Privacy Versus Security: Why Privacy is Not an Absolute Value or Right

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The idea that we have a moral right to privacy that ought, as a matter of political morality, to be protected by the coercive authority of the law is of comparatively recent vintage.[1] Prior to the seminal argument published by Samuel D. Warren and Louis D. Brandeis in 1890 that there is a right to be let alone, there was no widely held belief that people have a right to privacy—moral or otherwise.[2] Although people did believe that we have moral rights now thought to fall under the rubric of privacy, such as a right to physical separation in the borders of a physical home of one's own, these rights were afforded adequate protection by other moral and legal rights up to that point. In particular, my right to property allowed me to exclude you from obtaining information about me by being in my house or by peering into the windows if my blinds were drawn.

The publication of Warren and Brandeis's article triggered an evaluation of the issue of whether we have a privacy right that is independent of other moral rights we have, which may help in protecting some of the same interests, like the right to physical separation. Legal protection against slander, once thought of as being justified in terms of damage to one's property interest in one's reputation, was also thought to reflect a morally protected interest in privacy—although truth remained an absolute defense. New torts were created to protect this new interest where the truth of what was disclosed is not a defense against liability: dissemination of certain private facts is considered both morally wrong, regardless of whether or not they are true, and legally actionable in tort under certain circumstances.

In the early 1960s, the Supreme Court began to develop a jurisprudence incorporating pieces of this interest into the Constitution. A series of cases beginning with *Griswold v. Connecticut* hold that citizens have a right of privacy in personal decisions regarding marriage and reproduction.[3] The Court vitiated, first, bans on sales of contraceptives to married couples, then to unmarried couples, and finally to minors. Later cases established a constitutional right to abortion and a constitutional right to be free of coercive state prohibitions against certain sexual acts, such as anal sex performed by two consenting adult males.

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1. Much of my discussion here is informed by the excellent discussion in AMITAI ETZIONI, THE LIMITS OF PRIVACY 188–96 (1999).

2. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96, 205 (1890).

3. Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down law prohibiting access of unmarried couples to contraception); Loving v. Virginia, 388 U.S. 1 (1967) (striking down law prohibiting miscegenation); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (striking down prohibition on distribution of contraception to married couples).

Although some of these constitutional rights are deeply contested and resented by more conservative segments of the population, most people seem to believe that we have a moral right to *informational* privacy—informational and reproductive privacy *are* analytically and substantively distinct—that ought to be protected by the legal system. I think it is fair to say that the claim that we have such a right is, at this point in time, utterly uncontroversial among mainstream conservatives and liberals, even if the content of this right and the nature of the appropriate legal protection—constitutional or statutory—is contested.

In this essay, I consider the scope of this right to informational privacy relative to our interests in security and argue, in particular, that the right to privacy must yield to these interests in the case of a direct conflict.[4] I offer arguments from a number of different perspectives. I will, for example, begin with a case directly rooted in what I take to be ordinary case intuitions and then continue with an argument grounded in the distinction between intrinsic and instrumental value, which is thought to serve as a rough mark between what is important from a moral point of view and what is important from other points of view; though there can, obviously, be means to moral ends that will have moral significance in virtue of their relations to these ends. However, I will largely be concerned with showing that the major mainstream approaches to justifying state authority presuppose or imply that security interests can justify infringements of privacy rights. For example, I will argue that utilitarian and contractarian justifications of state authority entail that when privacy conflicts with the most important security interests, those security interests trump the privacy interests. I conclude that the idea that privacy rights are absolute in the sense that they are never justifiably infringed, which is surprisingly common, is not only counterintuitive, but lacks any general theoretical support from any of the major mainstream theories of legitimacy.

At the outset, I should point out that I do not attempt to resolve the very difficult questions associated with determining whether privacy interests genuinely conflict with security interests—and how to resolve those conflicts. I think, for example, that the general principle purporting to justify the USA PATRIOT Act is correct, but that it does not justify many of the provisions of that Act, because those provisions do not address or resolve any genuine conflict between privacy and security. I cannot defend the view here, but I doubt that allowing law enforcement

4. *See* discussion *infra* Part IV.

officers to inspect a patron's library records does any work by way of making us safer from the threat of terrorism; terrorists are much too careful to do their research by checking out books from a public library. If this is correct, then the provision allowing inspection of library records is not justified by the general principle allowing infringements of privacy when necessary to protect important security interests, because there is no genuine conflict between privacy interests—assuming we have legitimate privacy interests in what we check out from a *public* library—and these more important security interests.

Although an account that enables us to determine when security and privacy come into conflict and when security trumps privacy would be of great importance if I am correct about the general principle, my efforts in this essay will have to be limited to showing that the various theories of legitimacy presuppose or entail that, other things being equal, security is, as a general matter, more important than privacy.

I. INTRODUCTION

Among the moral rights most people believe deserve legal protection, none is probably more poorly understood than privacy. What exactly privacy is, what interests it encompasses, and why it deserves legal protection, are three of the most contentious issues in theorizing about information ethics and legal theory. While there is certainly disagreement about the nature and importance of other moral rights deserving legal protection, like the right to property, the very concept of privacy is deeply contested. Some people believe that the various interests commonly characterized as privacy interests have some essential feature in common that constitutes them as privacy interests; others believe that there is no such feature and that the concept of privacy encompasses a variety of unrelated interests, some of which deserve legal protection while others do not.

Notably, many people tend to converge on the idea that privacy rights, whatever they ultimately encompass, are absolute in the sense that they may not legitimately be infringed for any reason. While the various iterations of the USA PATRIOT Act are surely flawed with respect to their particulars, there are many people who simply oppose, on principle, even a narrowly crafted attempt to combat terrorism that infringes minimally on privacy interests. There is no valid justification of any kind, on this absolutist conception, for infringing any of the interests falling within the scope of the moral right to privacy.

It is perhaps worth noting that absolutist conceptions are not limited to privacy rights. Some people take the position that the moral right to life is absolute; on an absolutist conception of the right to life, it is never

justified to take the life of a person—and this rules out not only the death penalty, but the use of deadly force in defense of the lives of innocent others from a culpable attack. Many people take an absolutist view with respect to something they call a "right to information," holding that there should be no restrictions of any kind, including legal protection of intellectual property rights, on the free flow of information. As this view has most famously, and idiosyncratically, been put by John Perry Barlow, "information wants to be free."[5] When it comes to rights, absolutist talk among theorists, lawyers, and ordinary folk is not at all uncommon these days.

Indeed, some people seem to think that rights are, by nature, absolute and hence that it is a conceptual truth that all rights are absolute. Consider the following quote from Patrick Murphy, a Democrat who ran for Congress in 2006:

> I am also very concerned about the erosion of constitutional rights and civil liberties over the past few years. I taught Constitutional Law at West Point, and it makes me so angry to see our elected leaders in Washington—specifically the White House and the Republican leadership in Congress—pushing policies that erode the foundation of this country. *The equal protection clause of the constitution is absolute. The right to privacy is absolute. The right to assemble is absolute.* Yet time and time again, the administration has supported, and the Congressional leadership has supported nominees and policies that do not follow the constitution. With my background, I can add to this debate. And I'm not afraid to take a stand for what's right.[6]

As Murphy explains it, every right in the Constitution is absolute and hence utterly without exception. As there is nothing in the Constitution or any legal instrument or norm that suggests or entails that constitutional rights are absolute, it is reasonable to think that Murphy believes, as many people do, that it is part of the very meaning of having a right that it can never justifiably be infringed. This is why debates about political issues are frequently framed in terms of whether there is some right that protects the relevant interests; rights provide the strongest level of moral or legal protection of the relevant interests.

It is certainly true that rights provide a higher level of protection than any other considerations that are morally relevant, but it is not because rights are, by nature, absolute. Rights provide robust protection of the

5. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, 89, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html.

6. Above Average Jane, http://aboveavgjane.blogspot.com/2005/12/interview-with-patrick-murphy.html (Dec. 4, 2005, 23:06 EST) (emphasis added).

relevant interests because it is a conceptual truth that the infringement of any right cannot be justified by an appeal of the desirable consequences of doing so. No matter how many people it might make happy, it would be wrong to intentionally kill an innocent person because her right to life takes precedence over the interests of other people in their own happiness. As Ronald Dworkin famously puts this conceptual point, rights trump consequences.[7]

But this conceptual truth about rights does not imply rights are, by nature, absolute. The claim that rights trump consequences implies only that some stronger consideration than the desirable consequences of infringing a right can justify doing so. This latter claim leaves open the possibility that there is some such consideration that would justify infringing some rights.

One such candidate, of course, is the existence of other more important rights. It is commonly thought that at least some rights are commensurable and can be ranked in a hierarchy that expresses the relative weight each right in the hierarchy has with respect to other rights. For example, one might think that the right to life is at the top of the hierarchy of commensurable rights, and that property rights are in this hierarchy also. This would explain the common intuition that one may use deadly force when necessary to defend innocent lives from culpable attack, but not when necessary only to defend property rights from violation. If, as seems clear from this example, it is possible for two rights to conflict and for one to outweigh the other, it follows that rights are not, by nature, absolute.

What may explain the mistaken view that rights are necessarily absolute is confusion about the relationship of various terms that flesh out the status, origin, and contours of moral rights and obligations. For example, rights are frequently described as "inviolable," meaning that a right can never be justifiably violated. This, of course, is a conceptual truth; to say that a right is violated is to say that its infringement is without justification. But this does not imply that rights can never be justifiably infringed; a person's right to life can be justifiably infringed if he culpably shoots at an innocent person and there is no other way to save that person's life except through use of lethal force in defense of his life.

Rights are also thought, by nature, to be supreme, relative to some system of norms—moral, social, or legal—in the sense that they cannot be defeated by other kinds of protections; moral rights are thought to be supreme over all other kinds of considerations, including social and legal rights. But this does not imply that rights are absolute because it says

7. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi–xii, 86–88 (1978).

nothing about the relative importance of one right to another; it simply asserts that, by nature, rights outweigh all other relevant considerations. Supremacy and inviolability are part of the very nature of a right, but these properties do not entail that rights are, by nature, absolute.

Of course, the negation of the claim that all rights are absolute does not imply that no rights are absolute. The possibility of conflicts between any two rights does not preclude there being one right that wins every conflict because it is absolute, and hence, without exception. A moral pacifist, for example, takes this view of the moral right to life and holds that intentional killing of a human being is always wrong. Moreover, if there are two rights that do not come into conflict with each other and win in conflicts with all other rights, those two rights might be absolute. One might think, for example, that the rights to privacy and life can never conflict and that both are absolute.

I am somewhat skeptical that any right is absolute in this strong sense, but if there are any, it will not be privacy. As we will see in more detail, privacy is commensurable with other rights, like the right to life, which figures into the right to security. It seems clear that privacy rights and the right to life can come into conflict. For example, a psychologist might be justified in protecting a patient's privacy interests even though doing so includes information that might prevent that person from committing a minor property crime of some kind, but she would not be justified in protecting that information if the psychologist knows its disclosure is necessary to prevent a murder. In any event, I will discuss these kinds of examples in more detail below.

II. THE CONCEPT AND MORAL RIGHT OF INFORMATIONAL PRIVACY

An account of the concept of privacy differs from a substantive account of the contours of the moral right to privacy, if any. An account of the concept of privacy consists in a set of purely descriptive sentences that describe which interests are covered by the concept—without making, presupposing, or entailing any substantive claims about whether these interests are protected by morality or whether these interests should, as a matter of political morality, be protected by the law. An account of the moral right of privacy is a normative set of propositions that describes those interests falling within the concept of privacy that are protected by a moral right. A normative account may validate all or only some of the interests covered by the concept.

There are a number of different views about the nature of privacy and the scope of what is protected.[8] Some authors take a skeptical view, believing that the interests we characterize as "privacy" interests have nothing essential in common and are protected, to the extent they are protected, by different rights.[9] Law and economics theorists argue that these interests ought not to be protected by law because they are economically inefficient.[10] Feminists worry that privacy rights conceal oppressive practices of men against women, including domestic violence.[11]

Others hold a positive conception of privacy and believe that moral interests in privacy are legitimately protected by the law. Many of these theorists recognize that privacy interests seem to encompass a variety of different interests, including reproductive freedom, control over the free flow of information about oneself,[12] the ability to exclude people from certain spaces and facts as a means of enhancing human dignity,[13] controlling access to ourselves,[14] and maintaining intimacy in personal relationships.[15] The earliest conception of privacy defined it as the right to be let alone.[16] Although it has become clear that different cultures have different views about whether, why, and to what extent certain privacy interests are important, the assumption among these writers is that the cluster of interests we characterize as privacy deserves legal protection—regardless of whether there is any particular essential property all and only privacy interests instantiate.

Although I will not say much by way of argument here, I will conceive of the relevant right as being a *moral* right to *informational* privacy that obligates one to refrain from attempting to procure certain kinds of information about others, without their consent or some other legitimate authorization, in which they have a reasonable expectation of privacy. I exclude what is commonly called reproductive privacy, because I

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8. *See generally* Judith DeCew, *Privacy*, *in* STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Fall 2006 ed.), http://plato.stanford.edu/entries/privacy (discussing various privacy theories). My discussion here owes an obvious debt to this outstanding survey article.

9. Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 308 (1975).

10. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 235, 244–45 (1981).

11. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989).

12. W.A. Parent, *Privacy, Morality and the Law*, 12 PHIL. & PUB. AFF. 269, 272–73 (1983).

13. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74, 1002–03 (1964).

14. Adam D. Moore, *Privacy: Its Meaning and Value*, 40 AM. PHIL. Q. 215, 215 (2003).

15. James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 325–330 (1975).

16. Warren & Brandeis, *supra* note 2, at 193.

follow James Griffin in believing that the interests protected by the so-called right to reproductive privacy are better conceptualized as being liberty interests.[17] I exclude what is commonly expressed by a right to control access to oneself, because I think this amounts to a need for personal space and physical separation that has less to do with protecting informational privacy than with protecting us from feeling physically vulnerable because intruded upon. I recently attended a concert, for example, in which my wife and I got fairly close to the stage during the opening act before the venue began to fill with people there for the headliners. As the headliners began to play, people started crowding up against us, causing me, more than my wife, considerable discomfort. Such discomfort, however, had nothing to do with a sense that those persons would learn private facts about me; rather, I simply began to feel claustrophobic and somewhat threatened physically.

There is no question, as Adam Moore points out in his important contribution to this symposium, that we are beings who need some physical separation from others, but it does not follow that what motivates this is a need to protect informational privacy.[18] Indeed, as Moore points out, the need for physical separation seems to be universal among highly developed mammals—despite the fact that these other mammals lack the requisite linguistic or quasi-linguistic skills to process information. Because they cannot process, much less understand, the notion, it is fallacious to infer a right to informational privacy from a need for physical separation, even if this need gives rise to a right; after all, the right of physical separation can be as adequately protected by property rights as by any other right.

Indeed, this is probably true of some interests that are fairly characterized as informational privacy interests. A store with a unisex bathroom that allows men and women to use the bathroom at the same time clearly threatens informational privacy; people tend to regard information about what they look like in various states of undress as private to members of the sex to which they are attracted, and tend to regard information about what they look like while eliminating waste as being private relative to just about everyone else—and legitimately so. But these interests, though properly conceptualized as concerned with

17. *See* James Griffin, *The Human Right to Privacy*, 44 SAN DIEGO L. REV. 697, 709–10, 717 (2007).

18. Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 815–18 (2007).

information privacy, are adequately protected by a system of free enterprise anchored in private property rights, as these are traditionally conceived. Such a business would probably not last very long in the marketplace. Anyone who wants to make a profit selling things will simply have to recognize certain social conventions having to do with separation, personal space, and privacy of the person.

For our purposes, it does not matter what view one takes on these issues. My concern in this essay is to show that, from the standpoint of mainstream moral and political theorizing about the legitimacy of the state, informational privacy rights are below security rights in the moral hierarchy. In other words, I reject any conception of privacy rights that regards them as absolute from the standpoint of morality—political and individual. Although I cannot resolve the issue of whether such interests share a common essence, my thesis that security trumps privacy can be shown without taking a position on this important issue.

III. THE CONCEPT OF SECURITY AND ASSOCIATED MORAL INTERESTS

A. Elements of Security

I take the concept of physical security to refer to a variety of interests a person has in the healthy continuation of her life and the life of her community. By "healthy," I mean a continuation of her life and community that is free of certain kinds of encumbrances characteristic of diseases and serious injuries in the case of a person's life and characteristic of certain kinds of crises in the life of a community.

At the outset, it is important to stress that security interests do not embrace interests not immediately related to the survival and minimal physiological well-being of the individual. My interest in security encompasses my interest in continuing life, my interest in being free from the kind of physical injury that threatens my ability to provide for myself, my interest in being free from the kind of financial injury that puts me in conditions of health- or life-threatening poverty, and my interest in being free from psychological trauma inflicted by others that renders me unable to care for myself.

My interest in security is a negative one in the sense that it is protected by a moral right constituted, in part, by moral obligations owed to me by other people to refrain from committing acts of violence or theft capable of causing serious threats to my health, well-being, and life. While it is difficult to draw the line between a serious harm and a nonserious harm, it will have to suffice for my purposes to say that a serious harm is one that interferes significantly with the daily activities that not only give my

life meaning, but make it possible for me to continue to survive. Significant trauma to the brain not only interferes with many activities that constitute what Don Marquis calls the "goodness of life,"[19] but also interferes with my ability to make a living teaching and writing philosophy—while a mildly bruised arm does not. Where exactly to draw the line is not entirely clear, but for my purposes I do not think much turns on it as long as it is understood that security interests do not include minor injuries of any kind. I imagine the boundaries of the relevant notion of seriousness are likely to be contested in any event, but all would agree that the interest in security, by nature, protects only against threats of *serious* injuries.

It should be abundantly clear that morality protects these interests in the strongest terms available to it. Unless one is a complete skeptic about morality and moral objectivity, little argument is needed to show that we have a moral right to be free from acts that pose a high risk of causing either our death or grievous injuries to our bodies. Moreover, I would hazard that non-skeptics about morality would also accept that the moral right to physical security is sufficiently important that a state is, as a matter of political morality, obligated to protect it, by criminalizing attacks on it, as a condition of its legitimacy. No state authority that failed to protect this right could be morally legitimate; at the very least no state authority that failed to do so could be justified in claiming a legitimate monopoly over the use of force.

Security interests are not, however, just about our own well-being; they encompass the well-being of other persons whose activities conduce to our own physical security. We are social beings who live in societies in which there is a pronounced division of labor that makes the security of one person dependent upon the security of other persons in a variety of ways—some more abstract, some less abstract.

Here is perhaps an example from the extreme and quite abstract side of the spectrum: people legitimately worry about the economic prospects of the next generation for a variety of reasons. First, while globalization is likely to expand the total pool of material resources, it will also redistribute them through the outsourcing of work. Pro-globalization experts estimate that perhaps thirty to forty million jobs in the United

19. Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183, 196 (1989).

States will be lost in coming decades to the globalization process,[20] benefiting the countries that get these jobs, as well as the owners of the multinationals that redistribute these jobs, and harming those persons in this country who lose those jobs—if they are not, as some dissenters believe, easily replaced.

Second, although the value of our GDP, around $13.8 trillion in 2007, continues to grow,[21] so does our tax burden, now at over $5 trillion, and our federal debt, now at over $9 trillion, with about $2 trillion held by foreign governments.[22] Approximately $430 billion per year must be spent by the government merely to service the public debt—pay interest without reducing principal.[23] Baby boomers at the peak of their earning power and at the peak of the amounts that they pay in taxes are going to retire in droves in coming years, reducing the amount of tax revenues they contribute towards the federal budget, but also reducing the amount that they contribute towards servicing the debt. Unless boomers leave a sufficient amount in inheritance to significantly reduce the debt burden after inheritance taxes, which assumes that they remain healthy and die suddenly without having to dip into their savings for extended around-the-clock health care, the next generation will have to pay an increasing amount of their income in taxes to service the debt and possibly, if taxes are raised, to ensure continuation of the same governmental services.

One can also expect that baby boomers will not continue to consume at existing lavish levels. This means that not only will tax revenues fall with the mass retirement of the boomers, but consumer demand also will fall significantly, further reducing the demand for jobs in this country. If people are buying less, far fewer people are needed to sell those goods. Unemployment rates may hit some highs not seen since the recession of the 1970s—or perhaps since the Great Depression.

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20. Alan S. Blinder, *Free Trade's Great, But Offshoring Rattles Me*, WASH. POST, May 6, 2007, at B04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402555.html. Alan S. Blinder is a professor of economics at Princeton University, vice chairman of Promontory Interfinancial Network, and vice chairman of the G7 Group. *Id.* He is considered one of the most ardent proponents of globalization.

21. INTERNATIONAL MONETARY FUND, WORLD ECONOMIC AND FINANCIAL SURVEYS (Oct. 2007), http://www.imf.org/external/pubs/ft/weo/2007/02/weodata/index.aspx (follow "By Countries" hyperlink, follow "Major Advanced Economies" hyperlink, select "United States," select all "National Accounts" and follow "Prepare Report" hyperlink).

22. U.S. DEP'T. OF THE TREASURY, PUBLIC DEBT REPORTS, http://www.treasurydirect.gov/NP/BPDLogin?application=np (last visited Jan. 21, 2008); John W. Schoen, Commentary, *Just Who Owns the U.S. National Debt?*, MSNBC, Mar. 4, 2007, http://www.msnbc.msn.com/id/17424874/.

23. Joint Statement of Henry M. Paulson, Jr., Sec'y of the Treasury, and Jim Nussle, Dir. of the Office of Mgmt. and Budget, on Budget Results for Fiscal Year 2007 (Oct. 11, 2007), http://www.treas.gov/press/releases/hp603.htm.

Third, many economists are concerned that retired boomers will start selling off stock assets in their portfolios, resulting in a rash of sell orders that significantly depresses the value of the stock and of existing portfolios held by younger persons. If so, younger persons face not only the specter of fewer meaningful job opportunities and increased tax burdens, but also portfolios that are suddenly worth significantly less in value.

Fourth, the consensus among scientists is that global warming caused by greenhouse gas emissions will eventually culminate in significant changes in global climate adversely affecting the economies of many nations, especially the developing nations in Africa. Republicans put off, as a matter of economic platform, trying to do anything that significantly reduces greenhouse gas emissions because, they claim, they are skeptical about the evidence for the greenhouse gas theory of global warming. More likely, they resist environmental protection focused on reducing such emissions because it has an immediate cost to the economy in the form of increased prices for vehicles and gasoline, thereby leading to reduced demand and eventually to the loss of even more jobs. If the theory is true and the predictions for the effects on future climate patterns are true, the next generation will not have the luxury of putting off facing the problems. The consequences will have to be addressed by significant outlays of governmental revenue, which is another reason to worry that the next generation's tax burden will be much greater and will significantly reduce their standard of living to such an extent that they will be the first generation in history to be less prosperous than their parents.

Finally, the threat of global terrorism imposes significant economic costs on government that will continue to have to be funded with tax revenues or deficit spending. Either way, when the boomers begin to retire, the next generation will have to contribute increasing amounts of their gross income to ensure national security, provided that the United States does not radically change its foreign policy objectives in the Middle East from protecting its own interests to pursuing a just and lasting peace among nations, regardless of whether their interests coincide with our own. Given our sad record on this score—as is well known, we have a sad record of supporting despots hated by the people over whom they rule who oppress them with the threat of torture and imprisonment simply to ensure the continuation of a strategically valuable alliance—I am not optimistic.

The idea here is that, taken together, these considerations constitute a serious threat to the economic prospect of the next generation that is sufficiently grave, on my view, as to be properly characterized as a threat to their security. If the above considerations turn out to be true, we may see a significant drop in disposable income figures—a trend that does not necessarily implicate security interests because it need not reach the point where it threatens the satisfaction of basic needs. But we might also see much higher rates of unemployment than we have seen since the Great Depression—a trend that does implicate security interests, as unemployment rates positively correlate with rates of homelessness, substance abuse, mental illness, hunger, and diminished access to health care of every kind.

In this kind of economic case, however, the threat arises because of changes in behavior over a large class of persons. Of course, an economic threat rising to the level of a security threat can be precipitated by one person, such as a thief or embezzler, but threats that result from general downward trends in economic activity represent threats arising from the changes in the behavior of the many players in the various markets for goods and services. The range of security interests includes serious threats to economic well-being that result from changes in the behavior of very large numbers of people.

This is not particularly controversial. If the entire Canadian population suddenly stormed the U.S. borders in an attempt to wage war against the United States, it would constitute a threat to our security both as individuals and as members of a society whose existence ensures our survival and well-being. In part, what explains the moral importance of security interests is not just the content of certain interests they include, such as life, but the range of interests and range of threats that are encompassed by this notion. As was true of the concept of privacy, an analysis of the concept of security entails nothing about whether our interests are protected by morality; substantive argument is needed to do this work. But understanding the concept of privacy helps us to see that the idea that such interests are of moral significance is both intelligible and plausible; the same is true of an analysis of the concept of security, conceived of as including serious threats to economic interests. Even at this preliminary point, one would expect security interests to be, at the very least, deserving, as a matter of political morality, of legal protection.

B. Interests in Personal vs. Collective Security

As it turns out, the concept of security is ambiguous as between two interpretations. My interest in personal security extends no further than my having an interest in my own security. Accordingly, my interest in

personal security is concerned with my being protected from violent acts of assault and theft, but is indifferent with respect to other people being protected from such acts. My interest in collective security is an interest I have in the continuing existence of the social group I inhabit as providing an environment in which I and other people are free from the threats of violence and theft, and hence, which provides necessary, though not sufficient, prerequisites for the possibility of leading a meaningful human life. My interest in "national security," of course, is an interest in collective security—in particular, an interest in the continuing existence of the national group to which I belong.

There is, of course, an obvious relation between the two: if I live in a society that lacks collective security, then it is highly probable that I will also lack personal security. If people everywhere are rioting, then my individual, or personal, well-being is threatened—to some extent—even if I am sitting at home with all the doors bolted shut. If I feel I have to sit in a "safe room" to escape the direct threat to my security, then I am no longer leading a meaningful, flourishing life. For all practical purposes, my life is organized around defending myself from attacks on my life—surely not a desirable state of affairs for any practically rational being.

It might be that some persons are so selfish that they care about collective security only insofar as it impacts their own security, but I would be surprised—at the risk of overestimating the capacity for human empathy—if this were generally true. There is no doubt that there are many people with pathological psychological conditions who care only about their own interests and would hence care about collective security only because it bears on their personal security; for these people, the interests of other people count for nothing. But most people who share a communal life with us in society form social bonds—bonds that extend to people we have never met in virtue of their being a member of the same tribe or community. Although the empathetic bonds extended to those solely in virtue of tribe membership will be considerably weaker than those extended in virtue of the development of mutually satisfying personal relationships, they are significant bonds. Most of us who watched the floodwaters rise on people clinging for life on their roofs in New Orleans in the aftermath of Hurricane Katrina cared very deeply about what was happening to them. We care, of course, about our own security, but we also care a great deal about the security of our community—and not just because it bears on our safety and security.

I believe that morality protects some of these interests in collective and personal security to such an extent that they rise to the level of a right. Nevertheless, it is not at all clear how to draw the line between those interests *not* covered by a right to security and those interests covered by a right to security—and I cannot attempt to do so here.

The point I want to make here is that I am perfectly comfortable assuming our moral interests in privacy rise to the level of a right that a legitimate state is obligated to protect as a precondition of its legitimacy, and that, as I will show from a number of vantage points, the same is true of the right to security. In addition, I will provide a number of arguments—some of them grounded in individual morality and some grounded in major approaches to theorizing about the conditions a state must satisfy to be morally legitimate—that the right to security trumps the right to privacy when the two come into conflict.

IV. WHAT EXACTLY DOES "SECURITY TRUMPS PRIVACY" MEAN?

The meaning of the claim that security trumps privacy is not immediately obvious. At the outset, this much has been clear: if it is true that security trumps privacy, then it is also true that privacy is not an absolute right. Since the slogan that security trumps privacy entails that when security and privacy are in some sort of direct conflict, security defeats privacy, it follows that privacy is not absolute.[24]

But, quite frankly, this does not tell us much; the claim that privacy is nonabsolute does not tell us anything about how it should be weighed against other nonabsolute rights, and I do not wish to claim that security is an absolute right because I think this thesis is as counterintuitive as the thesis that privacy is an absolute right. If it were true, for example, that security was an absolute right, and privacy necessarily yields in the event of any conflict at all, then it would follow that it is morally justifiable for the state to sacrifice all interests in privacy if necessary to achieve just the slightest gain in security. I take this to be so obviously false as to constitute a counterexample to the claim that security is absolute, at least relative to privacy.

The claim that security trumps privacy is meant to express the more intuitive, but admittedly vague, idea that security and privacy are commensurable values and that, as a general matter, security is a more

24. I am deeply indebted to David Brink for making me aware of the need to address this issue in some way, although all I can really do here is acknowledge the epistemic issues that would have to be worked out in order to fully flesh out the content of the claim that security trumps privacy. I have no illusions that I have said anywhere near enough to deal adequately with his concerns or with the theoretical issue presented here. That will have to be a topic for another paper.

important value from the standpoint of morality than privacy. This does not commit me to the claim that all values are commensurable; perhaps there are two values that simply cannot be weighed against one another. But it does commit me to the claim that there is a hierarchy of commensurable morally protected interests and rights, which include security, privacy, and perhaps others, and that security has a higher position in the hierarchy than privacy. Indeed, I am tempted to think that security interests—construed to include freedom from grievous threats to well-being, which include death, grievous bodily injury, and financial damage sufficiently extensive to threaten the satisfaction of basic needs and hence survival of a person—are at the top of the moral hierarchy, encompassing as they do the rights to life and physical preservation.

The epistemology of resolving conflicts among rights is somewhat easier in the case of other interests that are not quite as broad as the security interest, as defined here. To say that the right to life trumps the right to property seems to entail that if one is confronted with a choice in which one has to damage one person's property or end the life of another person, it will always be the case that the right thing to do is to damage the property.

The epistemological problem of articulating a methodology for balancing competing security and privacy claims is quite difficult, and I cannot claim to be able to do that here because security might, in general, be more important than privacy, but privacy interests sometimes win in a conflict with security interests. It would not, for example, be permissible to disclose the most private information of one thousand people to save one person from being bruised severely on her leg. The relevant elements of the respective interests fall well short of being of comparable importance relevant to the privacy and security of affected persons.

Given the difficulties associated with working out a detailed epistemology of weighing competing privacy and security claims, I will have to content myself here with resting on another less than fully perspicuous formula to express my view. Other things being equal, a security interest defeats a privacy interest that has the same level of moral importance to privacy that the first element has to security.

Here is an example of what I have in mind, but it will fall far short of providing the sort of epistemic principle that would enable us to sort these issues out. If the life of one innocent person is at stake and can be

saved only by disclosing the most private information of another innocent person, it is morally permissible, though obviously regrettable, to disclose that information in order to save the life. Here the most important value protected by security comes into conflict with the most important value protected by information privacy; the result in this case is that the security interest is more important.

Of course, this case—as well as the case in which we can save someone from a bruised leg only by disclosing the most private information of one thousand people—is theoretically uninteresting because it is so easily resolved. The cases of real interest are those posed by various provisions of the USA PATRIOT Act where there is no consensus among theorists and laypersons about how to balance the competing interests—even where it is clear that there is a genuine conflict that a particular provision is intended to resolve.

One conspicuous class of issues involves how to compare a case in which some more important element of security that involves a small class of persons, possibly consisting of one, is weighed against some less important element that involves a much larger class of persons. There are two dimensions to balancing these interests: (1) the importance of the interest relative to the type of interest involved; and (2) the number of people whose interests in security are implicated compared to the number of people whose interests in privacy are implicated. Both factors count for something in the weighing process, but I have disappointingly little to say by way of clarifying how the latter issue should be worked out. Again, the epistemological challenges are so difficult, multifaceted, and nuanced that I could not even begin to take a stab at them here.

How to resolve either issue in a principled way is not something I can admit to having even the beginnings of a theoretical account for; I merely want to make a multifaceted case that security interests are, as a general matter, ranked more highly on the hierarchy of commensurable moral values than privacy interests. This would entail that the class of all security interests possessed in whatever form by every person is more important, from the standpoint of morality, than the class of all privacy interests possessed in whatever from by the same individual. This, as we have seen, is compatible with situations in which someone's privacy interests defeat someone else's security interests.

But something like a detailed epistemology would be needed to make out a rigorous theoretical explanation of the idea that, other things being equal, security interests trump privacy interests that are as important to privacy as the security interests are to security. First, one would need some sort of vertical ranking of both security and privacy interests that includes some mechanism for deciding where along the spectrum of privacy and security interests competing interests are of comparable

internal importance. Thus, for example, it is easy to see that life trumps the most private facts about oneself, but not so easy to see where the interest in financial security lines up with other information about oneself that is private. Second, one would have to come up with a calculus for aggregating security and privacy interests across persons so that they can be properly weighed against one another. Is one life more valuable than the most private information of ten people? One hundred? One thousand? The problem here arises because the number of persons whose security interests are implicated might not be the same as the number whose privacy interests are implicated. Finally, one has to have some sort of reasonably accurate probability calculus for determining the likelihood that a measure proposing a trade of privacy for security will result in securing the appropriate increase in security without causing a greater diminishment in privacy than can be justified by that increase. As is readily evident, these are three quite difficult problems to work out.

In closing, I should point out that privacy interests and security interests are commensurable in the sense that they can at least sometimes be compared and weighed accurately in the case of conflict. This is surely so some of the time; as noted above, the interest someone has in the privacy of information about his being homosexual cannot outweigh the interests of 300,000 people whose lives depend on the disclosure of that information. This, of course, is a far-fetched case, but it demonstrates beyond doubt that privacy and security interests will frequently be commensurable along both dimensions—the dimension of importance and the dimension of assessing that importance across different size classes of individuals—a prerequisite for being able to claim that, as a general matter, security interests, properly defined, are more important, other things being equal, than informational privacy interests.

This, however, should not be taken to imply that security and privacy interests are always commensurable. It might be that sometimes conflicts arise between security interests and privacy interests that cannot accurately be weighed because they are simply incommensurable values. For example, some property interests might not be commensurable with some privacy interests; sentimental attachments that are vital to a person's sense of well-being might—or might not be—commensurable with informational privacy interests. Nothing in the thesis of this essay should be construed to imply that we can always resolve conflicts—or even that an omniscient God can always do so—because nothing in this essay should be construed as implying or presupposing that it is a necessary

truth that the relevant values are commensurable. I would surmise that in the vast majority of cases they surely are, but there might be some small class of cases in which they are not. I am not entirely sure of whether this latter claim is true, but the issue is much too complicated to take on here. I simply want to gesture in the direction of the potential concerns here.

V. THE ARGUMENT FROM INTUITIVE CASE JUDGMENTS

From an intuitive standpoint, the idea that the right to privacy is an absolute right seems utterly implausible. Intuitively, it seems clear that there are other rights that are so much more important that they easily trump privacy rights in the event of a conflict. For example, if a psychologist knows that a patient is highly likely to commit a murder, then it is, at the very least, morally permissible to disclose that information about the patient in order to prevent the crime—regardless of whether such information would otherwise be protected by privacy rights. Intuitively, it seems clear that life is more important from the standpoint of morality than any of the interests protected by a moral right to privacy.

Still one often hears—primarily from academics in information schools and library schools, especially in connection with the controversy regarding the USA PATRIOT Act—the claim that privacy should never be sacrificed for security, implicitly denying what I take to be the underlying rationale for the PATRIOT Act. This also seems counterintuitive because it does not seem unreasonable to believe we have a moral right to security that includes the right to life. Although this right to security is broader than the right to life, the fact that security interests include our interests in our lives implies that the right to privacy trumps even the right to life—something that seems quite implausible from an intuitive point of view. If I have to give up the most private piece of information about myself to save my life or protect myself from either grievous bodily injury or financial ruin, I would gladly do so without hesitation. There are many things I do not want you to know about me, but should you make a credible threat to my life, bodily integrity, financial security, or health, and then hook me up to a lie detector machine, I will truthfully answer any question you ask about me. I value my privacy a lot, but I value my life, bodily integrity, and financial security *much more* than any of the interests protected by the right to privacy.

It is true, of course, that the hierarchy defined by my personal attributions of value may not reflect the hierarchy implied by the moral values themselves, but I would be surprised if there are any rational persons who would react differently to the choice presented above. Personal valuations can be idiosyncratic and for this reason not tell us

anything about the corresponding moral values. But if it is true, as I would hypothesize, that very few, if any, people would choose to withhold some piece of private information about themselves if needed to save their lives, or protect them from serious physical injury or financial ruin, that is a pretty good reason to think that these valuations do tell us something about morality. It would be very odd if, on the one hand, all, or nearly all, rational persons assign greater value to what I have described as the most important of security interests than to the most important of privacy interests where there is a genuine conflict between the two but, on the other hand, morality assigned more value to privacy than to security.

It is fairly easy to see, however, that my intuitions are widely shared in the United States. As an empirical matter, citizens in the United States frequently indicate a willingness to trade privacy for enhanced security. For example, a Harris poll conducted on October 4, 2004, three years after the attacks of 9/11, produced the following results:

> - Two-thirds (67%) percent favor "closer monitoring of banking and credit card transactions" up slightly from 64 percent in February (and down from 81 percent in September 2001).
> - Six in ten (60%) favor "adoption of a national I.D. system for all U.S. citizens" up from February's 56 percent (down from 68% in September 2001).
> - Those who favor "law enforcement monitoring of Internet discussions" [have] increased significantly from 50 percent earlier this year to a current 59 percent. This is only somewhat lower than the 63 percent who felt this way in September 2001.
> - Those who favor "expanded government monitoring of cell phones and email" have risen to 39 percent, with 56 percent opposed. In February this year, a somewhat lower 36 percent minority favored this.
>
> . . . .
>
> - 83 percent continue to favor "stronger document and physical security checks for travelers," basically unchanged since February (93% in September 2001).
> - 82 percent continue to support "expanded undercover activity to penetrate groups under suspicion," up from 80 percent in the February poll (93% in September 2001).
> - 60 percent continue to support "expanded camera surveillance on streets and in public places," virtually unchanged since February (63% in September 2001).[25]

25. HARRIS INTERACTIVE, THE HARRIS POLL #73: PUBLIC PERCEPTIONS OF LIKELIHOOD OF FUTURE TERRORIST ATTACK LEADS TO CONTINUING SUPPORT FOR TOUGH SURVEILLANCE MEASURES TO PREVENT TERRORISM (2004), http://www.harrisinteractive.com/harris_poll/index.asp?PID=501.

One might be tempted to argue that these results should not be taken as typical because the poll was taken only three years after the 9/11 attacks, and people have become somewhat more critical of late of the government's efforts to combat terrorism that implicate privacy. But the claim is not that the people *always* favor enhanced security measures even when they impinge on privacy interests; the claim is rather that when people are convinced that they face a *credible* deadly threat of some sort—that is, one that satisfies some threshold level of probability for success—they are generally willing to sacrifice privacy interests, even important ones, to reduce the probability of success. Criticisms of recent measures primarily express the view that they impinge upon privacy *without significantly reducing the probability of a terrorist attack on U.S. soil*. That, unlike the poll results described above, tells us nothing about common intuitions regarding how to balance security and privacy as a general matter.

More tellingly, people will frequently choose to give up a variety of more important interests to protect security interests. A 1996 poll found that 77% of Russians valued social order over democracy and hence can be interpreted as believing that security interests are more important than autonomy interests, while only 9% valued democracy over social order.[26] This not only speaks to the fact that ordinary intuitions commonly converge upon valuing security interests over other interests like privacy and autonomy, but also attests to the ill-advisedness of the sort of market fundamentalism embraced by the International Monetary Fund in attempting to remake the former Soviet Union in the image of the United States by immediately transforming the Russian economy from being centrally organized around state planning and state ownership of the means of production to one of essentially unrestricted free enterprise. The result has been a disaster; some Russians have gotten very rich, while others fall behind economically and are far more vulnerable to falling victim to crime of all kinds, leaving overall a diminished sense of well-being among the Russian people. Sadly, this is a mistake that the IMF continues to repeat all over the developing world—although this might be explained, in part, by the fact that Western multinational corporations almost always somehow find a way to come out ahead because these corporations derive the benefit of economic protectionist mechanisms, like tariffs, that make it impossible for developing nations to compete.

If this is true, and it is also true, as I am assuming, that individuals have a moral right to privacy that is sufficiently important from the

26. Michael Kramer, *The People Choose*, TIME, May 27, 1996, at 48, 56.

standpoint of political morality that states are obligated to protect it as a condition of moral legitimacy, then it follows that individuals have a moral right to security that is sufficiently important from the standpoint of political morality that states are obligated to protect it as a condition of moral legitimacy; if morality affords more protection to *X* than to *Y* and morality protects *Y* as a *right*, then it follows that morality protects *X* as a right. Moreover, insofar as morality provides more protection to the right to security than the right to privacy, it follows that the right to security outweighs the right to privacy, other things being equal—whatever that ultimately turns out to mean. Insofar as political morality requires, as a condition of state legitimacy, the protection of the moral right to *Y* by legal restrictions on behavior, it also requires, as a condition of state legitimacy, the protection of the moral right to *X* if *X* is of greater moral importance than *Y*. Since privacy and security can clearly conflict on matters central to each, it follows that the right to privacy is not absolute.

Of course, arguments of this sort can take us only so far. First, whether or not intuitions converge on a moral issue is a contingent matter that can only be determined by empirical sociological inquiry, something I am not prepared to do. Second, there may be more compelling general theoretical considerations that contradict these intuitions and convince us to give them up to achieve general coherence in our belief structure. Third, one person's intuitions about the importance of life relative to the most private facts about her provides very limited evidence for the claim that, other things being equal, security trumps privacy. Finally, in the absence of the appropriate metric for ranking privacy and security on their own hierarchies and a means of determining when security and privacy interests fall on comparable spots in that hierarchy, these intuitions, widespread though they might be—as reflected in the polls described above—will not tell us anything more than that privacy rights or interests are not absolute. They will not tell us that, other things being equal, security is the more important value.

VI. CONSIDERATIONS OF INTRINSIC AND INSTRUMENTAL VALUE

In determining what morally protected interests people might have, philosophers frequently distinguish two kinds of value. An entity has *instrumental value* if and only if it has value as a means to some other valuable end. In contrast, an entity has *intrinsic value* if and only if it has value as an end in itself. Money is an example of something with only instrumental value; while money clearly has value as a means to

other ends like nutrition and recreation, it does not seem to have any value as an end in itself. In contrast, one's own happiness is an example of something with intrinsic value. While it might make sense to value some other person's happiness as a means to some other end, it makes little sense to think of one's own happiness as primarily a means to some other end.

There are two concepts of intrinsic value that make use of this distinction—one primarily normative, and the other primarily descriptive. The normative concept is concerned with what rational moral agents *ought* to value as deserving of respect as ends in themselves. An entity intrinsically valuable in this sense has value as an end in itself, regardless of whether any rational agents actually value it this way. Thus, attributions of this kind of value are normative in the sense they are independent of the actual valuations of rational agents: if every rational agent failed to value an entity *E* with intrinsic value in this sense, each would be making a moral mistake. Attributions of intrinsic value in this normative sense are disconnected from what we actually value as an empirical matter.

Entities with intrinsic value in this sense are moral patients *entitled* to moral respect. Unlike something with only instrumental value, something with intrinsic value may not be used by an agent without some thought to its interests. Whereas the appropriate manner for thinking about things with only instrumental value is cost-benefit analysis, intrinsically valuable things have a right to some consideration in a moral agent's deliberations. For example, if nonhuman animals have intrinsic value in this sense, moral agents have an obligation to consider their interests in deliberations about acts that may affect those interests.

In contrast, the descriptive concept is concerned with identifying the sort of ends we *characteristically* pursue; the issue here is what, as an empirical matter, we typically regard worth pursuing for its own sake. An entity has intrinsic value in this sense if and only if, as an empirical matter, most of us actually value it as an end in itself; a thing has instrumental value if and only if most of us value it as a means.

The moral significance of being regarded as an end in itself by moral persons—that is, of having intrinsic value in the descriptive sense—is different from that of being owed an obligation of respect—that is, of having intrinsic value in the normative sense. As *persons*, we have a morally protected interest in what we typically intrinsically value that is fundamental in not deriving from some other more basic interest. Persons have a special moral status in the world in virtue of being, or potentially being, both moral agents with obligations and moral patients with rights. Respect for beings with this status entails some measure of respect for their characteristic ultimate ends.

This helps to explain why we have fundamental moral rights to life and liberty. It is surely true that we view our lives and our liberty as instrumentally valuable; being free and alive are necessary conditions for pursuing a life that is happy. But it is also clearly true, I think, that we typically view continued conscious existence and liberty as vitally important ends in themselves; we care passionately about these things for their own sakes—and not merely because they are useful for other purposes. Given the vital intrinsic importance of these ends, it is not surprising that they are the objects of fundamental rights.

Still, the fact that we intrinsically value these states does not fully explain why we have *rights* protecting them. Whether and to what extent morality affords protection to a person's interest in her ultimate ends depends on the nature of these ends and on the extent to which they can be adequately protected by moral rules given facts about human nature and the social arrangements under which we live. Although my interest in my life as an end in itself is clearly protected by a right to life, my interest in my happiness as an end in itself is not protected by a right to happiness. My achieving happiness can be facilitated by my rights to life and liberty, but my happiness depends on a host of factors that cannot be protected by the characteristic mechanisms of moral and legal obligation. It makes no sense to think that a woman with whom I am in love is morally obligated to return that love—even though my happiness may depend crucially on her loving me the way I love her. A person's happiness depends on the job she gets, the social connections she enjoys, and the sense of her own worth. These are simply not the kinds of things that can be protected or guaranteed by rights and obligations—moral or otherwise—in part, because such protections would infringe, without adequate justification, the rights of other people; surely, every person has a moral right to decide for herself with whom she is in love. Accordingly, the characteristic assignment of intrinsic value to *X* is not a sufficient condition for having a fundamental right to *X*.

Surprisingly, the characteristic assignment of intrinsic value to *X* is not even a necessary condition for having a fundamental right to *X*. Many persons believe we have a fundamental moral right to property, but it seems clear that property does not have value as an end in itself; someone who pursues property for its own sake, rather than as a means to other ends, seems to have badly misunderstood the value of property.

One does not, of course, have to take the position that property is a natural moral right, rather than a social right conferred by society. The

idea that we have a moral right to take things external to our persons out of a commons is somewhat less natural than the idea that we have a moral right to life, which does not extend beyond the physical boundaries of our own person and thus affords no right to things external to us. Indeed, the idea that property rights are moral in character has been notoriously difficult to defend; the best strategy continues to be a Lockean strategy that grants us such a right to things when we invest our labor in them and create new value, but no one has adequately explained why it is not equally reasonable to conclude that, as a moral matter, we lose our labor when we put it into something external to ourselves.

Instead, one can conceive of property as a social right but, either way, what explains why we have a right to property undoubtedly makes reference to the importance of property to well-being. Not only does it seem necessary for our survival that we can exclude persons from appropriating at least some *material* objects, it also seems that excluding others from appropriating an object *O* that satisfies some want always has instrumental value because it endows *O* with exchange value that enables *O* to be exchanged for another object that can satisfy some want. The importance of property to well-being certainly plays a role in our having a right to property—regardless of whether it is social or moral in character.

But what explains why a right to property is *fundamental* has to do with the relationship of its content to the content of other rights. While property might be necessary for survival, the right to life does not imply a right to property. My right to life implies that you are obligated not to kill me, but it does not imply that you are obligated to refrain from appropriating all objects, including those not necessary for my survival, that I have claimed as my own. The right to exclude other persons from appropriating an object, which is central to the notion of a property right, may conduce in some cases to survival, and hence, relates to the interest in life, but it cannot be derived from the right to life. Insofar as similar things can be said about the relationship of the right to property to other fundamental rights, the right to property is fundamental despite the fact that property lacks intrinsic value.

There is no general rule linking fundamental rights and instrumental value. There might be many entities we characteristically value as a means without having rights to them. For example, it seems reasonable to think that we typically value sexual experience as a means to some deeper intimacy or as a means of affirming our sexual identities. But it would not follow that we have some sort of right to sexual experience—though we obviously have basic liberty rights that entitle us to pursue such experiences within limits. How much protection, if any, morality

affords our interest in what we instrumentally value presumably differs from interest to interest.

In any event, the following can safely be said about the significance of rights that protect what is intrinsically valuable relative to rights that protect what is instrumentally valuable. If *X* is a right that protects something that is instrumentally valuable as a means to *Y*, something that is intrinsically valuable and protected by a right, *Y* is the more important value of the two from the standpoint of morality because the value of *X* derives from the value of *Y* in the following sense: but for the intrinsic value of *Y*, *X* would not be instrumentally important, and hence, would receive no moral protection.

It seems to follow that rights the value of which is purely instrumental are not as important as rights providing the ends to which the former rights are intended to secure. If our interests in *X* is purely instrumental as a means to securing *Y*, and both *X* and *Y* are morally protected in virtue of our interests in them, it seems clear that what is of ultimate importance from the standpoint of morality is *Y*. *X* is protected only because it facilitates the achievement of *Y*. If *X* did not conduce to *Y* in the appropriate way, *X* would not be protected, but *Y* would be, other things being equal. Since *Y* is the interest of ultimate value that is not contingent upon securing something else of moral importance, and *X* lacks this property, it seems reasonable to conclude that, from the standpoint of morality, *Y* is more important an interest than *X*.

This is surely true of property. As John Locke points out, we need to be able to consume material things to survive and to flourish in all the ways that human beings ought, as a moral matter, to flourish.[27] Property is ultimately protected then because of its crucial instrumentality to the achievement of these ends: without property, neither brute survival nor a morally meaningful life is possible. But clearly property is less important than brute survival; and property is also less important than whatever aspects of human flourishing to which property is essential that are deemed significant enough to be ultimate ends protected by morality. This explains why property rights are less important than rights to life and liberty—though neither of the latter need necessarily be construed as being absolute.

27. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 18–30 (C.B. Macpherson ed., Hackett 1980) (1690).

The same also seems to be true of the right to informational privacy and the right to, or interest in, security. Informational privacy is valuable only as a means to an end. If certain pieces of information about me were not likely to be used in ways that have damaging consequences to my well-being, I would not care one bit whether they were widely known. My hair is dirty blond, something I take no pains to hide because the risk that someone will use this information to discriminate against me in some way that significantly diminishes my well-being is virtually nil. In contrast, I care about personal information about my health because my being at high genetic risk for a particular disease, if this turns out to be true, might lead a potential employer not to hire me. There is no piece of personal information about myself that I value keeping private as an end in itself; privacy is all about avoiding embarrassing and otherwise damaging social consequences.

Security, on the other hand, is something I value instrumentally because it is a precondition for living a meaningful, enjoyable human life, but it is also something I value intrinsically. Continued sentient existence, bodily integrity—for example, having four limbs that I can move by volition—and financial security are ends in themselves and hence intrinsically valuable. Indeed, in many cases, I value privacy of information as a means to protecting security interests that I value intrinsically. Insofar as this is true, it seems reasonable to conclude that security is a more important value than privacy from the vantage point of individual and political morality.

This seems to be a view shared by other theorists. John Finnis, for example, attempts to identify those things we value intrinsically as the "basic goods" that are ultimately the subjects of foundational moral principles. Rejecting the claim that there are no values that are universally shared across cultures, Finnis identifies the following values as forming the foundation for moral rules:

> Students of ethics and of human cultures very commonly assume that cultures manifest preferences, motivations, and evaluations so wide and chaotic in their variety that no values or practical principles can be said to be self-evident to human beings . . . .
>
> . . . [But recent anthropological] surveys entitle us . . . to make some confident assertions. All human societies show a concern for the value of human life; in all, self-preservation is generally accepted as a proper motive for action, and in none is the killing of other human beings permitted without some fairly definite justification. All human societies regard the procreation of a new human life as in itself a good thing unless there are special circumstances. No human society fails to restrict sexual activity; in all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations. All human societies display a concern for truth, through education of the young in matters not only practical (e.g. avoidance of dangers) but also speculative or theoretical (e.g. religion). Human beings, who can survive infancy only by nurture, live in or on the margins of

> some society which invariably extends beyond the nuclear family, and all societies display a favour for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups. All know friendship. All have some conception of *meum* and *tuum*, title or property, and of reciprocity. All value play, serious and formalized, or relaxed and recreational.[28]

On Finnis's view, these values are sought as ends in themselves in all cultures and societies across all times and constitute universal intrinsic values that form the goods that are foundational to human well-being and flourishing. As such, these goods define the basic principles of morality that protect people in their pursuit of such goods by creating rights and obligations and encourage such pursuit by characterizing it as "good."

Finnis's view should not be construed as implying that anything omitted from the list receives no protection whatsoever from morality. His intent here is simply to identify the foundational goods—that is, the goods that are sought as ends in themselves because their achievement is constitutive of a good, flourishing human life. Insofar as some *X* is essential to achieving one of the basic goods and is not otherwise morally objectionable, it is reasonable to think that morality will afford some protection to efforts on the part of persons to achieve *X*; but, again, the value of *X* will be derivative of and of less importance than the value of the basic good *X* is needed to achieve.

It is noteworthy here that Finnis's list includes a number of values that would count as interests in security, but none that would count as privacy interests not ultimately derivable from some other interest on the list. My interest in security includes, as I have mentioned, my interest in life, my interest in living in a stable community that extends beyond the boundaries of the nuclear family, and my interest in ensuring that I am able to provide for my basic needs—which is secured by a protected interest in property.

But nowhere in the list does anything that would count as an interest in informational privacy appear; informational privacy might be necessary in varying degrees in different cultures as a means to achieving some of the basic goods, but its value, if Finnis is correct, is instrumental, rather than intrinsic. This, of course, does not imply that it receives no protection from morality; as noted above, what is a necessary means to an end that receives moral protection is something that also receives moral protection,

28. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 83 (H.L.A. Hart ed., 1980).

but it is of less importance from the standpoint of morality than the intrinsically valuable good it is essential to achieve.

Of course, one need not take Finnis as having gotten his list correct, but it is noteworthy that theorists who attempt to justify privacy protection in virtue of its value converge on characterizing its value, though not necessarily explicitly, as wholly instrumental. Charles Fried characterizes the value of privacy in terms of its value in facilitating intimate relationships; the value of privacy is a means to the intrinsic goods of personal intimacy.[29] Edward Bloustein argues that informational privacy is valuable as a means of protecting autonomy and one's sense of self as deserving of respect.[30] James Rachels argues that informational privacy protects against a number of harms and discriminatory behaviors as well as helps us control our social relationships with others.[31]

To my knowledge, no author has made a plausible case that any element of informational privacy is intrinsically valuable or counts as a basic constituent of human well-being or flourishing. If privacy is purely instrumentally valuable as a means to secure other goods, including security, that are intrinsically valuable and are constitutive of human well-being and flourishing, then it is reasonable to conclude that privacy is less important, from the standpoint of morality, than security.

VII. CLASSICAL SOCIAL CONTRACT THEORIES

A "classical" social contract theory is one that grounds the beginnings of an account of coercive state authority in an agreement that is actual in the sense that every party to the agreement has either expressly promised to be bound by the authority or done something that justifies attributing a promise to that party; in the latter case, the promise is said to be "tacit" or "implied." Social contract theories that take this approach tend to be "classical" in the more intuitive sense that they are, as a historical matter, the earliest version of the theories, which also correctly suggests that the approach of social contract theories has changed over time. I take the social contract theories of Hobbes and Locke, while differing in many respects, to be paradigmatic examples of classical social contract theories.

29. CHARLES FRIED, AN ANATOMY OF VALUES 140–44 (1970).
30. Bloustein, *supra* note 13, at 1000, 1002, 1006.
31. Rachels, *supra* note 15, at 323–26.

A. The Structure of Classical Social Contract Theories

Classical social contract theories begin with the postulation of a mythical presocial state, called the state of nature in which the goods that are needed to satisfy basic needs are insufficient to satisfy the needs of persons in that state. In the state of nature, there are none of the benefits associated with our living together cooperatively in a society of even the smallest scale.

To begin, there is no central authority of any kind, such as a state, to coercively enforce rules that limit behavior in the state of nature. There is hence nothing in the state of nature, other than a person's own efforts, to protect him or her from being victimized by other people. The only limits on the behavior of other persons towards any particular citizen are that citizen's ability to fend off physical attacks and other sorts of assaults on other interests he or she might have—such as an interest in food he or she has gathered.

In consequence, there are no binding social bonds or agreements possible. In the state of nature, it is always in an agent's interest to cheat on an agreement or promise—regardless of whether the other parties cheat. If the other parties cheat, the agent must cheat simply to keep up. If the other parties do not cheat, the agent can gain an unbargained-for advantage by cheating. Since this is known to all in the state of nature, cooperative arrangements are not possible.

This means that, in the state of nature, one has no friends, no relatives, and no family ties—nothing in the state of nature that would constitute the kind of social bond that makes possible mutual trust between individuals or even unilateral trust of one person in another person. Thus, there is nothing in the state of nature that would make cooperative behavior, or teamwork, possible. One is completely on one's own in the state of nature; and since trust is not possible, one must constantly be on guard against threats from other inhabitants.

Accordingly, there are none of the benefits that social cooperation makes possible in the state of nature. There is no art or entertainment, of course. But, more importantly, there is no technology of any kind that would enable one to make certain tasks easier, increase one's productivity, or increase the stock of material resources available to one in the state of nature. In the state of nature, one does have one's wits to rely on; after all, human beings remain rational in the sense of having certain problem-solving abilities that rely on conscious deliberation. But what a person

will be able to do with her wits will be severely limited by the fact that there is no history of trial and error, no science, and no education to provide persons in the state of nature with any information from other people they can work with. Presumably, one's rational capacities in the state of nature will be limited to enabling people to make fairly primitive tools and weapons.

Material resources in the state of nature are extremely scarce in the following sense. There is simply not enough of what human beings need to survive to enable all persons in the state of nature to live a lifespan that comes close to the average lifespan in the United States. Some will die more quickly than others, but nearly all will die long before reaching an age we in the twenty-first century take for granted as a probable lifespan.

Taken together, these conditions ensure that life in the state of nature will be violently competitive and, for that reason, extremely unpleasant. It is not just a matter of everyone's having to scratch out for themselves the minimum resources needed to survive; one will have to engage in some sort of fight or conflict with others to do this because resources are so scarce. Here is how Hobbes famously describes life in the state of nature:

> Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man against every man. . . .
>
> Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; No knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual feare, and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.[32]

This terrible state of war of all against all that constitutes the state of nature, as Hobbes describes it, is the alternative to life under some sort of common authority with the ability to coercively enforce rules to protect people against violence, theft, and other infringements of important interests.

Hobbes and Locke, the first classical social contract theorists, differed on whether morality governs life in the state of nature—Hobbes taking the counterintuitive position that everything is permissible there; but

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32. THOMAS HOBBES, LEVIATHAN 88–89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1660).

they clearly agreed that life in a state of nature is sufficiently unpleasant that any practically rational person will want out and be willing to sacrifice some measure of autonomy to a state in exchange for a similar sacrifice on the part of all others. While Hobbes believed this meant that people voluntarily submit to the authority of a sovereign whose authority is unlimited in the sense that the sovereign can commit no moral wrong against its subjects, Locke believed that people voluntarily submit to a state authority that enacts laws through democratic procedures while simultaneously respecting the natural moral rights to life, liberty, and property that persons have even in the state of nature.[33] Either way, people are plausibly presumed to actually agree to be bound by the common authority as a way of escaping the state of nature, which both theorists believe is the only alternative to life in a society governed by a sovereign entity of some kind with coercive authority.

B. Security vs. Privacy in Classical Social Contract Theories

It is clear that the primary motivation in the state of nature for submitting to a coercive state authority is to escape the extreme unpleasantness associated with life in that state. One's physical security is always in danger in the state of nature; one's life is always in danger—whether directly or indirectly. One must, most obviously, be on guard against threats of deadly physical violence; the price of failure to be sufficiently vigilant will frequently be grievous bodily injury or death. Less obviously, one must guard against having one's few possessions taken by other persons.

Indeed, while Hobbes was pretty explicit that the very point of submitting to the sovereign was to gain some measure of physical security by giving up the unlimited freedom one has in the state of nature, Locke believed that the very point of the state authority is to protect property. Although it may therefore seem that Locke and Hobbes disagree about the basic value that people submit to authority to achieve, the appearance is misleading. Locke presumably believes that in the state of nature the principal threat to security consists in the threat of having one's few possessions taken, assuming that the extreme scarcity of the state of nature presents the primary threat to security against which people have to guard.

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33. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330–33 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

This is, in part, what explains a number of features of Locke's famous argument for natural property rights. First, Locke argues, in effect, that people *need* to consume material objects in the commons to survive and that the moral right of self-preservation ensures that there must be some morally justified way to take things out of the state of nature and appropriate them. Locke argued that we can acquire a property right in an unowned object by mixing something to which we have a property right—our labor—with that object in a way that creates new value. But that is simply the mechanism Locke identifies as acquiring a moral property right in something, which he has antecedently concluded must exist as a consequence of our right to preserve our lives—and the reasoning is compelling: if we have a moral right to *Y*, and *X* is a necessary means to *Y*, then we have a moral right to *X*.[34] The very foundation of Locke's argument for natural property rights is grounded in an interest in the preservation of one's life that is central to the notion of security.

Second, the compelling importance of the interest in security explains one of the limitations on the natural property rights that the state is morally obligated to protect. Locke famously limited the capacity to acquire property rights in the state of nature to objects that belong to no one—"original acquisition"—by two provisos, one more telling than the other, for our purposes. The less relevant proviso is that one can never acquire an object for the purpose of destroying or wasting it, which is intended to try to preserve the stock of scarce resources as much as possible. The more relevant proviso is that one can acquire a property right in an otherwise unowned material object only if there was enough of that object of similar quality left for everyone else. The idea here is that original acquisition in these circumstances does not exacerbate the conditions of scarcity that are likely to promote violent conflict among persons; as Locke puts the point:

> No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the Case of Land and Water, where there is enough of both, is perfectly the same.[35]

Accordingly, the state's most important obligation is to protect property, on Locke's view, precisely because the protection of property will ensure the public peace and minimize threats to physical security. Protection of property, though first among the state's priorities, is a

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34. It seems clear that people have a moral right to consume what they need to survive if it does not belong to anyone else. But this gets us, at most, the existence of moral property rights in objects needed to survive; it would not justify a moral right to accumulate the amounts of property currently held by the world's richest persons.

35. LOCKE, *supra* note 33, at 291.

means to the ultimate end of protecting security by ending the war of all against all that occurs in the state of nature. For classical social contract theorists, then, the most important value that submission to state authority is intended to pursue is security.

It follows, of course, that whatever the rest of the hierarchy of values might look like, the value of privacy is less, according to classical social contract theories, than the value of security. The rights to life and freedom from intentionally inflicted grievous physical injury trump the right to privacy, if such there be, when the latter comes into direct conflict with the former. Of course, Locke would rank the right of property alongside the other rights or interests mentioned above as constituting the right or interest in security because he believes protection of property is so important to protection of security. But classical social contract theories all converge in implying (1) that the right or interest in privacy is not absolute; and (2) that the right or interest in security trumps the right or interest in privacy when the two come into direct conflict—though neither theory tells us much about how or when these interests might directly conflict.

VIII. CONTEMPORARY SOCIAL CONTRACT THEORIES

A. John Rawls's Justice as Fairness

Perhaps the most fundamental idea in John Rawls's famous theory of justice as fairness is "the idea of a society as a fair system of social cooperation over time from one generation to the next."[36] Implicit in the claim that society is a fair system of cooperation, as Rawls understands that claim, are two further claims: (1) the terms that govern societal cooperation ought to be reasonably acceptable to each participant; and (2) those terms ought to be reasonable from the standpoint of the participant's own prudential interests.[37] Accordingly, Rawls attempts to identify the fair terms of cooperation by means of a hypothetical agreement among rational participants: the principles of justice constraining the state's lawmaking activities are, on his view, those that would be chosen by rational persons in an "original position."[38]

36. JOHN RAWLS, JUSTICE AS FAIRNESS 5 (Erin Kelly ed., 2001).
37. *Id.* at 6.
38. JOHN RAWLS, A THEORY OF JUSTICE 15–19 (rev. ed. 1999).

The crucial idea of the original position is defined by three elements of normative theoretical importance. First, persons in the original position must be free and equal so as to preclude any unfair bargaining advantages among the parties. As Rawls points out, "[I]f it is to be a valid agreement from the point of view of political justice[,] . . . these conditions must situate free and equal persons fairly and must not permit some to have unfair bargaining advantages over others."[39]

Second, persons in the original position are assumed to be concerned only to maximize their own interests, and are not assumed to take an interest in the welfare of other persons.[40] The reason for this is that the most that can be assumed about the motivations of any human being is that she is motivated by her own prudential interests. While many human beings are motivated by altruistic considerations, not everyone is. To ensure that the principles chosen by persons in the original position are universally acceptable, Rawls defines the original position in such a way that the only psychological assumptions on which it depends are true of every human being.

Third, and most importantly, persons in the original position are shielded from information about their own contingent abilities and circumstances by the so-called veil of ignorance.[41] Persons behind the veil of ignorance do not know, for example, how smart, athletic, physically attractive, socially adept, wealthy, or healthy they are. As Rawls describes this feature of the original position:

> [N]o one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong.[42]

A person in the original position, then, knows nothing about the abilities and properties that distinguish her from other people. In effect, such a person knows no more about herself than she does about any other person; what knowledge she has about herself is limited to knowledge of those properties that she shares with every other person.

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39. RAWLS, *supra* note 36, at 15.
40. RAWLS, *supra* note 38, at 10.
41. *Id.* at 11.
42. *Id.* at 118.

There are two points worth making about the original position. First, it should be clear that the original position in Rawls's theory does the work of the state of nature in the classical social contact theories. The veil of ignorance forces a person to make a choice; and it should be clear that one of the relevant factors in making the choice will be to avoid some of the extreme unpleasantness associated with the state of nature. Second, the point of the veil of ignorance is to seal off information that is irrelevant as far as justice is concerned.[43] Although the principles of justice are chosen by rational agents concerned only to advance their own interests, they must make their choices only on the basis of information that is morally relevant. Information about a person's intellectual abilities is morally irrelevant because those abilities depend largely on circumstances over which she has little control: who her parents are, where she was born, and how much education she has are largely matters of luck. While such fortuitous circumstances are, of course, relevant with respect to one's *prudential* deliberations, they are irrelevant with respect to one's *moral* deliberations—and the choice of principles of justice is ultimately a moral choice. Accordingly, persons in the original position must choose principles that will advance their interests no matter what abilities and propensities they turn out to have.

The imposition of the veil of ignorance prevents persons in the original position from adopting an interest-maximizing principle for pursuing their prudential interests. In conditions of full information, a rationally self-interested agent can pursue a strategy that aims at maximizing her own utility. In particular, such an agent can assess the expected value of each act *A* by calculating the differential between the expected benefit of *A*—that is, the magnitude of the benefit associated

43. As Rawls puts this important point:

> [I]t seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. The aim is to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice. For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle.

Id. at 16–17.

with *A* multiplied by its probability, and the expected cost of *A*—that is, the magnitude of the cost associated with *A* multiplied by its probability, and select the act with the highest expected value.[44] By selecting the act with the highest expected value, the agent optimizes her prospects for maximizing her own utility.

In conditions of highly restricted information, however, rationally self-interested agents must adopt a more conservative "maximin" strategy and choose behaviors that are minimally necessary to protect themselves against highly undesirable outcomes. As Rawls describes it, the maximin strategy "tells us to identify the worst outcome of each available alternative and then to adopt the alternative whose worst outcome is better than the worst outcomes of all the other alternatives."[45] The maximin rule, unlike the ordinary prudential strategy of maximizing expected value, takes only into account the relative magnitude of the worst possible outcomes; it does not take into account any information that assesses the comparative probabilities of the various options because such information is not available. In effect, then, rationally self-interested agents deploy the maximin strategy as a means for avoiding the most unacceptable of undesirable outcomes.

While some authors argue that the maximin strategy is not the only rational strategy applicable in situations of high risk and uncertainty,[46] it should be clear that something very like the maximin strategy is rationally deployed in such situations. A somewhat perverse example is helpful in illustrating the point. From the standpoint of prudential rationality alone,[47] it is rational for someone with full information to play the most dangerous games if the prize is large enough and the odds of losing are remote enough. Whether it is prudentially rational, for example, to play

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44. While agents do not typically ground their behaviors in explicit mathematical calculations of probability, this is true for a variety of reasons that do not call the general principle into question. First, in most instances, the relevant probabilities are known to be one. For example, the probability of the only material cost of a candy bar—its price—is one. Second, in circumstances in which the material probabilities are not known to be one, the agent has only a rough feel for the relevant values. In such situations, the role that explicit calculations normally play is played by a rough intuitive process of weighing the outcomes.

45. RAWLS, *supra* note 36, at 97.

46. *See, e.g.*, John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 598 (1975) (reviewing RAWLS, *supra* note 38).

47. The standpoint of prudential rationality seeks nothing more than the maximization of one's own interests. While it is probably true that a purely prudential standpoint is rarely appropriate, it is crucial to realize here that moral considerations are not relevant with respect to making purely prudential decisions. Accordingly, the following example brackets any considerations of morality, which would function to deter the agent from playing the game. The only issue in deciding whether or not to play is whether doing so maximally conduces to one's self-interest.

a game of Russian roulette with one bullet depends on the amount of the prize and on the number of empty chambers in the gun. While it would clearly be irrational to play if I know the prize is $1 and there is only one empty chamber in the gun, it is clearly rational to play if I know the prize is $100 million and there are six billion empty chambers;[48] one incurs a substantially greater risk of death every time one gets into an automobile. In these cases, there is sufficient information to adopt an interest-maximizing strategy that will sometimes dictate playing the game. However, a more conservative maximin strategy is appropriate from the standpoint of prudential rationality if I lack information about some of the salient probabilities. For example, if I am not told how many empty chambers there are in the gun, it is clearly rational to adopt a maximin strategy that requires me to decline the game as a means of avoiding the worst of undesirable outcomes.

Although the motivation for the veil of ignorance is largely moral, its effect on the deliberations of agents in the original position is prudential in character. Since the veil of ignorance denies people any information about themselves that would tell them how likely they are to win or lose in society, they must adopt a more conservative prudential strategy for selecting the principles of justice than the interest-maximizing strategy that is available in conditions of full information. They must, as a matter of prudential rationality, choose those principles that are minimally necessary to enable them to avoid the very worst outcomes. Since a maximin strategy will enable them to do this, it is rationally deployed by agents in the original position.

Rawls believes that a person in the original position will avoid the very worst outcomes by choosing a principle that affords her maximum liberty compatible with everyone else's having comparable liberty and a principle that assures that economic inequalities will conduce to her benefit no matter where she winds up in society. According to the Liberty Principle, "each person is to have an equal right to the most extensive scheme of basic liberty compatible with a similar scheme of liberty for

48. This is subject to one qualification: if one believes that God exists and punishes suicide with eternal and infinite suffering in hell, then the expected cost of the game is infinite no matter how small the probability of losing. Since a finite expected benefit is infinitesimally small relative to an infinite expected cost, it is irrational to play the game on such theistic assumptions no matter how big the prize and how small the probabilities of losing.

others."[49] According to the Difference Principle, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."[50] The person in the original position thus uses a maximin strategy to enable her to avoid catastrophic situations in which her freedom is denied or in which economic inequalities are permitted at her expense.

Here it is essential to consider some of the catastrophic situations that the two principles of justice are chosen to avoid. The Liberty Principle, which allows the maximum freedom to each compatible with similar freedom for all, takes directly into account the consequences to physical security of allowing people to do whatever they feel like doing. Utterly unrestricted freedom is likely to lead people to resolve conflicts of interests by violent behaviors—violence being an obvious threat to physical security. The Difference Principle seeks to protect people from the effects of life-threatening poverty when there are more than enough resources to satisfy everyone's basic needs, which is likely to result in violent conflicts. The concern here is to avoid the catastrophic consequences associated with debilitating illness, injury, or disability that prevent a person from providing for her own needs. These are clearly provisions and concerns that are intended to protect people from threats to life and from threats of grievous bodily injury or debilitating disease and disability, which fall within, if not the province of, physical security—something closely related.

It should be noted that nothing in these principles necessarily protects any of the privacy interests that are typically protected by privacy rights. Of course, in some cases, one might argue that protection of privacy is necessary to ensure the full exercise of liberty rights, but these are two different issues that are only contingently related; after all, the value of privacy is not one accepted universally among cultures, and what is considered private varies from culture to culture depending on other contingent features that vary with culture. As was the case with the classical theories, the right to, or moral interest in, privacy is not absolute and must clearly sometimes yield to protection of physical security.

Rawls's theory is sometimes treated as though one must test the legitimacy of every proposed law by subjecting it to analysis from the original position—something I doubt to be correct; but if this is the correct interpretation, no practically rational self-interested agent would choose a principle making the interest in privacy absolute.

The following is an easy way to see this: suppose we were considering a law that made it possible for the state to combat terrorism by obtaining the library records of patrons meeting a certain description without

49. RAWLS, *supra* note 38, at 53.
50. *Id.*

disclosing to patrons that their records have been disclosed. What would someone in the original position say about this? It depends on how much more we assume about its efficacy. If, for example, the law would save one hundred thousand lives while slightly changing the reading habits of just one person, it would be irrational not to accept the act. However, if the act would prevent just one broken arm while severely changing the reading habits of millions of people, then it would probably be irrational to accept the act. From the original position, the act's legitimacy turns largely on the effects it will have on both security and speech—issues that are empirical in character. Because we do not know from the original position exactly what the facts are with respect to the relevant numbers, we will, in adopting the maximin perspective, seek to choose the rule with the most acceptable of the worst outcomes. In other words, we will choose to allow the state to combat terrorism this way because, from a position of highly limited information, the worst possible outcome of adopting the rule is better than the worst possible outcome of not adopting the rule: changing the reading habits of millions without saving any lives is preferable to the number of lives that might be lost in a worst-case scenario if the rule is not adopted.

From our current vantage point in combating terrorism, of course, this sort of provision, which mirrors one in the USA PATRIOT Act,[51] is clearly not justifiably adopted. The problem is that, given our particular experience with terrorists, we have enough information to be justified in believing that a rule like this is not likely to achieve its purposes since we have good reason to believe terrorists are not likely to seek out information in a way easily traced to them. The issue, however, is what would we say when we lack sufficient information to estimate the expected costs and benefits of such a provision. Because we have adopted something like a maximin perspective from this position, we would adopt a presumption in favor of what we rationally take to be the most important value from a self-interested perspective. From the standpoint of self-interest, most people will share the intuition that security is more important than privacy and make a presumption in favor of the act given its purpose.

Accordingly, in the absence of any information that would enable us to predict the efficacy of such a restriction on privacy, the worst-case scenario that the maximin strategy forces us to reject is being killed by terrorists. The worst-case scenario with respect to privacy is that the

51. *See* 50 U.S.C. § 1861 (Supp. IV 2004).

state learns we are reading something that is really embarrassing. On the assumption that we cannot estimate the probabilities from the original position, we choose what seems to us from a position of much greater information one of the most knuckleheaded provisions of the PATRIOT Act.

In closing this subpart, it is worth noting one conspicuous difference between classical social contract theories and Rawls's contract theory. The former relies on the idea that people *actually* consent to the social contract that establishes the state authority, whereas the latter relies on the weaker idea that people in the original position *would* consent to the two principles of justice if they were in a position that they are clearly not in. Otherwise put, the classical theories rely on actual consent, whereas Rawls relies on hypothetical consent. Something like this, as we will see, will turn out to be true of Robert Nozick's version of contract theory.

B. Robert Nozick's Deontological Libertarianism

Classical social contract theories of legitimacy begin with the mythical state of nature—a presocietal state that is the alternative to life in society under a central lawmaking authority. The state of nature, as we have seen, offers none of the benefits of society: no technology, no art, no communion with other people, and no family. Because life in the state of nature is a "Warre of everyone against everyone"[52] and is "nasty, brutish, and short,"[53] classical social contract theories infer that people either explicitly or impliedly consent to the authority of the state as a means of avoiding such a bad life. Since any social arrangement, and hence any state, is preferable to the state of nature, the state can be presumed legitimate as something to which citizens actually or impliedly promise obedience.

Nozick believes there are at least two problems with this strategy. First, it assumes that people would always behave very badly towards one another. Indeed, this comes close to assuming that people are inherently violent and bad. If the intrinsic goodness of people cannot confidently be assumed, neither can the intrinsic badness of people. Second, it assumes that there could not be a state that is worse than the state of nature. As Nozick points out, there are some possible states so bad, so oppressive, that even the state of nature would win. I would rather live in the state of nature than be subject to state-sponsored torture.

Accordingly, Nozick begins from a more modest assumption. He focuses on what he thinks is the best anarchic alternative to the state. In

52. HOBBES, *supra* note 32, at 91.
53. *Id.* at 89.

particular, he focuses upon a presocial situation in which people generally, though not always, satisfy moral constraints, and generally, though not always, act as they ought. In such an anarchic situation, people do not always behave well, but they usually do. According to Nozick:

> If one could show that the state would be superior even to this most favored situation of anarchy, the best that realistically can be hoped for, or would arise by a process involving no morally impermissible steps, or would be an improvement if it arose, this would provide a rationale for the state's existence; it would justify the state.[54]

In arguing for his libertarian theory of legitimacy, Nozick starts from certain Lockean assumptions about the state of nature and natural rights and by a series of steps that he takes to be inevitable, each one permissible under morality, shows that every rational person starting from the best possible anarchic situation would move to a situation with a minimal state—a minimal state being one that limits its coercive functions to protection of the moral rights to life, liberty, and property.

It is important to realize that there are two major streams to the analysis—and both play a crucial role in justifying the general conclusion that the minimal state is morally legitimate. The first is, of course, that each transition from anarchic existence to the minimal state is morally permissible. The second is that each transition is inevitable given certain basic facts about human well-being and psychology. Although it may appear less important, the second step is vital to the success of the argument. Nozick's argument will justify only those states that arise out of such a series of transitions. Nozick takes care of this problem by arguing that each step in the series is inevitable, given certain basic facts about human beings. Because there is, in effect, no other way to get from the anarchic state of nature to the minimal state, the minimal state can be presumed legitimate no matter where it occurs. For this reason, Nozick can validly draw the general conclusion that every minimal state is morally legitimate.

Although Nozick regards the state of nature as more pleasant than Hobbes and Locke did, he also realizes that life in the state of nature remains both unpleasant and unstable; people may not always behave badly, but they frequently do enough to make the state of nature a condition people want to escape—and this, as a matter of practical rationality, requires some sort of response. Initially, people deal with this difficulty

54. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 5 (1974).

by forming groups devoted to the mutual protection of all their members, a response that is morally permissible under the natural law, since people have a right to form consensual associations, and also have the right to defend themselves and other persons.

This will alleviate some of the difficulties associated with defending oneself, but Nozick argues such associations will have to be refined in certain ways. First, everyone will always be "on call," which involves tremendous inconvenience. Second, it is not clear how protective associations will resolve conflicts between their members. Third, it is not clear how to resolve disputes between members and nonmembers.

Most importantly, problems are likely to arise as a number of protective associations arise in the same region and members of different protective associations begin to have conflicts. While such problems are not likely to become serious when both associations agree on the disposition of the case, they can become serious when they disagree. If one association wants to punish the member of another association that wants to protect its member, the two associations are likely to wage battles. The eventual result of such battles will be that one protective association—a dominant protective association that will become a justified minimal state—will achieve ascendancy in the region, because opponents are either absorbed after defeat or move away. As Nozick describes the situation:

> In each of those cases, almost all the persons in a geographical area are under some common system that judges between their competing claims and *enforces* their rights. Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, divisions of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or a group of geographically distinct minimal states.[55]

Whether the minimal state is morally legitimate, on Nozick's view, will depend in part on whether or not it attempts in good faith to stay within the limits of the Lockean laws of nature. If it systematically and intentionally aggresses against the natural rights of others, then it will not be legitimate; it will be an "outlaw" association. If, however, it makes it a point to respect the natural rights of persons and minimizes violations, it will be legitimate to that extent.

As is true of classical social contract theory, the primary motivation for every rational being to move from a presocial state of nature to a society with a central authority is to achieve more security than is otherwise possible—even though Nozick's conception of the state of nature is somewhat more benign than that of the classical theories. Moreover, the minimal state is subject to the constraints of the Lockean conception of morality, which takes the primary purpose of the state to

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55. *Id.* at 16–17.

protect property—presumably because property is necessary to the survival of each person and is hence the most likely motivation for persons to threaten the security—and hence rights to life of others. To prevent such conflicts, the state must be especially concerned with protecting the right to property, and hence, derivatively, the right to life.

Although it is true that some privacy interests either fall within the ambit of liberty interests or are prerequisites for the meaningful exercise of liberty requirements—I am less likely to freely express my right to speech on the Internet if I feel that my movements and anonymity are tracked and compromised—it is crucial to note that Nozick's theory of the legitimate minimal state, as is true of every other theory we have considered, does not expressly name privacy as an interest or right that the minimal state is morally required to protect as a precondition of its legitimacy.

This suggests that, for Nozick's theory as for each other theory we have considered, security is the most important value. Although there is no talk of a "right" to security, security provides the morally legitimate motive for making the various transitions that move each rational person from a presocial state of nature to life under a society with a coercive and centralized state authority. This entails that security is the ultimate value that the state is morally obligated to protect and that when legitimate security interests directly conflict with legitimate privacy interests of comparable importance, the former trump the latter. Thus, for Nozick, as with every other theorist we have considered, if there is a privacy right, it is far from being absolute.

IX. UTILITARIAN THEORIES OF STATE LEGITIMACY

According to utilitarianism, the moral value of any act is fully determined by its effect on net aggregate utility among members of the community.[56] Utilitarian moral theories posit a particular state of affairs as objectively good—the maximization of aggregate utility—and define

56. Utility is usually defined in subjective terms of happiness, pleasure, or satisfied preferences. *See* WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 601 (1980). This creates epistemic difficulties in evaluating acts under utilitarianism: how does one go about measuring someone's happiness and comparing it to someone else's happiness. Welfarist conceptions frequently take an objective conception of human flourishing as the index for utility, easing the epistemic difficulties somewhat, but at the expense of a new difficulty—namely, identifying the objective measures of well-being. *See* 9 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 702–04 (Edward Craig ed., 1998).

an act as morally right to the extent that it promotes this favored state of affairs—to the extent that it promotes aggregate utility—and morally wrong to the extent that it fails to promote this favored state of affairs. Since an act's effect on utility is an extrinsic feature of the act,[57] utilitarian theories presuppose that the moral quality of an act does not depend on its intrinsic, or inherent, features, and hence that no act is inherently good or inherently bad. Acts are good or bad only insofar as they conduce or fail to conduce to the utility of members in the community.[58]

As a general moral theory, utilitarianism applies both to acts of individuals and to acts of the state. Applied to the state, it implies that the state's lawmaking authority is constrained by a duty to enact laws that maximally promote aggregate community utility. As political theorist Henry Sidgwick puts the point:

> [T]he true standard and criterion by which right legislation is to be distinguished from wrong is conduciveness to the general "good" or "welfare." And probably the great majority of persons would agree to interpret the "good" or "welfare" of the community to mean, in the last analysis, the happiness of the individual human beings who compose the community; provided that we take into account not only the human beings who are actually living but those who are to live hereafter. . . . Accordingly, . . . the happiness of the persons affected [is] the ultimate end and standard of right and wrong in determining the functions and constitution of government.[59]

Utilitarian theories of legitimacy, then, assess acts of the state entirely in terms of whether they sufficiently conduce to the favored state of affairs—maximal promotion of utility among the citizenry. The state's sole obligation, on this view, is to act in ways that have the effect of maximally promoting net utility among its citizens.[60]

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57. An act can have radically different consequences depending on the circumstances of its performance. For example, whether the act of giving a medication to someone promotes utility depends on to whom the medication is given. Whereas giving a cancer patient chemotherapy, which is highly toxic, can improve her utility, giving it to a healthy person can worsen her utility by increasing the probability that she develops certain kinds of cancer in the long term.

58. This distinguishes consequentialist theories like utilitarianism from deontological theories, which assert that the moral quality of some acts is determined entirely by their intrinsic features. On this view, for example, lying is intrinsically wrong—and hence wrong regardless of whether it happens to promote community utility.

59. Henry Sidgwick, *Utility and Government*, *in* SOCIAL AND POLITICAL PHILOSOPHY 35, 35 (George Sher & Baruch A. Brody eds., 1999).

60. John Stuart Mill argued that considerations of utility justified the general principle that the state can legitimately prohibit only those acts that are harmful to others. On Mill's view, utility is most likely to be maximized in a society where people are free to develop and act on their own conceptions of the good; people who are allowed to pursue their own values and plans are more likely to develop the sorts of skills and abilities that will make them useful to other people. JOHN STUART MILL, ON LIBERTY 86–138 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) [hereinafter

It is commonly thought that utilitarian theories that evaluate *acts* in terms of total utility are inconsistent with the idea that individuals have any moral rights of the sort we commonly take for granted. There are two related reasons for this. First, it is easy to come up with counterexamples that seem to show that utilitarianism *requires* what we take to be the violation of any right. For example, a doctor would be morally obligated under utilitarianism to painlessly kill a healthy but otherwise irreversibly depressed homeless person with no friends or family if necessary to harvest his organs to save the lives of several persons who contribute greatly to maximizing utility. Second, as we saw earlier, the infringement of a right, as a conceptual matter and matter of substantive morality, cannot be justified by the consequences to public utility of doing so; similarly, Nozick speaks of side constraints as doing the same work. Rights, on this common conception, "trump" consequences. The problem with utilitarian "rights" is that, as the counterexamples show, any interest we take to be covered by a right can be justifiably infringed if the consequences of doing so are favorable enough. As far as moral rights are concerned, utilitarianism seems inconsistent with there being any.

It is crucial to note, however, that the issue of whether the state should recognize and protect *legal* rights is an analytically distinct issue from the issue of whether there are any *moral* rights. It might be that any failure on the part of the state to protect what we (mis)take—if act utilitarianism is true—to be foundational moral rights would result in the kind of social instability that is inconsistent with maximally promoting social utility. If this turns out to be true, then the state will be obligated, under a utilitarian theory of legitimacy, to provide legal protection of rights to life, liberty, property, and presumably privacy—although these, strictly speaking, will not qualify as "moral" rights.

Even so, it seems clear that privacy interests will generally receive lesser protection than security interests under such a theory. If utility is defined subjectively, then it seems clear that this will be the case; many people in the former Soviet Union who are better off in terms of liberty, and possibly even income, have expressed preferences to return to the totalitarian regime precisely because they felt more secure under the protection of a police force that seemed to be everywhere. This, of course, is not an obviously irrational preference if the intuitions I described at

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MILL, ON LIBERTY]. See J.S. MILL, UTILITARIANISM (Roger Crisp ed., Oxford Univ. Press 1998) (1861) for a general account of Mill's utilitarianism.

the beginning of this essay are correct. I would prefer physical security over just about any other right—with the possible exception of a certain affluent standard of living. Indeed, despite all the hysteria in the United States about the violation of privacy rights by laws such as the USA PATRIOT Act, most people seem to be as happy, on any subjective measure, as always.

If, on the other hand, utility is defined objectively in terms of well-being, it seems clear that security is more important than privacy. It seems very difficult to make the case that, as an objective matter, people are better off in terms of well-being if they sacrifice security, other things being equal, for privacy. While privacy interests seem important in cultures like ours to well-being as an objective matter, it seems absolutely clear that security from death or grievous bodily injury is more important than privacy interests and will trump those interests in the event of a direct conflict, as I have defined that idea. According to utilitarian theories of state legitimacy, then, it is reasonable to conclude that privacy interests or rights are not absolute.

Again, the claim is not that any increase in security, no matter how small, is likely to offset any sacrifice in privacy, no matter how extensive. Doubts about the efficacy of a law in protecting security at the expense of privacy might have the effect of making people very unhappy even when these doubts are incorrect. But, other things being equal, people will regard the most important security interests they have as being morally more important than the most important privacy interests they have, suggesting that security is more important than privacy on a subjective conception of utility; and, on an objective conception of flourishing and well-being, that seems straightforwardly correct. Whether the utilitarian standard is defined in terms of subjective conceptions of happiness or pleasure, or whether it is defined in terms of objective conceptions of well-being and flourishing, a utilitarian theory of legitimacy seems clearly to afford more protection, other things being equal, to security interests than to privacy interests. As I have put this idea elsewhere, security trumps privacy.

X. COMMUTARIAN THEORIES OF STATE LEGITIMACY

A. Commutarian Theories Generally

There are a variety of different theories that fall within the rubric of commutarian justifications of state authority, but all begin by challenging an assumption, somewhat inaccurately attributed to all so-called liberal theories of legitimacy: the most important legitimate concern of the state is to protect individual rights and not to advance either (1) some notion

of the common good grounded in the moral importance of community; (2) a notion of the common good that is not simply aggregative of individual goods; or (3) a conception of the self as necessarily social in character. On these views, the values of protecting individual autonomy and rights is the best, if not the only viable way, to promote something viably characterized as a "common" or "public" good.

The commutarian positions range from descriptive claims grounded in history, sociology, and psychology that largely express Aristotle's view of human beings as social animals rather than as atomistic centers of individual autonomy and choice and the implications of this conception for claims about human well-being and flourishing, to normative claims about the moral importance of preserving community and social order relative to the moral importance of encouraging autonomy by expanding the range of individual choices available to each individual. Indeed, some commutarian claims are fairly grounded in meta-ethical claims about the inappropriateness of taking liberal assumptions about the individual as applying across all social contexts and cultures. The appropriateness of democracy, for example, for a society has to be assessed against the cultural context and history of that society—a lesson that has been painfully confirmed by our unfortunate experience in Iraq where the attempt to forcefully replace Saddam Hussein with a democratic regime reflecting *our* liberal values threatens to degenerate into a civil war that is likely to consume that country for at least the next fifty years,[61] but should have been learned from our experience with

61. As is so characteristic of the white Western world's attempt to remake the world of darker peoples in its own image, the majority position in the United States is now simply to get out of Iraq, without any concern for the damage that we have caused by creating the conditions for a civil war that will tear Iraq apart, resulting in perhaps tens of thousands of innocent deaths. The history of colonialism and rapid decolonization reflects this blithe unconcern with our sense of moral responsibility: we go in, assert dominion to take control of a nation's resources; and then we bail out when things get rough, arbitrarily drawing boundaries that are oblivious to existing hostilities and tensions among social groups while simultaneously attempting to maintain control over the country's resources. Slavery provides another somewhat different example: after years of one of history's worst injustices, the United States finally set the slaves free, but without providing them even one cent to compensate them for the profit they produced for white slaveowners and a growing agrarian economy and without putting them in a position to begin a meaningful and productive life as a U.S. citizen. Indeed, the present value of the forced labor taken from slaves from 1620 to 1865 has been estimated to be—depending on what reasonable rate of interest is chosen—$1 trillion to $97 trillion. *See, e.g.*, Joe R. Feagin, *Documenting the Costs of Slavery, Segregation,*

colonizing, decolonizing, and finally enslaving developing nations with loans tied to conditions that ultimately hurt those nations. These loans usually do so by requiring the recipient nations to open vulnerable markets to Western industries while Western nations continue to protect vulnerable industries like agriculture against recipient nations, which are in a favorable condition to compete only with those latter industries. The result of such aid is that it winds up destroying the local competing industries and exacerbating the very conditions of poverty the loans were supposed to alleviate.

Even at this high level of generality, it is easy to see that a commutarian agenda that values a common good independent of the aggregation of individual goods, constituted by opportunities for satisfied autonomous preferences, will entail the position that security, construed as a collective notion like a social order in which serious crime and violence is uncommon—rather than as an aggregation of individual rights to life, property, et cetera—is a more important moral value, other things being equal, than privacy. If preserving the social values associated with community, or common good, is more important than individual rights, then it follows that security, properly construed, is more important than privacy in the sense that threats to security are more important from the standpoint of morality and deserve more legal protection than "comparable" threats to privacy, which is an interest that is unique to individuals and which reflects the individualism of neoliberal traditions.

Again, this should not be thought to entail any sort of easy algorithm for deciding how to deal with apparent conflicts between security or privacy or any claim to the effect that any gain in security, no matter how small, justifies any sacrifice of privacy, no matter how large; the claim that security trumps privacy is compatible with a calculus of weighing competing privacy and security interests that is extremely complex and sometimes favors protecting privacy concerns over security interests if the former are substantial enough, and the latter trivial

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and Contemporary Racism: Why Reparations Are in Order for African Americans, 20 HARV. BLACKLETTER L.J. 49 (2004).

At the upper end of the scale, this would require, if universal reparations were morally required, a payout of more than $300,000 for each black man, woman, and child in this country. Of course, there is no guarantee that such value would have all been transmitted from one generation to the next, but I think it is clear that had slaves been fairly remunerated, we would not have the development of a permanent underclass of black citizens confined to terrible inner city neighborhoods.

I simply cannot resist saying what is just not said enough: the behavior of the white Western world towards peoples of color has been, and continues to be, reprehensible. The United States, to my knowledge, has not even been able to bring itself to apologize for slavery—much less take effective measures to reduce the economic inequalities that have been transmitted from one generation of black persons to the next from the time of slavery!

enough, or if there is simply not enough of a causal connection between the restrictions on privacy and some meaningfully large gain in security. The notion of security includes individual rights to life and physical and financial security, but it is also a collective notion that includes the idea that social order and the preservation of community is a value protected by security that is independent and not merely aggregative of individual security rights—a component, that is, of a common good not constituted by the aggregation of individual goods of all persons in the social group. If this notion of a common good applies to all societies—and methodological commutarians need not take this position insofar as they merely reject the universal application of the liberal conception of self and value—then it follows that security will, as I vaguely put it, trump privacy, and that privacy is not an absolute value because informational privacy is an individual interest, whereas security is an interest expressive of the common good.

B. Moderate Commutarianism, Security, and Privacy

Nevertheless, there are a variety of different commutarian theories, and one of the most nuanced and subtle is Amitai Etzioni's version of commutarianism. Unlike other theorists who characterize themselves as commutarian, Etzioni does not absolutely privilege the common good over individual goods or individual choice. On Etzioni's view, the commutarian view recognizes that individual choice or autonomy and social order exist in a symbiotic relationship. Too much freedom of choice, as arguably has happened in societies like the United States, and social order is threatened; too much social order, as arguably occurs in totalitarian societies like the former U.S.S.R., and individual autonomy is threatened. As Etzioni deftly puts the point:

> The commutarian paradigm, at least as advanced here, recognizes the need to nourish social attachments as part of the effort to maintain social order while ensuring that such attachments will not suppress all autonomous expressions. That is, a good society does not favor the social good over individual choices or vice versa; it favors societal formulations that serve the two dual social virtues [of collective order and individual rights] in careful equilibrium.[62]

Etzioni, then, differs from liberals who take the position that individuals are atomistic entities with individual autonomy being the most important

62. AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 27 (1996).

moral notion, and from social conservatives, and more extreme commutarians, who take the position that individual identity is constructed, in part, by the network of social relationships in which the individual stands and that social order is the most important balance. For Etzioni, meaningful individual autonomy and meaningful social order cannot be considered apart from one another. They must be weighed against each other to find the proper balance; Etzioni's view is thus what I will call the "moderate" version of commutarianism, one that attempts to strike the proper balance between individual autonomy and social order.

Etzioni attempts to articulate principles that indicate when the proper balance of privacy and social order is maintained—and it should be noted that these principles purport to address some of the epistemological principles I have indicated cannot be addressed in this essay. First, as he puts it, "a well-balanced, commutanitarian society will take steps to limit privacy only if it faces a *well-documented and macroscopic threat* to the common good, not a merely a hypothetical danger."[63] He argues, for example, that HIV poses a well-documented and macroscopic threat to millions of lives that can be reduced by testing infants for HIV.[64] Second, officials should explore the possibility of effectively minimizing the threat to the common good without restricting privacy; if the risk can be minimized by less intrusive means, it should be done so. Third, restrictions to privacy for the purpose of promoting the common good should be as minimally intrusive as possible. Finally, officials should take steps to minimize undesirable side effects of restrictions on privacy.

These are surely sensible principles, but they do not fully address the difficult epistemological questions I described above. Distinguishing well-documented and macroscopic threats to the common good from merely hypothetical threats is easy at the margins, but prohibitively difficult with respect to certain measures of, say, the USA PATRIOT Act, which is intended to protect against terrorism. Some probabilities are simply obvious, but those that are not resist accurate calculation because we lack an appropriate theory or algorithm for calculating them; much of the work here will be guesswork, and hence, highly speculative. Second, it will frequently not be clear whether a particular restriction on privacy will have the desired effect on promoting the social good or whether alternative restrictions will be equally effective. But, more importantly, none of these principles tells us how to weigh the privacy interests of one possibly larger set of individuals against the security interests of a smaller set, or how to determine when a threat to social order is comparable to a threat to privacy relative to their respective

63. ETZIONI, *supra* note 1, at 12.
64. *Id.* at 17–42.

hierarchies. Etzioni's principles are, of course, useful in helping us to make such decisions, but the major epistemological issues that would have to be resolved to comprehensively address all the issues remain without solution.

It is important to note that Etzioni sometimes talks in terms of balancing individual rights with the "common good" and sometimes in terms of balancing them with the need for "social order." These are two different notions that are themselves different from the notion of security. The common good is the weakest of the notions in the sense that it encompasses the broadest range of considerations. For example, the common good is surely promoted by the existence of libraries and museums where people can read books and view art free of charge, but it is not clear that these institutions promote social order—much less security. The notion of social order connotes a certain kind of functioning and cooperation among individuals that libraries and museums might, but need not, promote. Institutional protections of contract rights, in contrast, promote social order—and hence also the common good—by providing a foundation for cooperative economic behavior to take place; civil laws protecting contracts enable people to buy and sell goods and services in an orderly way that is less likely to lead to breaches that might cause wholesale breakdowns in the kind of economic activity that enables societies to grow their stock of economic assets.

The notion of security is somewhat narrower than the notion of social order. Breakdowns in social order need not be so severe as to threaten a society's collective security. Increasing disagreement on important moral issues diminishes social order by making political discourse less civil and less likely to resolve these disputes, as conversations on talk radio shows at both ends of the political spectrum amply demonstrate. But those disagreements need not rise to the level of something that threatens the kinds of interests in well-being implicated by the notion of security. A citywide riot involves both a breakdown in social order and a threat to security; a politically divided citizenry might diminish orderly functioning in various social domains, but it does not necessarily involve a threat to security. Threats to security necessarily implicate the social order, as a conceptual matter, but they involve the gravest threats.

The point here is that the idea that privacy and the common good or social order must be balanced does not involve denying the thesis of this essay—namely that, other things being equal, security trumps privacy. It might be true that social order might sometimes yield to privacy, but

the threats to the social order that rise to the level of threats to security always win in conflicts with privacy interests that are of comparable importance relative to the spectrum of privacy interests. When we are talking about saving innocent human lives, the most private facts about innocent persons are just not that important; if it is true—and this is not true as often as conservative politicians believe—that disclosure of such facts will save those lives, then it seems clearly justified to infringe privacy interests—as long as people are protected from any adverse consequences of those disclosures.

In any event, it is clear that even on Etzioni's more moderate conception of commutarianism, privacy interests are not absolute and do not necessarily trump other interests. Privacy must sometimes, even on the narrowest interpretation, yield to social order or the common good. But once the relationship between the concepts of security, social order, and common good are made clear, it seems reasonable to think that threats to security will win in conflicts with threats to privacy interests that are of relatively comparable importance. Our interests in those matters essential to physical survival and well-being, which are the subjects of our security interests, seem to be presumptively more important, as a general matter, than our interests in informational privacy. Informational privacy might sometimes defeat considerations that promote the common good or social order, but not considerations that promote or protect what is absolutely essential to physical survival and well-being.

XI. SCANLON'S "CONTRACTUALISM"

Thomas Scanlon is famous for developing an influential objectivist theory of morality that is fully grounded in the claim that morality provides reasons for action—and not in any sort of ontological account that attempts to identify real moral properties in the world. Scanlon is thus a moral objectivist—that is, some moral principles are true independently of what any person, group of persons, or culture believe, accept, or practice, and not in virtue of custom or convention—but not a moral realist—that is, there are real moral properties out there forming part of the fabric of the universe that are the mind-independent truth-makers of moral principles.

As is readily evident, moral realism implies moral objectivism, but if Scanlon is correct, moral objectivism does not imply moral realism. As Scanlon puts this important point:

> If we could characterize the method of reasoning through which we arrive at judgments of right and wrong, . . . [n]o interesting question would remain about the ontology of morals . . . .
>
> This is because, in contrast to everyday empirical judgments, scientific claims, and religious beliefs that involve claims about the origin and control of the

> universe, the point of judgments of right and wrong is not to make claims about what the spatiotemporal world is like. The point of such judgments is, rather, a practical one: they make claims about what we have reason to do. Metaphysical questions about the subject matter of judgments of right and wrong are important only if answers to them are required in order to show how these judgments can have this practical significance. It may be said that we need a metaphysical characterization of the subject matter of morality in order to establish that moral judgments are about something "real," but it is worth asking what kind of reality is at issue and why it is something we should be worried about.[65]

Scanlon takes the reason-giving force of moral judgments as basic—that is, as not being in need of theoretical explication—and as being fundamental to their objective quality, and not implying the existence of any sort of moral properties out there in the world picked out by the terms "right" and "wrong." The terms "right" and "wrong" simply indicate that we have a reason of a certain sort to perform, or refrain from performing certain actions.

Scanlon explains the special reason-giving force of moral judgments in terms of justifying acts in a manner that no person could reasonably reject. On this view, an act is wrong "if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement."[66] Although termed "contractualist," the claim here is not that there is such agreement or even that all rational persons would come to agree on certain principles; rather the claim is that people who are concerned to adopt principles would converge on principles that no one who shares certain cultural assumptions could reasonably reject. While there is no claim that everyone is concerned to adopt such principles—there are, of course, sociopaths who seem utterly unconcerned with that matter—he believes that someone who is not concerned to adopt principles governing the behavior of the relevant group is deficient in some sense analogous to the way in which someone who cares nothing about art is deficient.

It is important to note here that the notion of reasonableness is different from the notion of rationality, and that the claim is not the Kantian claim that an act is wrong if it violates principles that no rational person can reject as defining an end in itself. In contrast, Kant sought to derive moral principles from our nature as rational beings, holding that there are some ends, defined by "categorical imperatives," that every

65. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 2 (1998).
66. *Id.* at 153.

rational being has in virtue of being rational regardless of her wants, desires, emotions, preferences, beliefs, or practices. These ends are defined by moral rules that are categorical in the sense that they apply to persons regardless of such contingent mental states.[67] For Kant, to act wrongly is for the agent to act *irrationally* in the narrow sense of acting inconsistently with her own ends, although these ends need not be consciously embraced by the agent because they are her ends in virtue of being rational, and not in virtue of any desires she has or choices she makes.

Scanlon's claim is rather that an act is wrong if it violates a principle that no person with the right kind of motivations could *reasonably* reject. The notion of reasonableness is, itself, a moral notion, reflecting a prior commitment to adopting standards of right and wrong—and possibly presupposing some very general standards governing reasonableness:

> When we say, in the course of an attempt to reach some collective decision, that a person is being unreasonable, what we often mean is that he or she is refusing to take other people's interests into account. What we are claiming is that there is reason to take these interests into account *given* the supposed aim of reaching agreement or finding a course of action that everyone will be happy with.[68]

To reject something unreasonably seems to indicate a moral fault—something akin to unfairness: you are asking me to participate in agreeing to certain rules governing our behavior towards others, but you are not taking my interests into account. However, as Scanlon points out, it does not necessarily involve irrationality or incoherence: "the fault involved in failing to be moved by moral requirements does not seem to be a form of incoherence."[69]

Scanlon gives a number of examples of rules he believes could not be reasonably rejected by people motivated to reach an agreement on rules regulating the behavior of community members towards others in the community, and it would be instructive to consider one of them to see how this theory applies with respect to personal interests that fall within the rubric of security. Scanlon goes into much more detail than is appropriate or needed for our purposes, but it is worth noting what he has to say about a moral principle manipulating persons to do things by getting them to believe that something will be done that benefits them if they do the thing that is being induced by manipulation. Scanlon believes that we could not reasonably reject the following principle:

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67. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 31–33 (Allen W. Wood ed. & trans., 2002).
68. SCANLON, *supra* note 65, at 33.
69. *Id.* at 151.

> *Principle M*: In the absence of special justification, it is not permissible for one person, A, in order to get another person, B, to do some act, X (which A wants B to do and which B is morally free to do or not do but would otherwise not do), to lead B to expect that if he or she does X then A will do Y (which B wants but believes that A will otherwise not do), when in fact A has no intention of doing Y if B does X, and A can reasonably foresee that B will suffer significant loss if he or she does X and A does not reciprocate by doing Y.[70]

This principle protects persons from being induced by false expectations to do things they are not obligated to do, and would not otherwise do, but for the inducement of the false expectation.

Scanlon, reasonably enough, argues that anyone who is motivated to agree upon a rule that governs the behavior of persons in a given community could not reasonably reject this principle:

> I take this to be a valid moral principle. Considering the matter from the point of view of potential victims of manipulation, there is a strong generic reason to want to be able to direct one's efforts and resources toward aims one has chosen and not to have one's planning co-opted in the way Principle M forbids whenever this suits someone else's purposes. So it would be reasonable to reject a principle offering any less protection against manipulation. On the other side, the perfectly general generic reason for wanting to be able to manipulate others whenever it would be convenient to do so is not strong enough to make it unreasonable to insist on the protection that M provides.[71]

Here it is important to note that the reasons against adoption of *M* are purely self-interested and will not be strong enough to outweigh the other reasons for *M* in persons *who are motivated to reach agreement on rules governing the behavior of the group for the purposes of assigning praise, blame, reward, and punishment*—which are, of course, moral motivations to begin with.

It is easy to see how one would arrive through a contractualist analysis at moral principles protecting life, physical safety and health, liberty, property, and information privacy. Given the obvious significance of our vulnerability to suffer injuries to these interests and the limited import of self-interested reasons *in persons properly motivated to reach agreement*, it would be unreasonable to reject not only principles protecting these interests, but also to reject principles that rank these principles according to the personal importance of the interests they protect. Clearly, for example, it would be unreasonable to accept a principle that sacrifices the life of an innocent person in order to protect the information privacy

70. *Id.* at 298.
71. *Id.* at 298–99.

of another innocent person—no matter how intimate or embarrassing that piece of personal information might be. Anyone properly motivated would make the call based on his own obvious assessment that his life means more to him than the privacy of any particular piece of information, and adopt an impersonal point of view that recognizes the comparative importance to others of those same interests.

Similar things can be said about the interests in physical safety and health. No reasonable person concerned to reach agreement on moral rules could reasonably reject a norm that ranks protection against serious threats to personal health and safety as outweighing comparable threats to information privacy. My health and safety are more important to me than any embarrassing information that might be disclosed about me, and I may fairly presume that other persons will make the same valuations. Whatever idiosyncratic self-interest I might have in infringing someone's physical safety and health to protect my personal privacy, my special concern in my own interests could not justify *reasonably* rejecting a principle that protects everyone's physical safety and health, in part, because I would never accept any less protection of my own physical safety and health—and my interest in infringing such interests of other people is clearly *unreasonable if I am antecedently concerned to reach agreement on some sort of principle regarding the protection of such interests*.

The same is obviously true of the collective goods that make up collective security. My individual security, construed to include my interests in life, safety, health, and general well-being, are seriously threatened by threats to the collective security. A riot or a war being waged in my neighborhood poses serious risks to me that I would not accept for the sake of information privacy and thus I could not reasonably reject a principle that sacrifices comparable interests in my information privacy to protect the collective security—regardless of the extent to which my own individual security is threatened. A reasonable person motivated to reach agreement on such principles could not fail to realize that social insecurity that threatens her individual security interests outweighs, other things being equal, her interests in information privacy and would hence not be in position to reasonably reject principles that protect security over comparable threats to information privacy.

Scanlon's theory is not explicitly concerned with political morality, but its application to moral questions about what the state ought and ought not do is quite natural given that Scanlon views his theory as being the foundation for all moral duties and rights. If contractualism is the foundation for all moral principles, then it is the foundation not only for moral principles governing individuals, but also for moral principles governing the behavior of collective social groups, like state agencies.

Therefore, it governs what states may do by way of enacting laws that protect the various security and privacy interests, as well as norms intended to resolve conflicts that arise among these interests. If Scanlon's theory is correct, it seems clear that, other things being equal, security trumps privacy when there are competing threats to commensurable values of security and privacy.

XII. NORMATIVE THEORIES OF THE CRIMINAL, CIVIL, AND CONSTITUTIONAL LAW

Normative theories of the criminal and civil law attempt to state the conditions under which particular criminal and civil laws are morally legitimate in the sense that they may coercively restrict freedom; every law coercively restricts freedom to the extent that it is ultimately backed by the police power of the state either in the form of punishment or in the form of the contempt sanction, which empowers a court to incarcerate a party to a lawsuit until she complies with a court order—such as might occur in a civil suit for damages.

These theories tend to assume that the content of the particular area of law is morally legitimate and attempt to explain that fact in terms of a moral principle that laws in that area satisfy more often than not. For example, normative theories of the criminal law frequently focus on principles that indicate the law may prohibit behaviors that cause unjustified harm to others and even, in some cases, to oneself. Thus, for example, laws prohibiting intentional killing of others are justified in virtue of satisfying something like Mill's Harm Principle—though Mill limited his formulation of the Harm Principle to laws that prevent harm to others.[72] On this view, behaviors that cause significant, unjustified harm can be criminalized, which means that those behaviors can be *punished* by fines, incarceration, and possibly execution.[73]

Theories that justify the state's authority in areas of civil law tend to be more specific, focusing on the content of a particular substantive area of law—rather than on a general capacity of the state to enact civil regulations on behavior. For example, Charles Fried justifies the content of contract law by showing it coheres, for the most part, to

72. MILL, ON LIBERTY, *supra* note 60, at 80–81.

73. For a helpful summary of the various normative theories of punishment, see Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

uncontroversial moral principles governing promises.[74] Jules Coleman justifies the content of tort law by showing it embodies a legitimate conception of corrective justice.[75] Robert Nozick argues that property law is justified to the extent it coheres with moral principles that define a natural right to property, which includes the authority to freely alienate one's interest in property by a variety of morally effective consensual mechanisms.[76]

While there are a number of theories attempting to describe the conditions of procedural legitimacy, they have largely focused on the criminal context. For example, these theories focus on the procedural rights that a criminal defendant should have, which include, but are not limited to, a right to a fair trial, a right to competent representation, a right to appeal, and a right to be acquitted if the evidence does not meet the "beyond a reasonable doubt" standard. Normative theories of criminal procedure attempt to describe the principles that determine whether a trial is "fair," representation is "competent," and so on. In contrast, theories that focus on access to the civil justice system have not received a great deal of attention.[77]

On the assumption that the content of the criminal and civil law is generally justified, we have further reason to think that the right to privacy is not absolute and is not as important from the standpoint of morality than the rights to life, freedom from physical assaults, and freedom from property crimes that generally function to protect a more general right to security.

There are several general points to be made here. First, violations of those rights that protect security generally have both civil and criminal remedies. For example, certain homicides are not only punishable by the criminal law, but also actionable under the civil law under such causes of action, such as wrongful death claims. Physical assaults are both punishable under criminal law and actionable under the civil laws for compensatory damages. Crimes against property, likewise, are actionable under both criminal and civil laws. Although there are some infringements of privacy interests that are criminalized, such as laws prohibiting persons from looking into windows or laws prohibiting persons from taking videos or photographs, without consent, of people using public bathrooms,

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74. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION *passim* (1981).

75. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 1–63 (2001).

76. NOZICK, *supra* note 54, at 164–74.

77. One exception is Kenneth Einar Himma, *Towards a Theory of Legitimate Access: Morally Legitimate Authority and the Right of Citizens to Access the Civil Justice System*, 79 WASH. L. REV. 31 (2004).

these tend to be exceptional. Most infringements upon privacy interests are actionable only under civil law, which means that the appropriate remedy is compensation for damages caused by the infringement—remedies that lack the stigma of disapproval that is attached to criminal convictions and punishment. It is characteristic of the criminal law that it prohibits only the worst violations against individuals precisely because of the harm and stigma caused by punishment.

Second, many criminal laws protecting physical security provide far more severe penalties than criminal laws protecting privacy interests. For example, murder is sometimes punishable by death or life in prison, whereas criminal laws protecting privacy interests provide penalties nowhere in the neighborhood of life in prison. Similar things can be said about physical assaults and many crimes against property, such as burglary.

Third, the criminal law will frequently allow proportional force in defense against culpably violent attacks that significantly threaten a person's physical security. Indeed, it is permissible under the criminal law to utilize deadly force when it appears reasonably necessary to save one's own life or the life of other persons from a culpable attack. Physical assaults may also, as a matter of criminal law, be met with a proportionately forceful defense. As far as I can tell, it is impermissible under the criminal law to prevent a criminal breach of privacy interests by resorting to force of any kind; and it would surely result in a charge of murder for a person to defend against a criminal breach of privacy by killing the perpetrator.

Finally, the damages available in a civil suit are generally greater for acts that cause physical harm or death than for acts that merely breach privacy. When damages for privacy breaches reach levels associated with damages normally assessed against acts that violate security interests, it is usually because the consequences of the privacy breach cause significant damage to financial interests. Large awards are frequently available for defamation suits because the resulting harm to a person's reputation entails a significant reduction in the victim's capacity to earn a living; insofar as large damages are available for civil breaches of privacy interests, it is more likely to reflect concern for the plaintiff's property interests, which count as security interests, than concern for the plaintiff's interest in privacy. Although this is not necessarily the case, this much is certainly true: civil damage awards for significant breaches of security interests are, other things being equal—for example, ability of the

respective attorneys—likely to be much larger than awards for significant breaches of privacy interests. If the substantive content of the criminal and civil law is largely justified, the content of these laws provides yet another reason for thinking that privacy interests are not absolute and are, from the standpoint of morality, less important than security interests.

Something very similar can be said about normative theories of constitutional law that assume that the content of constitutional law is generally justified and attempt to justify that content by reference to moral principles showing the content in its best moral light. Whereas the Constitution expressly affords protection of the rights to life, liberty, and property, it does not expressly provide protection of privacy interests.

It is true, of course, that some of the protections afforded to security rights are somewhat indirect—the Due Process Clause seems a peculiarly modest principle for protecting life and property—but the Constitution itself says nothing that clearly immediately implies any sort of protection of privacy. Although the Supreme Court has, correctly in my view, inferred a right to privacy from the penumbra of more basic protections of liberty and security from unreasonable searches and seizures, this inference (1) is far more indirectly protected than the rights protected by the Due Process Clause and (2) has largely been construed to protect the right to reproductive privacy—or, perhaps more appropriately, *liberty*—with respect to the choice of whom to marry and whether to have children, and not anything that would count as *informational* privacy.

While it is clear that some protection of informational privacy should be guaranteed by the state, whether in the form of statutes, common law, or constitutional law, the assumption that our Constitution is generally legitimate suggests yet another reason for thinking that privacy interests fall well short of being absolute and lack the importance of security interests. A constitution that failed to protect life and liberty would surely be a moral nonstarter so to speak—that is, lacking content so important that it could not plausibly be regarded as generally legitimate—our Constitution is plausibly regarded as generally legitimate, despite lacking many protections of information privacy that ideally would be protected by a constitution that purports to lay down the "supreme law of the land." This suggests, again, that privacy interests lack the moral import of security interests.

XIII. SECURITY AS A PREREQUISITE FOR THE MEANINGFUL EXERCISE OF PRIVACY RIGHTS

The last argument I wish to make in this essay will be brief because it is extremely well known and has been made in a variety of academic and nonacademic contexts. The basic point here is that no right not involving

security can be meaningfully exercised in the absence of efficacious protection of security. The right to property means nothing if the law fails to protect against threats to life and bodily security. Likewise, the right to privacy has little value if one feels constrained to remain in one's home because it is so unsafe to venture away that one significantly risks death or grievous bodily injury.

This is not merely a matter of describing common subjective preferences; this is rather an objective fact about privacy and security interests. If security interests are not adequately protected, citizens will simply not have much by way of privacy interests to protect. While it is true, of course, that people have privacy interests in what goes on inside the confines of their home, they also have legitimate privacy interests in a variety of public contexts that cannot be meaningfully exercised if one is afraid to venture out into those contexts because of significant threats to individual and collective security—such as would be the case if terrorist attacks became highly probable in those contexts.

It is true, of course, that to say that *X* is a prerequisite for exercising a particular right *Y* does not obviously entail that *X* is morally more important than *Y*, but this is a reasonable conclusion to draw. If it is true that *Y* is meaningless in the absence of *X*, then it seems clear that *X* deserves, as a moral matter, more stringent protection than *Y* does. Since privacy interests lack significance in the absence of adequate protection of security interests, it seems reasonable to infer that security interests deserve, as a moral matter, more stringent protection than privacy interests.

XIV. CONCLUSION

In this essay, I have argued that the moral interest in or right to privacy is not absolute and is sometimes outweighed by the moral interest in or right to security. I have done so from two points of view. First, at the beginning of the essay, I have sketched intuitions to that effect, which I assume are widely shared among persons in cultures like ours. Second, I have argued that all the mainstream approaches to normative theories of state legitimacy presuppose, assert, or imply that privacy is less important from the standpoint of political morality than security. Accordingly, under ordinary intuitions and each of these theories, security interests trump, or outweigh, privacy interests when the two come into conflict.