



## **The Right to Our Personal Memories: Informational Self-determination and the Right to Record and Disclose Our Personal Data**

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*Journal of Evolution and Technology* - Vol. 25 Issue 2 – October 2015 - pgs 14-24

### **Abstract**

The right to informational self-determination has been widely recognized in many legal systems. It is the right of people to choose freely under what circumstances and to what extent they will expose information about themselves. So far, this notion has served as a means for restricting the circulation of information. By contrast, this paper argues that informational self-determination includes an informational-expansive aspect: the power of the individual to actively process – primarily by recording, storing, and eventually releasing to others - his/her personal information and circumstances. Express legal recognition of this right, along with a proposed criterion of the most affected person for cases involving overlapping claims to privacy, would assist an immense number of people who are subjected to abusive situations, violations, and arbitrary actions.

### **Introduction**

Privacy issues are a topic of public debate and concern in every society that achieves a degree of technological advancement. At the core of privacy anxieties is the danger that a combination of technology and powerful actors poses to the freedom and dignity of individuals. Addressing these concerns requires elaboration on the right to privacy, its boundaries in light of technological developments, and its interaction with other important rights.

Human dignity, freedom, and autonomy have been identified as grounds for a right to privacy, but privacy law has evolved disparately across countries to a point where dissimilar issues are usually included in what is labeled privacy law. Notably, there are different approaches between the United States, on one hand, and the majority of Europe, Latin America, and Canada on the other. Whereas the US Constitution contains no express right to privacy and the Privacy Act deals only with data possessed by federal agencies, Europe, Latin America, and Canada have laws that recognize such a right and, in many cases, create public agencies charged with remedying privacy violations. Whereas the US courts understand, and protect, the right to privacy largely in relation to personal decisions and

belongings (e.g., abortion, parental education, search warrants, etc.), in Europe, Latin America, and Canada, privacy deals with protection of personal information in the hands of government or private citizens.

A strong protection of personal information (also known as personal data) is at the core of the European and Latin American systems. This protection derives from a powerful idea introduced by American legal scholar Alan Westin in 1967, and dubbed by the German Federal Constitutional Court in 1983 as the right to informational self-determination (*informationelle Selbstbestimmung*). Westin defined privacy as:

The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. (...) [It is] the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others. (Westin 1967)

In the words of the German Constitutional Court, it is “the authority of the individual to decide for himself, on the basis of the idea of self-determination, when and within what limits facts about his personal life shall be disclosed” (Kommers 1989).

Many legal systems have awarded explicit and constitutional status to this right. It is also enshrined in international treaties on human rights such as the Charter of Fundamental Rights of the European Union.<sup>1</sup> In the United States, the issue remains elusive, but I argue that the US Constitution contains provisions that support the specific right that I describe as a necessary part of informational self-determination, and that is the subject of this paper: the right to record and disclose our own personal data.

Until now, the right to informational self-determination focused on limitations of information processing by third parties regarding a person: the “data subject” in contemporary terminology. In this sense, informational self-determination seems to be a fundamentally informational-restrictive concept. The restrictive component of the right, apparently being of its essence, has remained unscathed from the genesis of the concept. It was the focus when the traditional “right to privacy” was proposed by Louis Brandeis and Samuel Warren in 1890, and is reflected today in the European Union legal framework, which constructs the principle of consent by the data subject as a first condition for allowing the processing of personal data by a third party.<sup>2</sup> Brandeis and Warren popularized the expression coined by Judge Cooley, which conveys the limitative, restrictive, defensive, and even boundary-like role, regarding the eyes and attention of others, that has traditionally been linked with this right: “the right to be let alone” (Brandeis and Warren 1890).

In this paper, I argue that, in addition to limiting the processing of personal data by outsiders, the right to informational self-determination includes a fundamentally proactive, though overshadowed, aspect, which I describe as active, expansive, or positive. This proactive component pays particular attention to the data subject’s right to process (primarily by obtaining and recording) his/her personal information, and ultimately dispose of the most personal sphere of autobiographical memories. This right includes the power to record or collect data that he or she desires to document about him/herself, including events that happen to him/her. It comprises a right to take pictures, shoot videos, make audio recordings, record geolocations, record biometric information – including dynamic data such as pulse, blood pressure, identifiable brain activity, etc. – and any other personal attributes and circumstances susceptible to expression as information. This, in turn, entails the right to allow others to do these regarding oneself, as with hiring a photographer who follows a subject wherever he/she goes, or with tracking devices that a company manages. During a second stage, it includes the right of a subject to communicate recorded personal information to third parties or the public. This facet of informational self-determination plays a role against abuses, arbitrariness, and wrongdoings suffered by people in vulnerable situations, and it can be labeled a right to our personal memories.<sup>3</sup>

The right of an individual to the active and deliberate processing of personal information, including its creation, pertains to the notion of a right to informational self-determination, as both Alan Westin and the German Federal Constitutional Court define it: a strong power to control information about oneself. Affirming the right to record and disclose our own personal data leads to a surprising conclusion: the chronic struggle between personal data protection and freedom of speech becomes largely illusory. Instead, there appears to be strong convergence of these rights, explicable as an overarching right of people to register whatever they choose about themselves, and disclose such information as they wish. How can freedom of speech be protected if an individual is denied the power to tell (and record and show) circumstances and events concerning his/her life? How is true freedom of the press supposed to exist if people are forbidden being journalists of their own realities? Understood this way, personal data protection and freedom of speech are no longer polar; along some roads, they walk abreast, with informational self-determination providing common ground.

The purpose of the right to record and disclose our own personal data is not to foster the vacuous exhibitionism existing around us, much less to infringe on others' right to be let alone where they have a legitimate and reasonable expectation of privacy. Rather, it should be borne in mind that the most serious human rights violations have occurred, and continue to occur, largely because victims have been unable to document their circumstances, and have thus been doomed to an unwanted invisibility. In cases of arrest, detention, hospitalization, admission to mental health centers, and generally in environments marked by a strong imbalance of power among parties, the right to be left alone loses significance in comparison to a legitimate interest in not being abandoned.

A party that benefits, or potentially so, from secrecy is likely to object to a request by a weaker party to keep accurate and full records of events. It is no coincidence that the vehemence of the objection is in direct proportion to the technical quality of recording technology, since it relates to a record's value as evidence. We live in a world in which millions of people who suffer daily injustices, damage, negligence, and arbitrary exercises of power are unable to record such events, even if they desire to do so. Consequently, they find it difficult to prove the relevant facts and obtain redress. In addition to these injuries, the systematic difficulty of gathering information about disturbing realities hinders public debate and prospects for policy reform. It is clear that a right to record and disclose our own personal data in virtually all types of circumstances has not yet been given adequate attention. Just as an educational campaign is necessary for citizens to learn about and exercise their right to privacy conventionally, a similar campaign is required to raise people's awareness about proactive informational self-determination, so it can become one more of the rights people know they have, and to develop its full potential to improve the quality of lives and institutions.

### **The right to be let alone and the right to our personal memories as two sides of the right to informational self-determination**

Reviewing the origins of the right to contemporary informational self-determination, we can see it was conceived as an eminently individualistic right, closer to the right to private property than the right to equal human dignity. This close relation between private property and privacy is not simply semantic; its repercussions remain strong, and are the primary reason it is difficult to identify the substantial consequences of the right to informational self-determination when people are vulnerable. It is not so much about preventing others from learning about our personal circumstances, but about letting third parties know of them. For some people and under some circumstances, power lies in the restriction or limitation of disclosure of information. For other people and under other circumstances, that power might exist only if the injured person is able to record and preserve information regarding what happened. Thus, the right that I figuratively refer to here as the right to one's personal memories is the right of every person to record data about him/herself and disclose that information to some people, or to the public, as the subject decides.

Control over one's personal information remains the purpose of the right, but at this level the objective is not to withhold or limit its flow but to keep it and eventually release it for defense of substantive rights or other legitimate purposes, among which preserving memories is not minor. The

subject does not take a reactive role adopted by someone who must defend him/herself against third-party intrusions and processing of personal data; he or she pursues processing of the data – particularly recording and collecting them – and ultimately does so against the will of third parties, whose primary intention is to hide information and keep others’ memories undocumented. From this viewpoint, the current, paradigmatic judicial remedy resulting from the right to protection of personal data in pursuit of access, rectification, or withholding of a subject’s personal data – the *habeas data* – does not exhaust the right to informational self-determination. It should be supplemented by other actions directed to overcoming resistance in prisons, health facilities, work environments, and administrative and judicial premises, among others, to collecting one’s personal data and preserving autobiographical memories.

The idea that this right to personal memories is encompassed in the right to informational self-determination meets with objections. This is unsurprising since the mindsets of privacy law advocates have been nurtured so far by emphasis on restricting the use of personal data, not their collection or dissemination. However, rejecting or fearing technology *per se* is not the essence of the right to informational self-determination, and nor is a culture of secrecy inherent to such a right. Most importantly, profound reflection suggests that the essence of privacy is not a boundary against knowledge or disclosure, but a sphere in which each of us is the master of whatever is his or her own, and in which we should each be afforded the greatest degree of control and leeway. The sphere does not vanish when one engages in activities with other people, even in public spaces. Nor does it cease to exist when somebody is subject, whether by law, nature, or authority, to involuntary circumstances. Unwanted situations make the sphere of privacy particularly deserving of protection.

Having shown that the philosophical grounds of the right to privacy and informational self-determination support a right to record and disclose personal data, I refer briefly to important legal texts on the matter, which drive to the same conclusion.

Numerous legal systems regulate the right to privacy through laws of personal data protection. Although this protection of personal data usually evokes thought of limitations and prohibitions regarding processing of data by third parties, the term *protection* is sufficiently clear and meaningful to include the right of an individual to record his/her personal data. Nothing in personal data protection law prevents an individual from starting to process information about him/herself. Indeed, one’s own recording of personal data is the best way to protect it. In this context, protecting personal data means preventing loss of irretrievable information regarding a circumstance that can be represented in such forms as pictures, video, or audio. For example, a person subject to an operation conducted by police – on the street, at a police station, or elsewhere – might legitimately desire to document what is going on as accurately as possible by recording the experience audiovisually. The subject might want to do this for future disclosure or to preserve a record of events. Anyone subject to medical procedures, anyone who initiates a procedure before a state office or authority, anyone in the role of consumer, an employee at work, or a parent who brings his/her minor children to a daycare center or school has the same interest.

Even if all these cases give rise to other, conflicting rights, I emphasize that among them there is a right to informational self-determination in its proactive form, and in the interest of a subject involved primarily in the event. In subsequent sections, I consider the criteria to solve potential clashes between the right to be let alone and the right to our personal memories, and I refer briefly to technical issues derived from this complex topic, particularly regarding data dissociation.

Article II-67 of the European Constitution provides that “everyone has the right of access to data which has been collected concerning him or her.” It is simple to deduce that this right of access covers, impliedly but inevitably, the right to collect or generate data related to him/her. Any datum is a symbol of a portion of reality. Whenever this portion of reality refers to a holder of rights, it can then be represented by personal data. According to the principle of free will, from which the right to informational self-determination derives, the right of a subject to make a record that belongs only to him of his own circumstances in terms of time, place, image, voice, mood, and any other personal

circumstance, to the extent permissible by technology, must be unquestionably and primarily recognized.

The right to process, record, and publicize one's personal data impliedly arises from the wording of an important legal decision from Germany. This is the Ruling of the First Division of the German Federal Constitutional Court of December 15, 1983 mentioned above. The Court affirms what it calls "the authority of the individual to decide for himself, when and within what limits facts about his personal life shall be disclosed." Other definitions confirm this approach. Informational self-determination has also been defined as the "power every subject has to control personal information about himself, contained in public or private records, in particular, those stored through electronic media." If in some situations third parties are allowed to create such public or private records, the data subject should likewise be able to make a self-record of any information concerning him/her.

The right to privacy, as construed by case law in the United States, along with freedom of speech and the press enshrined in the First Amendment, supports the right to record and disclose our own personal information. The Free Press Clause protects the right of individuals to express themselves through publication and dissemination of information, ideas, and opinions, without interference, constraint, or prosecution by the government. This right was described in *Branzburg v. Hayes* as "a fundamental personal right" that is not confined to newspapers and periodicals.

Through these considerations, we discover an underlying, logical reason for the four pillars of the right to personal data protection, as understood in the European system (i.e., access, rectification, update, and suppression of one's data) and supplemented by a fifth element: recording, creating, and documenting a subject's personal information. This element is implicit under the prevailing scholarly interpretation of the right to informational self-determination. However, due to its importance, it should be identified expressly.

### **Image rights and the right to personal memories**

I discuss image rights, since a component of them relates to the purpose of this paper. These rights "address, ultimately, the negative and positive freedom of self-exhibition that should be awarded to every person and that may have a projection of gain to the extent the use of the image results in direct or indirect economic benefits (advertising) for the data subject or third parties" (Marquez and Calderon 2009). Following the same authors, the content of image rights includes:

- a) preventing the taking, appropriation, use, or disclosure of images by third parties;
- b) promoting the appropriation, use, and broadcast of images, by the person him/herself or by authorizing third parties for free (under some conditions);
- c) promoting image broadcasting, reproduction, and use for commercial or advertising purposes to generate economic benefits and gains;
- d) assigning third parties the right to broadcast, reproduce, and use images for commercial or advertising purposes in exchange for monetary consideration.

Paragraph b) relates particularly to the proactive side of the right to informational self-determination. However, the right to capture one's own image for self-exhibition has been considered largely as a property right, typical of celebrities, or of people who are not famous but perform in public. It does not entail a far-reaching guarantee element as informational self-determination does in safeguarding other fundamental rights (e.g., honor, privacy, due process, defense at a trial, or equal protection of the law; in other words, human dignity). Since the right to informational self-determination extends beyond the notion of image rights, a right to personal memories appears better framed within the scope of the former.

## **The myth: Protection of personal data versus technology**

The current mindset in privacy law presents technology as the primary enemy of the right to informational self-determination. However, simplifications of this kind tend to be counterproductive. The right is inherently focused on human dignity and free will. Together with the continuous progress of technology – which is increasingly accessible to ordinary people – this allows a refutation of the alleged privacy/technology opposition, at least for a broad class of cases. Technology has the potential to aid common people to exercise their right to proactive informational self-determination in the most comprehensive way that anyone might choose. It thus offers the possibility of developing effective safeguards against stronger public and private players. From this perspective, technology will be an ever-increasing ally to people in their struggles against injustice, corruption, arbitrary actions, abuses, and negligence. The fight will increasingly be based on the right of every person to record and disclose some of his or her biographical events. Ultimately, this is about making access to technology democratic: the overall struggle involves common people against the arbitrary actions of public officers, consumers against abusive practices by big companies, and elderly people against negligent caregivers. All of them need more technology, not less. Their priority is to record and transmit information to whomever they deem appropriate. Their struggles are against invisibility, because being invisible oftentimes serve the interests of powerful parties, allowing mistreatment, injustice, and negligence to go unpunished.

However, one simplification should not be replaced with another. It would be absurd to ignore the already proven risks that all types of misused technology pose, and the damage technology can cause. My purpose is not to object to justified precautions against illegitimate processing of personal information by third parties, but to elucidate a supplementary approach: technology as a resource that can facilitate a human subject's full exercise of his or her right to informational self-determination. The following section includes examples of, and offers insights into, the deep challenges faced by interpreters in pursuit of an appropriate balance of the rights at stake.

## **How can the right to personal memories be exercised in practice?**

A strong right to autobiographical memories finds its primary practical realization channel in technology. Technology gives rise to numerous conflicts that warrant a response by the law. Soon, the high costs and impracticality of having a third person record a video will yield to the increasing popularity of hands-free devices that can be used by any person to shoot a video at any time. Devices that facilitate audio recording, including recording telephone conversations, will become more affordable, and thus they will no longer be the privilege of large companies.

The quality of life of a person on foot can improve if he or she preserves, and ultimately transmits to third parties, constant signals about his/her geolocation (e.g., for personal safety) and dynamic biometric data (e.g., for early detection of heart attack). Technologies such as these will increasingly allow us a significant say as to the format, means, and content of information that we choose to capture about ourselves. Simultaneously, they will reduce the number of potential conflicts of rights, thanks to selective image-capture techniques, which facilitate the removal of images one does not wish to store or that cannot be captured without others' consent. Let us consider the possibility, available to an inmate serving time in prison, of capturing and even publicly disclosing images of his/her body, but not of his/her face or of other people. This information can enable third parties to protect the prisoner's physical integrity and safety. As more effective technological tools become available to facilitate dissociating someone's personal data from those of other parties in the vicinity, the right to record and disclose our own personal information applies more widely. There will then be fewer grounds for disputes resulting from its exercise. For example, if a patient could guarantee to a surgeon that he or she would record images of only his/her own body during surgery, without storing any third party's voice or image, there would be no reasonable basis to refuse to record the surgery.

Without attempting to exhaust the list, below are some situations in which the proactive component of the right to informational self-determination may have an increasing impact. In each case, the wisdom of Carlos Cossio's definition of law as a human behavior in its intersubjective relationships is apparent (Cossio 1944). The difficulties that await the interpreter will consist not only of judging the relevance of records of our own data that incidentally include information of third parties, but also the extent to which the information is subject to subsequent processing. This will force us to inquire into the purpose of any such processing and into other issues that I cannot develop on this occasion. The multiplicity of relevant interests – particularly in fields where the boundaries of what is possible are pushed daily – forces us to emphasize the tentative nature of whatever lines are drawn and to elaborate on them with time, prudence, and deliberation.

### *1. Healthcare and medical procedures*

The proactive aspect of the right to informational self-determination entails a patient's authority to shoot video or audio record the entire experience during interactions with healthcare personnel or institutions. This, however, can never be asserted as an absolute principle. The weight of this right, when it conflicts with others such as the right of healthcare personnel to their own informational self-determination, is contingent on a patient's vulnerability and the potential significance of the record the patient desires. In the context of surgery performed under general anesthesia, the right of the patient to record the procedure, even if it entails incidental capture of third-party information, carries more weight than a simple physician's examination.

### *2. Labor relations*

The proactive aspect of the right to informational self-determination means that all people have the right to film themselves while they perform duties in the workplace, and record at least statements made by them. Considerable restrictions could derive from a company's right to keep information confidential such as commercial, industrial, or financial secrets, and naturally from the right to informational self-determination of third parties. To illustrate the realities involved, reference should be made to the increasing number of legal proceedings that can be heard in the United States, which are more successful now than in the past, in cases of discrimination at work. This progress is because it is lawful in most states for employees to capture on film or by audio libelous or injurious statements uttered by employers or supervisors.

### *3. Business-consumer relationships*

All people should be afforded the right to make a video or audio recording of themselves in the framework of consumer relations. Since most consumer transactions occur in public spaces, the right to record an interaction between a consumer and business for the purpose of potentially submitting the recording to a court does not appear to be subject to valid limitations, particularly if the technology removes data that could identify a company's personnel. In this sense, the limitations to the right appear less substantial than restrictions that can be justified in, for example, the context of the workplace.

### *4. Police operations*

All people should be afforded the right to make video or audio recordings of themselves during police operations in which they are involved. This right might become merely theoretical to the extent that it falls within an overarching right: that of any person to make a video of police procedures since they are public, administrative acts.

### *5. Public administration*

Informational self-determination includes a right to record the circumstances surrounding interactions with public officials, both by capturing images and recording conversations. Again, the selective

image capture technique will lay the foundation for a broad criterion to assert the right, since it enables the individual to record the circumstances in which he or she is interested, without violating the privacy of public officials.

### *6. The prison system*

Imprisoned people should be given the possibility to film circumstances surrounding their detention and custody, whenever and wherever they wish, and even the possibility of disclosing such records in any way they consider fit. Security reasons, if any, might curtail such rights, which will also find a limitation in the privacy of the remainder of inmates who may not wish to be recorded. However, if conflicts exist regarding the right to informational self-determination of officials in charge of penitentiary facilities, the rights of prisoners should prevail. Their evident vulnerability, including a high degree of control over their lives under conditions that have frequently been considered illegal by court rulings and human rights bodies, tips the scales in their favor.

### *7. Educational institutions*

Subject to a major restriction resulting from rights of third parties, particularly other students, to their own informational self-determination, the principle that should prevail is the right of any person to record, to the fullest extent possible, the conditions surrounding their attendance at an educational institution. In the case of minors, this right is exercisable by parents and guardians.

## **Restrictions and criteria for the right to informational self-determination in its proactive form**

The limit to the right must be a different right or the same right held by others. We should recognize the right in contexts where an individual is typically subjected to restrictions on the possibility of using image capture and/or audio recording technologies (e.g., the prison system, medical procedures, educational institutions, and administrative and judicial agencies). Recording should be allowed to the extent it applies to the right-holder him/herself, and provided there are no valid reasons to disallow it. Some criteria should be applied to settle conflicts between different rights, or where the same right is exercised by more than one person, weighing the intensity of legitimate interests that might clash. I propose three principles to be employed as appropriate criteria: the principle of vulnerability, the principle of equity, and the principle of the most-affected person.

### *1. Vulnerability*

The weaker or more vulnerable the person is in the circumstances, the greater the weight that should be given to his/her right to proactive, informational self-determination. Vulnerability here denotes the likelihood that a subsequent, illegitimate violation of rights could occur in connection with a person, or the fact of the violation having already occurred. The likelihood should be examined in light of experience, or the insight that should be reasonably inferred from circumstances.

For example, when an individual is unable to express his/her will, it will be more pertinent to conclude that he or she has given tacit consent to recording of relevant actions by more powerful agents. In cases where police officers or health officials commence a procedure that involves a person who is not in a position to express his/her will, the authorities could even have a duty to film the procedure, and afterwards deliver the records to the person involved, his/her legal representatives, or the person's successors. Public debate could be useful to determine a default provision (with an opt-out option) for recording events like these.

### *2. Equity and a brief digression about recording telephone conversations*

The equity principle suggests that the data subject should have more latitude to exercise the right to informational self-determination if his or her counterpart in a transaction already processes information related to him/her. If a company, agency, or institution were to use film or audio systems

to gather information on a person, that person should be able to reciprocate. The person's right to informational self-determination should then be interpreted with the broadest scope, permitting the recording of not only the circumstances strictly affecting him/her, but also surrounding circumstances that might be relevant.

Analyzing whether it is lawful for a person to record a telephone conversation without the consent of the other party goes beyond the scope of this paper, though it is relevant to my concerns, and I will make a side comment on it. An interesting example is the United States, where a number of states follow the two-consent approach (i.e., both parties to a conversation must consent to the conversation being recorded), but most states are one-consent states (i.e., only one member of the conversation needs to consent). Comparative law offers a wide variety of approaches. In Argentina, prestigious legal scholars and case law subscribe to the stricter system (i.e., two-consent), and consequently, any recording of a telephone conversation recorded without the consent of one of the parties is deemed inadmissible as evidence (Kielmanovich 2009). The basis for this position is that a telephone conversation is, in principle, not meant to be disclosed, and takes place on the understanding that it is private.

The principle of equity applies where one party is already recording an interaction such as a telephone conversation. When this occurs, the conversation has been divested of any expectation of privacy by one of the parties – generally the more powerful one. This reinforces the right of the other party – generally the weaker of the two – to assert the right to informational self-determination broadly and proactively. This can include recording such circumstances as actions or words addressed to him or her. The equity principle helps to show that if one of the parties has removed the privacy expectation, this expectation cannot then be invoked to the other party's detriment.

### *3. Toward the most-affected person criterion*

If personal data is difficult to define, establishing who is entitled to control pieces of information containing data about more than one person is even more complex. The object of my memories, to which I have a right, can overlap with the object of the memories of others, to which they have rights. This poses a profound challenge when it comes to asserting the right to informational self-determination. Personal data means “any numerical, alphabetical, graphic, photographic, acoustic or other information relating to an identified or identifiable natural person,” but the same data often refer to more than one individual.<sup>4</sup>

Let us consider a surgeon who operates on a patient, assuming that the procedure is video-recorded by the healthcare institution and the patient later requests access to his/her personal data that appear on the video. The health center might argue that it cannot provide the information requested, since it also contains personal information of a third party – the surgeon – who did not consent to disclosure. For the purposes of the example, let us imagine that the video shows only the surgeon's hands, not the rest of his/her body or voice. The patient insists that the material be released, but the hospital refuses. At this point, the proposed criterion of the most-affected person comes into play, giving the right to the patient to have access to the video. This principle establishes that in cases in which there are personal data about more than one individual and the information cannot be reasonably dissociated, but one of the parties involved is the person primarily affected by the procedure or situation, this party should have the same access rights as if the personal data referred exclusively to him or her. The most-affected person will have a priority right to record or collect personal data even when the information could incidentally include third-party data that are not sufficiently significant. The high significance of an event for an individual makes the event part of the autobiographical memories that he or she is entitled to preserve and dispose of.

Analysis should always take into account the intensity of the legitimate interests of the most-affected person, and his/her real or prospective vulnerabilities. An unlawful beating of an inmate by a prison guard might be of high significance to the guard, and even considered by him or her a relevant part of

his/her biography. However, the principles outlined here forbid the guard to invoke a right to personal memories as a means to prevent the inmate recording and disclosing the beating.

The notion of the most-affected and vulnerable person justifies that, in educational institutions, the younger the children are the stronger the case is for allowing their parents to make video recordings of them, even if the videos also include images of teachers. Symbolic representations in the form of data of the actions taken by third parties surrounding the most-affected and vulnerable person are personal data of the latter, and of the greatest importance.

Thus, going back to the operating room example, if a surgeon says, “We are losing the patient,” the surgeon’s statement is part of his/her personal data, but is also the patient’s personal data since it undoubtedly refers to the patient. Even the surgeon’s physical movements, to the extent they are intended to perform the operation, are personal data of both the surgeon and of patient. Still, since the patient is the most-affected and vulnerable person in this circumstance, the right to informational self-determination should be granted to him or her.

Granting the right to record and disclose personal information to the most-affected and vulnerable person in circumstances in which other people are also involved would not require automatically authorizing subsequent processing (e.g., divulging) of the information as if it were exclusively personal data of the most-affected and vulnerable person. Since some records might also contain third parties’ relevant or sensitive information, requirements for transfer or dissemination might be limited to the defense of substantial interests before administrative or judicial authorities. In that respect, reference should be made to the flexible spirit of the European Union Directive regarding the processing of data:

Personal data may be processed only if ... processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.<sup>5</sup>

The final words of this – concerning overriding fundamental rights and freedoms – provide the best guidance for when, and to what extent, a person can exercise his/her right to informational self-determination in its proactive form when others possess conflicting rights.

## **Conclusion**

A long time has passed since Brandeis and Warren wrote about the right to be let alone. Since then, this complex area of law has undergone an extraordinary evolution, and today it encompasses a number of topics such as the right to privacy, technology, freedom of expression, and the right to make oneself known or unknown. At all times, human dignity was the core that shed light over all inquiries and developments, and it should continue that way.

This paper proposes one more step toward comprehensive respect for informational self-determination. I am aware of both the controversial potential of the outlined hermeneutics and the vast reality this topic touches on, from quantitative (millions of people who would like, if possible, to record what is happening to them) and qualitative (the importance, or rather seriousness, of what is happening to these people) perspectives. In this spirit, I postulate the proactive aspect of the right to informational self-determination as the right of any person to process his or her own personal data – including its recording, collection, organization, transfer, and disclosure – to be legally enforceable against a range of powerful actors. These include the state, employers, business corporations, and educational institutions.

Aware of the benefit that this would have for an immense number of people who are subject to an array of abusive situations, violations, and arbitrary actions, I call this proactive right the *right to our personal memories*.

## Notes

1. Pursuant to Article 8 of the Charter of Fundamental Rights of the European Union: “1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”

2. Article 7 of the Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals regarding processing of personal data, and on the free movement of such data, states, “Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent; or...”

3. In this paper, personal and autobiographical memories refer not only to facts that an individual knows about himself or herself from having experienced them, but also to facts about him/herself that an individual knows about at second hand, such as if they were not conscious at the time of occurrence (e.g., after having fainted).

4. Definition established by section 5 of Spain’s Royal Decree No. 1720/2007, de 21 de Diciembre, whereby the Regulations for the Development of the Law on Personal Data Protection (*Ley Orgánica de Protección de Datos Personales*) were approved.

5. EU Directive 95/46/EC – The Data Protection Directive, Article 7, (f).

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