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# Privacy, Interests, and Inalienable Rights

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**Abstract:** Some rights are so important for human autonomy and well-being that many scholars insist they should not be waived, traded, or abandoned. Privacy is a recent addition to this list. At the other end of the spectrum is the belief that privacy is a mere unimportant interest or preference. This paper defends a middle path between viewing privacy as an inalienable, non-waivable, non-transferrable right and the view of privacy as a mere subjective interest. First, an account of privacy is offered that clarifies the concept and demonstrates how privacy is directly related to human health and well-being. Second, along with considering and rejecting several accounts for why privacy might be considered an inalienable right, an argument is offered for why it is morally permissible to waive, transfer, abandon, or alienate privacy.

**Keywords:** privacy, interests, inalienable rights, waiving privacy rights

Some rights are so important for human autonomy and well-being that many scholars insist they should not be waived, traded, or abandoned. While there are many lists of fundamental, basic, or inalienable rights, most of these lists include the right to life and liberty. Privacy is a recent addition (see Allen 2011, 2015; Talbott 2010). Life and liberty, it is argued, should be not be traded, waived, or abandoned because of the resulting profound impact on self-government and individual autonomy.<sup>1</sup> In allowing such a transfer, we would be sanctioning an individual's ability to voluntarily give up all future autonomy and liberty claims. In a way, after such a transfer, the individual in question would be more like someone else's property than a person with moral standing.

Note the difference between transferring or waiving liberty and life rights and forfeiting those rights. Clearly we don't have as much of a problem in cases of forfeit. If I were to attack a police officer, for example, no one would object if I were restrained for questioning. In this case, I would have forfeited my liberty

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<sup>1</sup> See Satz (2010, p. 171). While Satz does not use the language of 'inalienable rights' she is providing an argument for why individuals should not be morally or legally permitted to waive, transfer, abandon, or sell specific rights fundamental for equal citizenship.

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rights for a limited time by committing a criminal and immoral act. In extreme cases, the immoral and criminal behavior of an individual may lead to forfeiture of all future liberty and life rights.

Viewing privacy rights as inalienable and non-waivable, as we do with life and liberty rights, would mean that we should as individuals and as a society, take a different stand both legally and morally. Perhaps we should morally admonish those who are too transparent or open with personal information. To nudge individuals down the correct moral path, we could legally prohibit specific sharing behaviors while incentivizing other privacy promoting practices. For example, the US *Federal Educational Records Privacy Act (FERPA)* prohibits improperly disclosing student grade information even if such a disclosure is verbally requested by the student.<sup>2</sup>

At the other end of the spectrum is the view that privacy is a mere unimportant interest or preference.<sup>3</sup> Individuals don't recognize the value of privacy and regularly trade privacy for access or use of websites, store loyalty cards, smartphones, or software. Individuals 'suffer from *privacy myopia*: they will sell their data too often and too cheaply' (Froomkin 2000, p. 1502). According to this view, there is nothing morally important about waiving, alienating, or abandoning privacy because privacy is a bit like someone's preference for chocolate ice cream over vanilla ice cream. Some people prefer chocolate ice cream while others prefer vanilla. Nothing of moral significance hangs on these mere preferences. Similarly, some individuals enjoy privacy while others enjoy transparency or openness. Moreover, it is perfectly appropriate that individual preferences change over time.

In essence, I argue for a middle path between viewing privacy as an inalienable, non-waivable, non-transferrable right and the view of privacy as a mere subjective interest that is largely unrelated to human health and well-being. First, I will sketch a position counter to the view that privacy is, and should be,

<sup>2</sup> US Department of Education, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf> (accessed on 27 June, 2018).

<sup>3</sup> For example, see Thompson, <https://stratichery.com/2014/privacy-dead/> (accessed on 27 June, 2018) and Davidson, <http://time.com/money/2902134/you-say-you-d-give-up-online-convenience-for-privacy-but-youre-lying/> (accessed on 27 June, 2018). This view of privacy is, in part, codified in *Katz v. United States*, 389 U.S. 347 (1967). In the *Katz* decision Justice Harlan established a two-part test for what counts as a reasonable expectation of privacy. 1) 'an individual has exhibited an actual (subjective) expectation of privacy' and 2) 'the expectation is one that society is prepared to recognize as reasonable.' See also Prosser (1960). Prosser identifies three interests protected by privacy: avoidance of emotional distress, reputation and emotional tranquility, and property interests. See also Bennett and Raab (2006); Nakada and Tamura (2005); Posner (2008). Note that some scholars use the word 'interest' in a more 'objective' way. See Marmor (1997); Raz (1984). Marmor, for example, directly links interests with well-being' (1997, p. 3).

understood as a mere unimportant preference, interest, or concern. An account of privacy will be offered that hopefully clarifies the concept, but also connects the view to human health and well-being. Against the view that privacy is unimportant and uninteresting, I will argue that we have clear reasons to carve up the privacy space in a particular way, and that once completed, there are compelling health-based or flourishing-based reasons to care about this conception of privacy.

Next, after sketching what is known as the ‘traditional view’ of rights alienation, relinquishing, waiving, forfeit, and abandonment, along with brief remarks about the distinction between specific and general rights, I will present the case for why privacy may be considered an inalienable right.<sup>4</sup> On this line of argument, privacy is essential for human health and well-being and thus, like the right to life, should be viewed as inalienable and non-waivable.

Care is needed to distinguish between three different sorts of claims.<sup>5</sup> First, we could be considering privacy-based moral duties to the self. For example, Anita Allen has suggested that we each have self-regarding moral duties to not disclose specific sorts of information. I will have relatively little to say about this issue. We could be considering if privacy is an inalienable right, making it wrong to disclose specific sorts of information or access to a location or a body. Moreover, even if access is unjustifiably granted, it would be wrong for others to use the information, location, or body in question. For example, someone could argue that modesty requires individuals not disclose nude photographs of themselves, and even if such disclosures occur, it would be wrong for others to access or use these photos.<sup>6</sup> I will argue that privacy is not an inalienable right of this sort.

Finally, there is privacy paternalism. On this view, there should be laws that make it illegal for individuals to disclose private information. There should also be laws that prohibit follow-on uses of illegally disclosed information by others. Privacy paternalists, for example, might argue that students should not be legally permitted to allow grade information to be sent via email. Further, even if this consent was given, a teacher sending grade information over email would be illegal. After considering several arguments in favor of privacy paternalism, I will argue against this view.<sup>7</sup>

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4 For an analysis of the many issues with rights, alienation, waiving, and forfeiting, see Allen (2015); Brown (1955); Ellerman (2010); Meyers (1985); McConnell (1984); Nozick (1974, ch. 2) Parent (1980); Radin (1987); Simmons (1983); Stell (1979); Thompson (1986); Van de Veer (1980).

5 Thanks to an anonymous reviewer for suggesting this clarification.

6 See Allen (2015). See also Zwick and Dholakia's (2001) discussion of *GDPR*; UN General Assembly, <http://www.un.org/en/universal-declaration-human-rights/> (accessed on 15th March, 2018).

7 Assumed in my analysis is an individualist and right-based approach to paternalism. Other starting points, like egalitarianism, may provide a different analysis. For example, whereas

# 1 Privacy: its meaning and value

While privacy has been defined in numerous ways since Brandeis and Warren's seminal article in 1890, I favor what is known as a control-based definition.<sup>8</sup> A right to privacy is a right to control access to and uses of physical places or locations, as well as private or sensitive personal information. First consider physical privacy. When I allow someone to touch my knee, for example a doctor examining my latest hockey injury, I am allowing access to my knee for a limited time, a particular purpose, and to a specific individual. Note that allowing my knee to be examined by a doctor is not also to waive, abandon, forfeit, or relinquish all future claims to control access or uses of my knee. Allowing a doctor to examine my knee during an appointment is not also to allow this doctor, or other doctors or anyone for that matter, to examine my knee whenever they wish. Note that my capacity to defend this 'boundary crossing' is irrelevant to the existence of the right in question. Lots of individuals may be able to overpower me and examine my knee whenever they desire. Nevertheless, if they were to do so, these individuals would violate my right to privacy.

Informational privacy works in similar fashion. Imagine I disclose some sensitive and private information to my doctor as part of an examination. In granting access to some bit of personal information, I do not also automatically waive, abandon, forfeit, or relinquish all future claims to control this information. Again, my capacity to control access is irrelevant to the right in question. Lots of individuals may be able to deploy sophisticated surveillance technologies that defeat my attempts at concealment. Nevertheless, an inability to protect certain sorts of information from being accessed by others is irrelevant to the existence of the right in question.<sup>9</sup>

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'luck egalitarians' like Arneson and Roemer may allow for robust state paternalism, Anderson's 'democratic egalitarianism' seems to reject strong paternalism. At least Anderson finds room for privacy. See Anderson (1999); Arneson (1997); Roemer (1993).

**8** Parts of this section draw from previously published material. See Moore (2003); Moore (2008); Moore (2003, chs. 2, 3). For further analysis of the major accounts of privacy that have been offered, see Allen (2011); Inness (1992); Nissenbaum (2010); Rössler (2005); Wagner DeCew (1997); Westin (1968).

**9** The *European Union Data Directive* provides a workable definition of 'personal information'. Personal information is 'any information relating to an identified or identifiable natural person ... one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity' (*Directive 95/46/EC of the European Parliament and of the Council, 1995, OJ L 281 0031–0050*). For example, information about a specific individual's sexual orientation, medical condition, height, weight, income, home address, phone number,

A right to informational privacy on this account affords the right-holder the moral authority to allow access to and uses of personal information regardless of how this information is instantiated. Information about my knee may be codified and saved in a medical record database, written on a medical chart, or chiseled into stone. Whatever form the information takes, however it is instantiated or expressed, the right to privacy would hold nonetheless. More importantly, even if someone has justifiably accessed sensitive personal information about another person, it does not follow that any use of this information is permitted. Similarly, in giving you access to my copyrighted poem, I do not also transfer joint ownership rights to you.

While it is hardly surprising that a right to privacy would be valuable for a rights-holder there is much more to be said about the moral value of privacy. The moral authority and capacity to control access to and uses of specific locations and personal information is important for human flourishing and well-being.<sup>10</sup> There are numerous empirical studies that support this claim.<sup>11</sup> Household overcrowding and overcrowding in prisons has been linked to violence and misconduct,<sup>12</sup> depression (Cox et al. 1984), suicide (McCain et al. 1981), psychological disorders (Paulus et al. 1978; Severy 1979), and recidivism (Farrington and Nuttall 1980). Children who are covertly monitored, subjected to onerous parental questioning, controlled with complex rule (you have to be home by 7 p.m.; no playing with this or that kid; etc.), have the same rate of problematic behavior as kids who are not monitored at all (Newell et al. 2015). Problematic behavior or ‘poor adjustment’, includes depression, violent outbursts, and risky sexual behavior. This behavior increases with the loss of privacy and control (Kerr and Stattin 2000; Milnitsky-Sapiro et al. 2006). However, where there is two-way communication between parents and children, when all are actively participating, including the voluntary sharing of information, there is an associated drop in problematic behavior.

Barry Schwartz provides a compelling case for why privacy is a cultural universal.<sup>13</sup> According to Schwartz, privacy is group preserving, maintains status

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occupation, and voting history would be considered personal information on this account. As with ‘privacy’, defining the term ‘information’ is difficult. See for example Buckland (1991).

**10** For a more complete defense of this claim see Moore (2003); Moore (2010, chs. 2, 3).

**11** Mumford (1961), as cited in Fuller et al. (1996). See also Conley (2001); Paulus, McCain, and Cox (1978); Ruback and Carr (1984).

**12** Gaes and McGuire (1985); Harer and Steffensmeier (1996); Megargee (1977); Porporino and Dudley (1984); Wooldredge, Griffin, and Pratt (2001). See also Lahm (2008).

**13** Schwartz (1968). This view is supported by Roberts and Gregor (1971). See also Lever (2012), p. 85, as cited in Allen (2015). See also Rössler (2005); Rachels (1975).

divisions, allows for deviation, and sustains social establishments. While the norms surrounding coming together and leave-taking are culturally dependent the need is not. The kinds of privacy rules found in different cultures will be dependent on a host of variables, including climate, religion, technological advancement, and political arrangements (Spiro 1971). Nevertheless, it is important to note that relativism about the forms of privacy — the rules of coming together and leave-taking — does not undermine the claim regarding the objective need for these rules. There is strong evidence that the ability to control access to our bodies, capacities, and powers, and to sensitive personal information, is an essential part of human flourishing or well-being.<sup>14</sup>

A critic may wonder why we should adopt my preferred account of privacy rather than others that have been advanced. In response to this worry I will offer four considerations. First, the conception sketched here conforms, more or less, with modern usage. In defining privacy as a right to control access to and uses of bodies, locations, and personal information doing violence to the language is avoided. My preferred definition of privacy does not fundamentally alter common understanding or use. Second, the definition offered is conceptually clear and does not lead to further ambiguities or trade on muddled definitions of other contested concepts (see Moore 2008, 2010, chs. 2,3). For example, the Warren and Brandeis definition of privacy as ‘the right to be let alone’ is both too narrow and too broad.<sup>15</sup> Covert NSA surveillance may technically ‘leave us alone,’ and inadvertently brushing up against someone while taking a seat on a bus may not. Third, the account offered places privacy squarely within human well-being and flourishing. Admittedly, this last point will not soothe the subjectivist about privacy, in fact it may be viewed as begging the question. Assuming the subjectivist about privacy is not a subjectivist *all the way down* (holding there are no objective values) and finds the proposed definition appealing, then they will be driven away from this subjectivity by the empirical data.<sup>16</sup> A perfectly coherent definition of privacy that

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**14** More evidence is found in the literature on workplace monitoring: ‘... the use of monitoring for control purposes will have dysfunctional consequences for both employees (lower job satisfaction) and the organization (higher turnover)’ (Chalykoff and Kochan 1989, p. 826). See also Kidwell and Bennett (1994); Posey et al. (2011); Irving, Higgins, and Safayeni (1986); Lund (1992). Whereas Irving et al. found that electronic monitoring caused employees to report higher stress levels, Lund found that such policies caused anxiety, anger, depression, and a perceived loss of dignity. See also Holt, Lang, and Sutton (2017); Maltby (1999); Shepard and Clifton (1998).

**15** Warren and Brandeis followed Judge Thomas Cooley in this definition. See Cooley (1888); Warren and Brandeis (1890).

**16** Critiquing subjectivist accounts of value is beyond the scope of this paper. See Moore (2004).

accords faultlessly with some group's intuitions or common usage may be totally useless. In the most general terms, we are asking 'what this or that way of classifying privacy is good for? Why carve up the world in this way rather than some other way'. Privacy is important for human flourishing. If so, we have a positive reason for carving up the world in the way indicated and we each have compelling reasons to care about privacy. Finally, viewing privacy as a mere interest to be *traded* for other interests like security or liberty will both fail to command our reflective loyalties, and provide little grounding for the view that privacy rights are inalienable.

If correct, the conception of privacy under consideration provides a reasonable counterpoint to viewing privacy as a mere interest or preference.<sup>17</sup> To put the point another way, insisting on a preference-based definition of privacy would leave us little reason to defend privacy against other, more important, values like security. If preferences for privacy change like preferences for red wine or spicy food, then it would be hard to argue for why society should care about privacy. But we do care. The rationale for this concern is, in my view, that we understand that privacy has value independent of mere preference or interest.

## 2 Alienation, relinquishing, waiving, transfer, forfeit, general, and special rights

While there are different ways to carve up the 'rights landscape' in terms of alienation, relinquishing, waiving, transferring, forfeit, and general versus special rights, for the purposes of this discussion I will adopt what is generally called the 'traditional view'.<sup>18</sup> Consider Locke's (1689) view when he writes,

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<sup>17</sup> Ryan Calo's (2011, pp. 1142ff.) account of subjective privacy harms falls prey to similar objections. For example, when Calo writes that a subjective privacy harm is '... the perception of unwanted observation ... the perception of loss of control that results in fear or discomfort ... feelings of violation ...' we are squarely in the area of subjective preferences or interests. To see the deficiencies of such a view, consider someone at either extreme ... someone who simply didn't care about such observations or someone who cares too much. Imagine someone who has been manipulated by society to care too little or too much. Without some sort of objectifying 'reasonable person' standard, we are left with arbitrary or specious privacy 'harms'. For an analysis and critique of such views see Moore (2004); Moore (2010, chs. 2, 3).

<sup>18</sup> See Allen (2015); Brown (1955); Ellerman (2010); Meyers (1985); McConnell (1984); Nozick (1974, ch. 2); Parent (1980); Radin (1987); Simmons (1983); Stell (1979); Thomson (1986); Van DeVeer (1980).



And thus it is that every man in the state of Nature has a power to kill a murderer, both to deter others from doing the like injury (which no reparation can compensate) by the example of the punishment that attends it from everybody, and also to secure men from the attempts of a criminal who, having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security. (ch. 2, sec. 11)

Here it seems that Locke is claiming that a right to life, presumably an inalienable right, can be forfeited by wrongdoing. Providing some clarity to Locke's view, A. John Simmons (1983) explicates three ways a right could be lost. Alienation refers to a voluntary transfer, forfeiture refers to the loss by wrongdoing, and prescription refers to the loss of a right by annulment. Inalienable rights cannot be transferred, non-forfeitable rights cannot be forfeited, and imprescriptible rights cannot be annulled. It is important to remember that being *lost* is different from being *overridden*. This is just to say that inalienable rights are not necessarily absolute rights.

According to the traditional view certain rights are inalienable and yet can be forfeited. An inalienable right is one that cannot be transferred or waived by the right holder. Again, consider the right to life. By engaging in egregious immoral behavior, a right holder may lose or forfeit her right to life. For example, if we view informational privacy as inalienable, the pedophile could not justifiably transfer personal information about himself to others. This information could, however, be forfeited so that others could access and transfer because of prior wrongdoing.

In contrast to an inalienable right, alienable rights may be justifiably waived, transferred, sold, or relinquished voluntarily by the right holder. Also, note the distinction between forfeiting, abandoning, and waiving a right. Unlike forfeit and abandonment, when a right is waived it is set aside (typically by the right holder) so that actions that would be immoral or unjust, are temporarily permitted. Waived rights are more like intended voluntary suspensions. For example, my right to control access to and uses of my body may be waived when I visit the doctor. In this case, I have not forfeited, abandoned, or relinquished body access and control rights. This feature of waiving privacy rights will be central to the argument about privacy offered below.

The difference between forfeiting and abandoning/relinquishing a right is one of desire or intention. When I abandon a right, I do so with desire and intention. For example, when I abandon my guitar I am absolving all others of having to refrain from interfering with my moral claims of access and control. My abandonment of rights *in rem* (holding against the world) is typically a



voluntary intentional act. Forfeiting a right, on the other hand, is not desired. When a right is forfeited because of wrongdoing the claims *in rem* may vanish, but this is not desired by the former right holder. For example, a convicted pedophile may not wish that others know of his past transgressions – in this case, there may be no ‘right to be forgotten’ (see Siry 2015).

Finally, there is an important distinction to be highlighted between specific and general rights. General rights afford individuals certain moral powers to do or allow a range of things. My general right to acquire property or enter into contracts affords me the moral authority to engage in these activities at my discretion.<sup>19</sup> I may never enter into a contract or acquire any property and yet still retain the general right to do so. Contrast this with a specific right, such as a property right over a particular Chevy Suburban. I may alienate, waive, abandon, or forfeit my specific property rights to the Suburban and yet still retain the general right to acquire or hold property.

To alienate a general right would mean transferring the *moral authority* to engage in the general practice the right protects. For example, the general right to make contracts affords individuals the moral authority to bind each other in various ways. Assuming there are no specific contracts in place, when an individual alienates her general right to make contracts she would transfer the authority to bind herself in various ways to someone else.

Forfeiting a general right, like the right to make contracts, would mean losing the right in question because of immoral or illegal activity. For example, because of prior behavior we may deny the recidivistic criminal the moral authority to enter into any morally or legally binding contracts. Alternatively, prior behavior may void the moral or legal force of a specific contract and yet leave the general right in place.

Imagine that Ginger realizes that she is both a terrible negotiator of contracts and weak-willed. Ginger knows that if she merely gives Fred the temporary authority to negotiate a specific contract, she will retract the authority at the first chance and continue with her past practice of binding herself to bad contracts. Instead, imagine that Ginger transfers her general right to make contracts to Fred. In this latter case, Ginger may say ‘I agree’ and even sign a contract, but none of it would have moral force. As with a young child who has signed away the house and all the money in the savings account, the act would have no moral standing because the child lacks the moral authority to enter into morally binding contracts or agreements.

To waive a general right to make contracts would mean to temporarily suspend one’s moral authority to bind oneself in this way. Perhaps knowing

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<sup>19</sup> For discussion of special and general rights, see Hart (1955).

that the medication I am using will cloud my judgement, imagine that I suspend my general right to make contracts for a specific time. The example used before was waiving rights to control access to one's body during a doctor's visit. Typically, it would be wrong of someone to examine your knee without consent. To completely waive the general right to control access to one's body would mean temporarily allowing anyone permission to access your body. Normally, when we waive a general access right to our bodies we do it for limited times, specific purposes, and only allow access to particular individuals (like doctors etc.).

Abandonment of a general right is simply to waive the right permanently. For example, suppose as a condition for joining a commune, individuals had to abandon, once and for all time, the moral authority to make contracts or to own property. If I abandoned my general right to make contracts, then I could not justifiably bind myself in various proscribed ways. To abandon a specific right would be to set aside the relevant specific entitlements or claims. For example, if I have contracted with you that a \$50 payment will get me 10 car washes, after making the payment I may abandon the contract and not require the washings. Note that unlike waiving a right, there is no temporal component to specific or general rights abandonment.

Obviously if someone lacks the moral authority to engage in a general practice, like making and binding oneself and others via contracts, then she will also lack the moral authority to make new associated specific rights. For example, if Sarah does not have the moral authority to make contracts in general, then she cannot contract to buy my guitar. With this overview of rights alienation, relinquishing, waiving, transferring, forfeit, along with the distinction general versus special rights in place, I will now consider the dimensions, scope, and strength of privacy rights. If privacy rights are like the general rights of life and autonomy, then there may be compelling reasons to view all these rights as inalienable. On the other hand, if privacy rights are similar to specific property rights, then we may have little problem with individuals waiving, transferring, alienating, or abandoning them.

### 3 Privacy, inalienable rights, and paternalism

As noted in the opening, I argue for a middle path between viewing privacy as a mere subjective interest that is largely unrelated to human health and well-being or viewing privacy as an inalienable, non-waivable, or non-transferrable right. I am not arguing against the view that we each have self-regarding moral duties

not to disclose certain sorts of information or access to specific locations. Rather, I will argue against the view that privacy is an inalienable right and that government mandated privacy paternalism is justified.

As a general right, the right to privacy would consist of the moral authority to have control over locations and private information. For example, to transfer a general right to privacy I would transfer the moral authority to control access to and uses of my body or my private information to others. In such a case, I would no longer have the moral authority to trade away access to a specific private fact, for example, in return for access to a web site.

While I have, in principle, no objection to alienating, relinquishing, waiving, transferring, or forfeiting a *general* right to privacy, I don't think this is the issue, or level, typically raised by those who would argue for moral and legal obligations to protect privacy. We don't typically see privacy scholars, such as Anita Allen (2011, 2015) arguing for moral and legal obligations protecting a *general* privacy. Moreover, while the inalienability of privacy is assumed by the *Declaration of Human Rights* and the *General Data Protection Regulation (GDPR)*, the concern is almost always focused on specific privacy rights.<sup>20</sup> The arguments in favor of privacy paternalism are offered with the goal of protecting the general and inalienable right to privacy. [Privacy](#) paternalism in support of privacy inalienability would thus protect individuals and promote various social goals (see Biasetti 2015; Steiner 2013). In this section, I will explicate and critique five of the most prominent arguments for privacy paternalism. At the end of this section I will return to the issue of alienating, relinquishing, waiving, transferring, or forfeiting a *general* right to privacy.

### 3.1 The prudential and consequentialist argument for privacy paternalism

According to this argument, individuals have a moral obligation to not alienate, relinquish, waive, transfer, or forfeit private information or access to a specific location because to do so is risky and irrational. Allen (2015, p. 25) sketches this argument writing, '[o]ne ought to limit disclosures of information about oneself for utility reasons, pertaining to one's reputation and future opportunity ... and

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<sup>20</sup> See UN General Assembly, <http://www.un.org/en/universal-declaration-human-rights/> (accessed on 15th March, 2018); European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX%3A32016R0679> (accessed on 27 June, 2018).

self-care ... ' This view is consequentialist in that it highlights harms and risks of harms that might be suffered because of allowing access to private places and information, but it is not utilitarian. There is no requirement to maximize overall utility for everyone affected. Individuals have a moral and prudential obligation to refrain from practices that lead to substantial amount of suffering, non-flourishing, and risk of suffering. Like being a heavy smoker or eating too much red meat, alienating, relinquishing, waiving, transferring, or forfeiting private information or access to bodies or locations causes increased health risks and impacts quality of life due to risks of being manipulated or controlled. It follows that we each have moral and prudential obligations to refrain from giving away too much privacy.

In terms of narrow self-interest, behavior that substantially increases risks of harm, injury, illness, manipulation by others, and the like, is irrational. If we are to behave rationally and if being rational is understood as a kind of human virtue, perhaps one of the highest virtues, then it is not outlandish to defend moral and prudential obligations to refrain from specific actions. At a certain point for example, smoking too many cigarettes is imprudent and irrational. In fact, one might plausibly maintain that engaging in any behavior to an extreme is imprudent, irrational, and perhaps, immoral.

Consider a different case. When telemarketers intrude into the sanctuary of our homes, '[t]he severity of the problem of interrupted lives [i]s sufficiently great in my view to warrant a categorical ban on telemarketing or an opt-in "calls permitted" registry' (Allen 2011, p. 37). Banning such telemarketing is justified because some individuals don't realize the importance of privacy. Moreover, this sort of intrusion interferes with essential freedoms.

The privacy paternalist would argue that while it is clear that disclosing too much personal information is unwise, imprudent, and irrational, it is also clear that individuals can't help but make these mistakes. As already noted, individuals don't much value privacy and they trade long-term private information, with the associated risks of being manipulated or controlled, for the immediacy of access to some website, social platform, or smart-phone. There is even some evidence that 'screen addiction' is altering the way we think, and not for the better (Cavanaugh et al. 2016). To push individuals, corporations, and state agencies to make better choices related to privacy, laws and legislation should be deployed paternalistically.

There are numerous ways privacy paternalism could be enacted. For example, upon checking in to a hotel, we might inform the patron that he or she should not disclose certain sorts of personal information to the hotel clerk. Moreover, if this information is disclosed we might fine hotel ownership for storing, using, or selling this information.

### 3.2 The utilitarian argument for privacy paternalism

According to this argument strand, we ought to do that act or adopt rules that allow us to maximize overall net utility. While there are many variations of the utilitarian standard, the basic principle is that moral obligations arise from the consequences of some act, rule, or institution on everyone affected. Setting aside extreme versions of deontology, it does seem plausible to maintain that goodness of consequences matters when determining one's moral obligations. The empirical premise of this argument would assert that allowing individuals to alienate, relinquish, waive, or transfer rights to control access to or uses of bodies, locations, or private information leads to bad consequences when compared to prohibiting such activity.

Some authors contend that human beings are so irrational and bad at making decisions, there is nothing wrong with benevolent paternalism. For example, Sarah Conly (2013) writes,

I recommend that we turn to a better approach, which is simply to save people from themselves by making certain courses of action illegal. We should, for example, ban cigarettes; ban trans-fats; require restaurants to reduce portion sizes to less elephantine dimensions; increase required savings, and control how much debt individuals can run up. (p. 1)

Simply put, when we allow individuals this freedom they tend to mess things up and this leads to overall less utility for everyone. 'The truth is that we don't reason very well, and in many cases there is no justification for leaving us to struggle with our own inabilities and to suffer the consequences' (Conly 2013, p. 1). It would follow that we each have a moral obligation to set up institutions that prohibit individuals from oversharing private information.

### 3.3 The Kantian argument for privacy paternalism

Rather than argue that individual autonomy is not all that important, as Sarah Conly might, others argue that privacy paternalism is required by autonomy. Allen (2015, p. 27) voices this argument writing that we each have duties of self-care and respect and 'duties to act so as to promote one's rational interests in safety, security, freedom, and opportunity and second, duties to strive to be the kind of person who acts with self-regard, dignity, and integrity'.<sup>21</sup> On this view,

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<sup>21</sup> Note, Allen's argument is nuanced and contains numerous duty-based, consequences-based, and virtue-based reasons for self-regarding and other-regarding obligations to protect privacy. Pulling out the strands as I have done may not accurately capture Allen's overall view.

individuals have a moral duty to protect their own privacy and the privacy of others because of the way privacy is essential for freedom, dignity, and autonomy. In a similar way, the Kantian might argue against drug use. Using drugs undermines ‘rationality and autonomy ... it truncate[s] future options or opportunities of the sort that foster autonomy and freedom’ (Allen 2015, p. 27). On this view we each have non-consequentialist self-regarding duties to act in a way that promotes or maintains our autonomy and rational faculties. We owe this to our current selves and to our future selves. Perhaps the best way to promote the dignity, autonomy, and self-worth of individuals is to paternalistically limit the choices, goals, and projects of otherwise competent and peaceful adults. Laws and legislation protect the inalienability of privacy by prohibiting specific autonomy-undermining disclosures and by prohibiting downstream use of this information.

### 3.4 Noxious privacy markets

In *Why Some Things Should not be for Sale: The Moral Limits of Markets* Debra Satz (2010) argues that we should prohibit or regulate what she calls ‘noxious markets’. While Debra Satz does not examine privacy *per se*, she does consider if individuals should be morally or legally permitted to waive, transfer, abandon, or sell specific rights fundamental for equal citizenship. Satz is worried about markets in women’s reproductive labor, women’s sexual labor, child labor, voluntary slavery, and kidney sales or transfers. Adapting her argument to privacy markets, something she did not attempt, is relatively straightforward.

According to Satz, a market is noxious when it causes individuals to be vulnerable because of economic desperation, compromises agency, imposes severe harm to individuals, or undermines equal citizenship. Three examples should suffice to illustrate this view. Allowing individuals to sell themselves into slavery runs afoul of each of these conditions. A more mundane case is where individuals trade security for cheaper transportation. For example, consider if those desiring a cheaper ticket on the *Titanic* – one without access to lifeboats – could purchase such discounted fares (Satz 2010, pp. 105ff). Satz (2010, p. 106) would deny such economic activity because ‘... there are instances in which inequalities in some goods affront the idea that people are the equals of their neighbors: they reek of caste like privileges’. Finally, in an example that comes close to privacy issues, Satz (2010, p. 207) considers how credit markets are noxious because they sometimes weaken the agency of borrowers.

Similar considerations may be extended to privacy markets. Economic desperation may cause some individuals to give up too much privacy causing harm

to themselves and their future selves while at the same time undermining agency and equal citizenship. Consider how giving too much private information or requiring the disclosure of too much private information may disproportionately affect the job prospects of various marginalized individuals or populations. Predictive analytics along with targeted advertising could be used to manipulate individuals and undermine equal citizenship. While I doubt that such considerations would warrant a blanket prohibition of waiving privacy or requiring too much access, they would ground a paternalistic argument for regulation.

### 3.5 The unraveling argument for privacy paternalism

An economy based on sorting has been dominant for several decades. Information is gathered about individuals and used to place them into different categories.<sup>22</sup> For example, data mining and credit ratings allow banks to categorize individuals into ‘low risk’, ‘medium risk’, and ‘high risk’ groups and offer loans appropriately. Information about individuals is harvested from numerous sources to create ‘digital dossiers’ that could be used for various purposes (see Solove 2004). Rather than sorting individuals based on publicly available information, there is also information that individuals may voluntarily disclose. In a signaling based economy, individuals may provide verified and accurate information about themselves in an effort to obtain an advantage or service.

Imagine two individuals, Bonnie and Clyde, in competition for a job. Clyde would likely reason the following way.

Allowing my employer to know more about me during the hiring process will likely allow them to minimize risk and make a good hiring decision. If I also agree that my employer may monitor my activities during work hours and off-work hours, I will likely have a competitive advantage compared to Bonnie in the case that she does not reveal. My willingness to be monitored itself may be seen as a virtue of a good employee.<sup>23</sup> If we both give up privacy, then neither will have the advantage. If I retain privacy while Bonnie does not, then I will be at a competitive disadvantage. So, no matter what Bonnie does, it is always best for me to give up privacy.

The problem should be obvious. Bonnie will reason the same way and privacy will be unraveled.

When considering different groups of individuals unraveling could proceed the following way. The group with the best information, the group with nothing to hide, would disclose because doing so gives them an advantage compared to

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<sup>22</sup> For an analysis of the unraveling problem see Peppet (2011). See also Posner (1998); Allen (2007).

<sup>23</sup> See Peppet (2011, p. 1172).



other groups.<sup>24</sup> In disclosing this information the top group can get better interest rates, services, promotions, and the like. After this disclosure by what might be called the ‘information saints’, the next group faces a problem. To not reveal information may cause information seekers to wonder what is being hidden and assume that members of this group should be viewed as belonging to a lower and more risky group. Rather than being viewed as members of a still lower group, the group just below the ‘information saints’ feels compelled to disclose as well. And on it goes until we get to the bottom group who has much to hide, but will nonetheless disclose to avoid the risk of being seen as a member of an even lower group. As noted by Frank (1988, p. 104), ‘if some individuals stand to benefit by revealing a favorable value of some trait, others will be forced to disclose their less favorable values’.<sup>25</sup>

The paternalist may seize on such considerations and argue that individuals should be prohibited from engaging in disclosures that lead to the unraveling of privacy.<sup>26</sup> Perhaps the best way to promote the privacy of all is to prohibit the individuals in any group from disclosing in the first place. Without the ‘information saints’ and nearby groups engaging in a kind of virtue signaling, there would be no unraveling of privacy down the line. In this way those most vulnerable on the privacy and information sharing spectrum could be protected from those already advantaged.

## 4 Why individuals should be morally permitted to alienate, waive, transfer, or abandon specific privacy rights

I do not think that any of the five arguments sketched above justify prohibiting individuals from alienating, waiving, transferring, or abandoning specific access and control rights to specific bodies, locations, or personal information. Nevertheless, we should be careful not to assume that when an individual consensually shares some personal information or access to a location this is to be construed as abandoning or relinquishing all downstream claims to control this information or access to a location.

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<sup>24</sup> ‘Silence cannot be sustained because high-value sellers will distinguish themselves from low-value sellers through voluntary disclosure’, Baird et al. (1998, p. 605).

<sup>25</sup> Frank calls this the ‘disclosure principle’.

<sup>26</sup> Steiner (2013, p. 241), following Hardin (1986), notes viewing certain rights as inalienable ‘can serve as a solution to a collective action problem ...’

Modest individuals allowing modest sorts of access in normal situations may not lead to concerns about the permissibility of waiving or relinquishing privacy claims. Consider how individuals who enter public spaces allow others to access various sorts of personal information. We don't typically wear disguises upon entering the public domain. If so, lots of personal data will be revealed such as eye color, sex, and approximate height. Video and audio recordings may capture even more information. The default position, it would seem, is that by entering the public domain we are allowing access to personal information. No one is doing anything wrong by looking, and the information target, in this case, is doing nothing wrong by allowing others to access this information.

Lifecasters, or individuals who put everything on display for public consumption, might give us pause (see Sanchez Abril 2007). An early version of this was JenniCam, where a young woman put her life on camera and millions of viewers watched each week. Most of the content was Jenni talking about relationships or shots of empty rooms, but sometimes nudity and sensitive personal information were shared.<sup>27</sup> Is this sort of robust waiving or transferring justified? Are we to say that Jenni was morally permitted to relinquish moral claims to control access to and use of this content?

My view is that individuals like Jenni have the moral authority to put themselves on display and can justifiably waive privacy. Agreed, it may be unwise and imprudent. Perhaps, as Anita Allen has argued, we have moral duties to ourselves not to engage in these sorts of displays (see Allen 2011, 2015; ch. 1). Moreover, if we take the results of the prior section seriously, it may even be unhealthy. Allen (2015, p. 19) would agree, writing 'The fact that a new generation has rewritten the rules of privacy or abandoned privacy as a value altogether would not prove that privacy was or is mostly worthless'. Nevertheless, as adults we make these sorts of decisions all the time. Eating the wrong foods, eating too much or too little, not exercising enough or exercising too much, and so on, are each unwise and imprudent. Perhaps friends, family, and other citizens should admonish us when we engage in such behavior. Nonetheless, we should be legally free to order our lives as we see fit, including making bad choices. So long as I am not violating the rights of others or not living up to the obligations I have acquired, I should be left free to set the course and direction of my own life.

In support of my anti-paternalistic position regarding the waiving of specific privacy rights, I will offer John Stuart Mill's (1999/1859) harm principle and 'best policy' argument.

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<sup>27</sup> Steve Baldwin, [http://www.disobey.com/ghostsites/2004\\_05\\_19\\_archive.html](http://www.disobey.com/ghostsites/2004_05_19_archive.html) (accessed on 27 June, 2018).

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (p. 51)

[T]he strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place. (p. 131)

The first quote contains Mill's ban on paternalism while the second hints at why we should accept such a ban. The essence of Mill's argument is that so long as conduct does not violate the obligations you have toward others or their rights, the conduct should be permitted. This sort of behavior might be labeled 'purely personal' or 'self-regarding'. The reason for this anti-paternalist stance is that when the public does interfere with self-regarding behavior, it tends to get it wrong. Just consider for a moment the sorts of behavior that have been deemed immoral by the public and enforced by law: masturbation, pre-marital sex, interracial sex, viewing pornography, having too many self-pleasuring devices, sodomy, homosexual sex; the list goes on and on.

A second reason to question paternalistic intrusions into self-regarding conduct is that we lose the very autonomy we are trying to promote and enhance. Treating adults like kids, saving them from failure and their own bad choices because we know better, is not to treat them with the respect that fully autonomous moral agents deserve. One of the arguments given for why it is morally impermissible to alienate the general rights to life and liberty, to become a slave, so to speak, was that such a choice would radically undermine autonomy and self-government. Here we have a different, and yet perhaps equally damaging, assault on autonomy.<sup>28</sup>

Fallibility is also important to Mill's best-policy argument. To require that sovereign adults limit their behavior because the public or some majority deems such conduct to be immoral, unwise, or imprudent is to assume infallibility on the part of the public or majority. Paternalists like Sarah Conley would presume that being fallible or being bad at making rational decisions somehow does not apply to those making the rules. This reminds me of Locke's reply to Hobbes – to paraphrase Locke (1689, ch. 7, sec. 93), 'if humans really are that bad, then why would you ever set up a system where some get to lord over others'? Moreover, there is an inherent conservatism in such thinking: the ideas, practices, and norms that the public has always had are assumed to be correct. Arguably,

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<sup>28</sup> With the requirements of notice, consent, breach notification, information access, and data erasure, the European Union (2016) *GDPR* is an example of legislation that promotes, rather than debases, individual control over private information.

many of the most revolutionary ideas and practices would have been stamped out if we had adopted this sort of paternalistic and conservative impulse.

The other side of fallibility is being instructed by successes and failures. I see the JenniCam experiment, the costs, dangers, and psychological toll it took, and I am instructed. I eat too many hamburgers or drink too much single-malt whiskey and I, as well as others, learn from my failures. When a student posts on Facebook that she was arrested for stealing time at work and was fired, we are all instructed. The nineteenth-century philosopher Herbert Spencer (1904, p. 354) once said, ‘The ultimate effect of shielding men from the effects of folly is to fill the world with fools’. I think Mill would agree. As genetics and environment shape our characters, we are fundamentally undermining individual autonomy by proscribing actions, policies, and legislation, picked by the public or the wise.

Admittedly many individuals don’t care enough about privacy. Individuals are also weak-willed, biased, and overly spontaneous. But these are characteristics of government actors as well. It is not as if those in government are less susceptible to bias, faulty reasoning, or lapses in self-control. When a privacy paternalist creates a law making it illegal to give up privacy and the justification for this law is something like ... ‘individuals are bad reasoners, they are biased, and they are fallible about these things etc.’ ... it is also true that these reasons apply to the paternalists themselves. More importantly, one could argue that when the government makes bad policy, by incorrectly mandating privacy or using the wrong legal instruments, for example, the consequences for individual autonomy, self-respect, and dignity could be profound. This is not likely the case when an individual makes a bad decision.

Note the paternalism hidden in my, admittedly, oversimplified characterization of Satz on noxious markets. Suppose buying a ticket in steerage on the *Titanic*, without access to lifeboats, was the only chance these individuals had to survive. Consider the individual selling a kidney to save herself and her family or the recipient who won’t survive but for the sale. All of these individuals should die or suffer because allowing such transactions ‘affront the idea that people are the equals of their neighbors: they reek of caste like privileges’.<sup>29</sup> Imagine imprisoning, fining, or shaming a ship captain because she made room for those who had no options. It would seem that only those who have never had to make such choices, or those who occupy a privileged position of affluence, opportunity, and choice would deny such choices or options to others.

The unraveling argument for privacy paternalism falls victim to similar objections. First, why think that those in power are somehow more fit to determine the value of different categories of private information where

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<sup>29</sup> Satz (2010, p. 106). Many of these worries are found in Schmidtz (2011).

transfer, abandonment, or waiving should be prohibited? If these folks are like the rest of us, they will undervalue privacy, make bad decisions, and be clouded by bias, prejudice, or favoritism. Second, as noted above, the cure could be worse than the disease. Allowing government to interfere, in terms of monitoring and sanctioning prohibited activity, could itself undermine autonomy and lead to bad consequences. The stop on the slippery road to invasive and unjustified paternalism, however imperfect the stopping point, is to insist on a zone of private action immune from the prying eyes, ears, and noses of government actors.

Third, while it is true that one individual's revealing disclosures may cause negative externalities to fall on others, this is not a compelling reason to prohibit such behavior. Painting my house pink might drive down the value of your house next-door, but I do not owe something for your loss. Moreover, if someone who reveals unflattering information about themselves, and thus provides a positive externality to an 'information saint', we would not say that the saint owes anything to the individual who revealed. Again, planting a rose garden in my front yard may cause the value of your house next-door to increase. But you do not necessarily owe me anything for this benefit. In part, the unraveling argument for privacy paternalism assumes that there is a morally suspicious 'forcing', a metaphorical gun so-to-speak, hiding beneath the voluntary disclosures of individuals or groups of individuals. But there is no gun and those who disclose private information do not owe others for the losses incurred.<sup>30</sup>

The strength of the unraveling problem may also be challenged. Information saints, as well as individuals from other levels, may simply refuse to share and forgo the benefits because of privacy norms.<sup>31</sup> As noted in Peppet's (2011) article, Richard Posner

gives the example of the market for physical attractiveness. Beautiful people have an obvious incentive to reveal their attractiveness by wearing little or no clothing whenever possible. In an unraveling of sorts, those who remain covered should be assumed to be less desirable. In equilibrium, everyone should become a nudist. (p. 1196)

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**30** There is a baseline problem here as well. To determine if unjustified harm has occurred we typically compare two states. For example, in a 'face-puncher' case, we compare how someone is before the punch to how she is after the punch. The moral worsening in such a case would be mitigated if both participants had agreed up front to a boxing match. When someone unravels by disclosing private information others may be worsened. But if privacy rights exist, this worsening is not unjustified. For more about baseline problems and issues see Moore (2010, pp. 4f.; 2012).

**31** Peppet (2011, p. 1191) notes 'Not all information markets unravel. Instead, unraveling is limited by transaction costs, ignorance of desired information, inability to accurately make negative inferences, and social norms'.

Obviously, this is not the case. Other norms may also work to stop unraveling. For example, voluntary SAT score disclosure does not unravel due to the withholding of this information by African-Americans and women in the middle group, even after the top group has revealed. Peppet's (2011) hypothesis was that African-Americans and women thought SAT scores to be biased and unfair. A competing hypothesis would be that disclosure of SAT scores was unnecessary by African-Americans and women because of affirmative action considerations.

Moreover, individuals who have the means to resist – where getting the promotion or service is not all that important – may do so despite the incentives to reveal.<sup>32</sup> If there are enough defections from unraveling at different levels, then the assumption that those who don't disclose are in the worst group is undermined.<sup>33</sup> There is some evidence that those who reveal information about their past bad behavior judge those who similarly disclose more harshly (see Brandimarte et al. 2018). Avoiding this bias would give all parties a reason to refrain from disclosing such information.

Transaction costs may also prevent unraveling. Gathering verified information into a digital prospectus may be costly and time consuming. If the costs of this activity are more than the benefits of unraveling, then individuals would not create or maintain such digital profiles. Second, the receiver of such information must have the time and inclination to process and analyze the digital profile. If the costs of processing and analyzing information disclosed by individuals who unravel is more than the benefits of secured information, then there would be no incentive to engage in such activity. Finally, if storing and maintaining these profiles were risky or if the individuals sending these signals insisted on limited use, no transfer, and the like, then those receiving these profiles may have incentives for not retaining the information.<sup>34</sup>

Note what would be required to establish a weak-paternalistic justification for prohibiting individuals from oversharing private information. First, one would have to demonstrate that giving away too much privacy is disvaluable (as mentioned above I do not take issue with this claim). Second, one would have to argue that from this disvalue we can generate a moral obligation or duty.

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<sup>32</sup> For example, Benndorf and Normann (2017) note that some individuals simply refuse to sell personal information for various reasons. See also Benndorf, Kübler, and Normann (2015). In this latter paper the authors note that unraveling occurred less than what was predicted.

<sup>33</sup> See Jin, Luca, and Martin (2018). Jin et al. argue that information senders reveal less than what is expected and information receivers don't assume the worst of those who don't reveal.

<sup>34</sup> See Federal Trade Commission v. Wyndham Worldwide Corp et al. (2015) and the European Union (2016) *GDPR*. Among other things, the *GDPR* requires breach notification, as well as, rights to access, and data deletion for data targets.

Individuals ought not to do such things. Making good on this task would require crossing the value/ought divide. Next, we would need an argument that individuals who fail to live up to the demands of morality in this area can be justifiably forced to comply by a government. Not all actions that are immoral are justifiably made illegal. Fourth, any defeating principles or arguments would need to be considered. Perhaps the cure, weak-paternalism, is worse than the loss of privacy, or more forcefully, perhaps weak-paternalism undermines autonomy, self-respect, and dignity. Finally, consider the level and types of surveillance necessary to catch and prosecute those who share too much private information. In the name of good consequences, dignity, or autonomy, we are going to fine, take to trial, and imprison those who fail to live up to the various mandated privacies. It would seem that justifying such practices in the name of autonomy, dignity, and privacy would be especially difficult.

## 5 The domino argument from specific rights to general rights

If someone could offer a compelling argument for alienating, relinquishing, waiving, transferring, or forfeiting a *general* right to privacy, then this would entail the moral and legal permissibility of alienation, relinquishing, waiving, transferring, or forfeiting *specific* rights to privacy. It would seem that if it is morally permitted that I give away my general right to privacy, the moral authority to control access to and use of my body and private information, then it would also seem that it would be morally permitted to give away control over any specific bit of information. In a long line of dominos set up to fall over sequentially, this is akin to knocking down all the dominoes at once.

Alternatively, we could knock them all down, but one at a time. Suppose that upon any request for a private fact I simply waive, transfer, or relinquish access and control claims. The end result of me doing this for each instance would be a total loss of informational privacy. While I do retain the moral authority afforded me by the general right to privacy, I will have, nonetheless, undermined my autonomy or agency by acceding to every specific request.

Consider a different case. Imagine that every time you propose that I accept a contract I do so. While I retain my right to make contracts, the general right is, in effect, largely non-operational because of my specific agreements to various specific offers. I could agree to so many specific contracts that I make it impossible to exercise my general right in any meaningful way. I think that defenders of autonomy-based arguments against relinquishing, waiving,



transferring, or abandoning general rights to privacy, for example, should be unsettled by my freedom to do the same work bit by bit at the level of specific rights.

There are three options at this point. Allow specific rights to be waived, transferred, abandoned, or relinquished, impoverishing the strength of the associated general rights. Prohibit specific rights to be waived, transferred, abandoned, or relinquished and thus save the associated general rights from impoverishment. Finally, we could adopt some sort of sliding scale where transfers, for example, would be prohibited on grounds of protecting the associated general right. For defenders of privacy, this latter option would present the problem of monitoring individual actions on grounds of protecting the general right to privacy from being debased by specific actions. ‘Your privacy must not be minimized, you must be monitored, so we can protect you from undermining your own privacy!’ This sort of worry also infects the second option. On grounds of good consequences, autonomy, or individual liberty, the first option seems the most plausible. If so, individuals are morally permitted to waive, transfer, abandon, or relinquish specific privacy claims with a cumulative result of impoverishing the strength of the general right to privacy. A similar argument can be made for the other general rights mentioned throughout this article.

## 6 Conclusion

One way to illustrate the difference between my view and those who would defend privacy paternalism is to consider the European Union’s *GDPR*.<sup>35</sup> This legislation gives individuals the rights of consent, breach notification, information access, data erasure, portability, and privacy by design (European Union 2016). Data subjects must explicitly consent to the use and purpose of how their information will be processed. Data subjects must be notified when a breach, or unauthorized access, has occurred. This notification must occur within 72 hours of the breach. Data subjects have the right to know if personal information about them is being held, used, or processed by data controllers. Individuals, with various exceptions, have the right to be forgotten. Data subjects can have ‘... the data controller erase his/her personal data, cease further dissemination of the data, and potentially have third parties halt processing of the data’ (European

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35 European Union (2016). See also Richards and Solove (2007); Voss (2016); Drake (2017).

Union 2016). Data portability gives data subjects the right to obtain a copy of his/her data. The privacy by design rule requires data protection be a core value in system design rather than an after-the-fact add on.<sup>36</sup> Finally, these rules apply to government agencies as well as private entities.

I would agree with the privacy paternalist, along with the authors of the *GDPR* and the *Declaration of Human Rights*, that privacy is essential for human flourishing and well-being. That is, we all reject the view that privacy is a mere unimportant subjective interest or preference. Nevertheless, the rights of notice, consent, accuracy, and deletion are seemingly anti-paternalistic. For example, individuals can allow access to their personal information and permit others to sell or trade this information. The question is: can an individual alienate her more general rights of notice, consent, control, and deletion? My guess is that the *GDPR* does not allow this, and thus has a paternalistic core. But following the domino argument, there is nothing to stop individuals from waiving or allowing access in each instance. Individuals never have to demand deletion or acknowledge notice. Thus, the paternalistic core of the *GDPR* is rather hollow.

Given the moral importance of privacy, we should prompt individuals, corporations, and governments to make appropriate choices by recasting privacy law and designing privacy-enhancing features into the technologies that have been implicated in the surveillance society we now inhabit. Designing technologies that promote, rather than debase, individual privacy could nudge individuals to make better choices while still granting them the freedom to opt out if they choose. The Tor Onion browser, encrypted email, text and voice communications, using cryptocurrencies, and obfuscation technologies will allow individuals the option of hiding in plain sight (see Nissenbaum and Brunton 2015).

I have argued that competent adults should be free to waive, relinquish, transfer, or alienate rights to their own private information. Aside from giving individuals better tools to protect privacy, and perhaps encouraging them to make better choices through privacy enhancing technologies, the best policy, and the default position in a free society, should always be liberty rather than paternalism.

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<sup>36</sup> The *GDPR* also allows fines up to four percent of a company’s worldwide yearly revenues or 20 million euros, whichever is higher.

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