than we think).

180 The *OED* distinguishes at least ten major meanings.

181 See: <http://www.ftc.gov/bcp/edu/microsites/idtheft/>.

182 Later we indicate how this apparently unique identity can also – because of the categories upon which it draws, such as ethnicity, religion and so forth – function to dis-identify one and to merge one with a group that is either privileged or discriminated against.

But even this notion of a core identity is fraught with complications.¹⁸³ At one level it seems to be constituted by a series of “objective” facts about one, allowing that some of those facts may change over time (or, perhaps better, need to be seen as historically mutable – e.g. was a pain in the neck when growing up and is now the salt of the earth, began as a girl but is now transgendered). But we also want to connect the idea of core identity with some notion of self-identity that links with the idea of one as an individual autonomous agent. Insofar as we connect these things there will be an irreducibly “subjective” aspect to one’s core identity. Our current sense is that there is an ongoing tension between these two elements within the idea of a core identity.

However, one’s current core identity may not be one’s only identity, for one may seek to create alternative identities for oneself.¹⁸⁴ For example, one may seek to pass oneself off as a wealthy *bon vivant* so that one can insinuate oneself into certain social circles. One may create an online identity for oneself so that one may enter certain chat rooms from which one would otherwise be excluded.¹⁸⁵ Less problematically, one may create an online identity for oneself simply for the purpose of experiencing an alternative identity, much as an actor may temporarily enter into the persona of a script character. Or one may go to live in a distant city so that one can create a new identity for oneself, either having tired of or wishing to escape an old one.

Even if one makes no conscious effort to do so, one may project a different identity to different people, and each may be – so far as it goes – “real”. To one’s students one may be an aging, white male philosopher; to one’s children one may be an easy touch and supportive presence; to one’s friends one may be funny and laidback; and to one’s bank manager one may be the guy who has trouble managing his finances. Some will have a better or fuller grasp than others of the “I” one really is; that is, they will have a better sense of the range of characteristics that constitute one’s identity. Although we are sometimes glad if people see us “in the round” (and not simply as the person who . . .), at

183 Even the very notion of a core identity is being called into question, and not just because Judith Butler says so. Has the notion of identity itself become a victim of self-creative postmodernism? Do we display our prejudices and/or unwillingness to let go of Linus’s rug? Is the elusive “I” non-existent? It may be, at least insofar as many time-worn – and seemingly fixed – categories (such as gender, religion, and nationality) become less permanent (or exclusive).

184 Sometimes, as we know from well-researched biographies, even what are seen as the core identities of individuals are radically reconstructed. Birth names, dates and places are reconfigured so that what their subjects present as their true selves are at variance with important facts about them. In some cases, it would appear that even the persons themselves have come to identify with the identity that they have now claimed for themselves.

185 Some of these identities may be reflective of or consonant with our wider identity. Others may not. The pedophile who pretends to be a teenager looking for sex is expressing, albeit deceptively, his identity as a pedophile, whereas the FBI agent who enters the same chat room as a 14-year-old girl is acting deceptively but (we presume) not expressing his identity as a sexually hungry person. Of course, to identify someone as a pedophile may be to impose on that person an identity with more associations than ought to be the case (e.g. predator, rather than desperately lonely).

other times we may wish to conceal aspects of our identity from others. Our identities may contain a variety of contradictory characteristics, the result of our (or others') attempts to create alternative identities for alternative purposes.

Thus we may be ambivalent about our identities, should it happen to be the case that some aspect of our identity will benefit or burden us in ways that we do not want. One's identity as an "Astor" may (to one's embarrassment) privilege one in the job market as one will be seen to be "connected" to certain social circles; whereas one's identity as "Robert Zimmerman" may be thought to prejudice one's chances in certain WASPy circles, leading one to change one's name to "Bob Dylan". On the other hand, there may be contexts in which we wish to assert our identity (e.g. as Australian or American) rather than conceal it. Our identities do not exist in a vacuum, whether we "own" them or are simply ascribed them. Some of our identifying characteristics tend to pick us out uniquely, others link us to groups (ethnic, national, religious, political and so on). Problematically, some of the factors that we think of as contributing to our uniqueness (because they narrow the field), may also serve to link us to others, thus including us – for some purposes – in socially significant groups (e.g. Jewish, gay).

We can crudely link identity in the sense(s) we have been outlining with identity in other senses as follows. In the philosophical literature, personal identity is usually taken to refer to the persistence of a particular individual over time¹⁸⁶; that is, the John Kleinig who is co-authoring this study is the same person who went to Nedlands Primary School in the 1940s. However, the personal identity issue focuses on continuity and persistence, not on what might be called one's identity at age five and one's identity at age sixty-five. In the latter sense, one is a different person now from the person one was then. The latter (change in identity over time) is sometimes used to deny that there is personal identity in the former sense.¹⁸⁷ The debate may have normative importance. Suppose John Kleinig at age ten broke into a neighbor's house and stole money that he used to

186 In the sociological and psychological literature, "personal identity" tends to be understood differently. For example, Erving Goffman understands by personal identity what we initially characterized as a person's identity: "Personal identity, then, has to do with the assumption that the individual can be differentiated from all others and that around this means of differentiation a single continuous record of social facts can be attached, entangled, like fairy floss, becoming then the sticky substance to which all other biographical facts can be attached", *Stigma: Notes on the Management of Spoiled Identity* (1963; Englewood Cliffs, NJ: Prentice Hall, 1968), 74–75. Susan Hekman states: "Each of us possesses a personal identity that is constituted by an array of influences and experiences that form us as a unique person. These forces are both public, the hegemonic discourses that define our social life, and individual, the character and situation of those who care for us as infants, and through whom the public concepts are transmitted to us. The result of these influences is . . . our core self. But in addition to possessing a personal identity, each of us is subsumed under an array of public identities: woman/man; white/nonwhite; middle class/working class, and so forth", *Private Selves, Public Identities, Reconsidering Identity Politics* (University Park, PA: Penn State University Press, 2004), 7.

187 See, in particular, Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984), esp. 326; and also L. Fields, "Parfit on Personal Identity and Desert", *Philosophical Quarterly* 37 (1987): 432–41.

purchase chemicals and equipment for his chemistry experiments. In his later teens he underwent a major change of outlook and subsequently became an exemplary citizen. Forty years later, he meets the neighbor again, and somehow the matter of the theft arises. Can fifty-year-old John be held responsible for what ten-year-old John did? Certainly the fifty-year-old John does not have the same identity as the ten-year-old John; he's now the kind of person who would never steal from others. But can he hide behind that change of identity to conceal his continuity with the ten-year-old who burgled the neighbor? Can he deny responsibility for what was done when he was ten? *Pace Parfit*, we think not. There does not seem to be anything inappropriate about his apologizing for what he did when he was ten.

In the case of identity politics, what we are talking about is political decision making designed to foster the interests of a particular group on the basis of some shared feature – often one feature, such as gender or race – that is also often included as part of a person's identity. In such cases, the feature in question, now being advanced as a reason for special recognition, was perhaps once exploited as a reason for invidious discrimination.

So far we have been talking about (more or less) self-ascribed identities – how we characterize ourselves as the particular persons we are (presumably on the basis of features that also hold true of us). Identities are also ascribed to us by others. Indeed, identities are first ascribed to us by others and it is only later that we are likely to claim an identity as our own. That later, self-ascribed identity may include (mostly) elements of what has been ascribed to us by others, or it may involve a repudiation of some or much of that other, other-ascribed identity. The co-author of this study was an Australian by birth, baptized as John Kleinig in a Methodist church and raised in a right-wing family. Each and all of these elements of his identity he may later wish to repudiate – not that they were never part of his identity but that they may come to have no significance for the person who forty years later is an American citizen called Roscoe Mann who worships in a working-class Catholic church. As far as personal identity is concerned, Roscoe Mann is continuous with John Kleinig, and if it turns out that John Kleinig went to the US to reconstitute himself as Roscoe Mann after he murdered someone in a robbery gone bad, he will not be able to wriggle out of it if he is found out fifty years later by claiming that he is not John Kleinig etc. but Roscoe Mann etc.¹⁸⁸

The identities that are ascribed to us are much more varied and complex than the ones that we have just alluded to. Governments and other organizations have multitudinous purposes in ascribing particular identities to us and they

188 The co-author of this study hastens to add that a number of the identifying factors that are being referred to here are fictional.

may do so in ways that we may wish to disavow.¹⁸⁹ Consider something that tends to be (relatively) anonymous – a census. By filling in a census form we will check a variety of boxes (number of people in household, zip code, ethnic identity (possibly a limited number of choices), income, etc.), information that will be aggregated and become the basis for distributions of federal funds – to age groups, communities etc. However, the identities that we may thereby acquire, albeit only for aggregative purposes, may not be identities that we want to “own”. If one of John Kleinig’s parents was German and the other Sorbian, he may be proud of his ethnic heritage, but the census will not allow him the option of identifying with that, even though it gives others the option of identifying with their heritage.¹⁹⁰ If one and one’s family are (normally) resident in Harlem, but at the time of the census one is incarcerated in an upstate New York prison, one will be counted (for census purposes and the distribution of certain federal funds) as a resident of the county in which the prison is located.¹⁹¹ In the 1930s many German Jews thought of themselves as more German than Jewish, but governmental policy prioritized (and denigrated) their Jewishness even if, as had occurred in a fair number of cases, they had converted.

For purposes of taxation, welfare, health benefits and salary, one’s identity (in the US) is largely structured around one’s social security number, supposedly a uniquely referring identifying number. It may serve to verify one’s identity but will not in other ways say very much about one’s identity (and because of that it may enable one’s identity to be stolen more easily). Other factors about one – such as one’s belonging to an underrepresented (for certain purposes) group (as determined by others) may make one eligible for certain opportunities that one may or may not otherwise have had and whether or not one wishes to have them.¹⁹² One’s passport does not include a social security number, even though an increasingly nonreplicable (but also not private) photograph is central. For other purposes, a fingerprint or other biometric data may be used. What we should note is the potential for divergence between our identity as it is construed by governmental agencies and our identity as we construe it for ourselves. It is unlikely to figure in a government account of one’s identity that one has a morbid fear of spiders or elevators, even if those fears may tend to dominate one’s everyday behavior.

189 We focus here on identities that may be ascribed to us for various governmental purposes. However, they may be ascribed to us for various marketing purposes as well – as people fitting various lifestyle or age classifications.

190 Intermarriage of various kinds creates havoc with the options provided by censuses and other registers. See Marx, “Identity and Anonymity: Some Conceptual Distinctions and Issues for Research”.

191 There are some – as yet unsuccessful – moves afoot to rectify this. The poor communities from which prisoners ordinarily come are further deprived of benefits and the communities in which the prisons are built are glad of the extra income. They also tend to have greater political clout.

192 Consider the offense felt in the 1990s by some African-American sergeants in the NYPD as those they supervised speculated about whether they were “affirmative action sergeants”.

We shall return to issues of identity, but first we go to the other term of our distinction.

2. *Identification* is what we do to establish an identity, and we do this by means of identifiers. Thus one may be identified as a particular person by one's name (though not uniquely so), one's parentage (though not uniquely so), one's height, weight and skin color (though not uniquely so), one's ethnicity (though not uniquely so), one's profession (though not uniquely so), one's address (though not uniquely so) the websites one visits (though not uniquely so) and so on, though it may well be the case that there is no other person who answers to all these identifying characteristics. Different identifiers may be used for different purposes. One's address, for example, may be used to locate one (for purposes of interrogation), to classify one (as middle class) or to render one as eligible for certain benefits/burdens.¹⁹³ One's name may be used to classify one (e.g. German lineage, gender, to sort one in a process) and so on. A biometric identifier (such as fingerprint, voiceprint or DNA) may identify one for purposes of immigration eligibility, criminal guilt or access to a restricted site.

In digital contexts, identities are fixed through a process of identification in which various identifiers are employed or brought together. A critical question will concern the match between a digitally created identity and the (core or self) identity of the person it is intended to "capture". Does the identity of the John Kleinig who is digitally identified match the John Kleinig who is co-authoring this study? Although there has always been an issue about the match between some public or official identity and the identity of the person it refers to, it was not until the development of digital tools that this became a significant issue.

One's digitally stored or available identity may be accurate so far as it goes (though it may not go far enough), or it may contain inaccuracies. Insofar as that identity may then be used to make various decisions that bear on one's interests (e.g. one's ability to take out a loan or fly on an aircraft, or one's capacity to be electronically surveilled), it is important that it should be adequate to the purposes to which it is put.

Not only is the accuracy of an ascribed identity for particular purposes important, it is also important to be able to correct misidentifications. One of the huge problems encountered in the so-called "war on terrorism" has been the misidentification of those who are deemed to pose a terrorist threat and the enormous difficulty such people have had in correcting such misidentifications.

¹⁹³ Some identifiers will usually contribute to one's being uniquely identified (such as name, address, and SS#), whereas others may be of a comparative nature, enabling one to be classified (e.g. using income range, IQ or SAT scores for marketing purposes, welfare eligibility, college admission and so forth).

Creating a set of identifiers that accurately and sufficiently capture or secure a person's identity is not an easy task.¹⁹⁴ Most names are not unique and even a name that is unique may be spelled in different ways, sometimes arising from simple typos and sometimes because of digital constraints.¹⁹⁵ Even a combination of name and address is not likely to remain stable. A more reliable identifier may be some code, such as a social security or employee number, though, like a name, it may not carry a lot of information with it, and if it does link to other information it may not always be accurate. It may be mined, stolen or misused, as may also be the case with passwords and PINs, which are used to protect a person from some invasion of his or her identity.¹⁹⁶ Such devices are protective rather than descriptive – and, of course, there may be some inaccuracies in what is protected. Various tokens (such as smart cards, drivers licenses, birth certificates and passports) may also serve to identify a person to others and secure that person against another's misuse of his or her identity. Currently, no widely used set of identifiers is foolproof, though some emerging biometric techniques such as retinal identification¹⁹⁷ may be very difficult to steal or forge.

Arguments for privacy and anonymity center on the idea of autonomous agency, both constitutively and instrumentally. Privacy and anonymity can assure our identity as something that we can control, but, insofar as we wish to secure the viability of various social activities and participate in them (activities that themselves may be expressive of our identities), we must enable our identity to be verified. That will be achieved via various forms of identification. Gary Marx suggests ten normative uses for identification. It may be used to:

1. assist accountability;
2. determine reputation;
3. pay dues or receive just deserts;
4. assist efficiency and improve service;
5. determine bureaucratic eligibility;
6. guarantee transactions distanced or mediated by time/space;
7. assist research;
8. protect health and consumers;

194 We may control some identifiers (even if socially adopted) ourselves. For example, we may choose to get a tattoo that identifies us as a member of a particular gang.

195 Roger Clarke notes some of the ways in which a name can go wrong in "Human Identification in Information Systems: Management Challenges and Public Policy Issues", *Information Technology & People*, 7 (1994): 6–37 (See: <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html>).

196 Vulnerability is exploited through practices such as phishing (see: <http://www.antiphishing.org>) or the attachment of trojans (see: [http://en.wikipedia.org/wiki/Trojan_horse_\(computing\)](http://en.wikipedia.org/wiki/Trojan_horse_(computing))) to emails or internet files.

197 See: <http://www.cse.msu.edu/~cse891/Sect601/textbook/6.pdf>.

9. assist relationship building; and
10. assist social orientation.

(Marx's paper was written before 9/11. No doubt he would have expanded one of the above categories or emphasized a security use of identifiers had he written it later.)

Though these social purposes may justify the development and implementation of increasingly sophisticated – because of failures or subversions – forms of identification, they bring in their train a series of normatively charged questions, lest these forms of identification jeopardize the identities of those whom they are intended to identify:

1. *Questions concerning necessity.* Are the identifying materials asked for really necessary? Why does *Y* need one's phone number when he/she has one's email address? Does *Y* really need one's social security number for this?
2. *Questions of reliability.* How good are the various forms of identification at doing the tasks for which they were intended? What are the problems of false positives and false negatives?¹⁹⁸ Are particular identifiers (religion, ethnicity, gender etc.) as relevant as they might once have been?
3. *Questions concerning rectification.* If the identifiers fail, will procedures be in place for setting records straight? Will they be easily accessible and responsive? Will there be some form of recompense for those falsely excluded from benefits or subjected to burdens?
4. *Questions concerning enforcement.* If matters go awry, what procedures are in place to *ensure* that rectificatory or punitive strategies will actually work?
5. *Questions concerning updating.* Will mutable identifiers have a mandated life? Will information be eliminated or reconfirmed after a certain period? How long?
6. *Questions concerning use.* Will use of the identifiers be restricted to the purposes for which they were originally developed or, if used for other purposes, will these be known (how?) and consented to (how?)? Will information that is given be sold or made available to others? If made available to others, will there be constraints on use? Will this information be aggregated with information given for other purposes? If so, to what further uses might this consolidated information be put? Does one have any control over such uses – or the imputations involved in such uses?¹⁹⁹

198 Gary Marx notes the number of communications he receives that are addressed to Georg Simmel, Emile Durkheim and Karl Marx, efforts he has made to deflect the intentions of marketers.

199 Consider how one's zip code could include or exclude one with respect to a range of benefits or burdens – higher real estate values, marketing targeting etc.

Aligning the values

We have endeavored to provide a broad articulation of the values at stake in the development of new technologies. We have sought to provide an account that will have traction for a wide spectrum of liberal democratic viewpoints, even though the policy traditions of different liberal polities have diverged considerably. Is it possible that out of this analysis some rapprochement may be achieved? We have some hope that this can be so. Although the current divergences track different strands and roots within the liberal tradition, they are more reflective of political responses to historical circumstances than of deep and intractable normative divisions.

At an earlier point in this study (Chapter III), we drew attention to James Q. Whitman's paper, "The Two Western Cultures of Privacy: Dignity versus Liberty".²⁰⁰ As we saw, his history of the development of privacy in Europe and in the US nicely illustrates their divergence from a common history (prior to US Independence) as well as the possibilities for rapprochement.

Whitman contended that European conceptions of privacy view it as an aspect of dignity, whereas the US conception of privacy tends to see it as an aspect of liberty. But dignity is closely connected to liberty, both in the latter's sense as autonomy as well as in its social sense of political liberty. There is a well-trodden path from political liberty to personal autonomy (and back) and from the acknowledgment of human dignity to the recognition of autonomy and support for political liberty. It should not be impossible to develop an account of privacy (especially) that will reunite or at least bring into fruitful dialogue the seemingly divergent conceptions that have developed in the EU and the US. What will then be needed is the political will to bring them into more practical alignment. Of course, this would by no means constitute the completion of the larger task of bringing all or most liberal democracies into such practical alignment. In the case of some liberal democracies, such as Australia, if alignment between the US and the EU were to be achieved, then alignment with Australia would be all but complete. However, in the case of others such as India, there would likely be some considerable way to go.

We believe that some motivation for a more fruitful dialogue and the possibility for some rapprochement might be fostered by recognizing the ways in which specifically US values have been exploited. Deeply embedded in US culture is a concern about governmental overreaching that goes back to the situation that prompted the Declaration of Independence – the British exploitation of the colonies and the eventual refusal of those colonies to accept this. A great

200 James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty", *Yale Law Journal* 113 (2004).

deal of US culture since then – including the Constitutional Bill of Rights – can be explained as a project to curb federal (and later state) excess. “Liberty” is construed primarily in terms of freedom from certain governmental constraints. A “free market” – commercial liberty – has been seen as one of the guarantors of this. One consequence of this stance – which reached its apogee/nadir in *Lochner*²⁰¹ – has been the failure to see the extent to which prized individual liberty (and the autonomy which it fostered) could be subverted by institutional structures other than governmental ones. Because they have seen commercial freedom as a bulwark against governmental oppression, American citizens have been remarkably sanguine about the collection of their personal information by commercial companies – such as ChoicePoint and LexisNexis – believing this to be an expression of legitimate social freedom (liberty). What has not been appreciated is the extent to which – especially since 9/11 – governmental agencies have sought to avail themselves of these commercially collected personal data. What Americans have been loath to permit their government to collect, their government has purchased or otherwise obtained from private/commercial sources. Indeed, government agencies (especially the FBI) have been the largest customers of some personal data-gathering agencies.²⁰²

We believe that, were this commercial/governmental nexus better appreciated, there would be a serious concern about existing privacy arrangements and a much greater sympathy for the privacy arrangements that exist in EU countries. In the latter, no distinction is made between governmentally and commercially gathered personal data. Personal data are viewed as private, no matter who collects them.

It is true that because the events of 9/11 occurred on US soil there have been greater concerns about terrorism in the US than in European countries (though we should not forget Madrid, London and Glasgow). But this should impact only secondary issues, such as the length of time that legitimately gathered personal data can be retained or with whom such data can be shared. It should not have manifested itself in a different conception of what constitutes appropriately private data.

In general, it appears to us that the countries of the EU have a more rigorous and defensible conception of privacy than the prevailing one in the US (even if, as we also believe, they do not always manage to live up to their own expectations). At the same time it appears to us that the dominant conception of privacy in the US trades on a misunderstanding of the independence of government and commerce, and that were American citizens to be more aware of the ways in which their federal government obtains backdoor access to personal data there would be a significant rethinking of the status quo.

201 *Lochner v. New York*, 198 US 45 (1905).

202 This is developed at some length in Chapter VII.

We do not want to suggest that this will resolve all differences between the US and EU regarding the privacy of personal data. However, if the foregoing enhanced awareness were to be realized we believe that it would move us in the direction of some form of liberal rapprochement. To reaffirm Whitman's judgment: "There is no logical inconsistency in pursuing both forms of privacy protection: It is perfectly possible to advocate both privacy against the state and privacy against non-state information gatherers to argue that protecting privacy means both safeguarding the presentation of self, and inhibiting the investigative and regulatory excesses of the state."