Synthesis and Satisfaction: How Philosophy Scholarship Matters

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Privacy and technology clash in the courts. I elaborate the example of Puttaswamy v Union of India (2017), an example from the High Court of India, whose sweeping and inclusive jurisprudential style raises starkly the question of the influence that academic philosophers and other scholars have over how legitimate societal interests in exploiting information technology and protecting personal privacy are "balanced" by the courts. Philosophers will be satisfied to see that their theories are acknowledged in a landmark national decision finding that India's 1.3 billion people have a constitutional, fundamental right to privacy that constrains a challenged government biometric identification system. Some scholars will appreciate the inclusive definition of privacy, which included decisional privacy, combined with the treatment of privacy as a paramount human good meriting the protection of fundamental rights. But some academic philosophers are potentially disappointed that the Court synthesizes rather than differentiates among their competing theories, concepts, and definitions, and, in the end, relies upon liberal Enlightenment ideals that some scholars have argued are singularly ill-suited for the twenty-first century.

Introduction

Privacy and technology can clash mightily in the legal arena. For example, a recent case before the United States Supreme Court concerned the constitutionality, under the Fourth Amendment of the United States Constitution, of warrantless government search and seizure of telephone company records capable of disclosing the movement and location of a mobile phone user.[1]

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Another recent U.S. case tested the authority of law enforcement to obtain personal data stored in foreign jurisdictions,[2] an authority that could be highly disruptive of efforts within the international community to collaboratively address the problem of trans-border access to electronic evidence, and that could potentially violate international human rights norms respecting individual privacy and data protection.[3]

However, I want to elaborate on a different example of the battles between privacy and technology facing the courts in recent years — an example of wide significance from the highest court of the nation of India. I single out *Puttaswamy v. Union of India* because its sweeping and inclusive jurisprudential style raises starkly the question of the influence that academic philosophers and other scholars have over the articulation of paramount individual privacy interests in tension with societal interests in exploiting information technology.[4] Some philosophers of privacy, and I include myself in this group, seek impact. We wish to clarify and inform debates about privacy in ways that matter. To that end we write scholarly papers, speak to policymakers, sign on to legal briefs and engage in political activism. The scholarly philosophical work of several scholars from the United States, the EU and Israel found its way into the *Puttaswamy* decision of the Indian Supreme Court.

The High Court of India's particularly florid (by American standards) citation of philosophical authority, which included references to my own work, provides an opportunity to characterize and assess the impact of philosophical scholarship on global society through the courts. I conclude that scholars like me should be satisfied to see that their theories are acknowledged in a landmark national decision recognizing the right to privacy, suggesting meaningful public impact; but they may be disappointed that a High Court synthesizes rather than selects among their competing theories, concepts, and definitions of privacy. Particular disappointment may be felt by those

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1 Carpenter v. United States, 585 U.S. _ (2018) (No. 16-402) (warrantless search of cell phone location record data violated the Fourth Amendment of U.S. Constitution).

2 Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Thirty-Seven Technical Experts and Legal Scholars in Support of Respondent, United States v. Microsoft Corp., 584 U.S. __ (2018) (No. 17-2).

3 *See also* Lisa M. Austin, *Technological Tattletales and Constitutional Black Holes: Communication Intermediaries and Constitutional Constraints*, 17 Theoretical Inquires L. 450, 468-85 (2016) (discussing the lack of protection foreign citizens have regarding their personal data while staying in the United States).

4 Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, (2017) 10 SCALE 1, https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/.

scholars who, unlike me, decry reliance upon liberal Enlightenment ideals they perceive as demonstrably ill-suited for addressing data protection in the twenty-first century.

In Part I of the Article, I describe India's massive national identification project and the privacy concerns, legal challenges and legal developments it engendered. In Part II of the Article, I describe ways to think about the impact of academic philosophy on privacy law in the U.S. and elsewhere, stressing that some of ideas that are popular with jurists are often expressly rejected by philosophers, such as the idea that privacy can be defined as "being let alone." I conclude that the Indian case exemplifies that conflicts created by technology may be addressed in the courts, by appeal to centuries-old concepts and values kept in circulation by philosophers. Philosophers may be satisfied to see their work cited but regretful that the most nuanced concerns of privacy and liberal theory discussed in the university — and perhaps even in chambers — are not apparent on the surface of published opinions.

I. A National Identification Project

India has undertaken a biometric database of demographic information, iris scans and fingerprints to support a system of identification for its population of 1.3 billion people.[5] The program was established pursuant to the Aadhaar Act (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) of 2016. In relation to its aims, the Act was described as

> [A]n Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto.[6]

The agency responsible for administering the Aadhaar program is formally designated "The Unique Identification Authority of India of the Government of India." Efforts have been underway to enroll as many qualified people as possible. Obtaining a unique 12-digit Aadhaar identification number is not,

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5 Unique Identification Auth. of India, https://uidai.gov.in/ (last visited May 3, 2018).

6 The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, No. 18, Acts of Parliament, 2016; Letter on the Validity of Downloaded Aadhaar (e-Aadhaar) as Proof of Identity from B.M. Patnaik, Deputy Dir. (Logistics), Unique Identification Auth. of India (Apr. 28, 2017), https://uidai.gov.in/images/uidai_om_on_e_aadhaar_validity.pdf.

strictly speaking, voluntary for citizens of India, since providing one's number is required as a condition for receiving important benefits and services, and for meeting certain basic obligations, including electronically filing taxes.[7]

A. Privacy Concerns

The Aadhaar project has been controversial inside and outside of India on privacy grounds.[8] Privacy concerns range from worries about data security, hacking and identity theft; worries about personal integrity and the lack of choice with respect to sharing one's personal data; concerns with the bodily integrity raised by having to share biometric as well as demographic data; concerns about government control, profiling and surveillance in a system in which individuals lack control of their own data; to fears about the exploitative creation of a "big data economy" based on data mining and predictive analytics of the banked data to discern behavior, preferences, risk and opportunity.[9] Claims have been made that the Aadhaar system can and has been hacked, information obtained and sold, and the ID card — legitimately issued to 1.19 billion people — forged.[10] The government officially disputes most such vulnerability claims, stating for example that the "Aadhaar database has never been breached during the last 7 years of its existence. Data of all Aadhaar holders is safe and secure. Stories around Aadhaar data breach are mostly cases of mis-reporting."[11]

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7 *Aadhaar: Myth Vs Fact*, Unique Identification Auth. of India, https://uidai.gov.in/images/Aadhaar_MythVsFact_May2017.pdf (last visited May 3, 2018); The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, art. 7, 2016, No. 18, Acts of Parliament, 2016 (stating that an individual can be required to enroll in Aadhaar).

8 Reetika Khera, *The Different Ways in Which Aadhaar Infringes on Privacy*, The Wire (July 19, 2017), https://thewire.in/159092/privacy-aadhaar-supreme-court/ (five privacy concerns raised by Aadhaar).

9 *Id.*

10 *See e.g.*, *An Online Researcher Hacked into Aadhaar's Official Android App to Show How Poorly It's Secured*, India Times (Jan. 11, 2018), https://www.indiatimes.com/technology/news/an-online-researcher-hacked-into-aadhaar-s-official-android-app-to-show-how-poorly-it-s-secured-337425.html (an example from a spate of hacking claims which were reported in January 2018).

11 For example, it disputed such claims in January 2018, on a "Myth Buster" page. *Aadhaar: Frequently Asked Questions*, Unique Identification Auth. of India, (Jan. 15, 2018), https://uidai.gov.in/images/recently_asked_ques_13012018.pdf.

B. Court Challenge Prompts Landmark Privacy Ruling

Aadhaar undeniably serves important public purposes. But the privacy and data protection concerns that the important project raises have led to worthy legal challenges in the courts, including in the Supreme Court of India. Not well known by the general public outside of India, the Indian Supreme Court is a bench of a maximum of 31 justices (currently 24), appointed by the President of India. By contrast to the life tenure of U.S. Supreme Court justices, the term of a justice in India is limited — retirement is set at age 65. Newly appointed judges must be citizens, distinguished, and have served as a judge or advocate of a High Court. Of the 24 current judges, one is a woman. His Honor Dipak Misra was appointed Chief Justice on August 28, 2017. The proceedings of the Supreme Court are conducted in English. The law declared by the Supreme Court is binding on all courts in India; however, like the U.S. Supreme Court, the Court of India can reverse or modify its earlier opinions. Subpanels of justices may make substantive decisions binding on the whole.[12]

In August 2017, privacy advocates experienced a major victory. A bench of nine justices of the Supreme Court of India ruled against the government in *Puttaswamy v. Union of India.* Twenty-two petitioners joined to challenge the constitutionality of Aadhaar, including the named petitioner, K. S. Puttaswamy, a very elderly former judge, who fought the requirement that a person must have an Aadhaar number to obtain cooking gas and to purchase grains through a public distribution system.[13] The Court ruled that the people of India have a fundamental constitutional right of privacy, a right critical to the assessment of Aadhaar's legality.[14] At the start of the opinion the Court made it clear that the judgment was not a simple exercise of interpreting the letter of the law. Indeed the Indian constitution, like the U.S. constitution, does not protect the right to privacy explicitly. American justices have written that a right to privacy is implicitly fundamental under the Due Process Clause because it is "deeply rooted in this Nation's history and tradition," and/or it

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12 *See generally History*, Supreme Court of India, http://www.supremecourtofindia.nic.in/history (last visited May 3, 2018) (history and overview of the court). The proceedings of the Supreme Court are conducted in English only. Supreme Court Rules, 1966 are framed under Art. 145 of the Constitution to regulate the practice and procedure of the Supreme Court.

13 *See* Menaka Guruswamy, *India's Supreme Court Expands Freedom*, N.Y. Times (Sept. 10, 2017), https://www.nytimes.com/2017/09/10/opinion/indias-supreme-court-expands-freedom.html.

14 Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, (2017) 10 SCALE 1, 3 ("the right to privacy is protected as an intrinsic part of the right to life.").

is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[15] The Indian justices issued a judgment premised on an implicit right at "the foundation of a constitutional culture based on the protection of human rights" and "their consequences for a way of life."[16] Importantly, the court made it clear that there would indeed be legal consequences: "If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection."[17]

There were several (using American parlance) "concurring" opinions delivered in the *Puttaswamy* case, all unanimous as to privacy being a "fundamental" right.[18] Prior to *Puttaswamy,* a smaller bench of three, and other benches of less than three, had similarly held that the protected right to liberty in Article 21 of the Constitution of India, which provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law," was a constitutionally protected fundamental right.[19] But the judges of India were divided. Two decisions of six- and eight-judge benches had rejected the right to privacy on the ground that such a right is not specifically mentioned by the charter on fundamental rights of the Constitution. The *Puttaswamy* Court found, however, that "the absence of an express constitutional guarantee of privacy still begs the question whether privacy is an element of liberty, and, as an integral part of human dignity, is comprehended within the protection of life as well."[20]

The lengthy *Puttaswamy* judgment included analysis of Indian law and precedents, international law, and law and precedents from other countries, as well as many practical and conceptual issues relating to the ruling.[21] The Court undertook an extensive comparative law analysis. The law of the UK,

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15 Ironically, the test is most clearly laid out in an overrule decision upholding criminal gay sex laws. Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986) ("Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

16 *Puttaswamy*, (2017) 10 SCALE at 4.

17 *Id.*

18 Opinions were written by J. Chandrachud, J. Chelameswar, J. Kaul and J. Nariman. *Id.*

19 India Const. art. 21.

20 *Puttaswamy*, (2017) 10 SCALE at 25.

21 *Id.* at 194 ("In deciding a case of such significant dimensions, the Court must factor in the criticisms voiced both domestically and internationally" which are "based on academic, philosophical and practical considerations.").

USA, South Africa and Canada was discussed. The constitutional privacy law of the United States was laid out in particular detail,[22] and the ideas of many American legal scholars and philosophers were cited and discussed directly and indirectly in the opinion.[23] For example, some of my ideas are briefly discussed; and the court cited philosopher Judith DeCew's review article for the *Stanford Encyclopedia of Philosophy*, which surveys the work of many who have contributed to the debates about philosophical aspects of privacy. I conjecture that it is unusual for the Supreme Court of India to cite work of an academic philosophical bent, on any subject.[24]

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22 A learned version of USA privacy law history is told, spanning cases U.S. privacy law experts know by shorthand names: Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Olmstead v. United States, 277 U.S. 438 (1928); Griswold v. Connecticut, 381 U.S. 479 (1965); Katz v. United States, 389 U.S. 347 (1967); Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1972); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Roe v. Wade, 410 U.S. 113 (1973); Miller v. United States, 425 U.S. 435 (1976); Smith v. Maryland , 442 U.S. 735 (1979); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Minnesota v. Carter, 525 U.S. 83 (1998); Minnesota v. Olson, 495 U.S. 91 (1990); Kyllo v. United States, 533 U.S. 27 (2001); Lawrence v. Texas, 539 U.S. 558 (2003); NASA v. Nelson 562 U.S. 134 (2011); Whalen v. Roe, 429 U.S. 589 (1977); Nixon v. Admin General Services Administration, 433 U.S. 425 (1977); United States v. Jones, 565 U.S. 400 (2012); Florida v. Jardines, 569 U.S. 1 (2013); Riley v. California, 134 S. Ct. 2473 (2014); Obergefell v. Hodges, 135 S. Ct. 2071 (2015).

23 For example, the court cited a *Stanford Encyclopedia of Philosophy* review article on the philosophy of privacy by philosopher Judith DeCew, that discusses the work of many contributors to the debates about philosophical aspects of privacy. Thus, the thought of many American philosophers is indirectly reflected in the opinion. Judith DeCew, *Privacy*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2018). My work is directly reflected through a reference to an article based on my book, *Unpopular Privacy*. Anita L. Allen, Unpopular Privacy: What Must We Hide? (2011).

24 *Cf.* Heikki E.S. Mattila, *Cross-references in Court Decisions: A Study in Comparative Legal Linguistics*, 1 Lapland L. Rev. 96, 108 & n. 58, 61 (2011):

> The information retrieval system for the data bank of the Indian Supreme Court, which works in English, is well developed and easy to use. If one searches for the terms "learned author" and "learned authors," the bank gives 400 hits for the years 1960-2009, including some from each decade.

It does not appear to be commonplace for the Indian Court to cite bioethics, one important discipline of academic philosophy. On March 17, 2018, along with others designated as "scholars /colleagues," I received the following email

C. High Court's Reasoning

Taken as a whole, *Puttaswamy's* reasoning can be summarized as follows. A fundamental constitutional right to privacy must be recognized for Indian citizens — in light of Article 21 and supportive national, international and comparative legal and scholarly authority — even without express mention in the text of the Charter on Fundamental Rights or other parts of the constitution, and even in the absence of a supportive national legislative statute. A fundamental right to privacy is a part of a legal framework that respects human dignity. Dignity is a central human right, a natural right and constitutional value, whose protection is both an end of the law and a means to justice. The protection of the inviolable human personality and the integrity of mind and body are called for by respect for dignity. Choice, control and autonomy over intimate decisions are key to respecting inviolable human personality, as are respect for private spaces and, generally speaking, being let alone. To realize the mandate of privacy there must be protection given to bodily and mental integrity, intimate decisions, family, marriage, sexual orientation, and the right to be silent.[25]

So described, a striking feature of the Court's reasoning is that, although the case before it could be viewed narrowly as an "information privacy" or "data protection" case, the Court approached the case as a question of the right to all important forms of privacy, generally. In fact, the Court framed the constitutional values at stake about as broadly as they could be framed — as values surrounding the requirements of human dignity, bringing to mind early discussions of privacy by American scholar Edward Bloustein and the

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message from Dr. R. R. Kishore, MD, LLB, President of the Indian Society for Health Laws and Ethics:

> May I give you some important news on the bioethics and legal front. On 9th March, 2018, the Hon'ble Supreme Court of India, in a path-breaking pronouncement, legalized passive euthanasia in the country. I had the privilege of successfully arguing the matter before the apex Court which has quoted *in extenso* from one of my articles, *End of Life Issues and the Moral Certainty: A Discovery through Hinduism*, 13EJAIB 1 (6) 210-213 (2003). This is for the first time that the apex Court has quoted from a journal of Bioethics. It is a long judgment running into 538 pages. I hereby attach the relevant pages. [*link omitted*]
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> As an avowed scholar of Bioethics and Health law the above judgment may, perhaps, be of interest to you.

E-mail from Dr. R. R. Kishore, MD, LLB, President of the Indian Soc'y for Health Laws and Ethics to Anita L. Allen (Mar. 17, 2018, 3:40am) (on file with author).

25 *Puttaswamy*, (2017) 10 SCALE at 244.

Australian Peter Benn in the 1970s.[26] The Court did not isolate informational privacy or data protection as normatively unique; nor for that matter, as fully conceptually unique. Rather, the Court treats data protection as an informational privacy problem, conceptually and morally akin to what I and others have termed physical, decisional, proprietary, associational and intellectual privacies.[27]

In its analysis of the implications of the right of privacy, the *Puttaswamy* decision appeals to principles familiar to the constitutional jurisprudence of both the U.S. — which asks that interference with privacy be related to legitimate state aims and respectful of reasonable expectations — and the EU — where interferences with privacy are required to be "proportionate." While the Court discusses the controversial "substantive due process" version of U.S. constitutional privacy jurisprudence under the Bill of Rights and the 14th Amendment, as it might apply by analogy to the derivation of the right to privacy in India, it insists that the right to privacy in India does not stand or fall with the fate of the U.S. debates.

Hence, *Puttaswamy* reasons in this vein. The right to privacy is not absolute, and reasonable limits must be recognized. Individuals are social beings, not hermits. Our reasonable expectations of privacy are conditioned by regulations designed to protect the interests of the community. We have subjective expectations, but there must be objective principles which determine whether expectations are reasonable. "Information privacy," the main opinion concluded, "is a facet of privacy . . . . We commend to the Union Government the need to examine and put in place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state."[28] Under the constitutional right of privacy, a law that infringes privacy must advance a legitimate state aim and be proportionate to the object and needs sought to be fulfilled.[29] Under this test, it should be determined whether the Aadhaar program is partially or thoroughly unconstitutional.

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26 Philosophical Dimensions of Privacy: An Anthology (Ferdinand David Schoeman ed., 1984) (anthologizing privacy-related articles written by philosophers and legal theorists through its publication date, including Edward Bloustein, S.I. Benn, Judith Thomson, Jeffrey Reiman, James Rachels, Ruth Gavison, William Prosser and Robert Gernstein).

27 Anita L. Allen & Marc Rotenberg, Privacy Law and Society 1-14 (3d ed. 2015).

28 *Puttaswamy*, (2017) 10 SCALE at 264.

29 *Id.* at 254-55, 264.

D. Court Calls for New Data Protection Laws

Post *Puttaswamy*, it now remains for the courts to decide what legal limits may be imposed on Aadhaar.[30] (And beyond the world of informational privacy and data protection, does the decision require more personal freedoms, such as sexual freedom and the legalization of gay marriage?[31]) An inference to be drawn is that the collection of biometric and demographic data to generate the unique numerical identifier could be justified in a country with porous borders, by the demands of keeping track of the allocation of resources to a

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30 On September 26, 2018, the Supreme Court of India issued its 4:1 judgement regarding the constitutionality of the Aadhaar Act. The main judgment was authored by Justice A.K. Sikri, Chief Justice Dipak Misra and Justice A.M. Khanwilkar concurring, with Justice A. Bhushan concurring in a separate judgement. Among the Sections of the Act to have been stricken down by the Supreme Court one can find Section 2(d) of the Act, which pertains to authentication records, which would, after the Judgment, not include metadata; Regulation 27 of Aadhaar (Authentication) Regulations, 2016, which provided for the archiving of data for a period of five years; Section 33(2) of the Act, which allowed for the disclosure of information in the interest of national security by an officer not below the rank of Joint Secretary; and Section 57 of the Act, insofar as it authorized corporations and individuals to seek authentication. Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, W. P. (Civil) No. 494 of 2012, https://indianexpress.com/article/india/aadhaar-verdict-full-text-judgment-supreme-court-order-5374794/. This judgement was influenced by the earlier *Puttaswamy* judgement:

> In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors*."

Id. at 52.

31 *LGBT Community Cheerful after Right to Privacy Ruling,* The Hindu (Aug. 24, 2017), http://www.thehindu.com/news/national/lgbt-community-cheerful-after-right-to-privacy-ruling/article19555773.ece. On September 6, 2018, the Supreme Court of India struck down Section 377 of the Indian Penal Code, insofar as it criminalized consensual sexual conduct between adults of the same sex. The Section was upheld regarding sex with minors and nonconsensual sexual acts such as rape and bestiality. Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016, https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf. The *Puttaswamy* judgement paved the way for this outcome: "While testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been recently proclaimed in *Puttaswamy*." *Id.* at 96.

population of many multimillions. As a practical matter, the fact that so much has now been invested in the program and so many are now enrolled may mean that the Aadhaar program is harder to dismantle. Aadhaar's fate is a question of limits and constraints. For example, can the Aadhaar number be mandatorily linked to bank accounts or mobile phone numbers? The Court invited legislation to answer questions like this — "a robust regime for data protection" to regulate privacy-threatening practices.[32] Aadhaar will survive constitutional challenges, so long as there is strong data security attached, and a minimal reliance upon unduly intrusive collection schemes.

In the midst of the Aadhaar controversy, the Indian Ministry of Electronics and Information Technology (MEITY) established a Committee of Experts charged with identifying data protection concerns and now, consistent with *Puttaswamy*, drafting a responsive regulatory framework of laws. At the time Aadhaar was established, India did not have a comprehensive national data protection regime analogous to the EU's Privacy Directive/General Law, although some data protection rules and principles existed in the form of the Information Technology Act (ITA) of India.[33] The ITA was heralded in the report of an earlier Group of Experts on Privacy convened by a government Planning Commission in 2012 as satisfying nine important fair information principles.[34] However, the new Committee of Experts recommended that India adopt fresh, comprehensive legislation and sought public comment.[35] The Committee of Experts has published a *White Paper* identifying their own "Key Principles of a Data Protection Law," a data protection framework for India.[36] The seven key principles are not a classic formulation of Fair

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32 *Puttaswamy*, (2017) 10 SCALE at 254, 260, 264.

33 *See generally* Smitha Krishna Prasad, (Draft) Paper on Information Technology Act, 2000 and the Data Protection Rules (Dec. 30, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3094792 (the only "comprehensive" data protection law in India at the time of *Puttaswamy* was the Information Technology Act and associated rules. The author is affiliated with the Centre for Communication Governance at National Law University Delhi. The Committee acknowledged that "[t]he provisions of the IT Act and the Rules can in some ways be seen to check the boxes of accepted privacy / data protection principles."). One way to understand the consequences of *Puttaswamy* is that it will prompt modernization of state regulation of data practices.

34 *Id.* at 14 ("The provisions of the IT Act and the Rules can in some ways be seen to check the boxes of accepted privacy / data protection principles.").

35 White Paper of the Comm. of Experts on a Data Prot. Framework for India, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf (2017).

36 *Id.*

Information Practice Principles (which did not include technology agnosticism or controller accountability), but reflect an emerging international consensus:

1. Technology agnosticism — The law must be technology agnostic. It must be flexible to take into account changing technologies and standards of compliance;
2. Holistic application — The law must apply to both private sector entities and government. Differential obligations may be carved out in the law for certain legitimate state aims.
3. Informed consent — Consent is an expression of human autonomy. For such expression to be genuine, it must be informed and meaningful. The law must ensure that consent meets the aforementioned criteria.
4. Data minimization — Data that is processed ought to be minimal and necessary for the purposes for which such data is sought and other compatible purposes beneficial for the data subject.
5. Controller accountability — The data controller shall be held accountable for any processing of data, whether by itself or entities with whom it may have shared the data for processing.
6. Structured enforcement — Enforcement of the data protection framework must be by a high-powered statutory authority with sufficient capacity. This must coexist with appropriately decentralized enforcement mechanisms.
7. Deterrent penalties — Penalties on wrongful processing must be adequate to ensure deterrence.

Suggesting another road different from the courts by which theorists impact public policy — the road of legislatures — the *White Paper of the Committee of Experts* cites privacy scholars, including some academic philosophers.[37] Interestingly, it does not cite the same philosophers and scholars cited by the *Puttaswamy* Court. Conceivably, the ideas needed to articulate the normative foundation of the constitutional right to privacy and the ideas needed to motivate and design practical legislation are the ideas of an overlapping but distinguishable set of academics. For example, my scholarship is not directly cited in the White Paper.

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37 Following a discussion of the definition and value of privacy, they cite, for example, Alan F. Westin, Privacy and Freedom 7 (1967); Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* Privacy: Nomos XIII 26 (J. Ronald Pennock & John W. Chapman eds., 1971); Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000); Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934, 1950 (2013); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash. L. Rev. 119 (2004); Daniel J. Solove, *Conceptualizing Privacy*, 90 Calif. L. Rev. 1087, 1088-89, 1100-02, 1112-13, 1130-31, (2002). *See* White Paper, *supra* note 34, at 5.

E. The Context of a Global Information Society

If privacy is a constitutional value, then what liberties justly constrain government and non-state regulation, specifically "the norms for and compilation of demographic biometric data by government"?[38] The *Puttaswamy* court articulated its responsibility to answer this question as requiring attention to its context. Coming to the High Court today, the demands of human privacy should be addressed "in the context of a global information based society."[39] However, contextually specific presentation was nominal and minimal. Moreover, recognition of the digital information society did not prompt the Court to undertake a contextually or empirically informed discussion on the surface of its lengthy opinions about whether and how the digital age might require the courts to embrace a fundamental redefinition of "privacy" or a reassessment or recharacterization of privacy's value. The Court reached back to and repurposed Enlightenment conceptions of dignity, autonomy and individual liberty. Enlightenment ideals were presumed to apply: the trick was only to explain how. In addition, the Court relied upon nineteenth-century discourse popularized by Samuel Warren and Louis Brandeis, defining privacy as being "let alone in a core which is inviolable," and twentieth-century ideals of individual control over personality and personal information and the attributes of personal identity, popularized by Alan Westin and many others after him in the final third of the twentieth century.[40] While understanding that the world has been transformed by technology, the Court analyzed the problem of translating privacy as a constitutional value into practical rulings about everyday life much as it would have thirty years ago when privacy interests competed with state interests in access to telecommunications, video recordings and the regulation of morals.

F. Next Steps for the High Court

Article 21 provides the basis for a broad constitutional right to privacy in India, and now that right must be applied, even in the absence of controlling legislation. In the aftermath of *Puttaswamy*, a five-judge bench of the High Court that includes the Chief Justice began in 2018 to hear challenges to

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38 *Supreme Court Verdict on Right to Privacy: Key Observations*, Zee News (Aug. 24, 2017), http://zeenews.india.com/india/supreme-court-verdict-on-right-to-privacy-key-highlights-2035898.html (summarizing courts' key observations).

39 Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, (2017) 10 SCALE 1, 4.

40 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Westin, *supra* note 36.

specific aspects of the Aadhaar scheme.[41] Depending upon the results of continuing litigation, the Central Government may be required to abandon Aadhaar, approach data security differently, or make certain applications of Aadhaar less than mandatory.

II. Philosophy's Impact on Privacy Law

Spawned in turn by developments in medical decision-making, sexual freedom, telephones, the internet, surveillance, and big data, widespread concerns about privacy have inspired philosophical discussion and debate around the world. Some of the philosophical discussion found its way into the *Puttaswamy* decision of the High Court of India, raising for me the question central to this Article — whether or how what academic philosophers have said, hoping to clarify and inform debates about privacy, has mattered to the courts.

Theoretical explorations of privacy were cited in abundance in *Puttaswamy.* They proliferate alongside global precedence, especially from the English-speaking world, in the main opinion of the case. On the surface, in an institutional sense, academic scholarship engaged the Court and the Court favored some scholarly opinion over other. By weaving in so much and such diverse scholarship, *Puttaswamy* appears to achieve a laudable mass synthesis of privacy thought in service of finding a right to privacy in its country's constitution, applicable to the resolution of a digital era conflict.[42] The apparent synthesis is illusory, but the demonstration that many privacy scholars agree that privacy stands for a broad set of human concerns demanding legal protection is real.

The academic scholarship cited in *Puttaswamy* has weight as an undifferentiated whole, not unlike the weight of the international legal precedents cited. For example, *Puttaswamy* presents U.S. privacy jurisprudence as if it tells a coherent progressive story. That U.S. constitutional privacy jurisprudence is in something of an intellectual shambles could not be guessed. The U.S. Supreme Court began to avoid the word "privacy" and privacy jurisprudence in decisional privacy cases of the 1980s and 1990s. In fact, some notable U.S. Supreme Court cases that the public and media described as "privacy" cases

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41 *See* Sruthi Radhakrishnan & Krishnadas Rajagopal, *Constitutional Validity of Aadhaar: The Arguments in Supreme Court so far*, The Hindu (Feb. 14, 2018), http://www.thehindu.com/news/national/constitutional-validity-of-aadhaar-the-arguments-in-supreme-court-so-far/article22752084.ece.

42 Bart Van Der Sloot, Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data (2017) (offering a different account of the relationship between definitional stances and politics than is found in cited authorities).

were cases in which the more conservative justices skirted or disavowed privacy talk, presenting the legal issues as raising mere "liberty interests" or equality. The best example may be *Cruzan* (1986), the case establishing an individual's interest in making important medical decisions and the state's interest in prohibiting euthanasia.[43] But *Planned Parenthood v Casey* (1992) is another example.[44] The *Lawrence* (2002) and *Obergefell* (2015) decisions advance what I would unapologetically call decisional privacy, but direct invocations of privacy jurisprudence in the cases, by contrast to equality and dignity, are muted.[45]

A humbling reminder that, first, judges and law clerks cite more than they have a chance carefully to ponder and, second, that some of the most precise, nuanced work of academics will play a marginal role in practical jurisprudence, the *Puttaswamy* synthesis of scholarship is satisfying in that it honors philosophical labor. *Puttaswamy*'s engagement with academic philosophy is a partial and pragmatic appeal to intellectual authority. Theorists hoping that the courts will learn from philosophical debates about the meaning and value of privacy find that the subtleties of debates embedded in cited intellectual authority are mostly invisible.

Still, the case has a number of satisfying features and implications. These relate to the broad definitional understanding of privacy the Court deploys — in implicit defiance of some philosophers' recommendations — and its characterization of privacy as a paramount liberal human value.

A. The Broad Definitional Understanding

Privacy became a focal point of analytical-style philosophical discussion in the United States in the 1970s and 1980s. Much of the work in these two decades focused on how to precisely define or best characterize privacy. What does it denote? What does it mean? Is it a value or a state? How should "privacy" be used in the law?

Israeli scholar Ruth Gavison published an article in 1980 in the *Yale law Journal* that was a milestone in the history of academic theorizing about

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43 Cruzan v. Director, Mo. Dep't. of Health, 497 U.S. 261 (1990) (allowing states to require clear and convincing evidence of a comatose individual's autonomous choice to refuse hydration and nutrition needed to sustain life).

44 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (holding that government restrictions on abortion that promote legitimate state interests and that do not unduly burden the fundamental right to abortion are constitutional).

45 Lawrence v. Texas, 539 U.S. 558 (2003) (striking down criminal sodomy statutes as unconstitutional infringements); Obergefell v. Hodges 135 S. Ct. 2071 (2015) (striking down same-sex marriage bans as unconstitutional infringements).

privacy in the U.S.[46] Gavison's article, which was based on doctoral work completed under the legal philosopher H.L.A. Hart, critically and analytically engaged the philosophical literature, alongside the legal literature, to suggest a structured way to think about privacy in relation to common-law doctrines and constitutional law debates.[47] Surveying the philosophical debates up to that point, Gavison argued that conceptual clarity can be gained by distinguishing "privacy" in the sense of freedom from government prohibitions on choice (e.g., to use birth control, have an abortion, marry outside your race) from limited access to persons and personal information (e.g., seclusion, secrecy, solitude, and anonymity).

My 1988 book, *Uneasy Access: Privacy for Women in a Free Society,* the first book-length treatment of privacy by an American philosopher, began with a Gavison-inspired chapter on the definition of privacy and followed with a chapter on the value of privacy.[48] (Two other sole-authored books about privacy followed from my keyboard.[49]) I followed Gavison in advancing a "restricted access" definitional theory of privacy, but offered my own account of the value of privacy and the gendered politics of privacy in the American context.[50] Wary of the politics of denying privacy discourse to those seeking progressive movement in the law, I did not similarly prescribe excluding conceptions of liberty, freedom or autonomy related to intimate decision-making from the realm of privacy's meaning.[51] I believed at the time that women typically feel that their privacy is invaded by restrictions on birth control, abortion laws,

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46 Ruth Gavison, *Privacy and the Limits of Law*, 89 *Yale* L.J. 421 (1980).

47 *Id.* at 438 ("A great many instances of 'not letting people alone' cannot readily be described as invasions of privacy. Requiring that people pay their taxes or go into the army, or punishing them for murder, are just a few of the obvious examples.").

48 Looking back I see that Gavison even subtly influenced the title of my book. The first sentence of her article reads: "Anyone who studies the law of privacy today may well feel a sense of uneasiness." *Id.* at 421.

49 Anita L. Allen, Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability (2003); Allen *supra* note 23.

50 I was convinced by Gavison that privacy is best seen as a neutral condition of limited (or as I preferred, "restricted") access, and that privacy is not conceptually superfluous, as Judith Thomson argued. I took issue with Gavison's sentiment that the concept of privacy was exhausted by its restricted access or its physical and informal senses, and applied only problematically in its decisional and other senses. My goal was not to dictate ideal uses so much as to clarify and amplify persistent common usages with political and moral resonance.

51 I detail my past and more recent views on defining privacy in my response to critics, part of American Philosophical Association, Law and Philosophy

and even sex work, and that philosophical theories should not define privacy in a way that construed that sentiment as a mere confusion.

1. The Intractable Vagueness of Privacy Thesis

One strand in twentieth-century privacy thought about the definition of privacy has been what I will dub the "intractable vagueness of privacy thesis." The popularity of the "intractable vagueness of privacy thesis" is perhaps explained in part by the fact that when one *first* seeks to define or state what privacy means, it is not instantly clear how to go about it. It takes hard work to understand privacy. But to my mind, it is no harder work than getting a grip on notions like "liberty," "solidarity," "free expression" or "justice."

The Court of India took on and nicely dispensed with the disabling trope that privacy is "so amorphous as to defy description"[52] and hence too vague for legal application. The intractable vagueness of privacy thesis suits well the needs of privacy law opponents, be they traditionalists who want to weaken fundamental rights jurisprudence that might be used in support of progressive social causes, or pro-technologists who find privacy constraints a drag on exciting and lucrative innovation. The best reasons to prefer tradition over progress and innovation over privacy do not include the supposed intractable vagueness of privacy. To refute the thesis, the Indian court turned to the history of ethical, legal and political thought, surveying philosophers and jurisprudes who have offered intelligible, enduring, shared perspectives on privacy and related concepts. These include Aristotle, with his public sphere, private sphere distinction; Blackstone and Mill, followed by Austin; then James Madison, E.L. Godkin, Thomas Cooley Warren and Brandeis, and Roscoe Pound. For the Court, intellectual history underscores that privacy is not somehow singularly vague and, furthermore, is amenable to legal applications in the highest law of India.

> [Privacy] reflects the basic need of every individual to live with dignity. Urbanization and economic development lead to a replacement of traditional social structure . . . . The need to protect the privacy of the being is no less when development and technological change continuously threaten to place the person into the public gaze and portend to submerge the individual into a seamless web of inter connected lives.[53]

Newsletter. *See* Anita L. Allen, *Our Privacy Rights and Responsibilities: Replies to Critics*, 13 Am. Phil. Ass'n L. & Phil. Newsl. 19 (2013).

52 Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, (2017) 10 SCALE 1, 26.

53 *Id.* at 34.

2. Being Let Alone, Control over the Personal Attributes

Puttaswamy crowds into an apparent grand synthesis what analytic philosophers would regard as different and competing conceptions of privacy, failing to acknowledge significant developments in philosophical insight and disagreement. Examples of this include the court's perpetuation of "being let alone" as one of the core definitions of what it means to enjoy privacy. Philosopher after philosopher, including the aforementioned Ruth Gavison,[54] has argued the inadequacy of defining privacy as "being let alone." But "being let alone," connotes "Let me alone!" The Cooley-Brandeis discourse, which echoes a defiant line drawn in the sand compelling others to back off, continues to be attractive to the public and the bench.

Another blow to the hubris of academic philosophers, the Indian Court embraced the idea that critical to privacy is having the ability to exercise "control." Privacy-as-control is a popular idea, helped along by sociologist Alan Westin, who set the stage for much of privacy theory in the U.S. with a 1967 book of lasting influence, *Privacy and Freedom*. Philosophers, again, including Ruth Gavison, have found much fault in it. But courts and others keep it alive. The Court of India undertook to explain the idea that privacy is not only about control over personal information, but "a concomitant of the right of the individuals to exercise control over his or her personality."[55] The Court did not struggle over the philosophical question whether having control over personal information and/or personality is privacy-protective if one uses one's control to eschew privacy;[56] or whether we can speak meaningfully of exercising control over information and/or personality in the big data age (we are being extensively surveilled, shaped and manipulated,

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54 Gavison, *supra* note 45, at 436:

> The neutral concept of privacy presented here covers such "typical" invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; peeping, following, watching, and photographing individuals; intruding or entering "private" places; eavesdropping, wiretapping, reading of letters; drawing attention to individuals; required testing of individuals; and forced disclosure of information. At the same time, a number of situations sometimes said to constitute invasions of privacy will be seen not to involve losses of privacy per se under this concept. These include exposure to unpleasant noises, smells, and sights; prohibitions of such conduct as abortions, use of contraceptives, and "unnatural" sexual intercourse; insulting, harassing, or persecuting behavior; presenting individuals in a "false light"; unsolicited mail and unwanted phone calls; regulation of the way familial obligations should be discharged; and commercial exploitation.

55 *Puttaswamy*, (2017) 10 SCALE at 26.

56 Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 Conn. L. Rev. 861 (2000).

often by choice).[57] The limits of the control paradigm are not acknowledged. But we will need privacy even if people do not want it and cannot control it as individuals. The Court straightforwardly linked the ideal of control over personality with the notion that there are certain rights which are natural to or inherent in a human being and "inalienable" because they are inseparable from the human personality.

3. Politics of Decisional Privacy, Avoided

In the late twentieth century, the argument that "decisional" privacy (freedom from interference with one's own choices) is not a true form of privacy raged. The philosophers' version of the debate began in the 1970s with a handful of articles published in academic philosophy journals. Ruth Gavison argued that it is conceptually confusing to think of "typical" cases of privacy and freedom to use birth control or have an abortion as equally and in the same way concerned with privacy.[58] The concern that "decisional" uses of privacy might be unworthy of the name did not deter *Puttaswamy,* which elided the definitional debates that have intensely occupied philosophers for decades.

Overlooking definitional problems and differences that have been surfaced in the philosophical literature it abundantly cites, the Court freely characterized privacy without attention to nuance as being let alone, control over information, freedom from state interference with personal life, etc. The deep history of philosophical, theoretical debate about privacy is invisible. The invisibility, however, may be politically empowering.

Puttaswamy declares without reference to the debates over definition that "privacy lies across the spectrum of protected freedoms."[59] It was satisfying to see the Court embrace — as I have argued in numerous places that courts coherently can — a constitutional jurisprudence of privacy that includes not only physical and informational senses of privacy, but also decisional senses. In the U.S., definitional claims that freedom from government intervention in personal choice is not "privacy" enabled ridicule by opponents of reproductive choice and sexual freedom. Claims that they were confused and sloppy in the use of privacy concepts frustrated advocates arguing on behalf of women and the LGBTQ communities. *Puttaswamy* has no trouble including informational and decisional concerns under a common rubric of privacy. For this reason,

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57 Anita L. Allen, *Protecting One's Own Data in a Big Data Economy*, 130 Harv. L. Rev. F. 71 (2016).

58 Philosophical Dimensions of Privacy, *supra* note 26 (collecting the best philosophically informed work on privacy predating the internet age, including the literature cited by Gavison's *Yale* article).

59 *Puttaswamy*, (2017) 10 SCALE at 244.

oppressed and marginalized groups in India seeking freedom from state prohibitions under the rubric of privacy are not unvoiced. Indians may thus freely use the concept of privacy in defense of personal freedoms.

B. Foundational Goods, Fundamental Right

In the United States, India and elsewhere around the world, contemporary courts are required to resolve disputes over government use of new technology, applying constitutional, civil and criminal law provisions, principles and concepts that are in some cases centuries old. While the jurisprudence of privacy at the courts' disposal is often younger than other aspects of the law,[60] it has roots in the thought of long past eras. One might suppose that normative and conceptual understandings of privacy rooted in the past are ill-suited for purposes of deciding how states may deploy the newest, most sophisticated science and technology. Yet as *Puttaswamy* illustrates, courts resort to liberal Enlightenment ideals of individual freedom and human dignity for a normative discourse to ground the informational privacy and data protection jurisprudence of the twenty-first century. Theorists claiming that premodern and merely modern liberal concepts and theories of privacy cannot support the needs of the emergent global digital society notwithstanding,[61] ideas marked for retirement are still in service, helping the courts find their way to substantive justice.

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60 For example, the United States came into existence with constitutional law and inherited civil law and criminal law from England — all in the eighteenth century. But it legislated most of its information privacy protections after the 1970; and most of its express constitutional privacy jurisprudence dates back to the 1960s.

61 I have in mind Julie Cohen, whose account I have assessed as aggressively and needlessly antiliberal. Anita L. Allen, *Configuring the Networked Self: Shared Conceptions and Critiques*, Concurring Opinions, (Mar. 6, 2012), https://concurringopinions.com/archives/2012/03/configuring-the-networked-self-shared-conceptions-and-critiques.html:

> For Cohen, the "self" is "situated." She faults liberal theorists for perpetuating a conception of selves as abstract and unembodied. (She doesn't think privacy feminists' contextualisms or Helen Nissenbaum's privacy-as-contextual integrity or Solove's pragmatism go far enough in pushing an understanding of self as "situated." . . . . Far from being committed to obscurely transcendent selves, some liberal philosophers of privacy have long appreciated respects in which social practices, some intentional, some not, are dynamically responsible for selves. They have understood that "boundary management" is an important dimension of what it means to have, want, expect and confer privacy.

Given my broadly liberal political and philosophical leanings, it was striking and personally satisfying to see the Court appeal to concepts in the Western natural rights and dignitarian traditions. I have argued that privacy goods are extremely important, and worthy of characterization as foundational goods of the sort one might view as the basis of fundamental rights, natural rights and human rights. A lawyer close to the *Puttaswamy* case told an audience at the University of Pennsylvania Law School that my views in *Unpopular Privacy* — urging that paternalistic privacy laws could be justly imposed in liberal states whose people were indifferent or opposed to privacy — had directly influenced his views that alleged general population indifference to privacy in India would not be a reason to refrain from recognizing a fundamental privacy right and privacy interests countermanding aspects of Aadhaar.[62] *Unpopular Privacy* is, in fact, cited in the opinion (along with work published in my University's law review that I seem to have influenced).

1. Privacy is a Foundational Right

The idea — that privacy is the basis of a certain special and inalienable kind of right — is at the base of my book *Unpopular Privacy* and a paper in *Fordham Law Review*.[63] I point to the natural law origins of the American common-law right to privacy and link it to human rights frameworks and EU data protection law.[64] Recognizing and celebrating these origins is consistent with a liberal defense of privacy rights.

The human element in life is impossible to conceive without the existence of natural rights, the *Puttaswamy* court states, citing as backup Locke, Blackstone, the Declaration of Independence, the Declaration of the Rights of Man, and Pound's "Spirit of the Common Law." The Court is right in my view to invoke these traditional thinkers and to suggest that privacy is tied to core human rights. In work that has struck some of my more junior colleagues as "retro," I have pointed to the natural law origins of U.S. common-law privacy rights.

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62 The attorney was Sajan Poovayya, who argued the case before the court. He is a Senior Advocate at the Supreme Court of India & High Court of Karnataka. He is the Founding Partner of Poovayya & Co., a national Indian law firm. *See* Sajan Poovayya, Address at the University of Pennsylvania Law School (Oct. 16, 2017).

63 Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 Fordham L. Rev. 1187 (2013).

64 *Id.* at 1215 (The natural law discourse of Pavesich does not render the opinion archaic. Far from it, the spirit of natural law reasoning and a robust regard for liberty promoted by the case resonate even in the technology-saturated age of social networking and revelation.).

Yet I have tried to acknowledge the ways in which big data and technology strain traditional ways of thinking about rights.

One can embrace liberal theory without ignoring the conceptual and practical problems associated with viewing "control" as the goal or meaning of privacy rights. Some philosophers and legal theorists doubt globally the apparatus of liberal rights theory and liberal privacy rights theory. But this Court's approach to philosophy seems distinctly liberal, embracing the idea that rights are trumps, citing Ronald Dworkin: "Privacy recognizes the autonomy of the individual and the right of every person to make essential choices which affect the course of life."[65]

While its grand synthesis and largely uncritical inclusion of various perspectives on privacy are disheartening, the Court does acknowledge and seek to dispense with a number of philosophical and conceptual perspectives that could be seen as standing in the way of finding a right to privacy for India. *Puttaswamy* took on originalism.[66] It took on substantive due process critics.[67] It broached the feminist critique associated with Catharine MacKinnon in the 1980s, but embraced my feminist move from 1988 — not throwing out the baby with the bathwater. Privacy discourse has been used to oppress women, but women need and deserve modern privacy rights, too.

2. Privacy Rights Not Elitist

The Court dispensed with the notion that privacy is an elitist value. The elitist critique urged that the "right to privacy must be forsaken in the interest of welfare entitlements provided by the state."[68] The Court cited the work of Amartya Sen to reply to the view that the poor need welfare only and not also civil rights of privacy. The ideas that the interests of the poor are adequately served by welfare rights alone and that they need no privacy rights "wreak the most egregious violations of human rights" by authoritarian regimes with immunity from judicial restraint. Privacy is not just "a privilege for a few," but every individual is due the "intimacy and autonomy" which privacy protects.

While I agree with the Court of India, it could be argued, learning from the way the constitutional right to privacy evolved in the United States, that

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65 Justice K.S. Puttaswamy (Ret.) & Anr. v. Union of India, (2017) 10 SCALE 1, 109.

66 *Id.* at 213 (originalism is unworkable and it "would be an injustice both to the draftsmen of the constitution as well as the document which they sanctified to constrict its interpretation to an originalist interpretation").

67 *Id.* at 241 ("judicial review is a powerful guarantee against legislative encroachments on life and personal liberty.").

68 *Id.* at 215.

there is something of a missed opportunity that relates to economic and class differences in the *Puttaswamy* ruling. Progressives were disappointed that the decisional privacy right developed in U.S. constitutional law in the 1970s was quickly given a "negative liberty" rendering. The right to privacy is a right to choose, not a right to have one's choices granted like wishes made with a magic wand. Thus the right to abortion in the U.S. is a right against laws criminalizing abortion. It is not a right to have the government pay for abortions or even birth control desperately needed by poor and low-income families.

Is the privacy right found by the Indian court also construed as a negative liberty? The Court states that it is a right from interference and a right to protection by the state. But it does not go so far as to state that the goods protected via privacy rights must be provided by the state. The Supreme Court of India has been characterized as progressive and activist.[69] The economic challenges of so large and poor a nation make the positive rights formulation perhaps thinkable but completely impractical, even in the minds of judges on the progressive edge of things. Yet the Court refers approvingly to justice, liberty, equality and fraternity. These, as a group, are potentially generous values. The Court also relies on the idea of dignity, another potentially generous value. "Dignity as a constitutional value finds expression in the Preamble," the court said,[70] and "human dignity is an integral part of the constitution. Reflections of it are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and the right to life and personal liberty (Article 21)."[71] We do not know exactly what substantive goods, freedoms and protections will be found to flow from *Puttaswamy*. We can be optimistic.

Conclusion

The aim of scholars should be to be on the side of truth and eventual justice as we understand them. Based on the limited evidence of *Puttaswamy*, one would have to describe the potential impact of recent and contemporary philosophical labor relating to privacy on a High Court of the world and its published decisions as striking, but modest. Philosophers should not wish for too much academic philosophy, replete with its specialized vocabulary, ultrafine distinctions and internecine debates, on the surface of published

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69 *See* Sanjay Ruparelia , *A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court* 1-55 (Kellogg Institute Working Paper #391, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807217.

70 *Id.* at 94.

71 *Id.*

judicial opinions. That level of overt philosophical authority would render written opinions inaccessible to the general public, to whom High Courts ought to be speaking. What philosophers reasonably wish for is to see some sign in overt opinion that learned High Court Justices and their clerks have identified and assessed relevant theories toward relying on the best. Citing a plentitude of scholarship could be a practical way of signaling that the desired deeper engagement has taken place behind the scenes in the quietude of chambers. Unfortunately, citing a great many scholars could also just be a conventional practice thought to elevate the stature of an institution seemingly steeped in cultural materials only glanced at. With respect to *Puttsaswamy*, I believe philosophers' scholarship, amicus briefs, and advocacy were genuinely engaged in good faith, nuances set aside in the interest of practical efficiency. The Court viewed the amount of attention philosophers as a group have paid to the subject matter of privacy as a sign of its great importance.

Inevitably, philosophical traditions and ideas that are consonant with judicial inclinations will receive more endorsement than others. However, the most admirable judicial analysis anticipates and answers objections. Thus philosophical traditions and ideas that are not consonant with judicial inclinations potentially challenge judges and their clerks aware of them to work harder to develop stronger, more comprehensive arguments. The challenge of forging a "new" privacy jurisprudence specifically for a digital age, has yet to be fully set out or followed. The demands of justice continue to be fleshed out in modern and twentieth-century languages of ultimate value and human interest.