

A Catholic Theological Analysis of the Right to Informational Privacy

Thesis Defense

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Introduction

Back in 2017, I saw that Canada passed a bill prohibiting employers or insurance companies from forcing you to do a genetic test or punishing you if you refuse. At the same time, an amendment was presented to the Obamacare repeal and replace bill that would allow companies to spike your insurance 30% if you refuse a genetic test. As someone who regularly commented on ethical issues in the public sphere from a Catholic perspective, I wondered about these issues. I wrote a brief piece at the time arguing that requiring genetic tests is contrary to human dignity.¹ But, even as I wrote it, I realized the dearth of information from a Catholic perspective on the topic.

About this same time, I was coming to the end of my licentiate studies and looking at the possibility of doing a doctoral degree after. Looking at topics, genetic privacy was interesting, so possible as topic for a doctoral thesis.

The more I researched on this, the more I realized there was a lack of Catholic reflection not just on genetic privacy, but informational privacy more generally. For example, what is the ethics of Facebook and Google collecting all our data, what degree of security is needed for government records like the driver's license database, what about HIPAA (or healthcare privacy beyond genetics), was the NSA surveillance revealed by Snowden ethical? This moved the thesis from about just genetic privacy on the border between moral theology and bioethics right into moral theology more strictly. It forced me to focus more on principles than on applications.

¹ Cf. M. SCHNEIDER, «FORUM: Requiring Genetic Tests Violates Fundamental Human Rights», 2017, *ZENIT - English*, in <https://zenit.org/2017/03/28/forum-requiring-genetic-tests-violates-fundamental-human-rights/> [7-6-2022].

Looking at what already existed in both theological and secular sources, a double-pronged strategy seemed like the best way to approach informational privacy from a Catholic theological perspective: look at what exists in secular thinkers that can be appropriated into Catholic thought and what exists in Catholic thought on related topics that can be expanded into informational privacy. This forms the basic structure of the thesis, with parts two and three dedicated to these two prongs respectively. The rest of this presentation will follow the four parts of the thesis, with some preliminaries before these two core parts and a conclusion that matches the last chapter from the fourth part.

1 Preliminaries

Four preliminaries need to be covered. Limits of this thesis, what question, what is meant by “informational privacy,” and what kind of applications this thesis would have.

This thesis began with the hope to get well into application, but through the research, it ended more in principles than expected. Thus, although some application is given, a lot is left to prudence and not examined here for lack of space. Even with the focus on principles, a selection of authors and subpoints needed to be made. Some of this was made in research by which authors were read, and some was made after writing. You can see a number of authors in the bibliography that end up nowhere in the text: this often indicates they were read but removed in editing. This thesis mainly follows American secular thought on privacy but mentions European and Confucian thought as well. In American law, there are two independent realities categorized under privacy: “informational” privacy is used here to exclude the kind of decisional privacy which is the other thing classed as privacy in modern American law. Decisional privacy is about the government not interfering with personal choices: but becomes farcical when used as the basis for “gay marriage” as marriage is by nature public. At the same time, although this is a theology thesis, it seeks to be intelligible to secularists who are not buffered against transcendence. Obviously being a doctoral thesis, its audience is rather limited to an academic audience, but there is hope principles from it can help with less academic policy discussions on privacy.

The question of this thesis is simple: “How can the right to informational privacy be understood in Catholic moral theology?”

We can all recognize that privacy is a good people seek by how the rich have more of it and the poor less. The vast majority feel wronged when their privacy is violated. But in the same breath, if I ask what privacy is, I will likely get descriptive definitions amounting to Justice Stewart’s definition of obscenity: “I know it when I see it,”² or Nippert-Eng’s description of “selective concealment and disclosure.”³ This leads to a need for a definition that can work in moral theology. This thesis begins with Warren and Brandeis, then adds human flourishing as an end from Moore, the points of several on the informational aspect of privacy that is limiting access or controlling information, the relationality of privacy in Dumsday, and several points from Westin. Westin notes it is a right or claim, who can possess privacy, control of information, and several points repeated from others. This chapter concludes with the following definition:

A secondary natural right of individuals, groups or organizations to a rational degree of control over the spread of private information to other individuals, groups or organizations such that human flourishing is not inhibited.

The last chapter in the first part outlines five areas of privacy that will be repeated throughout when application is discussed. First is general privacy which deals with practical external issues in the physical world like searches and seizures of cars. Second is medical privacy in general which covers HIPAA, drug testing, insurance, defaults, etc. The third is genetic privacy, the initial topic of the thesis, which is related to medical privacy but also deals with questions of the nature of genetics as a causal factor of health information, and it is currently exploding in possible uses. The last two are surveillance and big data: both deal with issues like the NSA, Facebook, Google, your smart home devices, etc. tracking all kinds of information about you: the distinction is that surveillance is the collection of said data while big data is the analysis or use of that data. Many

² «*Jacobellis v. Ohio*», 378 US 184 (1964), 197.

³ C. NIPPERT-ENG, *Islands of Privacy: Selective Concealment and Disclosure in Everyday Life*, University of Chicago, Chicago 2010, 2.

cases can include multiple types of this application: a lot of the issues of genetic privacy comes from using big data on it, or your smart car may store your location on the cloud, so it is both the physical world and surveillance, etc.

2 *Appropriating from Secular Thinkers*

Researching a slew of secular thinkers, Alan Westin seemed like the best to focus on for several reasons: he is one of the most cited, if not the most cited author in the past 50 years, he has a reasonable understanding of privacy, and his understanding of privacy goes beyond simply what is the law to a more philosophical description of what the law should be and why (essentially a secular version of social doctrine of the Church). Thus, the first chapter in this part covers Westin and he is the only thinker who gets his own chapter. After that, this part has two chapters on history: both in philosophy and US law; followed by two chapters on contemporary secular thinkers: general principles and application.

Westin makes several key points: privacy's universality, a number of distinctions, and its application in databases and medical situations. A few also add to him. The first point which Westin makes is that privacy is a universal with culturally specific elements. He finds that female genitals and the sexual act are always private, and male genitals are almost universally private. Every culture has significantly more that is private but each culture varies in exactly what is considered private and how it is protected. This is drawn from studies of anthropology, sociology, and even biology of higher animals like rats that he and multiple other thinkers analyze. This inductive reasoning shows there is a natural right to privacy, so it is beyond a mere legal right. Westin provides a lot of helpful distinctions around privacy as well. He notes four states: privacy can be individual (solitude) or in small community (intimacy); how it can be keeping information (reserve) or simply not connecting information to a person (anonymity). Different thinkers emphasize various types of privacy: for example, Slobogin notes how important anonymity is and how the lack of it through modern technology can lead to a lack of authenticity and a sense of conformity. Westin notes different ends of privacy: these seem like intermediate ends between human flourishing, the ultimate end, and privacy as a good object of the act. These include things like autonomy, emotions, and communication. He also avoids the pragmatic error of

only looking at these ends. Others like Powers and Woo, end up with mere pragmatism. Westin notes how various things can intrude into privacy such as voyeurism, surveillance and personality tests. Westin's applications are in two categories. First, he points to the issues big electronic databases were having regarding privacy even back in the 1970s. The incredible growth since then is a danger for our privacy. Second, he notes how genetics can intrude on privacy both in law enforcement and more generally. Later, he notes how trust in institutions has declined with these developments that could invade privacy. Several add to Westin regarding the universality of privacy, and a few add a more psychological analysis of him. More importantly, a number point out he has an issue with his theory of knowledge in that he assumes that a moderate privacy person is well-informed on privacy and thus able to be a rational actor, but studies show this to be an inaccurate assumption and most people are far less knowledgeable than he assumes. This needs to be added to ensure more solid rules protecting privacy.

The next chapter on the philosophical history has three main sections: Aristotle, Plotinus and Augustine together, and Locke. The first two sections give a basis in classical philosophy while Locke provides a background for much of the contemporary thought. Aristotle argues for the private as the default such that individuals in society practice virtue in private and this can emanate into the public to form an ideal society. Plotinus and Augustine focus on the soul or the intellect as something private and individual against a common agent intellect or shared universals as some philosophers. This provides a kind of metaphysical basis for privacy and a *princeps analogatum* of privacy, which Catholic thought will adapt in ways such as with the seal of the confession, protecting the conscience and one's interior relationship with God. Locke's contribution is his wider theory of property where we appropriate something to be ours – owned by us – through any action. This would include private things like a diary or even things where the action is simply existing like our DNA. This idea of considering privacy an extension of property is so prevalent in US law and contemporary thought that it is presumed. Locke can be appropriated as a legal theory for righting wrongs but must be rejected as a metaphysical theory or we end up being separate from our DNA or other private aspects of our body.

The following chapter covers US legal history which is in large part the application of Locke's theories. The US Fourth Amendment protecting against searches and seizures by government without a warrant based on probable grounds is fundamental for US privacy. The home, considered like a castle, is the *princeps analogatum* of US privacy law. Torts – suing over implied contracts – became a main way to redress privacy in US law. Warren and Brandeis wrote their essay on the right to privacy arguing that the press encroached on people's "propriety and decency." Prosser moved the issue from publication in Warren and Brandeis to the invasion to collect that information. US privacy keeps a legal and thus limited definition of a person.

The last two chapters in this part go into a lot of details with various contemporary thinkers in principle and in practice. They are valuable for getting a comprehensive view of secular thought on privacy, but most of the details need to be skipped here for the sake of time. Nonetheless, a few highlights. Many of them note how privacy is being invaded in a panopticonic manner and point to the need for the right to privacy increasing against modern invasions. Early on we see that Wasserman puts the soul as the most private even in secular thought which lines up with what was seen in Plotinus-Augustine and will be seen in Catholic thought. Bok and others point to the need for a neutral definition of privacy as people can use privacy for good – virtuous familial relationships – while others use it for ill – domestic violence. Bok and Solove also note that privacy is one-way in that once privacy is invaded, it cannot be fully redressed: if someone steals \$20 from me, getting \$20 from them redresses the situation, but privacy invasion cannot be redressed like that. Repeated thinkers here and in the Catholic section later distinguish real and legal consent for invasions of privacy: they also ask about defaults or about how things can slip by without notice. There is some discussion of the nature of information: like is new big data somehow "re-ontologized" or is genetic information of a different type of information from other health information (difference of degree or difference of kind). We also see that without regulations or large public outcry, companies do not care for privacy: best data practices have existed for decades yet only 8 of the 50 biggest US companies had

implemented them. People often consider privacy as a binary regarding collecting data, but how that data is stored and used needs a separate consent.

3 Expanding Catholic Thought

Now we move to the second half of the movement of this thesis: trying to expand existing Catholic moral principles to deal with the right to privacy. This part moves from more general to more specific, but this summary will be more thematic: background, anthropological foundations, family, private property, natural law, sexual modesty, the conscience, secrets, privacy in the magisterium, and then two applications: genetics and data.

Before going into themes, it is worth noting two points of background. First, theology has tended to focus more on confidentiality and secrecy than privacy *per se*. Thus, the principles from those prior two will be drawn out for privacy.

Second, we see the idea of privacy or secrecy in the Bible. We see in John 7:10 that even Jesus sought privacy at times: here, in how he went up to the feast. We also see the disciples coming to him privately then him communicating some of his lessons to them privately showing how privacy is valuable for communication and intimacy. The Bible refers repeatedly to the secrets of divine knowledge, indicating there is a goodness to some secrecy. For humans, the Bible notes it is a kind of good in itself – as an object of the act – but can also be used for evil ends when seen as part of a whole moral act.

The first theme is the anthropological foundation of privacy. Humans have intrinsic dignity which supports a private sphere of life. God created us *imago Dei*, which bridges between the secular and the spiritual in *Gaudium et Spes*, allowing theology to speak on secular topics. This dignity is the basis for rights, and more specifically for the right to privacy. God also loves us with a Trinitarian love within ourselves more intimate to us than we are to ourselves. That relationship will become foundational as a model of Catholic privacy. This dignity also points us to the end of privacy, avoiding interfering with human flourishing,

which can be described as, “The harmonious development of the person in their physical, social, and spiritual dimensions.”⁴

The next theme Catholic thinkers bring up is the family. Social doctrine has long taught that the family is the basic unit of society, not the individual. This is well established, but it has some effects on how we view privacy, as more will be at the family level while secular thought focused on the individual. In *Octogesima Adveniens*, Paul VI noted the need for each family to have privacy granted by having their own dwelling for the proper relationships among the family. Forcing families to live without that privacy in their home damages familial relationships.

Next, we see the appropriation of private property from secular thinkers into Catholic magisterium. The magisterium appropriates this in an adapted form from Locke. As Locke was adapted for property more specifically, his wider theory of property would seem to apply likewise to privacy. Catholic teaching maintains a rational, not absolute level of property, and likewise similar rules can be adapted for a “rational degree of control over information.” Combining this with the prior emphasis on the family, we see the magisterium and Grisez indicate that property is most directly family property and since privacy is in a way an extension of property, privacy is family privacy. The magisterium based the right to private property on the dignity of the person which would also seem to apply to privacy.

Next, Catholic teaching provides a superstructure for privacy in natural law. This thesis took Hittinger and Grisez as exemplars of the two main schools. Hittinger focuses on order in the Divine mind, that we can see by recognizing order elsewhere. We see that humans flourish more if granted privacy so this would seem to be a right based in his natural law. He also points out how technology is not neutral as often assumed. His examples are other, but this can easily be applied to the modern near-elimination of privacy through technology that keeps track of everything and is not neutral regarding privacy. Grisez is more focused on a system of natural law in the human mind. He puts privacy as a virtue of justice that is needed in our state between the fall and the second coming: this

⁴ DICASTERY FOR LAITY, FAMILY AND LIFE, «Giving the best of yourself: a Document on the Christian perspective on sport and the human person», (June 1, 2018), 3.6.

in-between state is unable to perfectly commune with all so needs privacy to develop good communion or intimacy with those close to them. Communication builds up community, but community is always limited here so some communication must be too. He notes that the conscience, marriage, friendship, and professional relationships, for example, are private. Grisez argues not just for private property, but a well-ordered system of private property, which can also apply to privacy.

Sexual modesty as an example of privacy can be drawn from John Paul II's theology of the body. He repeats the point from above that we need a degree of privacy between the fall and second coming but focuses it on modesty or covering the body with clothing, and specifically the sexual aspect of intimacy, not friendship or family. He also notes that civil law needs to be aware of the law of the fallen, not just the law of the redeemed. He points out how the language of the body can both hide and reveal, and how there is a general language of the body, but a couple often creates their own variation of this. Grubin argues physical modesty indicates spiritual modesty which ties in well with our next point.

The interior privacy of the conscience is the *princeps analogatum* or exemplar of privacy from a Catholic perspective. This is seen in confession, religious liberty, and spiritual growth. The Church has been zealous in protecting the seal of confession. She has an absolute seal over revealing both the confessant and the sin confessed. However, she has a rational degree regarding other aspects of the seal like if a penitent can release the confessor, if a priest can say generally if he had heard a sin in confession, or what counts as a confession versus normal confidential communication with a priest. The seal shows us how privacy is not just a datapoint but often a combination of datapoints. Although confession is at the end of absolute privacy, it also shows us the spectrum of privacy when compared to other communication. Regarding religious liberty, we see in Hittinger already proposing a right to religious liberty as an important right. *Dignitatis Humanae* reminds us of the *imago Dei* in each human as the basis for freedom of religion or conscience. We do not think much about it, but Rodriguez, as an example of spiritual theology, showed that we need things like modesty and silence to achieve deeper levels of prayer. This indicates a sense of privacy even

in the law of the redeemed, not just the law of the fallen. This interior space of the conscience is a model for privacy in Catholic teaching.

The keeping of secrets is well developed in Catholic theology and a good analogue for privacy. We see this indirectly in Aquinas in questions like when one is obliged to testify. Then we see various thinkers point to distinctions in types of secrets and when they can be broken. These generally affirm the importance of rational control of information when talking about secrets, as these distinctions are rational, and a similar thing can be applied to other situations. Davis defines a secret as “a hidden fact which cannot be revealed without injustice or uncharity.”⁵ There is a lot of discussion around mental reservation regarding secrets in what can be done to hide a secret without lying. There is a lot of rational work in determining when one can presume permission to break a secret. There are also different kinds of secrets requiring different rational control over them: mainly natural, promised, and professional secrets. Bradley even rightly notes issues with how this is dealt with regarding the internal forum of confession in ecclesiastical law as something to better clarify.

The Magisterium has briefly addressed the right to privacy a few times. There are a number of implicit references or references to a particular form of privacy, but most importantly by far is *Fratelli Tutti* 42:

While closed and intolerant attitudes towards others are on the rise, distances are otherwise shrinking or disappearing to the point that the right to privacy scarcely exists. Everything has become a kind of spectacle to be examined and inspected, and people’s lives are now under constant surveillance. Digital communication wants to bring everything out into the open; people’s lives are combed over, laid bare and bandied about, often anonymously. Respect for others disintegrates, and even as we dismiss, ignore or keep others distant, we can shamelessly peer into every detail of their lives.⁶

Moving on to genetic privacy, we see a big divergence from secular thinkers in affirming fetuses have individual rights. In general, their parents can exercise those rights by proxy, but if the parents plan to kill the child if he or she has

⁵ H. DAVIS, *Moral and Pastoral Theology*, Two: Commandments of God, Precepts of the Church, Sheed and Ward, London 1943, 422.

⁶ FRANCIS, «Fratelli tutti», (Oct 3, 2020), 42.

certain genetics, the fetus would appear to have a right to privacy against the parents running that test. Catholic thinkers also talk a lot about what is the justice involved in informing family members about genetic conditions, emphasizing the family as the limit for the right to privacy. The moral duty to family members is approximately proportionate to the genetic similarity so there is a natural parallel here: I am more genetically similar to my sister than my cousin and have more of a moral duty to my sister as well.

Finally, on technological privacy, the theological thinkers generally follow secular thinkers in the practical aspects but provide a more robust understanding of our created yet fallen nature, so insist on things like an oath for data scientists.

4 Conclusion

One requirement of a doctoral degree is adding something to human knowledge. I think this thesis adds something internal to theology proper, and something to theology in the public sphere. For the public watching, even if much of what went before was over your head as I often presumed knowledge of authors or documents, this is the most important part and a little easier for an average person to understand.

Back in that original 2017 article I wrote on genetic privacy that I mentioned at the start of this presentation, I note:

The Church doesn't lay out a direct "right to privacy" but this arises from what it says about private information and the truth in Catechism 2489-2492. "Charity and respect for the truth should dictate the response to every request for information or communication... Respect for privacy... [is a] sufficient reason for being silent about what ought not be known." Also, "Everyone should observe an appropriate reserve concerning persons' private lives." [...] Furthermore, "Private information prejudicial to another is not to be divulged without a grave and proportionate reason."⁷

These numbers hint at something of a right to informational privacy, but they do not directly address the point. Fr. Nicanor challenged me to present what I would add to the Catechism from this thesis. In the final chapter, I provided something

⁷ Cf. M. SCHNEIDER, «Requiring Genetic Tests...».

that would fit a little better in a social encyclical or the *Compendium of Social Doctrine*:

Informational privacy is a secondary natural right of individuals, groups or organizations to a rational degree of control over the spread of private information to other individuals, groups or organizations such that human flourishing is not inhibited. The right to privacy stems from our human dignity. It helps people achieve the good of solitude and other goods. Principles for when it can or cannot be broken parallel the rules moral theology has developed regarding keeping various kinds of secrets, and to a lesser extent rules around private property as well. As privacy is unidirectional in that it cannot be regained once lost, privacy law should generally default to more privacy to protect the more vulnerable, while allowing those who want less privacy to express themselves. Information from the interior of our soul, our conscience, is absolutely private: as one gets further from that, the degree of privacy offered rationally decreases. The family as the basic unit of society should also generally be the basic unit of privacy.

Law and custom need to protect informational privacy with particular import in the modern world where privacy is under attack. Medical and genetic privacy are one key concern as they have information about who we are in our body. In this regard, those more interior aspects of our body like our DNA need greater protection. The areas of electronic surveillance and big data processing also provide an important area for privacy. Society needs better protections to allow people to make conscious choices about what surveillance is happening or if any is happening. The right of one – like a government or corporation – to collect data does not necessarily imply the right to analyze or distribute that same data.

Along with internal discussions, this thesis can help more external discussions and not just with a social encyclical. The last page and a half of the thesis lists 9 ways this theological understanding of privacy can help with public discussion. They are in summary:

- 1) Catholic thought emphasizes the family as the basic unit of society so privacy would be more focused on the family and less on the individual than secular thinkers.
- 2) Catholic thought allows us to speak of it being a natural right in a structure of natural law.
- 3) Virtue ethics or natural law allows us to see privacy in a stronger superstructure of objective morality.

- 4) A Catholic understanding of human rationality allows us to speak of it more universally, avoiding circular reasoning or relativism.
- 5) Catholic thought focused on interiority, especially the soul in its relationship with God, as the *princeps analogatum* of privacy.
- 6) Our view of human dignity goes much deeper than the view common in legal theorists or contemporary philosophers: dignity is not based just on the physical or some external factor but goes back to constitutive metaphysical elements of body and soul.
- 7) Related to dignity is the idea of human flourishing, which Catholic thought brings in as an objective measure beyond just each seeking their own goals.
- 8) A recognition of man's fall provides for laws which are more protective of privacy as it recognizes man's tendency to go against his fellow man.
- 9) The prior points combine to provide a stronger defense when privacy is under attack from governments or corporations.

Hopefully, this brief summary of the thesis helps you to see how we can view the right to privacy in moral theology.