



UNITED STATES OF AMERICA

Opening Keynote of Commissioner Noah Joshua Phillips

Future of Privacy Forum :
9th Annual Privacy Papers for Policymakers

Washington ,

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Republican and Democratic lawmakers report that new consumer
privacy legislation may move forward in 2019.

The privacy conversation has gone public. In many ways, that is good.
Increased awareness can help LQFXOFDWH D FXOWXUH RI ¶SULYDF\ EH
it can foster the digital ethics on which the ICDPPC focused in October in Brussels.
Awareness can help serve what many view as a market failure of consumer
information about what happens with data consumers generate.

But the *Sturm und drang* of our public conversation about privacy ² often
regrettably including fear-mongering stoked by ambition of one kind or another ²
too often drowns out the rigor, thoughtfulness, and nuance that good policymaking
requires .

To borrow a phrase from Professor Lilian Edward V DQG OLFKDHO 9HDOH·V
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ORRNHG DW WUDFWLYH μ

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We ² the community of academics, policymakers, and law enforcers who focus
on privacy ² need to resist that impulse.

To develop policy on the future of consumer privacy, or should I say to
develop *good* policy on the future of consumer privacy, we must strive to know and
understand more.

¹ See, e.g., Ari Ezra Waldman, *Designing Without Privacy*, 55 HOUSTON L. REV. 659, 713 (2018).

² Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For*, 16 DUKE L.

We should be empirical and thoughtful.

We should make conscious and informed choices based on what we learn, not what we presume.

We should be honest in when we are making normative judgments and how they work as applied.

Or, as Jef Ausloos and Pierre Dewitte recognize in the context of their empirical research, we need to

Let me cite just a few examples where I fear much of the policy discussion is

First, what problem² or problems² are we solving? Last November, I testified before the Senate Commerce Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security. Privacy is a nebulous term, meaning different things to different people. So I urged the senators first to agree on the

and impact. We should be analyzing and using that experience to engage in an informed discussion.

These questions and countless others is where the work supported and encouraged by FPF comes in. The name of this event really says it all ² Privacy Papers for *Policymakers*. Not academic research of interest to a limited audience ² not that there is anything wrong with the unadulterated search for truth ² but the type of analysis that should inform policy decision-making, that should inform Congress as it wrestles with consumer privacy.

Edwards and Veale ⁶ SDSHU 6 O D Y H W R W K H \$ O J R U L W K P μ L V the need to match remedies to problems. They conclude that, practically, W K H ¶ U L J K W W R D Q H [S O D Q D W L R Q · L V X Q O L N H O \ W R D G G U H V V F R Q F H U Q making. New rules should solve the problems identified and avoid providing unproductive, or even counterproductive, new rights. ⁶

Do the ⁷ & · V H [L V W L ² the Fair Credit Reporting Act and Equal Credit Opportunity Act in particular ² provide sufficient protection against algorithmic unfairness, and, if not, why not? In a recent case, RealPage, the FTC entered into a settlement for three million dollars with a tenant screening company whose automated screening software, allegedly, associated consumers seeking apartments with criminal records that did not belong to them. ⁷

⁶ Edwards & Veale, *supra* note 2, at 81.

⁷ See **FTC Press Release**, *Texas Company Will Pay \$3 million to Settle FTC Charges That it Failed to Meet Accuracy Requirements for its Tenant Screening Reports* (Oct. 16, 2018),

The broader point is that privacy regulation is a complex policy question and we need to test solutions² whether on algorithmic unfairness or portability or what have you² as best we can before they are implemented, lest they create burdens without benefits, or, worse, the false perceptions of protection.

critics contend the U.S. has no federal privacy law, in fact we have been doing privacy at the federal level for over 40 years, with a risk-based scheme focusing regulation and enforcement on the areas of greatest potential consumer harm.

While fostering tremendous innovation and economic growth.

Still, I do think that the present process of Congress evaluating our data security and privacy laws is extremely valuable. Perhaps we will target another case of heightened risk, as Congress will take a comprehensive approach. Again, such an approach requires a clear view of the goals, not just the tools. It is not enough to say we need penalties. Or rulemaking authority. Those are tools, and they only make sense if built and used properly. And they come with costs, deterrence of efficient conduct, or the empowerment of unelected bureaucrats² like me.

All of this is to say that if the U.S. is going to continue to protect privacy and foster innovation and growth, our policy should be grounded in facts and analysis, not speculation, hope, or panic.

⁸ See Noah Joshua Phillips, Commissioner, Federal Trade Commission, Remarks at the U.S. Chamber of Commerce and the American Chamber of Commerce to the European Union: *Our American Privacy* (Oct. 23, 2018), <https://www.ftc.gov/public-statements/2018/10/our-american-privacy>.

We must be careful, smart, and informed.

We must understand the problems we are trying to solve and how the solutions match up in practice .

We must be honest and cognizant of tradeoffs, and not succumb to the

We must ask the right questions and do the hard work, not settling for simple answers.

If we do this, and only if we do this, we may be able to craft a revised privacy regime that has legitimacy and efficacy both at home and abroad . That is why your work is so important. So thanks, to FPF; to the scholars we are honoring this evening; to all of you.