by Amitai Etzioni

While *The New Golden Rule* was aimed strictly at academic audiences, *The Limits of Privacy* speaks to all who care about the moral, legal and policy issues raised by the tension between personal privacy and the common good, especially public health and safety.

The book explores five specific current hot issues:

- **Megan's Laws**: Etzioni argues that these laws do not do enough to protect children from sex offenders. He outlines a whole new approach to dealing with pedophiles.

- **HIV Testing of Infants**: The book shows that many infants die unnecessarily because the vast majority of states has not yet adopted a testing procedure which has worked in New York to identify and treat infected newborns.

- **Bio-metrics**: In very short order your face and hand will become your 100% reliable, unforgible ID card. Anonymity will vanish, but so will most fugitives from the law, illegal immigrants, welfare cheats, and many others who rely on false IDs.

- **Hyper-privacy**: New encryption programs allow your e-mail to be completely private. But how can we use this technology to protect our communications and transactions, and also be sure that this same hyper-privacy is not afforded to Internet-savvy drug lords, pedophiles, and terrorists? Etzioni shows what might be done.

- **Medical privacy**: The privacy of your medical records is violated daily when corporations trade that information on the open market. This is a case of Big Bucks, not Big Brother, violating our privacy. What can be done about these Privacy Merchants?

Each of these issues is debated daily in the media, in public meetings, in legislatures, and at home. Etzioni takes a highly original stance on all of them: Rather than decrying the loss of privacy, his first concern is safety and health. The book closes with a call for a whole new legal conception of privacy. One based on the notion of equal concern for the common good (public health and safety) and privacy, rather than according privacy a privileged position.

Amitai Etzioni has served as president of the American Sociological Association, as White House consultant, and has been a professor at Columbia University, Harvard, and Berkeley. His book *The Spirit of Community* was widely hailed by both the left and the right.

**Praise for The Limits of Privacy**

- "Etzioni can always be counted on to pose thoughtful challenges to conventional wisdom. His new book, *The Limits of Privacy*, which
advocates a balancing approach to privacy, does not disappoint. Though I quarrel with the weight of the communitarian thumb he places on the scale, I admire the wisdom and data he brings to bear on the debate. A must-read for everyone who values privacy, community and rationality." --Alan M. Dershowitz, Professor of Law, Harvard University; Author of Sexual McCarthyism, Chutzpah, The Best Defense, and The Abuse Excuse, among others.

- "While privacy rights in a democratic society must always be balanced with the values of public disclosure and protective surveillance, people can disagree sharply over where to set the balances. Etzioni argues in this book that privacy claims have been accepted too often in recent decades at the expense of the civilized communitarian society for which Professor Etzioni is a pre-eminent advocate. Looking at five areas of privacy debate, ranging from HIV testing for infants to biometric identifiers, Etzioni offers a thoughtful framework for weighing privacy claims in a high-tech society. His analyses are a very welcome addition to the privacy literature, whether or not one reaches the same conclusions as he does in specific settings." --Alan F. Westin, Professor of Public Law & Government Emeritus, Columbia University; Author of Privacy and Freedom; Databanks in a Free Society; Computers, Record Keeping and Privacy; and The Anatomy of a Constitutional Law Case among others.

- "Amitai Etzioni's The Limits of Privacy offers much of what has been missing from contemporary public policy - thoughtful common sense. As a member of Congress, I have been astonished by the political might of those who advocate privacy at any cost - even if the cost is someone else's life or well-being. As a practicing physician, I have been bewildered by the medical community's capitulation to political correctness as a substitute for sound public health in our efforts against HIV and AIDS. Dr. Etzioni's balanced and thorough analysis of the debate surrounding newborn HIV screening exposes the atrocity of a misguided policy that has allowed thousands of innocent babies to be sacrificed at the altar of privacy. In addition, he offers a sound and reasonable solution that transcends politics and saves lives. His incisive analysis of this and other major privacy debates makes this book required reading for all Americans wishing to balance the right to privacy with issues of public health and safety." - Congressman Tom A. Coburn, M.D., Member of Congress and practicing physician.

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Accompanied by his wife and 9-year-old son, John Becerra moved to Farmington, New York in December of 1995 to start a new life. Mr. Becerra had pleaded guilty to sexual abuse, served his time, and quietly begun his probation. In spring of 1997, however, the Becerra family found themselves in the crosshairs of a neighborhood campaign to drive them out of town. Picketers rallied outside the family's home; a brick was thrown through their car window; a shot was fired through a window of their house, and anonymous calls were made to Mr. and Mrs. Becerra's workplaces. All this happened when members of the community found out about Mr. Becerra's past.\(^1\)

One afternoon in late July 1994, 7-year-old Megan Kanka didn't come home. Earlier, a neighbor had offered to show her his new puppy. Once inside his home, the man sexually assaulted Megan, then strangled her with a belt and wrapped her head in a plastic bag. Her body was eventually found buried in a nearby park, blood trickling from her mouth and her shorts cut to pieces. Investigation led to the arrest of Jesse Timmendequas, a man who had served six years in prison for two sex offense convictions and lived with two other child molesters. No one in the neighborhood knew about his past. Especially the Kankas.\(^2\)

No one needs to read a book--let alone a philosophical tract or an extensive policy analysis--to be reminded that the right to be let alone is much cherished, that without privacy no society can long remain free. And, unless one has been denied access to all forms of communication and media, one has been fairly and repeatedly warned that privacy is not so much nibbled away as stripped away by every manner of new technology. Hardly a week passes without alarming headlines that warn Americans that their cell phone conversations are not secure, employers read their e-mail, mutual funds sell details of their financial records to marketers, and their medical records are an open book. Public opinion polls show that Americans are appropriately agitated.\(^3\) And Congress as well as state legislatures at least are claiming that they are about to pass new laws to protect privacy.\(^4\) Also, as the abundance of cliches about cyberspace indicate, new technologies have made invasion of privacy so much easier, that one is justified in asking what remains of privacy and how might it be saved in the new cyber-age?\(^5\)

This is a book largely about the other side of the equation that makes for a good and free society. It is about our investment in the common good, about our profound sense of social virtue, and about our concern for public safety and public health. While we cherish privacy, we also value other goods. Hence, one must face the moral, legal, and social issues that arise when serving the common good entails violating privacy, and seek for ways to address these issues.
When I mentioned the subject of this book to an audience of my friends, students in my classes, and people who attend public lectures, initially they were all taken aback. Privacy, they pointed out, was under siege if not already overrun. Given privacy's great importance to a free people, my colleagues stressed, one should seek new ways to shore it up, not to cast more aspersions about it.

To begin a new dialogue about privacy, I asked my audiences whether they would like to know if the person entrusted with their child care is a convicted child molester. I mentioned that when such screening is done, thousands are found to have criminal records, including pedophilia. I further asked: Would they want to know if the staff in the nursing home in which their mother now lives have criminal records that include abusing the elderly? I noted that 14 percent of such employees have are found to have criminal records, including violent acts against senior citizens. And, should public authorities be entitled to determine whether drivers of school buses, pilots, and members of the police are zonked on drugs? Should the FBI be in a position to crack the encrypted messages employed by terrorists, before they use them to orchestrate the next Oklahoma City bombing? Meeting such concerns requires measures that diminish privacy in the service of the common good.

One may be tempted for a moment to employ a double standard, to seek to enshrine one's own privacy while denying that of others, perhaps on the grounds that "we" are innocent while "they" are suspect. However, such a position is too cynical to be entertained seriously. That all of us are subject to the same law is a principle at the heart of democratic government. Nor can one ethically lay claims on others from which we exempt ourselves. In principle and in practice, there is no escaping the basic tension between our profound desire for privacy and our deep concern for public safety and public health.

In my view, a good society does not automatically privilege one core value over another. To “ privilege” a value means to accord it a special standing, that of a basically unmitigated good. While such a value is not treated with the ultimate reverence accorded to an absolute value, because it is assumed that a privileged value might be curbed out of consideration for the claims of other values, the burden of proof is assumed to be on those who speak for other concerns. And, when a value is strongly privileged, any other claims are suspect on the face of it and are made to jump over numerous hurdles (lawyers speak here of "strict scrutiny") before they may be taken into account. Privacy is treated in our society (more than in any other) as a highly privileged value; the question this book grapples with is, under which moral, legal, and social conditions should this privilege be revoked? What are the specific and significant harms that befall us when we do allow privacy to be so treated?

The Common Good, Defined

When I refer to the "common good" (or to the good society), one may fear that I am about to stray into some vague or preachy realm. Note, though, that while different terms may be applied, we all view some matters as shared concerns of society-at-large. Defense from nuclear attack, for instance. And practically all Americans agree that protecting the environment is a common good, although we differ regarding the scope and specifics of this commitment.

The common goods this book focuses on, public safety and public health, are not two among many, but the mainstays of what are considered practically uncontested common goods. Indeed, very often when reference is made by courts or in common parlance to the public interest, reference is to matters that fall into one of these two pivotal categories. Without questioning the basic virtue of privacy, this book will show that in several important matters of public safety and health, the common good is being systematically neglected out of excessive deference to privacy.

Moreover, I shall try to demonstrate in the following pages that what is
called for are not limited, ad hoc concessions to the common good, some grudgingly accorded elbow room to the public interest, extended if and when a specific and strong case can be presented that privacy must be curbed. What is required is a fundamental change in civic culture, policy making, and legal doctrines. We need a paradigm that treats privacy as an individual right that must be balanced with concerns for the common good (or as one good among others), without a priori privileging any of them.

Discussions about privacy (and other rights) often take form around a particular new technology or social measure that violates privacy and hence, it is argued, should be rejected. When civil liberties groups learned recently that parents at work now may watch their children play in child care centers on their desktop computers, these groups objected on the ground that the cameras involved violate the privacy of the staff. However, as I see it, this claim is merely the beginning of a necessary dialogue on the subject. The next step ought to be to inquire whether the gains to the children, the parents, and the community justify whatever loss in privacy is entailed. (Note that the staff is informed about the presence of the cameras.) Even the First Amendment, often considered the most absolute value of them all, does not trump all other considerations, which is, of course, the reason shouting “Fire!” in a crowded theater is a forbidden form of speech (unless there is a fire, the ACLU reminds us). Privacy should be treated with similarly high, but not unbounded, respect. To put it differently, we must recall that both ethics and public policies often entail not a choice between good and evil or right and wrong, but rather the much more daunting challenge of charting a course when faced with two conflicting rights or goods. This book seeks to provide such a sorting out of the conflicting claims of the right to privacy and the needs of public safety and public health.

On the One Side or the Other: the Need for Balance

My approach is nourished by a social philosophy: communitarian thinking. I should briefly indicate where I am coming from, the kind of communitarian philosophy I draw upon, although one can readily read this book without dwelling on these concerns. My communitarianism holds that a good society seeks a carefully crafted balance between individual rights and social responsibilities, between liberty and the common good, a position I have written about elsewhere in some detail. This book applies this general approach to the tensed and confused relationship between the right to privacy and specific societal concerns.

If one takes as a starting point the general principle that a good society crafts a careful balance between individual rights and the common good, the next step is to apply the principle to actual societies. One then asks whether a particular society, in a given period, leans too far in one direction or the other. If one finds that a particular society strongly fosters social duties but neglects individual rights (as does Japan, for instance, when it comes to the rights of women, minorities, and the disabled), balancing requires strenuously fostering the other side, which in this case entails the expansion of autonomy. Indeed, even in the West, in earlier ages, when John Locke, Adam Smith, and John Stuart Mill wrote their influential works, and for roughly the first 190 years of the American republic, the struggle to expand the realm of individual liberty was very much called for, and there was little reason to be concerned that social responsibilities would be neglected. However, as communitarians have repeatedly noted, the relationship between rights and responsibilities drastically shifted in American society between 1960 and 1990, as a new emphasis on personal autonomy and individualism gradually overwhelmed other societal considerations. As a result, in the 1990s, society has recognized the need to reign in the excesses of individualism. I will show in the next pages that this much needed social correction--this balancing of rights with a fresh emphasis on responsibilities--has yet to be brought to bear on privacy issues.

Two reasons stand out for the strong reluctance to face this issue. First,
there is a widely held belief in American society that privacy, far from being excessively indulged, is endangered. The ACLU, for example, claims that "Americans' right to privacy is in peril." (12) Popular magazines have run cover stories about the "death" of privacy, analyzing "who killed it." (13) Scholars such as Brian Serr have argued, more carefully, but still to the same effect, that "the [Supreme Court's] means of promoting law enforcement interests has tipped the balance unnecessarily further and further away from individual freedom, significantly diminishing the realm of personal privacy" and that "government investigatory techniques threaten to intrude more and more on the privacies of everyday life." (14) Dr. David Brin puts it mildly, in a book entitled The Transparent Society: "Privacy is under siege." (15)

Professor Scott E. Sundby chronicles his colleagues' concern over the "loss of privacy": "The Supreme Court's recent Fourth Amendment decisions have drawn sharp criticism from the legal academy. Article after article documents the Court's transgressions... [how the Court] has suffocated individual privacy through an all-encompassing reasonableness standard... If ever a united cry of warning has been made that a basic civil liberty was in danger, this chorus of law review laments is it." (16) Professor Richard Spinello writes in his article "The End of Privacy": "The title of this article may sound ominous, but it is intended to convey the stark reality that our personal privacy may gradually be coming to an end." (17)

These statements by opinion makers and scholars have left their mark on the American public, major segments of which are rather alarmed about threats to privacy. A 1996 Harris/Equifax poll found that nearly 80 percent of Americans are "somewhat" or "very" concerned about threats to personal privacy, the highest percentage ever recorded by the polling agency on this subject. (18) A 1997 poll found a still larger number of Americans troubled about the state of privacy in America. Ninety-two percent of respondents were "concerned" about "threats to their personal privacy," and 64 percent were "very concerned" in a 1997 Harris-Westin survey. (19)

Champions of privacy argue that the appropriate consideration at this stage in history is not to what extent privacy may need to be limited to serve the common good, but rather what might be done to save this endangered right.

Effectively summarizing the alarmist position about the loss of privacy, Sundby writes:

To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with another person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the back yard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available (be sure to check the latest Sharper Image catalogue). Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents (again see your Sharper Image catalogue); ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached. (20)

The second reason champions of privacy oppose adapting conceptions of privacy to contemporary social conditions--even when faced with the kind of evidence presented below, demonstrating specific significant public safety and public health deficits--is a widely shared belief that our emphasis on maintaining privacy has no negative consequences. The courts, champions of privacy hold, far from neglecting the public interest, have regularly included careful attention to it in their deliberations. The same is sometimes said about policy makers, federal and state
administrations and legislatures, and regulatory bodies. To put it in the terms of reference employed here, it is argued that given that strong advocacy of privacy has not unbalanced the societal scales, there is no need to right them.

The Impacts of Strong Privacy Advocates

In the studies of specific public policies, and related matters of civic culture and legal doctrines, that follow, my first call is to demonstrate that there is a problem to begin with, that champions of privacy have not merely engaged in rhetorical excesses but that these excesses have had significant detrimental effects. Specifically, I show in the following pages that the champions of privacy (1) have been successful in delaying for years needed public actions by bottling them up in the courts, even if a balanced view ultimately prevailed; (2) have blocked altogether the introduction of other needed public policies that entailed some new limitations on privacy; (3) they have had a chilling effect on the consideration of still other public policies that would advance the common good, preventing them from being even seriously examined because public authorities feared lawsuits by the ACLU or others, and by making such considerations politically costly (in the court of public opinion, not to mention on the campaign trail, in various legislatures, and in the White House). (4) Finally, the champions of privacy (and of related individual rights) have for years sidetracked the introduction of new devices that could have enhanced both privacy and public health. Often, we shall see, individualistic public philosophies, policies, and legal doctrines had all these effects simultaneously, each enforcing the other.

I support these claims by examining in detail five public policies: the issues raised by violation of the privacy of mothers following HIV testing of their newborn children (Ch. 1); the pros and cons of protecting children from repeat sex offenders by notifying the community about the offenders' presence (Megan's Laws) (Ch. 2); the conflicting views regarding whether the government should be able to examine privately encrypted communications, a sort of phone-tapping of the Internet (Ch. 3); the dangers and opportunities posed by the development of new powerful biometrics ID systems, which in effect constitute national ID cards (Ch. 4); and new measures needed to protect the privacy of medical records, measures that go beyond those based on the libertarian doctrine of relying on the consent of patients for each specific use of the information about them (Ch. 5).

Several other public policy measures not examined here reflect the same basic tension between privacy and the common good. They include drug testing of those who hold directly in their hands the lives of others (e.g., police, pilots, air traffic controllers, school bus drivers, and train engineers), anti-terrorist measures, the placement of surveillance cameras in public places to observe and deter criminal activity, searches of public school lockers for drugs and firearms, searches for firearms in public housing, the establishment of sobriety checkpoints and anti-drug checkpoints, and government-fostered but voluntary HIV testing and contact tracing.

These issues are also faced by the 13 states that so far have not set up sobriety checkpoints, and which the Michigan Supreme Court has declared unconstitutional. Similarly, anti-drug checkpoints, which have been proven to be surprisingly effective in closing open drug markets, eliminating drive-by shootings, and reducing violent crime, have been challenged in courts. In some cases these challenges have led to temporary removal of the checkpoints; in others, barriers have been permanently dismantled. In still other cases such checkpoints have not been erected, as public authorities have feared being sued.

The treatment of HIV stands out among the major public policies, laws, regulations, and court cases in which privileging privacy has had considerable impact. Privacy advocates and their allies have prevented HIV from being treated like other dangerous communicable diseases (a trend referred to among experts as "HIV exceptionalism"). Government-
encouraged (but not coerced) HIV testing and contact notification, which does entail some violation of privacy, is still blocked—although even several major gay leaders who in the past opposed such measures, now favor them. In short, one cannot reasonably claim that privileging privacy has had no ill effects. The question that needs to be addressed, as I attempt to do in the following chapters, is how can the common goods at issue be better served without unnecessarily undermining privacy? When, specifically, are there "harms," and what public policy remedies can be introduced that would minimize the diminution of privacy these harms may entail? Finally, how should we address the moral, legal, and social concerns raised by these remedies?

Wrong Address: The Privacy Paradox

While in the cases of four out of the five policies I examine in the following pages, as well in those just listed, I find that privacy often is privileged over the common good, the examination of the fifth area of public policy, that of medical records, shows that privacy is very much endangered, often without serving any significant common good (or one that could not be served in ways that are much less injurious to privacy). However, the threat to privacy here turns out largely to be not the state, the villain champions of privacy traditionally fear most, but rather the quest for profit by select private companies. Indeed, I find that many corporations now regularly amass detailed accounts about many aspects of the personal lives of many millions of individuals, profiles of the kind that until but a few years back could be compiled only by the likes of the East German Stasi or other major state agencies with huge budgets.

Moreover, I find a general pattern: while our civic culture, public policies, and legal doctrines are rather attentive to privacy when it is violated by the state, when privacy is threatened by the private sector our culture, policies, and doctrines provide a surprisingly weak defense. Consumers, employees, even patients and children have little protection from marketeers, insurance companies, bankers, and corporate surveillance. If privacy is to be better protected from commercial intrusions, a new approach needs to be developed. This approach will best rely, as I aim to show below, in part on new technological and social devices, and in part on a more benign view of an active role of the state. Totalitarianism deeply concerned people in the 20th century; its dangers can be hardly ignored in the 21st century. However, renewed attention will have to be paid to ill effects that arise out of new unfettering of market forces. Privacy advocates will not make progress in this area, I show below, until they break out of the paradox that while they fear most Big Brother, they need to lean on him to protect privacy better from Big Buck.

Criteria for Corrective Action

I face a common challenge when I argue for a carefully crafted balance between the common good and individual rights, between public health, public safety and privacy. This challenge is particularly keen as the balance I seek is not merely within some abstract theory or model, but in the context of specific historical and social conditions of a real, existing society--ours. The challenge, raised in practically every public lecture I delivered on the subject: how is one to determine if the existing relationship between privacy and the common good (or between privacy as one good and other common goods) is out of kilter, and--if it is--what ought to be done to correct the imbalance?

In the following pages I suggest four criteria which, when applied jointly, help to determine whether an imbalance exists, in which the direction society is tilting, the scope of corrective action that is called for, and the specific qualities of the correctives that are to be employed. They are applied to each of the five public policies under review here. Even those who do not share the approach to privacy advanced in these pages may well find the specific criteria presented in the following pages to be of interest for the study of other matters of public policy, legal doctrines, and civic culture. (Previous presentations and applications of these criteria have
been received favorably. Indeed, even if the common good would somehow overnight be well protected in all the areas under study--there would be no more pedophiles, no infants born with HIV, no criminals hiding behind false IDs, and no terrorists exchanging unbreakable encrypted messages--the following analysis would still apply. The specific studies of public policy, aside from whatever light they cast on measures needed to protect better public safety and health, also seek to illustrate a mode of policy analysis that encompass considerations of ethical, legal, and practical considerations in the quest for a better society.

Much of the discussion reflects a pivotal fact about society: unlike ideologies, which can seek to center around one core value, society cannot but serve multiple needs and wants. This, in turn, has an important consequence that deserves much more attention: societies typically cannot make perfect choices, because often they must sacrifice a measure of one good for the sake of another. This fact is reflected in that much of what is under discussion here concerns trade-offs, between privacy and the common good. I like to note, though that trade-offs are not always necessarily the case. Indeed, most issues should be approached first with a quest for policies or laws that could enhance both goods.

A brief example: Development for a kit that allows one to determine in the privacy of one's home if one has HIV was begun in 1985. The kit entailed no visit to a doctor's office or clinic, no filling out of forms or computer entries. Users can mail in a few drops of blood and a code name and then call for the results. Aside from providing more privacy than previously available, the kit also advanced public health by offering an opportunity for those reluctant to be tested in other places to proceed. One notes with some sadness that the politics of privacy are such that even this very simple kit was bottled up in the FDA for seven years before it was finally approved. However, when the FDA finally allowed it to be marketed, it did serve as an example of zero-plus (rather then the zero-sum) opportunities.

Four Balancing Criteria

First, a well-balanced, communitarian society will seek to reduce the scope of privacy only if it faces a well-documented and macroscopic threat to the common good as opposed to a merely hypothetical danger. (The phrase “clear and present danger” comes to mind, but for those who are legally-minded it implies a standard that is too exacting for the purposes at hand.) Policy makers and the general public are bombarded with dire warnings that society is about to face this or that grave danger (e.g., flesh eating bacteria, chicken-driven flus and mad cows, holes in the ozone layer, El Niño, and the extinction of swordfish), presented as grounds for curtailment of privacy and other individual rights. If a society were to respond to such frequent warnings by curbing rights in every instance, rights would erode rapidly, often without serving any true common good.

Before limiting privacy, a society needs first to determine how well-documented various reported dangers to the common good are and how encompassing their expected consequences will be. When many thousands of lives are lost and many millions more are at risk, as they are to HIV, we face a clear, major threat. The effects of abusing marijuana are real but of a much lower magnitude, and hence do not legitimate the same kind of response. Still other dangers are highly hypothetical, and hence usually do not legitimate public action. (I write “usually” because in situations in which the probability of major ill consequences is low, but the magnitude of possible disutility is very high--for instance, a nuclear attack by terrorists--some privacy limiting measures might be justified, as we argue in the case of encryption.)

Second, if a communitarian society acts to counter a tangible and macroscopic danger, it ought to start by trying to cope with the danger without resorting to measures that might restrict privacy. For instance, if medical records are needed by researchers and epidemiologists, the data is best collected and utilized as much as possible without identifying
specific individuals. Because these measures often entail changes in mores, institutions, or habits of the heart rather than laws or constitutionally protected rights, I refer to them in the following discussion as "second criteria treatments."

Third, to the extent that privacy-curbing measures must be introduced, a communitarian society makes them as minimally intrusive as possible. For example, many agree that drug tests should be conducted on those directly responsible for the lives of others, such as school bus drivers. Yet, the highly intrusive visual surveillance sometimes applied to those who provide a test specimen--to ensure that the sample is in fact from the person who delivers it--often can be avoided by measuring the temperature of the sample immediately after it is presented. To distinguish these kinds of measures from those that qualify by the second criteria, I refer to these acts--often undertaken by the government, and typically entailing changes in legal doctrines--as "third criteria interventions".

The principle of limiting the intrusiveness of privacy-curbing measures is further illustrated by the example of a national database that contains the names of medical practitioners who have been sued, sanctioned, or otherwise penalized for crimes, misconduct, or incompetence. The National Practitioner Data Bank allows hospitals that consider granting "privileges" (i.e., the right to practice in the hospital) to physicians to conduct limited background checks on these physicians. However, the data bank discloses only that a physician has been subject to malpractice litigation or an out of court settlement, or adverse action (which might include revocation of license to practice or removal of privileges, for acts such as substance abuse), but stops short of providing details of the violation. Because it is known that, as a rule, physicians are disaffiliated only for major violations, this information suffices for hospitals who seek to protect the public. Divulging more information would unnecessarily violate the privacy of those involved. Moreover, if a particular hospital needs to establish the specific reasons why a physician has been censured, it can garner this information from the physician applying for a position or privileges. But this additional information is not available to anybody who accesses the national data bank. For the first screening, provided by the data bank, the limited information seems sufficient.

Lastly, measures that treat undesirable side-effects of needed privacy-diminishing measures are to be preferred over those that ignore these effects. Thus, if more widespread HIV testing and contact tracing are deemed necessary for public health purposes, efforts must be made to enhance the confidentiality of the records of those tested for HIV. These records need to be particularly well-protected to ensure that individuals testing positive will not lose their insurance, employment, housing, or otherwise suffer discrimination. For the same reasons, one may have to increase penalties imposed upon those who violate these privacies.

The four criteria are arranged sequentially in the sense that only policies and social actions that satisfy the first criterion need to be analyzed in light of the second one, and so on. While the criteria have just been introduced with examples of situations in which the public good may need to be given priority over privacy, it should be stressed that the same criteria also provide guidance when the societal balance tilts too far in the opposite direction, that is, when privacy is endangered and the concern for the common good must be scaled back. A case in point is the abuse of medical records. Information about patients included in their personal medical records and shared with health insurance companies is sometimes transmitted to other parties, such as employers (who use the information to fire those with problems such as cancer or the "wrong" genes), to banks (who call in the loans of the sick), and even to tabloids. Drawing on the four criteria outline to determine whether or not such spreading of personal medical information should be curbed and the privacy of medical records strengthened, one first seeks to establish
whether there is a significant common good served by such spreading of information to third parties. Finding little or none, one then seeks to determine if these privacy-endangering transmissions can be curbed without altering the law, through means such as changing patient consent forms (which now almost totally relinquish the patient's control over his or her medical information and history) or via more advanced technological safeguards in computer information systems (e.g., audit trails that allow for the tracking of all those who access a file, and enable administrators to determine if there has been unauthorized access), and other such devices. If these measures are deemed insufficient, legal remedies might be considered. One might, for instance, introduce new penalties for the unauthorized transmission of medical information. Finally, those who have suffered from undue violations of their privacy—for instance, a person, who loses a job as a result of such actions—might be entitled to receive compensation. In short, the four criteria can be used as much to determine if privacy is deficient as to determine if it is excessive, as well as what actions are best taken to shore up privacy or to limit the sway of the common good.

The following analysis proceeds on two levels: it seeks to determine in which areas major modifications are needed in our public philosophies, policies, and legal doctrines concerning the balance between privacy and the common good, as well as to illustrate extensively the merit of relying on the four criteria as a way to sort out changes in directions that might concern most any matter of public concern.

A word about methodology: knowledge is often either analytical and specialized (the kind basic research often generates) or synthesizing and encompassing (the kind policy analysis requires). In the following study, I must draw on sociology, psychology, ethics, and jurisprudence (and occasionally on other bodies of knowledge) to try to cobble together a coherent policy analysis. I recognize that this inevitably prevents me from doing justice to any of these disciplines; is an imperfect choice, but one I believe that policy analysis cannot avoid making.

Toward a New, Communitarian Conception of Privacy

The detailed studies that follow serve a significant purpose beyond examining major instances in which new limits must be set on privacy (or the common good), and finding ways to ensure that corrective measures will not be excessively broad. The studies point to a rather different concept of privacy, developed in the last chapter.

The volume closes with an extensive attempt to provide a new conception of privacy, one that systematically provides for a balance between rights and the common good. The argument unfolds in response to a series of questions: what are the effects of the socio-historical conditions under which privacy was fashioned on the concept of privacy that plays such an important role in our civic culture, public policies, and legal doctrines? What led to the blending of privacy as an exception from scrutiny ("informational privacy") and privacy as the right to control one's acts ("decisional privacy")? Has this blending outlived its usefulness, and if so, what would a more clearly delineated conception of privacy entail? Closely related: What is the relationship between two elements of the right to be let alone, that of privacy and autonomy?

I realize that there are those who will immediately condemn any such undertaking as an assault on sacred American values. I hope to engage as many of them as possible in a reasoned and moral dialogue on a crucial issue.

ENDNOTES


5. The term cyber-age is rather unfortunate, but no better term seems available.


A new Congressional law bars background checks from reporting criminal convictions that are more than 7 years old for positions that will earn less than $75,000, which includes most positions in child care centers. Del Jones, "Background Check Rule Change Contains Flaws," USA Today, 24 February 1998, 4B.


8. There are those who object to formulations of balancing rights and the common good, arguing that privacy and more generally rights are the common good; hence objections to the suggestion that one should or even could balance rights such as privacy and the common good. But this is largely a semantic issue. If one considers rights a common good, one needs to balance them with other common goods. The issue does not change by calling privacy a common good rather than a right. For an important book that treats privacy as a social good--but not the only one--see Priscilla M. Regan, Legislating Privacy (Chapel Hill: University of North Carolina Press, 1995). For a major, seminal work on privacy and the common good that withstood the test of time see Alan Westin, Privacy and Freedom (New York: Atheneum, 1967).


21. Documentation concerning this development may be obtained from The Communitarian Network, Washington, D.C.


A notable exception is a coding in the National Practitioner Data Bank for payment made in settlement of a medical malpractice action, which the National Practitioner Data Bank cautions "shall not be construed as a presumption that medical malpractice has occurred." See "Interpretation of Data Bank Information" in the National Practitioner Data Bank's Guidebook, available http://www.hrsa.dhhs.gov/bhpr/dqa/factsheets/fsnpdb.htm#1.

For additional discussion of these criteria, see Etzioni, *The Spirit of Community*.

For documentation see below, Chapter 5.


Note: There may be some minor differences between this and the published version.