

Assessing Rights-based and Legal Approaches to Protecting Mental Privacy

Friday, November 5, 2021

Speakers

- Sara Goering, University of Washington (United States)
- Brenda McPhail, Canadian Civil Liberties Association (Canada)
- Abel Wajnerman Paz, Alberto Hurtado University (Chile)
- Moderator: José Manuel Muñoz, University of Navarra (Spain)

Recording and resources:

<https://www.neuroethicssociety.org/2021-annual-meeting-mentalprivacy>

Speaker 8 [\(03:01\)](#)

If this is a meeting, will people just start trickling in, or would you still have to let them in now you still have to let them in, right?

Speaker 1 [\(03:08\)](#)

Yeah. We're running with a waiting room so that if you need to, we could converse. So instead of saying start webinar, I'm essentially opening the waiting room, and people will file in. For the most part, people have their camera off, except for a handful of people.

Speaker 8 [\(03:25\)](#)

I mean, it's lunch time. I think many of might have the camera.

Speaker 1 [\(04:54\)](#)

I'm letting Nicole in early as well.

Speaker 4 [\(05:00\)](#)

Okay, so everybody's here now.

Speaker 1 [\(05:03\)](#)

We can just add one person every minute. This is a really popular session. Sorry. There's a line at the door we've got.

Speaker 4 [\(05:19\)](#)

There's a specific password everyone needs to give.

[\(05:45\)](#)

Yeah.

Speaker 1 [\(05:46\)](#)

It looks like people are starting to come to the waiting room now. So we even started one or two minutes after just because people see the time change, go to the link. And after I say, let them in from the waiting room, just kind of give it like about 10 seconds before you start talking. That way, people can kind of enable their camera and come in. Seems like it takes about that amount of time for everybody, just like a physical door where there's a bottleneck real quick.

Speaker 4 [\(06:16\)](#)

Do the panelists are like pinned or how does it work?

Speaker 1 [\(06:24\)](#)

I hadn't used the Spotighting feature right now, so it'll kind of hop around.

[\(06:29\)](#)

But.

Speaker 1 [\(06:32\)](#)

I'll manage that as we go so that it doesn't hop around unnecessarily between people. If you want me to pin all the panelists, I can do that as well. So that it's a grid.

Speaker 4 [\(06:43\)](#)

I don't know what Nicole thinks. I think that would be good, actually.

Speaker 1 [\(07:11\)](#)

Did I do it correctly?

[\(07:14\)](#)

Yeah.

Speaker 4 [\(07:14\)](#)

Thank you.

Speaker 1 [\(07:41\)](#)

Okay. We do have 30 people in the waiting room look like it kind of tapped out there, so I'm going to let them in and just wait about 10 seconds after I say go, and then we'll start it up.

[\(07:59\)](#)

Okay.

Speaker 1 [\(08:00\)](#)

I'm going to let them in now.

Speaker 2 [\(08:25\)](#)

Okay.

Speaker 1 [\(08:25\)](#)

Feel free to start.

Jose Munoz [\(08:28\)](#)

Hi, everyone. Welcome to this INS workshop entitled Assessing Rights Based and Legal Approaches to Protecting Mental Privacy. I am Jose Munoz, working as a research fellow in neuroethics at the University of Navarra in Spain and also at the International Center for Neuroscience and Ethics, which is abbreviated as C-I-N-E-T and Creative Body Tatiana Foundation in Madrid, also in Spain. I have the great pleasure of being the moderator for this workshop on the critical and present topic of mental privacy. I am accompanied by three great panelists who are experts in privacy issues from the fields of neuroscience, law, philosophy, and ethics.

Jose Munoz [\(09:15\)](#)

They are Sara Goering from the US, Brenda McPhail from Canada and Abel Wajnerman from Argentina. I would like to thank them for agreeing to participate in this workshop. I also want to thank our colleagues, Nicole Martinez-Martin and Karen Herrera-Ferra for their incredible work in preparing and coordinating this session. Please let me start by stressing the fact that a number of developments in recent years have

led to calls and proposals to provide protection for neural and mental data, including the availability of digital neural and behavioral data sets and advances in technologies to collect and analyze brain data.

Jose Munoz [\(10:01\)](#)

For the next hour, there will be discussions on human rights based approaches and other legal approaches to protecting mental privacy. We will be addressing some of the key issues, such as the types of data that need additional protections, the rationales rights-based for different legal and rights based approaches and the promises and pitfalls in these different approaches. Please also let me briefly explain what the general dynamics of the session will be like. The idea is that I will begin by throwing some initial questions to our panelists.

Jose Munoz [\(10:34\)](#)

Thereafter, a working debate will be open between them and the attendees. I think at first the attendees will be able to use the Q&A option, the questions and answers option of the chat to ask their questions. I would like to request the panelists to feel free at all times, to be in conversation with each other and the audience. I would also like to ask the attendees to please feel free to participate in each of the questions I will be introducing to the panelists, and the format is meant to debate, to ask questions and participate in the discussion through public session.

Jose Munoz [\(11:15\)](#)

Okay, so let's start by getting to know better speakers for the session, please. Sarah, could you introduce yourself and then Brenda will follow Sarah and come after Sarah.

Sara Goering [\(11:30\)](#)

Great, thanks everybody for coming. So I'm Sara Goering. I'm a professor of philosophy at the University of Washington in Seattle, and I've been working with the center for Neuro Technology here for about the last ten years, and I think I'm particularly interested in questions about implantable neural devices and human agency and in our group. One of the things that we've argued is that Privacy is sort of a fundamental feature of human agency that there's a way in which who I am separate from other people requires this kind of internal, private space.

Sara Goering [\(12:10\)](#)

I have also worked a lot with Rafa Yuste at Columbia, a group that we convened there had a number of neuroscientists and neural engineers coming together, and also some people from industry as well as academia, really from all across the world to talk about concerns with neural devices. And one of the main concerns that came out of that was privacy. And I think my recognition of the salience and the seriousness with which we need to address this issue right away really is built on the neuroscientists who are doing work that shows a reasonable ability to read out certain things that are going on visually or

through speech decoding inside somebody's brain and interpreting that and then thinking ahead from the neuroscientist themselves.

Sara Goering ([13:07](#))

This is something that could be potentially quite dangerous. And so we want to try to have anticipatory governance and figure out a way to protect those private spaces. And with Abel, I've been working with a group at Freiburg too, looking at just what are the appropriate legal frameworks for thinking about how we do this kind of policymaking best. So that's me over to you. Brenda.

Brenda McPhail ([13:35](#))

Hi. So I'm Brenda McPhail. I direct the Privacy Technology and Surveillance program at the Canadian Civil Liberties Association. I am relatively new to this field. Part of my job at the CCLA, which is a legal advocacy organization in Canada that has been around for more than 50 years protecting rights and freedoms. Part of my job is trying to anticipate what's coming that we need to think through as a society and prepare for and obviously, issues of neural Privacy in the context of the kind of research that has been discussed in this conference and that we're talking about today is going to have a fundamental potential impact on civil liberties.

Brenda McPhail ([14:22](#))

So I approach this as a relative novice. But as somebody who thinks through social impacts of technologies regularly and then who does things like stand up before parliamentary or legislative committees and tell them why they need to care and why they need to think through these issues as well. So I'm thrilled to be part of this conversation because I view it as much as a learning opportunity as an opportunity to provide any insights that I can offer. And it's absolutely going to feed the kind of advocacy that we're increasingly going to see as necessary as the promise of this field of research starts to evolve and become and move out further into the world.

Brenda McPhail ([15:08](#))

That's me.

Abel Wajnerman Paz ([15:12](#))

Hi, everyone. Thank you very much for coming: I'm in the philosophy of Neuroscience program, and I am part of an emerging Chilean neuroethics society that connects scholars from main Chilean universities. Personally, I'm interested in conceptual and epistemic issues related to consciousness, thought, motion and perception and how they are related to ethical issues concerning autonomy, identity, and privacy. I am especially interested in exploring the connections between privacy and other ethical dimensions, such as identity, autonomy, and so on. I have been working the last two years with law experts developing some protection bills in Chile in which what I find interesting about these legal and regulatory

developments is that they are, I think, very influenced by philosophical ideas that have been developed around privacy and specifically mental privacy.

Abel Wajnerman Paz [\(16:33\)](#)

So I will be willing to discuss these issues.

Jose Munoz [\(16:39\)](#)

Thank you very much to the three of you. Now, I would like to throw an initial, very general question, which I hope can serve to better know the general perspective which concerns us about the issue. The question is, what are the rationales and reasons behind calling for the protection of mental Privacy? So if you want, we could follow the same order as previously.

Sara Goering [\(17:05\)](#)

Yeah.

Sara Goering [\(17:06\)](#)

So I can start just a little bit. I think one of the things we talked about in this pre panel meeting is just thinking about how neural data are somewhat different from other forms of data about us. So you can think about genetic data as things that matter, because they have a lot of information about what makes us up and risks that we may be facing as we develop. Right. Depending on the environments that we come into, depending on a lot of other things, we know we aren't just essentially our genes.

Sara Goering [\(17:45\)](#)

Right. But that information is something that could be used against us to discriminate in terms of access to health care, access to certain kinds of jobs, et cetera. I know within the US context, we have worried about that and then passed GINA, the genetic information nondiscrimination act. Right. So we recognize this is a really important kind of thing to protect against. But if you place that beside something like neural data, and again, it will depend a lot on the particular mode of drawing in that data.

Sara Goering [\(18:25\)](#)

We have potentially the ability to have data that is an ongoing, much more immediate readout of certain things that are happening inside of our heads as we're processing the world. Right. As we're thinking thoughts, imagining speech that we want to describe experiencing emotions. Right. And it will always be a kind of interpretation of that data. It's not as if we have this immediate access to inside our brains are these thoughts and they're just there and we could put on the spectacles and read them and know what's going on.

Sara Goering [\(19:08\)](#)

But as we get better and better at interpreting and understanding what's there, and even if it's pretty good but not perfect, then we make available this very private internal space, which might be sort of the last frontier of privacy. When you think about all the other data that's out there about us and the ways in which it's used. If you think Internet clicks, location data on an iPhone, et cetera, et cetera. All these things are already out there. One of the members of our group at Columbia said there's this problem that you can also infer the intimate from the available, right.

Sara Goering [\(19:51\)](#)

We have a lot of information we can infer certain things about what might be going on in our heads from that data already. Now, if we add an additional kind of data, we're going to get much better at it. So if we want to protect this sphere, it seems like now is the time to take particular care to put up some barriers. This is not, I just want to add, because each of us has something to hide. There's negative stuff that we're doing, and maybe there is for some of us, the thoughts could be negative, but it's not so much that I have something I need to hide it's more that that's what it means to have an intimate private sphere, to have some control over who has access to what's going on in my head.

Sara Goering [\(20:36\)](#)

So if I decide to share with you something that I've been thinking, that's a form of intimacy, right? I'm allowing you access to that. And I think we want to leave that control very firmly in the hands of the individual. I'll pass it over to Brenda.

Brenda McPhail [\(20:56\)](#)

So what Sarah said, I absolutely agree. And I love the phrase infer the intimate from the available, because that speaks to how I'm going to frame my first intervention. One of the things I do in my job that I least enjoy is responding to media inquiries. But I got one yesterday that was amazingly well timed, given that I have the privilege of participating in this conversation today. So in Canada, we have a federal police force they're called the Royal Canadian Mounted Police. You might have seen them in TV comedies with their red coats.

Brenda McPhail [\(21:38\)](#)

Yesterday, they put out a call for proposals for vendors to pitch them an artificial intelligence machine learning type tool that would have the capacity to sift through the browsing history, the documentary history that they could compile social media, any other unencrypted information about the life and behavior of a criminally accused person in order to infer from what they look at, what they think about as could be inferred from their communications or their reading habits or their browsing habits, a list of potential passwords in order to circumvent decryption on their device and find evidence with which to accuse them of a crime they've already been accused with which to prosecute them for a crime.

Brenda McPhail [\(22:26\)](#)

So here in Canada, cell phones, computers have been recognized by our Supreme Court as having a heightened Privacy interest precisely because they carry such- we live our lives on these devices, and they hold within them the intimate details of our thoughts and our interactions with other humans. Our Constitution prohibits compelled description. You can't just in Canada tell someone you've been arrested, unlock your phone. But this kind of technology, which is not neuro technology, but which is in the sort of same category of inferring the intimate from the available is being imagined, created and bought to give the justice system insight into the biographical core of people in order to use that intimate information against them.

Brenda McPhail [\(23:20\)](#)

So from a civil liberties perspective, which is where I come from. The core rationale for calling for the protection of brain data and mental Privacy using technology that promises to be potentially much more invasive, much greater scope than that more limited tool I just described because it promises access potentially as Sarah described, not just to what we've actually done or looked at, but what we're seeing, the choices we might be about to make and then possibly with the goal of influencing or controlling or manipulating or changing that thinking or behavior has to be the dangers to citizens if States decide to use that technology against them.

Brenda McPhail [\(24:00\)](#)

So in my day to day life, I spent a lot of time talking about the ways that Privacy is a right, that is a gateway right because it protects other rights, freedom of expression, freedom of Association, fundamentally Liberty in this context, mental Privacy, I think, is the gateway to cognitive Liberty, and that's something that in Democratic societies in particular has to be worth protecting. I think if we fail to find effective means to protect it, then the technology runs the risk of eroding or possibly eliminating meaningful Liberty in society.

Brenda McPhail [\(24:39\)](#)

So I think that the stakes to these kinds of conversations are that high.

Abel Wajnerman Paz [\(24:52\)](#)

I think that.

Abel Wajnerman Paz [\(25:00\)](#)

it's crucial when Sarah said earlier what is at stake and trying to point out what is different about the violations of mental Privacy as opposed to other violations of informational Privacy. In that respect, I think

it's central to tackle the conceptual question regarding what is mental privacy and relating to that question. I think that it's central to understand. I was directly inspired by Sarah's idea mental piracy, something like some sort of psychological capacity, this ability to selectively and rationally filter what information, which I think perhaps is inspired in Irwin Altman's famous approach to Privacy as our ability to achieve some kind of equilibrium in the control of our information, about what information comes out of our mind and what information we receive from others or from the environment.

Abel Wajnerman Paz [\(26:08\)](#)

I think that this conceptualization of mental Privacy can have at least three implications which are very important to understand what is at stake in protecting mental Privacy and what is not different from other kinds of Privacy. I would like to briefly mention these three implications. The first one is that mental Privacy may have a direct relationship with the control of interpersonal communication that, according to some relational approaches to identity, which are especially popular in the ethics literature, this interpersonal communication that is necessary for the formation of our narrative identity.

Abel Wajnerman Paz [\(26:58\)](#)

So this could explain what is special about mental Privacy. It is intertwined with our identity and second implication that I think it is also important is that protecting psychological Privacy understood is not limited to the protection of information about our minds or brains, but also information in our minds and brains information instantiated and processed by our psychological capacities, which could be about something else. So I think that this is an important distinction between information about the brain and information in the brain that affects the scope of mental Privacy as a concern.

Abel Wajnerman Paz [\(27:45\)](#)

And finally, I think that the flow of mental information with which mental Privacy is concerned is also bi directional. We must not only protect our control over which information gets out of our mind, but also our control over which information gets in. Our ability to shield our minds from information is part of what mental Privacy is. I think our brains cannot only be intervened in the sense, electrically or magnetically, but also information through data that could affect our thoughts and emotion processes in ways that we would like to prevent these.

Sara Goering [\(28:44\)](#)

Jump in for a second. Jose, I just want a second. Abel's points all of them, really. But thinking about I think so much of the conversation that's out there goes on around Privacy of data or information, as if it's a separable thing that's already extracted and out there in some way. And I think there are ways in which our relatively new capacities to gather information or data from our brains. It's also an attack on the person, right on the body of the person. So you think there are ways that we might want to frame it more broadly rather than just about this information pulled out.

Sara Goering [\(29:29\)](#)

But about me as an individual agent feeling under attack when there's a capacity to get what did you say, what's in us as well?

Sara Goering [\(29:47\)](#)

Thank you very much. Sorry, Brenda.

Brenda McPhail [\(29:54\)](#)

There are different kinds of Privacy, as they're always mentioning. And I think it's really important that we don't limit these conversations to informational Privacy and think of this as purely in an informational context. In Canada, our Commissioner recently sort of set up in their past terms, set up a series of strategic priorities, and one of them was bodily Privacy and bodily integrity. And that kind of Privacy, I think, is less commonly thought about in the data protection world, but really fundamentally core to the kind of conversations that we need to have about this information.

Jose Munoz [\(30:37\)](#)

Sorry, I have to say that previously I mentioned that there's a Q&A option for the attendees. There is no Q&A option.

Jose Munoz [\(30:44\)](#)

There is a chat.

Jose Munoz [\(30:45\)](#)

So sorry about this. You can use the chat. And I think that later where the conversation goes on, we can use the raise hands option. There are two commentaries or questions in the chat. Let me read it. For example, Armani says to what degree might or concerns surrounding the protection of mental identity be connected to Judeo Christian views regarding body purity and Holiness. From my perspective, brain data regulations seem to be an extension of religious doctrine. If this is the case, our concerns surrounding mental privacy have the sense of colonial intellectualism.

Jose Munoz [\(31:36\)](#)

Given the theme of this conference, this may be an important point to discuss. What do you think about this?

Sara Goering [\(31:46\)](#)

I think it's an interesting thought, right? And I certainly haven't thought about it like that. So whatever I say will be off the cuff here. I would say I'm not sure that it's about purity so much. When I think about identity and agency, I think that we're always already relational. And so it doesn't seem to me that we are somehow fully separate, atomistic individuals, but we're always in relation to both individual people, but also built environments and social structures around us. I don't want to say that we are totally distinct and need to remain pure away from whatever is around us.

Sara Goering [\(32:28\)](#)

I think there's no way that we could possibly do that, but nonetheless, right there's this interesting tension because I think there is something to my individual space of thinking the ideas that are influenced inevitably by people around me, but that are right now in my head that I determine how and when I share and that part of the Privacy. I don't know that I would call it purity exactly. Although I'd be open to hearing more about this idea that I think really deserves protection, it doesn't mean that we're not already in relation to other people or the world around us.

Sara Goering [\(33:08\)](#)

It just means that there's still something that I can turn to as I work through ideas I have that are still just mine. Other panelists do you have thoughts on this.

Abel Wajnerman Paz [\(33:27\)](#)

Wonderful question, because it can be related to the idea that we have to think about neuro rights or rights-based approaches in a universal way, but also respecting differences between different countries and cultures and so on. So I think that it is important to understand what are the conceptions underlying different conceptions, different views of identity, and also Privacy and autonomy in a way to try to find a way to conceptualize, for instance, Privacy that takes into account many different, perhaps inconsistent ways to understand identity.

Jose Munoz [\(34:29\)](#)

Here's another question. I think this is more specifically addressed to Sarah. This is about the US, but of course, please feel free to answer it. [Barakbar] says it appears fairly clear, based on the leaks from Edwards, noting that mass surveillance with storage of all of our emails and text by central governments such as the NSA, including social media feeds is prevalent at least in the United States. Do you still believe privacy exists?

Sara Goering [\(35:03\)](#)

Yeah. Good question. And I think sometimes when I've been at conferences, people will say, Well, is there Privacy anymore? We're in the world of social media. Everybody is connected, even without NSA surveillance. But again, I think there's a difference between what we're actually typing into our phones or into our computers and where we're going and what is actively going on inside of my head. And I think all the more reason that we need to do some work to try to protect that space, because I think we are thinking about this moving forward with this technology against a background where privacy hasn't been valued or protected.

Sara Goering [\(35:47\)](#)

And I think in the US context, one of my worries is that we tend to think in an overly individualistic way. Well, we'll just do individual consent, but people have no idea what it is that they're giving up right? They surrender all access to all kinds of data for convenience of getting access to a program. Nobody reads their end user licensing agreements, and they tend to get longer and longer. This is not going to be an effective means of protecting privacy moving forward. And given that this feels like a kind of last frontier of protection where we right now still do have some mental privacy, even though many people are sharing lots of things about their lives on social media.

Sara Goering [\(36:36\)](#)

It would be good to try to preserve that at this moment. And again, I think we can't just turn to the kind of traditional modes of informing people because I don't think they've been at all effective and that's even within the consumer space beyond the NSA surveilling what's out there. Yes, I think there is still privacy. The world is encroaching on it, and now is the time to put up a little fence. A big fence, maybe.

Jose Munoz [\(37:11\)](#)

Thank you very much, Sarah. There's a question about context, which is a topic that I find especially interesting, Sarah Goering, how do you create is the question, how do you create a neural rights or legal framework that is anti colonial or anti imperialist? And what would it look like to incorporate flexibility, contextual awareness of the concepts used in these frameworks to be able to reflect multicultural values while also sustaining the legal impact that they have context. For example, while the philosophical legal concept of Privacy and experience of it is prioritized and important in certain countries or cultures, in others, it's either less important or not, a concept around which to organize governance because it does not fit into the culture lives values of communities.

Jose Munoz [\(38:04\)](#)

This is also intimately related to the concepts of autonomy or agency. For example, privacy might prioritize the individual identity, which might ignore social structures or morals built around communal or relational identity. I'm thinking of Joseph Mfutso-Bengo and Francis Masiye's work on integrating Ubuntu into notions of bioethics. What do you think about, in this context, this question? I was thinking about the

concept of privacy in general, since it's a cultural changing one, I'm thinking about it. Maybe it's anecdotal but in Spain asking a person if they're married.

Jose Munoz [\(39:07\)](#)

So it's not a personal question, but in other countries, such as the US, it could be a personal question. So in my view, privacy, it's obviously a contextual cultural concept, but in particular with the privacy, with the concept of mental privacy. What do you think it's important? This issue of context of culture.

Abel Wajnerman Paz [\(39:41\)](#)

That's a great question. This will lead you to a cultural diversity in neuro rights which has been wisely discussed. And there's a difference between the fact that privacy is different in different countries or different cultures. And if the notion of privacy is different or if there is no concern of privacy as a relevant designation to be protected. For instance, I am thinking about Altman's notion of psychological privacy or psychological dimension of privacy, more than 70 years ago. He thought that was privacy like this process of boundary regulation is very different from culture to culture or even within one culture, in different contexts or within a given person at different moments of his or her life.

Abel Wajnerman Paz [\(40:49\)](#)

But privacy as some kind of regulation of what gets in and gets out to some point, may be something universal in the same way as our memory, perception, emotion, and so on in the same way as emotions vary across cultures. It doesn't mean that there isn't something in common between different cultures that perhaps we can think a common way to protect and regulate related.

Jose Munoz [\(41:34\)](#)

From now on, please feel free to raise hands and ask directly to the speakers. But in the meantime, there's a question from Louis Vetanan, and the question is, is it not the concept of mental Privacy problematic? Because if that is to be conceivable, the mind itself must be able to determine that it is in control of itself. Is this not problematic, given that there is no distinction between subject and object in the mind a paradox of selfconsciousness? Furthermore, neural devices, even that they are inseparable to the mind itself, cannot be guaranteed for mental privacy, and to some extent, agency, cannot be verified with certainty in the first place.

Jose Munoz [\(42:24\)](#)

So are we barking at the wrong tree when we think mental privacy is the way forward for mental security?

Sara Goering [\(42:36\)](#)

I'm trying to think about how to think about that, and I wasn't reading along with you, so I'm not sure I collected all of it. So maybe tell me if I'm not getting this right. But I think that we are not in control of our mind seems right fully right. There's all this stuff that's happening that is beyond my individual kind of control. Those things are still mine or me. And even if I don't immediately have access to them, it seems that I might have reason to not want other people to be able to read out of things that are going on in my brain - fears I have

Sara Goering [\(43:24\)](#)

that I don't realize you can just imagine beyond that. I don't think the fact that it's beyond my control means that it's not worth protecting in a way. But maybe part of the point is to think about what are we really trying to protect? And I think we're trying to protect often against the interpretability of intimate...think about what the word is that I want, there are intimate processes within my self within my brain, and some of those are within my control, and some are not.

Sara Goering [\(44:06\)](#)

But it still seems to me relevant to not give wide access or even NSA access to what's happening there. That seems very important for my sense of having my own internal space. And I think, as Abel was saying in response to the last question, even though culturally there are different boundaries around privacy and different senses of what needs to be private, this most intimate internal sphere, I think it's almost like the ground for the ability to have other perceptions of where we put those boundaries. So if we don't have that we won't have any kind of control over the boundary revelation or the boundary defining. Those are my two cents, maybe barking up the wrong three other questions.

Jose Munoz [\(45:05\)](#)

Here's another one by [Yahashi]. I wonder about political and power dynamics, interpretation of who and when someone is considered to be criminal. At what point should access to private data be allowed. A recent case in India used historic WhatsApp chats as evidence for incarceration under the narcotics law and has been hotly debated. So I would be interested to hear your thoughts.

Brenda McPhail [\(45:44\)](#)

It feels like a place that I could jump in, and it's a really good question. It's something that our criminal justice systems have grappled with for a long time, and we do have some sort of tried and true rules around and laws that structure what kind of evidence can be collected, when and what level of threshold of suspicion is required in order to do something like get a warrant, acquire judicial authorization in order to dive into information that otherwise would be protected by privacy laws. In Canada, we have various constitutional protections around that.

Brenda McPhail [\(46:29\)](#)

So we have rights against unreasonable search and seizure, which tend to be drawn on in criminal cases. But more fundamentally, we have rights to life, liberty and security of the person, which I think are particularly relevant in the context of mental privacy and mental processes. So when you think about at what point should access to data be allowed, I think the fundamental question becomes first is how do we think about the nature of evidence and what kind of evidentiary value should be granted to sort of the innermost workings of our brains?

Brenda McPhail [\(47:12\)](#)

And at one point is intentionality evidence of criminality as opposed to action. So our legal systems at the moment are very firmly grounded on action. You have done the thing, the process. This legal system is designed around showing that you've done the thing, producing evidence that you've done it. I think it's a very slippery slope when we start to move towards deciding not who has done, committed a criminal action, but who should be considered a criminal, particularly if it's based on sort of intrusions into their deep mental processes.

Brenda McPhail [\(47:54\)](#)

So there are really complex and intertwined questions around. What do we think is the appropriate role of criminal justice systems in our society? What is appropriately considered evidence of a crime? What are the lines that we have? And we do always create lines in our legal systems beyond which law enforcement officers are not allowed to go, because we consider that to be a step too far. That's why we have constitutions. That's why we have laws. Perfect knowledge of everyone all the time would mean a perfect record of crime resolution.

Brenda McPhail [\(48:33\)](#)

And we've never considered that an acceptable solution in a democracy to the idea of public safety. I think when it comes to these questions of how much we can determine about what's going on in someone's brain and how that can then be relevant to public safety. We have to keep those sort of fundamental values that we currently have in place, and that have been part of our justice systems for a long time about the idea that there are places where the state does not deserve to go and I would say that the ultimate place the state does not deserve to go is into the depths of my mental processes.

Jose Munoz [\(49:14\)](#)

Thank you very much, Brenda. So here's another one for you from Roland Nadler. Section Two B of Canada's Charter lists freedom of thought as one of its protections, in contrast to the US First Amendment, which omits it. Yet, to my knowledge, Canadian courts have never made much of it. Do you see any promise in trying to incorporate the provision into impact litigation strategy, or is it better to work via more jurisdiction.

Brenda McPhail [\(49:53\)](#)

Because it's important at this point to mention, although I work as a legal advocacy with an organization-legal advocacy organization -and lead litigation, I'm a social scientist, not a lawyer. That said, you're right, that Section Two B hasn't been used as much as other sections of the Charter, particularly in criminal contexts. I think that we're starting to see some of that litigation drawing on those provisions around freedom of thought or going to see them in relation to Covid and pandemic measures where people are trying to argue against vaccination methods, for example, by drawing on their Section Two B rights.

Brenda McPhail [\(50:35\)](#)

So it could be that we're about to see a burgeoning of litigation in that area in courts trying to grapple with what it means to have freedom of thought more broadly. I would identify that section as a place where a principle, a law based on fundamental principles and values of a society like freedom of thought does have strong potential as existing legal protections against the kinds of intrusions that we're talking about today. And that would be part. I think of a legal and regulatory strategy as we think through how we want to protect mental privacy, how we want to protect cognitive liberty, is what kind of legal instruments do we have that are principles-based that apply?

Brenda McPhail [\(51:29\)](#)

And then what additional layers do we need to add on in terms of frameworks, structure, prohibitions, limits, constraints that are necessary in order to address the sort of wider scope of concern that these technologies have the potential to create because of their fundamental intrusiveness.

Jose Munoz [\(51:52\)](#)

Thank you very much. Question from the Chat and then there are people waiting with the hand-raised, Professor Fins is waiting. This question is, to what extent do the panelists support legislative efforts such as those in Chile to treat neural data as legally equivalent to human organs, thereby effectively prohibiting its commercialization?

Abel Wajnerman Paz [\(52:29\)](#)

I will talk about the case of Chile. I support that initially, but I think that it's going by the way. I want to clarify that this organ analogy has two components to those that are not familiar with this. The first one is that they have to do with the consent regarding new data sharing, that opt in which you have to give explicit consent, and the other one has to do effectively the commercialization or the restriction of the commercialization of neural data in the same way that the organs or organic tissue cannot be commercialized in the present state of the neural protection law of Chile.

Abel Wajnerman Paz [\(53:30\)](#)

The only element that is present now is the opt-in component, not so much the other. But that said, we have still, like two years ahead until this deal is enacted, so we don't know what its final form will be. And that being said, Brazil has proposed very recently a new deal as part of its data regulation law, which does include this idea of restricting the commercialization of neural data. I think that it's a very interesting way to frame the idea that we have been talking about as neural privacy as protecting something more

Abel Wajnerman Paz [\(54:30\)](#)

than informational privacy, the data is something that is perhaps more closely related to psychological integrity or some of those other dimensions I jump into just to say.

Sara Goering [\(54:47\)](#)

I think sometimes we think it's either this or that, and I think we likely want both kind of UN level recognitions of the new threats. However, we want to articulate it, freedom of thought, freedom of expression, which often are aspirational because you have countries that are signatories. But then each country is going to have to have their own kind of regulatory set up to try to enforce what they're agreeing with. So I think we both need that kind of local understanding of what privacy is and how it should be regulated and the broader shared aspirational recognition that this is a fundamentally valuable thing for humans, and it matters that we recognize what needs protecting at that level.

Sara Goering [\(55:48\)](#)

So I think we need all of these not just a patchwork of nation states writing regulations, but a broader UN declaration, or it doesn't have to be a new declaration. It might be an interpretation and making explicit how we think about protecting this space, given what's already there.

Brenda McPhail [\(56:14\)](#)

Just a little pitch since the UN General Human Rights Council may be considering a new interpretation guide, Article 17, which is around privacy. So just a little pitch for members of this community who have unique and important insights into this area to keep an eye on that. If you're interested in that sort of international policy development, because there would be a real role for the depth of knowledge that this audience brings about this issue in that forum.

Jose Munoz [\(56:49\)](#)

Thank you very much. The three of you, Joe Fins, please.

Joe Fins [\(56:55\)](#)

Thank you. I really like the distinction between data privacy and neural privacy, and I want us to sort of think a little bit about the effect of these concerns on the mind itself. Eric Casell distinguished pain from

suffering by saying that suffering was an anticipatory state of a threat to the self, and it's related to fear and anxiety. So I want to ask the question about what does it do to our state of being to be at this stage of our evolution, with technology, to have the kinds of concerns that we can only entertain today, and the analogy that I draw about this kind of neurosurveillance kind of state is the effects that people who have lived under totalitarian regimes where their actual privacy was at stake and they became sort of pseudo paranoid for good reason.

Joe Fins [\(57:51\)](#)

And I'm just wondering about the developmental effects. And we also know that people were in concentration camps, had epigenetic phenomenon because of the stressors. So I'm just wondering now that we can envision these possibilities that are terrifying, what does it mean to the underlying brain more than our mind? Rather than simply the appropriation of data, it may be fundamentally changing us in a way that we need to sort of begin to think about.

Sara Goering [\(58:25\)](#)

That. That's a really interesting point, Joe. I think I'm thinking about the Stasi, right. Or ways in which you think what you're talking about in the private area of your own home could be made accessible to the state under that kind of regime. And I think it inevitably alters what you feel capable of talking about or doing. For that matter, it doesn't even have to be speaking right. So it's a really interesting question about kind of developmentally. How does it alter how we understand ourselves when that threat is there, whether or not it's carried out?

Joe Fins [\(59:07\)](#)

I have to think about that more; Tolstoy shared his diary with his wife and it blew everything up. I'm just, I'm just -- other comments.

Brenda McPhail [\(59:23\)](#)

There is sociological research. Canadian scholar John Penny did a neat study after the Snowden revelations that was trying to address whether or not people behaved differently, knowing that after knowing the content of the Snowden leaks, he and then some other researchers who followed him did find that not only were people afraid online to look up things like bomb or terrorist or virus, but they were increasingly afraid to look up things like abortion or sexually transmitted disease or cancer. And the qualitative portion of that study when we spoke to people, it was about wanting to protect what they were thinking about, what they were concerned about, what they might be going through in their lives that was particularly intimate from external scrutiny.

Brenda McPhail [\(01:00:20\)](#)

If you extrapolate those kinds of fears and behavioral changes to a model where someone could not just detect those things from your behavior online, but from your very mind itself. I think the question of what that would do to us as humans, whether that would change the nature of what it means to be human is not what I thought about, but one that now that you've asked a question becomes really clear that requires deep, intermediate thinking. So thank you for that question.

Abel Wajnerman Paz ([01:00:57](#))

Something about in addition to the effects that can have psychologically losing mental privacy, it is all important to take into account the possibility of not only regulating the collection of neural data, but also the analysis and application of neural data. Because you will take that into account. You have situations in which newer mental psychological information is used for the manipulation of behavior. I think that should be also part of the concerns regarding mental privacy in the Children's Protection Bill. They are already thinking about criminal law applications, and they are mostly related to the influence of behavior to new technology.

Abel Wajnerman Paz ([01:01:46](#))

You may think that this is only concerned with mind writing technologies, but this manipulation can also result from mind reading technologies. This is a dimension of losing psychological or mental privacy that I think that it is also relevant.

Jose Munoz ([01:02:15](#))

Pretty much we are almost reaching the 1 hour time frame.

Mariel Leuenberger ([01:02:32](#))

Thank you. I think my questions just really connects to the last question, and it's quite nice. So I think now we have been talking about how neural data may reveal information to other people, and it seems that there's also the potential for neural data to collect information about myself, which I wasn't aware of myself, so to reveal information to myself. And I was wondering if you have some thoughts about the ethical implications of that, as if it pertains our self understanding and how it may change our self understanding by learning about our thoughts and about our minds in this different way.

Sara Goering ([01:03:16](#))

I think that's such an interesting question. I saw it in the chat before and was hoping that we would get there. But then there's so many things. So thank you for raising it. I do think there are so many ways that we're not transparent to ourselves. Right. So having readouts from what is happening, where they're interpretable in some way could destabilize our sense of who we are and how we have understood ourselves. I'm not sure that that's always bad, right? There might be ways that we learn more about ourselves.

Sara Goering ([01:03:51](#))

I think we inevitably learn about ourselves from our relationships with other people. This would be a way to have a relationship with ourselves, where we discover things that aren't immediately available to us through things like therapy or introspection or what have you? But I do think that there's a danger of being forced to do that. I don't have to go to therapy. Well, I guess maybe there would be some context in which I could be directed to therapy, but I recognize that this is a kind of challenge and a kind of thing that could change in my own self understanding if I have certain kinds of access to data or to processes in my brain that I'm not aware of.

Jose Munoz ([01:04:44](#))

So maybe our last comment or last question. Okay. So I'm afraid we have already come to the end of the 1 hour time limit set for the session. This is, of course, a very long, debatable topic, and I'm happy to see that we cover some of the most pressing topics. I think it's been a real honor to me, this workshop and learning from all of you. I think it's now time to go and enjoy the rest of the activities scheduled in the INS meeting. So thank you all.

Sara Goering ([01:05:20](#))

Thank you, Jose. Good to see you.

Brenda McPhail ([01:05:24](#))

Thank you.

Sara Goering ([01:05:29](#))

Bye .