

# Privacy and the Illusions of ‘Balancing’

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Commentators on privacy, who do not readily agree about many things, widely affirm that privacy cannot be upheld as an ‘absolute’ value. By this we mean (I by no means exclude myself) that we must recognize situations where considerations of privacy must necessarily and legitimately be subordinated to other values. Defenders of confidentiality in doctor-patient communications, for example, still accept the need for physicians to report cases of highly-communicable diseases. Or, strong upholders of Fourth Amendment strictures against arbitrary search and seizure nevertheless acknowledge that, with a court order, unannounced raids of private premises may sometimes be justified. Or, defenders of lawyer-client privilege will still be prepared to compromise that principle, given strong evidence that the lawyer and client are co-conspirators in a crime.

Challenged to give account of such exceptions, privacy advocates typically resort to the language of ‘balancing’—insisting that the goodness of their favoured value must nevertheless be discounted in relation to other social *desirabilia*, so that both privacy and—let us say—public safety receive just and equal consideration. Here our reasoning on privacy does no more than recapitulate the logic with which we approach countless other dilemmas for policy and practice—instances where two or more legitimate values stand in conflict with one another. Thus labour relations experts may propose solutions to workplace conflicts that purport to balance considerations of workers’ well-being with those of increased efficiency. Or university administrators seeking to adjudicate campus disputes may propose balancing freedom of expression on campus with due consideration for the sensitivities of its various sub-communities.

But discussions of privacy sometimes seem to evoke this language even more than other topics. Indeed, a key spokesman for a communitarian approach to privacy has placed ‘balancing’ at centre stage. In *The Limits of Privacy*, Amitai Etzioni writes:

...good societies carefully balance individual rights and social responsibilities, autonomy and the common good, privacy and concerns for public safety and public health, rather than allow one principle to dominate. Once we accept the concept of balance, the question arises how we are to determine whether our polity is off balance, and in what direction it needs to move, and to what extent, to restore balance.<sup>1</sup>

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<sup>1</sup> Amitai Etzioni, *The Limits of Privacy* (Basic Books 1999) 184.

Anyone familiar with writing on privacy policy will recall countless iterations of this language. Consider the statute creating the White House Privacy and Civil Liberties Oversight Board (2004), an advisory body established in the wake of the 9/11 attacks to monitor anti-terrorist surveillance measures. It charges that board with ensuring that ‘the need for such [privacy-eroding] actions is *balanced* with the need to protect privacy and civil liberties’<sup>2</sup>. In European Union privacy law, the term ‘proportionality’ plays much the same role as the language of balancing. In a crucial decision handed down in April 2014, the European Court of Justice invalidated legislation mandating long-term retention of Europeans’ telecommunications records—data on who communicated with whom, when and how long. Such retention does serve an ‘objective general interest, namely the fight against serious crime and, ultimately, public security,’ the court held. Nevertheless, the EU legislature had ‘exceeded the limits imposed by compliance with the principle of proportionality’<sup>3</sup>. In other words, the *extent* of demands on the privacy of European consumers (apparently not the *kind* of demand) *outweighed* the gains likely to be realised on behalf of the aforementioned interests.

So much do such statements resound with tones of reason and moderation, I suspect, that they slip under most people’s critical radar. Who, after all, can recall a serious exhortation *against* ‘balance’ in human affairs or public policy? When was the last time we heard any serious public figure declaim openly in favour of excluding all but his or her favourite value in charting the direction of public policy? Notions of ‘balancing’ seem to convey a disinterested, scientific vision of public decision-making, one freed of partisan world-views, entrenched interests, or *partis pris*.

## I. Balancing *What*?

Yet I hold that most invocations of balancing in these contexts actually represent *obstacles* to deeper understanding of clashes of value—both in matters of privacy and elsewhere. This is not to deny that we personally have *experiences* that we may think of as ‘balancing’. In voting decisions, individual taxpayers may mentally ‘balance’ the perceived benefits of better schools or roads against the personal costs of increased tax bills likely to result from such expenditures. Or, at the dinner table, we may balance the attractions of a second helping of cheese cake against the assumed costs in terms of our health or waistline expansion.

But the fact that such mental processes *occur*, and even eventuate in decisions leading to action, hardly establishes them as a model for rational collective decision-making. For that, we would need a common metric for the goodness or badness of the things being ‘balanced’—a standard that could reliably be applied by any fair-minded analyst to produce the same results, whenever repeated in the same circumstances.

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2 Privacy and Civil Liberties Protection and Oversight, 42 USC 2000ee–1 (2004) (emphasis added)

3 Court of Justice of the European Union, ‘The Court of Justice declares the Data Retention Directive to be invalid’ (Press release no 54/14, 8 April 2014) regarding the judgment in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

But how should we reckon the goodness of ‘the common good’, or for that matter the goodness of privacy practices? For one thing, different observers surely have widely varying personal values to ascribe to these things. For another, these changeful and ever-emerging evaluations have their existence only within human consciousness. It is impossible to imagine a rating system that would literally ‘weigh’ or ‘balance’ them, as one would a physical object.

To be sure, one could poll members of the public as to how *they* would ‘strike a balance’ between, say, values of privacy and those of national security. If one inquired carefully, one might develop scale values showing, for any given respondent, *how much* protection for privacy ought to ‘balance’ with a certain degree of consideration for ‘the common good’—though putting these crucial terms into operational form would surely be a contentious matter. But we can be confident that the resulting quasi-equivalences would differ vastly across the population. In other words, one man’s point of balance would be the next woman’s excess. Quite likely no one would pronounce himself or herself indifferent to both values. But as for *how much* privacy protection would be required to ‘balance’ a given amount of defence of ‘the common good’—as well as how such diffuse variables could possibly be quantified—consensus is bound to be more than elusive.

The fact that views are likely to vary widely on matters like these must not be interpreted to mean that the people concerned are making *mistakes* of some kind—that they are failing to examine all the relevant evidence, or refusing to consider some important argument. That interpretation would imply that there exists some unique ‘true’ or ‘appropriate’ degree of support (or non-support) for one of these alternatives. In fact, the goodness or badness of such alternatives does not exist in any way exterior to the consciousness of individuals. The desirability of steps that might be taken on behalf of privacy—or environmental protection, or support for gender equality, or any number of other social values—can only be reckoned in terms of the experience of specific individuals. And such desirability, as experienced by individuals, is the product of all of their social experience, ranging from what generation they belong to, to what personal frustrations they may suffered at some stage in life for lack of privacy.

All such inputs, and many more, contribute to the diversity of ultimate values that shape people’s interests and behaviour. By ultimate values I mean those deep directions in human personality that define for us what states of life are most worth striving for—the wild cards of human motivation, one might say. In some sense, such profound commitments can never be shown to be right or wrong; they simply are what they are. True, empirical inquiry may legitimately provide grounds for passing judgments on *instrumental* values in human affairs. Thus if we compare the instrumental efficiency of Arabic numbers to Roman numerals as vehicles of accurate calculation, the former wins. But if we compare, say, the ultimate values prevailing in the Roman Empire with those of the Ottomans, such categorical judgment are impossible. Here I join Max Weber and many other social scientists and philosophers in noting the limits of empirical inquiry as bases for passing judgment on people’s ultimate values.

In public controversies like those discussed here—and especially the tension between those favouring stronger privacy codes *versus* those preferring more government prerogatives, say, for national security—it is clear that vast differences in underlying values are at work. To oversimplify, but only slightly: people simply have different ideas of what constitutes ‘the good society’ or ‘the good life’. These differences are resistant to resolution through appeal to evidence or empirical investigation in ways that questions of the likely empirical consequences of embracing different instrumental values are not. The ultimate directions of human striving are more like *tastes* in music, art, or food than they are like, say, mathematics problems that admit of unique right or wrong solutions. Were this not true, governance would be (as Saint Simon expected that it would someday be) simply a matter of applying agreed-upon principles to new situations—thus substituting administration for politics. But Saint Simon vastly overestimated the malleability of ultimate values underlying basic directions of government. Nearly everyone has noticed how rare it is for people to undergo deep conversions in fundamental political or social values—for example, that might transform them from traditionalist religious conservatives to radical hyper-modernists. Instead, most people seem to adjust their immediate understandings of their political environments so that anything that resembles disconfirmation of their ultimate values is avoided.

Given the pervasive role of ultimate values in shaping and organising people’s political world views, it’s easy to see the limits of characterizing the public conscience on such value-laden topics as ‘the common good’. One could imagine assembling a mixed sample of ice cream lovers, divided more or less evenly between chocolate and vanilla enthusiasts. Asked for each participant’s input on what constituted the ‘better’ flavour, these subjects could probably not do much better than give a head count of their own divided numbers. Asking chocolate lovers to consider the relative virtues of vanilla, or vice-versa, would probably not do much to reduce their differences. Such pure tastes don’t really leave much to discuss, and urging partisans of the two to come up with a ‘balanced’ position wouldn’t help. As one author put it, looking for a middle ground in differences like these would have about as much chance of success as asking a confirmed homosexual to take a little interest in the opposite sex.

## II. Possibilities of Accommodation

If this were all one could say on these matters, chances of identifying ground for compromise in value-based public policy controversies would be slim. Closely examined, the idea of quantitatively ‘balancing’ conflicting value positions makes little sense. If there is no unique rational ‘solution’ to differences of conviction on these matters, we may face a permanent quandary, one where the insights of social inquiry cannot help much.

But I do not believe that the choices available to us are quite that stark. Under the pressure of needs to maintain a *modus vivendi* with our differently-minded fellow citizens, we quite properly cast about for common grounds even in the face of major differences of ultimate value convictions. Perhaps, under these circumstances, we should

remember the adage of a successful American politician of yesteryear: ‘I take all my political positions on the basis of strict principle—and my first principle is flexibility’.

Most of us share with our fellow citizens at least one core value of not wishing to destroy our common social world through mortal combat over every single difference. Moreover, our political world-views consist not just of any one single, overriding value, but rather of different value commitments in different realms. People may hold conservative principles in matters of fiscal policy and government spending for most purposes, for example, but favour major government spending on environmental questions. Or we may favour sharp government surveillance and control over trafficking of vulnerable individuals, but something more like *laissez-faire* where those involved in such activities are adults who appear competent to look out for their own well-being. Thus we often find ourselves agreeing with some of our fellow-citizens about one area of social practice, yet disagreeing about others. These abilities to find limited areas of agreement with those who initially appear as enemies to our cherished values may provide avenues for limited accommodation.

The idea of seeking some quasi-arithmetical ‘balance’ between conflicting values represents a dangerous illusion, I have argued. But if we cannot afford to look for any unique, scientific ‘solution’ to conflicts of principle, we can resort to a kind of ‘friendly persuasion’. This would involve encouraging our interlocutors to re-examine the implications of these values that we hold in common for those areas in which we disagree. In the words of W.G. Runciman, one of the most sophisticated commentators on these questions, our best gambit may be to urge our opposite numbers to consider the *costs* of the values that they uphold, in terms of values that we hold in common. Alluding to another realm of value-charged public debates, Runciman writes,

One tries ... to secure the approval of one’s interlocutor to the picture of the ideal society conjured up by the implementation of one’s own political philosophy, and one tries to get him to accept that terms of approbation are more appropriate to one’s own picture than to his. ‘But surely,’ one says, ‘it is more important that nobody willing to work should be allowed to remain unemployed than that extra entrepreneurial initiative should be rewarded by incentive payments,’ or whatever it may be.<sup>4</sup>

Thus privacy advocates might test others’ opposition with appeals like the following: ‘So you say that you are willing to have government authorities range at will through our telecommunications metadata, in the hope that these investigations might reveal a destructive terrorist plot... But how broadly would you want to apply such thinking? Would you authorise the authorities to monitor all forms of medical data, on the off-chance that its analysis might yield clues to thwart a terrorist attack? Would you advocate that all citizens wear GPS monitors, just to alert the authorities if their movements appear associated with the movement patterns of terrorists?’ To these challenges, pro-

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4 W.G. Runciman, *Political Science and Social Theory* (Cambridge University Press 1969) 172.

surveillance interests might well counter with ripostes like, ‘Would you insist on the privacy of *any* of these forms of data, if you had certain knowledge that they contained clues to an imminent terrorist attack?’ Note that in any debate like these empirical inputs can and should matter—as in examples of other plots and conspiracies that have been undone by relaxing privacy strictures. In exchanges like these, participants effectively ask one another ‘What kind of world are you willing to live in, if the ultimate values you seem to be embracing are indeed given overriding consideration in relation to other priorities? Are you willing to embrace all the costs—to all of your values—of living that way?’

Attempts along these lines to moderate clashes of deep social values, over privacy or any other highly-charged question of principle, will never offer certain success. But they do do justice to the actual dynamics of the decisions we face, and to embeddedness of these clashes in the complex value positions that people bring with them to every public policy dilemma. And they emphasize something that privacy advocates should never forget: that privacy is a matter of choice, and that we can only succeed by making choices in our favoured direction as attractive as possible to our fellow citizens. Despite some ill-advised statements to the contrary by privacy advocates in the past, defending restrictions on the flow of personal data in an information-hungry world will always come at a cost. This world could always function more efficiently by suppressing privacy altogether, and allowing resourceful organisations a free hand to do with our information as they like. Such a privacy-free world might be highly convenient and efficient—with concerns for public safety and national security rigorously acted on. But it would be a disaster for values of pluralism, autonomy and freedom of the spirit.