A Communitarian Perspective on Privacy

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Internet Privacy and the State1 by Paul Schwartz raises many issues on many levels, ranging from questions of rhetoric or law to matters of sociology of privacy or communitarian philosophy. In this commentary, however, I will focus on a few specific areas, as it is impossible to do justice to all of his arguments, nor do I have the technical legal background to do so.

I. INFORMATIONAL PRIVACY VERSUS PRIVATE CHOICE

One of the great virtues of Schwartz’s paper is that it focuses on informational privacy and practically disregards decisional privacy. This move is essential if we are to overcome the major intellectual, legal, and moral confusion introduced by Samuel Warren and Louis Brandeis in their very influential article The Right of Privacy2 and by the Supreme Court’s reproductive right cases, which created a constitutional right to privacy. The confusion arises because privacy to most of us (and in numerous other cultures that have such a concept3) means exemption from scrutiny—the ability to surround one’s actions and thoughts with a veil. This concept is called “informational privacy.” The Supreme Court, however, has dealt with some quite different, albeit not unrelated issues, ruling on cases dealing with exemption from control by the State, resulting in a constitutional right of freedom to choose.

The distinction is highlighted by the very behavior at issue in the reproductive choice cases. The question is not whether decisions concerning the use of contraception or abortion should be made public. Indeed, those who find that certain behavior violates their values would be even more perturbed if such conduct were not carried out behind closed doors. What is at stake in these cases is who controls the decision—the persons in=

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I realize that there is disagreement over whether *Griswold v. Connecticut* deals with privacy as an issue of scrutiny or one of private choice. Several eminent constitutional scholars take the position that it deals with transparency. Others, in contrast, see it as a matter of control.

True, Supreme Court Justice William O. Douglas's argument in *Griswold* was not that the Court's ban was unconstitutional because it sought to control the couple's actions, but rather that surveillance procedures necessary to establish whether or not contraception is used would be unacceptably intrusive. Note, however, that the result of the Court's ruling was not to move behavior concerning contraception from public view to private spaces; the behavior was not public to begin with! What the ruling did change was the designation of behavior the State could control to behavior that was from then on a matter for individual decision. Most importantly, there was no controversy that the subsequent reproductive choice cases, including *Roe v. Wade*, dealt with control and not scrutiny issues (what Schwartz and others call informational privacy).

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

As a means of further illustration, consider buying items in a supermarket a matter of personal choice, not a State-controlled action. It is a private act, but cannot be said to imply privacy because it is conducted in public. Generally, the advocates of the private sector and the opponents of government interventions are concerned with who controls the act rather than whether the action is visible (or audible). In contrast, preparing a tax

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4. 381 U.S. 479 (1965).
6. Louis Henkin, for instance, notes in reference to *Griswold* that "the issue was whether the state could bar the use of contraceptives not whether it could intrude into the bedroom for evidence of their use." Louis Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1424 (1974).
return is legitimately carried out in privacy, but is not a matter over which one has a choice; it is required by the State, and in this sense is a public act typically carried out under the condition of privacy.

One might argue that while informational privacy and private choice are clearly distinct concepts, the second presumes the first—a state that seeks to control certain kinds of behavior must be able to scrutinize, and thus cannot allow such behavior to take place in privacy. Yet this is not the case. Precisely in order to respect the privacy of certain acts, while retaining the ability to control them, the State often waits until publicly visible consequences of behavior that took place in private are evident before taking any action. Thus, the State typically acts to rescue a child from abuse only after some signs of ill treatment are noticed or a complaint is filed with the authorities, rather than scanning homes preemptively to ensure that no child abuse takes place. The same holds true for domestic abuse and use of controlled substances.

Additionally, there are many important matters in which the law calls for public scrutiny, but not state control. Examples include the legal requirement that many meetings of elected officials, corporate stockholders, and others be held in open session, as well as the numerous disclosure requirements such as certain data in annual reports of publicly held corporations, or personal financial details that candidates for certain public offices must provide.\(^\text{11}\)

In short, the Supreme Court’s expansion of the right to privacy in the reproductive rights cases conflates notions of scrutiny and control, as well as privacy and private choice.\(^\text{12}\)

I should further note that liberals (in the political theory sense of the term) often draw a sharp distinction between a private and public realm. In the private realm, people are free to choose their own definition of the good without a greater accountability, whereas a public realm is to be kept thin and is an area in which individuals may work out shared arrangements, but do not hold shared definitions of the good. However, this distinction does not withstand elementary observations, as has been pointed out by both

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11. While some of the disclosures are required to enable governmental controls, audits for instance, others presume that the very exposure to the “sunshine” of the public and the press will suffice to prevent anti-social conduct, thereby precluding the need for State-control.

12. I do not go into the many issues raised here due to the fact that this distinction is much more problematic and blurred than is often assumed. Alan Wolfe also addresses the slippery nature of the distinction between the public and the private. See Alan Wolfe, Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary, in Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy 182 (Jeff Weintraub & Krishan Kumar eds., 1997); see also Jeff Weintraub, The Theory and Politics of the Public/Private Distinction, in Public and Private in Thought and Practice, supra at 1.

Using privacy as an all-encompassing concept often results in confusion and conceptual vagueness, such as one scholar’s attempt to refer to freedom from scrutiny as distinct from freedom from control with the circumlocution “private right of privacy.” Henkin, supra note 6, at 1419.
feminist and communitarian scholars. Informational privacy is characterized by trust; society deems that a person will not be under surveillance, but society does not forego its right to act, for example, in cases where a person uses his or her privacy to molest a child or to make bombs.

While Schwartz does not explicitly deal with these issues, it is to his credit that he liberates his arguments from the confusion the Supreme Court has created, and focuses, as one should, on informational privacy.

II. THE STATE AS A SAVIOR OF PRIVACY

Schwartz assigns the State a major role as a protector of privacy. A main thrust of his article is to identify and specify ways the State may enhance privacy. These include:

(1) discouraging a default of maximum information disclosure, and (2) encouraging a market for privacy enhancing technology.

... (3) reducing information asymmetries, and (4) seeking ways to overcome collective action problems. 13

Schwartz simply sidesteps the resulting dilemma, that his conception calls for relying on what has been and often is still considered the privacy paradox: the fox is entrusted to protect the chicken. He seeks to rely on Big Brother to enhance privacy in the cyber-age, when the government is traditionally considered a threat to privacy and is the party against which the constitutional right to privacy has been crafted.

There is strong evidence to support Schwartz's implicit position, namely that the source of contemporary threats to privacy in Western societies, especially in the United States (which is much more deeply entrenched in cyberspace than other societies), are corporations which either specialize in selling personal information or practice it as a major sideline. (In my terms, in the USA these days, the main threat to privacy is from Big Bucks, not Big Brother, and we shall need to rely on the government to protect us from Big Bucks, as the new federal privacy regulations show.) 14

For example, one Web site advertises software that can purportedly "Find Out Anything About Anyone On The Net," including anyone's criminal record, driving or credit history. 15 Another such Web corporation, Discreet Data Search, offers to find unlisted phone numbers, information on ex-spouses and other such data. 16

This point is further supported by an examination of the lineup of those who oppose new measures seeking to protect privacy in general and medical privacy in particular. Such opposition is led by major industry groups such as the Health Benefits Coalition, which has financed an advertising and lobbying campaign to stop the patient rights bill "dead in its tracks"; and the Healthcare Leadership Council, comprising approximately fifty large pharmaceutical companies, trade groups, and managed care plans. "The [Health Insurance Association of America], along with the U.S. Chamber of Commerce, the Blue Cross Blue Shield Association, and others, pledged to oppose any effort to legislate patient rights." And "the $1 billion-a-year data transaction industry, including companies such as IBM, MasterCard and Electronic Data Systems...fear that proposed new forms of data encryption would needlessly complicate their work." As a result, like many other privacy-protecting acts before it, a proposed Patients' Bill of Rights was not enacted in 1998. (This may change if Congress permits the privacy regulations the Clinton administration posted for commentary in the end of 1999 to take effect in the year 2000, but this is by no means a foregone conclusion.)

Still, leading libertarians persist in their focus on the government as the great enemy to individual privacy. Writing about this issue in the libertarian publication Reason, Brian Taylor states, "[w]hile private-sector surveillance is commonplace and widely accepted... the trend of placing cameras in public areas for use by law enforcement is a new and disconcerting variation on the established practice." Solveig Singleton stakes out this anachronistic position more starkly, in a Cato Institute report:

We have no good reason to create new privacy rights. Most private-sector firms that collect information about consumers do so only in order to sell more merchandise. That hardly constitutes a sinister motive. There is little reason to fear the growth of private-sector databases. What we should fear is the growth of government databases.

21. Industry objections to the Patients' Bill of Rights included both privacy—and non-privacy—related concerns.
Without seeming to realize the paradox of characterizing the government as the enemy of privacy, other privacy advocates call for new federal legislation to protect privacy more effectively.24 Schwartz simply assumes that the State can be called upon to protect privacy. It is not an assumption many other privacy advocates openly share.

III. IT TAKES A VILLAGE TO PREVENT AN INDECENT ACT

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

The key to understanding this notion lies in the importance of the “third realm,”25 of which communitarians are particularly mindful. This realm is neither the state nor the market (or individual choices), but rather the community, which relies on the subtle social fostering of pro-social conduct by such means as communal recognition, approbation, and censure. These processes require the ability to scrutinize some behavior by friends, neighbors, and members of one’s voluntary associations—not by police or official agents.26

26. In a similar discussion, Steven Nock frames the issue in terms of reputation:
Reputation, I will argue, is a necessary and basic component of the trust that lies at the heart of social order. To establish and maintain reputations in the face of privacy, social mechanisms of surveillance have been elaborated or developed. In particular, various forms of credentials and modern ordeals produce reputations that are widely accessible, impersonal, and portable from one location to another. A society of strangers is one of immense personal privacy. Surveillance is the cost of that privacy.

My greatest differences with Schwartz's positions stem from his discussion of communitarian viewpoints. He argues that one tenet that all communitarians share is the notion that "the good society is a self-governing one based on deliberative democracy."27 I beg to differ. As I showed in some detail in The New Golden Rule,28 the concept of deliberative democracy is based on procedural notions concerning discussions of fact and the application of reason.29 Schwartz refers to those as civic forums or exchanges.30 Communities, in contrast, draw mainly on substantive moral dialogues, in which the values of the members are engaged and persuasion occurs, leading to a new or recast shared definition of the good.

Schwartz argues that, historically, communities have often oppressed their members rather than served to curb antisocial behavior.31 This is true, but no longer the case in free societies. These days, communities are often much too weak to oppress people, and people—who move on average once every five years—can choose communities they find compatible. Of course there are exceptions, but they do not make the rule.

Schwartz quotes several law and economics scholars who say that communities' social norms are inefficient.32 First, the main task of social norms is to define what is morally right and wrong. Thus, as I see it, child abuse violates the norms of most communities, whether or not it is efficient. Second, if an "inefficient" social norm exacts higher costs than any other norm, it might be a burden but it does not follow at all that efficiency is the only thing that matters to people. People will light candles during various rituals and holidays even if it is safer and less costly to turn on a light. Muslims will fast all day long for thirty days during Ramadan although it slows down work and commerce, and Jews refuse water on Yom Kippur even when it is hot like hell.

I find Schwartz's argument that communities lead people to falsify their preferences most puzzling. As evidence, he provides the disclosure about Clinton in the Kenneth Starr report.33 Whatever one thinks about it, Starr, Clinton, Congress, and the millions of Americans and foreigners who read the report do not make a community. On the contrary, people obviously find it much easier to falsify their preferences when faced with strangers (especially on the Internet) than with those they know, with members of the community.

Furthermore, Schwartz's argument that cyberspace is self-governing, and hence meets the communitarian criteria, is twice mistaken. First, cy-
berspace is rapidly being normalized and subject to extensive government regulations, for instance in matters regarding intellectual property, child abuse, violations of privacy, (especially medical privacy) and much more. Second, Internet chat rooms often provide no interpersonal affective bonds, an essential basis of community, and little opportunity for moral dialogues. In short, while there can be virtual communities, most Internet forums are not.

Returning to the question of how communities self-govern, one finds an answer by examining crime. Criminal acts are best prevented when a community abhors the behavior that is considered criminal by law makers; conversely, law enforcement works poorly when not supported by the community's moral and informal enforcement systems.\textsuperscript{34} For instance, abuse of controlled substances and alcohol is very rare in religious communities that object to such behavior, such as in Mormon, Hasidic Jewish, Amish, and black Moslem communities, and is relatively rare in much of the Bible Belt and segments of small-town America.\textsuperscript{35} The reason is not simply that internalized values lead individuals to avoid the behaviors in question; pro-social values also find much support in their communities, support that entails a measure of scrutiny by others. The extent to which many professionals, such as physicians and lawyers, conform to their ethical codes is also largely determined by the values their particular community upholds, and mainly governed by informal enforcement mechanisms requiring social scrutiny but reducing need for government control. The same holds true for honor codes among students in military academies and select colleges.

In fact, continual efforts by groups such as the ACLU to extend the sphere of privacy paradoxically force increases in government interventions. A sterling example is encryption. As the ACLU and other individualist groups blocked the introduction of public key recovery (which enables the government to decode encrypted messages if proper court authorization is accorded), the government was pushed to use more invasive procedures for the same kind of criminal investigations, for instance planting microphones in the homes of suspects.\textsuperscript{36}


\textsuperscript{36} William Donahue effectively highlights these self defeating tendencies:

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

In short, if we hold the values involved and the level of adherence we seek constant, publicness reduces the need for public control, while excessive privacy often necessitates State-imposed limits on private choices. Admittedly, each community and society determines the scope and content of their particular formulations of the good, normative claims made, and the intensity with which they foster compliance. However, once these matters are agreed upon, higher levels of communal scrutiny facilitate compliance better than higher levels of public control, and often facilitate much lower levels of official oversight.

IV. CONCLUSION

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

37. See Ernest van den Haag, On Privacy, in PRIVACY 149 (J. Roland Pennock & John W. Chapman, eds., 1971) ("The protection of everybody's life, property, and convenience (including privacy itself), and the enforcement of laws generally, requires some limitation of any right in favor of other rights and of the rights of others.").

38. On the question of how communities make such formulations, see ETZIONI, NEW GOLDEN RULE, supra note 10, at 85-159 (asserting that social and public decision-making is substantive and not merely procedural); see also MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF PUBLIC PHILOSOPHY (1996).