Generic Negative: Privacy Does Matter

By Josiah Hemp

***Resolved: The United States federal government should substantially reform the use of Artificial Intelligence technology***

This brief and its companion brief (Privacy Doesn’t Matter) address the critical issue of privacy. AI often affects privacy in many ways, and thus these briefs which deal with privacy will be helpful in addressing the topic. These should always be carried into Negative rounds, but you may find them helpful when going Affirmative, if your plan increases or decreases privacy. They may help you respond to Negative arguments.

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Negative: Privacy Does Matter

OPENING QUOTES / NEG PHILOSOPHY

Fundamental philosophy of freedom

Sen. Rand Paul, 2015 quoted by Andrew Desiderio, “Rand Paul's NSA Filibuster: His Notable Quotes” May 21, 2015. REAL CLEAR POLIICS. <https://www.realclearpolitics.com/articles/2015/05/21/rand_pauls_nsa_filibuster_his_notable_quotes_126676.html>. (Accessed November 20, 2020.)

“We have to decide whether our fear is going to get the better of us. Once upon a time we had a standard in our country that was ‘innocent until proven guilty.’ We’ve given up on so much. Now, people are talking about a standard that is ‘if you have nothing to hide, you have nothing to fear.’ Think about it. Is that the standard we’re willing to live under?

DEFINITIONS OF PRIVACY

Right of Privacy

Merriam-Webster Legal Dictionary, “Right of privacy.” <https://www.merriam-webster.com/legal/right%20of%20privacy>. (Accessed 27 Jul. 2020.)

“The right of a person to be free from intrusion into or publicity concerning matters of a personal nature.”

Four kinds of privacy rights

Dr. Judith DeCew 2018, (B.A. University of Rochester, 1970; M.A. 1976; Ph.D. 1978, University of Massachusetts at Amherst. Senior Research Scholar; Professor Emerita, Department of Philosophy, Clark University) "Privacy", Stanford Encyclopedia of Philosophy (Spring 2018 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2018/entries/privacy/>. June 11, 2018. (Accessed 6 Nov 2021)

Although the first cases after the publication of their paper did not recognize a privacy right, soon the public and both state and federal courts were endorsing and expanding the right to privacy. In an attempt to systematize and more clearly describe and define the new right of privacy being upheld in tort law, William Prosser wrote in 1960 that what had emerged were four different interests in privacy. Not claiming to be providing an exact definition, and admitting that there had been confusion and inconsistencies in the development of privacy protection in the law, Prosser nevertheless described the four “rather definite” privacy rights as follows:  
Intrusion upon a person’s seclusion or solitude, or into his private affairs.

Public disclosure of embarrassing private facts about an individual.

Publicity placing one in a false light in the public eye.  
Appropriation of one’s likeness for the advantage of another (Prosser 1960, 389)

HUMAN RIGHTS

Privacy is a basic right as part of the right to life

Prof. Dorothy J. Glancy, 1979 (Associate Professor of Law, University of Santa Clara, Visiting Professor of Law, University of Arizona. B.A., Wellesly, 1967; J.D. Harvard, 1970.) Arizona Law Review “The Invention of the Right to Privacy,” <http://law.scu.edu/wp-content/uploads/Privacy.pdf> Page 3-4. (Accessed November 3, 2021). (brackets added, ellipses in original)

In their definitive Harvard Law Review paper, “The Right to Privacy” Samuel Warren and Louis Brandeis,

“Although primarily intent on establishing the right to privacy as a practical legal protection which could function in the social context of their day, Warren and Brandeis were also participants in what Roscoe Pound called “the organizing, systematizing era after the Civil War. ‘Accordingly, they carefully located the right to privacy within the context of the highly schematic jurisprudence of late nineteenth century American law. They [Samuel Warren and Louis Brandeis] placed the right to privacy within the more general category of the individual’s right to be let alone. The right to be let alone was itself part of an even more general right, the right to enjoy life, which was in turn part of the individual’s fundamental right to life itself. The right to life was part of the familiar triad of fundamental, inherent, individual rights reflected in the fifth amendment to the United States Constitution: ‘No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .’ Unlike the United States Supreme Court in recent opinions, Warren and Brandeis carefully disassociated the right to privacy both from the right to liberty and from the right to property.” According to Warren and Brandeis, the right to liberty ‘secures extensive civil privileges,’ but not privacy. They also contrasted the right to property, which comprised the individual’s material interests, ‘every form of possession-intangible as well as tangible,’ with the right to privacy’s concern for spiritual interests.’

Privacy is a fundamental right

Privacy International, 2017. (non-profit privacy advocacy group) “What is Privacy” 23 Oct 2017. <https://privacyinternational.org/explainer/56/what-privacy> (Accessed November 6, 2021).

Privacy is a fundamental right, essential to autonomy and the protection of human dignity, serving as the foundation upon which many other human rights are built.

Privacy creates important barriers

Privacy International, 2017. (non-profit privacy advocacy group) “What is Privacy” 23 Oct 2017. <https://privacyinternational.org/explainer/56/what-privacy> (Accessed November 6, 2021).

Privacy enables us to create barriers and manage boundaries to protect ourselves from unwarranted interference in our lives, which allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit who has access to our bodies, places and things, as well as our communications and our information.

Privacy Critical to Preserving Liberty

Privacy International, 2017. (non-profit privacy advocacy group) “What is Privacy” 23 Oct 2017. <https://privacyinternational.org/explainer/56/what-privacy> (Accessed November 6, 2021).

The rules that protect privacy give us the ability to assert our rights in the face of significant power imbalances. As a result, privacy is an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control.

Privacy Necessary for personhood and personality

Dr. Judith DeCew 2018, (B.A. University of Rochester, 1970; M.A. 1976; Ph.D. 1978, University of Massachusetts at Amherst. Senior Research Scholar; Professor Emerita, Dept of Philosophy, Clark Univ.) "Privacy", Stanford Encyclopedia of Philosophy (Spring 2018 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2018/entries/privacy/>. June 11, 2018. (Accessed 6 Nov 2021) (brackets added)

More systematic written discussion of the concept of privacy is often said to begin with the famous essay by Samuel Warren and Louis Brandeis titled “The Right to Privacy” (Warren and Brandeis, 1890). Citing “political, social, and economic changes” and a recognition of “the right to be let alone” they argued that existing law afforded a way to protect the privacy of the individual, and they sought to explain the nature and extent of that protection. Focusing in large part on the press and publicity allowed by recent inventions such as photography and newspapers, but referring as well to violations in other contexts, they emphasized the invasion of privacy brought about by public dissemination of details relating to a person’s private life. Warren and Brandeis felt a variety of existing cases could be protected under a more general right to privacy which would protect the extent to which one’s thoughts, sentiments, and emotions could be shared with others. Urging that they were not attempting to protect the items produced, or intellectual property, but rather the peace of mind attained with such protection, they [Warren and Brandeis] said the right to privacy was based on a principle of “inviolate personality” which was part of a general right of immunity of the person, “the right to one’s personality” (Warren and Brandeis 1890, 195, 215). The privacy principle, they believed, was already part of common law and the protection of one’s home as one’s castle, but new technology made it important to explicitly and separately recognize this protection under the name of privacy. They suggested that limitations of the right could be determined by analogy with the law of slander and libel, and would not prevent publication of information about public officials running for office, for example.

Privacy upholds human dignity

Dr. Judith DeCew 2018, (B.A. University of Rochester, 1970; M.A. 1976; Ph.D. 1978, University of Massachusetts at Amherst. Senior Research Scholar; Professor Emerita, Dept of Philosophy, Clark Univ.) "Privacy", Stanford Encyclopedia of Philosophy (Spring 2018 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2018/entries/privacy/>. June 11, 2018. (Accessed 6 Nov 2021)

In an article written mainly as a defense of Warren and Brandeis’ paper and as a response to William Prosser, Edward J. Bloustein (1964) argues that there is a common thread in the diverse legal cases protecting privacy. According to Bloustein, Warren and Brandeis failed to give a positive description of privacy, however they were correct that there was a single value connecting the privacy interests, a value they called “inviolate personality.” On Bloustein’s view it is possible to give a general theory of individual privacy that reconciles its divergent strands, and “inviolate personality” is the social value protected by privacy. It defines one’s essence as a human being and it includes individual dignity and integrity, personal autonomy and independence. Respect for these values is what grounds and unifies the concept of privacy. Discussing each of Prosser’s four types of privacy rights in turn, Bloustein defends the view that each of these privacy rights is important because it protects against intrusions demeaning to personality and against affronts to human dignity.

PRIVACY IN INTERNATIONAL LAW

Privacy is a universally recognized moral value

Privacy International, 2017. (non-profit privacy advocacy group) “What is Privacy” 23 Oct 2017. <https://privacyinternational.org/explainer/56/what-privacy> (Accessed November 6, 2021).

Privacy is a qualified, fundamental human right. The right to privacy is articulated in all of the major international and regional human rights instruments, including:  
United Nations Declaration of Human Rights (UDHR) 1948, Article 12: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”   
International Covenant on Civil and Political Rights (ICCPR) 1966, Article 17: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.” The right to privacy is also included in:  
Article 14 of the United Nations Convention on Migrant Workers;  
Article 16 of the UN Convention on the Rights of the Child;  
Article 10 of the African Charter on the Rights and Welfare of the Child;  
Article 4 of the African Union Principles on Freedom of Expression (the right of access to information);  
Article 11 of the American Convention on Human Rights;  
Article 5 of the American Declaration of the Rights and Duties of Man,  
Articles 16 and 21 of the Arab Charter on Human Rights;  
Article 21 of the ASEAN Human Rights Declaration; and  
Article 8 of the European Convention on Human Rights.  
Over 130 countries have constitutional statements regarding the protection of privacy, in every region of the world.

PRIVACY IN MEDICAL INFORMATION

Medical privacy is widely acknowledged and protected under federal law

U.S. Department of Health & Human Services Office for Civil Rights, “Your Rights Under HIPAA” <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>. Last reviewed on January 31, 2020. (Accessed 15 Jan 2022)

“Most of us believe that our medical and other health information is private and should be protected, and we want to know who has this information. The Privacy Rule, a Federal law, gives you rights over your health information and sets rules and limits on who can look at and receive your health information. The Privacy Rule applies to all forms of individuals' protected health information, whether electronic, written, or oral. The Security Rule is a Federal law that requires security for health information in electronic form.”

Moral duty to protect medical privacy

Dr. Rosalind Croucher, 2011 (President, Australian Law Reform Commission; Professor of Law, Macquarie University. PhD from University of New South Wales in the field of legal history. 25 years in university teaching and management, former Acting Dean of Law at Sydney University, Australia) “Australian Privacy Law & Practice – Key Recommendations for Health Information Privacy Reform” September 28, 2011. <https://www.alrc.gov.au/news/australian-privacy-law-practice-key-recommendations-for-health-information-privacy-reform/>. (Accessed November 3, 2021)

“Personal health information was traditionally protected by the ethical and legal duties of confidentiality. Such duties are owed by health service providers—such as doctors, dentists, nurses, physiotherapists and pharmacists. The duties prevent the use of personal health information for a purpose that is inconsistent with the purpose for which the information was provided.”

Privacy is fundamental to healthcare

Dr. Rosalind Croucher, 2011 (President, Australian Law Reform Commission; Professor of Law, Macquarie University. PhD from University of New South Wales in the field of legal history. 25 years in university teaching and management, former Acting Dean of Law at Sydney University, Australia) “Australian Privacy Law & Practice – Key Recommendations for Health Information Privacy Reform” September 28, 2011. <https://www.alrc.gov.au/news/australian-privacy-law-practice-key-recommendations-for-health-information-privacy-reform/>. (Accessed November 3, 2021)

“Privacy is a fundamental principle underpinning quality health care. Without an assurance that personal health information will remain private, people may not seek the health care they need which may in turn increase the risks to their own health and the health of others. Indeed consumers regard health information as different to other types of information and consider it to be deeply personal.

SUPREME COURT CASES / CONSTITUTIONAL ANALYSIS

Brandeis: Right to be free from intrusion on privacy is essential and is protected by the 4th Amendment

Supreme Court Justice Louis Brandies 1928. Dissent in the case of "Olmstead v. United States, 277 U.S. 438.” 4 June 1928. Library of Congress. <https://tile.loc.gov/storage-services/service/ll/usrep/usrep277/usrep277438/usrep277438.pdf> (Accessed November 2, 2021)

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Stewart: Fourth Amendment isn’t a general guarantee of privacy, but that right still exists

Supreme Court Justice Potter Stewart 1967. Opinion of the Court in the case of Katz v. United States, 389 U.S. 347.” 1967. Library of Congress. <https://www.loc.gov/item/usrep389347/> Page 350 (Accessed 2 Nov 2021)

In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy."That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy his right to be let alone by other people '-is, like the protection of his property and of his very life, left largely to the law of the individual States."

Compelled disclosure of information requires “exacting scrutiny” – not just some government interest

Lee E. Goodman 2019 (former Chairman and Commissioner of the Federal Election Commission (FEC); former legal counsel and policy advisor to the Governor of Virginia) “The First Amendment Right to Political Privacy, Chapter 7 – In Need of Judicial Clarity” Privacy in Focus, 2019. Available from Wiley Law. <https://www.wiley.law/newsletter-Apr_2019_PIF-The-First-Amendment-Right-to-Political-Privacy-Chapter-7-In-Need-of-Judicial-Clarity>. (Accessed November 18, 2020.) (brackets in original)

The Court consistently has used the term “exacting scrutiny” to analyze compelled disclosure laws. In Davis v. Federal Election Commission, a decision written by Justice Alito, the Court reaffirmed an “exacting scrutiny” standard described as follows:  
“[W]e have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals’ political speech. To survive this scrutiny, significant encroachments cannot be justified by a mere showing of some legitimate governmental interest. Instead, there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny. That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”

Claim of “transparency” doesn’t outweigh privacy rights

**Note: this is an A/T one of the “GEN: Privacy Doesn’t Matter” Responses to using the Compelling Interest Test.**

Lee E. Goodman 2019 (former Chairman and Commissioner of the Federal Election Commission (FEC); former legal counsel and policy advisor to the Governor of Virginia) “The First Amendment Right to Political Privacy, Chapter 7 – In Need of Judicial Clarity” Privacy in Focus, 2019. Available from Wiley Law. <https://www.wiley.law/newsletter-Apr_2019_PIF-The-First-Amendment-Right-to-Political-Privacy-Chapter-7-In-Need-of-Judicial-Clarity>. (Accessed November 18, 2020.)

First, the most problematic is the “informational interest.” This interest is problematic because its logic, when placed under a microscope, often boils down to information for the sake of information, or exposure for exposure’s sake, which is circular logic. Advocates of greater exposure and lawmakers increasingly invoke this generic interest to justify virtually all compulsory disclosure. It is also a boundless justification. It can be invoked to justify public exposure in almost every context because it has no logical stopping point. It is often trumpeted under the siren sounding term “transparency,” or the pablum “transparency is good,” which may sound like a constructive public policy, but constitutionally it amounts to nothing more than elevation of the government’s policy preference for exposure over the citizen’s First Amendment right to non-exposure. It can be an interest that swallows the right. The Court should place clear metes and bounds on the “informational interest” and require that the information made public actually advances a specific ulterior interest such as the prevention of quid pro quo corruption or election integrity.

Claim of “law enforcement needs it” doesn’t outweigh privacy rights

Lee E. Goodman 2019 (former Chairman and Commissioner of the Federal Election Commission (FEC); former legal counsel and policy advisor to the Governor of Virginia) “The First Amendment Right to Political Privacy, Chapter 7 – In Need of Judicial Clarity” Privacy in Focus, 2019. Available from Wiley Law. <https://www.wiley.law/newsletter-Apr_2019_PIF-The-First-Amendment-Right-to-Political-Privacy-Chapter-7-In-Need-of-Judicial-Clarity>. (Accessed November 18, 2020.)

Second, the “law enforcement” interest is problematic because it often authorizes the government to collect information about citizens’ political activities not for the purpose of enforcing a specific law with respect to any suspected unlawful conduct, but for the purpose of collecting information about wholly lawful and virtuous democratic activity in order to determine if the information might yield the rare unlawful activity. The government has to collect a far broader range of private information than is necessary for a case-specific investigation in order to build a haystack in order to look for a needle in that haystack. It often resembles a fishing expedition. The collection effort can be invasive and voyeuristic, especially given that government officials are partisan creatures. And the information can be abused or misused.