

DANIEL J. SOLOVE



**Nothing
to Hide**

**The False
Tradeoff between
Privacy and
Security**

Why Privacy Isn't Merely an Individual Right

Suppose the government believes that you might be smuggling weapons. It wants to track your movements. You have an Apple iPhone, and the government can have AT&T pinpoint where you are at nearly all times (assuming the phone is turned on). A cell phone can work somewhat like a global positioning system (GPS) device. The cell phone towers must be able to locate your cell phone, and they do it through a process called “triangulation.” Three cell phone towers stay connected to your phone at all times to determine precisely where you are.

On the security side of the scale, the government's interest in stopping the smuggling of weapons is very important: Dangerous unauthorized weapons can threaten all of society, and stopping them makes us all safer. On the privacy side of the scale, what gets weighed is your individual interest in the privacy of your whereabouts. So the balance is between the safety of society versus one person's privacy—and the likely outcome is that the security side will win.

In this chapter, I argue that the balance shouldn't just focus on *your* privacy—it should weigh privacy of location for everybody in society. **Privacy should be understood as a societal value, not just an individual one.**

Privacy as a Societal Value

“Privacy is inherently personal. The right to privacy recognizes the sovereignty of the *individual*.”¹ These are the words of one court, but they reflect the views of many in and out of the courtroom. For example, the legal scholar Thomas Emerson states that privacy “is based upon premises of individualism, that the society exists to promote the worth and the dignity of the individual. . . . The right of privacy . . . is essentially the right not to participate in the collective life—the right to shut out the community.”²

Traditionally, rights have often been understood as protecting the individual against the incursion of society based on respect for the individual’s autonomy. Many theories of privacy’s value construe privacy in this manner. For example, Charles Fried argues that privacy is one of the “basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons. . . . In this sense, the view is Kantian; it requires recognition of persons as ends, and forbids the overriding of their most fundamental interests for the purpose of maximizing the happiness or welfare of all.”³

The law often sees privacy rights as individual rights. The U.S. Supreme Court has held that Fourth Amendment rights belong only to the person whom the government is searching. For example, suppose you put some things in your friend’s bag. The police illegally search it and find your things. The police want to use these things to prosecute you. Does the Fourth Amendment protect you?

No. According to the Supreme Court, you can’t challenge this search—even though it was improper—because it wasn’t your bag.⁴ The reasoning is that your rights weren’t violated. The search was of your friend, and it involved rights belonging to your friend. The Supreme Court sees rights as individual possessions, and since your friend’s rights don’t belong to you, you’re out of luck.

Communitarian scholars launch a formidable critique of tradi-

Not Merely an Individual Right

tional accounts of individual rights. The social theorist Amitai Etzioni, for example, contends that privacy is “a *societal license* that exempts a category of acts (including thoughts and emotions) from communal, public, and governmental scrutiny.” For Etzioni, many theories of privacy treat it as sacrosanct, even when it conflicts with the common good. According to Etzioni, “privacy is not an absolute value and does not trump all other rights or concerns for the common good.” He goes on to demonstrate how privacy interferes with greater social interests and contends that privacy often, though not always, should lose out in the balance.⁵

Etzioni is right to critique those who argue that privacy is an individual right that should trump social interests. The problem, however, is that utilitarian balancing between individual rights and the common good rarely favors individual rights—unless the interest advanced on the side of the common good is trivial. Society will generally win when its interests are balanced against those of the individual.

Etzioni, however, views individual rights as being in tension with society. The same dichotomy between individual and society that pervades liberal theories of individual rights also pervades Etzioni’s communitarianism. Etzioni views the task of communitarians as “balanc[ing] individual rights with social responsibilities, and individuality with community.”⁶ Such a view assumes that individual and societal interests are conflicting.

In contrast, the philosopher John Dewey proposed an alternative theory about the relationship between individual and society. For Dewey, the good of individual and the good of society are often interrelated rather than antagonistic: “We cannot think of ourselves save as to some extent *social* beings. Hence we cannot separate the idea of ourselves and our own good from our idea of others and of their good.”⁷ Dewey contended that the value of protecting individual rights emerges from their contribution to society. In other words, indi-

vidual rights are not trumps but are protections by society from its intrusiveness. Society makes space for the individual because of the social benefits this space provides. Therefore, Dewey argues, rights should be valued based on “the contribution they make to the welfare of the community.” Otherwise, in any kind of utilitarian calculus, individual rights wouldn’t be valuable enough to outweigh most social interests, and it would be impossible to justify individual rights. Dewey argued that we must insist upon a “social basis and social justification” for civil liberties.⁸

Like Dewey, I contend the value of protecting the individual is a social one. Society involves a great deal of friction, and we are constantly clashing with one another. Part of what makes a society a good place in which to live is the extent to which it allows people freedom from the intrusiveness of others. A society without privacy protection would be oppressive. When protecting individual rights, we as a society decide to hold back in order to receive the benefits of creating free zones for individuals to flourish.

As the legal theorist Robert Post has argued, privacy is not merely a set of restraints on society’s rules and norms. Instead, privacy constitutes a society’s attempt to promote civility.⁹ Society protects privacy as a means of enforcing order in the community. Privacy isn’t the trumpeting of the individual against society’s interests but the protection of the individual based on society’s own norms and values. Privacy isn’t simply a way to extricate individuals from social control; it is itself a form of social control that emerges from a society’s norms. It is not an external restraint on society but an internal dimension of society. Therefore, privacy has a social value. When the law protects the individual, it does so not just for the individual’s sake but for the sake of society. Privacy thus shouldn’t be weighed as an individual right against the greater social good. Privacy issues involve balancing societal interests on both sides of the scale.¹⁰

Surveillance of Movement

Let's return to the issue I began the chapter with—the government wants to track your location. Although you're the one raising the court challenge against the surveillance, the court shouldn't focus its balance just on protecting you. At stake in the case are not just your rights but everybody's rights to the privacy of their movement.

If the court focuses merely on your individual rights, the balance becomes skewed. Suppose you really are guilty of smuggling weapons. On one side of the scale is your ability to exercise your right to privacy in order to carry out a crime. On the other side is society's interest in maintaining safety and order. Society clearly wins if the balance is understood in this way.

Even if you're innocent, the balance is hard for you to win. Stopping the smuggling might save countless lives. So what if your privacy is violated? If the government made a mistake and tracked your movements when you were innocent, it will soon realize its error. The government could send you an apology note, saying:

We're sorry we violated your privacy. But we had a really important need to investigate the smuggling of weapons. Stopping this crime can save many lives. Once we discovered you were innocent, we ceased our surveillance of you. We realize you might have been harmed by this, but think of how much good your sacrifice did for society. Sometimes you have to take one for the team. Thank you.

Fondly,

The Government

Keeping you safe and secure, since 1789

The problem with this argument is that you're not the only one harmed by this practice. The power of the government to engage in this kind of surveillance without adequate oversight affects every-

Values

one. It shapes the kind of society we live in. Moreover, the government can engage in systemic surveillance that dramatically increases its power and has widespread effects on people's freedom.

Many of the most important Supreme Court cases were brought by some rather unsavory criminals. They might have done some awful things, and they might not be heroes, but they are champions of the law. Many of them probably fought only for their own selfish interests. If asked why they were fighting, many might have said: "I'm fighting for *my* rights!" But their cases affected us all, and shaped the meaning of our Constitution. They didn't just fight for their rights. They fought for the rights of all of us.