Privacy, Social Values and the Public Interest

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1. Introduction

The protection of privacy and the achievement of the common good or the public interest are often perceived to be poles apart as societal or policy goals. On both sides of the argument, it has become commonplace to construct the relationship between privacy and the public interest as one of zero-sum opposition: one can only increase at the expense of the other. Civil libertarians are likely to see an increase in public-interest policy developments, such as the use of collections of personal data for national security, law enforcement or the provision of public services, as an encroachment – however justifiable this may be – on the dimension of individual liberty that involves personal privacy. On the other hand, proponents of these policies are likely to see the protection of privacy as throwing up barriers to the interests of the society or the state. The opposition between these poles has become the prevailing mind-set, which Regan has called “simplistic”, arguing that this antithesis ignores the complexity of people’s dynamic involvement in public and private relationships (Regan 1995, pp. 217-218). But concern about this dichotomy, and looking for a principled theoretical way of overcoming it beyond individual case-by-case settlements, is not widespread.

Is it possible to escape an “individual privacy v. public interest” formulation of the relationship between these two values? To some extent, an alternative conceptualisation already exists in the sources, as we shall see, including some that approach a fully realised statement of privacy’s social value. However, these fragments have not yet made significant inroads upon mainstream or conventional views of privacy, or on more public political or lay understanding. This article assembles the pieces of this approach in order make them available for a more rounded picture of a theory of privacy that is not beholden to the dominant trend, and that instead leads to a clearer appreciation of privacy’s social value. Reviewing the work of others, it highlights privacy’s non-individual, public-interest value, based on a view of social complexity, and aims at expanding the idea of “public interest” itself to include more clearly the protection of individual pri-

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1 Earlier versions of this discussion were presented from 2005 to the present in seminars at the Max Planck Institute for Research on Collective Goods (Bonn), the University of Tilburg Institute for Law, Technology and Society (TILT), Queen’s University (Kingston, Ontario), the University of Ottawa, the University of Edinburgh, and the Hanse-Wissenschaftskolleg (HWK), Delmenhorst.

2 This article is concerned with information privacy, but its arguments also pertain to other dimensions of privacy that concern the body, space, and communications.

3 For the purpose of this article only, these terms are taken as synonyms; differences between them are not relevant for this discussion.
vacy, rather than opposition to it. There may be important practical consequences of this shift in understanding privacy.

To the extent that this view of privacy is plausible, it would provide a more robust defence—or promotion—of privacy by creating a conceptual space in which privacy and the public interest could be understood in such a way as to enable both to be supported in many instances, or at least by establishing a less biased terrain for arbitrating their opposition. Such a departure would thus also undermine the rationale for the conventional, and significantly flawed, method of reconciliation in which one value is “balanced” against the other, often producing unconvincing results that serve mainly the interests of whoever does the balancing: typically, those who value privacy less than other desirable qualities (Solove 2008, ch. 4). In the discourse around “balancing”, the individual right of privacy is too often trumped by a concern for the greater social good, as Solove points out (Solove 2008, pp. 78-79).

It is first useful to look a bit more deeply into some aspects of the concept of privacy that shape the prevailing paradigm that, in turn, informs public policy and political debate. Following that, the positions of several seminal writers are outlined in the light of their contribution to, or detraction from, a social-value dimension. These views have a bearing on the possibility of a more robust argument for privacy, one that incorporates—as privacy theory must do—a nuanced understanding of the nature and construction of society in order to theorise privacy and its social value. Whatever else it might mean, privacy is about the kind of society we want to live in, and we can debate this better if we have a richer understanding of the way privacy works in the kind of society we do live in. At the end of this excursion, an indication of policy implications of privacy theories precedes a concluding assessment.

2. The Current Theoretical Position

The philosophical and legal literature on privacy is both voluminous and controverted. Many have commented on the elusiveness of a single definition of “privacy” or of an agreed-upon conceptual framework for privacy analysis and practice (for example Lindsay 2005). Solove remarks that “[p]rivacy seems to be about everything, and therefore it appears to be nothing” (Solove 2006, p. 479). He argues persuasively that a search for core or essential characteristics of privacy in all situations is misguided, and Nissenbaum similarly highlights privacy’s contextual nature (Solove 2002; Nissenbaum 2010). But this article is not the place for a comprehensive examination of the concept as developed and debated by a very large number of philosophers, lawyers, social scientists, historians and others (Young 1970; Schoemann 1984; also Solove 2008, ch. 2; Rössler 2005, ch. 1; Laurie 2002, ch.2). Notwithstanding disagreements about, for example, just how privacy should be construed, or about the differences between spatial, personal or

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4 Solove’s critique of the conventional position is not unprecedented, but it is particularly apt and lends great strength to the search for a better articulation of the value of privacy. The present article parallels this work. For a critique of the doctrine of ‘balance’, see Raab (1999).
information privacy, commentators take it that privacy is a value pertaining to the individual, and most discourse about privacy, its protection or its breach, is tied to that conception. For many or most, privacy is a value inherent in a liberal society, and is to be defended for that reason. As we will see later, the thought that invasions of privacy potentially threaten the persistence of a form of society in which individuals can live their lives within the limited and necessary constraints of state or social control may contain the germ of an approach that considers the societal value more directly, but the germ has not been widely cultivated in privacy scholarship.

The prevailing privacy paradigm (Bennett and Raab 2006, ch.1) sees society as comprising relatively autonomous individuals, and holds an image of society as comprising their sum total: individuals who need privacy in order to perform citizen roles in a liberal-democratic state. It reflects the individualistic-liberal side of Mill (Mill [1859] 1991), which contrasts “self-regarding” activities of private concern with “other-regarding” activities that fall within the purview of collective interest and regulation. The modern claim to privacy posits boundaries between individuals, and between the individual and the state; it rests on the idea of a distinction between the public and the private. As Warren and Brandeis comment in their seminal article on the right to privacy: “...the protection of society must come mainly through a recognition of the rights of the individual. Each man is responsible for his own acts and omissions only” (Warren and Brandeis 1890, pp. 219-20).

The paradigm sees privacy mainly as an individual right and articulates its protection accordingly. In criticising Westin and other privacy theorists, Schwartz – with whose thinking Solove’s argument has affinity– has labelled this “privacy-control”, a liberal paradigm of individual control of personal information that culminates in an ‘autonomy trap’ and a “data seclusion deception” because it ignores the conditions of cyberspace data-processing under which people supposedly make choices and determine themselves (Schwartz 1999; Westin 1967; Bennett and Raab 2006, ch. 1). Although a privacy right is certainly crucial, its articulation in terms of what it does for the individual needs to be carefully shaped in order to avoid the connotation of self-interestedness and opposition to, or withdrawal from, society – a charge to which privacy is all too vulnerable in contemporary social and political circumstances – and to preserve the possibility of emphasising its trans-individual values. That connotation leaves privacy open to strong and damaging challenges to rights-based defences of privacy, especially if such defences are founded on the valuation of rights only in individualist terms. Privacy has a long-standing, and valuable, normative and humanistic affinity with individual autonomy (for example Rössler 2005, ch. 3) and dignity (Whitman 2004). Many accounts of privacy reflect a dichotomy between dignity and liberty that, Whitman argues, historically differentiates European and American (USA) conceptions of privacy but that should not be seen as values in opposition (Whitman 2004). Privacy is normally seen as a shield for the individual against the incursions of, and excessive involvement with, primarily, the state (Shils 1956, pp. 154-160; Westin 1967, p. 24). Lindsay has described the deontological nature of rights-based constructions of privacy, with their emphasis on individual dignity.
and autonomy (Lindsay 2005, Sections III-B and V-A). This is contrasted with consequentialist or interest-based utilitarian arguments that involve weighing the desirable outcomes of information processing against the value of privacy protection for individuals (Lindsay 2005, Sections III-C and V-B). Solove draws similar distinctions between theories that emphasise, variously, privacy’s intrinsic value (for its own sake) (Rössler 2005, p. 68), its nonconsequentialist value (e.g., relating to dignity and autonomy), and his preferred pragmatic value. Inspired by Dewey, the pragmatic approach makes a major constructive move, in the present article’s perspective, by incorporating individualism into a conception of the common good (Solove 2008, p. 91), and by judging the value of privacy in terms of the plural problematic situations in which appeals are made for its protection, rather than in the abstract (Solove 2008, pp. 98-100). In these judgments, privacy is assessed in terms of its social contribution and is balanced, in specific contexts and situations, against opposing interests by methods that, Solove claims, surpass the usual perfunctory or inadequate ones (Solove 2008, pp. 84-88; 91-93).

However, the intrinsic/functional distinction should not be too sharply drawn, because most privacy discourse embraces both emphases, and in so doing, contains the elements for developing a social-values conception. Rössler says that most privacy definitions can be interpreted as functional, and that it “makes sense to ask why we value privacy, what it is that would be lost if we were to lose our privacy” (Rössler 2005, p. 69, emphasis in original). Westin’s functional view, for example, sees privacy still in individualist terms as serving to protect and promote personal autonomy, emotional release, self-evaluation, and limited and protected communication (Westin 1967, ch. 2). But these are important not primarily because individuals may wish to live in isolation (for they do not, mostly), but so that they can participate in social and political relationships at various levels of scale, and so that they can undertake projects and pursue their own goals: “[p]rivacy is an irreducibly critical element in the operations of individuals, groups and government in a democratic system with a liberal culture” (Westin 1967, p. 368). In relation to considering the nature of social relationships, we will later describe further arguments in Westin’s work, which – as Steeves explains – is steeped in socio-psychological understanding but which veers off course because of his emphasis on the individual’s control of her personal information as the principal mechanism for achieving privacy (Steeves 2008).

This emphasis is part of the “mainstream” view of privacy, in which we each have a right or claim to be able to control information that relates to ourselves. In many countries, the protection of informational privacy enhances this control, as expressed in the German idea of Informationelle Selbstbestimmung. In 1983, the German Constitutional Court linked data protection to the personal rights protected by the German Constitution, which sustain the individual’s capacity to determine the use and disclosure of his/her personal data; only in cases of overriding public interest can this right be limited. The Court declared this right to be essential for protecting the individual’s personality and dignity under Articles 1

5 Customarily, but somewhat misleadingly, rendered in English as ‘informational self-determination’.
and 2 of the German Constitution, but also to safeguard democratic society: “Inconsistent with the right of informational self-determination would be a societal order and assisting legal order in which the citizen no longer knew the who, what, when and how of knowledge about him.” But it is essential to note that the development of the individual’s personality was seen as only possible in society: it “develops within a social community and is dependent on communication” (German Constitutional Court, 65 BVerfGE, 1, 1983). This has historical roots in German conceptions of personality and freedom. Whitman distinguishes the latter, as the exercise of free will and the development of personality within a political and legal framework that could sustain active social welfare and economic functions, from the American conception of freedom as liberty, with its connotation of antagonism to state power and of individual market choice. He notes that legal thinkers in the late nineteenth century considered privacy protection as part of broader personality protection: “[p]rivacy, for Germans, became one part of ‘free self-realization’” (Whitman 2004, p. 1182).

Although we should bear in mind Schwartz’s highlighting of the fallacies of “privacy-control”, the German approach adds strength to the importance of recognising the individual’s participation in, and indeed constitution of, society and the political system in any account of the value of privacy. It steps away from simply considering how privacy benefits the individual for “private” reasons – even if understood in functional terms including psychological well-being and the ability to pursue life-projects – or how incursions on privacy harm only her. As mentioned, these social and political dimensions are ignored when privacy protection is construed as standing against society’s wider public interest. For Westin, however, privacy promotes freedom of association, and protects scholarship and science from government interference. It underpins secret ballots and protects voting by forbidding government surveillance of citizens’ voting records, and also curbs improper police conduct such as “physical brutality, compulsory self-incrimination, and unreasonable searches and seizures” (Westin 1967, p. 25). It serves to safeguard those institutions, such as the media, that act to keep government accountable. It thus also embodies utilitarian values for society and for a liberal, democratic political system.

3. Towards a New Approach

As we have already begun to see, challenges to the conventional understanding of privacy that are of particular interest here are those that spring from different conceptions of the nature of society and its relationship to the individual, and of the (democratic) polity, and that engage – even if not always in a supportive way – the concerns that lie behind the attempt to construct a social-value or political-value defence of privacy. There have, of course, been other, and more prominent, challenges to the typical understanding of privacy. Some are sceptical that privacy is a separate value at all, and claim that it can be reduced to other rights; others would see privacy only as part of property rights. Some critics reject the anti-feminist implications of the private/public distinction; still others see a claim to privacy as an anti-social cover for dishonourable machinations or illegal deeds, or
for personal greed (Schoeman 1984; Bennett and Raab 2006, pp. 14-15). However, these stances cannot be pursued further here, but Pateman draws attention to an alternative, participatory tradition of democratic theory that emphasises participation, co-operation and community values – found in Mill himself, and in Rousseau – rather than the individualistic values that underlie the “right to be let alone” (Pateman 1970, chs. 1 and 2).

If a foundation stone has been laid for a fresh way of seeing and valuing privacy, recent writers’ attempts provide further encouragement that a new departure may be possible. This will be considered in greater detail later. Solove, building on earlier but somewhat fragmentary bases (Solove 2008, especially chs. 4 and 6), emphasises the importance of privacy’s social value. He first recalls the many arguments in the privacy literature that either assert the value of privacy in terms of its importance to individuals and to political democracy, or that, conversely, assert that privacy poses a threat to society, to trust, and to interactions; some feminist, economic, and national security arguments are among the latter as well. Grounding his own approach in Dewey’s pragmatic philosophy, Solove holds that individualism should be seen as part of, and not outside, the common good (Solove 2008, p. 91). Bygrave thinks that protecting privacy and self-realisation is constitutive of a society “infused with civility, stability, pluralism and democracy” (Bygrave 2002, p. 134). He maintains that this is a republican position of positive freedom that is concerned with enabling the individual to participate in the political public sphere, as distinguished from safeguarding her against intrusions from that sphere, which is the negative-liberty position (Bygrave 2002, p. 136). Goold has also elaborated and clarified this. He points further in a political direction by linking privacy to the autonomous individual’s ability to exercise fundamental rights and freedoms of expression, association, and religion without being subject to surveillance and its chilling effect on political discourse and peaceful collective action (Goold 2009, p. 2). Such conceptions as these of privacy’s instrumental or utilitarian value are important stepping-stones en route to new ways of thinking about privacy. They deeply affect the weighing of private and public interests when conflicts are perceived and further analysed, as Solove argues (Solove 2008, p. 91).

4. A Communitarian View

Coming from a different direction, however, a particularly trenchant and controversial challenge to privacy in recent years has been mounted from within the body of communitarian theorising, which explicitly advances the claims of society or community rather than those of the individual, and is exemplified most prominently in the case of privacy by Etzioni (Etzioni 1999a; Etzioni and Marsh 6 That book in part recapitulates earlier writing.
7 Further discussion of possible affinities and differences with Berlin’s (1958) two concepts of liberty cannot be undertaken here; see also Carter (2008).
This challenge is not so much to the conception of privacy as it is to its value. It is important, therefore, to dwell upon this argument in order to assess its relevance, juxtapose it briefly with the discussion put forward a generation earlier by Westin (Westin 1967), and distinguish it from other accounts that support, rather than negate, the idea that privacy has positive social value.

Etzioni challenges the primacy of privacy as a right and a value, counterposing the claims of the common good or public interest from the standpoint of communitarian political theory. He is sceptical of privacy as a “highly privileged value” and aims to explain the conditions – moral, legal and social – under which the right to privacy should be restricted. If privacy is not compromised, he asks, “[w]hat are the specific and significant harms that befall us?”. The ‘common good’ refers to “shared concerns of the society at large” and is not just a property of some supra-individual entity with a narrower scope and membership, a subdivision of the whole society. Presumably, the frame of reference for the “common good” is that of a country or nation-state, rather than a sub-national or international jurisdiction, although that issue is not directly addressed. Etzioni’s concern is with the issues of public safety and public health; whilst these have international and sub-national extensions, his discussion concerns American society at large. His complaint is that in regard to these two issues, “the common good is being systematically neglected out of excessive deference to privacy”. He professes to not to question “the basic virtue of privacy”, but presses for “a fundamental change in civic culture, policymaking, and legal doctrines”, so that privacy is treated “as an individual right that is to be balanced with concerns for the common good – or as one good among others, without a priori privileging any of them”. But his “balancing” counters privacy in a way that goes beyond only “limited, ad-hoc concessions to the common good, extended if and when a specific and strong case can be presented that privacy must be curbed” (Etzioni 1999a, p. 3-5).

For Etzioni, the “community” is the source of collective values. “Communitarianism”, he states, “holds that a good society seeks a carefully crafted balance between individual rights and social responsibilities, between liberty and the common good (…)”. Although he argues that neither rights nor social responsibilities should be privileged, in the absence of an accepted communitarian conception of privacy, he suggests that it is “the realm in which an actor…can legitimately act without disclosure and accountability to others. Privacy is thus a societal license that exempts a category of acts (including thoughts and emotions) from communal, public, and governmental scrutiny” (Etzioni 1999a, p. 196; emphases in original).

This indicates that the scope given to privacy, and its rationale, is determined by the community’s values, and not through any determination of individuals’ functional needs or rights, as in liberal theory. It therefore starts at the community end and works down to circumscribe individuals’ privacy. But in an even-han-

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8 No assertion is being made that Etzioni is the best representative of communitarian thinking, or that communitarian thinking on other matters besides privacy is flawed. For an overview of communitarianism in its philosophical and political phases, and of Etzioni’s place within the latter, see Bell (2009).
ded expression of the position, he maintains that “[p]rivacy cannot be extended to the point where it undermines the common good; conversely, duties set to maintain social order cannot be expanded to the point where they destroy privacy” (Etzioni 1999a, p. 199). Putting it in terms of undermining the one or destroying the other is to present the issue at its limits, but there are, he shows, criteria to be applied in adjusting the balance more finely (Etzioni 1999a, pp. 10-14). Few would probably disagree with the reasonableness of this position in the abstract, although in applying the criteria to cases, agreement on the fine judgments of balance may be scarce, and “balancing” may be a flawed and euphemistic term for a process that may span a range from negotiated accommodation to communal force majeure as the even hand emerges with its thumb firmly on the community side of the scale.

It is worth observing, however, Etzioni’s declaration that the criteria for determining privacy’s permissible limits and the legitimacy of restrictions can be operated in the other direction – that is, when it is privacy, rather than the common good, that is threatened. He does not argue that privacy should always be set aside in favour of other values and interests, especially public safety and public health. Nonetheless, the thrust of his discussion is what to do about threats to the common good, and not to privacy, except for an example of medical data elaborated in a later chapter, in which it is private enterprise that endangers privacy and points to the need for privacy-protective state action. For Etzioni, the individualist nature of privacy, in the conventional paradigm that he appears to endorse, counts against it in light of his strong preference for a society founded on communitarian, rather than liberal, values.

From the heart of Etzioni’s communitarian philosophy, it is clear that the common good is indeed to be privileged more often than individual privacy, and the other illustrative examples reinforce this conclusion. His examples – apart from the medical one mentioned above – systematically load the argument against privacy and fail to establish convincingly the case for doing so. The illustrations are ones that resonate with heightened public concern in the USA, and in which privacy’s claims have been difficult to assert. This is perhaps especially so since ‘9/11’ as far as identity cards are concerned; indeed, in a subsequent book, Etzioni and Marsh reassert the view that public safety against terrorist threats should take pride of place (Etzioni and Marsh 2003).

9 The criteria are: macroscopic and well-documented threat to the common good; no first resort to privacy-restricting measures; minimally-intrusive privacy restriction; undesirable side-effects taken into account.
10 See Solove’s general remark on this, mentioned earlier, Solove 2008, ch.4.
11 His stance, and the results of his application of the criteria to the cases, have been widely criticised. Even two of the book-jacket endorsers of The Limits of Privacy, Professors Alan Dershowitz and Alan Westin, distance themselves from, respectively, Etzioni’s communitarian bias in the balancing approach, and the conclusions about the balance arrived at in specific cases. Godwin’s (1999) review of the book is strongly critical. See Etzioni’s (1999b) rebuttal.
12 Their position is more complex, however: arguing that restrictions on privacy should be minimal as well as effective in public protection. It is also more controversial: arguing that going to war against terrorists is preferable to curtailing freedom in a garrison state that remains unsafe.
Despite his claim to point to a new “communitarian concept of privacy – one that systematically provides for a balance between rights and the common good” (Etzioni and Marsh 2003, p. 15) Etzioni does not really offer an alternative conception of privacy as a value to be protected. On the contrary: he accepts and even caricatures the conventional liberal paradigm, but from a communitarian perspective that seeks to contain privacy’s claims, overcome its supposed priority, and – despite any even-handedness of method – judge it against what seem to be the morally superior claims of the common good as exemplified in the social community.\(^{13}\) It is important to note that what is being “balanced” is still an individualistic idea of privacy against other values with which it is “not fully compatible” (Etzioni 1999a, p. 200). His “new” conception amounts, in practice, to the drawing of tight limits around the scope for individual privacy (as conventionally understood) by means of the four criteria for determining the drawing of such limits.

In sum, despite giving criteria for “balancing” in practice, Etzioni puts forward only a binary, either/or construct in theory: individualism or the common good; or “[t]he realm of rights, private choice, self-interest, and entitlement” versus “corollary social responsibilities and commitments to the common good” (Etzioni 1999a, p. 195). The stark nature of the binary construction – in which, incidentally, it concerns the individual’s freedom from what the government is allowed to scrutinise, and the individual’s scope for choice as against what the government is entitled to choose (Etzioni 1999a, p. 197) – is further developed in his treatment of the US Constitution’s Fourth Amendment. He argues that it provides his favoured balanced conception of privacy, one that confines privacy to the area of freedom from illegitimate scrutiny, stripping away its connotation of exemption from state control over the freedom to choose. But, for all the emphasis placed on “responsive communitarianism” and its doctrine of balance (Etzioni 1999a, pp. 198-200), he does not venture to consider how the concept of privacy can be reconstructed to incorporate individuals’ relationship to a community which is structured in complex ways, and in which the individual’s relationship to a welter of overlapping groups – not simply to “the” community and society or to the government and state – arbitrates the nature, extent, and value of privacy.

For that, we must turn later on to other sources, which will enable us to see the relevance of social complexity to the construction of a more rounded conception of privacy. However, Etzioni does touch on the plural nature of social organisation by invoking a “third realm” of “friends, neighbours and fellow members of voluntary associations” – that is, “the community, which relies on subtle social fostering of prosocial conduct by such means as communal recognition, approbation, and censure” (Etzioni 1999a, pp. 198-200). He extends the types of entities that may be involved in such informal scrutiny and enforcement to include professional bodies and colleges. But this is as close as he comes to view of society as a complex entity, and it is too sketchily argued to enable a grounded understanding of how it works and its consequences for freedom and for the individual’s management of relationships.

\(^{13}\) See the comparable remarks on this in Solove (2008, pp. 90-91).
Etzioni argues that the distinction between privacy and private choice matters only to responsive communitarians, “who hold that important social formulations of the good can be left to private choices – provided there is sufficient communal scrutiny!” That is, the best way to curtail the need for governmental control and intrusion is to have somewhat less privacy” (Etzioni 1999a, p. 213; emphasis in original). For Etzioni, the value of invoking a third realm is in arguing that the way to forestall state intervention and control of private choices, and to foster the common good, is to give scope to communal scrutiny and “publicness” at that level, and to oppose what he regards as the atomistic, solitary-individuals view of society adopted by individualists and civil libertarians. Whether or not this is a convincing proposition, his construction does nothing to alter an individualistic conception of privacy as the only theoretically possible one, but in this case as one to be rejected.

Here it is relevant to mention Westin’s attempt at determining when privacy can be overridden, although he does this from a different philosophical as well as a privacy-protective starting-point (Westin 1967). He robustly defends privacy because of a worry that technological trends and intensive surveillance practices will be unrestrained by the application of regulations and appraisal criteria. For Westin, these criteria – it turns out – partly overlap with Etzioni’s (Westin 1967, pp. 370-377). Both writers seek a balance, and for both, that is construed in terms of individual versus collective values, although they differ in their conceptualisation of the latter. Westin’s collectivity is associated with the overall society or political community of which the state is the expression, rather than with a more “communal” or local connotation. However, perhaps this contrast should not be overemphasised, for Westin does not jump to the regulation of privacy invasions through statist mechanisms of legal regulation as the necessary first line of protection. Although he favours state regulatory action, he first examines the constructive role played by “private forces” in strengthening privacy values in a democratic society (Westin 1967, pp. 379-384). These are moral consciousness (public opinion), scientific counter-measures (what have more recently been termed “privacy-enhancing technologies”, or PETs), intra-organisational restraints (what we may call “civil society” self-regulation at the level of the single organisation, such as business firms, voluntary associations, trade unions, religious groups and the like), private agreements (including contracts), and professional standards (including codes of practice). Where these are insufficient, the state steps in with legislation, a regulatory body, executive action and judicial remedies embracing a new constitutional right to privacy (Westin 1967, pp. 384-399).

We will return later to Westin’s view. But one has to look further afield for approaches that take a different turn or a further step away from seeing privacy primarily in individualistic terms and as a value that can be balanced away in fa-

14 His five criteria are: serious need to restrict privacy; seek alternatives to privacy-restriction first; ensure reliability of surveillance devices; seek individuals’ consent; surveillance dependent on the specific system and its effective regulation.

15 Etzioni (1999a, pp. 136-137) Likewise, sees a role for an ‘ombudsperson’ to oversee identity cards.
vour of other values, whether seen in a communitarian or a liberal frame of reference.

5. A New Departure: Privacy Theory and Social Relationships

As Fieschi observes, “[p]rivacy allows us to posit human beings as relational” because it is “the regulatory mechanism through which we can construct our relationships to each other and to the state” (Fieschi 2008, p. 31). In turn, conceptualisations of society and of social relationships are central to an understanding of the possibility of developing a more privacy-friendly argument for privacy in the context of competing values. Agreeing with Negley that the definition of the individual is crucial for a consideration of whether privacy is an individual right, Laurie emphasises that “[t]hat definition, in turn, depends on the definition of society we accept” (Laurie 2002, pp. 48-49; Negley 1966, p. 319). Some of the variety of understandings of “society” and relationships therefore plays an important part in the argument, as will be seen. If personal privacy is to be seen as beneficial for any entity beyond the individual, it may be important to distinguish, however crudely, between society, with its patterned relationships on the one hand, and the state, with its political processes and institutions, on the other, as the supra-individual objects for which privacy is functional. We will see later that a conception of society as constructed through participation in multi-level and cross-cutting networks and organisations, rather than as a simple aggregate of individuals, has consequences for the way privacy may be viewed. For many if not most other writers as well, the object of attraction or repulsion is the state, and privacy as seen as a way of keeping state incursions at bay, or, in more subtle accounts, as necessary for political participation and the construction of the public realm, or political community. Through a variety of perspectives, we will be taken closer to a more nuanced view of individuals and social relationships, and away from a stark “individual v. society (or state)” narrative of privacy, its values, and its limits.

5.1. Regan’s View: Privacy’s Social Values

Whereas most other writers cannot conceive of privacy outside a framework of individual liberalism, Regan criticises their excessive emphasis on atomistic and isolated individuals, and their neglect of the liberal tradition of communality (Regan 1995, p. 221). Her conceptualisation makes a major advance towards validating a defence of privacy as something other than an antagonist of social and public-interest norms by deploying an argument for privacy’s value beyond its value for the individual. She claims that society, and not just the individual, is better off when privacy exists because privacy also serves “common, public, and collective purposes”. Moreover,”[e]ven if the individual interests in privacy became less compelling, social interests in privacy might remain” (Regan 1995, p. 221). The three social values she perceives in privacy are outlined as follows (Regan 1995, pp. 221-231):
1. **Common value**: all persons have a common interest in a right to privacy even though they may differ on the specific content of their privacy or what they regard as sensitive. Among the authors Regan cites are Mill (1859) [1991], for whom individual liberty had social utility, and Gavison (1980), who saw privacy as contributing to the formation of a tolerant, pluralistic society. Dewey (1927) and Walzer (1984) are others whose writing tends to support this conception of privacy in a highly institutionalised society in which individuals’ personal data are captured and processed by large organisations, giving rise to apprehensions by large majorities about privacy threats. These fears reflect the common valuation of privacy amidst differences in the substance of what different individuals cherish. Elsewhere, she says that “[t]he common value of privacy derives in large part from a moral argument that privacy is intrinsically valuable as part of human dignity and autonomy” (Regan 2002, p. 399).

2. **Public value**: privacy is instrumentally valuable to a democratic political system, as for example in regard to freedom of speech and association, and in regard to setting the boundaries that the state’s exercise of power should not transgress. As Mill (1859) [1991] argued. Regan says that the US Fourth Amendment cases have seen the Supreme Court defending privacy in this sense.

3. **Collective value**: this is an economistic conception of privacy’s value as a collective good that cannot be divided and from which individuals cannot be excluded, and which cannot be efficiently provided by the market. Regan says that, despite mechanisms for giving people control of their privacy through market decisions (for example, by opting-out of further use), these are not really effective because personal data are ‘out there’ in the world of organisations that trade them beyond one’s knowledge or control. Moreover, especially in the public sector, a person is not free to give or control her information; all relevant individuals are indivisibly included in these record systems. Any (perhaps minimal) privacy protection that is provided for these systems covers all the persons included in them. Moreover, the design of ICT infrastructures may militate against the division of privacy where privacy protection cannot be tailored to the higher requirements of specific individuals.

Focusing on information privacy as well as communication and psychological privacy, Regan aims to strengthen privacy protection by gaining recognition for these three, with implications for policy that we will see later. What has been Etzioni’s view of this theoretical position? Without acknowledging that the nature of the issue moves from “individual rights vs. society” to a different relationship requiring different reconciliation, he has dismissed as a semantic issue the argument that privacy is better seen as a common good rather than as a right; it still requires privacy to be balanced with other common goods (Etzioni 1999a, p. 218). Yet he also refers, with commendation, to Regan’s treatment of “privacy as a social good – but not the only one” (Etzioni 1999a, p. 218), but he has clearly failed to grasp Regan’s point. By constantly seeing proponents of privacy as “individualists” and by referring to “civil libertarians, libertarians, classical liberals, and contemporary classical liberals” (Etzioni 1999a, p. 191), he cannot comprehend other, non-individualist constructions of privacy, so that the only issue remains one of “balancing” and the procedural criteria for effecting balances. His frame of reference is only the legal position of privacy as a right, rather than, in addition, the sociological position of privacy as a feature of social interaction in a highly complex society made up of individuals and a large number of different
kinds of groups, and in which people act in a variety of contexts that cannot simply be labelled “public” or “private”.19

In this, he, along with many writers who seek to defend privacy, exemplifies Regan’s observation that many writers fail to identify the range of components of society and do not address the question whether their interests are “social” (Regan 1995, p. 218). Exploration of the structure of society is indeed important to the theory of privacy, as will be shown below. To be sure, the main elements for Regan are concrete social and economic organisations rather than less-bounded networks of social relationships in which individuals are embedded. It is in the context of those that other social scientists have given accounts of the way privacy is negotiated and identity constructed (for example, Goffman 1959; Jenkins 2004), but she is attentive as well to those relationships in any understanding of privacy’s value.

Regan’s move remains still within the liberal paradigm but expands its boundaries in ways that, to some extent, were foreshadowed by Westin. Not only did he see freedom of association and the secret ballot as important functions aided by privacy, but two of his “states of privacy” have supra-individual social and political value that have nothing to do with the “right to be let alone” in the sense of personal withdrawal from connections with wider associations or organisations. Thus intimacy and anonymity (Westin 1967, pp. 31-32)20 imply the ability of the individual to engage with others, serving to sustain participation in social and political life, whether within very small or larger social circles. Steeves therefore sees Westin’s construct as “rich in sociality”, but not properly developed (Steeves 2009, p. 196).21 Of course, the fact that intimacy does not imply engagement with a large number of others is important for an understanding of its social relevance, but it is not an atomistic concept. It is clear that, for Westin, intimacy’s supra-individual extent is only to a “small unit”, such as a married couple, a family, a circle of friends or a work group, encompassing those who are trusted by the individual (Westin 1967, p. 31, 38). But just as, even within a marriage, the partners may – as Westin argues – each retain a more narrow zone of privacy about matters that they do not reveal to each other, so we may also argue that the zone of the trusted can be one of larger extent, although not coterminous with “society” as normally understood: intimacy, of course, has limits far short of that.

5.2. Laurie’s Idea of Privacy and Society

Further insights into the nature of the society to which privacy relates may be gained from Laurie’s discussion, with reference to genetic privacy. It appears to draw on some of the contrasting positions we have already seen, and shares a

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19 This point is developed considerably more by Nissenbaum (2010).
20 The other two states of privacy are solitude and reserve.
21 She tries to revalorise Westin’s social-value elements by way of reference to the canonical literature on social interaction on which he draws. She argues that Westin took a wrong turning away from this approach by defining privacy mainly in terms of the individual’s informational control, and of her withdrawal from, and conflict with, society. See Steeves (2009, pp. 151-157). Regan (2008, p. 216) seems to underestimate the ‘sociality’ dimension in Westin.
laboral functionalist position similar to that of Regan, Westin and Bygrave. But Laurie acknowledges that the “public interest” can reside in privacy protection as well as opposing it, and this is akin to Regan’s social-value argument. His conception of privacy must first be described. Although he invokes a definition of privacy as a “state of separateness” (Laurie 2002, p. 68), he recognises the difference between privacy as a state that occurs in a social context and can be maintained or relaxed, and isolation, which enforces non-access to others. Therefore “simply to be in the presence of others does not necessarily mean that privacy interests cannot be claimed” (Laurie 2002, p. 68). Laurie is careful to distinguish privacy (as separateness) from autonomy, liberty or freedom, although they are interrelated and may coincide as values implicated in certain issues or law cases. He believes that true liberty, freedom and autonomous choice require an element of privacy and freedom from interference, but he strikes a different note by saying that these concepts are “open to criticism as ill-defined, anti-communitarian and conceptually obfuscated” (Laurie 2002, p. 83).

His argument is that while – unlike liberty and autonomy – privacy might not always be seen as an end in itself, a valid claim for its protection can be made if we can “identify areas of our lives that are most appropriately described in terms of privacy” (Laurie 2002, p. 84). He argues that there are such areas with regard to genetic information, in which certain interests require protection in ways that cannot be provided by liberty and autonomy. Nevertheless, the “state of separateness” remains central to this conception of privacy’s function, with only legitimated invasions being permitted. At this point, the distinction between individual privacy rights and the public interest is maintained, as is the need to strike a balance between them (Laurie 2002, p. 51). In this respect his argument is conventional, but his discussion of various views of privacy draws attention to “a tension between individualist and communitarian notions of privacy” (Laurie 2002, p. 46) as a deleterious polarisation of stances. With respect to familial genetic information, Laurie develops a communitarian-oriented discussion of privacy and the public interest, in which he alludes to the “classic tension” between the two, points up the difficulty of determining what “public interest” might mean (Laurie 2002, p. 279).

This is where a sophisticated conceptualisation of society or the community becomes important: in this case, in the context of genetic information. He urges that a “public”, in the case of genetics, should also include the family of those who are genetically tested, as a microcosmic community. This is because they constitute “a collective with a common interest in familial information” (Laurie 2002, p. 280) having a claim to this information. Any balancing would have to be between two public interests: the family’s (as a “public”) and the interest in res-

22 The more general issue of the maintenance of privacy in public places, aired in case law, is germane to this.

23 Let us note, in passing, O’Neill’s (2002) powerful critique of individual (as against principled) autonomy in debates about bioethics. Laurie, like O’Neill and for similar reasons, is also sceptical about autonomy, especially when it is purportedly exercised through consent procedures, giving only “an illusion of power and control”. Laurie (2002, p. 312).
pecting the individual’s privacy or in protecting her from harmful use of the information (Laurie 2002, p. 281).

Commensurate with Solove’s or Nissenbaum’s appreciation of the contextualised and pluralistic nature of privacy, Laurie’s move is remarkable and intriguing in two senses: first, whilst he recognises that there are a host of difficulties in delineating what the “family” is, what its rights are and how they relate to the individual’s rights, who is to speak for it, and so on (Laurie 2002, pp. 281-282), he seriously proposes that the “public”, with regard to genetic information, can be a similar sort of collectivity to Westin’s “small unit” (Westin 1967, p. 31), but seen from the other end of the telescope. Second, and of especial significance to the argument of this article, Laurie clearly indicates that there is a (wider) public interest in respecting and protecting an individual’s privacy in respect of information, and that this cannot merely be seen as a matter only for the individual, to be balanced against the claims of society, however the latter is construed. Although he refers to his approach as “communitarian”, it seems to have a different thrust from Etzioni’s, with the label denoting the community nature of the family.

The point, we may conclude, is that privacy need not be interpreted simply in terms of the needs of the sole individual, pitted against the claims of some maximal society or public. We can note that Westin devotes much attention to “organizational privacy”, which serves to protect groups in their democratic, public, political roles (Westin 1967, pp. 42-51). Group privacy thus has a legitimate role in the workings of a pluralist democracy, and this role can be seen, in Westin’s analysis, in terms (more or less) of the same four states of privacy that apply to persons. He concludes that “[p]rivacy is thus not a luxury for organizational life; it is a vital lubricant of the organizational system in free societies” (Westin 1967, p. 51).

Our enquiry has thus shown that the black box of “society” can be opened to reveal a more variegated set of structures to which privacy claims might pertain, and therefore a more complex constellation of conflicts of interests or rights that might require resolution. That is an important step towards an enhanced conception of privacy. But other writers, perhaps especially Schoeman, have taken this social enquiry further.

5.3. Schoeman’s Approach to Social Complexity

Schoeman’s views on “privacy as social freedom” provide further insights for an alternative or complementary view of privacy (Schoeman 1992). For Schoeman, privacy’s purpose is to protect the person against the overreaching of society, not the state, thus differing from the starting point of many other writers. But he does not look to the concept of autonomy to support this protection. This is because autonomy is too often inward-facing rather than outward-facing and interpersonal; looking at the individual from the exterior, the conventional view fails to see any sociality in the “private” sphere. Autonomy is important to assist individual

24 The question of the privacy of social groups or organised collective entities is as yet underexamined, but see Bygrave (2002): Part III; Vedder (1995, ch. 4).
role-expression. It is not to isolate individuals from relationships but, to the contrary, to assist their choice of relationships and to enable deeper ones. Privacy, like autonomy, polices the threshold between people to keep certain others out, but privacy goes further by suggesting that on the individual’s side of the boundary “there may be something still interpersonal” (Schoeman 1992, p. 21).

This resembles Laurie’s distinction between privacy and isolation, but goes further in seeing privacy protection as rooted in the desire to maintain relationships: interpersonal and social involvement and intimacy, rather than isolation; “privacy for”, and not just “privacy from”. “By conceiving freedom in associational terms”, he asserts, “we help to emphasize the social aspects of freedom. By connecting social control with associational effectiveness we establish or help make more salient the connecting, rather than the conflicting, features of the categories: freedom, control, agency, and privacy” (Schoeman 1992, pp. 156-157).25

Schoeman’s framework is mainly utilitarian and consequentialist, and links to a more subtle form of social theory than in the case of other writers whose concept of “society” is one-dimensional. He understands that the tapestry of society is woven from complex, inter-related social arrangements that provide many contexts and situations in which privacy is engaged. Society is not monolithic or all-embracing: “[i]n place of a single, traditional authority that speaks for the entire community, distributed authorities speak for the local relevant interests that various associations promote” (Schoeman 1992, p. 152).

This nuanced, sociologically perceptive view comprehends the way in which the structural properties of society – in which the individual is a member of a number of groups and collectivities, or “spheres of life” (Schoeman 1992, ch. 9) within the maximal society – serve to protect privacy through the scope that this fragmentation allows for private life, thus sustaining freedom of association (Schoeman 1992, p. 152). The variety of social groups provides individuals with options for their agency, and thus ensures their social freedom (Schoeman 1992, p. 6). In a multi-associational society, privacy functions to enable the individual to engage in relations within a particular group whilst restricting others’ access to what goes on in that group. It thus polices the boundaries between the different spheres in which the individual is engaged, thus maintaining their integrity (Schoeman 1992, p. 157).26 It creates restrictions on access to persons, not to isolate them “but to enable them to relate intimately or in looser associations that serve personal and group goals. Characteristically privacy is engaged as a social category not just to preclude a wider influence but also to enshroud with respect an association of people that is meaningful in its own terms” (Schoeman 1992, p. 21; emphasis added).

Schoeman emphasises that his account does not prescribe the content or direction of individual social development but engages privacy norms so that individuals can develop free of “overreaching social pressures”, with legitimate social access depending on contextual factors: “[b]ecause what counts as expressing the

26 For a consonant social-psychological analysis of privacy in terms of boundary regulation, see Altman (1975, especially chs. 2 and 3), and see the discussion of Altman in Steeves (2009).
individual’s self and...as overreaching interference with this self vary with context and domain, what is rightfully the individual’s will vary. Accordingly, what privacy legitimately protects will vary” (Schoeman 1992, p. 113). This view foreshadows Solove’s pluralistic notion of the varied contexts of privacy and Nissenbaum’s argument in a similar vein, and is particularly important in any attempt to construct privacy as a social value. If we consider that privacy and its protection is functional for society and/or the political system, as several of the writers discussed above would argue (or at least concede), then the importance of considering what kind of society we have in mind to which privacy makes and important contribution is manifest. But this consideration is made difficult within the conventional, conception of privacy solely, or mainly, as a value and a right enjoyed by individuals, and in which the societal context within which privacy is claimed is not described or analysed. What are the policy implications of these theories of privacy?

5.4. Policy Implications

The adversarial construction is typically found in public policy discourse and in the mass media. It sustains Bygrave’s complaint that, by focusing on privacy benefits for individuals as such, and therefore emphasising a supposed detriment to society and the common good, the discourse leads to a “skewed appreciation of the societal benefits of privacy rights” that interferes with the call for stronger data protection laws (Bygrave 2002, p. 135). Theoretical discourse aside, there are only rare and fragile exceptions in public policy that aim to set aside the duality. One is the claim – as in the United Kingdom (UK) – that joined-up, information-age government, involving intensive and extensive exploitation of the personal data of citizens in order to provide more effective and efficient public services and to achieve other public policy objectives, can be brought about whilst also enhancing privacy. In the UK, this claim has been reiterated on many occasions over several years, as the Government has returned repeatedly to the question of how the twin imperatives can be reconciled so that both are achieved, at least to a considerable degree.

Such exceptions, however, are not very substantial and lack conviction, and movement towards this goal in practice has been halting and unconvincing in the UK, at least. Establishing a sound claim for privacy as a social value depends not only on theoretical discourse, but also to a considerable extent on whether it can be realised in information processes through demonstrations of its efficacy in practical policy-making and decisions. But progress towards this is vulnerable to the scepticism of practitioners in a wide variety of public-service roles who, in their day-to-day work with patients, clients and others, are more frequently confronted with privacy or confidentiality restrictions on the processing of informa-

27 These clashes have sometimes involved ad hominem verbal abuse: ‘Big Brother’ versus the ‘Privacy Taliban’.
28 For example, UK Government (1999) and later documents; see the discussion in 6, Bellamy and Raab (2005).
tions, restrictions that they perceive to be obstacles to their work. Institutions and professional cultures are not founded on the assumption that there are no real tensions between the two. But often, professionals themselves invoke norms of confidentiality to explain why they are reluctant to communicate personal information about clients, even to other professionals. There is much less support, whether in professional circles, governments or among the general public, and far fewer rewards, for acting as though privacy and the public interest were a positive-sum situation. Beyond exhortation and rhetoric surrounding the desirability and possibility of achieving both aims, there is little advice on how to do this, and what there is often lacks credibility in the face of the dichotomous construction that persists in political parlance, in the media, and in public opinion.

Exceptions are also vulnerable to the pressure of events. This is nowhere more evident in the political and public climate since ‘9/11’. It has been very difficult, in many countries, to gain a hearing for the view that security measures, including anti-terrorism laws, heightened surveillance, and the like should be modified to minimise invasions of privacy. The argument is universally put the other way round: that privacy must give way to overriding interests in these circumstances, and this position is even sustained by human-rights legislation in which privacy is seen as a fundamental but not absolute right. It is also evident in instances of the tragic deaths of children through abuse or neglect. Subsequent formal inquiries have pointed the finger at the failure of organisations to share personal data, often because of actual or purported data-protection and confidentiality restrictions that are thought to have interfered with drawing attention to likely abuse, so that the relevant care workers were unaware of it. In the recommended remedies, the privacy-invasive collection and communication of data in the public interest, or for the good of categories of persons deemed to be at risk, appears to take precedence over the protection of privacy. This happens largely without serious public debate about the values involved, much less about the nature and level of risk – and how to assess this – in these and other situations.

Policies and practices in many fields, and more generally, are therefore underpinned by the conventional conception that sees privacy as pertaining to the interest or the right of the individual, set against the more general public or societal interest. This does not mean that public policy should not be involved in the protection of individuals; indeed privacy laws rightly do just that, safeguarding individuals’ privacy through the use of public resources and not leaving it entirely up to the individual to protect herself. But the shaping and application of public policies and laws for privacy protection are constrained by countervailing pressures in the direction of limiting privacy for the sake of social or trans-personal interests in collective security, safety, economic efficiency, public order, and a variety of social-policy aims. To be sure, states do not all have the same thresholds for allowing privacy considerations to prevail or to be trumped; nor do they apply

29 For example, Article 8 of the European Convention on Human Rights.
30 For the UK, see Bichard (2004) and Laming (2003).
the same criteria for determining when, and especially why, privacy or the public interest should hold sway (Whitman 2004).31

Only a few indications can be given here of the difference that a new approach to privacy might make to public policy. Regan argues that an acknowledgement of privacy’s social importance will enable more serious policy debate about privacy and more effective public policy for its protection (Regan 1995, p. 220). She says that an individual’s waiver of privacy rights reduces the level of privacy for all because it has been devalued (Regan 1995, p. 233), thus underlining one implication of her conception of the social importance of privacy. The policy implications that Regan draws from her three social values are related to institutions and processes. Recognising privacy as a common value would move one away from considering privacy as an individual right to be pursued by each person. It would address common problems by placing an obligation on institutions to respect common, shared interests in information, and to justify their information processes. It would highlight the need for regulation and organisational compliance with data-handling standards (Regan 1995, p. 232). Acknowledging information privacy’s public value would strengthen the point that the exercise of an individual’s privacy rights against an organisation can also serve the public interest by bringing the organisation’s practices to public attention. Privacy as a collective value would point up the deficiencies of property-based, market-transaction approaches to privacy protection in which individuals’ choices about the collection and use of their information may serve to lower the level of protection available to all. She illustrates this with the communications-infrastructure example of how at least minimal privacy facilities should be built into these systems – thus being available to all – rather than leaving it to individuals to buy the level of privacy they want; the latter would be socially divisive and perhaps not even an effective guarantee for those who did so (Regan 2002).32

Regan also discusses the three social values of privacy with regard to genetic information, a topic of heightened importance in the light of the growing use of DNA samples and genetic screening, and of the particular characteristics of genetic material in providing information about others beyond the individual herself. The privacy issues raised are common to all persons, for instance, in the workplace situation in which the right of employers or insurers to use genetic testing to make hiring or insurance-cover decisions may be in question. The public value of privacy is evident in the possibility that knowledge of different persons’ genetic information may result in decisions or processes that counter a society’s egalitarian assumptions. Collective-good value attaches to genetic privacy insofar as, for example, the customary pooling of risks is abandoned in favour of tailoring insu-

31 Whitman draws a relatively sharp distinction between the USA and continental Europe (principally France and Germany) in the way privacy is construed, resulting in different stances on issues in which the question of privacy protection is engaged.
32 In further writing, Regan (2002) explores the policy implications of seeing personal information as a common pool resource, and privacy as a common good engaging the three social values, in the context of the online world as a commons.
rance premiums to the risks pertaining to particular persons revealed through genetic testing (Regan 1995, pp. 238-241).

Beyond these observations, Bennett and Raab contend that the question of how privacy is distributed in society – who gets what privacy? – is important but infrequently asked (Bennett and Raab 2006, ch. 2). It is nearly meaningless within the conventional privacy paradigm and within a primarily legal construction of privacy, in which the exercise of one person’s privacy rights has no consequences for other persons’ exercise of theirs. The distributional question would be less easy to avoid if privacy is conceived to have a social value in addition to its value to the individual. But Regan does not enquire into the way privacy is distributed, and does not focus attention on the policy actions that might be taken, or should be taken, in response to an answer to this question.

Of course, the collective value of privacy addresses this to some extent: certain privacy protections cannot be individuated and have to be available to all, to the extent that information technologies and systems can be designed to have this effect. But there is no guarantee that such design will occur, whether in the shaping of the technology or through public-policy or legislative requirements regarding technological design. Many information systems and technologies widen social differences, and are likely to continue in this way unless the trans-individual value of privacy is realised in organisational practice, systems construction, and public policy. This realisation is likely to be undermined by the better ability of some people to provide privacy protection for themselves than other people, and if this self-protection continued to be legitimised by the individualist paradigm, thus contributing to the ‘gated community’ nature of privacy protection in the information society and trumping broader public policy approaches in the public interest (Bennett and Raab 2006, pp. 41-42).

6. Conclusion

The observation that “we need privacy to build social relationships” (Fieschi 2008, p. 39) between individuals themselves and with social and state institutions is only the beginning of an argument. It should be clear from the foregoing account that the sociologically informed theoretical building blocks for a social-value approach to privacy are sufficiently available to enable a challenge to the conventional conception’s construction of a privacy-unfriendly opposition between the individual and society or the state. This opposition is, moreover, unhelpful in policy terms, where answers to the question why privacy is worth protecting currently draw on a limited range of reasons, mainly related to individual values. This tends to ignore the social importance of privacy as well as wider ef-

33 This point is made in another context by O’Neill with reference to the 1990s British policy debate about the use of genetic information for insurance purposes (O’Neill 2002, pp. 110-116).

34 It is not certain that the current attention being given to “privacy by design” will embrace social policy questions such as this, unless it is steered in that direction. See, for example, Cavoukian (2009).
fects that excessive surveillance has in eroding privacy and affecting social equality and solidarity.

Privacy-protection regimes, constructed as an edifice of laws – including data protection statutes and regulatory agencies that enforce them – as well as other mechanisms, are primarily oriented towards individual rights and draw strength from the body of national and supranational human rights legislation and jurisprudence. While it is essential to safeguard these rights, the practical realisation of the value of privacy cannot end at that point. Moreover, the protection of the individual right to privacy gains strength, especially in policy terms, from an understanding – grounded in social theory and sociological analysis as well as in the recognition of rights – that this protection is in the public interest and not only in the interest of the individual whose right is at stake. But it is one thing to establish the credibility of a fresh conception of privacy, as this article and its sources have aimed to do, and this conception itself is not yet in the mainstream of thought. It is a more formidable task to establish a nuanced social theory of privacy as the foundation for policy and practice. That foundation remains to be built, albeit in unfavourable current conditions. Its construction would amount to a significant political transformation.

References


Wissen handelbar gemacht? Politik und Patente

Irene Troy / Raymund Werle

1. Einleitung
