Despite the fact that privacy is not so much as mentioned in the Constitution, and that it was only shoehorned in some 34 years ago, it is viewed by most Americans as a profound, inalienable right.

The media is loaded with horror stories about the ways privacy is not so much nibbled away as it is stripped away by bosses who read your e-mail, neighbors who listen in on your cell phones, and E-Z passes that allow tollbooth operators to keep track of your movements. A typical headline decries the "End of Privacy" (Richard A. Spinello, in an issue of America, a Catholic weekly) or "The Death of Privacy" (Joshua Quittner, in Time).

It is time to pay attention to the other half of the equation that defines a good society: concerns for public health and safety that entail some rather justifiable diminution of privacy.

Take the HIV testing of infants. New medical data, for instance evidence recently published by the prestigious New England Journal of Medicine, show that a significant proportion of children born to mothers who have HIV can ward off this horrible disease but only on two conditions: that their mothers not breast-feed them and that they immediately be given AZT. For this to happen, mothers must be informed that they have HIV. An estimated two-thirds of infected mothers are unaware. However, various civil libertarians and some gay activists vehemently oppose such disclosure on the grounds that when infants are tested for HIV, in effect one finds out if the mother is a carrier, and thus her privacy is violated. While New York State in 1996, after a very acrimonious debate, enacted a law that requires infant testing and disclosure of the findings to the mother, most other states have so far avoided dealing with this issue.

Congress passed the buck by asking the Institute of Medicine (IOM) to conduct a study of the matter. The IOM committee, dominated by politically-correct people, just reported its recommendations. It suggested that all pregnant women be asked to consent to HIV testing as part of routine prenatal care. There is little wrong with such a recommendation other than it does not deal with many of the mothers who are drug addicts or otherwise live at society’s margins. Many of these women do not show up for prenatal care and they are particularly prone to HIV, according to a study published in the American Health Association's Journal of School Health. To save the lives of their children, they must be tested at delivery and treated even if this entails a violation of mothers' privacy.

Recently a suggestion to use driver's licences to curb illegal immigration has sent the Coalition for Constitutional Liberties, a large group of libertarians, civil libertarians, and privacy advocates, into higher orbit than John Glenn ever traversed. The coalition wrote:

This plan pushes us to the brink of tyranny, where citizens will not be allowed to travel, open bank accounts, obtain health care, get a job, or purchase firearms without first presenting the proper government papers.

The authorizing section of the law... is reminiscent of the totalitarian dictates by Politburo members in the former Soviet Union, not the Congress of the United States of America.

Meanwhile, Wells Fargo is introducing a new device that allows a person to cash checks, at its ATM machines because the machines recognize faces. Rapidly coming is a whole new industry of so-called biometrics that uses natural features such as voice, hand design, and
eye pattern to recognize a person with the same extremely high reliability provided by the new DNA tests.

It's true that as biometrics catches on, it will practically strip Americans of anonymity, an important part of privacy. In the near future, a person who acquired a poor reputation in one part of the country will find it much more difficult to move to another part, change his name, and gain a whole fresh start. Biometrics see right through such assumed identities. One may hope that future communities will become more tolerant of such people, especially if they openly acknowledge the mistakes of their past, and truly seek to lead a more pro-social life. But they will no longer be able to hide their pasts.

Above all, while biometrics clearly undermines privacy, the social benefits it promises are very substantial. Specifically, each year at least half a million criminals become fugitives, avoiding trial, incarceration, or serving their full sentences, often committing additional crimes while on the lam. People who fraudulently file for multiple income tax refunds using fake identities and multiple Social Security numbers cost the nation between one billion and five billion dollars per year. Numerous divorced parents escape their financial obligations to their children by avoiding detection when they move or change jobs. (The sums owed to children are variously estimated as running between 18 billion to 23 billion dollars a year.) Professional and amateur criminals, employing fraudulent identification documentation to make phony credit card purchases, cost credit card companies and retail businesses an indeterminate number of billions of dollars each year. The United States loses an estimated $18 billion a year to benefit fraud committed by illegal aliens using false IDs. A 1998 General Accounting Office report estimates identity fraud to cost $10 billion annually in entitlement programs alone.

People hired to work in child care centers, kindergartens, and schools cannot be effectively screened to keep out child abusers and sex offenders, largely because when background checks are conducted, convicted criminals escape detection by using false identification and aliases. Biometrics would sharply curtail all these crimes, although far from wipe them out singlehandedly.

The courts have recognized that privacy must be weighed against considerations of public interest, but have tended to privilege privacy and make claims for public health or safety clear several high hurdles. In recent years these barriers have been somewhat lowered as courts have become more concerned with public safety and health. Given that these often are matters of state law, and that neither legislatures nor courts act in unison, the details are complex and far from all pointing in one direction. But, by and large, courts have allowed mandatory drug testing of those who directly have the lives of others in their hands, including pilots, train engineers, drivers of school buses, and air traffic controllers, even though such testing violates their privacy. In case after case, the courts have disregarded objections to such tests by civil libertarians who argue that such tests constitute "suspicionless" searches, grossly violate privacy, and--as the ACLU puts it--"condition Americans to a police state."

All this points to a need to recast privacy in our civic culture, public policies, and legal doctrines. We should cease to treat it as unmitigated good, a sacred right (the way Warren and Brandeis referred to in their famous article and many since), or one that courts automatically privilege.

Instead, privacy should rely squarely on the Fourth Amendment, the only one that has a balance built right into its text. It recognizes both searches that wantonly violate privacy ("unreasonable" ones) and those that enhance the common good to such an extent that they are justified, even if they intrude into one's privacy. Moreover, it provides a mechanism to
sort out which searches are in the public interest and which violate privacy without sufficient cause, by introducing the concept of warrants issued by a "neutral magistrate" presented with "probable cause." Warrants also limit the invasion of privacy "by specification of the person to be seized, the place to be searched, and the evidence to be sought." The Fourth may have become the Constitutional foundation of privacy a long time ago if it was not for the fact that Roe v. Wade is construed as a privacy right, and touching it provokes fierce opposition. The good news, though, is that even the advocates of choice in this area are now looking to base their position on some other legal grounds, especially the Fourteenth Amendment.

We might be ready to treat privacy for what it is: one very important right, but not one that trumps most other considerations, especially of public safety and health.