

Privacy, Technology, and Terrorism: *Bartnicki*, *Kyllo*, and the Normative Struggle Behind Competing Claims to Solitude and Security

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“Doonesbury” cartoon, July 24, 2001:

Character 1: You know, it's too bad the public can't access Cheney's defibrillator – you know, on the web or something.

Character 2: Yeah, someone ought to license the wireless output rights. *Think* what they'd be worth to stockbrokers, media outlets and foreign governments!

[pause]

Character 1: We're gonna be rich! We're gonna be rich!

* * * * *

“Doonesbury” cartoon, July 25, 2001:

....

Character 2: Clients like that would pay a *fortune* to have beat-by-beat information on Cheney's latest “routine” cardiac “event”!

Character 1: Direct from his digital “insurance policy”!

Character 2: Confirming that he's not “dead.”¹

Introduction

The 2000-2001 term of the Supreme Court produced at its end two excellent examples of the continuing disagreement that swirls around the intersection of two fundamental propositions – one normative, the other scientific: privacy and modern sensing and surveillance technologies. In ordinary circumstances, this controversy

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¹ Both cartoons can be found at the cartoon's website, www.doonesbury.com.

would be interesting. But in the context of the newly declared campaign against terrorism, the topic has taken on a new seriousness and urgency. Clashes between competing claims to solitude and security are increasing quickly. The two Court decisions – *Bartnicki v. Vopper*² and *Kyllo v. U.S.*³ – therefore deserve special attention for the purpose of revealing lessons about the analytic struggle that lies at the heart of this issue.

The purpose of this article is not, however, to propose some dramatic, but no doubt short-lived, solution to the many, and changing, difficulties in this context. Our objective is more modest, yet hopefully more enduring: to improve the debate rather than to end it.⁴ Toward that goal, we first emphasize that we believe the debate will *never* end.⁵ We will argue that the concept of privacy is now and always will be controversial, that there exists no deep theoretical foundation for it that could serve to end the debate about it, no matter how hard we try.⁶ In turn, we believe that this

² 532 U.S. 514 (2001).

³ 533 U.S. 27 (2001).

⁴ This conclusion, and the analytic methodology behind it, were the subject of an earlier article: Terrell, “Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons From the “Metaethics” of Legal Ethics,” 49 *Emory L. J.* 87 (2000) (hereinafter “Turmoil”). The present article relies upon, and expands, that prior work as part of a larger research agenda applying a metaethical analytic model to a range of legal issues.

⁵ The basic message from *Turmoil*, *supra* n.4, that is reinforced here is two-fold: First, disagreement about fundamental values involved in legal and policy debates is inevitable not only because values themselves may be disputed, but more subtly, because the *perspectives* from which those values are assessed and applied varies. That “metaethical” level of analysis helps explain the strident disputes that can divide policy-makers even when they all seem to support the same broad goal, like ethical legal practice or (here) privacy. Second, that disagreement nevertheless follows a pattern that can be depicted and then used to organize and orient a sophisticated normative argument.

⁶ The debate will not end precisely because the meaning and value of privacy is contingent. Privacy is relationally determined by the constraints of and ongoing changes within the social, cultural, historical, and technological milieus within which privacy is valued. For a survey of the effects of such changes and the concomitant perpetuation of the debate on privacy by shifts in focus of concern, see *Philosophical Dimensions of Privacy: An Anthology*, Ferdinand Schoeman, ed. (Cambridge University Press: Cambridge, 1984) and compare *The Right to Privacy*, Ellen Frankel Paul, et. al., eds. (Cambridge University Press: Cambridge, 2000).

The controversy extends down to the very definition of the word “privacy.” Is privacy a matter of possessing control over one's personal information, of concealing certain kinds of facts, or of both? Does

continuing disagreement about the “ought” of privacy will sustain a similarly continuing debate about the “is” of current and future technology⁷ – the effort to identify exactly what features possessed by that technology produce the legal controversies in the first place.⁸

Yet ours is not a message of despair. Understanding the inevitable disagreement this aspect of public policy will generate can nevertheless yield useful guidance for those on the topic’s front line. The disagreement, as we hope to show, is not chaotic, but instead follows a pattern that can be depicted and then used to anticipate the range of arguments that will surface (and must therefore be addressed) in any collision involving claims for privacy, the capabilities of information science, and the demands for public safety.

The collisions in the two cases took place within quite different contexts.

Bartnicki v. Vopper involved a privacy-based challenge to the broadcast of an illegally

privacy refer to information itself or to the act of making a decision? For a discussion of the consequences that choice of definition can have for the legal treatment of privacy see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *Stan. L. Rev.* 1393 (2001) (hereinafter “Privacy and Power”).

⁷ The “is-ought” distinction, is, of course, a traditional one within philosophy, its origin often related to David Hume. The distinction, and its background, are developed extensively in Terrell, “Property,” “Due Process,” and the Distinction Between Definition and Theory in *Legal Analysis*, 70 *Geo. L. J.* 861, 862-878 (1982). The focus of the present article is obviously the “ought” side of this dichotomy – the “is” segment is certainly relevant and is the subject of Part II at the end of the article. But the emphasis here is on unpacking the normative elements of any argument.

⁸ In “Privacy and Power,” *supra* n.6, Prof. Solove takes issue with the commonly held belief that the ability to expose private information is the most troublesome aspect of advanced technologies. He argues that, at least for large commercial databases, the real problem is the lack of control that the individual has over the collection and use of his or her personal information. Consequently, “Big Brother” is not an appropriate metaphor for guiding legal policy in that area. metaphor is not appropriate. As we discuss *infra*, note ____, notes _____ and accompanying text, neither worries about exposure nor worries about control are limited to the commercial setting. Both are very much a part of the design and implementation of context-aware sensing technologies and applications that are intended for use in the home. However, as Solove himself points out, the differences between various types of privacy problems require different metaphors (Privacy and Power at 1413). When the setting is the family home and the objective to be served by the technology is enhancing life therein, what metaphors are helpful? Which will assist in developing a legal foundation that will balance the multiple, often conflicting, expectations and desires that will exist between members of the same household? What will the consequences be of continuing to use the Big Brother imagery? Does Solove’s Kafka fit any better here?

intercepted cell phone call;⁹ *Kyllo v. U.S.* involved a privacy-based challenge to the search of a home by government agents using a heat detection device.¹⁰ Privacy could be said to have “lost” in the first case to a stronger claim based in freedom of speech, while privacy “won” in the latter, overcoming a government claim based in reasonable search and seizure. The evident doctrinal differences between these cases – one relating to the appropriate behavior of a broadcaster (albeit publicly funded), the other the appropriate behavior of the police – nevertheless obscure what is common between them, and therefore more interesting and fundamental.

Given the different results in the two cases, and given the current Court’s ideological split,¹¹ it is not surprising that the author of the majority opinion in one case also wrote the dissent in the other.¹² But that is about as far as the usual assumptions about the Court will take you. The coalitions that otherwise produced the results in each case were quite different mixes from what one might ordinarily expect. As the various opinions reveal, even though all the Justices certainly agree that a constitutional right to “privacy” exists, they disagree, as we all do, on the fundamental basis of that right as it competes with other recognized rights and policies. The Justices also evidently can, and do, disagree about how technology impacts privacy – whether it is through its actual invasion of some space, or an invasion of a more abstract aspect of our lives, or through the data it produces to be used against us.

⁹ 532 U.S. at 517.

¹⁰ 533 U.S. at 29.

¹¹ The decision in *Bush v. Gore* apparently confirms both the popular and academic imagination of the ideological divisions of the current Supreme Court. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *Yale L.J.* 1407 (2002); Frank Michaelman, *Bush v. Gore: Suspicion, or the New Prince*, 68 *U. Chi. L. Rev.* 696 (2001); Robin West, *Rethinking the Rule of Law*, forthcoming draft on file with author.

¹² Justice Stevens wrote the majority in *Bartnicki*, 532 U.S. at 517, and the dissent in *Kyllo*, 533 U.S. at 41.

In summary form, the issue in these kinds of cases is particularly difficult because it is founded on two subtle distinctions that have important policy consequences: on the one hand, the differences between “justice”¹³ and “fairness,”¹⁴ and on the other, the differences between normative reasoning that is “categorical”¹⁵ and “consequential.”¹⁶ Although these fundamental propositions are obviously related to each other, they are distinct enough to require choices to be made between values competing in ways not often identified. This article is about clarifying both the method and the substance of those choices, even though no particular resolution to the debate will be able to claim normative superiority over any other. Instead, as we noted, in a political and technological environment that is rapidly evolving, the highest attainable ambition will be the acceptance of inevitable and continuing disagreement about the relationship between privacy and invasive science.

The task for policy-makers, then, should not be to search for *the* answer in this daunting context, but to be better able to anticipate the range of *competing* answers – each with strong arguments in its favor – that they will confront. The goal will therefore be the principled management of grudging situational compromise. Similarly, the task for lawyers in these new frontiers is to understand this range of potential argument well enough to anticipate the challenges their clients will face. To do so, both policy-makers

¹³ As this term will be developed later in this article, “justice” will be equated with the “macro” theoretical exercise usually labeled political philosophy. See pp. _____, *infra*. The distinction between political philosophy and moral philosophy is developed at *Turmoil*, *supra* n.4 at 100-102.

¹⁴ This term, as developed later, will be equated with the “micro” level of moral philosophy. See pp. _____, *infra*.

¹⁵ This term will be related to deontology or “Kantianism.” See pp. _____, *infra*. It too is developed extensively in *Turmoil*, *supra* n.4 at 102-105.

¹⁶ This term will be related to teleology or end-based normative theories. See pp. _____, *infra*. It too is developed in *Turmoil*, *supra* n.4 at *id*.

and lawyers will need a useable analytical tool that depicts the nature of the privacy debate more comprehensively.

Developing that tool – a structural model of the complex normative debate underlying the right to privacy – is our goal here. If we cannot calm this turbulent legal sea, we can at least attempt to provide a rudder.

We begin below with a summary of our target cases and the legal background of which they are a part. In Part II we introduce our suggested analytic model, one that will lay a template of structure on the otherwise intractable debates about the right to privacy. The model will attempt to do so by differentiating normative perspectives along all four of the key dimensions – “justice,” “fairness,” “categorical,” and “consequential.” The result will be a better picture, in Part III, of the underlying normative significance of the arguments in both cases, and then in Part IV, a better understanding of the implications of these cases more generally for privacy in a world of continuously expanding technological capabilities and our new circumstances of significant possible domestic terrorism.

I. The Cases and Their Doctrinal Background

Bartnicki and *Kyllo* are each the latest in lines of cases in their own traditional doctrinal areas – respectively, challenges to freedom of speech or press¹⁷ and challenges to police investigative activity.¹⁸ Two common threads bring them together: the challenges are based on claims to privacy, and the invasion of privacy is in turn

¹⁷ 532 U.S. at 519.

¹⁸ 533 U.S. at 29-31.

based on new technologies. The challenge *here* will be to see if the common threads produce insights that transcend the doctrinal distinctions.

A. *Bartnicki*: Does Speech Define Privacy, or Privacy Define Speech?

*Bartnicki*¹⁹ involved a heated labor dispute that at one point provoked a cell phone call between two teachers' union activists angered over a school board's "intransigence" in negotiations. During the lengthy conversation, one of the activists made what sounded like threats to the property of the board members. The conversation was intercepted by someone unknown, and a tape of the conversation was delivered to the mailbox of the head of a local taxpayers' organization that had opposed the union's demands. This person in turn played the tape for the school board members and delivered it to a local radio commentator who had also been critical of the union. The commentator played the tape on the air, and the union activists heard on the tape sued both the person who received the tape and the radio commentator under both federal and state anti-wiretapping statutes.²⁰

Cross motions for summary judgment were filed, which the district court denied. But it certified for interlocutory appeal the issues raised by the defendants: Were the statutes unconstitutional as applied to these defendants in the exercise of their First Amendment rights?²¹ A majority of a Third Circuit panel replied in the affirmative, reversing the district court's denial of summary judgment for the defendants.²² The Supreme Court, in a 6-3 decision, in an opinion by Justice Stevens, affirmed.²³ Justices

¹⁹ The facts in this case are developed by the Court at 532 U.S. at 518-19.

²⁰ *Id.* at 519-20.

²¹ *Id.* at 521.

²² *Id.* at 521-22.

²³ *Id.* at 518.

Breyer and O'Connor filed a concurrence,²⁴ and Justice Rehnquist wrote a dissent in which Justices Scalia and Thomas joined.²⁵

One important aspect of this case is that the claim by the union activists was based not in some abstract, general sense of a right to privacy, but in a more precise statutory manifestation of that right. Thus, the Court understood its task as comparing this statutory right to the defendants' constitutional rights under the First Amendment. To set that comparison up carefully, all the opinions assumed, as the lower courts had, certain facts concerning the recording and broadcasting that would eliminate any collateral issues: the defendants had had no involvement in the clearly illegal recording of the conversation itself; although the defendants received the recording legally, they knew or should have known that the recording was nevertheless illegal; and the conversations dealt with a matter of public concern.²⁶

The Justices disagreed most basically, however, over *whose* right to speak was at stake. The majority focused on the defendants – basically as surrogates for all of us – who want to have a right to speak about issues of public moment.²⁷ The odd point, of course, is that they want to do so using other people's words. The dissent focused on the activists, in two senses: first, narrowly as individuals who, by being denied the protection of privacy, are being forced to speak publicly in a particular way against their

²⁴ *Id.* at 535.

²⁵ *Id.* at 541.

²⁶ *Id.* at 525. Part of the decision therefore rests in statutory interpretation and legislative authority, which is peripheral to the issues we are raising: Did Congress, for example, intend to extend the criminal penalties in its anti-wiretapping bill to those who knowingly *receive* illegal recordings? If it did not, *could* it so extend the law? One member of the Third Circuit panel believed the federal statute did in fact include the defendants in this way, 200 F.3d 109, _____, and Justice Rehnquist in dissent agreed, 532 U.S. at 547-49.

²⁷ 532 U.S. at 526-28.

will;²⁸ and second, more generally, as people – like us all – who do not want to encounter disincentives to speaking, like having our private conversations used against us.²⁹ The odd point, of course, is that this ostensibly private conversation was directly relevant to issues of public moment.

So who's on first? Is this case a "speech case" with a privacy twist, or a "privacy case" with a speech twist? The difference is critical in orienting the analysis of the technology involved: Is the interception of cell phone conversations to be assessed within the overarching principle of public debate, or within the overarching principle of personal choice regarding when and how to enter that debate. Because the majority sees the case as an example of the former, it connects the case to the line of precedent focused on the importance of the First Amendment to maintaining a democratic society.³⁰ The question becomes whether the interest in protecting the confidentiality of certain information outweighs the consequences of chilling the American tradition of vigorous debate. As the majority recognized,³¹ confidentiality seldom wins that contest. Only the most egregious *public* detriment, such as interfering with a war effort, could compete with that social and political perspective. Thus, in *Bartnicki*, the activists' argument for *privacy*-based restrictions on news-related activities would be a tough one to sustain. The fact that new and unusual technology is causing an impact on confidentiality would not seem to make any serious legal difference.

²⁸ *Id.* at 553-54.

²⁹ *Id.*

³⁰ The context of the majority's attitude, if not its analysis, is therefore most basically in "prior restraint" cases like *Near v. Minnesota*, 283 U.S. 697(1931); *New York Times v. Sullivan*, 376 U.S. 254(1964); *New York Times v. U.S.*, 403 U.S. 713 (1971); and *Florida Star v. B. J. F.*, 491 U.S. 524 (1989). In each, newspapers sought to publish information that was, according to other legal doctrines, not theirs to print: libelous material, statutorily protected private information, or stolen government documents. The Court has consistently held that public debate trumps private interests in restraining publication.

³¹ 532 U.S. at 534.

But Justice Stevens' opinion for the Court *did* take the activists arguments seriously. He noted as "considerably stronger"³² the government's contention in favor of the anti-wiretapping statutes that these laws "minimiz[e] the harm to persons whose conversations have been illegally intercepted."³³ Yet his conclusion was clear: Not only did his opinion hold that "privacy concerns give way when balanced against the interest in publishing matters of public importance,"³⁴ his reasoning made those public matters actually *define* the privacy concerns in such a way that they were bound to lose in this balancing. Citing the original article on the right to privacy by Warren and Brandeis,³⁵ Justice Stevens noted that "[o]ne of the costs associated with participating in public affairs is an attendant loss of privacy."³⁶

Hence, the initial attention paid in Justice Stevens' opinion to cases involving dangers to privacy from new technologies³⁷ was really of no consequence to the result. No matter how vulnerable some new technology might make our conversations – or perhaps other personal data, for that matter – the overarching facts of public importance and debate orient the analysis away from individually-focused privacy rights and toward the politically-oriented First Amendments rights of speech and press. In other words, Gary Trudeau's comic strip, quoted at the beginning of this article, makes a very serious point.

³² *Id.* at 532.

³³ *Id.* at 509.

³⁴ *Id.* at 534.

³⁵ Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890) (hereinafter "Privacy").

³⁶ 532 U.S. at 534.

³⁷ *Id.* at 522-27.

Justice Breyer's concurrence is significant for its effort to avoid the Doonesbury scenario. He criticized Justice Stevens' tendency to put this case in the context of the "strict scrutiny" given to prior restraint cases, and urged instead a straightforward, but therefore more flexible and less predictable, balancing of the public and private interests implicated in the case.³⁸ *Both* these elements, he contended, have constitutional implications concerning "speech" within our society.³⁹ Yet he concurred in the result simply because he believed the statutes involved in this case did not properly strike that balance.⁴⁰

But why these statutes fail is interesting. Although Justice Breyer agreed with the majority that the public quality of the issues *did* matter to analyzing the statutes' constitutionality, and he further agreed that the actual technology involved in the case did *not* matter, he differed by focusing on the actual *data* produced by the technology – that is, the substance of the overheard conversation itself. He noted that the balance between the public and private elements in the case was impacted seriously by the nature of the activists' message: In threatening the safety of others, the activists "had little or no *legitimate* interest in maintaining the privacy of the particular conversation."⁴¹ The information involved therefore became "of a special kind,"⁴² and the statutes could not protect the activists.

In significant contrast, Justice Rehnquist's dissent took the nature of the technology at stake to be the critical, anchoring context for the constitutional question: "[T]he Court's decision diminishes, rather than enhances, the purposes of the First

³⁸ *Id.* at 536.

³⁹ *Id.* at 536-37.

⁴⁰ *Id.* at 538.

⁴¹ *Id.* at 539 (emphasis by Justice Breyer).

⁴² *Id.* at 540.

Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."⁴³ Privacy, therefore, at least as much as the "public importance and debate" aspect of a situation, defined both the nature of the statutes at stake and the nature of protected speech itself. "This concern [in the federal anti-wiretapping statute] for privacy was inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure."⁴⁴

Justice Rehnquist therefore not only rejected the majority's emphasis on the "public debate" element in the case, but he rejected Justice Breyer's more explicit, but more privacy-friendly, balancing approach. For Justice Rehnquist, there simply was no balance to be struck here, no competing set of consequences that needed to be considered:

The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.⁴⁵

The anti-wiretapping statutes, as a consequence, should be understood as perfectly appropriate, quite constitutional, efforts to protect privacy interests from "a marginal claim to speak freely."⁴⁶

The result in *Bartnicki* is then this: For the majority, the public-interest based freedoms of speech and press define an important limitation to the individual-interest

⁴³ *Id.* at 542.

⁴⁴ *Id.* at 543.

⁴⁵ *Id.* at 554-55.

⁴⁶ *Id.* at 556.

based right to privacy. When anyone engages in any activity related to public affairs, that public character necessarily reduces the range of any claim to privacy. In turn, for this weakened claim to privacy, the technology involved in the invasion does not much matter. Similarly, for Justice Breyer in concurrence, there is a public-based limitation to privacy, but it is a bit less dramatic, coming into play only when the substance of the information sought to be protected threatens public safety. Thus, while it would remain difficult to justify a limitation on *speech* based on the content of one's expression, it is apparently, and ironically, much easier to justify a limitation on one's *privacy* based on what one says in private. For the dissent, the contest is more about two competing claims to free speech, with that competition being decided by one side's additional claim to privacy for its conversations. From this perspective, technology, as the means of invasion into that privacy, matters a great deal.

B. *Kyllo*: Does Privacy Define Searching, or Searching Define Privacy?

Given that a clear majority of the Court in *Bartnicki* took privacy interests to be serious competitors for freedom of speech, it is not particularly surprising that a majority of the Court in *Kyllo* took privacy interests seriously enough to hold a new form of sensing technology to be an unconstitutional search. But what *is* somewhat surprising is that the reasoning and coalitions in the two cases do not match up, indicating that something else is at stake as well.

The most unusual grouping in this regard is Justices Stevens and Rehnquist, who could not have been much further apart in *Bartnicki*, but are here together in dissent. Since both *Bartnicki* and *Kyllo* involve claims to privacy in the face of new

technology, the key challenge becomes explaining the reasoning that brings the two of them together.

The facts in *Kyllo* were uncomplicated.⁴⁷ Police suspected that a particular residence was being used to grow marijuana. Because this would require high-intensity lamps, the police aimed a thermal-imaging device at the home to determine whether unusual heat was emanating from any portion of it. They determined that there was, and obtained a search warrant to enter the home. Based on "tips from informants, utility bills, and the thermal imaging,"⁴⁸ a federal magistrate issued the warrant, and the search revealed more than 100 growing marijuana plants. Mr. *Kyllo* was of course indicted, and unsuccessfully moved to suppress the evidence found in the search.

The Ninth Circuit initially remanded the case for more fact-finding concerning the thermal imaging technology,⁴⁹ and when the conviction returned for review, a panel reversed the conviction.⁵⁰ That opinion, however, was withdrawn, and a new panel affirmed the District Court's refusal to suppress the seized evidence.⁵¹ It concluded that the homeowner lacked a "subjective expectation of privacy"⁵² because he had done nothing special to insulate his dwelling from heat loss, and, even if he had, he still lacked an "objectively reasonable expectation of privacy"⁵³ because there was nothing particularly intrusive about the workings of the thermal-imaging device.

⁴⁷ 533 U.S. at 29-31.

⁴⁸ *Id.* at 30.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 31.

⁵³ *Id.*

The Supreme Court, in a 5-4 split, reversed, suppressing the evidence of the seized plants and overturning the homeowner's conviction.⁵⁴ The disagreement, as in *Bartnicki*, turned primarily on whether – and how – privacy and the nature of a new technology would be critical elements in defining a constitutional right.

The connection between *Kyllo* and its decisional predecessors is even more direct than that for *Bartnicki*. A long line of cases has worried about the government's ever-increasing ability to gather information through new technologies, and the relationship of that ability to the Fourth Amendment's prohibition of "unreasonable searches and seizures."⁵⁵ The issue in these cases, however, is not ordinarily whether a particular search was "reasonable," but whether a search had occurred *at all*. The usual starting point is *Katz v. U.S.*,⁵⁶ which established the principle that has consistently guided the Court's analysis for nearly 35 years: The focus is not so much the reasonableness of the *government's* action as it is "whether the *individual* has an expectation of privacy that society is prepared to recognize as reasonable."⁵⁷ Thus, similar to *Bartnicki's* use of privacy to understand speech, *Kyllo* makes clear that the concept of privacy defines the concept of "search."

But it is a sense of privacy, as Justice Scalia's majority opinion notes,⁵⁸ that is defined *not* by the individual himself or herself, but by *society*. The "expectation" involved here is not a psychological fact that a defendant could establish with his or her own testimony. It is instead a philosophical proposition – a normative, value-based concept that is determined by courts rather than juries. Yet a judge's conclusion that a

⁵⁴ *Id.* at 41.

⁵⁵ U. S. Constitution, Amend. IV.

⁵⁶ 389 U.S. 347 (1967).

⁵⁷ 533 U.S. at 34.

⁵⁸ *Id.* at 33.

search has or has not occurred will nevertheless be informed by an understanding of psychology and modern circumstances. In other words, in trying to determine whether a "search" has occurred, "ought" and "is" will both require attention.

For Justice Scalia, "ought" clearly dominates the analysis. The details of the heat-sensing technology did not matter so much. He was not limiting his thinking to the "relatively crude" technology in this case, but sought instead to accomplish something more visionary: "[T]he rule we adopt must take account of more sophisticated systems that are already in use or in development."⁵⁹ But to look forward in this way, his technique was to look backward – at the original basepoints for Fourth Amendment thinking. What mattered to him was the *place* at which the technology was aimed. *Kyllo* did not involve a phone booth or a wire running from a building or business and utility records. It involved a *home*, which Justice Scalia characterized as the central element of the Fourth Amendment:

At [its] very core . . . stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.⁶⁰

This is a somewhat unusual emphasis since, as Justice Scalia also acknowledged,⁶¹ the analysis of searches under the Fourth Amendment had long ago lost its anchor in common law understandings of property rights and trespass. From *Katz v. U.S.* on, the question was more personal than tangible: whether the individual had formed a "subjective expectation of privacy" – *and*, very importantly, whether that expectation was

⁵⁹ *Id.* at 36.

⁶⁰ *Id.* at 31 (quoting *Silverman v. U.S.*, 365 U.S. 505, 511 (1961)).

⁶¹ *Id.* at 32.

one “that society recognizes as reasonable.”⁶² But to give this vague test some particular meaning for this case, Justice Scalia returned to those common law roots:

We think that obtaining by sense-enhancing technology any information regarding the interior of a home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” . . . constitutes a search – at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.⁶³

The degree or “significance” of the intrusion did not therefore matter, as it did to the dissent. The key was drawing “a firm line at the entrance to the house.”⁶⁴

Justice Stevens in dissent took a very different analytical approach: circumstantial rather than categorical. He was not at all impressed by the talisman of “the home.” Instead, the details of the technology mattered critically. He distinguished between, on the one hand, “through-the-wall surveillance,”⁶⁵ like x-rays, that can effectively reach into the interior of a space, and, on the other, “off-the-wall” surveillance,⁶⁶ “which is inferences drawn from information released into the public domain, like light rays or smells. While Justice Scalia rejected this distinction as “mechanical,”⁶⁷ rather like the trespass requirement of older cases, Justice Stevens argued that it accurately characterized the state of current science, which should be the limiting focus of the decision:

Just as “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,” . . . so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne

⁶² *Id.* at 33.

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

⁶⁵ *Id.* at 41.

⁶⁶ *Id.*

⁶⁷ *Id.* at 36.

particulates, or radioactive emissions, any of which could identify hazards to the community.⁶⁸

None of these potential “hazards” would require an intimate knowledge of activities in the house; they would just require some external manifestation that could then be interpreted by police officials to yield useful insights.

Justice Stevens was also therefore critical of the majority’s effort to fashion an ambitious rule that would anticipate future technologies. He noted, for example, that Justice Scalia’s reference to technologies not “in general use”⁶⁹ meant that the actual application of the majority’s rule would float with future “subjective expectations of privacy,”⁷⁰ to return to Justice Brandeis’ phrase. The issue of appropriate police conduct would then seem to hinge on what the police and the technological community have managed to get us to accept over time as inevitable and appropriate. One example emphasized by Justice Stevens is a “dog sniff” for the purpose of disclosing narcotics, held by the Court long ago not to constitute a search.⁷¹

The majority’s overly-ambitious rule was therefore in his opinion both too broad and too narrow: it called into question too many police surveillance techniques, many of which have already been held by the Court to be reasonable; and it was limited too strictly to the “home,” when so many other contexts raise legitimate privacy concerns.⁷²

Once again, then, who’s on first? Is *Kyllo* a “search case” with a privacy twist or a “privacy case” with a search twist? And once again, the difference is critical: Is the heat-sensor technology to be assessed within the principle of the kind of privacy to

⁶⁸ *Id.* at 45 (quoting *California v. Greenwood*, 486 U.S. 35, 41 (1988)).

⁶⁹ *Id.* at 47.

⁷⁰ *Id.* “Privacy,” *supra* note 35.

⁷¹ *Id.* at 48.

⁷² *Id.* at 48-49.

which citizens are entitled, or within the principle of, as Justice Stevens puts it, “entirely reasonable public service”?⁷³ Does privacy define searching, or searching define privacy? At least at this level of abstraction, Justice Stevens is quite consistent between *Bartnicki* and *Kyllo*: In both cases his opinions have placed privacy in the secondary position. But if *he* is consistent, a significant number of his colleagues are not: Four members of the Court took one approach in one case and a different tack in the other.

How then should we understand these cases and their implication for the future? The decisions were rendered in an “ordinary” time when the pressure on the right to privacy came principally from the unavoidable fact of technological advance, which has already significantly reduced both our objective ability to be and our subjective expectation of being shielded in some way from scrutiny, by government or otherwise. What direction will analysis of that right take in a post-September 11 world of serious concern about the clandestine activities of terrorists? Will “security,” like “search,” be defined by privacy, as *Kyllo* suggests, or, as *Bartnicki* implies, will security be treated as a dominant concern, like free speech, that defines our sphere of privacy?

II. Perspective: An Analytic Model for Normative Reasoning

A. Not “Which Values,” But “How Valued”

Our interest here is not directly in answering these difficult questions, however. That would require serious efforts in developing comprehensive theories of each of the principles at stake – privacy, search, security, free speech, and so on. As we noted in the Introduction, our aim is more limited, but nevertheless ambitious: Rather than argue

⁷³ *Id.* at 45.

what each of these complex legal concepts should mean, we hope to make observations about *how* these various moral and political values are, and will be, analyzed. That “how” can help explain why cases like *Kyllo* and *Bartnicki* will always generate a range of judicial conclusions.

Our thesis, however, is that despite the vast variation in what judges might and can say in any opinion, the great bulk of those possibilities can be organized around a few key analytic elements that anchor the much narrower range of possible base points for their normative thinking. The result is a model of normative perspectives that can help us predict normative disagreement more generally. If successful, the model would then have implications wider than the issues involved in the two cases.

We should pause to note the character of the controversies that arose in *Bartnicki* and *Kyllo*, a character that is quite common in litigated disputes. The facts that have generated the cases are not really contested – *which* facts are key may well be disputed, but the data itself that comprises the cases are not. Neither does anyone contest the “legal” data at stake – all the relevant cases are known to all the parties and decision makers, although *which* cases are key and how they should be appreciated may well be disputed. In other words, the “is” of the matter is not the problem.⁷⁴ Rather, “ought” is in play: Which values will be vindicated in any particular case, and how do these values come to have the power or influence they enjoy?

Our interest is in this “ought” – the value-based thought process that seems most often to be analytically opaque: You have your values, I have mine, and we just throw together arguments until one set somehow manages to dominate the other. In fact, in cases like *Bartnicki* and *Kyllo* the situation seems even more intractable because the

⁷⁴ See note 7, *supra*.

range of normative disagreement is actually quite narrow. No one, for example, in either of these cases – or in *any* case any longer – argues that the right to privacy does not exist as a constitutional matter, or that free speech isn't a principle of the highest concern. *Everyone* accepts the same fundamental normative propositions that lie at the foundation of these cases. The disagreement is therefore in normative details that are more difficult to identify.

Among those details, our focus here is on certain structural elements that we believe are common to the vast bulk of legal controversies that are the stock-in-trade of the Supreme Court and other policy-level decision makers.

B. The Elements of a “Metaethical” Model

Although the issues that prompt cases like *Bartnicki* and *Kyllo* certainly involve choices among competing values – *e.g.*, the importance of solitude and individualism on the one hand; the importance of safety and social connectedness on the other – we will not argue for any particular resolution of these debates. Our interest is one step back in abstraction, to the “meta” level⁷⁵ of analysis: What normative perspectives lie behind the value-based decisions that people reach? Can we unpack those perspectives in a way that will help us understand why controversy continues to attend all discussions of key normative propositions, even when so many fundamental propositions are agreed?⁷⁶

⁷⁵ The “meta” level obviously is related to the philosophical category of “metaethics,” but we are not attempting to root our analysis in any traditional form of that style of inquiry or reasoning. See *Turmoil*, *supra* n.4 at 97-98.

⁷⁶ See “Privacy and Power,” *supra* note 6 at 1419 for Prof. Solove’s discussion of the normative influence on this debate of the influence of metaphor.

The analytic strategy we suggest uses a metaethical model of normative reasoning developed in an earlier article by one of the co-authors of the present piece.⁷⁷ The model does not attempt to resolve the complex debate over the values that should guide us; it seeks only to organize that debate more usefully, so that we can at least see more clearly why we disagree among ourselves so regularly. The model itself, then, is not normative, but descriptive. It depicts the range of normative argument that we believe in fact lies behind the debates on public policy.

The model divides normative thinking along two dimensions, one based on the “scale” of that reasoning, the other on its basic “orientation” or anchoring purpose. Both these dimensions involve familiar categories within philosophical analysis. The first is based on the distinction between political philosophy⁷⁸ and moral philosophy,⁷⁹ the latter on the distinction between deontology⁸⁰ and teleology.⁸¹

1. Justice and Fairness

First, scale: Our analysis and application of basic values change, we argue, based on whether you are thinking “macro” or “micro.” Macro is the realm of the political – the values associated with large-scale governmental institutions: Who do we want making governmental decisions, and why? About what do we want government to be making these decisions? What propositions should guide this decision-making? Micro is the realm of the moral – the values that animate interpersonal and small group relationships, values traditionally associated with “ethics”: How should you and I treat

⁷⁷ *Turmoil*, *supra* n.4.

⁷⁸ *Id.* at 100-102.

⁷⁹ *Id.*

⁸⁰ *Id.* at 102-105.

⁸¹ *Id.*

each other? About what can we legitimately be concerned as we interact? Where does your “moral space” begin and mine end?

Political philosophy is therefore ordinarily connected to our sense of *justice* and institutional *rights*, while moral philosophy is ordinarily connected to *fairness* and individual *dignity*.⁸² These perspectives are obviously not neatly distinct from each other, however. Indeed, modern efforts to develop ambitious, comprehensive theories of values often deny this distinction altogether, arguing that theories of political justice must find their roots in moral fairness.⁸³

But because we are not attempting to develop this kind of Grand Field Theory of normativity – indeed, we are denying that such a theory can be agreed upon widely enough and consistently enough to be meaningful – we argue that the political and moral are sufficiently distinct perspectives to be noted separately. An example⁸⁴ might help make this point. A faculty colleague once observed to one of the co-authors of this article that he had an aunt who always amused him with a fundamental contradiction in her behavior. If she saw a destitute person on the street, she would not hesitate to offer personal assistance, believing such actions to be at the very core of her Christian moral responsibility. On the other hand, she was a fierce opponent of government welfare programs of any kind, believing them primarily to encourage sloth and other bad habits. Rather than inconsistency, however, she would perceive little connection between the two situations. One was about helping a person whose desperate circumstances were immediately and clearly before her, to which she could respond in ways that could have

⁸² *Id.* at 100-101.

⁸³ The most famous example of such an effort to unite, rather than separate, the analysis of moral and political values is John Rawls' theory of “justice as fairness.” John Rawls, *A Theory of Justice* 11-17, 30, 221-28 (1971). For others, see *Turmoil*, *supra* n.4 at 101 n.49.

⁸⁴ This same example was presented in *Turmoil*, *supra* n.4 at 100-101.

a direct impact on the situation. The motivation to act was simply the demands inherent in the individual dignity of the destitute person. The other circumstance was about “assisting” people she did not see or know, and assisting them with aggregate, impersonal responses in which she would participate only tangentially and involuntarily. This was about government, not her.

The aunt’s bifurcated approach to values is not at all special or unique to her. It is in fact reflected in, and particularly relevant to, the law. Courts are always faced with precisely this dichotomy: Are they supposed to focus on the litigants themselves in resolving the case – trying to be “fair” to the parties – or are they to take into consideration wider social implications of a decision – trying to “do justice”? Much as any judge would like to believe that the two always perfectly coincide, they do not. Decisional angst is therefore simply an unavoidable part of the judicial job.

The particular angst in which we are interested here is determining the relative strength of claims to “privacy” in the face of competing claims to “free speech” and “public safety.” The background “meta” question, then, as a first step, is how interpersonal values and institutional values interact in this context. Individual people are being targeted for exposure or interference, or are being silenced or subjected to increased personal risk; but their circumstances involve social institutions such as courts, legislatures, the police, businesses, and so on. Does the value of privacy, for example, exist to vindicate the moral dignity with which we are all endowed, or to limit potentially dangerous social institutions? Is a search unreasonable because it interferes with a particular person’s life too much, or because those doing the searching are not subject to appropriate oversight? Although any decision will obviously force these

perspectives to mix to some degree, reasonable people can disagree about which is key to defining the proper legal outcome.

2. Categorical and Consequentialist

A second traditional division separating types of normative reasoning is between those that assess behavior entirely on the basis of the normative value that prompts or justifies the behavior – labeled as “categorical” or “deontological” or “Kantian,” or sometimes “rights-based” or “duty-based” theories⁸⁵ – and those that assess behavior on the basis of the consequences to human well-being that result from the behavior -- labeled “consequentialist” or “teleological” theories.⁸⁶ One shorthand for this distinction is the separate focus one can have on the “means” by which something is done, and the “ends” the something produces. For example, lying could be morally criticized either because it is simply inherently bad in that it demonstrates a lack of respect for the innate dignity and worth of other people, or because it leads to a society filled with distrust and wasteful self-protective, rather than productive, activities.

In the usual parlance of philosophy, deontological theories focus on the “right,” or the intrinsic values of human existence, with all other guidance for behavior being derivative or secondary. Teleological theories, on the other hand, focus on the “good,” in the sense of some goal or end that would define or enhance human society, with all other values being derivative or secondary. Hence, in general, for deontology, “the right precedes the good,” while for teleology, “the good precedes the right.”⁸⁷

To illustrate this distinction, consider two normative issues – one at the “moral” level, the other at the “political.” The moral example returns us to the question of

⁸⁵ *Turmoil*, *supra* n.4 at 102-03 and accompanying notes.

⁸⁶ *Id.*

⁸⁷ *Id.*

lying.⁸⁸ A categorical (deontological) approach would be able to determine the rightness or wrongness of a particular falsehood by identifying the values impinged by the statement. The actual circumstances surrounding or consequences of the false statement would be relevant only to the extent these factors impacted the normative values at stake. For example, telling a lie could be understood as inconsistent both with the speaker’s own sense of personal integrity and with the speaker’s responsibility to respect the dignity of others, even though the lie might avoid hurting someone’s feelings in some situation. The philosophical values trump the psychological impact. A consequentialist (teleological) approach, in contrast, would assess the goodness or badness of the falsehood by its actual impact on the kind of social order the theory was meant to achieve. Any normative values at stake in the situation would then be a function of whether they were appropriate for this desired society. If, for example, your social goal is to have a happier, less tense society, then telling a lie to avoid hurt feelings could be entirely appropriate, despite the vague negative impact on “integrity” and “dignity.” Indeed, these latter two terms could be interpreted quite differently from a teleological perspective, becoming entirely consistent with telling falsehoods (*i.e.*, “dignity” understood as “contented calmness” could actually be *enhanced* by lying).

The political example is freedom of speech⁸⁹: Why does this right have such a central place in our thinking about the appropriate relationship between government and

⁸⁸ The morality of lying is one of the famous examples examined by Immanuel Kant. See his 1797 essay “On a supposed right to lie from philanthropy” in *Immanuel Kant, Practical Philosophy* 611-615 (M. Gregor, trans. and ed., 1996). His conclusion, true to the rigorous logic upon which philosophy must be based, is that one cannot lie even to save a friend from a murderer. One is thus led to wonder how many friends he had.

⁸⁹ U.S. Constitution, Amendment I. For examples of discussions of freedom of speech that reflect the two approaches described in the text, see, e.g., for deontology, Richards, “Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,” 123 *U. Pa. L. Rev.* 45, 62 (1974); Scanlon, “A Theory of

citizens? It could be because we believe that lots of talking produces lots of ideas, and among those ideas we can choose those that produce the most benefit for us. If so, we are assessing free speech consequentially. Consistent with this perspective, we would support limitations on our right to free speech if they, for example, produced a society enjoying more overall happiness.

But while this might be “good,” it might not be considered the “right” thing to do. Freedom of speech could, in contrast, be assessed categorically: The right exists not to produce anything, but because it vindicates our individual dignity and autonomy. We might hope that all the autonomy being exercised out there will produce something nice, but that would not be the point – the justification – for the right.

C. The Analytic Model: Combining the Normative Perspectives

The previous section’s use of both a moral (fairness) and a political (justice) example to illustrate the difference between categorical (deontological, means, or “right”) and consequentialist (teleological, ends, or “good”) reasoning leads to our model of normative disagreement. Our contention is that both elements of the dimension of scope – micro and macro – can be approached from either perspective of the dimension of orientation – values themselves or valued results. This then leads to a classic four-part box depicting the range of value-based “world views” from which any policy issue might be analyzed and assessed:

Freedom of Expression, 1 *Phil. & Pub. Aff.*, 204, 213-18 (1972); for teleology, John Stuart Mill, *On Liberty* (1859); Mickeljohn, *Free Speech and its Relation to Self-Government* 15-16, 24-27, 39 (1948).

POLITICAL PHILOSOPHY (“justice” and institutional dominance)

- Categorical
- deontological
 - “right”: importance of values themselves
 - protecting rights (means)
- Consequentialist
- teleological
 - “good”: social end product
 - enhancing community

MORAL PHILOSOPHY (“fairness” and individual “dignity”)	
<u>Categorical</u>	<u>Consequentialist</u>
<ul style="list-style-type: none"> • deontological • “right” • “means” • individual autonomy 	<ul style="list-style-type: none"> • teleological • “good” • “ends” • responsibility to one’s context
<p>(1) <u>Classical liberal:</u></p> <ul style="list-style-type: none"> • Rights-based Kantian • Emphasizing autonomy and individual rights (society as a salad?) 	<p>(2) <u>Civic liberal:</u></p> <ul style="list-style-type: none"> • Rights-based contextualist • Acknowledging interpersonal connectedness, but tempered by respect for individual rights (society as a stew?)
<p>(3) <u>Liberal communitarian:</u></p> <ul style="list-style-type: none"> • Goal-based Kantian • Acknowledging the legitimate demands of cohesive community, but tempered by respect for the importance of the individual (society as a layer cake?) 	<p>(4) <u>Classical communitarian:</u></p> <ul style="list-style-type: none"> • Goal-based contextualist • Emphasizing social goals and interpersonal connectedness, and the interactive values that allow one to flow into the other (society as a mousse?)

Before we analyze each of the boxes in detail, we must emphasize again that the boxes do not depict particular sets of values, either generally, like “conservatives,” or specifically, like “pro-gun control.” They identify instead forms of value *thinking*. Thus,

Box 1, for example, could contain both sides in a particular dispute where each determines its position based on values themselves (the “right”) rather than on any measure of benefit to society (the “good”) from the application of these values. Aspects of the debate over the right to an abortion have this character⁹⁰: Both supporters and opponents of the right can proceed from value-based, rather than end-based, conclusions about the nature of moral dignity, one group focusing on the woman, the other on the fetus.

But even if this four-part box has not separated these two combatants, it has nevertheless identified the nature of the dispute more accurately, and thus served at least three useful purposes. First, it shows that the two sides are talking about the same “thing” at the meta level, and must therefore mount careful and comprehensive categorical arguments to wage this battle. Second, and perhaps more significantly, it will show when one side or the other goes “off story” to gain some additional edge in the debate – when, in other words, the two sides are *not* arguing from the same normative perspective. An example would be the argument made by proponents of the right to abortion that restrictions on the right will cause women to go “underground” for medical assistance, thus creating more health risks and fostering disrespect for the rule of law⁹¹ – both primarily consequential rather than categorical arguments.

Third, perhaps most significantly, the four-part model allows contenders for a particular public policy choice – say, the right to abortion – to anticipate the range of arguments they must make to satisfy all the normative analytical perspectives that will arise in the debate, and correspondingly to anticipate the range of arguments that will

⁹⁰ As good a summary source on this as any remains Laurence Tribe, *American Constitutional Law* ____ (2d ed. 19__).

⁹¹ *Id.* at ____.

be made against them in the debate. Contenders for this right, for example, who base their argument solely on the woman’s claim to a version of individual dignity will have done a poor rhetorical job, for our model predicts that attacks will be made against their conclusion from other directions not addressed, such as the claim that the right to an abortion will be exercised most often by the poor and minorities, thus having racial impacts on society otherwise unanticipated; or that the right as a constitutional right denies legislative supremacy and distorts our democratic ideals; and so on.

D. The Normative Analytical Perspectives

Now, on the details of the four normative perspectives identified by the model:⁹²

Box (1) relies entirely upon the individual person for philosophical substance. One’s micro/moral responsibility is to respect the autonomy of others; political theory, quite consistently, demands that the state focus on protecting individual rights. Hence, individuals create their own community. Through their independent, unforced choices, they generate and maintain a collectivity that remains legitimate only as a defender and facilitator of the rights necessary for voluntary interpersonal interactions.⁹³ This form of community is no larger or more important than its constituent members; the separate ingredients in this concoction matter more than the concoction as an entity. To use an analogy to food, from this normative perspective society looks like a salad rather than the familiar idea of a “melting pot” – while we may all share the same bowl, rather than blending within it we maintain our rights to individual distinctiveness.

Box (4) is the mirror image of this approach. Individuals are not ignored, of course, but they are understood quite differently as the *product* of community, rather

⁹² The following discussion of the four boxes is drawn quite directly from *Turmoil*, *supra* n.4 at 107-109.

⁹³ The most famous philosophical work developing and defending this point of view is *Robert Nozick, Anarchy, State & Utopia* (1974).

than the other way around. One's micro/moral responsibility, then, is to treat others in ways that will maintain and enhance this community, which is in turn producing morally-aware and responsible individuals.⁹⁴ Individual values are therefore derivative of community values. Political theory follows suit: The state's principal purpose is to maintain and enhance at the macro level a sense of community that fosters and reinforces the sense of community established at the micro level. Macro values are the community's micro values writ large, and vice versa. But the political community has a life and legitimacy of its own transcending that of its individual components. The focus from this perspective is on improving the larger end-product regardless of the impact on particular social elements. Those elements matter, of course, but only as contributors toward the larger enterprise rather than directly in and of themselves. The food analogy here, we think, is something like chocolate mousse – a smooth blending into a pleasing whole.

The possible alternatives to these approaches, in the upper right (2) and lower left (3) boxes, seem potentially attractive because they might be less strident in their perspectives and dogma, but, for precisely those reasons, they can then seem a bit mushy and confused in their inconsistent emphasis of values and consequences. Box (2) is a kind of constrained individualism,⁹⁵ but its nature depends in part on whether one describes it starting with the moral level or the political level. The moral theory of Box (2) again puts the individual in a context of micro-community: We cannot ignore the fact that our immediate community preceded us as individuals, and we must therefore

⁹⁴ A well-known example of this kind of perspective is Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998).

⁹⁵ An example of this approach would be Ronald Dworkin, *Taking Rights Seriously* (1977), and Ronald Dworkin, *A Matter of Principle* (1985).

acknowledge that our sense of ourselves – our sense of our “dignity” – is shaped and directed by that context. Moral values are necessarily then rooted in this interconnectedness, and are for that reason consequentialist: We value those forms of individual interaction that will maintain an appropriate sense of personal connection rather than dislocation. But this attention to functioning relationships is tempered by a political theory that requires the state to refrain from imposing values at the macro level. Rather than being directly in the business of value-definition, government's function is to foster small-scale community by focusing on the protection of individual rights -- in other words, protecting the rights of individuals to participate or not participate in various communities as they choose. Thus, the focus of the state would be on preserving *systems* of interaction. By the same token, the constituent elements within this political community certainly matter in and of themselves, because each has individual rights, but these are not rights to fundamental disassociation from others, but instead rights to choose appropriate forms of association. To return to the food metaphor, the social result here is more of a stew – cooking blends but does not transform and merge the ingredients.

Much the same result is reached, but with a different flavor, by starting the description of Box (2) with the political element. From this perspective, political theory is again oriented toward process rather than substance.⁹⁶ Long-range social goals are viewed with suspicion, the emphasis instead being on the importance of interaction and interchange that can produce varying outcomes. Individual rights are consequently critical – the constituents within a community matter more than any particular social

⁹⁶ We have in mind here the work of James Fishkin. James S. Rishkin, *The Dialogue of Justice* (1992).

end-product. But the interplay of individuals is not as freewheeling as might be endorsed by Box (1). A certain responsibility attends the process that is based in a recognition of legitimate moral demands that we can make on one another to respect the interconnections from which we each spring. All values are therefore not up for grabs in the political realm – some at the moral level in effect preceded that game and are entitled to be maintained by it. Hence, while our system of justice may emphasize individual rights, it must do so within a context in which our individual *dignity* is defined by interdependence rather than separateness.

Box (3) is a kind of constrained communitarianism.⁹⁷ Moral theory here emphasizes autonomy rather than connection, but political theory introduces a sense of community at the macro level. This community has, as a whole, a sense of its long-term destiny or character, and therefore the political rights it extends to its citizens may vary from time to time as these social goals are sought and rethought. But this social effort is made in the context of a fundamental respect for individual autonomy. Although a recognizable end-product may animate this approach, its production depends to some significant degree upon the free choice of the ingredients. And, as with the development of Box (2), we can get different nuances of this version of metaethics by “starting” with, or emphasizing, either the moral or political dimension in the analysis. The food image that comes to mind here is a layer cake – more of a finished product than that of Box (2), but still not a homogenous blending like Box (4).

⁹⁷ Examples here would range from John Stuart Mill, see Mill “Utilitarianism,” in _____, to Alisdair MacIntyre, Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (1985), to Martha Nussbaum, Martha Nussbaum, [to be supplied].

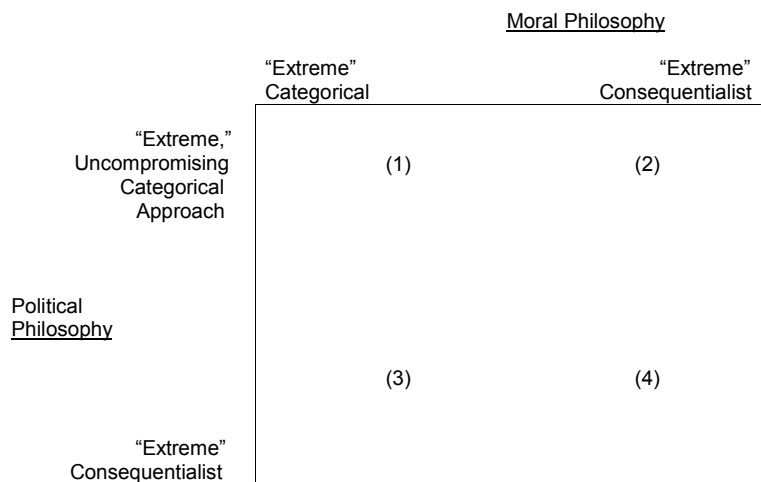
E. From Boxes to Variables

Because the model depicts the *range* of any normative debate – the categories of value *thinking* rather than values themselves – it follows that the four categories it isolates are not “absolutes” of any sort that demand or require that a person arguing for a particular policy stay within any one of them. Quite the contrary, these categories are more accurately understood as “beginning points” or opening “default positions” in a debate, even a debate going on inside the head of a single thinker. None of us is confined to or “locked into” any one or more of these categories; we wander among them as we attempt to decide what course of action to endorse.⁹⁸ What the model shows, then, is the background difficulty in understanding any given policy debate, for the contentions will vary not only according to the values themselves argued by different positions, but also by the *kind* of values (metaethically) being argued. Given this background, normative disagreement, as we noted in the article’s Introduction, is inevitable.

But the circumstances are even worse. As a last step in appreciating what our model of normative disagreement is depicting, we note that we are *not* claiming that these four categories – even as mere “beginning points in one’s normative thinking – are themselves clean or neat. Picturing the normative categories in the form of boxes masks a further characteristic of the interaction of the basic perspectives (moral and political, categorical and consequentialist) that we need not explore in detail for purposes of this article, but is nevertheless important to note: All these elements, rather than being specific categories of normative thinking, are more accurately perceived as

⁹⁸ See Turmoil, *supra* note 4 at 129-132.

variables that create a complex functional relationship.⁹⁹ We are not, then, actually depicting “boxes” but areas in a graph where similar, but not identical, beginning or default positions would be grouped. If, for ease of presentation, we leave the variables of moral and political philosophy on the top and left, respectively, of this graph, and the depiction of categorical and consequentialist thinking to vary from an extreme, relentless deontological perspective to an extreme, relentless teleological perspective, then the graph would look like this:



One important lesson emerges from this more complex picture. Now that the categories of normative reasoning have become areas on a graph, the lines that demarcate the boundaries of each are, of course, arbitrary rather than the result of scientific study. Placing the lines where we have simply indicates that the different

⁹⁹ This graphical depiction of the range of normative reasoning also appears in *Turmoil*, *supra* n.4 at 126-129.

perspectives exist, but the *degree* of “purity” of any point of view can vary – not just person to person, but issue to issue. Our argument is that in every public policy dispute the meta-perspectives of micro and macro, and means and ends, will come into play to some extent. It should come as no surprise, then, that the lines of these categories overlap, and may indeed have an area of complete overlap in the middle, suggesting that many policy discussions will find their way to that muddled centrality of grudging, unstable agreement.

III. Confirming the Analytic Model: The Normative Reasoning in *Bartnicki* and *Kyllo*

If our separation of normative disagreement into separate categories has merit, then we ought to be able to apply it to the two cases that prompted this article, and then ultimately to the larger issue of the intersection of the right to privacy with other potential substantive rights, particularly today our concern with personal security and safety. The model predicts that a right as fundamental and abstract as privacy will generate a range of points of view even where everyone involved in the discussion accepts the existence of the right itself. The separate opinions in *Bartnicki* and *Kyllo* confirm this prediction quite nicely, and, in Part IV below, lead us to an exploration of additional implications.

A summary depiction of the meta-perspective from which those opinions spring would be the following:

		MORAL PHILOSOPHY	
		Categorical • litigant focus	Consequentialist • context relevance
POLITICAL PHILOSOPHY	Categorical • rights and courts	(1) <i>Bartnicki</i> – dissent <i>Kyllo</i> – majority	(2) <i>Bartnicki</i> – Breyer concurrence
	Consequentialist • social ends and legislatures	(3) <i>Kyllo</i> – dissent	(4) <i>Bartnicki</i> -- majority

To explain the placement of opinions in any of the boxes, some general observations about the nature of the dimensions in our model, mentioned earlier,¹⁰⁰ need to be repeated here. The essential difference between the moral and political dimensions – between “fairness” and “justice” – will be whether the author of an opinion emphasizes the circumstances of the litigants who prompted the case or the political institutions that must determine what to do about these kinds of situations. If a Justice does not pay much attention to this distinction, then the opinion will tend strongly to fall into either Box (1) or (4).

Within the dimensions of the moral and political, the split between categorical (deontological) and consequentialist (teleological) will mean roughly the following. On the political side, the issue will be whether the institution primarily charged with a responsibility for “rights” – the courts – will have a strong role to play in determining the appropriate outcome in the case, or whether instead the courts should be more humble

¹⁰⁰ See notes _____, *supra* and accompanying text.

and acknowledge the superior normative role to be played by the institution primarily charged with the social “good” or “ends” – the legislature. On the moral side, the issue confronting the consideration of the litigants in the matter will divide between a focus on the litigants themselves (or persons similarly situated in the future) or a focus on the larger context or sub-community of which these litigants (or similarly situated others in the future) are a part or from which they spring.

The opinions in *Bartnicki* and *Kyllo* thus separate themselves as follows.

Box (1): The emphasis on rights

We can now see that the dissent in *Bartnicki* and the majority opinion in *Kyllo* share an important orientation: Both are classically “categorical” in their approach to the issue of privacy and its relationship to other claims, emphasizing the importance of key values in and of themselves – both morally and politically – rather than any social consequences that might flow from the result in the case. Interestingly, both opinions were authored by Justices associated with the Court’s “conservative” wing.

Justice Rehnquist’s *Bartnicki* dissent focuses on the circumstances of the speaker whose cell phone conversation is intercepted, and stresses the appropriateness of the speaker’s own, individual (moral) expectation of not being forced to share that private conversation as part of a public debate,¹⁰¹ as well as the appropriateness of Congress’ (political) endorsement of that expectation of privacy in the anti-wiretapping statute involved in the case.¹⁰² The opinion contains no discussion of the utility – either at the micro level of individuals or the macro level of social welfare – of adopting his view of the importance of privacy in this context.

¹⁰¹ 532 U.S. at 553.

¹⁰² *Id.* at 549-552.

Justice Scalia's opinion in *Kyllo* similarly emphasizes the "right" rather than the "good": Even though society might be better off to some degree if the police could use their new technologies to gather more information about our activities, doing so by invading our homes in ways we cannot predict or detect simply goes too far. We have a right to privacy, based both on our status as citizens (moral) and on the dangerous nature of the police left unchecked (political), that causes the heat sensor to be an "unreasonable" search.¹⁰³

Box (4): The ends justify the means

The clearest contrast to these normative perspectives is Justice Stevens' majority opinion in *Bartnicki*. Freedom of speech trumps privacy because the public "good" requires it.¹⁰⁴ The person whose cell phone call was intercepted was not focused on individually as the key to the case; instead, at the moral level that person had to be seen in the context of his interaction with others in the community whose lives would be impacted by his possible actions. Nor was the individual broadcaster's right to speak the key to the decision, for his role was less important in the Court's reasoning than the function of free speech within our political context. Similarly, the claim to cell phone privacy more generally was viewed by reference to the larger social interest in robust free speech. Hence, "good" dominated "right" quite thoroughly.

Box (2): *Some* ends, and narrower means, make a difference

Justice Breyer's concurrence in *Bartnicki* occupies this category of the civic liberal because of his insistence on limiting the scope of the result in the case. Rather than allowing the public character of a matter to swamp the claim to privacy so

¹⁰³ See text accompanying notes ____, *supra*.
¹⁰⁴ See text accompanying notes ____, *supra*.

completely, Justice Breyer limited the impact by focusing on the more immediate potential impact of the speaker's statement on the lives of others within the speaker's sub-community.¹⁰⁵

This had two implications for his normative reasoning: First, at the moral level, he could agree with the majority's outcome because the context of the individual's claim to privacy mattered. The consequences to his fellow citizens could not be ignored, thus reducing the viability of the speaker's claim to privacy. Second, however, Justice Breyer then differed from the majority at the political level by emphasizing the "rights" context of his thinking – the clearly established legal rights of all persons to be protected from assault *and* the speaker's clearly established legal (statutory) right to some degree of telephone privacy – rather than the general social "good" that might follow from protecting the dissemination of information. While both the majority and Justice Breyer in *Bartnicki* allowed the "end" of speech to define privacy, Justice Breyer considered differently the "means" of a narrower legal holding as a key factor. For him, then, the courts had a more serious institutional role to play in this kind of case than the majority seemed willing to acknowledge.

Box (3): Legal flexibility matters more than categories

The dissent in *Kyllo* is a good example of why we noted at the end of Part II of this article that the categories of normative reasoning we have identified are more like areas on a graph than neat boxes. This dissent and the majority opinion in *Bartnicki* both have the same author – Justice Stevens – and they have much in common: primarily, that circumstances, and hence "ends" matter more than conceptual categories, here meaning the legal "means" by which ends will be accomplished.

¹⁰⁵ See text accompanying notes ____, *supra*.

In *Kyllo*, however, Justice Stevens rejected the majority's focus on the home as a key to the analysis for two reasons, one of which causes us to shift this opinion away from Box (4) and into Box (3). One reason was basically consequentialist: that public safety will be unnecessarily compromised by ultra-respect for a particular physical location that already emits lots of data that law enforcement is entitled to capture and use (light, smells, and so on).¹⁰⁶

But the other reason was more deontological in nature, and more moral than political: The individual right to privacy might actually be narrowed by this emphasis on the home, for technological invasions of our personal "space" are occurring in many more contexts than just the home.¹⁰⁷ The Court's responsibility, then, was not to develop an ambitious approach to privacy-related cases, but let future circumstances – both future litigants and future legislation – be the contexts for such decisions. The Court's role was therefore cast as a more limited and traditional one, which is certainly consistent with Justice Stevens' majority opinion in *Bartnicki*, but for a reason that is not reflected there.

IV. More General Implications of Meta-Disagreement

Although the opinions in *Bartnicki* and *Kyllo* certainly reflect the range of normative thinking our model predicts, simply confirming the existence of the model's normative categories is not our only goal. We seek as well to demonstrate the model's utility – how it offers useful, practical lawyering insights. In this section we will develop some general points of this kind, concerning the nature of effective policy advocacy and

¹⁰⁶ See text accompanying notes ____, *supra*.

¹⁰⁷ See text accompanying notes ____, *supra*.

judicial decision-making. In the article's last section, we will apply the analytic model to the more specific points raised in the article's introduction: the implications of technological innovation and terrorism for our right to privacy.

A. Advocacy and Judicial Decision Making

If one of the hallmarks of effective advocacy is to anticipate the reasoning of those before whom an argument will be made, then certainly in the challenging context of unpredictable emerging technologies our analytic model has added an important analytical layer. At first glance, however, this might not seem to be so: If all we have managed to demonstrate is the fact of disagreement about values, and hence disagreement among judges, then we have contributed very little. Everyone already knows that in "hard" cases judges disagree,¹⁰⁸ and more specifically that the Justices of the current Supreme Court disagree often and energetically. Indeed, the common assumption among lawyers and non-lawyers alike is that the root of that disagreement can be labeled simply as the differences among "liberal" Justices who seem most concerned with individual rights, "conservative" Justices who seem to be dedicated to endorsing legislative activities, and "swing vote" (pragmatic?) Justices who seem to float disconcertingly between the two camps for reasons that are not easily anticipated.¹⁰⁹ If our meta-categories simply confirm that traditional typology – only with fancier words – then we will not have improved advocacy because we will not have improved anyone's understanding of the Court's thinking.

Our analytical model, however, extends well beyond and beneath those tired labels. Advocates facing the *next* major privacy case will do themselves a disservice if

¹⁰⁸ For a general discussion of the nature of "hard" cases, see Ronald Dworkin, *Taking Rights Seriously* (1978).

¹⁰⁹ [to be supplied]

they try to appreciate the import of *Barnicki* and *Kyllo* simply by emphasizing the liberal/conservative dichotomy. Our model instead identifies features more fundamental, and therefore more accurate, in portraying the normative reasoning from which these opinions spring.

For example, the Court's so-called "liberal" wing (Justices Souter, Stevens, and Ginsburg) that is supposed to be "rights"-focused turns out in these two cases to be (mostly) a bunch of consequentialists;¹¹⁰ the Court's "conservative" wing (Justices Rehnquist, Scalia, and Thomas) that is supposed to be apologists for result-oriented legislatures everywhere turns out to be (mostly) "rights"-focused deontologists;¹¹¹ and the Court's political middle (Justices O'Connor, Kennedy, and Breyer) is not "pragmatic" in these cases because it eschews normative reasoning in favor of the practical, but because its members (usually) straightforwardly mix categorical and consequentialist perspectives.¹¹²

Thus, applied rigorously and consistently, our analytic model should provide a rhetorical roadmap or checklist for an advocate. The questions become: What different kinds of normative perspective do I need to address in my arguments to best encourage a single judge or group of judges to agree with the result I seek in a particular case? If my goal is legislation, how do I best develop the consensus that will be necessary for success? How can I show that my result reflects *both* fairness *and* justice, *and both* appropriate means *and* ends? Although any successful advocate probably understands

¹¹⁰ While Justice Stevens is consistently consequentialist, Justices Souter and Ginsburg remain consistently deontological.

¹¹¹ Justice Rehnquist switches approach from his dissent in *Barnicki* to joining Justice Stevens' dissent in *Kyllo*.

¹¹² While Justices Breyer and O'Connor write together in concurrence in *Barnicki*, they split in *Kyllo*.

this range of necessary argument intuitively, unpacking some of the detail of these different contentions and the way they interact ought to be useful.

The same considerations would apply on the other side of the policy question – the decision makers. The rhetorical issues are essentially the same: When is it "best" for a judge to understand, and apply, the law in a rigidly categorical form, or instead in a flexibly circumstantial, consequential form? When do the circumstances of the litigants themselves matter most, and when should social ramifications sway results? How can one judge best express his or her reasoning to develop a consensus among judicial colleagues for a particular result? What does it mean for a decision maker to be "ideological" or "pragmatic"?

And concerning the analysis of the work of any decision maker, our model provides avenues for assessment that perhaps have not been fully exploited: A decision maker's possible normative inconsistencies can be exposed by focusing on the elements behind particular conclusions, inconsistencies that could be mistakes or at least require additional justification. For example, in *Kyllo*, Justice Scalia categorically emphasized the home as an essential nexus in our right to privacy, despite the impact that that approach might have on other interests like law enforcement.¹¹³ Yet a decade earlier in *Employment Division v. Smith*¹¹⁴ he had no qualms in holding consequentially that the social interest in enforcing drug laws trumped an individual's right to free exercise of religion. In other words, in *Kyllo*, privacy dictated the limits of a legitimate search, while in *Smith* it did not impact the relationship between religion and drug policy. Why not? Do other values justify what seems to be a switch from deontology to

¹¹³ See text accompanying notes ____, *supra*.

¹¹⁴ 110 S.Ct. 1595 (1990).

teleology, or a switch from a micro to a macro orientation? Is the difference between *Kyllo* and *Smith* just the passage of time? And while Justice Scalia may give categorical significance to the *home* for the right to privacy, he certainly does not show similar respect for the relationship between doctor and patient for purposes of the debate over the constitutional status of abortion rights.¹¹⁵ Why is the home more central to privacy than personal medical procedures?

All these questions may well have defensible answers. But our analytical model forces to the surface both the questions and the need for answers.

B. Implications for Policy Development in the Specific Contexts of Technology and Terrorism

The task that remains is to connect the four-part analytic model to the wider debate concerning the right to privacy beyond drug law enforcement and cell phone use. Doing so, however, causes the analytic task to become more and more daunting: The closer one looks at the layers of issues and perspectives involved, the more difficult it becomes to perceive patterns within varying circumstances, and to make use of those patterns.

We have avoided some of that complexity thus far by focusing on the inevitable range of normative reasoning that will attend *any* important policy issue – here, the right to privacy – but we now need to acknowledge the influence on those perspectives imposed by the *facts* in any case: the details surrounding the privacy claim, like the identity of the parties involved, the kinds of technology that have prompted the dispute,

¹¹⁵ See, e.g., his opinions in [to be supplied].

and so on.¹¹⁶ Quite simply, as we noted earlier,¹¹⁷ “is” and “ought” inevitably intermingle. The normative struggle beneath any privacy claim – whether to approach such claims deontologically or teleologically, and whether small-scale moral or large-scale political concerns will be key – will be influenced by this sense of context.¹¹⁸ You might be perfectly comfortable, for example, being firmly categorical when others seek to disclose or use information about your sex life (since it involves only you and seems to have little to do with how others will lead their lives) but become more consequential as the claims involve information about bomb-making activities by terrorists. But note

¹¹⁶ These details include the following: 1) Whether or not the sensing system produces a signal of some type that enters a protected area or simply receives stimuli already present in the environment, 2) the physical or chemical nature (i.e. infrared radiation, audio waves) of the stimulus accepted by the sensor (the input stimulus), 3) the source of the input stimulus (i.e., human speech or activity), 4) the granularity of the input stimulus (how precise is the input compared to what it could be?), 5) the privacy expectations associated with the space from which the input stimulus originates, 6) the category of person (public figure, private, adult, child) about whom the data was collected, 7) the granularity of the information produced by the sensing system and/or sensing application.

¹¹⁷ See n.7, *supra*.

¹¹⁸ The following example illustrates this point: A family decides to install a wireless sensor network in their home. One part of this network is the set of RFID powered floor mats located in the doorway of each room. Inside of each mat is a transmitter that powers the passive receptor tags that each member of the family wears on his or her shoes. As he or she steps over the mat, the transmitter sends out a signal to the tag that, in response, returns the number of the passive tag. This number, along with a date and time stamp, is sent to a CPU that associates it with the name of the person. The network combines the information pertaining to each member of the household into a set of histograms that illustrate the traffic patterns throughout the house.

Do any privacy concerns emerge from the use of this sensor network? If so, how should policies be constructed to deal with information that is voluntarily collected within the home? This is not a hypothetical example. A system of this kind is already partially developed and deployed at The Georgia Institute of Technology, *infra* note 126.

Note the relevance of the dimensions of the four-part box to this example. Political: One factor to consider in deciding whether a room that is equipped with an RFID mat can still be deemed a private space that is under the control of only one person is the impact on social institutions. How might the recognition of such a right affect a judicial system that is facing increasingly complex questions about ownership of personal information? What would the consequences be for the social and judicially endorsed principle of personal privacy of not according such a right to the individual?

Moral: Is it “fair” to hold the use of a mat to constitute a waiver of privacy? Is it fair to require that, as the price of enjoying the benefits of a context aware sensing application in one’s own home, one must forgo a right to privacy that one would otherwise have?

Teleological: How will the goal of maintaining the status of the home as the central case of privacy be furthered by distinguishing the privacy interests in the tag data depending upon the room from which it originated?

Deontological: For the purposes of the mutual access/joint control rule, does the presence of the RFID transceiver constitute shared access and control over an individual’s bedroom?

that the nature and relevance of these circumstances will themselves be a function of your normative perspective: Justice Scalia, for example, discounted the consequential importance of Mr. Kyllo's potential criminal drug-producing activity – something which impacts a wide audience indeed – in favor of the categorical importance he placed on the sanctity of Mr. Kyllo's home.¹¹⁹ Would he have reached the same conclusion if the sensing device involved in the case alerted police to the presence of explosives in a defendant's home?

These variable circumstances do *not* mean, however, that the analysis of normative perspective now collapses into chaos. Quite the contrary, it means that the strategy one develops for making an effective policy argument must pay even closer attention to the earlier analytic model to prevent the circumstances from overwhelming one's reasoning, and making each new situation seem intractably unique. Disagreement about how to handle each new case that arises may seem to revolve around differing facts, but the facts only matter if they have normative significance. In a privacy case, for example, a person's "actual" expectation of privacy – a psychological fact to which he or she could testify – does not really matter; instead, the key is having a "legitimate" expectation of privacy,¹²⁰ which is a value arising from assessing a situation from a normative perspective.

But because facts will indeed influence our normative reasoning, and vice versa, it would be useful to organize them in some way that could better bring to the surface their interaction with values. Fully cataloguing the vast array of circumstances that

¹¹⁹ See text accompanying note ____, *supra*.
¹²⁰ See text accompanying note ____, *supra*.

might be relevant to a privacy analysis is certainly not possible here,¹²¹ but we will at least make a preliminary effort.

The structure we will impose is simply that of traditional story elements: who, what, when, and so on. These categories contain the questions that will prompt and orient our assessment of the values at stake in any case, and push us toward various points in the graph depicted in Part III above:

Who: Whose personal information is being gathered and used? Is he or she a public figure with public responsibilities and exercising governmental power, or a private person simply being observed? Did this person consent to the information gathering? And who is doing the observing? Is it government or private citizens? If the latter, is it a business with significant reach and potential influence, or just a nosy individual?¹²²

What: What kind of information is being gathered or used?¹²³ Is it general (about human beings) or specific (about *you*)? Does it concern bodily functions or

¹²¹ See, e.g., notes 6, 8, and 118 *supra*.

¹²² What the appropriate questions under this heading are will depend, in part, on the context in which the sensing system is being deployed. In the emerging field of context-aware computing in the home, the relevant identity questions would concern the categories (parent, child, visitor) to which the persons about whom the data was being collected belonged and the relationships between those categories. The law uses categories as one means of establishing presumptions about the relationships between family members. See *United States v. Duran* 957 F.2d 499 (1992), *United States v. Rith* 164 F.3d 1323 (1999), *United States v. Anderson* 42 F.Supp.2d 713; 1999 U.S. Dist LEXIS 14368. Because those presumptions are about matters such as who has control over a space or the authority to disclose information, they are closely connected to the assessment of privacy interests within the home. For the purposes of a context-aware sensing device, the category would be the one that best describes the person about whom the data is being collected. If the sensing device is being used in the home, the appropriate category might be "parent" or "child." For example, a parent is presumed to have control over the entire physical structure of the home- even those areas that the child might consider to belong to him (i.e. bedroom). *Rith* at 15 (citing *United States v. DiPrima*, 472 F.2d 550,551 (1973) , *Anderson* at 33.

Thus, a parent would, in most instances, also enjoy the presumption of access to all information that an application collected about a child in the home. For example, spouses are presumed to have shared access to all areas of the home. Consequently, each spouse is also presumed to have the right to disclose information that is generated in any area of the home *Duran* at 503.

¹²³ The initial question here is whether one is referring to information produced by the sensing system or to information produced by the sensing application. The sensing system collects stimuli from the surrounding environment. The application is what presents to the human the information produced from that stimuli. Conversation with Prof. Gregory Abowd, Georgia Institute of Technology.

activities, or the products of those activities? Is it about temperature or smells or noises or discarded trash or observable activities? Is information being gathered in raw form, or is it being “processed” in some way to produce additional insights or information (for example, a histogram of traffic through a space or the pairing of a voice stamp with a name and picture)? Is the gathered information in a form that can be readily shared?

When: Is the information historical or current? Was it gathered when the subject knew that information was or could be being gathered, or instead when the subject was unaware? Is the information being collected constantly or regularly, or only at particular moments? Is the information relevant to assessing prior actions or to guiding future conduct? How long will the information be stored? How long will it be useful or significant?¹²⁴

A second question concerns how extensive the span, or input full scale, of the sensor is. The span of the sensor is the range of values, for any given type of stimulus, that the sensor can detect. See Jacob Fraden, *Handbook of Modern Sensors: Physics, Designs, and Applications*, 12-13, (2nd Ed., 1996).

Span is important for how the information yield made possible by the sensor compares to what would be possible for unenhanced human capabilities. Does the range of the scale extend beyond what a person, without technological assistance, could discern?

In *Kyllo*, the majority appears to indicate that when technology makes it possible to derive information from stimuli that would otherwise not be perceptible the privacy interests that a person has in his home are violated. *Kyllo*, supra note , at 20. The dissent disagrees: So long as the stimulus is in the public domain, it does not matter if the detection thereof (and resulting production of information) is possible only with the technology, *Id* at 29

A third question is about the granularity of the information. How precise is that information compared to what is possible in the real world? A person’s location could be given at the level of a floor in the house, a specific room, an area of the room or XY coordinates in the room. The XY coordinate information is more precise and, hence, of a finer granularity than any of the other kinds of information. (Discussion with Prof. Gregory Abowd, Georgia Institute of Technology).

¹²⁴ These questions must be understood differently depending upon the context in which the sensing systems and applications are being used. The context of use influences the relationship between the individual, the community, and the larger social institutions. Those relationships, in turn, affect what the consequences will be of collecting, storing, and using information.

When the setting is the home and the purpose of the sensing system and applications is to enhance family life, the individual stands in a fundamentally different position vis a vis the community and social institutions than when the setting is a city street and the purpose is to prevent terrorist activity. In the former situation, the individual has control over the collection and use of the information. He or she can choose when to turn the system on or, even, whether to have such a system in the home to begin with. The benefits of the application are intended to flow to the individual. In the latter situation, the individual does not have authority over the gathering and use of the information and the benefits flow primarily to society.

Where: What “space” was invaded to gather the information? Did it involve an intrusion into a physical location of some kind, or into cyberspace, or was it simply collected from the “common” of the air or extant waves of some sort?¹²⁵ If the intrusion is physical, what kind of space was involved? A home? A school? A public telephone booth? A shopping mall public area? A person’s clothing or body?

How: How is the information actually being gathered? Observation? Electronic sensing? Is the information being collected through hardware or software? Is the collection passive or does it involve interaction with the subject (requiring the subject to push buttons, for example, or enter a sensing area)?

How much: Is the amount of data being gathered large or small? What is the proper measure for determining whether the amount is in either category? In what sense will the amount of data matter?

How often: Is the data collection a “one time”¹²⁶ event, or is it an ongoing, continuous enterprise?

¹²⁵ Disambiguating these questions is not always an easy task. The place from which the input stimulus originates and the place in which the stimulus is detected may not be the same. In such an instance, which place should “where” refer to? Which place is more important to the evaluation of privacy concerns? Can the functional equivalent of an invasion occur if the input stimulus originates in a constitutionally protected space but the detection occurs in the public domain?

This was true in *Kyllo*. As we have discussed, while the two sides agreed that the place of detection was in the public domain beyond the curtilage of the house, they disagreed as to the place of origin. The majority said that the infrared radiation originated inside of the home, *Kyllo*, supra note at _____. The dissent said that the radiation detected was the reflection off of the exterior walls of the home, *Id* at _____. The majority said that the radiation carried information about the interior of the home and, consequently, the homeowner’s privacy interests were violated. *Id* at _____. The dissent said that the radiation carried information about the home but not about the interior thereof. As a result, the homeowner’s privacy interests were not affected, *Id* at _____.

¹²⁶ The production of some types of information depends upon input from multiple sensing systems, each of which operates in a different way. In the Aware Home Residential Laboratory at Georgia Tech, www.cc.gatech.edu/fce/ahrl, work is underway to produce precise location information by combining an RFID system and a visual tracking system. Thomas O’Connell, Peter Jensen, Anind Dey and Gregory Abowd, Location in the Aware Home, Location Modeling for Ubiquitous Computing -UbiComp 2001 Workshop Proceedings, (Michael Beigel, Phil Gray, and Daniel Salber, eds.), (Atlanta, GA), pp. 41-44 Sep. 2001

The RFID system provides specific identity information but only approximate location information

Why: What is the purpose (admitted or inferred) of the data collection? To save lives? To prevent crimes? To prevent immoral acts? To embarrass or annoy?¹²⁷

A few examples might help draw all these lines together with the normative perspectives they might implicate.

Should Vice-President Cheney be able to protect his health information from the entrepreneurial efforts of the “Doonesbury” characters noted at the beginning of this article? The information is certainly quite specific, personal, and current, but the Vice-President is clearly an important public figure whose health matters a great deal to many people. And the information could be gathered and disseminated without any further invasion of the Vice-President’s person or space beyond the medical checkup he has already voluntarily undergone. Our argument in this article is that we would predict that points of view about whether the capturing and use of this information violated the Vice-President’s right to privacy would differ, and the variation would be based on the normative perspectives depicted in our earlier four-part box. Some would emphasize the Vice-President’s individual right to be left alone, while others would emphasize his political role; some would focus on the values of individual dignity at stake, while others would target the consequences of releasing or keeping private the Vice-President’s health information. And, finally, to be best prepared to argue this case, or to develop a consensus on the appropriate outcome in this case, all these

(which room a person is in but not where in the room). It operates by means of transceivers that activate the passive badges worn by individuals.

The visual tracking system does the opposite. It produces precise coordinate location information but not identity. It operates by means of a series of video cameras and image processing software. Combining the two yields information about exactly where a specific person is.

Before one can answer the question about how the information is being gathered, one must specify whether one is talking about the RFID system, the visual tracking system, or the combination of the two.

¹²⁷ A complicating factor here is that in a sensor network, the input stimuli that are collected are likely to be made available to multiple applications for a wide variety of purposes.

perspectives would have to be identified and addressed, even if some approaches ultimately “win” the debate.

A more benign example that nevertheless involves the same kind of variation in both facts and values is the recent efforts by scientists to install monitoring devices in residences, not for the purpose of spying, but to allow elderly or other disadvantaged persons to live more independent lives while remaining closely connected to other family members or caregivers.¹²⁸ For these scientists to be able to predict the kinds of privacy concerns that their efforts will provoke, and how they might design their devices to allay these concerns, the normative perspectives of Part III are again the key. The fact that initially, or on the surface, all this monitoring activity is being conducted within family (or other voluntary) contexts does not at all mean that all privacy questions or implications have been answered or resolved.¹²⁹

¹²⁸ See the Digital Family Portrait, Smart Intercom, and other applications presently under development in the Aware Home Residential Laboratory at the Georgia Institute of Technology.

<http://www.cc.gatech.edu/fce/ahri/>; Elizabeth Mynatt et al, Digital Family Portraits: Supporting Peace of Mind for Extended Family Members, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, 333 (2001); Kris Nagel et al, The Family Intercom: Developing a Context-Aware Audio Communication System, Proceedings of Ubicomp 2001: Ubiquitous Computing, 176 (2001).

¹²⁹ The privacy questions that are relevant in different situations will vary along with the following parameters: the physical or chemical nature of the input stimulus, the room, the granularity of the information produced, the family member(s) about whom the data is collected, the application to which the sensing system is providing the data.

Protecting users’ privacy is a concern for many developers of new computing devices and applications. In their writings on the topic, researchers in this area often take one of two approaches. The first is to discuss privacy and the closely related concepts of notice and consent in general terms without reference to a certain application or usage scenario. See Gregory Abowd and Elizabeth Mynatt, Charting Past, Present, and Future Research in Ubiquitous Computing, *ACM Transactions on Computer-Human Interaction*, 29 (2000); Mark Ackerman, Developing for Privacy: Civility Frameworks and Technical Design, Proceedings of the Tenth Conference on Computers, Freedom, and Privacy: Challenging the Assumptions, 19 (2000); Alan Dix, Tom Rodden, Nigel Davies, Jonathan Trevor, Adrian Friday, and Kevin Palfreyman, Exploiting Space and Location as a Design Framework for Interactive Mobile Systems, *ACM Transactions on Computer-Human Interaction*, 285 (2000); Marc Langheinrich, Privacy by Design-Principles of Privacy Aware Ubiquitous Systems – Proceedings of Ubicomp 2001: Ubiquitous Computing, 272, (2000), Rein Turn, Security And Privacy Requirements In Computing, Proceedings of 1986 Fall Joint Computer Conference, 1106 (1986).

The second is to discuss privacy, notice, and consent almost exclusively in terms of a particular system and the individual who uses that system controlling what information is being conveyed by it and to whom. Jerry Alan Falls and Dan Olson Jr., Light Widgets: Interacting in Everyday Spaces, *Proceedings*

Most dramatic, of course, are examples involving current concerns with terrorism – domestic or otherwise. When the consequences of actions can become so serious, it is difficult to imagine the kind of categorical argument that would sustain a claim to a right to privacy.¹³⁰ Our constitutional history is filled with examples of limitations on individual rights accepted in the context of perceived national danger,¹³¹ and the only question now is how strong that pressure will be. Even in these circumstances, however, contrary voices – or at least voices of warning – can be heard,¹³² not because some people see no danger from terrorist activities, but because the balance these persons strike between categorical values and potential consequences, and between a moral emphasis on individuals and a political emphasis on governmental institutions, is different. And these contrarians, we have argued, will *always* be out there on *every* issue.

Conclusion

As our discussions of *Kyllo* and *Bartnicki* have shown, separating out the normative elements in a policy dispute can help facilitate comparisons across factual situations and technology implementations. Consistencies that were previously

of the International Conference on Intelligent User Interfaces, 63 (2002); Ajith K. Narayanan, Realms and States: A Framework for Location Aware Mobile Computing, *Proceedings of the First International Workshop on Mobile Commerce*, 48 (2001); Nisanka B. Priyantha, Anit Chakraborty, and Hari Balakrishnan, The Cricket Location-Support System, *Proceedings of the Sixth Annual International Conference on Mobile Computing and Networking*, 32 (2000); Einar Snekkenes, Concepts For Personal Location Privacy Preferences, *Proceedings of the 3rd ACM conference on Electronic Commerce*, 48 (2001).

¹³⁰ A useful philosophical development of this point is Prof. Michael Moore's concept of "threshold deontology." Moore, "Torture and the Balance of Evils," 25 *Isreal L. Rev.* 280 (1989). For a critical response, see Alexander, "Deontology at the Threshold," 37 *San Diego L. Rev.* 893 (2000).

¹³¹ [to be supplied]

¹³² See, for example, Jess Bravin, Washington Police to Play 'I Spy': Camera Network Will Monitor People All Over District; Civil Libertarians Worry, *The Wall St. Journal*, February 13, 2002, at B1.

obscured are revealed. Analytic discrepancies that were hidden by shared outcomes are disclosed. The differences in the results of these two cases cannot be explained by saying that privacy "won" in the former and "lost" in the latter, or that the use of a thermo-imager is prohibited while the interception of a cellular phone call is permitted. Rather, the different results were the products of the ways that the Justices combined the factual vectors with a political or a moral focus and a deontological or a teleological methodology.

Because our four-part box can weave together detail and methodology in this manner, it is particularly well-suited to the understanding and development of public policy in a host of contexts, including technology and terrorism in particular. Both of these subjects present sharp conflicts between values of the greatest importance. Privacy, of the home and of the person, is set against the flourishing and safety of the public arena. Both subjects raise the question of how the individual stands in relation to the larger society and which of the two should be the focal point of the analysis. Both topics are ones for which time is of the essence and for which policies must be created despite only limited knowledge of what the future might bring. But neither enjoys a single, unique set of answers to the difficult questions each poses. There is, instead, a broad range of possible resolutions, each of which embodies a particular normative configuration.

As *Kyllo* and *Bartnicki* both show, different outcomes do not automatically mean that one principle, be it privacy or free speech or any other, is valued and another is not.¹³³ Instead, the cases demonstrate that it is the normative framework upon which those values are hung that effects what they mean in a particular situation. Determining

¹³³ See notes ____, *supra* and accompanying text.

how best to realize valued principles under different conditions is the heart of meaningful public policy.