

Privacy and the Varieties of Moral Wrong-doing in an Information Age

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Anonymity and complexity: lack of trust, free-riding and crime.

The privacy issue goes to the heart of an ongoing debate in nearly all Western Democracies between Liberalists (individualists) and Communitarians (collectivists) over the question how competing claims for personal freedom and autonomy and the needs of the community must be balanced.

The communitarian arguments to make more information on persons available and to relativize privacy claims are often clear, straightforward and convincing. They refer to benefits to the community of having knowledge about its members freely available. A social security agency in The Netherlands (GAK) saved the community 30 million dollars in 1996 by means of very simple computer matching procedures to detect fraud. The Italian government decided to match the list of people who receive government allowances because they are blind and the list of persons who recently got their drivers-licence. The potential for savings seems to be limited only by the limits of our imagination in data-base management. What more is there to say? Who would object to having his data processed if such honorable community causes are served?

Communitarians usually emphasize that modern societies exhibit high degrees of mobility and complexity, hence anonymity. And as they are quick to point out crime, free-riding and the erosion of trust are rampant under these conditions. Political philosopher Michael Walzer observed that "Liberalism is plagued by free-rider problems, by people who continue to enjoy the benefits of membership and identity while no longer participating in the activities that produce these benefits. Communitarianism, by contrast, is the dream of a perfect free-riderlessness" (Walzer, 1995: 63).

It is not accurate to identify the communitarian stance with the political right. As the social philosopher Alan Wolfe has observed (Wolfe, 1997: 189) in the privacy issue we have a crossing over of political ideas. The political right hails the free-market and abhors government intervention, yet they favor government intervention when it comes to making knowledge on persons widely available, signing Megan's law into action and installing clipperchips. The political left has always proclaimed the desirability of government interventions and state regulations, but detests interference with private decisions about abortion, sexuality and religion.

The communitarian diagnosis of our moral predicament goes deeper than just pointing to crime and free-riding as the collateral damage of the volatility and superficiality of modern life. It questions the very viability of the liberal conception of the self, which is so central to much of modern ethical theory and political philosophy. The liberal self is -as Michael Sandel has called it- too much of an "un-encumbered self": a self that makes its choices -including choices about its own identity- in splendid isolation, far from a community and a world that is already there, a self which has no constitutive attachments and preceeds the formation of its own identity. The liberal conception of the self is thus voluntaristic (Sandel), disengaged (Taylor) and radically un-situated (Benhabib). So insisting on a moral right to privacy seems doubly wrong from a communitarian perspective: the subject of the right -being a figment of Enlightenment philosophy - does not exist strictly speaking, and the protection it offers is not worth wanting, if not clearly undesirable.

What we need therefore is not just a matter of a counterexample proof definition of privacy, it is a matter of defending a whole philosophical tradition called liberalism and arguing for the plausibility and acceptability of the conception of the self that comes with it.

Panoptic technologies and the public good

According to communitarians we are thus in a sorry state and our unquenchable thirst for privacy serves as its epitome. Information technology's applications—panoptic technologies as Oscar Gandy and Jeffrey Reiman call them—ranging from active badges, Intelligent Vehicle Highway Systems (IVHS), Closed Circuit Television (CCTV) and data-base mining techniques, encourage government agencies, business firms and non-profit organizations alike to pursue the communitarian dream of perfect free-riderlessness.

The communitarian position and the communitarian operation "Restore Trust" are backed up by the logic of gametheory in the following way.

Many public administration problems can be characterized as free-rider problems: law enforcement, tax collection, implementation of environmental policies. The general description of a free-rider problem is that it is a situation where a number of persons contribute to the maintenance of a public good, where each person individually has an incentive to profit from the existence of the public good without making the necessary con-

tribution to its maintenance. When too many persons ride free, i.e. benefit without contributing, the means fall below the minimum required and the public good can no longer be produced or sustained, so it disappears altogether. For example, all citizens have to contribute to the budget for the protection of the environment in order to sustain particular environmental programs. If too many persons succumb to the seduction to profit from the cleaner and healthier environment without pulling their weight, the basis for a sustained environmental policy will eventually crumble.

The free-rider problem manifests itself in many areas and at all levels of government and has the structure of the Prisoners' Dilemma. The Prisoners' Dilemma is a strategic choice situation, where the optimal result is individually inaccessible, and the only equilibrium is suboptimal. In the free-rider problem, as in the Prisoners' Dilemma, we need some way of constraining the prudential motives, which are individually rational but do not lead to Pareto optimal results. One way for optimal results to ensue is to see to it that cooperation is in itself so highly valued by the parties involved so as to affect the pay-off matrix in the right direction. This is sometimes referred to as an 'internal solution' to the dilemma. Philosophers and game theorists have proposed ways to avoid the worst outcome by suggesting strategies of constrained maximization. Public administration has to deal with free-riders, without assuming too much self-constraint in the population. Therefore government agencies try to discourage free-riders by affecting the pay-off matrix primarily by means of 'external solutions', i.e. by excluding non-contributors or by tracking them down and punishing them. But as De Jasay observes " (...) it is not non-exclusion that makes retaliation impossible, but *anonymity of the free-rider*". (Jasay, 1989: 149,n.9)

An increase in relevant identifying information increases chances of retaliation, by alleviating the problem of anonymity. Free-rider problems can only take on socially unacceptable forms if the provider of the public good does not know who rides free and has no cost effective means to determine who the free-riders are. IT is ideally suited to uncover identities of free-riders -the determination of identities and the detection of instances of free-riding go hand in hand. IT gives government agencies the tools to provide adequate information to street-level bureaucrats. Networks, ID-chip cards and palm-top computers with CD-rom discs containing addresses and postal codes to check for consistency of the information on the spot greatly, they all increase the effectiveness of administrative procedures. Information technology is in many cases a cost efficient technology to affect the pay-off matrix of free-riders and thereby establish results that are superior in terms of average utility.

Some may think that this diagnosis about the logic of the situation is rapidly becoming irrelevant since it is no longer government agencies but private organisations that pose the greatest threats to personal privacy. However in the market sector the

logic of the situation is no different in principle. In a society of strangers trust and the means to establish normative status and moral reputation among virtual strangers are of paramount importance. By means of credentials (on-line searchable data-bases, front-end verification,) and ordeals (polygraph sessions, log-in procedures, and biometrical identification) we try to compensate for our ignorance. Information Technology is expected to deliver the techniques of perfect information, reducing transaction and information cost dramatically and reducing the risks of commerce among strangers, so as to approximate levels of trust, associated with smaller, traditional and less volatile communities.

Information and communication technology has established itself as the technology of the logistics of exclusion and access-management to public goods, goods involved in private contracts and interactions among private citizens. Both in the private as well in the public sector IT is seen as the universal technology to resolve the problem of anonymity.

It is this game-theoretical structure and the calculability of the gains which makes the arguments in favor of overriding privacy seem so clear, straightforward and convincing.

Moral constraints on the use of panoptic technologies.

How can these straightforward arguments be countered by those who wish to defend generous dataprotection regimes?

To begin to scratch the surface I think it may be useful to distinguish between four forms of wrongdoing which typically involve personal information. They are all forms of informational wrongdoing, which call for data-protection, but they do not all involve privacy in a strict sense. Protection against the first three are acceptable to both liberalists and communitarians. The weaker fourth justification for data-protection is controversial and its acceptance constitutes the deep divide between communitarians and liberalists in the context of the privacy debate.

Information based harms

There are forms of wrongdoing or harming which have as their necessary condition that the wrong-doer makes use of certain personal information about his victim. The fact that it is information about persons that is used to inflict the harm doesn't necessarily make it a privacy issue. Post modern criminals are known to have used computerized data-bases and the Internet to stage their crimes. We have to realize that in an information society there is a new vulnerability to what might be called 'information based harms'. Because of the ubiquitousness of information and information processing equipment inflicting harm and thwarting of individual preferences and life-plans will often involve as a matter of course the use of information and personal data on the part of others. As you can grab someone's arm and

twist it to hurt him, you can get someone's personal information and use it to his harm. Rigorous security policies have to be put in place to protect citizens against information-based harms.

It has always struck me as somewhat strange that the defenders of privacy here in Holland point to the second world war for a paradigm case of privacy violation. They relate the sad history of the occupation by the Nazi's, who found an easily accessible and well organized citizen administration, from which they could hand-pick jews, gypsies, criminals, mentally handicapped, homosexuals, trace them and send them off to the extermination camps. This part of our national past has for a long time effectively prevented the introduction of identification cards, registration of religion and sexual preference. But it seems somewhat odd to say that the Nazi's invaded the privacy of the Dutch Jews. They murdered, tortured innocent human beings. The reason for insisting on security and reasonable care in the context of storing sensitive data on persons is of course fear of harm. Just like we ban weapons out of fear of harm. It not strange that we fear information-based harm now information is becoming more and more like a gun.

No other moral principle than John Stuart Mill's Harm Principle is needed to justify limitations of the freedom of persons who cause, threaten to cause, or are likely to cause, information based harms to people. And Mill's Harm Principle is widely acknowledged as an uncontroversial justification for interference with individual liberty.

Equality

A second form of informational wrongdoing which involves personal data concerns a form of inequality. It has been pointed out by several authors that privacy may be disappearing as a foundational moral value in the Western World. Data privacy is already technologically obsolete, according to Calvin Gottlieb. The laws do not work because 'people don't want them to work in far too many situations' (Gottlieb, 1996: 156-175). One reason for this development is that people really want the benefits of ICT in exchange for the use of their personal data. One type of benefits they want is the benefits of a market of personal data. Citizens as customers have become aware of the fact that market transactions have changed in character. If I buy coffee at the shopping Mall, information about the transaction will be generated and stored. Customers have gradually become aware of this. Everytime they come to the counter to buy something they realize they have something to sell as well, namely the information about their purchase. A lot of privacy concerns have been resolved in a market for personal data and private contracts about consent to personal data use.

Now we should not be led to believe that now citizens have become aware of the fact that they can get discounts on consumer goods in exchange for personal data that they know, or could know, what they are doing and what they are consenting

to. It simply cannot be assumed that the conditions of the market are fair, and that the parties meet as equals.

Dataprotection should be put in place in order to guarantee fair market for personal data.

Justice

I think that what is often seen as a violation of privacy has more to do with the information-traffic across the boundaries of what we intuitively tend to think of as separate social "spheres". Many people do not object to the use of their personal medical data for medical purposes, whether these are directly related to their own personal health affairs, to that of their family, or expanding the circle even further, to that of their community, or the world population at large for that matter. They will however object for understandable reasons to being disadvantaged socio-economically, discriminated against on the workfloor, refused services, denied benefits, or turned down for insurance coverage on the basis of their medical records. These medical records were created to cure them from diseases.

Michael Walzer in criticizing John Rawls' conception of primary goods and his abstract idea of simple equality develops the idea of separate spheres of justice which have goods internal to them and have their own schemes of fair distribution (Walzer, 1983). In the medical, the political, the commercial, educational spheres there all seem to be different goods which are associated with the characteristic and defining practices. What has to be prevented, according to Walzer, is that some goods become 'dominant' and replace the goods which are internal to a particular sphere of justice, as happens when money (commercial sphere) could buy you a vote (political sphere), or if political office (political) would give you preferential treatment in healthcare (medical). What seems to be especially offensive and to go against the grain of our sense of justice is these transfers across spheres that should be have been kept separate. Walzer thinks therefore that some of the passages between spheres are blocked and should be blocked. He refers to this as blocked exchanges and practicing the art of separation.

The type of injustice I would like to draw your attention to here comes into existence when certain distinctions and associated information (the use of which may be perfectly unobjectionable in one sphere) carry over into another sphere. If difference in health status would be allowed to determine one's educational opportunities, or one's socio-economic achievements (that is information about them) would lead to preferential treatment in the legal setting, or political offices (information about the fact that someone holds them) would advance your entrepreneurial opportunities, and family relations (the fact that you are known to be the president's nephew) would determine eligibility for political office, these would be perceived as injustices, because of the fact that distinctions -information about

properties and qualities in one sphere - are imported into another one.

This is an important aspect of what people fear when they object to their data being made available without their informed consent. In order to prevent this from happening an art of 'information separation' between spheres has to be practiced, and 'blocked information exchanges' between different spheres have to be established.

Seyla Benhabib distinguishes between two types of communitarian thinking, Integrationist and participatory (Benhabib, 1992: 77). According to the first the problems of individualism, anomie, egotism, alienation can only be solved by recovery of a coherent value scheme. Participationist see the problems of modernity not in fragmentation and a loss of belonging and solidarity but in a loss of political agency and efficacy. This loss may be a consequence, she surmises, of the contradiction between the various spheres which diminishes one's possibilities for agency in one sphere on the basis of one's position in another sphere (as when the right to vote is made dependent upon income, e.g.). Social differentiation is not the problem to be overcome for participationist communitarianism, it is the reduction of contradictions between spheres and the articulation of non-exclusive principles of membership among the spheres (Benhabib, 1992:77-78).

My suggestion drawing upon both Michael Walzer's *Spheres of Justice*, and Benhabib's *The Situated Self* is that information like (other) goods is internal to different spheres and cannot travel freely across the boundaries of spheres of access. Communitarians, at least those of a participationist type have to acknowledge protection of personal data in order to prevent these informational injustices to people.

Encroachment on moral autonomy

Harm, inequality, injustice are the three uncontroversial justifications of data-protection regimes. They are framed in moral terms which should as I indicated be acceptable to both liberals and communitarians. One other reason for protecting personal data has been left out of consideration; it is what I like to refer to as the privacy concern in a strict sense which involves the *moral* autonomy of the person. Privacy, conceived along these lines, would only provide protection to the individual in his quality of a *moral* person engaged in self-definition and self-improvement against the normative pressures which public opinions and moral judgements exert on the person to conform to a socially desired identity.

Information about Bill, whether fully accurate or not, facilitates the formation of judgements about Bill. Judgements about Bill, when he learns about them, suspects that they are made, fears that they are made, may bring about a change in his view of himself, may induce him to redefine his desires, to reorder his preferences or make him behave differently than he would have

done without them. There are several mechanisms of what Von Wright referred to as normative pressure, which I can't discuss here.

To modern individuals living in a highly volatile socio-economic environment, and a great diversity of audiences and settings before which the individual makes its appearance, the *fixation* and rigging of identity by means of the judgements of others is felt as an obstacle to 'experiments in living' as Mill called them, or 'experiments with character', as Kierkegaard called them. The modern individual wants to be able to determine himself morally or to undo his previous determinations, on the basis of more profuse experiences in life, or additional factual information. Informational privacy can provide the person with the leeway to do just that.

This conception of the person as being morally autonomous, as being the experimenter of his or her own moral career, thus provides a justification for protecting his personal data. Data-protection laws provides protection against information based harms, against inequality but also against to a more elusive wrong, namely the fixation of one's moral identity by others than oneself. As far as this latter rationale is concerned they have a symbolic utility of conveying to citizens that they are morally autonomous.

Factual knowledge of another person or another person is always knowledge by description. The person himself however, does not only know the facts of his biography, but is the only person who is *acquainted* with the associated thoughts, desires and aspirations. However detailed and elaborate our files and profiles on Bill may be, we are never able to refer to the data-subject as he himself is able to do. We may only approximate his self-understanding.

Bernard Williams has pointed out that respecting a person involves 'identification' in a very special sense, which I refer to as 'moral identification', which has a static and a dynamic dimension:

" (...) in professional relations and the world of work, a man operates, and his activities come up for criticism, under a variety of professional or technical titles, such as 'miner' or 'agricultural labourer' or 'junior executive'. The technical or professional attitude is that which regards the man solely under that title, the human approach that which regards him as a man who has that title (among others), willingly, unwillingly, through lack of alternatives, with pride, etc. (...) each man is owed an effort at identification: that he should not be regarded as the surface to which a certain label can be applied, but one should try to see the world (including the label) from his point of view" (Williams, 1973, 236)

Moral identification thus presupposes knowledge of the point of view of the data-subject, which is concerned with what it is for a person to live that life. Persons have aspirations, higher or-

der evaluations and attitudes and they see the things they do in a certain light. Representation of this aspect of persons seems exactly what is missing when personal data are piled up in our data-bases and persons are represented in administrative procedures. The identifications made on the basis of our data fall short of respecting the individual person, because they will never match the identity as it is experienced by the data-subject. It fails because it does not conceive of the other on his own terms. Respect for privacy of persons can thus be seen to have an epistemic dimension. It is a way of acknowledging the 'impossibility' of really knowing other persons and to perceive others on their own terms.

And even if we could get it right about persons at any given point in time, by exhibit of extraordinary empathy and attention, then it is highly questionable whether the data-subject's experience of himself, as far as the *dynamics* of the moral persons is concerned, can be captured. The person conceives of himself as trying to improve himself morally. The person can not be identified, not even in the sense articulated by Williams, with something limited, definite and unchanging. The person always sees itself as something that has to be overcome, not as a fixed reality but as something in the making, something that has to be improved upon. Protecting privacy here is proposed as a way of acknowledging our systematic inability to identify the data-subject as being the same as the moral self with which the data-subject identifies itself.

It is clear that this construal of privacy implies a disengaged, 'unsituated' and 'punctual' liberalist self. What I have called the privacy concern in a strict sense is thus what seems to keep communitarians and liberalists divided in privacy debates. Communitarians probably agree on the acceptability of the first three reasons to protect to personal information, but they tend to question the last one, because they hold radically different views on the good life and the self. I have no simple answers as to what would be the more adequate and interesting conception of human beings and the good life. But a safe and thus somewhat boring guess would be that it lies somewhere in the middle. ♦

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