

Privacy: A Privileged Right?

Book Review by David Simcox

Only a consummate intellectual such as Israeli-American sociologist Amitai Etzioni could argue that personal privacy has gone way too far in super-individualistic America, and be heard without jeers.

Etzioni, today's leading communitarian thinker, presents the case that the common good, a suspect value in a society that prizes autonomy, has suffered in many spheres from the enthronement of personal privacy. He admits — perhaps too cursorily — that the common good is an elusive concept: prescriptions about what the common good might require in a specific situation are usually profuse and conflicting. Most, for example, would agree that the environment is a common good that must be protected, but disagree where and how much it is threatened, and by what or whom? The current deadlock over whether there is global warming and what to do about it is another striking reminder that the common good is far from obvious. The author stresses that the common good defended in this particular book is above all the protection of public health and safety.

The author finds that privacy has become a “privileged” right, assumed to trump all others. For communitarians, however, all rights are subject to reasonable limitations in the interest of other rights of equal or greater value and of the common good. So, as his book title suggests, there must be limits on privacy rights: but how much, in what circumstances, and with what safeguards?

Etzioni offers four criteria for considering the best balance between the common good and the demands of

individual privacy. He then applies those criteria in five case studies of major recent and current privacy issues: Megan's Law for disclosure of child molesters, the anonymity of HIV-infected mothers, public power to decipher encrypted private messages for crime control and security, the need for a national ID card, and the use and misuse of individual medical records.

In each of the five cases he applies his four-criteria test. First, is there a “well documented and macroscopic threat to the common good, not merely a hypothetical danger?” If so, what are the available options for dealing with that danger without first resorting to restrictions on privacy? The third criteria is: what can be done to make any needed curbs on privacy as unobtrusive as possible?

And finally, what are ways to treat the undesirable side effects of the restrictions on privacy?

In the case of HIV infected mothers, Etzioni's four-point test convinces him to support mandatory testing of all newborns for the HIV virus, requiring disclosure of the results to the mothers. Existing arrangements permitting only consensual testing of infants, or “blind testing” with no disclosure of individual results, present a clear danger to the common good — the suffering and death of considerable numbers of children that their parents and society could easily avoid with proper knowledge. The author reasons that the right to life outweighs any increase in the risk of the mothers' being stigmatized and discriminated against by a fearful community, although this risk must be recognized and alleviated. His third and fourth criteria require new and tighter measures to sharply restrict access to the test results to the medical professionals immediately involved and to increase the penalties for those misusing the information or discriminating against HIV-positive persons.

Looking at the state of health records, Etzioni finds a paradox in the well documented abuse of personal medical care data by the “privacy merchants” of the business world. Society's defenses of confidentiality are remarkably weak against private sector intrusions. But

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by Amitai Etzioni
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meanwhile most of the alarm and agitation over privacy loss has targeted government as the privacy-destroying Leviathan. It is "Big Brother" on the Potomac that commands the menacing network of snoops, dossier-keepers and data banks. Paradoxically, while Americans "...fear 'Big Brother' most, they need to lean on him to protect privacy better from the abuses of 'Big Bucks.'"

The case study of secure national identification cards finds, not one, but a cluster of distinct threats to the common good from the country's failure to adopt them. The tangle of issues, interests and phobias involved makes the national identification card the most heated and intractable of the five privacy issues examined. In late 1999 Congress overturned a 1996 law that would have placed federal document security standards on state-issued driver's license. A small band of libertarian congressmen had only to label federal standards a "de facto national ID card" to kill the legislation.

For a decade, privacy interests in Congress, joined by pro-business groups, have invoked similar accusations to block implementation of a nationwide system to check job applicants' eligibility to work in the U.S. The same anxious advocacies are gathering to keep the contemplated individual health care and gun owners' identification cards off the table, and to stall any efforts to make the social security card into a secure personal ID document.

For Etzioni this behavior is national negligence, and the common good is the prime victim. He sees no incompatibility between democracy and card-carrying citizens, as is evident in the well-safeguarded use of national ID cards in societies no less democratic than our own. He is not the first to argue that societies don't become totalitarian by use of ID cards; they abuse ID cards because they are totalitarian. Democracy has the adaptability to use ID cards and remain democratic.

America pays a high price for its peculiar notion of privacy. He outlines how the country's jerrybuilt system of identification prevents the detection and control of criminal fugitives, sex offenders, income tax cheats, child support deadbeats and welfare cheats, illegal gun merchants, illegal immigrants, and thieves out to steal our very identities. Reliable identification, secured by

biometric identifiers, can increase, not diminish, the citizen's privacy and autonomy. As further safeguards against abuse Etzioni calls for a network of "privacy ombudsmen" and greater individual citizen involvement in the policing of others' use of his own personal data.

The book closes with an appeal for an updated, communitarian concept of privacy — a privacy that is not absolute, but varies with context. Sure to elevate the eyebrows of libertarians and civil rights advocates is his statement that the country is now in a "...new sociohistorical context [which] calls for greater dedication to the common good and less expansive privileging of individual rights."

The author is skeptical about the constitutional reasoning of the last three decades that underpins today's concept of a natural, absolute right of privacy. For him, the fourth amendment remains the proper cornerstone of American privacy law. This amend-ment embodies the constitution's "clear and firm foundation for acts that serve the common good and take precedence over privacy considerations by establishing a whole category of legitimate, 'reasonable' searches and seizures." Thus the fourth amendment provides a balanced, almost communitarian conception of privacy that does not privilege it.

Libertarians, seeing privacy under siege at every turn, will scoff at Etzioni's characterization of privacy rights as "privileged," and will probably regard his book itself as more evidence of the steepness of the slippery slope on which privacy is now skidding. But privacy exists as a value in an American society that is rapidly becoming something new and not necessarily more benevolent. Etzioni's perception of the changing "socioeconomic context" in which privacy must operate will indeed resonate with those aware of the prospects of steadily higher population density and resource competition, spreading technological wizardry, and the globalization of crime and terrorism. Will privacy as we know it in its current golden age be affordable or even conceivable in the super-competitive, heterogeneous market-nation of half a billion Americans looming on our horizon?

