

Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy

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Introduction

Civil liberty and privacy advocates have criticized the USA PATRIOT Act (“Act”)¹ on numerous grounds since it was passed in the wake of the World Trade Center attacks in 2001. Two of the primary targets of those criticisms are the Act’s “sneak-and-peek” search provision, which allows law enforcement agents to conduct searches without informing the search’s subjects, and the business records provision, which allows agents to secretly subpoena a variety of information – most notoriously, library borrowing records. Without attending to all of the ways that critics claim the Act burdens privacy, I wish to examine whether those two controversial parts of the Act, the section 213 “sneak-and-peak” search and the section 215

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¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. At the time this manuscript went to press, Congress was in the process of passing the USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong., 1st sess. (“Reauthorization Act”). Both houses were set to vote on the version of the bill outlined in H.R. Rep. No. 106-333 (2005).

business records “gag-rule” provisions, burden privacy as critics charge. I’ll begin by describing the two provisions. Next, I explain why those provisions don’t burden privacy on standard philosophical accounts. Moreover, I will argue that they need not conflict with the justifications for people’s claims to privacy, nor do they undermine the value of privacy on the standard accounts. However, rather than simply concluding that the sections don’t burden privacy, I will argue that those provisions are problematic on the grounds that they undermine the value of whatever rights to privacy people have. Specifically, I will argue that it is important to distinguish rights themselves from the value that those rights have to the rights-holders, and that an essential element of privacy rights having value is that privacy right-holders be able to tell the extent to which they actually have privacy. This element is justified by the right-holders’ autonomy interests.

The Act

Section 213

According to the Fourth Amendment of the U.S. Constitution, the people are “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...., and no Warrants shall issue, but upon probable cause....”² Under the amendment, police searches generally require a search warrant issued by neutral magistrate and based upon probable cause.³

² U.S. Constitution, Fourth Amendment.

³ Three points are worth noting at the outset. First, there are numerous exceptions to the rule that searches must be made pursuant to a search warrant. For example, searches in exigent circumstances, searches made during an arrest, non-criminal administrative searches, and consensual searches do not require warrants. Second, “probable cause” means that there must be a “reasonable ground for belief in certain alleged facts,” and must obtain whenever a

Courts have further interpreted the amendment to mean that law enforcement agents must provide *notice* of searches and seizures; that is, agents have to let people know when their homes are searched. However, giving adequate notice requires different things in different circumstances. First, it typically requires that agents let occupants of a home know that the home is about to be searched. Thus, in *Wilson v. Arkansas*, the Supreme Court held that police must knock on the door and announce their presence before entering a home to search it.⁴ Under some circumstances, however, police may forego knocking and announcing. In *Richards v. Wisconsin*, the Supreme Court held that when agents have “reasonable suspicion” that it would be too dangerous or that it would undermine their investigation, they may enter without knocking and announcing. So, for example, agents may forego knocking and announcing if it would likely allow the people inside the opportunity to flush evidence down the toilet or to brace for an armed standoff.⁵

Second, providing adequate notice requires informing people once a search has taken place. So, if a person is not around when police search her home, agents are required to notify the person about the search. Normally, the notification must be immediate (e.g., by leaving a copy of the warrant at the site of the search),⁶ but at least two federal appeals courts have held that some delay of notice is compatible with the Fourth Amendment.⁷ Third, adequate notice requires that when agents use a warrant to seize property – including intangible property such as

magistrate issues a search warrant. *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West Publishing, 1990), p. 1201.

Finally, section 213 applies only to searches conducted under such a search warrant.

⁴ *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

⁵ *Richards v. Wisconsin*, 520 U.S. 385, 394-395 (1997).

⁶ See U.S. Federal Rules of Criminal Procedure 41(f)(3).

⁷ *U.S. v. Villegas*, 899 F.2d 1324, 1337 (9th Cir. 1990); *U.S. v. Pangburn*, 983 F.2d 449, 453 (2nd Cir. 1993).

email or voicemail records – they provide the owner of the property with an inventory of the seized property.⁸

Under Patriot section 213, law enforcement agents may delay notice of the execution of a search warrant where the court issuing the warrant finds “reasonable cause” to believe that providing notice will have an “adverse result.”⁹ So, for example, a court may allow agents to delay giving notice where notice would likely result in flight from prosecution, evidence destruction, witness intimidation, or where it would “jeopardiz[e] an investigation or unduly delay[] a trial.”¹⁰ Section 213 also allows agents to seize tangible property or communications during a surreptitious search “where the court finds reasonable necessity for the seizure.”¹¹

There is significant disagreement about the extent to which section 213 constitutes a change in the law, and the extent to which any such change would be permissible under the Fourth Amendment. The U.S. Department of Justice (DOJ) argues that because the section is “primarily designed to authorize delayed notice of searches, rather than delayed notice of seizures,” and because the delayed notice of searches has already been established in federal case law, section 213 does not expand law enforcement’s power to conduct secret searches. Rather,

⁸ Note, however, that covert entry for the purpose of installing surveillance devices (e.g., phone taps) has long been considered constitutionally permissible. *Dalia v. U.S.*, 441 U. S. 238, 248 (1979).

⁹ § 213(2)(b)(1). Section 213 modifies 18 USC § 3103(a) (2005).

¹⁰ 18 U.S.C. 2705. Patriot § 213 incorporates this statute by reference.

¹¹ § 213(2)(b)(2).

the DOJ argues that it merely makes rules concerning such searches consistent across jurisdictions.¹²

On the other hand, privacy advocates argue that section 213 expands the range of surreptitious searches and seizures in three ways. First, they argue that it expands the circumstances under which the police may delay notice of warrant execution. Before the act, delayed notice had been explicitly permitted only to prevent destruction of evidence and to protect people's safety; section 213 broadens justifications to include "seriously jeopardizing an investigation or unduly delaying a trial."¹³ Second, critics argue that it extends the length of time that police may delay notice. The Ninth Circuit has held that the Constitution requires "notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity."¹⁴ However, section 213 allows for an indefinite delay upon showing "good cause."¹⁵ Critics argue that the move from a delay less than seven days absent a "strong showing of necessity" to an indefinite delay with "good cause" has the effect of extending the number and length of delays.¹⁶ And third, they argue that it allows for greater surreptitious seizures of tangible property or electronic communication.¹⁷

¹² Department of Justice, Field Guidance on New Authorities Enacted in the 2001 Anti-Terrorism Legislation (Redacted), pp. 4-6. Available World Wide Web at http://www.epic.org/privacy/terrorism/DOJ_guidance.pdf (last visited October 15, 2005).

¹³ 18 U.S.C. § 2705(2)(e) (2005).

¹⁴ *U.S. v. Freitas*, 800 F.2d 1451, 1456 (1986).

¹⁵ § 213(b)(3).

¹⁶ The Reauthorization Act changes this slightly, stating that warrants should provide notice "within a reasonable period not to exceed 30 days," though that can be longer "if the facts of the case justify a longer period of delay." H.R. 3199 §114(a)(1). The Reauthorization Act reaffirms the power to extend the delay upon showing "good cause." § 114(a)(2). Note that these changes do not bear significantly on my analysis of the Patriot Act's impact on privacy.

Still other groups argue that section 213 changes the law, but that it does so in ways that are consistent with the Fourth Amendment. Scheidegger et al. argue that section 213's delayed notice provision is constitutional because its standards for delaying notice are at least as stringent as the standard for "no-knock" searches held constitutional in *Wilson* and *Richards*, and the affront to the Fourth Amendment by delaying notice is less than the affront of no-knock entry into one's home. The Supreme Court held in *Richards* that the Fourth Amendment notice requirement can be circumvented to allow for no-knock searches as long as there is "reasonable suspicion" that knocking and announcing would "inhibit the effective investigation of a crime." Scheidegger et al. argue that this standard is no more stringent than the "reasonable cause" standard of section 213. Moreover, they argue that delaying notice after a search has occurred presents no greater constitutional burden than not providing notice that a search is about to occur (i.e., forgoing knocking and announcing), for, "however unsettling such a search in one's absence may be, it pales in comparison to the terror of unknown intruders suddenly kicking in one's door and bursting in while the residents are home."¹⁸

Section 213 clearly expands the number and scope of delayed-notice warrants, if only because it makes it easier for law enforcement agents to obtain such warrants; indeed, that is the

¹⁷ The DOJ recognizes that case law concerning surreptitious seizures – specifically the "reasonable necessity" requirement under §213(2)(b)(2) – is not very well developed. Field Guide, p. 6. However, John Whitehead and Steven Aden of the Rutherford Institute imply that this erodes the notice requirement, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives," 51 *American University Law Review* 1081, 1112-13 (2002).

¹⁸ Scheidegger, Kent, Charles Hobson, Maritza Meskan, Kannon Shanmugam, and Stephen Henderson, "The USA PATRIOT Act of 2001: Criminal Procedure Sections," Federalist Society White Paper (November 2001), p. 8. Available on the World Wide Web at www.fed-soc.org.

clear purpose of the section. If it had no effect upon agents' ability to get delayed-notice warrants, there would be no need for the section at all. However, my arguments in this paper are about the extent to which a lack of notice burdens privacy, regardless of whether it is established by the Patriot Act or by prior statutes and case law, and regardless of whether it runs afoul of the Fourth Amendment. If lack of notice does burden privacy, it will follow that section 213 burdens privacy precisely because it facilitates surreptitious searches.

So, what can we conclude thus far about the effects of section 213? First, it does not expand the circumstances under which courts can issue warrants, and it does not expand the range of information or property that law enforcement may seize under a warrant. Under the Fourth Amendment, courts may issue search warrants only upon probable cause, and the probable cause requirements for obtaining warrants remain the same under section 213. Thus, the Act does not alter the conditions under which a judge may issue *some* sort of warrant, thereby making it no more likely that a law enforcement agent will actually search one's home. Rather, the primary, direct effect of section 213 is to make it more likely that any search or seizure will be performed secretly. Consequently, section 213 makes it more difficult to tell when law enforcement agents have searched one's property or seized assets or communications.¹⁹

¹⁹ It may, however, have the practical effect of turning up more information through more effective, ongoing surveillance. But more effective surveillance alone is not sufficient to decrease privacy. Another way in which 213 might be relevant to privacy considerations is its effect upon thwarting defective warrants. Without notice (i.e., without knock-and-announce), there may well be cases in which the subjects of searches are unable to stop searches based on faulty warrants. Thus, if a warrant is for a wrong address, or if it has expired, notice allows a subject to stop the search from happening. This may become important on the account that I offer below, for there are no *other* cues for when one has been subject to a search based upon a faulty warrant. Thus, even for those who have good

Section 215

Section 215 of the Act, the “business records” section, amends the Federal Intelligence Surveillance Act (“FISA”), which establishes the FBI’s procedures for conducting foreign intelligence surveillance.²⁰ FISA establishes a special court from which the FBI requests subpoenas and warrants for foreign intelligence investigations. Under Patriot section 215, the FISA court must grant any subpoena for any “tangible things that the FBI requests” – including library borrowing records, financial institution records, books, papers, and so forth – so long as the FBI specifies that those things are “sought for” an investigation related to terrorism or spying.²¹ In order to have its request granted, the FBI need not show any reason to believe that the target of the investigation is engaged in spying, terrorism, or criminal activity, and the FBI may base its investigation at least in part on the subject’s First Amendment-protected activity.²²

Unlike section 213, section 215 clearly expands the circumstances under which the FBI may access information. It does so in three ways. First, it expands the class of people subject to searches under FISA. Before the Act passed, the target of such a search had to be linked to a

reason to believe that they would be the subject of a legitimate, warranted search, the lack of notice means that their belief is a little less warranted.

²⁰ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1861 et seq. (2005).

²¹ The Reauthorization Act requires that the FBI show “that there are reasonable grounds to believe” that the records sought are “relevant to an authorized investigation.” H.R. 3199 § 106(b).

²² If the target is a “United States person,” the investigation may not be “conducted solely upon the basis of activities protected by the first amendment to the Constitution,” Patriot Act §215. This makes it possible for such an investigation to be solely based upon the First Amendment protected activities of non-United States persons and to conduct investigations of United States persons based *primarily*, but not solely, upon First Amendment protected activities.

foreign power and engaged in espionage; now, the search itself need only be to protect against terrorism or espionage, regardless of its targets' affiliations. Second, it lowers the FBI's burden for obtaining authorization for a search. Before the Act passed, agents had to demonstrate suspicion; now, they need only specify that the search is part of (or, under the Reauthorization Act, "reasonable grounds to believe" it is "relevant to"²³) an investigation authorized under FISA.²⁴ Third, it expands the circumstances under which the FBI may gather information by broadening the range of justifications for investigations to include First Amendment protected activities.

Privacy advocates have focused substantial attention on section 215's effect upon the scope of intelligence gathering, and it seems clear that 215's effect on upon that scope constitutes a burden to privacy (though of course this leaves open the question of whether it is an *unjustified* burden). However, the more interesting issue, and the one I wish to focus on, concerns section 215's notice requirements and its so-called "gag-rule," which have also been criticized by privacy advocates. For the sake of simplicity, when I refer to section 215, I will mean the "gag rule" provision unless specifically noted otherwise.

²³ § 106(b).

²⁴ See Patriot Act section 215(c)(1) ("Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section."); Reauthorization Act section 106(c) ("Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of tangible things.") Note too that later amendments included in the 2004 Intelligence Authorization Act have expanded the sorts of information available for disclosure under section 215 by broadening the definition of "financial institution." See Eric Lichtau, "Lawmakers Approve Expansion of F.B.I.'s Antiterrorism Powers," *New York Times*, November 20, 2003, p. A23.

There is no statutory requirement that the government provide the subjects of a section 215 search with notice of such a search. More importantly, section 215 requires that “no person shall disclose to any other person” that the FBI has conducted a business records search. Thus, were a librarian, a corporate record-keeper, or church treasurer to inform a search target, supervisor, or coworker that the FBI sought records, she would be breaking the law.²⁵ Notice that the non-disclosure provision by itself does nothing to expand the universe of available information or the circumstances of availability; that is, the gag-rule neither increases access to information nor makes it harder for citizens to control access to their information. Rather, it simply makes it unlikely that anyone – including the subject of an investigation – will learn that the FBI has retrieved their records.

There is one aspect of both section 213 sneak-and-peek warrants and the section 215 gag-rule that may well have an impact on privacy, but which I think ought not to be central in this discussion. Specifically, they both may allow for an increase in improper searches. Section 213, for example, may preclude people from thwarting defective warrants. Without notice (i.e., without knock-and-announce), there may well be cases in which the subjects of searches are unable to stop searches based on faulty warrants. That is, if a warrant is for a wrong address, or if it has expired, notice allows a subject to stop the search from happening. Similarly, section 215’s gag-rule may facilitate faulty searches by preventing record-keepers from consulting colleagues to assure that information disclosed is appropriate to the subpoena.²⁶ These are no doubt

²⁵ The Reauthorization Act allows disclosure only where it is necessary to comply with the order or to an attorney in order to “obtain legal advice or assistance” regarding the order; these other parties are prohibited from further disclosure. H.R. 3199 §106(e).

²⁶ See, for example, Rosenzweig, Paul, “Civil Liberty and the Response to Terror,” 42 *Duquesne University Law Review* 663, 700 (2004).

important worries, and I will return to them below. However, they seem insufficient to motivate privacy-based criticisms of the act because they depend on searches that have both faulty warrants (or vague subpoenas) and in which a homeowner or record-keeper examines the instrument, recognizes the fault, and refuses to comply despite its faults. This may well be a small group. More importantly, the privacy-based criticisms of the Act would likely persist even if effective measures existed to avoid such mistakes.

So, section 213's sneak-and-peek warrants and section 215's gag-rule (coupled with the lack of a notice requirement) make it more difficult to determine when law enforcement agents have obtained information about oneself. But determining whether these provisions burden privacy requires an account of privacy, which is the task of the following section.

Accounts of Privacy

Commentators typically understand privacy in terms of access, control, or some combination of the two. William Parent's view exemplifies one type of access account. He writes that privacy is "the condition of not having undocumented personal knowledge about one possessed by others."²⁷ Thus, as long as a piece of information is undocumented, it remains private until someone actually learns of it, regardless of how open or easily accessible the information is. A narrower type of restricted access account defines privacy in terms of inaccessibility, not mere lack of access. On these accounts, one has privacy insofar as others are unable to gather information about them or observe them, not just that they do not happen to gather the information. Ruth Gavison, for example, defines privacy in terms of inaccessibility, describing

²⁷ Parent, W.A., "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12(4) (Autumn, 1983): 269-288, p. 269.

perfect privacy as a condition in which no one else can observe her, can access her, or has any information about her.²⁸ Anita Allen also provides a restricted access account, according to which saying that “a person possesses or enjoys privacy is to say that, in some respect and to some extent, the person (or the person’s mental state, or information about the person) is beyond the range of others’ five senses and any devices that can enhance, reveal, trace, or record human conduct, thought, belief, or emotion.”²⁹

These accounts will lead to different conclusions about the circumstances under which people have privacy. For example, on Allen’s view, a public record buried in an archive need not diminish one’s privacy, while on Parent’s view, one does not have privacy with respect to facts in that record. On Gavison’s view, the fact that a person could – but doesn’t – learn about another’s habits by following her around decreases that person’s privacy (which is to say, it moves her further away from the state of perfect privacy); on Allen’s account, however, that mere possibility need not diminish one’s privacy.³⁰ Despite such differences, however, these accounts of privacy each hinge upon others’ diminished capacity to learn information or others’ failure to learn information. That is, on access views, a particular action or policy decreases privacy only if (a) someone accesses information that they would not have otherwise accessed,

²⁸ Gavison, Ruth, “Privacy and the Limits of Law” in Ferdinand Schoeman (ed.), *Philosophical Dimensions of Privacy*, (Cambridge: Cambridge University Press, 1984), p. 430.

²⁹ Allen, Anita, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman and Littlefield, 1988), p. 15.

³⁰ I take Allen’s view of privacy as “being beyond the range of others’ five senses...” to mean that one is in fact beyond others’ five sense, though they might be in principle within their range. Thus, I have privacy with respect to my daily habits so long as no one actually follows me around, though someone could in principle do so.

(b) someone is able to access information that they otherwise would not have been able to access, or (c) someone is more likely to access information than they would have otherwise.

Control accounts of privacy describe a class of things that, should one have control over them, are private. One has privacy with respect to intimate information, intimate decisions, and undocumented personal information only if one can effectively control access to those things.³¹ Thus, even if there are effective protections on one's personal information and intimate decisions, that information would not be private unless one has control over its dissemination. So, for example, a record of one's personal information might be relatively inaccessible (perhaps one's diary is stored at an acquaintance's, or one's confidant shares a secret); however, to the extent that one does not have control over the information, that information is less private.³² On this view, privacy could decrease because of decreased control over information – if, for example, a tight-lipped friend found out about some interesting gossip – whereas the same circumstances might not diminish privacy on restricted access accounts precisely because the tight-lipped friend is unlikely to reveal what she knows.

³¹ For an extensively developed control-based view, see Inness, Julie, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1992). See also Fried, Charles, "Privacy [A Moral Analysis]" in Schoeman, *Philosophical Dimensions of Privacy*, pp. 209-210; Westin, Alan, *Privacy and Freedom* (New York: Atheneum, 1967), p. 7.

³² There are, of course, social controls over one's friends and acquaintances, so one has some limited control. The important point is that control admits of degree (after all there are social controls over strangers and adversaries as well).

The Patriot Act and Contemporary Accounts of Privacy

Section 213 – Delayed Notice Search Warrants

Turning back to the Patriot Act, it is hard to see how sections 213 and 215 impinge upon privacy on any of the accounts discussed above. Consider section 213, which allows for delayed notice of the execution of search warrants. Learning sooner rather than later that a warrant has been executed and one's home searched does not give the subject of the search any more control over the information gleaned, nor does it impose a restriction on the access gained via the warrant, nor does it make public undocumented personal information. That is, the process of getting a warrant and the necessity of showing probable cause to get that warrant are what restrict government access to one's home, and these remain unaffected by section 213. Further, the only real control one can exert to prevent a court from issuing a warrant is to modify one's behavior to avoid arousing suspicion, regardless of whether one has contemporaneous or delayed notice of a search.

There is an argument, however, that delayed notice warrants increase the likelihood that the government will learn of personal information where the surreptitious search is followed by other searches. Consider the case where a section 213 search turns up less evidence than agents had hoped. If the subject learns of the search, they will be more careful to conceal information in anticipation of further searches, but if the search is secret, they will not do so, and agents are therefore more likely to access information. However, the information that agents are more likely to access in the second search is precisely the information that justifies the warrant in the first place. And, while this arguably decreases privacy, the information that it exposes beyond a non-secret warrant is likely information over which one does not have a legitimate privacy claim –

evidence of illegal activity. Thus, while there is an argument that section 213 decreases privacy on one conception, that argument is insufficient to explain privacy-based criticisms of the Act, for the only information it exposes is information over which one cannot justify a privacy claim. That is, the information that justifies the warrant in the first place is just what later searches are more likely to turn up.

Section 215 – Business Records and the “Gag Rule”

The ease with which the FBI can get a judge to order a release of records under section 215 does provide greater access to people’s information, and therefore less privacy on access conceptions (save for Parent’s view, according to which *any* documented information – and a fortiori business records – is not private).³³ Even such expanded access, however, does not seem to decrease the amount of control people have over information about themselves, for information subject to a section 215 subpoena is already in other people’s possession. Thus, with respect to complying with a subpoena, that information is not within the control of the people to whom the information pertains. But more to the point, the “gag-rule” provision, which is the focus of this paper, does not seem to decrease privacy on either access or control accounts. The fact that people are unlikely – or unable – to learn that their records have been disclosed neither decreases their control over the information contained in those records nor increases others’ access to it. Rather, it is the subpoena requirement itself that restricts access and affects control. In fact, restricting the record keepers’ ability to reveal the search arguably *increases* privacy by limiting access to the information that the FBI is interested in one’s personal records. That is, by

³³ There is some dispute about whether section 215 really does provide greater access to information, for FISA and grand jury subpoena powers were quite broad before the Act passed. This, however, is not important for the purpose of this paper, which focuses on the gag-rule provision.

revealing a search, a record keeper would effectively decrease search subjects' privacy with respect to the fact that they are being investigated; the gag-rule prevents this. Thus, section 213's "sneak and peak" search provision and section 215's "gag-rule" do not seem to burden privacy on either control or restricted-access accounts.

Other Criticisms

There are, of course, other potential grounds for criticizing Sections 213 and 215. For example, one might argue that contemporary notice of a search is part of what it means for a search to be reasonable under the Fourth Amendment, and one might argue that section 215's gag rule violates the First Amendment by chilling legitimate speech.³⁴ Whatever the constitutional merits of these objections, they require some explanation to be philosophically convincing. Consider first the issue of contemporary notice. There seem to be two reasons that a reasonable search requires contemporary notice. First, one could argue that it is unreasonable for the state to search its citizens surreptitiously, for citizens must have some means for keeping track of the state's actions in order to control its power. This, however, does not seem to be a very powerful criticism of section 213, because the section provides for eventual notice of the search. There is no obvious reason why delayed notice should prevent the citizenry from learning about and keeping a check on the state's search powers.³⁵ Alternatively, reasonableness might

³⁴ The plaintiffs in *Muslim Community Association of Ann Arbor v. Ashcroft*, Civil Action No. 03-72913 (E.D. Mich.) raise these concerns. See Motion in Response to Defendants' Motion to Dismiss.

³⁵ There is the possibility that the Act might permit such extraordinarily long delays that effective opposition would be impossible. This is an important issue, but because it would be hard to establish "reasonable cause" for such long delays, an objection based on such delays would seem to presume abuse. My task here, though, is provide a critique of the Act that address the provisions absent abuse. See "Potential for Abuse" section, *infra*.

require contemporaneous notice because surreptitious searches violate an interest of the person searched – for example an interest in privacy. However, as discussed above, it does not seem to conflict with any of the prevailing philosophical views of privacy.

There seem to be two potential non-privacy grounds for criticizing section 215’s gag-rule. First, one might criticize it as an infringement upon the First Amendment right to free-speech. On this view, the gag-rule constitutes a prior restraint upon speech, and the governmental interest in banning such speech is not of sufficient magnitude to justify such a restraint.³⁶ While this criticism has no implications for privacy (at least on the standard views recounted above), it does help to explain many people’s reflexive aversions to the gag-rule. The second criticism of the gag-rule is similar to the second alternative criticism of section 213, viz., that it makes government less transparent and accountable. Unlike section 213, the section 215 gag-rule does not allow for people to eventually disclose that they have fulfilled a 215 search request. And this certainly does decrease government transparency.

The Value of Privacy

In this section I will argue that although sections 213 and 215 do not burden privacy itself, and therefore do not impinge upon people’s right to privacy, they do undermine the *value* of whatever right to privacy that people have. I begin by discussing the distinction between having rights and those rights having value to those who hold them, and the conditions under which the full value of rights ought to be protected even where the right itself remains intact. I argue that the Act does not seriously conflict with the values ordinarily attributed to privacy. Nonetheless, I

³⁶ See Plaintiff’s Response to Defendant’s Motion to Dismiss, *MCAA v. Ashcroft*, Civil Action No. 03-72913, (E.D. Mich. 2004), at 35.

argue that sections 213 and 215 do undermine the value of privacy, on a fuller account of the value of privacy.

As a preliminary matter, I assume that people have some moral right to privacy. I mean this only in the weak sense that, should someone impinge upon our privacy, we have some grounds for complaint. If people gather or disseminate certain sorts of information, our indignation has some justification short of an all things considered conclusion that we have been wronged. This claim seems weak enough to be plausible. It looks even more plausible considering its denial. If we have no claim to privacy, 24-hour government video surveillance, full bank record disclosure, medical history disclosure, etc. of opposing party members would be completely conscionable. But what value underlies that right? In what follows, I will discuss two principal justifications for a right to privacy: the intrinsic good of respecting privacy, and the instrumental value of privacy to those who have it, and I will examine sections 213 and 215 in light of those values.

Having a Right and That Right Having Value

I have three primary aims in this section. First, I aim to show that having a right and having the full value of that right are distinct; second, I argue that in some cases securing a right will not exhaust our obligations to the rightholder (or, put another way, the rightholder's claims are not exhausted just because their right is secured); and third, I outline the conditions under which we have obligations to protect the value of a right (or where a rightholder has a claim to the value of a secured right). Just what it means to have a right is of course controversial; however, the distinction I articulate is compatible with a wide variety of views of the nature of rights. Thus, for the moment I leave the notion vague; saying only that a right is a valid claim of one's moral

due.³⁷ This falls short of an all-things-considered judgment that one's moral due must be given; for example, one might have a right to the \$100 dollars promised in exchange for one's labor, but the employer's bankruptcy might provide sufficient reason to say that he can default.³⁸

Distinguishing Having a Right and Having the Value of that Right

The distinction I have in mind is the difference between having a right to free expression – construed as a right against the government to not interfere with one's speech, writing, and so forth – and being able partake in the benefits of having the right of free expression. So, even if one has a right that the government not interfere with their expression, it may be the case that one simply has too few resources to learn very much, develop one's thoughts, and express those thoughts effectively. That is, where one lacks resources, the right to free expression may be of little value. Similarly, there is a difference between having a right to vote (construed as a right to accessible polls, a right that others not interfere with one's ability to get to the polls, and a right to have one's vote counted the same as everyone else's), and that right's having value. Suppose, for example, that no one puts obstacles in the way of one's getting to polls, and one's ballot gets counted along with all other ballots in determining the outcome of an election. However, suppose also that up to the time of the election no information about the candidates is available, not because of government censorship, but because candidates have decided not to reveal very much

³⁷ This follows Joel Feinberg's view in "The Nature and Value of Rights," in Feinberg, Joel, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, (Princeton, NJ: Princeton University Press, 1980), pp. 143-58.

³⁸ Of course this does not make it excusable that the employer not pay; she has committed a moral wrong precisely because the employee has a valid claim. Rather, considerations dictate that the best possible outcome will leave that valid claim unmet or redressed in some way other than immediate repayment.

and the press has not done anything to find out more. In this case, it seems that citizens have a right to vote, but the lack of information renders that right practically worthless.³⁹

The distinction makes a certain amount of intuitive sense. Certainly people with greater resources are better able to make use of some of their rights, and those rights are more useful to them than they are to people without as many resources. I take Rawls to be drawing on this distinction in *A Theory of Justice* when he claims that neither the equality of basic liberties nor the difference principle suffice to guarantee the equal value of the political liberties; that is, whether or not one has a political liberty such as free speech is a distinct issue from how much value that liberty has to the person.⁴⁰

At this point it is worthwhile to consider the free expression case in more detail. The right to free speech is best understood as a right of individuals or corporations that the state not

³⁹ In this example, it may be the case that the voters do not care about whether or not their right to vote is valuable (the same could be true in the case of privacy). However, whether a right is not valuable because necessary conditions of its having value are absent and whether or not people actually place value on that right are distinct issues. Moreover, where the mechanism for protecting the conditions under which a right has value is popular support (e.g., markets for information, electoral support for notice of searches) the question of whether a group of people overall values a right will likely come apart from whether that right has value to those few people who do care about it.

⁴⁰ Rawls, John, *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999), p. 179. See generally Brighouse, Harry, "Political Equality in Justice as Fairness," *Philosophical Studies* 86(2) (May 1997): 155-184; Daniels, Norman, "Equal Liberty and Unequal Worth of Liberty," in Norman Daniels (ed.), *Reading Rawls* (New York: Basic Books, 1975) pp. 253-281. Strictly speaking, Rawls only distinguishes between liberties and the value of those liberties. However, as long as some liberties are so important that they are people's moral due (as is the case on Rawls' view), the distinction will hold for such rights and the value of those rights.

interfere with what they say (in certain ways and in certain contexts).⁴¹ However, there is a sense in which a person who lacks the resources to express their thoughts (despite the state's or others' non-interference), does not have the liberty to speak freely. To make sense of how a person could not have the liberty to speak freely and yet have a right that is often characterized as a liberty, it is necessary to distinguish two senses of having a liberty. In the first sense, a liberty is a relationship between people or entities, such that one person is free of certain sorts of constraints imposed by others to do certain things. In the second sense, a liberty is a capacity to actually do something, should they desire.⁴² So, one can be at liberty from state interference with one's expression, and at the same time not have the capacity to express oneself freely because of other constraints (e.g., lack of resources). The right to free speech only includes the first liberty, as there is no right that one have the resources necessary to express oneself as one wishes. Those other constraints diminish the value of the right, rather than diminishing the right itself. That is, while one may be at liberty from state interference with one's expression, and therefore fully have the right to free speech, that right's value can be diminished by the presence of other constraints.⁴³

⁴¹ It is more accurate to say that the right is a complex right which includes the right to speaking freely and the right to immunity from prosecution for what one says (in certain contexts). But that does not bear on the analysis.

⁴² While 'liberty' is often used to mean either a relationship in which one person is free of constraints from other, particular entities (e.g., free from state-imposed restrictions on speech) or the capacity to achieve certain ends, should one desire to, 'right' generally refers only to the former. Thus, 'right' will only apply to 'liberty' in the first sense. Moreover, this means that where one has a right to a relational-liberty but not a capacity-liberty, any intuition that there is some sense in which one does not *really* have the right at all should be rejected.

⁴³ Note how this fits with the text of the First Amendment of the U.S. Constitution, which states that "Congress [subsequently interpreted to include all federal, state, and local governments] shall make no law ... restricting

It is worth noting, though, that even where one has constraints that vitiate most of a right's value, there is likely some other value retained. So, although one may not be able to achieve any of the good that comes with expressing oneself, the mere fact that the state would not interfere with one's expression (or that the state does not interfere with the expression of other, similar people) may suffice to retain some of the value of the right to free speech.

The value of the right, note, is not merely the subjective value to its holder (i.e., how much the right-holder happens to value the right in question). Rather, it is the value of the right to a person, *should she wish to exercise it*. It may be true that fewer resources with which to effectively express one's views will decrease the value of the right to free speech for those who consciously value free speech in the first place. But it would be a mistake to limit the value of the right to this group. Rather, the proper measure of the value of a right is its ability to do whatever it is that justifies that right in the first place. To see why, suppose a person moves to a liberal democracy after having lived in a politically oppressive society for a long time, and does not realize that criticism of the government is protected by right in the democracy. She will not value that right, for one cannot subjectively value something one is unaware of. However, the mere fact that she does not subjectively value that right does not show that the right has no value to her. Rather, it is valuable to the extent that she could use it for an end that warrants the existence of the right, much in the same way that the value of not smoking is valuable even when one still enjoys a pack-a-day habit. Moreover, the right is valuable when it is operative, even in cases where the rightholder does not realize it. The person in our example might say things that she would have been punished for in her native country. However, suppose also that her new state is

freedom of speech." Certainly this allows the possibility that free speech can be restricted by other actors; indeed, it's a commonplace that constitutional free speech claims extend only to state actions.

fully aware of her comments (fortuitously, and via innocuous means), but does not punish her because of her right to free speech. In this case, too, the right is valuable even though it is not subjectively valued by the rightholder.

The value of a right will track closely whatever it is that justifies the right in the first place, rather than the descriptive content of the right itself. The best way to illustrate this point is to look at a possible counterexample to the distinction I've been making.⁴⁴ Consider the case of a person in a well-functioning democracy who is part of a persistent minority that never gets its views implemented. Clearly this person has the right to vote. However, one might argue that my account commits us to saying that its value is diminished. This view, I think, would be mistaken. As noted above, the right to vote consists in (a) accessible polls and non-interference with access to those polls, (b) having one's vote count equally along with everyone else's, and (c) having one's political choices hold sway when one is in the majority.⁴⁵ The justification for the right to vote is multifaceted, but includes (d) giving citizens a stake in governance in order to foster a kind of community, which makes it more likely that things will run better and be more stable, (e) providing for a degree of citizen autonomy, and (f) assuring that governance reflects the will of the people in the right kind of way. The reason that an information-poor environment does not undermine the right to vote itself is that it leaves intact (a), (b), and (c), and the reason that it undermines the value of the right to vote is that it confounds some of the justifications for the right to vote, in this case (e) and (f). Similarly, the right to vote remains intact for the member of

⁴⁴ Thanks to Harry Brighouse for bringing this point to my attention.

⁴⁵ See Rawls, *A Theory of Justice*, 196-7, 200-1. The idea here is that the fact that citizens are political equals implies a pro tanto reason for collective decisions to be made in accordance with the majority's will. This is manifest in the right to vote, which accordingly encompasses the right to have one's will hold, when one is in the majority. Note that this is a more detailed (but compatible) account of the right to vote than described in above.

the persistent minority because (a), (b), and (c) remain, but the value of the right to vote remains intact for this group precisely because (d), (e), and (f) remain stable.⁴⁶

Obligations Beyond Securing a Right

If rights are distinct from the value of rights to their holders, it seems plausible that securing a right does not exhaust our obligations to the rightholder. Supposing that is the case, the question is to what extent do decreases of the value of a right create duties for others, and to what extent should we structure our society so as to preserve the value of rights? One possibility is that individuals and the state have no responsibility to preserve the value of rights. This view, however, is implausible. In the case of voting rights, for example, it seems wrong to say that citizens need only be assured of non-interference with access to the polls, and of having their vote counted equally with all other votes. Rather, it is clear that the state ought to provide very accessible polling places, and candidates, the state, and the press ought to provide a substantial amount of information relevant to the election. Moreover, even if we do not think that the state ought to curtail individual efforts to undermine others' attempts to exercise their rights of free expression – for example by firing employees based upon their political speech – it does seem that there is something morally problematic with their doing so. Consider that widespread employment penalties for free expression of political views (where those views have no bearing on job performance and cause no work disruption) would severely undermine the value of people's right of free expression against the state. Surely this provides a moral reason for

⁴⁶ Again, the mere fact that a member of a persistent minority thinks less of her right to vote does not suffice to undermine its value, unless thinking that the right has value is integral to the justification for the right in the first place. Note, too, that the existence of persistent minorities *may* engender rights-violations or undermine the value of some other rights. But merely being in the minority does not suffice to do so.

employers to refrain from penalizing employees for their political speech, even if we do not believe that the state ought to impose sanctions on employers who do.⁴⁷

Another possibility is that any decrease in the value of rights is morally problematic, and therefore gives rise to moral reasons to mitigate such a decrease. This too is implausible, for many decreases in the value of rights are morally unproblematic. Consider, for example, the effect upon the value of free expression that results from a person moving to an isolated area. Certainly such a move will make that person less able to speak to, and thereby influence, others. Assuming that the prospect of persuasion is part of the value of free expression, isolation decreases the value of having the right to speak freely. However, it also seems clear that that decrease is morally unproblematic.⁴⁸

So, there seem to be cases in which a decrease in the value of a right is morally problematic, and cases in which a decrease is not morally problematic. This view is supported by Rawls's claim that free and equal citizens are not only entitled to the basic liberties, but to the "fair value of political liberties." That is, merely assuring that citizens are free from state restrictions upon their political liberties (which is to say, securing their political rights) does not discharge a society's obligations with respect to the rights to those liberties. Rather, on Rawls's view a society has a responsibility to make sure that people have not only the relational-liberty

⁴⁷ Of course, the ability of employers to do so is usually justified in terms of their right to hire or fire whom they wish. But this is compatible with the exercise of that right diminishing the value of other rights.

⁴⁸ However, Brighouse argues that on Rawls's view, equality requires the fair value of political liberties ("Political Equality in Justice as Fairness," supra note 40). On this view it would seem that because poor oratory decreases one's opportunity for political influence, it ought to be compensated for with greater opportunity for political influence in other ways. Something similar might be necessary in the case of isolated living.

aspect of the political rights, but that they also have the cognate capacity-liberties, which in turn help secure the value of rights.

This raises a further question: Assuming that one has a right, to what extent does one have a claim to the value of that right? Put another way, to what extent does preserving the value of a right create duties for others? As I noted above, not all decreases in the value of a right are problematic. But why should we think that preserving the value of a right has any moral force at all?⁴⁹ My contention is that, because it is likely that people would not care significantly about rights which confer no value, there is at least a *prima facie* argument that undermining the value of rights is morally problematic. Suppose we ask a person to choose between two circumstances. In the first, she lacks a right to a liberty altogether, and in the second, she has that right, but cannot effectively exercise it. It is, I believe, hard to figure just how one would choose between the cases. The choice is especially hard where we ignore ancillary considerations. So, one might imagine that the situation where one lacks a right to a political liberty altogether occurs in a society with much greater problems – an oppressive state, for example. But if we look narrowly at what an individual would choose for herself, independently of what the rest of society looks like, it is entirely unclear why she would choose the right without the capacity to exercise it. In fact, the frustrations of “having” an unusable right might be great enough that it would be more attractive to not have the right at all. Regardless, the point is that the mere difficulty of the choice provides a strong *prima facie* case for protecting the value of rights in addition to the rights themselves.

⁴⁹ Another way of putting this might be that merely having the *intuition* that some decreases in the value of a right are morally problematic is insufficient to show that such a decrease creates a duty for others to preserve that value. Rather, there must be an underlying account of *why* such decreases have moral force at all.

Beyond this prima facie case, there are cases in which a right is fully protected, yet the value of that right is diminished, and there does seem to be an obligation to protect that value. Consider a case in which state actors decide to publicly counter one person's free expression, regardless of what she says, though the state does not impede her from speaking. Certainly the value of her speech decreases (assuming persuasion is among her goals), but it is hard to see how the right itself decreases. If there is no good reason to counter her speech, the state's actions are morally problematic; there is an obligation not to counter all of her speech, on the sole grounds that it is *her* speech, based precisely on preserving the value of her right to free speech. One might argue that the obligation here is that the state not act arbitrarily, and not that it preserve the value of rights for right-holders. However, this would leave open the question of why it should not act arbitrarily. Presumably, this must be based upon preserving people's rights (otherwise, it would prevent arbitrary state action on even trivial matters or on arbitrarily conferring benefits); for example, arbitrary exercise of eminent domain would violate a right to due process, and arbitrary restriction of political signage would violate the right to free speech. In this example, however, no such right is impinged. Rather, the state's action arbitrarily decreases the value of one person's speech; thus, it seems that the relevant obligation is to preserving the value of a right.

It seems, then, that there is a prima facie case for a duty to preserve the value of rights, and it seems that there are cases where the value of a right creates duties. This still leaves open the question of what justifies the claim that preserving the value of rights creates duties. My contention is that the normative force of preserving the value of a right to the rightholder derives precisely from the normative force of the right itself. That is, to the extent that the importance of a right derives from the right-holder's ability to make use of that right, then preserving the value

of the right has normative force. Further, as noted above, the value of a right will track closely what justifies the right in the first place, and the goods sufficient to underwrite that right also suffice to merit protecting its value. In fact, it seems plausible that in many instances preserving some of the value of a right will be morally preferable to preserving some aspect of the right itself. For example, the state might curtail the number of political offices citizens can vote for, perhaps making the dog-catcher post an appointed position rather than an elected one. This certainly limits people's right to vote. However, that limitation is relatively innocuous compared to a case in which the state failed to disclose important information about the powers and responsibilities of dog-catchers, the performance of the incumbent dog-catcher, and the number and nature of unrestrained dogs. That is, where the public has the right to vote for dog-catcher despite a complete lack of information, and if part of the value of the right to vote is to have government reflect the people's will in a certain kind of way, the public's right to vote will have diminished value. More importantly, that loss of value will be more weighty than the loss of the right to vote on the matter altogether, so long as there is reason to think that the appointment process will yield a dog-catcher that is a reasonable choice based upon the needs of the job and the characteristics of the people vying for the office. Where the people may vote without knowledge of those things, there is no reason to think that their choice will be so-based.

When Decreasing the Value of a Right is Morally Problematic

Having explained the distinction between having a right and that right having value, and having argued that our obligations are not exhausted by securing a right, I turn now to the question of when a decrease in the value of a right is morally problematic.

To begin, there are a number of factors that make decreases in the value of a right less problematic. First, a decrease in the value of a right will be less problematic if it is due to a

decision in which a person gives up some of the value of a liberty in order to pursue another goal. Consider the example discussed above of a person moving to a remote area with relatively little opportunity for communication. Certainly the value of that person's right to free speech is diminished because there are few opportunities to speak to and persuade others. Yet so long as the decision to move was made freely amid sufficient options, the fact that it decreases the value of free speech is unproblematic and creates no obligations on others to protect that value.

Second, decreases in the value of a liberty to particular people are less problematic if they result from (or are necessitated by) an overall increase, or fairer distribution, of the value of that right to others. So, for example, the development of new media (e.g., cable television, satellite radio, the Internet) will decrease the value of free speech to those with large stakes in older media with finite broadcasting potential due to bandwidth constraints (e.g., broadcast television and radio). However, the existence of new media will presumably allow more people to have access to large audiences, and it will therefore increase the value of free speech for them. If political influence is a scarce good (even if not zero-sum), then the decrease in the value of the right to free speech for some people will be offset by an increase in the value of that right for others; in this case the distribution may be more fair as well. In contrast, restricting the amount of bandwidth available for broadcasting will decrease the value of free speech to most people, without being offset by an increase in the value of free speech to many other people; it would also appear less fair.⁵⁰

⁵⁰ It would increase the value of free speech for those with access to the remaining broadcast spectrum, but if influence is not zero-sum then there is an overall decrease in the right. I make no claim here about the principles according to which the value of a right ought to be distributed. However, as an anonymous reviewer for this paper pointed out, mere maximization of aggregated value would conflict with Rawls's difference principle. "The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve

There are also a couple of factors that make decreases in the value of rights especially problematic. First, the decrease in the value of a right will be more problematic if the value is a central justification for the right in the first place. So, for example, the value of freedom of expression might decrease if journalists' wages or the social esteem accorded to public expression were to decline. However, because remuneration and social esteem are not central justifications for the right to free expression, those declines in value are not problematic. Consider, though, the case in which the state (or other actor) systematically withholds or obfuscates information. Because free expression is important in part to better arrive at well-justified beliefs about how the world is and ought to be, and because good information is important to this goal, this would be an especially problematic decrease in the value of the liberty of free expression.

Second, decreases in the value of a right are more problematic if they are due to the actions of a person or entity against whom one ought to have the right in the first place. The right to free expression is typically considered to be a liberty right that one has against state interference. If the state decreases the value of free expression by incompetently or cynically managing communications media (e.g., airwaves, phone lines, etc.), that decrease is more problematic than if private parties incompetently or cynically manage components of communications infrastructure. It is hard to see how those parties would have an obligation to protect the value of a right that they have no obligation to honor, whereas it is equally hard to see how decreasing the value of a right that the state has an obligation to honor is permissible.

their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied." *A Theory of Justice*, p. 179.

Consider the right to vote. The value of the right to vote depends in part on access to polling places. Where the state does a poor job of disseminating information about where to vote – perhaps by making the instructions vague, though not deliberately obfuscating the information – the value of the right to vote decreases. But because the right to vote includes the right that the state make polling places accessible, this decrease in the value of the right to vote is particularly problematic. It is more problematic than a newspaper’s failure to accurately disseminate good poll information released by the state, precisely because the original right to accessible polls is a right against the state, not against the newspaper.

Value of Privacy: Respecting Personhood

To determine whether or not Patriot sections 213 and 215 undermine the value of privacy, we first need an account of the value of privacy, or a justification for a right to privacy. There are a number of such accounts in the philosophical literature. One justification is that there is an inherent value in respecting people’s privacy. A number of commentators argue that invading another person’s privacy is morally problematic because it disrespects the person whose privacy is invaded. Most famously, perhaps, is Edward Bloustein’s argument that what unifies claims of privacy, and what gives those claims moral force, is that they protect one’s “inviolable personality.”⁵¹ If we are to respect individuals’ dignity, treat them as the autonomous agents they are, and not undermine their independence, we must respect their privacy.⁵²

⁵¹ Bloustein, Edward J., “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,” *New York University Law Review* (39) (1964): 962-1007.

⁵² Exactly what Bloustein’s view demands, and arguments for why people ought to be viewed as autonomous agents is a task beyond this paper. The main point is that Bloustein’s view focuses on the inherent wrong of impinging upon privacy, independently of any ill-effects on individuals whose privacy is violated.

A number of commentators take a similar view – for example, Stanley Benn, Jeffrey Reimann, and I think Louis Brandeis and Samuel Warren.⁵³ The thread running through these views is that invading privacy is intrinsically wrong, based upon the moral status of those whose privacy is violated. On these views, for a person or a government to impinge upon a person’s privacy is morally problematic in itself, without reference to other harms and regardless of whether the subject knows his privacy has been invaded.

This view of privacy’s value does not conflict with sections 213 and 215; those sections do not conflict with the intrinsic value of privacy, for precisely the same reason that they do not impinge upon privacy itself. Neither the delayed-notice warrant nor the business records gag-rule provision expands the number of searches that the government can perform, and therefore neither will result in instances of persons’ privacy being impinged upon.

Privacy as Instrumentally Valuable

A second thread in the privacy literature is that privacy serves to benefit those who have it; that is, privacy is valuable largely because of what it *does*. A number of folks have argued that privacy promotes and protects intimate relationships. Julie Inness, for example, argues that it promotes intimate relationships, which themselves have intrinsic value, thus making privacy instrumentally valuable.⁵⁴

⁵³ Benn, Stanley I., “Privacy, Freedom, and Respect for Persons,” in J.R. Pennock and J.W. Chamman (eds.), *Nomos XIII: Privacy*, (New York: Atherton Press, 1971), pp. 1-26; Reiman, Jeffrey, “Privacy, Intimacy and Personhood,” *Philosophy and Public Affairs* 6(1) (1976): 26-44; Warren, Samuel and Brandeis, Louis, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193-220

⁵⁴ Inness, *Privacy, Intimacy, and Isolation*. Inness’ view is a little more complex than this. She seems to meld the intrinsic and instrumental values of privacy by identifying privacy as a constitutive part of intimate relationships,

Ruth Gavison's account also attributes instrumental benefits to privacy. She argues that privacy prevents certain types of interference, pressure to conform, ridicule, retributive action, and other forms of hostile reaction, and that these are valuable because they promote individual growth, creativity, and mental well-being.⁵⁵ In a similar vein, others argue that privacy allows one the time to reflect, think clearly, or relax free of scrutiny in order to better confront their professional, personal, or political affairs. Examples of this line of argument abound,⁵⁶ and there does not seem to be much reason to rehearse them here. Rather, the point is just that much of the value of privacy seems to be in what privacy does.

Notice, though, that these views of the instrumental value of privacy actually pick out the instrumental value of a *belief* in privacy (a point made by William Parent⁵⁷). That is, the instrumental benefits listed above only obtain where people actually believe that they have privacy, regardless of whether or not they actually have it. Arguably, sections 213 and 215 do undermine the instrumental value of privacy. Before the Patriot Act became law, I would have found out about a search warrant for my house rather quickly⁵⁸, and it is likely that a librarian or church record keeper would reveal any searches for borrowing or membership records. Thus, not learning about warrants or records requests was good evidence that no one had searched my home or perused my records. Now, however, I may have a bit less confidence that no one has

which are themselves intrinsically valuable. Whether or not this is plausible is not vital to my purposes in this paper, which is merely to point out that there are a number of views that seem to value privacy for what it does.

⁵⁵ Gavison, "Privacy and the Limits of Law," pp. 361-2.

⁵⁶ Allen, *Uneasy Access*; DeCew, Judith, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, (Ithaca, NY: Cornell University Press, 1997).

⁵⁷ "Privacy Morality and the Law," *Philosophy and Public Affairs* 12(4) (1983): 269-288, p. 275.

⁵⁸ Under *U.S. v. Freitas*, one would in any case find out within seven days. See *supra* note 14.

accessed my records or my home. This does seem to be an important way in which sections 213 and 215 undermine the value of privacy; they make the instrumental goods that come from privacy (or from the belief in privacy) more elusive.

However, there are a couple of problems with this view. First, it is possible that sections 213 and 215 do not engender concern for privacy. After all, it's an empirical question whether people are *actually* more worried that they lack privacy because of sneak-and-peek searches and gag-rules. It seems unlikely that many of us really took lack of notice of a search warrant, or the fact that our librarians hadn't informed us of records searches, as reasons to think that we had not been the subject of a search. Moreover, even if people are apprehensive that their information has been examined, it is possible that that apprehension has not altered their behavior, or harmed them in the ways suggested by the instrumental accounts of privacy's value. Finally, this view depends on the publicity of the Act for whether or not it undermines the value of privacy. Should the same provisions have passed unnoticed, the instrumental account would recognize no diminution of the value of privacy.⁵⁹ But if the Act is problematic, it would seem to be so regardless of whether people are aware of its provisions or not. Thus, it seems likely that sections 213 and 215 leave intact both the intrinsic and extrinsic value of respecting privacy.

⁵⁹ Here one might point out that some people – for example, those most distrustful of the state or jealous of their privacy – may be particularly likely to think that the Act will be put to use to monitor them, and that these people's privacy is of particular importance. Even so, the effect of the Act on their behavior would be unclear. After all, their distrustful disposition may suffice to shape their behavior independently of the Act. Moreover, the criticism would fail to apply to the Act if it were passed in secret. Thanks to an anonymous reviewer for raising this point.

Preserving the Value of Privacy

At best, then, on the standard accounts of the value of privacy, sections 213 and 215 create a possible threat to the instrumental value of privacy. So are the privacy-based criticisms of those provisions just misguided? I don't think so. My purpose in this section is to offer an understanding of the value of privacy that accounts for privacy-based criticisms of sections 213 and 215. So, I offer the following account of privacy's value: One's privacy with respect to information has value only to the extent that one has warranted confidence that others will not access that information. And one's privacy with respect to information *lacks* value if one has a warranted concern that others will access one's information. So, even if one actually has privacy (that is, even if no one actually accesses one's information), that privacy's value is diminished to the extent that one's beliefs about privacy lack warrant. That decrease is based upon people's autonomy interests. In the first part of this section I explain my view more thoroughly, and in the latter part I support the view by explaining the relationship between lack of warrant and autonomy.

My view partially tracks the instrumental account of privacy's value. On both accounts, the extent to which sections 213 and 215 undermine people's beliefs that they have not been subjects of a search decreases the value of not having been searched. However, there are important differences. Most importantly, on the warranted concern account, one's actual beliefs and behavior are not critical to the question of whether the value of one's privacy has been diminished. It therefore accounts for criticisms of Patriot sections 213 and 215 without being vulnerable to the arguments against the instrumental account that I mention above.

But why should we subscribe to this account of privacy's value? I think that it covers the important aspects of the instrumental accounts of privacy's value, but it can also explain why the

value of privacy is diminished in some cases where the instrumental view cannot do so.

Specifically, my view accounts for both the instrumental value of believing in privacy and the intrinsic value of being able to base one's beliefs upon good reasons. I'll explain that a bit.

To the extent that privacy allows us to do the things that Gavison, Inness, Allen, and others argue, privacy – or at least belief in privacy – clearly seems valuable. Thus, in a case where a person has privacy and knows it, both the instrumental view and my view account for privacy's value. However, if one does *not* have sufficient evidence to support one's belief that they have privacy, the fact that they have privacy seems to have diminished value – even if the positive instrumental effects remain. The warranted concern view accounts for that diminished value, but the instrumental view does not.

Now, if one comes to doubt that they have privacy – because of sections 213 and 215, for example – and they therefore lose the instrumental benefits of believing in privacy, the value of actually having privacy also diminishes. Both the instrumental account and my account reflect this. However, the view I've articulated distinguishes between cases in which one correctly believes that they have privacy, but without having good reasons, and cases in which one correctly believes that they have privacy, based upon good reasons. On the instrumental account, privacy is equally valuable in the two cases. My view, though, marks the case in which one has good information as better. In sum, then, the view I've outlined attributes greater value to privacy where one's beliefs about privacy are supported by evidence. Thus, so long as we think it

is better to base beliefs on good reasons, that view seems superior to the instrumental view precisely because it accounts for the value of believing on the basis of reasons.⁶⁰

So, I think that the warranted concern view accommodates some intuitions regarding privacy's value in different situations, specifically, the intuitions that having privacy is more valuable where we believe that we have privacy, and that belief is backed by good reasons. That, I believe, should count in its favor. But why, other than simply accommodating some intuitions about when privacy is more or less valuable, should we adopt the warranted concern account?

Put simply, I think that the warranted concern view is the only view that adequately accounts for people's autonomy, and the value of respecting that autonomy. In what follows, I provide an argument for why sections 213 and 215 fail to respect people's autonomy, why that is problematic, and how it supports the warranted concern view.

The argument from autonomy:⁶¹

(A1) Acting autonomously requires that one be able to incorporate one's values into decisions as he sees fit.

(A2) In order to incorporate one's values into one's decisions, one needs information that is relevant to those decisions.

⁶⁰ On a side note, both views explain cases in which one irrationally doubts that they have privacy – because of outlandish conspiracy theorizing, for example. In this case, the value of privacy is diminished because one doesn't believe one has it.

⁶¹ This argument follows closely the formulation in Streiffer, Robert, and Rubel, Alan, "Democratic Principles and Mandatory Labeling of Genetically Engineered Food," *Public Affairs Quarterly* 18(3) (July 2004): 223-348, pp. 226-233, and Rubel, Alan and Streiffer, Robert, "Respecting the Autonomy of European and American Consumers: Defending Positive Labels on GM Foods," *Journal of Agricultural and Environmental Ethics* 18(1) (January 2005): 75-84.

- (A3) Therefore, acting autonomously requires that one have information relevant to one's decisions.
- (A4) Information about one's privacy is deeply important to one's decisions.
- (A5) Therefore, acting autonomously requires that one have information about one's privacy.
- (A6) Now, respecting autonomy requires that one make available information that is relevant to people's decisions (when possible).
- (A7) Therefore, respecting autonomy requires making information about people's privacy available.
- (A8) The effect of sections 213 and 215 is to make information about people's privacy unavailable.
- (A9) Therefore, sections 213 and 215 fail to respect autonomy.

I'll explicate this a bit, beginning with the claims about autonomy. Now, autonomy is a complex and controversial concept. But it at least requires that one be able to make decisions that comport with one's values, goals, and desires. Given this minimal – and I think uncontroversial – claim, being fully able to act autonomously requires having sufficient information to be able to decide whether particular actions are appropriate, given one's values, goals, or desires. Moreover, as Thomas Hill, Jr. argues, an important element of autonomy is the ability to determine how to interpret one's situation. That is, deception violates persons' autonomy even if it does not change their actions, for it prevents them from seeing the world in the proper light, from being able to decide what to make of things.⁶² Similarly, if one falsely believes that they have privacy, their interpretation of their actions (i.e., that they are private) is mistaken, and this diminishes their

⁶² Thomas Hill, Jr., "Autonomy and Benevolent Lies," *Journal of Value Inquiry* 18 (1984): 251-267.

autonomy. Thus, if information would be integral to one's decisions, to the way one acts, or to how one interprets those decisions and actions, it is also integral for one to fully realize her autonomy. Of course, the mere fact that people lack sufficient information to act fully autonomously does not entail that others have a responsibility to provide such information, for people may lack information for a variety of reasons. Information may simply not exist, for example. However, when information that is important to persons' decisions does exist, their autonomy creates a compelling moral reason for making that information available, or in any event not obscuring it. Failure to do so is a failure to respect autonomy.

I think it should be relatively uncontroversial that autonomy requires information that bears significantly upon one's actions. But why should information about *privacy* matter to one's decisions or actions? I think that this is the most important insight from the instrumentalists about the value of privacy that I mention above. Even if privacy itself is not instrumentally necessary (or even instrumentally *helpful*) for us to engage in intimate or meaningful relationships, and even if privacy itself is not instrumentally helpful for us in carrying out our projects, acting as political beings, or in facilitating individual growth and mental well-being, lack of privacy bears upon how we act. We just act differently depending upon whether or not we believe others will learn information about our actions. That is, if we take the instrumentalist claims seriously – even if we reject claims that privacy itself is necessary for intimacy or autonomy – we seem committed to the likelihood that belief in privacy does *something* (even if it is not valuable for what it does). Knowing the extent to which others access our information, then, bears substantially upon our actions. Therefore, information about whether or not we have

privacy seems necessary for our autonomy; thus, if information regarding our privacy exists, respecting autonomy requires that it not be obscured.⁶³

Sections 213 and 215 clearly do seem to fit here. As I noted in the first part of this paper, the primary effects of the sneak-and-peek search and gag-rule are to make it less likely that one will find out whether one has been the subject of a search. If knowing that a search warrant has been executed to search one's home, or if knowing that one's business records, library records, church membership records, or charitable donation records have been subpoenaed is the kind of thing that would have an effect on one's behavior – and it is hard to imagine that it wouldn't – then obscuring that information disrespects people's autonomy. So, while even if it is true that the gag-rule and delayed-notice warrants do not impinge upon privacy itself, and even if the rules themselves do not undermine the instrumental value of privacy, they undermine the value of having privacy because they undermine our ability to tailor our actions according to whether or not we actually have privacy, and, as Hill points out, they undermine our ability to adequately interpret our situation. That is, a right to privacy is less valuable if one cannot tell that their privacy has been intruded, and cannot therefore alter and interpret their actions.

Note that this criticism is distinct from the criticism, based upon an instrumental view of privacy's value, that sections 213 and 215 will undermine people's belief in their privacy, and that this will cause some harm (e.g., to intimate relationships, or to our ability to reflect, etc.). This is the case for a couple of reasons. First, the instrumentalist criticism rests upon the claims that sections 213 and 215 will actually affect people's beliefs. However, if the sections do not lead people to believe that they have less privacy, then there is no instrumental concern. In fact,

⁶³ Note that this is not an all-things-considered judgment that the information must be revealed or transparent. That conclusion will depend on what sort of obligations the information holder has to the person the information is about.

it seems likely that most people will not begin thinking that a lack of notice of a warrant or a lack of information regarding business records subpoenas no longer supports their belief that they have not been subject to a search. The autonomy argument, however, concerns a counterfactual circumstance, viz., whether those people who *would have heard* of searches, but for sections 213 and 215, and those people who would have learned, had they inquired, that they had not been subject to business records searches, would have changed their behavior.

Second, the instrumentalist criticism relies on the claim that belief in privacy has positive effects. However, the autonomy argument does not. Rather, it is based on the claim that autonomy requires relevant information regardless of its effect. Thus, even if people were to overreact to the knowledge that their records had been subject to search, considerations of autonomy merit providing the information. That is, it is possible that the sneak-and-peek search and gag-rule have positive effects on people because it maintains their belief in privacy, and that belief, as instrumentalists maintain, has benefits. However, the autonomy argument requires that people have access to relevant information so that they can tailor their actions as they see fit, even if doing so causes some instrumental harm. Forcing them to reap the benefits of a false belief in privacy is, it seems, paternalistic.⁶⁴

⁶⁴ Another possibility is that the view defended here is really an instrumental account, on the grounds that information about privacy is instrumental for us to tailor our actions according to whether we actually have privacy. This would be true only if there were particular ends that having such information fosters, but the view here just concerns having the information. Put another way, it is not an instrumental account for the same reason that truth-telling is not instrumental in respecting persons. There is no particular outcome that underwrites the value of truth-telling; rather, truth-telling is important because respecting persons demands it. Similarly, having information (about privacy, for example) may be either instrumentally good or instrumentally bad, based on consequences. But

Now, the autonomy argument is the root of the warranted concern account. The instrumental account does a nice job of explaining certain aspects of privacy's value, viz., the beneficial effects of belief in privacy on things like intimate relationship, pursuing one's projects free from scrutiny, and so forth. The argument from autonomy, though, points out why that is not sufficient to fully account for privacy's value. The warranted concern account, however, incorporates the value of affording people the opportunity to base their actions and decisions upon good reasons, for it recognizes that as one's ability to determine whether they have privacy decreases, the value of actually having that privacy diminishes.

Why this is a problematic decrease in the value of a right.

In the previous section I argued that sections 213 and 215 decrease the value of people's right to privacy. However, this leaves open the question of whether it is a morally problematic decrease in the value of that right. There are several reasons to think that it is, based on the criteria I outlined above. Note that my contention that the loss is problematic need not be an all-things-considered judgment that the decrease is unjustified. Rather, it is a claim that the decrease requires some justification in the first place. That is, merely claiming that the sections do not decrease privacy itself and people's right to privacy remains intact would not suffice to justify the two sections. Rather, because the value of the right diminishes in a problematic way, some justification is required.

The two conditions I argued make a decrease in the value of a right less problematic do not obtain here. First, the decrease in the value of privacy is not the result of people making individual choices in which they trade a degree of privacy for some other advantage. The loss

obfuscating that information is a failure of respect for persons' autonomy. I owe this point to an anonymous reviewer.

comes “from above,” as it were. Second, there is no overall increase in the value of the right to privacy that justifies the decrease in its value to some people.

More importantly, two of the conditions that I argued make a decrease in the value of right problematic do obtain in this case. First, one important justification for a right to privacy is that it is central for people to act autonomously. However, secreting information about the degree to which people’s privacy is compromised is, as I have argued above, antithetical to people’s autonomy. More importantly, the right to privacy (especially insofar as that right is instantiated by the Fourth Amendment) is a right against the state. Thus, because the decrease in the value of the right to privacy that comes with sections 213 and 215 is the result of state action, it is all the more problematic.

Why this is not the same as a chilling effect.

One oft-repeated criticism of laws affecting basic rights is that they have a “chilling effect” upon legitimate activities. So, for example, many criticize innocuous-seeming prosecutions of speech-related activities on the grounds that other, legitimate speakers might self-censor, and that public discourse might thereby suffer. At least one commentator on this paper has suggested that this would likely be a fruitful argument for me to make regarding the Patriot Act.⁶⁵ However, I think that my argument here is distinct from such arguments for two reasons.

First, chilling effect arguments are typically instrumentalist. That is, they consider potential negative consequences of particular practices. So, for example, one might argue that prosecuting internet file sharing operations is problematic even if it prevents illegal music downloading because it will harm the free flow of legitimate information. Such an argument points to particular, positive ends and considers the extent to which government actions would

⁶⁵ I’d like to thank Bruce Landesmann for raising this point to me.

undermine, decrease, or “chill” that activity. However, my argument regarding the Patriot Act is different in that there may be no particular, identifiable, legitimate activity chilled. Rather, it turns on the likelihood that some people act differently because they do not know the extent to which others have accessed their information. These activities need not be particularly important (though they may be). The second, related, reason is that it may be that *knowing* of searches would have a chilling effect. That is, should a mere belief in privacy facilitate people’s relationships and projects, revealing section 213 and 215 searches would be more likely to have a chilling effect on valued activities than disclosing them.

Potential for abuse.

One prominent worry about the Act concerns the potential for its abuse. The broader the powers of law enforcement agencies, such arguments run, the more likely they are to be abused, and the more harmful the abuses are likely to be. Such arguments are intuitively appealing, and indeed some people think that they always operate in a liberal democratic state. I have not advanced them here for two reasons. First, they usually rely upon the existence of bad actors; if law enforcement agents are well-trained, do not act in bad faith, and so forth, the potential for abuse is minimized. Leaving aside the question of whether abuse usually stems from bad (or poorly trained) actors, this issue is somewhat tangential to the Act itself. That is, I wish to address problems that stem directly from the Act itself, rather than a prediction of how people will use the Act. Second, the potential for abuse argument fails to address privacy directly. My task here is not a full critique of the Patriot Act. Rather, it was, first, to look specifically at whether two provisions impinge upon privacy, and more importantly to see what those provisions can tell us about privacy itself. The likelihood of abuse is not directly related to those questions. Abuse could have the effect of burdening privacy, but this is true of many other goods as well.

Conclusion

For most of my paper, I've viewed the sneak-and-peek search and gag-rule provisions in isolation. I'd like to conclude, however, with a few remarks viewing my criticisms of the gag-rule in conjunction with the rest of section 215. In my earlier discussion, I pointed out that the section expands the information available to the government and conditions under which it is available. Moreover, I think that this expansion highlights the way in which the gag-rule violates an autonomy interest. Because the government can access a great deal more information than before, and because we have no means of finding out what it has accessed, it is now much more likely that we do not have privacy with respect to business records (construed very broadly) – though we might. Even if those intrusions on privacy are justified, many people would behave differently if they *knew* that their records had been accessed. This, I think, is the best understanding of privacy-based criticisms of section 215's gag-rule and lack of notice requirement. We are at once more likely to have our information turn up in legitimate searches, but unable to find out if it does. Thus, the combination of a decrease in privacy that might change one's behavior and the impossibility of finding out whether one's own information has been searched make us less able to tailor our actions according to a warranted belief about whether or not we have privacy.