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A Secret Weapon?: Applying Privacy Doctrine to the Second Amendment

by JODY LYNEÉ MADEIRA*

For the past 80 years privacy has been of increasingly important legal concern. In 1952, the U.S. Supreme Court ruled in *Public Utilities Commission of the District of Columbia et al. v. Pollak et al.*[1] that plaintiffs had no legal right to avoid radio broadcasts in Washington, D.C. city trolleys and buses. The U.S. Supreme Court distinguished a bus, a public space, from a home, a private space, and ruled that the broadcasts were not inconsistent with public convenience, comfort, or safety because individuals in public are "subject to reasonable limitations in relation to the rights of others."[2] The lone dissenter, Justice William Douglas, urged, "Liberty . . . must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."[3]

Over ensuing decades, the Supreme Court has continued to wrangle with privacy and its boundaries in many contexts. Women have a fundamental right to reproductive freedom, including contraceptive use, freedom from involuntary sterilization, and abortion—but they do not have the right to be entirely free of governmental interference, and can be subject to fees, waiting periods, and informational counseling requirements.[4] Parents have a fundamental right to determine many, even most aspects of the care, control, and upbringing of their children, but cannot make decisions

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1. 343 U.S. 451 (1952).

2. *Id*. at 465.

3. *Id.* at 467.

4. *See, e.g.*, Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1694 (2008); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 275 (1992).

that imperil the child to the point of serious bodily harm, such as choosing not to obtain medical care for a serious physical illness.[5] The privacy doctrine has never ceased to be controversial, perhaps partially because of its dependence on context and partially because it is constructed out of "penumbras, formed by emanations from those [other constitutional] guarantees."[6]

In addition to its legal meaning, privacy has complex and everchanging sociocultural contours, influenced by diverse factors ranging from individual hobbies and personalities to judicial opinions and enacted laws. For instance, "the widespread practice of legally carrying a gun in public was facilitated by the movement for shall issue concealed carry laws."[7] In essence, our own orientations to privacy are incredibly subjective and in flux and may be even be contradictory across contexts. We may go to great lengths to prevent others from knowing that we pass gas after eating broccoli or look up strange topics on internet searches, but care not a whit about reading HIPAA disclosures at the doctor's office or share genetic data obtained through direct-to-consumer genetic testing services.

Privacy claims thus have legal and social meaning. According to Sarah Igo, privacy is "elastic," and can function as "a kind of default right when an injury has been inflicted and no other right seems to suit the case."[8] In the past decade, there have been increasingly frequent attempts by individuals who espouse "gun rights" stances to fit the exercise of Second Amendment privileges into the envelope of the privacy doctrine, with varying outcomes. Plaintiffs have contended that privacy gives them the right to silence intrusive questioning from medical professionals, to have handgun permit holders' identifying information protected from public disclosure under freedom of information laws, and to confer anonymity to litigants.

This essay examines how Second Amendment enthusiasts attempt to strategically articulate a Second Amendment privacy interest in being free from interference from both governmental actors and private actors with ownership of, access to, or use of firearms, and with what consequences. Part I explores privacy's status as a legal and sociocultural construct, the violations of which carry significant cultural, social, and emotional consequences. It then explores the stigma that firearms enthusiasts often

5. *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421 (1991).

6. Griswold v. Conn., 381 U.S. 479, 484 (1965).

7. David Yamane, *The Sociology of U.S. Gun Culture*, 11 SOC. COMPASS, no. 7, 2017, at 7.

8. Louis Menand, *Why Do We Care So Much About Privacy?*, NEW YORKER (June 18, 2018), https://www.newyorker.com/magazine/2018/06/18/why-do-we-care-so-much-about-privacy (quoting J. Douglas, dissenting).

claim to experience, and discusses how they attempt to manage stigma, including claiming privacy rights. Part II examines three cases in which gun rights supporters and organizations have claimed privacy rights, addressing doctor-patient counseling about firearms and firearm safety, disclosure of handgun permit holders' identifying information, and disclosure of litigants' identities. This essay concludes that, while most courts have thus far declined to extend privacy protections to firearm ownership and use, they may do so in ways that confirm the stigmatized nature of the Second Amendment.

I. Privacy, the Second Amendment, and Second-Class Citizenship

A. Understanding Privacy as a Legal and Sociocultural Construct

Legally, privacy doctrine is a veritable hydra, with heads representing reproductive autonomy, family law, Fourth Amendment, and First Amendment bases. The doctrine stems from Samuel Warren's and Louis Brandeis's seminal article from 1890, *The Right to Privacy*, which proposed extending laws protecting privacy in other situations to encompass the right to control publicity of one's own information. One branch of privacy law, following *Griswold v. Connecticut*, protects "decisional" privacy—the right to make certain profoundly personal decisions free from government intrusion, which has encompassed contraception, marriage, family relationships, procreation, child rearing, and education.[9] A second branch of case law has focused on "informational privacy," the right to control public dissemination of private facts, in contexts such as media publication and Fourth Amendment search and seizure law.[10] These two categories overlap; a woman has the right to be free from undue governmental inference when deciding to obtain an abortion, and deserves privacy in keeping this decision confidential.[11] Although the decision to own, carry, and use a firearm is protected, Second Amendment privacy arguments primarily implicate informational privacy concerns.

In a sociological sense, privacy is "the access of one actor (individual, group, or organization) to another," "what people conceal and reveal and

9. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U. S. 833, 927 (1992).

10. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967), Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), Wilson v. Layne, 526 U.S. 603 (1999), Katz v. United States, 389 U.S. 347 (1967), Kyllo v. United States, 533 U.S. 27 (2001).

11. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1046 (2009).

what others acquire and ignore."[12] Privacy is influenced by laws that "define the contents, levels, and types of access that are legal and illegal," social practices, technologies that "affect[] ease of access and structure[] who has access to whom," and privacy norms, which "identify the characteristics of access that are deemed appropriate within a context."[13]

Individuals' attempts to manage privacy by controlling access to themselves and their information reflect "effort[s] to achieve [the appropriate balance of giving and seeking information] by complying with privacy norms and ensuring that others do not violate those norms as well as implementing their own privacy preferences."[14] Moreover, privacy is intertwined with social order. Because visibility facilitates social control and affects behaviors, social order demands an "optimal balance between revealing and concealing."[15] Above all, "organizations, corporations, and governments, rather than individuals, have the greatest ability to access others and potentially invade privacy,"[16] particularly because technology makes it easy and cheap to "gather, stockpile, and analyze information."[17]

Privacy norms are violated by "levels of access that are too high or too low, access to the wrong kind of information, access through inappropriate channels, and inappropriate uses of information."[18] Though privacy norms vary greatly across persons, periods, cultures, and contexts, their violation produces certain predictable negative psychological and emotional reactions, with consequences for individuals and relationships; people who perceive their privacy has been invaded "may feel invaded or isolated, or they may feel that another actor is being too secretive or exposing too much."[19] Privacy violations influence trust in others and "essential social institutions," and news of breaches can reduce confidence and perceptions of institutional legitimacy and security, prompting greater concealment attempts.[20] Privacy's maintenance, then, is intertwined with human emotions, which determine how we "construct these subjective private spaces," erecting and

12. Denise Anthony, Celeste Campos-Castillo & Christine Horne, *Toward a Sociology of Privacy*, 2017 ANN. REV. SOC., no. 43, at 251.

13. *Id.* at 251.

14. *Id.* at 252.

15. *Id.*

16. *Id*. at 259.

17. *Id*. at 260.

18. *Id*. at 251.

19. *Id.* at 251.

20. *Id.* at 258.

maintaining "barriers" of "various cultural, psychological, and material factors."[21]

Monitoring—and responses to being monitored—change in reaction to social relationships and technologies (Foucalt's panopticon[22] is a prime example). The institutions that engage in monitoring activities are varied. Governments monitor citizens to "collect information to ensure compliance with relevant rules,"[23] through observation, informants, and technology. Employers monitor employees to "protect company assets, control public communications and ensure that employees are as productive as possible."[24] Monitoring is more acceptable when it is "perceived as contributing to the collective good," "contributes to collective safety and security," or concerns out-group members and not one's self, such as cameras set up in a city to catch criminal activity.[25] However, such vigilance can inspire negative reactions when it implies a lack of trust, and when the people under surveillance feel they have something to hide.[26] Disclosure of information can build trust and enhance relationships, but invites risk by enhancing intimacy and allowing opportunities for confidentiality. As a result, concealment is especially critical for individuals who feel they are stigmatized, who "may seek to hide their discrediting condition to maintain their standing in a relationship."[27] "Patterns of disclosure [and concealment] "strengthen ties among group members and create stronger boundaries between the group and outsiders."[28]

B. The Stigmatized Second Amendment

The ownership and use of firearms have been at the heart of American history since the Revolution; "gun ownership is normative, not deviant, behavior across vast swaths of the social landscape."[29] Nonetheless, "there is no sociology of guns, per se"; firearms as a research topic has largely been ceded to disciplines that analyze criminology, violence, and public health.[30]

21. Luke Stark, *The Emotional Context of Information Privacy*, 32 INFO. SOC'Y, no. 1, 2016, at 14, 17.

22. *See generally* MICHEL FOUCALT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1979).

23. Anthony, et al., *supra* note 12, at 253.

24. *Id.*

25. *Id.* at 254.

26. *Id.*

27. *Id.* at 256 (citation omitted).

28. *Id.* at 257.

29. Yamane, *supra* note 7, at 1 (quoting James D. Wright, *Ten Essential Observations on Guns in America,* 32 SOC'Y, no. 3, 1995, at 63–64).

30. *Id.*

But American gun culture, now centered upon "armed citizenship," has changed profoundly since Obama's presidency and the watershed U.S. Supreme Court case *District of Columbia v. Heller*,[31] which held that the Second Amendment right to possess a firearm is individual in scope, unconnected to militia service. These cultural and legal changes, together with accompanying increases in firearm sales, the visibility of gun rights legislation, and advocacy, have wrought profound changes to the Second Amendment landscape in the past decade.

Despite their increased visibility and legal protections, firearms and gun rights advocates still face stigma. Certain firearm types, accessories, and use typify "morally controversial leisure," and guns themselves may be "morally controversial products."[32] In morally controversial leisure, participants often cannot "explain their activities in 'rational' language acceptable to non-participants."[33] Collecting firearms may be linked to obsession and compulsion[34] and unprogressive ideals, as "guns symbolize security, freedom, and wholesome recreation to a bedrock America that is at its core lower-middle or working class, small town or rural, less exposed to higher education, . . . conservative or tradition oriented."[35] Criminological or public health research on firearms issues connect them to crime, violence, and disease: "the more guns, the greater the spread of gun related pathology."[36] Sociologically speaking, then, gun enthusiasts have "a master status associated with undesirable auxiliary traits."[37]

Gun owners may feel that others hold them "partially responsible for the very existence of gun violence,"[38] and thus employ out-group stigma management techniques with non-enthusiasts to "avoid being perceived as morally or socially flawed by virtue of one's identification with a particular stigmatized status or activity."[39] The most obvious way to manage stigma is to dissemble, or "pass," among non-enthusiasts, exercising "strategic control over what information is revealed to, or withheld from, non-peers" through

31. 554 U.S. 570 (2008).

32. Yamane, *supra* note 7, at 4; A.D. Olmsted, *Morally Controversial Leisure: The Social World of Gun Collectors*. SYMBOLIC INTERACTION, Fall 1988, at 277, 278 (citation omitted).

33. Olmsted, *supra* note 32, at 278.

34. *Id.*

35. *Id.* at 281 (citation omitted).

36. *Id*. (citation omitted).

37. Jimmy D. Taylor, Gun Shows, Gun Collectors, and the Story of the Gun: An Ethnographic Approach to U.S. Gun Culture 148 (2008) (unpublished Ph.D. dissertation, Ohio State University) (on file with author).

38. Yamane, *supra* note 7, at 4.

39. Taylor, *supra* note 37, at 153.

selective concealment from coworkers and neighbors.[40] Individuals who do not attempt to conceal their firearm-related interests can provide an alternative frame "within which potentially stigmatizing information is either neutralized or presented in a positive light."[41] For example, individuals can give "dignifying accounts," justifications for firearm ownership and use including hunting ethics, the "calmness, discipline, and self-control required and cultivated by shooting."[42]

Gun owners may also utilize "impression management" strategies, such as denying that their guns inflict harm on others; invoking commitments to idealized values like the right to bear arms or military sacrifices that preserve constitutional freedoms; panning non-enthusiasts' moral failures, inconsistencies, and lack of knowledge; rationalizing their enthusiasm for firearms to distance themselves from "bad guys" or "bad guns;"[43] and "identify[ing] themselves as deeply committed" and "knowledgeable."[44] They may be "extremely serious" about performing safety regiments, engaging in what Olmsted terms "dramaturgical discipline."[45] Significantly, unlike other stigmatized groups like the homeless and mentally ill, gun enthusiasts can "trade on his/her stigmatized identity at will," playing up certain stereotypes that have positive in-group meanings (like "badassitudes" or stoicism).[46]

C. Privacy as a Sword Against Stigma

Social movements—many of which are organized directly to combat stigma—often make certain legal claims to gain legitimacy, social esteem, and social capital. A movement gains social credence if it can convincingly claim to advance "civil rights" and eradicate discriminatory practices through protective legislation or case law. People in search of civil rights are victims of oppression, often trapped in a complex web of oppressive social, economic, and cultural institutions and practices. Those who fight for civil rights are heroes, "champions of social justice."[47] In civil rights litigation, law becomes a "tool by which they can force perpetrators of

40. Taylor, *supra* note 37, at 153, 155.

41. *Id.* at 154.

42. Yamane, *supra* note 7, at 4.

43. *Id.*

44. Olmsted, *supra* note 32, at 283.

45. *Id.* at 284.

46. Taylor, *supra* note 37, at 173.

47. KRISTIN BUMILLER, THE CIVIL RIGHT SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 2 (1992).

unlawful conduct to comply with socially established norms."[48] Second Amendment advocates have recently begun to articulate civil rights arguments; America has a "gun problem," with individuals who own and use firearms facing discrimination and loss of rights. This claim appropriates the collective action frame of groups such as African Americans and women, turning the moral tables on liberals who are seen as traditional civil rights supporters—and gun rights opponents. "Civil Rights" is a "master frame"[49] that can "serve as [a] dominant 'algorithm[]' that resonate[s] deeply across social movements and protest cycles."[50] Thus, "by appropriating the civil rights master frame, the gun rights . . . movement[] seek[s] to culturally legitimate their claims (especially among liberal audiences) and to counter opponent organizations such as . . . gun control groups."[51]

Law, too, is a master frame; claims of "legal rights" are a "dominant symbolic framework of rules, rights, and obligations [which] set[] boundaries on how collective actors conceive of their grievances and goals."[52] Thus, "disputes over the proper construction of legal symbols is likely to take place both within a given movement itself and between the movement and its external environment"—including the conferral of "rights" in the first place.[53] According to Pedriana:

> [L]aw is a unique type of symbolic resource; it is not only a *means* by which a movement can, by appealing to deeply resonant legal symbols, garner legitimacy and support for the movement. Law in part also represent the *ends* of that process. . . . Access to courts allows aggrieved groups to turn a symbolic frame into a legal claim. And courts have the power to codify . . . those claims. If successful, such legal change not only further enhance a movement's symbolic framing efforts; legal change also transforms social and political relationships and thus have the capacity to exert power and influence beyond the movement itself.[54]

48. BUMILLER, *supra* note 47 at 2.

49. Shoon Lio, Scott Melzer & Ellen Reese, *Constructing Threat and Appropriating "Civil Rights": Rhetorical Strategies of Gun Rights and English Only Leaders*, 31 SYMBOLIC INTERACTION, no. 1, 2008, at 11.

50. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC., 1718, 1718, 1725 (2006).

51. Lio, Melzer & Reese, *supra* note 49, at 11.

52. Pedriana, *supra* note 50, at 1728.

53. *Id*.

54. *Id.* at 1729.

Recently, Second Amendment advocates have attempted to use law as a master frame to articulate individual privacy interests in firearm ownership and use. The individual right to privacy is "another broad legal right steadily expanded by the federal courts throughout the 1960s," one traditionally associated with issues very different from the Second Amendment, being a "legal frame more strategically equipped to symbolically represent the burgeoning national debate over abortion, and the women's movement's interest in expanding reproductive rights."

Redeployed to address gun rights causes, Second Amendment privacy-seeking strategies have been particularly successful on the state level. For example, in 2011 the Indiana General Assembly enacted the "Disclosure of Firearm or Ammunition Information as a Condition of Employment Law," prohibiting any Indiana employer from requiring job applicants or employees to "disclose information about whether the applicant or employee owns, possesses, uses, or transports a firearm or ammunition" unless that disclosure concerns the individual's ability to fulfill employment duties; employers also cannot condition employment or any opportunities or benefits upon foregoing these activities.[55] Notably, there is no public safety exception, such as if an employee is an imminent danger to self or others and may have a firearm stored in his car. Plaintiffs can sue for actual and punitive damages, injunctive relief, costs and attorneys' fees.

A Second Amendment privacy doctrine also maps well onto other gun rights virtues, such as individualism, conveying the message that the government needs to clear a protected space for activities associated with these rights. Individualistic people are "defined as emotionally independent or 'detached from community,' and they tend to be self-contained, autonomous, and self-reliant," and "do not rely on law enforcement for providing protection."[56] Pushing for privacy means that gun owners could behave as they wanted and have a right to be left alone while doing it. That is a clearly productive way to both beat back the stigmatization that is allegedly associated with gun rights, *and* to secure additional social and legal space for firearms ownership and activities. However, this turns individualism on its head, as the "good guys with guns" are now victims that need to be protected, although as a population firearms owners famously resist victimization on principle.

55. Ind. Code § 34-28-8-6(1) & (2).

56. Katarzyna Celinska, *Individualism and Collectivism in America: The Case of Gun Ownership and Attitudes Toward Gun Control*, 50 SOCIO. PERSP., no. 2, 2007, at 229, 231–234 (citation omitted).

II. Privacy in Firearms and Second Amendment Litigation

Privacy claims have been raised and effectuated in several legal contexts, including legislation and case law. Such claims have been directly addressed in three cases: *Wollschlaeger v. Governor of Florida*[57]; *Doe v. Putnam County*; *Mager v. State*,[58] and *NRA v. Bondi*.[59] Each touches upon a different aspect of privacy: the right to be free of uncomfortable speech touching upon protected Second Amendment rights, the right to prevent the public from accessing intimate information connected with the exercise of protected Second Amendment rights (such as names and addresses of gun permit holders), and the right to participate anonymously in a legal Second Amendment challenge to avoid stigma and harassment.

A. *Wollschlaeger v. Governor of Florida*: Do Gun Owners Have a Right to Be Free From Firearms Speech?

In *Wollschlaeger*, the Eleventh Circuit considered the constitutionality of Florida's Firearm Owners' Privacy Act (FOPA), overturning it on the First Amendment grounds that it impermissibly restricted medical professionals' speech. As enacted, FOPA prevented medical professionals from asking all patients whether they owned firearms or had them in their home and from recording patients' answers, with exceptions only for situations where particular information suggested such inquiries were medically necessary for a particular patient, such as suicidal tendencies. FOPA violations were punishable by fines of up to $10,000, letters of reprimand, probation or suspension, compulsory remedial education, or license revocation.[60]

Shortly after FOPA was passed, several doctors and medical organizations filed a federal lawsuit against Florida officials, alleging some of its provisions were unconstitutional.[61] In defending FOPA, state officials argued the legislation was enacted to protect patient privacy by "keeping private facts away from the public eye."[62] The NRA, in its motion to intervene, urged that FOPA protected "NRA members from intrusive, irrelevant questioning . . . and discrimination on account of their exercise of

57. 848 F.3d 1293 (11th Cir. 2017).

58. *Putnam*, No. 16-CV-8191 (KMK), 2018 U.S. Dist. LEXIS 169727 (S.D.N.Y. Sept. 28, 2018); *Mager*, 595 N.W.2d 142 (Mich. 1999).

59. *Bondi*, No. 4:18-cv-00137-MW-CAS, 2018 WL 1234695 (N.D. Fla. Mar. 9, 2018).

60. *Wollschlaeger*, 848 F.3d at 1303.

61. *Id.* at 1300.

62. *Id.* at 1314.

Second Amendment rights."[63] Plaintiff medical professionals and associations, however, asserted that FOPA impermissibly chilled or prohibited conversations on matters such as routine firearm safety counseling that were important to injury prevention and depriving patients of their First Amendment right to hear censored information.[64] This lawsuit gave rise to two rulings.

Initially, in its 2015 ruling, the Eleventh Circuit agreed that patients had such a privacy interest, ruling that such "unnecessary" firearms questions were, in effect, bad medicine: "good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient's care."[65] The court found that such privacy protections were needed due to power imbalances between doctors and patients, which could make patients feel helpless and coerced into answering such queries.[66] According to the majority, FOPA's legitimacy was grounded in physician adherence to codes of conduct mandating privacy and confidentiality, and negligence or malpractice.[67]

These arguments received little deference in the Eleventh Circuit's 2017 *en banc* decision, however. There, the Eleventh Circuit stated, under an unchallenged FOPA provision, "any patients who have privacy concerns about information concerning their firearm ownership can simply refuse to answer questions on the topic." Florida had already significantly restricted disclosure of patient medical records, "and there is no evidence that . . . doctors and medical professionals have been improperly disclosing patients' information about firearm ownership."[68] Nor was there evidence that "patients who are bothered or offended by such questions are psychologically unable to choose another medical provider."[69] Finally, patients have no right to avoid wholesale any questioning or speech that they found uncomfortable or controversial.[70] The Eleventh Circuit observed, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the

63. Proposed Intervenor National Rifle Association's Motion to Intervene and Incorporated Memorandum of Law at 5, Wollschlaeger v. Scott, No. 11-22026-Civ-Cooke/Turnoff (S.D. Fla. June 27, 2011).

64. Plaintiffs' Motion for a Preliminary Injunction and Accompanying Memorandum of Law at 1, Wollschlaeger v. Scott, No. 11-22026-Civ-Cooke/Turnoff (S.D. Fla. June 24, 2011).

65. Wollschlaeger v. Governor of Fla., 814 F.3d 1159, 1204 (11th Cir. 2015).

66. *Id.* at 1214–15.

67. *Id.* at 1216–18.

68. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1314 (11th Cir. 2017) (en banc).

69. *Id.* at 1315.

70. *Id*. at 1315–16.

unwilling listener or viewer,"[71] and "doctors and patients undoubtedly engage in some conversations that are difficult and uncomfortable . . . many are those who must endure speech they do not like, but that is a necessary cost of freedom."[72]

The Eleventh Circuit's *en banc* ruling was a major blow to supporters of a Second Amendment privacy doctrine; law, as the master frame, had rejected privacy claims outright. While it did not definitively exclude Second Amendment rights from privacy protection, it declined to extend them so far as to dictate how medical professionals counseled patients. Rather, it put the burden on patients to refuse to engage in such conversations, which could materially benefit other patients and prevent injuries. This reveals the court's assumption that individuals have the ability to assert control over their own information, regardless of the power imbalances inherent in the doctor-patient relationship. Curtailing firearms counseling is a necessary public good, not a stigmatizing subject, and refusing to answer is a stigma maintenance strategy. Ultimately, the *en banc* ruling places firearms ownership and use in the space of other controversial issues for which individuals must negotiate norms and in everyday interpersonal interactions and activities; just because Second Amendment concerns can be stigmatizing is not enough to grant them privacy protection.

B. *Doe v. Putnam* and *Mager v. State*: Do Permit Holders Have a Right to Shield Identifying Information from Public Scrutiny?

On December 24, 2012, the *Journal News*, a New York newspaper, published an interactive map that identified the name and address of each person who held a state handgun permit in Westchester and Rockland counties.[73] Thereafter, in *Doe v. Putnam*, anonymous plaintiffs and the New York State Rifle and Pistol Association challenged a New York law allowing public disclosure of gun permit holders' identifying information on the grounds that it violated the Fourteenth Amendment due process right to privacy and "impermissibly chill[ed] the free and uninhibited exercise of fundamental Second Amendment rights by subjecting permit holders to unwanted public attention and censure by those in the community who are opposed to guns and gun owners."[74] Plaintiffs contended that "the fact that

71. *Wollschlaeger*, 848 F.3d at 1315–16 (quoting *Erznoznik c. City of Jacksonville*, 422 U.S. 205, 210 (1975)).

72. *Id*.

73. Jason Horowitz, *N.Y. Newspaper Posts Gun Permit Map, Starts Nasty Online Battle*, WASH. POST (Dec. 26, 2012), https://www.washingtonpost.com/politics/ny-newspaper-posts-gun-permit-map-starts-nasty-online-battle/2012/12/26/747ae7d6-4fb0-11e2-950a-7863a013264b_story.html.

74. Complaint for Declaratory Judgment and Injunctive Relief at 2, Doe v. Putnam Cty., No. 7:16-cv-8191 (S.D.N.Y. Oct. 19, 2016).

a person is a handgun permit holder and is therefore exercising his or her individual Second Amendment right to armed self-defense in the home is a private, personal matter that is protected from public disclosure by the government under the constitutional right to privacy."[75] Evaluating these claims, the U.S. District Court for the Southern District of New York stated that the plaintiff had to prove that there was no set of circumstances under which the disclosure statute would be valid under the Second Amendment under intermediate scrutiny.[76] The court agreed with the New York Attorney General's argument that there is no legal authority for the position that such information is a private, personal matter protected from public disclosure by the government under the Constitutional right to privacy.[77] Not all disclosures of private information will trigger constitutional protection; under Second Circuit precedent, such information was "in a limited set of factual circumstances involving one's health and personal information," like HIV-positive status and sexual assault.[78] Thus, the court stated, disclosure of name, address, and permit holder status is not one of these very limited circumstances that implicated the right to privacy.[79]

In an earlier Michigan case, *Mager v. Dep't of State Police*,[80] the Michigan Supreme Court reached the opposite conclusion. In *Mager*, the plaintiff had asked for the names and addresses of registered Michigan handgun owners, but the State Police refused, stating that such information was private information that could be withheld from disclosure under state Freedom of Information Act exceptions.[81] Under Michigan law, exemptions to disclosure applied to information of a "personal nature"—that revealed intimate or embarrassing details of a person's private life, as evaluated by community customs and mores.[82] The trial court held that such information was *not* private information:

> [O]wnership of a gun does not reveal intimate or embarrassing details of an individual's private life. . . . gun ownership is a highly regulated area of conduct in this state. . . . Defendants do not point to, and we are unaware, of any customs, mores, or

75. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 74, at 6.

76. Doe No. 1 v. Putnam Cty., No. 16-cv-8191, 2018 WL 4757967, at *14 (S.D.N.Y. Sept. 29, 2018).

77. *Id.*

78. *Id.*

79. *Id.*

80. Mager v. State, 595 N.W.2d 142 (Mich. 1999).

81. *Id.* at 143.

82. *Id.* at 146.

> ordinary views of the community that would lead to the conclusion that gun ownership is an intimate or embarrassing detail of an individual's private life."[83]

On appeal, however, the court overturned this decision, stating that gun ownership *was* information of a personal nature:

> The ownership and use of firearms is a controversial subject. . . . Further, knowledge that a household contains firearms may make the house a target of thieves, and thus endanger its occupants. . . . A citizen's decision to purchase and maintain firearms is a personal decision of considerable importance. We have no doubt that gun ownership is an intimate or, for some persons, potentially embarrassing detail of one's personal life.[84]

Reconciling *Doe* and *Mager* requires accepting that there are competing perspectives on whether information about gun ownership (and, by implication, use) is intimate, personal, and embarrassing. *Doe* implicitly differentiated *sociocultural* stigma from that requiring *legal protection* and rejected the assertion that gun ownership status resembled intimate details such as personal medical information. *Mager* came to the opposite conclusion, citing that such details were controversial and could be embarrassing, even dangerous, in the wrong hands. *Mager* demonstrates that law as a master frame is capable of recognizing a Second Amendment privacy claim, while *Doe* illustrates that this reasoning is contentious and can be rejected by subsequent courts, limiting its rhetorical and pragmatic authority. It is especially damaging to Second Amendment privacy rights claims that the Second Circuit's dismissal occurred in a context where disclosure could expose handgun permit holders to theft or other crime—the very rationale why most own a handgun. This also suggests that permit holders' safety was less determinative of case outcomes than each judge's differing valuations of firearms stigma. The *Doe* holding leaves gun rights supporters in a truly uncomfortable position: attain personal safety (and lawful handgun possession) by obtaining a handgun permit at the cost of disclosure or attain privacy (and forego lawful handgun possession) by not obtaining a permit at the cost of personal safety.

83. Mager v. State, No. 197222, 1997 WL 33330940, at *2 (Ct. App. Mich. Dec. 12, 1997).

84. *Mager*, 595 N.W.2d at 146–47.

C. *NRA v. Bondi*: Does a Legal Party Have a Right to Anonymity to Escape Stigma and Harassment?

Privacy was also implicated in an ancillary open courts question in *NRA v. Bondi*, in which two 19-year-old plaintiffs sought anonymity in contesting a Florida law raising the statutory age for gun ownership from 18 to 21 following the Marjory Stoneman Douglas High School massacre, stating that pseudonyms were necessary because of the suit's highly controversial nature.[85] Jane and John Does argued that they were afraid that public knowledge of their involvement in the suit would make them "subject to harassment, intimidation, threats, and potentially even physical violence."[86] The court record contained an affidavit from Marion Hammer, the former NRA president, stating that, after media had publicly identified her with the lawsuit, she had received harassing emails and phone calls threatening her life and physical well-being.[87]

The district court, while expressing sympathy for the plaintiffs' claims, nonetheless found that parties to suits are granted pseudonyms only in "exceptional" circumstances to overcome a constitutional presumption of openness in court proceedings, such as being "required to disclose information of the utmost intimacy."[88] The majority first noted that anonymity had been denied in prior cases involving birth control, abortion, homosexuality, welfare rights for illegitimate children, sexual assault, substance use, attempted suicide, HIV infection fears, and for publicity-wary relatives of 9-11.[89] It then clarified that anonymity was granted only in exceptional cases, and rarely for stigma or harassment: "the threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity."[90] Finally, the district court emphasized that no court had ever deemed the Second Amendment or the rights it confers quintessentially private.[91]

The motion decision in *NRA v. Bondi* is the most troubling of these three cases because it directly imperils law's legitimacy as a master frame. Here, the court confesses that its hands are tied by legal precedent, and so it *must* rule that Second Amendment stigma's potential consequences do not merit privacy protection. Common sense conflicts with formalistic rulings.

85. Order Denying Motion to Proceed Under Pseudonyms at 4–5, NRA v. Bondi, No. 4:18-cv-00137-MW-CAS, 2018 WL 1234695 (N.D. Fla. May 13, 2018).

86. *Id.*

87. *Id.* at 5.

88. *Id.* at 8 (quoting Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992).

89. *Id.* at 14.

90. *Id.*

91. *Id.*

Present here, also, is an important countervailing interest: openness and transparency in judicial proceedings. Here, the consequences for gun rights supporters are more stark: either risk exposure and harassment to fight perceived injustice, or forego exposure and opportunities to reform the law. Stigma maintenance strategies are also drastically reduced for these named plaintiffs; they cannot dissemble but must openly acknowledge their involvement in such legal challenges—although they can certainly justify this participation. And as the court's own statement confirms, this justification strategy stands to be highly persuasive, even for individuals who may disagree with their legal arguments.

Conclusion: Whither Second Amendment Privacy?

The U.S. Supreme Court decision in *District of Columbia v. Heller* was intended to enshrine individual protections for firearm ownership and use, but thus far it has done a poor job of delivering on this promise. Consequently, the past decade has witnessed gun rights' supporters' attempts to attain additional legal recognition of Second Amendment rights, including under the privacy doctrine. Privacy doctrine affords an attractive means for Second Amendment advocates to attain increased legal legitimacy for firearm ownership and activities, secure the social, cultural, and physical spaces in which such behaviors take place, and counter the perceived stigma associated with such behaviors. To date, state legislatures have been more receptive to these claims than courts, with most judges being reluctant to extend traditionally narrow privacy shields to include problematic interactions with physicians, public disclosure of gun permit holders' names and addresses, and publication of litigants' actual names. While Second Amendment activities are indisputably constitutionally protected, courts may accord them less weight than other intimate subjects for which (according to judicial reasoning or legal precedent) disclosure carries more profoundly harmful consequences.

Ironically, two disparate conclusions could be drawn from these outcomes. First, courts may conclude that Second Amendment claims lack the requisite degree of stigma to trigger privacy protection—reasoning that could suggest gun rights advocates have been quite successful in eradicating the stigma they claim to have traditionally faced. Second, these rulings might be predicated on the assumption that gun rights concerns are innately less worthy of protection than others, confirming the Second Amendment's second-class status. As of now, however, we lack insight into which of these conclusions is most accurate. Thus, the question of whether and how privacy doctrine overlaps with the Second Amendment is just one of many issues that have grown increasingly murky since *Heller*.