Liberal Communitarian Approach to Privacy and Security

A. Balancing Privacy and Security

1. The Liberal Communitarian Approach

Liberal communitarian philosophy (developed by the author) assumes that nations face several fully legitimate normative and legal claims and that these claims can be neither maximized nor fully reconciled, as there is an inevitable tension among them. It follows that society must work out some balance among the conflicting claims rather than assume that one will always trump the others. This chapter applies this approach to the balance between security and privacy.

In contrast to this balancing approach, contemporary liberals tend to emphasize individual rights and autonomy over societal formulations of the common good. At the opposite end of the spectrum, authoritarian communitarians (mainly in East Asia) privilege the common good a priori, and pay mind to rights mainly to the extent that they serve the rulers’ aims.

As discussed in Chapter 1, the Fourth Amendment is an eminently liberal communitarian text. When it comes to give-and-take over what qualifies as legitimate public policy, liberal communitarianism starts from the assumption that the public’s right to privacy must be balanced with the concern for national security (and public health, among other common goods), rather than from the position that any breach of privacy contravenes an inviolable basic right.

2. The Advocacy Model

Deliberations about public policy as carried out by elected officials, in think tanks, and in public discourse in the contemporary United States
often follow a model that differs sharply from the liberal communitarian one, which emulates the advocacy model found in American courts. According to this model, interested parties are divided into antagonistic, ideological camps, with each side—and there are only two—presenting its respective interpretation of the facts in the way that will most strongly support its brief. Following the notion that one ought to “zealously” defend one’s client, each side feels free to make emotive points, provide stretched interpretations and selective facts, and advance particularistic normative arguments favorable to its case. The implicit assumption is that the proper judgment (if not “the truth”) will arise out of the clash of two extreme advocacy positions. American judges (unlike, for instance, French ones) act as neutral referees, and the jury is kept mum during the proceedings.

In public discourse, the advocacy model is reflected in the increasingly polarized debates between liberals and conservatives over numerous issues including the role of government, gun control, abortion rights, and even climate change.6 Liberal communitarianism and other intermediary positions are often barely heard over the noise from the resulting clash.

In comparing the advocacy and the liberal communitarian approaches to public discourse, one notes that intermediary or third positions (not necessarily compromises) find little room in the former. Moreover, the advocacy approach does not take into account the basic tenets of the balancing approach of the Constitution, especially the Fourth Amendment. Typical pro-privacy arguments run as follows: There is a right to privacy that is important both in its own right and as a necessary means for realizing various other values such as democracy, creativity, and the flourishing of the self. The government is violating this right by this or that act; thus, the government should be made to desist. The implicit assumption is that the whole normative and legal realm is the domain of the right and any consideration of other values, such as security, constitutes an “intrusion.” When Nadine Strossen was asked when she served as the president of the American Civil Liberties Union (ACLU) if she ever encountered any security measure of which she approved, she first responded with a firm “no” and then corrected herself and approved of fortifying the doors of commercial airliners that separate the pilot’s cockpit from the cabin holding the passengers.7 Similarly, the ACLU objected even to the use of handheld computers at Transportation Security Administration (TSA) checkpoints—describing them as “a violation of the core democratic principle that the government should not be permitted to violate a person’s privacy, unless it has a reason to believe that he or she is involved in wrongdoing”—despite the fact that these computers were using the same data as all the other computers and simply reduced the distance agents had to travel to review the data. That is, they added a bit of convenience rather than constituting a new intrusion.8