

# Ethics and Privacy

(SOTERIA Working Paper)

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## Introduction

Privacy encompasses what is strictly peculiar to an individual: the body, the image, home, comings and goings, existential choices, affective, sexual, familial, associative, and professional relations, political, philosophical and religious tendencies, secrecy of correspondences, marital status, identity, name, honour, reserve, physical integrity, moral, intellectual and artistic rights and even economic and social rights<sup>1</sup>. To apprehend it more concretely, we can consider that privacy is *a limitation of others' access to an individual*<sup>2</sup>. Ethics are, on the other hand, *the discipline dealing with what is good or bad or right and wrong or with moral duty and obligation*<sup>3</sup>.

The two notions interact in different ways. For the present report, we have chosen to explore three angles of analysis (Sections 1-2-3 of the report) in relation to these interactions from which a number of issues and debates have emerged among scholars. The report proposes to give an outline of those debates and to provide readers with extracts and references of associated publications and articles.

Section I of the report examines the ethicality of privacy itself. Indeed, a number of faults are generally attributed to privacy which sparks off diverse reactions among scholars. In fact, the ethical review of privacy goes beyond the strict legal or sociological approaches of privacy to examine its philosophical meaning and interest. The underlying questions are: What is good about privacy? What are its beneficial and harmful effects?

After having analyzed privacy through the grid of ethics, we will confront privacy and ethics through a different approach. Section 2 of the report examines the effect of privacy on the ethicality of individuals' actions. Indeed, according to some scholars, privacy has a decisive role in self-determination and in choices that lead an individual to act in a certain way rather than another.

Finally, in Section 3 of the report, we will consider privacy as a notion built in current ethics, as a moral standard that public and private stakeholders should be meant to respect. We will thus review debates over public and private stakeholders' ethical duty to limit impediments on privacy and to protect it.

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<sup>1</sup> F Rigaux, 1990 in : M-T Meulders-Klein, —L'irrésistible ascension de la "vie privée" au sein des droits de l'Homme|| in : F Sudre (ed), *Le droit au respect de la vie privée au sens de la Convention européenne de sauvegarde des droits de l'Homme* (Bruylant, Bruxelles 2005)

<sup>2</sup> R Gavison in : D.H. Flaherty, *Protecting privacy in Surveillance Societies*, USA, The University of North Carolina Press, 1989.

<sup>3</sup> "Ethics: 1. The discipline dealing with what is good or bad or right and wrong or with moral duty and obligation; 2.a. A group of moral principles or set of values; b. a particular theory or system of moral value; c. the principles of conduct governing an individual or a profession: standards of behavior." Merriam-Webster's 3<sup>rd</sup> International Dictionary of the English Language 1917 (3d ed. 1986).

## 1. The ethicality of privacy itself: discussing the faults generally attributed to privacy

The present ethical review of privacy adopts a functional approach of ethics with man's happiness and well-being as a general objective (cf. Aristotle *ultimate goal*). The faults generally attributed to privacy will thus be considered in view of this general objective. A lot of different perspectives exist on the matter. We will successively review debates in relation to the role of privacy in: undermining the common good, facilitating crime and in the management of public health services.

### Privacy, undermining the common good?

**Issue:** A traditional reproach made to privacy is that it privileges self-centeredness and that it puts the emphasis on the individual's interest. As a consequence, some scholars consider it as undermining the common good at a certain extent. The argument stems from the utilitarianism theory; however, it has been objected by a number of scholars who have put forward the multiple functions of privacy that go beyond the satisfaction of a purely individual interest.

**Argument 1-** Explanation and relevance of Mill's utilitarian theory.

*For Mill, happiness means the presence of intended pleasure and the absence of pain; and this is the only thing that is pursued. Everything else is pursued as a tool that leads us to this goal, which is called the greatest pleasure principle.[...]*

*The utilitarianism theory specifies how much an act is ethical based upon the maximum satisfaction to the maximum number of individuals. This does not mean that the persons are not asked to follow their own utility. It means however, that everyone should follow their own interests, as well the community's.*

*There is one important issue left unsolved: how to keep the balance between the conflicting interests and pleasures of individuals and of the community. Mill's answer is to maximize the society's pleasure, because the final gains are more than the individual's happiness. If there is no conflict, the individuals should be left undisturbed to satisfy their own interests.<sup>4</sup>*

**Argument 2-** Etzioni's application of the utilitarianism theory to privacy.

According to Amitai Etzioni, *"the pendulum has swung too far toward the radical individualistic pole"* and a *"judicious mix of self-interest, self-expression, and commitment to the commons-of the rights and responsibilities"*<sup>5</sup> is needed.

*"A new social, moral, and legal conception of privacy would continue to cherish it, but would also explicitly recognize that there are situations in which it ought to yield to concerns of public safety and public health [...]"<sup>6</sup>.*

### References:

Amitai Etzioni, *Rights and the Common Good: The Communitarian Perspective* (Saint Martin's Press, New York 1995)

<sup>4</sup> Hassan A. Abbas and Salah M. Al-Fadhly, "Privacy Perspective from Utilitarianism and Metaphysical Theories" in: Rasool Azari (ed), *Current security management and ethical issues of information technology* (IRM Press, London 2003) p. .

[http://books.google.it/books?hl=it&lr=&id=uU5JrygkdukC&oi=fnd&pg=PA267&dq=utilitarianism+privacy&ots=dE6bcXCpNX&sig=v\\_amXijlRY13STBSYGWcTvQc2jA#v=onepage&q&f=false](http://books.google.it/books?hl=it&lr=&id=uU5JrygkdukC&oi=fnd&pg=PA267&dq=utilitarianism+privacy&ots=dE6bcXCpNX&sig=v_amXijlRY13STBSYGWcTvQc2jA#v=onepage&q&f=false)

<sup>5</sup> Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* (Crown Publishers, New York 1993).

<sup>6</sup> Amitai Etzioni, *Rights and the Common Good: The Communitarian Perspective* (Saint Martin's Press, New York 1995) [http://books.google.it/books?hl=it&lr=&id=HcqSaHZjw2oC&oi=fnd&pg=PR2&dq=privacy+undermining+the+common+good&ots=U5k8cfTnKY&sig=uPfZ00II0\\_hZpl64OgUSDuqYoEw#v=onepage&q&f=false](http://books.google.it/books?hl=it&lr=&id=HcqSaHZjw2oC&oi=fnd&pg=PR2&dq=privacy+undermining+the+common+good&ots=U5k8cfTnKY&sig=uPfZ00II0_hZpl64OgUSDuqYoEw#v=onepage&q&f=false)

[http://books.google.it/books?hl=it&lr=&id=HcgSaHZjw2oC&oi=fnd&pg=PR2&dq=privacy+undermining+the+common+good&ots=U5k8cfTnkY&sig=uPfZ00IIO\\_hZpl64OgUSDuqYoEw#v=onepage&q&f=false](http://books.google.it/books?hl=it&lr=&id=HcgSaHZjw2oC&oi=fnd&pg=PR2&dq=privacy+undermining+the+common+good&ots=U5k8cfTnkY&sig=uPfZ00IIO_hZpl64OgUSDuqYoEw#v=onepage&q&f=false)

Amitai Etzioni, "The Right to Privacy vs. the Common Good" (sept.2000) *USA Today (Society for the Advancement of Education)*. [http://findarticles.com/p/articles/mi\\_m1272/is\\_2664\\_129/ai\\_65230204/](http://findarticles.com/p/articles/mi_m1272/is_2664_129/ai_65230204/)

Amitai Etzioni, *The limits of privacy* (Basic Books, United States of America 1999)  
[http://www.amazon.com/Limits-Privacy-Amitai-Etzioni/dp/046504090X#reader\\_046504090X](http://www.amazon.com/Limits-Privacy-Amitai-Etzioni/dp/046504090X#reader_046504090X)

Amitai Etzioni, *The Common Good* (Polity Press, Cambridge 2004)  
[http://books.google.it/books?id=DB9C5KmwSDEC&pg=PA35&lpg=PA35&dq=privacy+undermining+the+common+good&source=bl&ots=S5apzFY7db&sig=umWUnzx3inJEW48bhscHdBvHwY&hl=it&ei=FXobTIqVL9G2\\_QaT3-WUCQ&sa=X&oi=book\\_result&ct=result&resnum=4&ved=0CCAQ6AEwAzgK#v=onepage&q&f=false](http://books.google.it/books?id=DB9C5KmwSDEC&pg=PA35&lpg=PA35&dq=privacy+undermining+the+common+good&source=bl&ots=S5apzFY7db&sig=umWUnzx3inJEW48bhscHdBvHwY&hl=it&ei=FXobTIqVL9G2_QaT3-WUCQ&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCAQ6AEwAzgK#v=onepage&q&f=false)

**Argument 3-** The view of privacy as being in conflict with society is reflected in this statement by Barrington Moore: "*Privacy cannot be the dominant value in any society. Man has to live in society, and social concerns have to take precedence*"<sup>7</sup>.

**Argument 4-** Spiros Simitis identifies privacy with the individual's ability to withdraw from society and with his ability to establish a boundary between himself and society. Privacy is thus viewed as an impediment to the functioning of society.

*"Far from being considered as a constitutive element of a democratic society, privacy appears as a tolerated contradiction, the implication of which must be continuously reconsidered"*<sup>8</sup>.

**Counter argument 1-** Other scholars have argued that privacy had, beyond the satisfaction of the individual's interest, a function/role to play in social interactions. In her article, Valerie Steeves<sup>9</sup> stresses the social value of privacy, which puts in perspective Etzioni's argumentation.

The vision of privacy is considerably enriched; it appears as an essential element for the mental peacefulness of human beings and in the functioning of human societies in themselves, thus providing a greater good. (The utilitarian argument can be reversed)

*[...] Autonomy, [is] an aspect of the core self that interacts with others in a series of concentric circles moving outward from solitude to intimacy to general social interaction*<sup>10</sup>.

*[...] the second privacy function emotional release, is based on Goffman's social roles. Westin argues that, from this perspective, privacy is essential because it provides moments when individuals can "lay their masks aside to rest. To be always 'on' would destroy the human organism*<sup>11</sup>.*[...]*

*The privacy function of self-evaluation is based on Park's argument that reflective solitude is necessary to provide the individual with an opportunity "to anticipate, to recast, and to originate." Westin argues that contemplation enables the individual "to integrate his experiences into a meaningful pattern and to exert his individuality on events," and that, "[t]o carry on such self-evaluation, privacy is essential*<sup>12</sup>.

<sup>7</sup> Barrington Moore, Jr, *Privacy: Studies in Social and Cultural History* (M.E. Sharpe, Armonk, NY, 1984) p.274.

<sup>8</sup> Spiros Simitis, "Reviewing Privacy in an Information Society" (March 1987) 135 *University of Pennsylvania Law Review* 732.

<sup>9</sup> Valerie Steeves, "Reclaiming the Social Value of Privacy" in: Ian Kerr, Valerie Steeves and Carole Lucock(eds.) *Privacy, Identity and Anonymity in a Network World: Lessons from the Identity Trail* (Oxford University Press, New York 2009)  
[http://www.idtrail.org/files/ID%20Trail%20Book/9780195372472\\_kerr\\_11.pdf](http://www.idtrail.org/files/ID%20Trail%20Book/9780195372472_kerr_11.pdf)

<sup>10</sup> A Westin, *Privacy and Freedom* (1967) p.33

<sup>11</sup> A Westin, *Privacy and Freedom* (1967) p.35

<sup>12</sup> A Westin, *Privacy and Freedom* (1967) p.36

Westin's argues that limited and protected (3<sup>rd</sup> function of privacy) communication enables us to share confidences in relationships of trust. His conclusion that it also "serves to set necessary boundaries of mental distance in interpersonal situations"<sup>13</sup> is drawn directly from Simmel's discussion of the need to create mental distance in a successful marriage, and Goffman's studies of the ways in which facial expressions, gestures, jokes, and conversational conventions (such as changing the subject) are used to signal the need to withdraw from others.

*Reference:*

Valerie Steeves, "Reclaiming the Social Value of Privacy" in: Ian Kerr, Valerie Steeves and Carole Lucock(eds.) *Privacy, Identity and Anonymity in a Network World: Lessons from the Identity Trail* (Oxford University Press, New York 2009)

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**Counter argument 2-** Friedman does not support Etzioni's plea for the restriction of privacy on behalf of the common good. According to him, Etzioni's reasoning on privacy is misleading mainly because of its idealistic and trusting views on governments.

*[...] Etzioni (1999) makes occasional references to the risk of some future oppressive government misusing information, he does not take seriously similar concerns with regard to our current government. His implicit assumption is that government is to be viewed as a benevolent agent standing above the human struggle, not as a mechanism through which individuals seek to achieve their goals, often at the expense of other individuals. That is not a view that strikes me as realistic<sup>14</sup>.*

Being more suspicious regarding governments' having the best intentions, Friedman proposes a more pragmatic repartition of gives and takes between citizens' privacy and the possibility for governments to intrude their lives.

*Reducing government's ability to do bad things to us, at the cost of limiting its ability to protect us from bad things done to us by ourselves or by other people, may not be such a bad deal<sup>15</sup>.*

*David D. Friedman defends privacy as a bulwark against injustice inflicted by governments and private individuals. Privacy gives individuals the discretion to disclose about themselves as much or as little as they wish. While at times it may then protect some criminals, on balance privacy "gives each of us more control over his own life – which on average, if not in every case, is likely to lead to a freer world". Technologies – especially encryption – furnishes many salutary improvements to privacy, partly by offsetting the effects of other technologies aimed at learning things about us without our permission, and partly by allowing us to shield our activities from prying governments and busybodies<sup>16</sup>.*

*Reference:*

David D. Friedman, "The case for privacy" in: Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary debates in applied ethics* (Blackwell Publishing Ltd, Carlton 2005).

<http://uwch->

[4.humanities.washington.edu/Texts/Philosophy%20Guides.%20Analysis'%20and%20Resources%20\(ver.2\)/Conte](http://uwch-4.humanities.washington.edu/Texts/Philosophy%20Guides.%20Analysis'%20and%20Resources%20(ver.2)/Conte)

<sup>13</sup> A Westin, *Privacy and Freedom* (1967) p.38

<sup>14</sup> David D. Friedman, "The case for privacy" in: Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary debates in applied ethics* (Blackwell Publishing Ltd, Carlton 2005) p.273.

<sup>15</sup> David D. Friedman, "The case for privacy" in: Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary debates in applied ethics* (Blackwell Publishing Ltd, Carlton 2005) p.265.

<sup>16</sup> Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary debates in applied ethics* (Blackwell Publishing Ltd, Carlton 2005) p. 7.

[emporary%20Debates%20in%20Applied%20Ethics%20\(Contemporary%20Debates%20in%20Philosophy\).pdf#page=276](#)

**Counter argument 3-** In her book Priscilla M. Regan<sup>17</sup>, put the emphasis on the social importance of privacy. In “*Federalist Paper #10*”, James Madison refers to factions or particular interests opposed to “*the permanent and aggregate interests of the community*”. Priscilla M. Regan argues that privacy is one of those permanent and aggregate interests.

*The philosophical basis of privacy policy overemphasizes the importance of privacy to the individual<sup>18</sup> and fails to recognize the broader social importance of privacy. [...] When privacy is defined as an individual right, policy formulation entails a balancing of the individual right to privacy against a competing interest or right. In general, the competing interest is recognized as a social interest. For example, the police interest in law enforcement, the government interest in detecting fraud [...].*

*I argue that privacy is not only of value to the individual as an individual but also to society in general, and I suggest three bases for a social importance of privacy. [...]*

*Privacy is a common value in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a public value in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. The third basis for the social importance of privacy is derived from the theoretical literature in economics. Privacy is rapidly becoming a collective value/good in that technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy<sup>19</sup>.*

In her demonstration of privacy being a public value, Priscilla M. Regan argues that privacy is essential to create commonality outside the private sphere. This process in fact participates to the definition of a thoughtful public sphere and supports democratic political systems.

*In order for the “common” [interests] to develop, the private realm is essential. If the private realm is destroyed the public realm is destroyed as well because the human is destroyed. [...]*

*Arendt points to the older, non intimate, traits of privacy that are important to the common of the public world; without initiative and a hiding place from seen and heard, the public would become shallow<sup>20</sup>. This is similar to Alexis de Tocqueville’s distinction between individualism, or a preoccupation with self-interest and economic pursuit, which was associated with the isolation of the individual, and*

<sup>17</sup> Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p.212-213.

<sup>18</sup> See legal and philosophical literature that emphasizes the importance of privacy for the individual:

- Samuel D. Warren and Louis D. Brandeis, “The right to Privacy” (Dec. 1890) 4 *Harvard Law Review* 193.
- Charles Fried, “Privacy” (Jan 1968) 77-3 *Yale Law Journal* 475.
- Alan F. Westin, *Privacy and Freedom* (Atheneum, New York 1967)
- Edward J. Bloustein, “Privacy as an Aspect of Human Dignity – An Answer to Dean Prosser” (Dec. 1964) 39 *New York University Law Review* 962.
- James Rachels, “Why privacy is important” (Summer 1975) 4-4 *Philosophy and Public Affairs* 323.
- Jeffrey H. Reiman, “Privacy, Intimacy and personhood” (Fall 1976) 6-1 *Philosophy and Public Affairs* 26.
- J Roland Pennock and John W. Chapman (eds), *Privacy*, Nomos Series 13, Yearbook of the American Society for Political and Legal Philosophy (Atherton Press, New York 1971)
- Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984)

<sup>19</sup> Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p.212-213.

<sup>20</sup> Hannah Arendt, *The Human Condition* (University Press of Chicago, Chicago 1958) p.38.

*individuality, which was associated with the political exercise of public virtue in the company of others*<sup>21</sup>. [...]

*Privacy may be essential to a democratic political system because some commonality among individuals is necessary to unite a political community and the development of commonality requires privacy. [...] The more fragmented or differentiated people become, the harder it is to put them together in a society or body politic. As more is known about the uniqueness or distinctive characteristics of others, it becomes more difficult to find "mutually disinterested persons". [...]*<sup>22</sup>

In her demonstration of privacy being a collective value/good, Priscilla M. Regan examines the relevance of privacy from an economical perspective.

*The concept of collective value used here is derived from the economists' concept of collective or public good without others also benefiting*<sup>23</sup>. *Clean air and national defense are examples of public or collective goods. If a good is a collective good, then it will not be produced through the market [...]*<sup>24</sup>.

According to Colin Bennett, protection of privacy notably protection data provides *an indivisible public good; it applies to the whole society*.<sup>25</sup>

**Counter argument 4-** William P. Baumgarth sheds light on the fundamental role of privacy in the civil order. According to the author privacy is a necessary condition to a sound setting up of political associations.

At first, the author examines Socrates' idea according to which a political association needs to abolish privacy in order to ensure justice. Indeed when discussing justice in the city:

*Socrates refers to the myth of Gyges, the possessor of a ring of invisibility. With the assistance of this device, Gyges is enabled to kill the king, sleep with his queen, and perpetrate various other atrocities (Plato, *The Republic*, Bk. 2, 359c-360D). Injustice is thus assisted by "invisibility"; or, less allegorically, crimes against the community are facilitated by the protection which institutions such as the family or private property afford. The lesson is clear: to have the perfectly just regime, it is necessary to abolish those institutions which stand between the individual and the scrutiny of the community. That is to say, it is necessary to abolish privacy. [...]*

*Justice, in one of its senses, means a full commitment to the demands of the community. [...]*

*The various private interests of the several classes of the political community are reduced to a single common good ascertained by a single ruling class singularly divorced from the pursuit of self-interest. All*

<sup>21</sup> Thomas E. McCollough, *The Moral Imagination and Public Life: Raising the Ethical Question* (Chatham House Publishers, Chatham, N.J. 1991), p.66.

<sup>22</sup> In: Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p. 226-227.

<http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>

<sup>23</sup> For discussions of this concept, see J.G Head, "Public Goods and Public Policy", (1962) 17-3 *Public Finance* 197. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of the Groups* (Harvard University Press, Cambridge 1965); Vincent Ostrom and Elinor Ostrom, "Public Choice: A Different Approach to the Study of Public Administration" (Mar./Apr.1971) 31 *Public Administration Review* 203.

<sup>24</sup> In: Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p. 227.

<http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>

<sup>25</sup> Colin J. Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell University Press, Ithaca 1992) p. 202 In: Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p. 230.

<http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>

*this is effected by the wisdom of the philosopher-kings who alone can provide a social order in which each man is given what is his due, which is another way of expressing the notion of justice*<sup>26</sup>.

Then, William P. Baumgarth reviews Aristotle's reaction and own analysis:

*It is true that unity is to some extent necessary, alike in a household and a polis; but total unity is not. There is a point at which a polis, by advancing in unity, will cease to be a polis[...] (Aristotle, Politics, Bk. 2, 1263B).*

*What is common to the greatest number gets the least amount of care. Men pay most attention to what is their own: they care less for what is common; or, at any rate, they care for it only to the extent to which each is individually concerned. . . . The scheme of Plato means that each citizen will have a thousand sons: they will not be the sons of each citizen individually: any and every son will be equally the son of any and every father; and the result will be that every son will be equally neglected by every father [Aristotle, Politics, Bk. 2, 1261B]. [...]*

*The Aristotelian regime is one based upon a notion of justice which is fully appreciative of the claims made by self-interested political classes. The political association grows out of and enhances the types of social institutions, such as the family, which are apparently dismissed by the Republic as mere conventional devices*<sup>27</sup>.

William P. Baumgarth then gets onto exploring Hayek's classical liberalism theory. The latter stresses the fundamental contribution of the concept of rule of law in the interrelation between privacy and political association.

*The following characteristics are distilled by Hayek from the history of liberal legal theorizing regarding genuine laws: such laws must be general (containing no proper names), they must bind both the governors and the governed, and they must be certain (Hayek, 1960a, p.208). These attributes create a legal space around the individual within which he will be free to act. In short, their main effect is to provide a realm of privacy for the citizen. [...]*

*The citizen is permitted by the rule of law to plan his own activities as he sees fit, the incentives of the market serving to alert him as to where such services are profitably to be proffered. It is not that the classical liberal believes that every person is the best judge of his own interest; it is merely that nobody can be sure of who would know that interest better ( Hayek, 1948, p. 15). This is to say, the philosopher-king may be a wise man or a maniac. Given this possibility, Hayek opts for a political system in which bad men can do the least amount of harm, rather than one which seeks some positive notion of the nature of the good. Just as Aristotle finds Plato's notion of "the Good" not particularly helpful in defining what is good for this political community here and now ( Aristotle, Ethics, Bk. 1, 1096A-1097A), so Hayek finds problematic the claim that any ruler could so discern talent and social need as to distribute ability to projects more accurately than the way in which the market does. [...]*<sup>28</sup>

After having analyzed and criticized those different perspectives on privacy in the political association context, William P. Baumgarth concludes that privacy is necessary in the civil order.

<sup>26</sup> William P. Baumgarth, "Justice, Privacy and the Civil order" In: William C.S.J. Bier (edn) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/Index.jsp>

<sup>27</sup> William P. Baumgarth, "Justice, Privacy and the Civil order" In: William C.S.J. Bier (edn) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/Index.jsp>

<sup>28</sup> William P. Baumgarth, "Justice, Privacy and the Civil order" In: William C.S.J. Bier (edn) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/Index.jsp>



*For a rich public life, there must be assets and talents brought by the citizens to that public arena, and these are, within the boundaries of the rule of law, cultivated in the domain characterized by privacy. Is privacy, then, helpful in sustaining civil order? It is not only helpful but necessary, for there can be no community when a diversity of citizens is lacking and no such diversity unless the realm of private affairs is adequately secured. The "common good" created and sustained in political activities would be, in reality, only the good of some individual or class if it did not arise out of the give-and-take encouraged by the multiplicity of interests begotten in the private sphere. And the private sphere lacking a proper political context would, it appears, merely generate communities characterized by domination. Privacy and political order are but different aspects of the same phenomena: the human civil condition<sup>29</sup>.*

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William P. Baumgarth, "Justice, Privacy and the Civil order" In: William C.S.J. Bier (edn) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/Index.jsp>

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<http://www.springerlink.com/content/w687083931n177v7/>

## 2. Privacy, a crime-facilitating factor?

**Issue:** Privacy is usually presented as contrary to crime investigations and to fight against terrorism interests. At its far-reaching point this argument concludes that the protection of privacy is a crime-facilitating factor and that on the contrary impediments on privacy enable more effective fight against crime policies. A number of specific issues particularly arouse controversy on privacy as a crime facilitating factor: CCTV, hidden crimes or else the collection, storage, passing on and use of personal data.

### CCTV:

CCTV is a technology that has been introduced as a mean to prevent crime. In this respect, some scholars argue that privacy should not be defined too widely in order to facilitate investigations and prevention of criminal offences, notably through CCTV, while for other scholars the widespread use of CCTV corresponds to state surveillance and impedes on one's privacy.

**Argument-** In his article Jesper Ryberg argues that if our privacy is not violated when a little old woman looks at the street from her window, then by analogy, it is not violated by the functioning of CCTV cameras which monitor and record our movements.

**Counter argument-**Annabelle Lever

*The comparison between CCTV and a little old lady [...] depoliticizes the use of CCTV as a crime-fighting tool, confusing the justificatory burden facing government surveillance, with the justificatory burden*

<sup>29</sup> William P. Baumgarth, "Justice, Privacy and the Civil order" In: William C.S.J. Bier (edn) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/Index.jsp>

*facing an old lady. As a consequence, the analogy cannot be supported. Even if CCTV is effective at preventing crimes, there may be less intrusive ways of doing so. People have a variety of legitimate interests in privacy, and protection for these is important for their status as free and equal citizens. Consequently, though necessary effectiveness is insufficient to justify CCTV in a democracy<sup>30</sup>.*

**Counter argument-** Benjamin Goold

*State surveillance is qualitatively different from (and more problematic) than surveillance by “lonely old ladies”<sup>31</sup>.*

References:

Jesper Ryberg, “Privacy Rights, Crime Prevention, CCTV, and the Life of Mrs Aremac”, (2007) 13 *Res Publica* 127.  
<http://www.springerlink.com/content/w59770008121314/>

Annabelle Lever, “Mrs. Aremac and the Camera: A Response to Ryberg” (2008) 14 *Res Publica* 35.  
<http://www.springerlink.com/content/q8m3u37775r57647/>

Benjamin Goold, “The Difference Between Lonely Old Ladies and CCTV Cameras: A Response to Ryberg” (2008) 14 *Res Publica* 43 <http://www.springerlink.com/content/n2463u3539121322/>

Jesper Ryberg, “Moral Rights and the Problem of Privacy in Public: A Reply to Lever and Goold” (2008) 14 *Res Publica* 49 <http://www.springerlink.com/content/x7031412l626k081/>

**Counter argument-** States go round their legal orders to increase their surveillance powers, in order to prevent and investigate terrorism acts.

*States claim that their ability to prevent and investigate terrorist acts is linked intimately with increased surveillance powers. The majority of counter-terrorism legislation activities since the events of 11 September 2001 have therefore focused on expanding Governments’ powers to conduct surveillance. Second, States claim that since terrorism is a global activity, the search for terrorists must also take place beyond national borders, with the help of third parties which potentially hold extensive amounts of information on individuals, generating a rich resource for identifying and monitoring terrorist suspects. States that previously lacked constitutional or statutory safeguards have been able to radically transform their surveillance powers with few restrictions. In countries that have constitutional and legal safeguards, Governments have endangered the protection of the right to privacy by not extending these safeguards to their cooperation with third countries and private actors, or by placing surveillance systems beyond the jurisdiction of their constitutions<sup>32</sup>.*

References:

UN General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, A/HRC/13/37, 28 December 2009.  
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37.pdf>

<sup>30</sup> Annabelle Lever, “Mrs. Aremac and the Camera: A Response to Ryberg” (2008) 14 *Res Publica* 35.  
<http://www.springerlink.com/content/q8m3u37775r57647/>

<sup>31</sup> Benjamin Goold, “The Difference Between Lonely Old Ladies and CCTV Cameras: A Response to Ryberg” (2008) 14 *Res Publica* 43.  
<http://www.springerlink.com/content/n2463u3539121322/>

<sup>32</sup> UN General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, A/HRC/13/37, 28 December 2009.  
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US Department of Defense, *Safeguarding Privacy in the Fight Against Terrorism, Report of the Technology and Privacy Advisory Committee*, March 2004.

<http://www.defense.gov/news/Jan2006/d20060208tapac.pdf>

The collection, storage, passing on and use of personal data

The collection, storage, passing on and use of personal data are more and more frequently carried out in the context of crime prevention and investigations. Some scholars do not acknowledge restrictions on privacy in relation to those practices and assert that on the contrary privacy would facilitate crime if claimed in such situations. For other scholars, information privacy and anonymity are relevant principles including when dealing with crime prevention and investigation.

**Argument 1-** Some scholars who give recommendations on possible policies to counter terrorism do not mention at all the problem of privacy issues. They notably argue that military solutions are outdated and that Intelligence and information gathering practices are the most relevant means to fight terrorism<sup>33</sup>.

*Reference:*

Seth G. Jones, Martin C. Libicki, *How terrorist groups end: lessons for countering Al Qa'ida* (RAND Corporation, United States of America 2008)

**Argument 2-** Evidence can be found in the rhetoric of public authorities (in western countries) that privacy should be restricted in view of security interests.

*The rhetoric of public policy after September 11 encourages us to believe that the preservation of freedom and the safety of the common good requires our universal acquiescence to technological invasions of privacy. [...] The rhetoric of public policy solutions post-September 11 may be inconsistent with the philosophical and legal framework of American democracy. While serving as a solution today, this rhetoric may pose a devastating blow to the balance of individual privacy and common good that is essential to the preservation of freedom*<sup>34</sup>.

Other references:

David Brin, *The transparent society* (Perseus Books, United States of America 1998)

Tal Z. Zarsky, "Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems in Information Privacy in the Internet Society" (2003-2004) 58 *U. Miami L. Rev.* 991.

Rapport de la CNIL, « Transferts de données à caractère personnel vers des pays non membres de l'Union européenne » (Juin 2008), <http://www.cnil.fr/fileadmin/documents/approfondir/dossier/international/Guide-tranfertdedonnees.pdf>

F. Donson, "Data bases- positive policing or civil liberties nightmare?" in: S Field and C Pelser (eds), *Invading the Private: State Accountability and New Investigative Methods in Europe* (Ashgate Publishing Ltd, Aldershot 1998).

A. Roberts and N Taylor, "Privacy and the DNA Database" (2005) *E.H.R.L.R.* 373.

<sup>33</sup> Seth G. Jones, Martin C. Libicki, *How terrorist groups end: lessons for countering Al Qa'ida* (RAND Corporation, United States of America 2008) p.127.

<sup>34</sup> Lisa Nelson, "Protecting the Common Good: Technology, Objectivity, and Privacy" (2002) 62 *Public Administration Review* 69. <http://www3.interscience.wiley.com/journal/118944851/abstract>

S. Blackeney, "The Data retention Directive: combating terrorism or invading privacy?" (2007) 13 *Computer and Telecommunication Law Review* 153.

S. Preuss-Laussinotte, « L'Union européenne et les technologies de sécurité » (2006) 64 *Cultures & Conflits* 97. Available at <<http://conflits.revues.org/index2142.html>>

S. Preuss-Laussinotte, « Bases de données personnelles et politiques de sécurité : une protection illusoire ? » (2006) 64 *Cultures & Conflits* 77. Available at <<http://conflits.revues.org/index2133.html>>

Lisa Nelson, "Protecting the Common Good: Technology, Objectivity, and Privacy" (2002) 62 *Public Administration Review* 69. Available at <<http://www3.interscience.wiley.com/journal/118944851/abstract>>

Yves Poulet, "The fight against crime and/or the protection of privacy: a thorny debate!" (2004) 18 *International Review of Law, Computers and Technology* 251. Available at <<http://www.informaworld.com/smpp/content~db=all~content=a713622148>>

### 3. Privacy, obstacle to the management of public health?

**Issue:** This issue gets back to the essential relation between privacy and the societal good. For instance, some scholars argue that databases of medical information offer improved access to timely information, evidence-based treatments, and complete records from which to provide care. To the extent that these claims are true, it would seem that this is a valuable asset that offers immeasurable benefit to all<sup>35</sup>. Others think that the systematic recording of information on patients' is a serious threat to their privacy.

**Argument 1:** Corey M. Angst places the issue of privacy and management of public health in the field of social dilemmas.

*People find themselves in social dilemmas when they are presented with an option that provides them with greater benefit when acting selfishly, irrespective of what other decision-makers do, than when acting in a cooperative manner with the others<sup>36</sup>. In addition, if everyone acts selfishly, the affected population as a whole will receive less benefit than if a cooperative choice was made<sup>37</sup>. [...]*

*What is intriguing is that extant research does not explicitly draw the connection to societal good but instead focuses on concern for privacy and the potential benefits and costs that may accrue to the individual. What remains to be investigated is whether a portion of our population may choose to put*

<sup>35</sup> Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009). Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>36</sup> Dawes, R.M. "Social Dilemmas," *Annual Review of Psychology* (31) 1980, pp 169-193 and Weber, J., Kopelman, S., and Messick, D. "A Conceptual Review of Decision Making in Social Dilemmas: Applying a Logic of Appropriateness," *Personality and Social Psychology Review* (8:3) 2004, pp 281-307.

<sup>37</sup> Dawes, R.M. "Social Dilemmas," *Annual Review of Psychology* (31) 1980; Messick, D.M., and Brewer, M.B. "Solving Social Dilemmas," in: *Review of Personality and Social Psychology*, L. Wheeler and P. Shaver (eds.), Sage, Beverly Hills, CA, 1983, pp. 11-44; Biel, A., and Thøgersen, J. "Activation of social norms in social dilemmas: A review of the evidence and reflections on the implications for environmental behaviour," *Journal of Economic Psychology* (28:1) 2007, pp 93-112. In: Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

aside its privacy concerns and provide access to health data in hopes that the information can help them or others<sup>38</sup>.

**Argument 2:** A number of benefits resulting from interoperable health information exchange have been asserted. The upheld opinion is that the diffusion of information on patients provides a greater good to society.

*There are many benefits which result from an interoperable health information exchange (HIE). At the most simple level, it would be very valuable for patients to be able to traverse amongst all care providers and have their medical information transmitted with them – without making a concerted effort to have paper copies generated and mailed. This streamlining would benefit both the average patient who sees multiple providers for care and people who move to different geographic locations. Further, the electronic transmission of a computer-generated prescription to a pharmacy would reduce the chance that a pharmacist would misread a poorly written prescription and provide the wrong medication or the wrong dosage. At a more complex level, a massive database of health information would allow for improved public health reporting, bioterrorism surveillance, quality monitoring, and advances in clinical trials<sup>39</sup>. The Institute of Medicine, in its report, “To Err is Human,” argued that up to 98,000 deaths result from avoidable healthcare provider errors<sup>40</sup>. Many believe this number can be dramatically decreased with HIE. For example, it is posited that more complete information would lead to less duplication, increased coordination, and thus fewer errors<sup>41</sup>. [...]*

*[...] Some early studies of HIE estimate that approximately \$120 billion in savings per year from health-care costs can result by eliminating duplicate tests, shortening hospital stays, and improving care for chronically ill patients<sup>42</sup>. These authors argue that digitization brings efficiency and standardization to workflow and thus reduces costs<sup>43</sup>.*

**Argument 3:** The author considers the idea of Health Information data as a Public Good; a consequence would be that health information data should be shared. He in fact draws an analogy between health

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<sup>38</sup> Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p.4. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>39</sup> Brailer, D.J. "Interoperability: The Key To The Future Health Care System " *Health Affairs* (Web Exclusive) 2005, pp W5-19-W15-21. In: Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>40</sup> Kohn, L.T., Corrigan, J.M., and Donaldson, M., *To Err Is Human: Building a safer health system* (Institute of Medicine, National Academy Press Washington, DC, 1999). In: Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>41</sup> Brailer, D.J. "Interoperability: The Key To The Future Health Care System " *Health Affairs* (Web Exclusive) 2005, pp W5-19-W15-21. In: Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>42</sup> Hillestad, R., Bigelow, J., Bower, A.G., Girosi, F., Meili, R., Scoville, R., and Taylor, R. "Can Electronic Medical Record Systems Transform Healthcare? An assessment of potential health benefits, savings, and costs," *Health Affairs* (24:5), September 14 2005 and Pan, E., Johnston, D., Adler-Milstein, J., Walker, J., and Middleton, B. "The Value of Healthcare Information Exchange and Interoperability," Center for Information Technology Leadership, Boston, MA, 2004. In: Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>43</sup> Angst, Corey M., “Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges” (March 6, 2009) p. 10. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

information data and science. This issue puts into question the voluntary nature of giving up one's privacy.

*The term, 'public good' has its roots in the economic literature. It has been defined in several ways but the consensus suggests that it is a good that when any group member consumes it, it cannot be withheld from any other member of the group<sup>44</sup>. Once these goods are provided, nobody can be excluded from using them<sup>45</sup>.*

*Callon (1994) argues that with respect to science, one must think of a public good not from the perspective of an economist but instead from an anthropological and sociological sense and suggests that, "science is a public good, not because of its intrinsic properties but because it is a source of diversity and flexibility." In a sense, his argument is one step removed from the more direct question of whether data, which provide the means for discovery, i.e. 'science,' should be made available in a public way. I would argue that lawful and transparent uses of health data provide the same opportunities for diversity and flexibility. What is somewhat different is that no particular intellectual property, be it science or art, resides within the data itself. It is only through research that a sense-making process occurs, transforming data into new, actionable information. Thus, science adds meaning and context to data, but to what level do we agree to make the data available such that this discovery process can take place? And are the impacts of discovery great enough to justify the risks?*

*This leads to the intriguing question, what if one's privacy is voluntarily surrendered, such as in the case of the PGP10? Prior literature suggests that there is a privacy calculus<sup>46</sup> associated with a decision [...] for which there are tradeoffs. Typically, one would evaluate how important the private information is and weigh that against the return associated with giving it up. Some preliminary work by Anderson and Agarwal<sup>47</sup> suggests that people will relinquish some degree of privacy if the rewards or incentives are properly aligned. Other work suggests that disclosure of personal information will occur only if the individuals believe their data will be used in a just way that does not impact them negatively in the future<sup>48</sup>.*

**Argument 4-** Reducing the risks of pandemics or contributing to their resolution is another legitimate objective that can be put forward to develop health information exchange.

*Pandemic preparedness and response: Concerns about a possible avian flu pandemic caused by the H5N1 virus, as well as other public health emergencies, will test our ability to protect privacy and confidentiality against credible challenges. Privacy and confidentiality are not absolutes, and there are a number of*

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<sup>44</sup> Olson, M. *The Logic of Collective Action: public goods and the theory of groups* Harvard University Press, Boston, MA, 1971 p.14-15. In: Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 13. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>45</sup> Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 13. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>46</sup> Culnan, M.J., and Armstrong, P.K. "Information Privacy Concerns, Procedural Fairness, and Impersonal Trust: An empirical investigation," *Organization Science* (10:1) 1999, pp 104-115 and Dinev, T., and Hart, P. "An Extended Privacy Calculus Model for E-Commerce Transactions," *Information System Research* (17:1), March 2006, pp 61-80.

<sup>47</sup> Anderson, C., and Agarwal, R. "Boundary Risks, Affect, and Consumer Willingness to Disclose Personal Health Information," in: *INFORMS 2008*, Washington, DC, 2008.

<sup>48</sup> Derlega, V.J., Metts, S., Petronio, S., and Margulis, S.T. *Self-Disclosure* Sage, Newbury Park, CA, 1993 and Thibaut, J., and Kelley, H.H. *The Social Psychology of Groups* Wiley, New York, 1959.



*good reasons to breach them. Perhaps the best reason is public health, though even here the justification must be sound, the threat imminent, and the breach as minimal as possible*<sup>49</sup>.

**Argument 5-** Technologies should be trusted and there is a need to advance science.

**Counter argument:** Health information exchange (HIE) is impeding on privacy and could potentially cause damage to individuals' on who information has been taken. It poses the question whether there should be opt-in an opt-out systems or else what type of information should be available for health information exchange.

*Skeptics and cynics argue that creating databases of health information only further the agenda of control by various stakeholders. For example, a common HIE and Privacy complaint is that having access to large databases of medical information will allow insurance companies to 'cherry-pick' only those people who are healthy and require fewer health services*<sup>50</sup>.[...]

*One clear challenge with any voluntary system – be it opt-in or opt-out – is whether a disparity in care will result between those who have a complete electronic record and those who do not. While no studies have directly addressed this question, some research has suggested that technologies such as electronic medical records (EMR) and computerized physician order entry (CPOE) contribute to fewer errors in care*<sup>51</sup>. Yet, some studies have found virtually no effect or a negative effect<sup>52</sup>.[...]

*The irony of this situation is that the better and more complete the information in an HIE, the more useful it becomes for various stakeholders, which ultimately may lead to its demise: a classic case of the so called Icarus Paradox*<sup>53</sup>.

**Reference:**

Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 13. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>49</sup> Kenneth W. Goodman, "Privacy, confidentiality, law and ethics", available at <http://www.dcmsonline.org/jax-medicine/2008journals/ethics/privacy.pdf>

<sup>50</sup> Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 10-11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>51</sup> Bates, D.W., and Gawande, A. "Improving Safety with Information Technology," *New England Journal of Medicine* (348) 2003, pp 2526-2534. In: Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>52</sup> Ash, J.S., Berg, M., and Coiera, E. "Some Unintended Consequences of Information Technology in Health Care: The nature of patient care information system related errors," *Journal of the American Medical Informatics Association* (11) 2004, pp 104-112; And Crosson, J.C., Ohman-Strickland, P.A., Hahn, K.A., DiCicco-Bloom, B., Shaw, E., Orzano, A.J., and Crabtree, B.F. "Electronic Medical Records and Diabetes Quality of Care: Results From a Sample of Family Medicine Practices," *Annals of Family Medicine* (5:3), May 1, 2007 2007, pp 209-215; and Koppel, R., Metlay, J., Cohen, A., Abaluck, B., Localio, A.R., Kimmel, S.E., and Strom, B.L. "Role of Computerized Physician Order Entry Systems in Facilitating Medication Errors," *Journal of the American Medical Association* (293) 2005, pp 1197-1203. In: Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 11. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

<sup>53</sup> Miller, D. *The Icarus Paradox: How Exceptional Companies Bring about Their Own Downfall* HarperBusiness, 1990. In: Angst, Corey M., "Protect My Privacy or Support the Common-Good? The Social Dilemma of the Opt-In versus Opt-Out Decision Related to Electronic Health Information Exchanges" (March 6, 2009) p. 13. Available at Social Sciences Research Network (SSRN): <http://ssrn.com/abstract=1354782>

**Counter argument 2:** In his article, Kenneth W. Goodman has stressed the “particular sensibility” of health information.

*[...] With special regard to the health professions, the kinds of things clinicians learn can be especially delicate, and they are often learned from people who are in a particularly vulnerable position. Indeed, one could argue that nothing is more intimate and personal than a medical fact or diagnosis, be it cancer or HIV, let alone the increasing amounts of genetic information being collected and used for clinical purposes and research.*

*There are, generally, two solid reasons for regarding medical information as especially worthy of protection. One is quite practical and utilitarian: If patients do not trust clinicians and others to keep their secrets, they will not disclose them in the first place, thus frustrating medical diagnosis and therapy. The other reason is based on the idea that there need be no adverse consequence at all, namely, that people, given the various foundations of privacy rights just enumerated, have a right to decide whom to share information with. Rationality requires that this unremarkable right be respected because most reasonable people prefer to control who has access to their information. Here, the information might be a stubbed toe, a sexually transmitted disease, or a diagnosis of schizophrenia. The right ranges across all health information and need not be justified on a case-by-case basis<sup>54</sup>.*

*References:*

Kenneth W. Goodman, “Privacy, confidentiality, law and ethics”, available at <http://www.dcmsonline.org/jax-medicine/2008journals/ethics/privacy.pdf>

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<sup>54</sup> Kenneth W. Goodman, “Privacy, confidentiality, law and ethics”, available at <http://www.dcmsonline.org/jax-medicine/2008journals/ethics/privacy.pdf>



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#### 4. Which role for privacy in the ethicality of individuals' actions?

This section adopts a different approach on privacy and ethics by reviewing the role of privacy in the ethicality of individuals' action. It will firstly examine debates concerning the link between the cognitive dimension of ethical choices and privacy, and secondly, it will consider the potential intervention of privacy in ethical decision making.

##### **Privacy and psychological growth**

**Issue:** Is privacy necessary to psychological growth? A positive answer to this question would put in direct link privacy and the cognitive activity that leads to self-determination and to ethical choices.

**Argument 1-** According to Constance T. Fischer, privacy is a condition for human development, influencing intellectual, emotional and moral development.

*"Human development" refers to growing up through infancy, childhood, adolescence, and adulthood. The stages and tasks of development identified by Erikson (1950, 1959) will serve as an outline for a consideration of the importance of privacy for optimal growth through the stages. Remember that here we are thinking of privacy in the usual way as an absence of surveillance and intrusion. [...]*

*[...]I am not claiming that privacy is an adequate condition for optimal development; rather, I see privacy as a facet of the complex structure of growing and maturing.*

**Argument 2-** Privacy is also "thought explicitly as a mode of consciousness", directly linked with imagination and creation.

*One aspect of what privacy provides is an opportunity to get in touch with one's self while not worrying centrally about other people's judgments; we might call this "being at home with one's self." Privacy is*

also a condition for imagining different possibilities --of freeing one's self from perceived contingencies. Growth toward optimal fulfillment requires both at-homeness and visions of what else might be. We are speaking here of creative productions (art, cuisine, writing, etc.) as well as of personhood. A related opportunity provided by privacy is that of getting in touch with other people, of "where they're coming from"; a prerequisite for this process is the un-self-conscious, non-defensive openness to changes in one's own perceptions. Finally, in privacy one can experience a sense of unity, not only with other people, but with events and the world at large. Emerging from such dwelling, one can be much more patient and understanding of others' projects and differences. Note how very different the above process has been from secrecy or other defensive stances. [...]

Privacy does not always lead to growth. One's openness, unity, and flow may be with, or even restricted to, negative, limited, or evil profiles. In addition, one may enter privacy as an escape and thus avoid coping constructively with problems. Even where within privacy the person has been awed by the newly discovered facets of something and his own connectedness with it, there is no guarantee that this experience will later "go" anywhere. Being-in- privacy is not sufficient for positive growth. But it does seem necessary<sup>55</sup>.

**Argument 3-** Privacy is considered as a privileged area for the delineation of one's personality. Privacy enables us to decide who we are and to what extent we want to share oneself with others.

Privacy is related to notions of solitude, autonomy, and individuality. Within some socially defined limits, privacy allows us the freedom to be who and what we are. By embracing privacy, we exercise discretion in deciding how much of our personhood and personality to share with others. We generally feel less vulnerable when we can decide for ourselves how much of our personal sphere others will be allowed to observe or scrutinize<sup>56</sup>.

**Counter argument-** The authors criticize Mahler's theory according to which autonomy and capacity to decide things for oneself, from the age of toddlerhood, entail separating from others (individuation-separation theory). According to Robert M. Galatzer-Levy and Bertram J. Cohler, Mahler's theory implicitly aims at enhancing independence and freedom of thoughts. However, they believe that those are social ideals particularly valued in our society and that thus Mahler's theory artificially conforms itself with those values. For instance, according to them, separation is not necessary for one's self development. Mahler's theory would be biased by her own experience of living.

Mahler's theory is consistent with a central theme in Western morality: people are independent moral agents who can and should voluntarily and individually decide their actions. Even if we accept this as an admirable goal, it hardly reflects ordinary functioning. In a recent series of papers on psychoanalysts functioning in extreme situations, for example, Germany under Hitler or Argentina during the "disappearances," the authors repeatedly designated as "normal" capacities to resist social demands that in another context would be called heroic ([Chasseguet-Smirgel, 1988](#)). This type and degree of independence is a Western ideal. It is not a universal moral value ([Shweder, Mahapatra, & Miller, 1987](#)). We believe that Mahler's views confuse moral and natural law and equate "normality" with ideal behavior ([Offer & Sabshin, 1974](#)). Mahler took a common moral precept and made it into a psychoanalytic theory. The idea that to behave morally is to go beyond group values is implicit even in

<sup>55</sup> Constance T. Fischer, "Privacy and human development" In: William C.S.J Bier (ed) *Privacy: A Vanishing Value?* (Fordham University Press, New York 1980) available at <http://www.questia.com/index.jsp>

<sup>56</sup> Alpert S. Privacy and intelligent highways: Find the right of way. *Santa Clara Computer & High Technology Law Journal* 1995;11(1):97-118. Cf. Alpert S. Health care information: Access, confidentiality, and good practice. In *Ethics, Computing and Medicine: Informatics and the Transformation of Health Care*, ed. Goodman KW, Cambridge University Press, Cambridge, 1998, pp. 75-101. In: Kenneth W. Goodman, "Privacy, confidentiality, law and ethics", available at <http://www.dcmsonline.org/jax-medicine/2008journals/ethics/privacy.pdf>

the work of as thoughtful a scholar as Kohlberg ([Shweder et al., 1987](#)). This notion contrasts with a view that the individual is a part of society and equates "right" with what benefits the community. The usefulness of independence and freedom can even be questioned from a purely economic standpoint ([Schelling, 1984](#)).

The idea that independence is a central feature of the self's development has special appeal in our society, which highly values independence. Independence is the value of a land of immigrants--people whose displacement from their culture occurred within a few generations. The theory also grows from psychopathology. The patients to whom it best applies may need to separate from their disturbed families to be themselves. Separation is a necessary solution to an unfortunate situation, not a necessary part of ordinary development. It is analogous to the surgical removal of a cancerous limb, lifesaving but not in any sense normal.

Separation-individuation theory was the work of the last years of a displaced person. Like many German Jews forced from their homeland by the Nazis, Mahler experienced the value of being able to tolerate unrootedness and separation. Mahler's memoirs (1988) reveal that she based her views on her recurrent life experiences. She was a brave but deeply troubled person, whose whole life, not only her forced emigration, was dominated by involuntary separations and lack of support. She transformed horrendous suffering into personal growth. Although we admire Mahler's ability to make so much of her isolation, we believe her theories originated in a need to make personal painful realities into norms.<sup>57</sup>

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Margaret Mahler, *The psychological birth of the human infant: symbiosis and individuation* (Hutchinson & co, 1975)

Robert M. Galatzer-Levy and Bertram J. Cohler, "Toddlerhood, the self and morality", In: Robert M. Galatzer-Levy and Bertram J. Cohler, *The essential other: A Developmental Psychology of the Self* (Basic Books, 1993) p. 73-74.

Available at

<http://www.questia.com/read/86095295?title=The%20Essential%20Other%3a%20A%20Developmental%20Psychology%20of%20the%20Self>

## 5. Ethical decision making: does privacy intervene?

**Issue:** The issue at stake is to determine which factor influences decisions individuals judged to be ethical. The potential role of privacy may lead "to introspective, proactive, purposeful, and personal evaluation as situations demanding ethical judgment arise in the future" (Trevino & Brown, 2004; Trevino et al., 1999)<sup>58</sup>.

#### **Argument 1-** Which definition for ethical decision-making?

*In a study of ethical decision making in a crisis situation, Christensen and Kohls (2003) defined an ethical decision as one that addresses the needs and concerns of all stakeholders to the problem. Gini (2004) concluded ethics seeks to find a way to balance an individual's needs with those of others. Burns (2004)*

<sup>57</sup> Robert M. Galatzer-Levy and Bertram J. Cohler, "Toddlerhood, the self and morality", In: Robert M. Galatzer-Levy and Bertram J. Cohler, *The essential other: A Developmental Psychology of the Self* (Basic Books, 1993) p. 73-74 available at <http://www.questia.com/read/86095295?title=The%20Essential%20Other%3a%20A%20Developmental%20Psychology%20of%20the%20Self>

<sup>58</sup> In: Joe W. Cotter and Toni Buchsbaum, Ethical decision-making in a fast changing world (1 September 2007) *International Journal of Business Research* .  
<http://www.highbeam.com/doc/1G1-178945807.html>

*discussed leadership ethics in three categories. Ethical virtues are viewed as "character tests" of "sobriety, chastity, abstention, kindness, altruism"--personal rules of conduct (Burns, 2004, p. ix-x). Ethical values include such traits as "honesty, integrity, trustworthiness, reliability ..." and are important in transactions with others (Burns, 2004, p. x). Moral values include "order (or security), liberty, equality, justice, [and] community", terms dealing with interaction with society (Burns, 2004, p. x). [...]*

*Weston (2001) defined moral values as personal values that address the needs and expectations of others and oneself. He depicted ethics as the action of thinking about moral values and finding the best ways to integrate them into our actions.[...] The ethical decision-making process is personalized as individuals use their own moral base to evaluate the decision as right or wrong (Carlson, Kacmar, & Wadsworth, 2002)<sup>59</sup>.*

**Argument 2-** A number of authors argue that, from a substantial point of view, privacy enables the shaping and appropriation of personal values that later on are used as referent in ethical decision making.

*Numerous authors have argued that personal values play an important role in influencing the behavior of managers (England, 1967, Christensen and al., 1987; Freeman and Gilbert, 1988). If that is true, one would expect personal values to influence the ethical dimension of decisions<sup>60</sup>.*

*A value is a conception, explicit or implicit... of the desirable which influences the selection from available modes, means, and ends of action." (Kluckhohn, 1951); "A value is an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence" (Rokeach, 1973); and "... as normative beliefs about proper standards of conduct and preferred or desired results" (Nystrom, 1990). While definitions differ, there appears to be a general agreement that values influence behavior<sup>61</sup>.*

**Argument 3-** No work has been found that specifically analyzes the role of privacy in ethical decision making. In fact, if we proceed to the review of the different theories focused on the "reaching of" ethical decision making, a variety of factors are pointed out. A number of those factors can be linked to privacy, for instance, the development of personality, values and beliefs of individual decision makers or else their self-appropriation of education and religion principles. In fact, ethical decision making can be studied by analyzing external factors to the individual decision maker such as the influence of others and the social environment more generally, or by analyzing internal factors peculiar to the individual. The analysis of internal factors notably focuses on the cognitive dimension of decision-making. This cognitive dimension though resulting from complex phenomenon can be considered as having privacy as an elaboration background.

*Several theories combine to build a picture of how ethical decisions are reached. Kohlberg (1976) described individual development of morals and ethics. Jones' (1991) issue-contingent model proposed that there are factors within the issues to be decided upon that affect the decision itself. Management of attention, meaning, trust, and self can be used to influence followers (Bennis, 1984). Education,*

<sup>59</sup> Joe W. Cotter and Toni Buchsbaum, Ethical decision-making in a fast changing world (1 September 2007) *International Journal of Business Research* .

<http://www.highbeam.com/doc/1G1-178945807.html>

<sup>60</sup> Personal values: Potential keys to ethical decision making, (November 1995) 14-11 *Journal of Business Ethics* 909

<https://springerlink.metapress.com/content/v70645rj22343945/resource-secured/?target=fulltext.pdf&sid=gmxiksityvlspp55xcx2qo55&sh=www.springerlink.com>

<sup>61</sup> Personal values: Potential keys to ethical decision making, (November 1995) 14-11 *Journal of Business Ethics* 909

<https://springerlink.metapress.com/content/v70645rj22343945/resource-secured/?target=fulltext.pdf&sid=gmxiksityvlspp55xcx2qo55&sh=www.springerlink.com>

training, and religion were reviewed for their possible impact on ethical decision making. Religion has been viewed as both positively and negatively influencing decision making (Sankar, 2003).

Wood and Bandura (1989) discussed the implications of our social nature. Social cognitive theory views behavior, cognitive and other personal factors, and environmental factors reacting on each other as influencers on individual behavior actions within an organizational structure. The theory suggested that behavior, reciprocal determinism and personal factors react together to influence action of an individual in their environment. [...] These studies suggest that others can have a significant influence on how each individual makes ethical decisions.

Scholarly studies of the development of personality, values and beliefs of individual decision makers are limited both in number and in agreement (Ford & Richardson, 1994; Fritzsche, 1995).

There is considerable evidence that an individual can be influenced by others in organizations including both leaders and peers (Aaltio-Marjosola & Takala, 2000; Bennis, 2004; Caldwell et al., 2002; Clements & Washbush, 1999; Goleman, 2004; Mintzberg, 2001; Trevino et al., 2000)<sup>62</sup>.

**Argument 4-** If we take Jones' model for example, the ethical decision-making process is characterized by its "internality", except for the "engaging in moral behavior" phase. This internality could suggest an important role for privacy in the procedural steps of ethical decision-making.

Jones' (1991) model relies significantly on the work of existing models (Dubinsky and Loken, 1989; Ferrell and Gresham, 1985; Hunt and Vitell, 1986; Rest, 1986; Trevino, 1986), but also extends them. He draws on Rest's (1986) model outlining four distinct components; recognizing the moral issue, making a moral judgment, establishing moral intent, and engaging in moral behavior. More specifically, his model suggests that individuals encounter moral or ethical issues within the personal environments of their daily living. These personal environments are complex, including diverse and sometimes conflicting social, economic, cultural, and organizational elements (Ferrell and Gresham, 1985; Hunt and Vitell, 1986). According to Jones (1991), the first step in the ethical decision-making process requires that the individual be capable of recognizing the moral dilemma in an act or in the failure to act. Failure to recognize a moral choice places the individual's behavior outside the realm of the ethical decision-making process. Once a moral dilemma is recognized, the individual is then asked to make a moral judgment and establish a moral intent. Included in the moral intent phase are individual and situational moderating variables as well as variables of opportunity and significant others. Following the establishment of moral intent, the final step of Jones' model depicts the individual engaging in moral behavior. What differentiates Jones' (1991) model from previous ones is that past models failed to consider the explicit characteristics of the issue as either an independent or moderating variable<sup>63</sup>.

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<http://www.springerlink.com/content/k5tj64j3q60325p2/>

<sup>62</sup> Joe W. Cotter and Toni Buchsbaum, Ethical decision-making in a fast changing world (1 September 2007) *International Journal of Business Research* .  
<http://www.highbeam.com/doc/1G1-178945807.html>

<sup>63</sup> Dawn S. Carlson, K. Michele Kacmar, Lori L. Wadsworth, "The impact of moral intensity dimensions on ethical decision-making: assessing the relevance of orientation" (Winter 2009) *Journal of Managerial Issues*.  
[http://findarticles.com/p/articles/mi\\_hb6703/is\\_4\\_21/ai\\_n50364945/pg\\_10/?tag=content:col1](http://findarticles.com/p/articles/mi_hb6703/is_4_21/ai_n50364945/pg_10/?tag=content:col1)

A Review of The Empirical Ethical Decision-Making Literature: 1996–2003, (July 2005) 59-4 *Journal of Business Ethics* 375.

<http://www.springerlink.com/content/t71vq26125774812/>

Frederick Stoutland, “Reasons for Action and Psychological States” In: Anton Leist, *Action in context* (Walter de Gruyter, Berlin 2007)

[http://books.google.it/books?id=O3wmaqjzDhUC&printsec=frontcover&dq=Action+in+context+Anton+Leist&source=bl&ots=875iPS4b58&sig=OVwaRTEklk9LSpYjkb1qUKsJM-k&hl=it&ei=sncsTLKOHM6JOOjy6Z8J&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false](http://books.google.it/books?id=O3wmaqjzDhUC&printsec=frontcover&dq=Action+in+context+Anton+Leist&source=bl&ots=875iPS4b58&sig=OVwaRTEklk9LSpYjkb1qUKsJM-k&hl=it&ei=sncsTLKOHM6JOOjy6Z8J&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false)

Anton Leist, *Action in context* (Walter de Gruyter, Berlin 2007)

Ethical Climates and the Ethical Dimension of Decision Making, (March 2000) 24-2 *Journal of Business Ethics* 125.

<http://www.springerlink.com/content/j14850761u078744/>

## 6. Public and private stakeholders: limiting impediments on privacy and protecting it, an ethical/moral duty?

This third section considers privacy and ethics from the perspective of public and private stakeholders. The first part will review debates over the relationship between privacy and democracy. “Traditional positions” are notably put into question by the fact that we have entered a technological era. The second part of this section examines the debate regarding the sincerity of private stakeholder in carrying out ethical commitments in relation to privacy.

### **Privacy and Democracy: a relation of duration or under disruption?**

**Issue:** To what extent is privacy linked to democracy? The traditional position according to which respect for privacy by public stakeholders is a condition to democratic societies is questioned in view of the technological revolution that may redefine or get rid of privacy.

**Argument 1-** Privacy is a mean to limit the State power over citizens; it fixes boundaries to the exercise of power. As a consequence, privacy is an important element for social and civil liberties.

*Privacy has been regarded as an instrumental value, having value not as an end in itself but as a means of achieving other ends.*

*Another basis for a public value of privacy can be found in the liberal belief in limited government, or more specifically, in restrictions on arbitrary and capricious use of power.[...] In thinking of privacy as establishing boundaries for the exercise of power, it is instructive to refer to John Stuart Mill’s discussion of the “struggle between liberty and authority”. His concept of “civil, or social, liberty” involves not the rights of individuals but “the nature and limits of the power which can be legitimately exercised by society over the individual”. [...] Privacy in this sense is not important just to individual liberty but also to civil or social liberty because it helps establish the boundaries for the exercise of power<sup>64</sup>.*

**Argument 2-** Thomas Emerson puts the emphasis on the central role of privacy in a democratic society. He asserts that privacy is a necessary condition for citizens to put into perspective social issues and to

<sup>64</sup> Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p.225-226. Partially available at <http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>



free their mind from social pressure. In this perspective, privacy is a preliminary to freedom of expression.

*“In its social impact a system of privacy is vital to the working of the democratic process. Democracy assumes that the individual citizen will actively and independently participate in making decisions and in operating the institutions of society. An individual is capable of such a role only if he can at some points separate himself from the pressures and conformities of collective life”<sup>65</sup>.*

**Argument 3-** Some authors argue that privacy should not be sacrificed because it is a sound basis for trust and accountability

*Privacy is essential to the development of trust and accountability, which are basic to the development of a democratic political community<sup>66</sup>. (Cf. surveys data that show a link between distrust in governments and in institution and concern about privacy)*

*Reference:*

Charles D. Raab, Trust, Technology and Privacy, *Journal of Scottish studies*  
<http://www.abdn.ac.uk/philosophy/endsandmeans/vol3no1/raab.shtml> From: Raab, C. (1998) 'Electronic Confidence: Trust, Information and Public Administration, in I. Snellen & W. van de Donk (eds.), *Handbook of Public Administration in an Information Age*, Amsterdam: IOS Press

**Argument 4-** Professor Solove argues that the creation of database enhances citizens' vulnerability in relation to public authorities.

*Professor Solove argues that [...] the problem [databases] is better captured by Franz Kafka's *The Trial*. Understood with the Kafka metaphor, the problem is the powerlessness, vulnerability, and dehumanization created by the assembly of dossiers of personal information where individuals lack any meaningful form of participation in the collection and use of their information.<sup>67</sup>*

**Counter argument-** A number of opinions have been recently formulated according to which privacy is an outdated principle in the technological era and that we have entered a post-privacy era (or that the death of privacy is inevitable<sup>68</sup>). It should be noticed that for the time being those opinions are mainly stemming from outside the realm of academic studies.

An interesting event to be noticed is the Lift Conference<sup>69</sup> which purpose is to “explore how the technologies and concepts of the web are changing the real world today and in the future”. One of the speakers, Christian Heller, defines himself as a “post-privacy optimist”. He enhances the emancipating potential of a post-privacy era that would notably uninhibited society.

<sup>65</sup> Thomas I. Emerson, *The System of Freedom of expression* (Random House, New York 1970) In: Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p. 225. Partially available at <http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>

<sup>66</sup> Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, United States of America 1995) p.227.  
<http://www.amazon.com/Legislating-Privacy-Technology-Social-Values/dp/0807822264#noop>

<sup>67</sup> Daniel J. Solove, “Privacy and power: Computer Databases and Metaphors for Information Privacy” 53-6 *Stanford Law Review* 1393 available at <http://www.jstor.org/pss/1229546>

<sup>68</sup> See A. Michael Froomkin, *Cyberspace and Privacy: A New Legal Paradigm? The Death of Privacy?* 52 STAN. L. REV. 1461, 1462 (2000) (quoting Scott McNealy, the CEO of Sun Microsystems as saying “You have zero privacy. Get over it.”); David Brin, *The Transparent society* (1998) (exemplifying the notion that technology infringing on privacy is “here to stay”) Edward C. Baig, Marcia Stepanek & Neil Gross, *Privacy: The Internet Wants Your Personal Info. What's in It for You?*, BUS. WK., Apr. 5, 1999, at 84 (discussing the prevalence of McNealy's “get over it” attitude).

<sup>69</sup> See <http://liftconference.com/lift-france-10>

*The dissolution of privacy in the digital age shatters personal and social securities. That's not necessarily a bad thing.*

*[...] As we externalize our social and personal lives into Google, Facebook and Twitter, privacy seems to fade away. There are warnings that this will lead us into victimization by surveillance states, corporations, employers and our intolerant neighborhood. But these very same institutions can just as well be put under pressure by a shattering of privacy. Instead of seeing the current privacy earthquake just as a danger to be prohibited, we should open our eyes to its emancipatory potentials: towards creating a "Transparent Society" (David Brin), towards making our world more tolerant by exposing it to that which previously was forced into secrecy (as the Gay Pride movement did through public outing) and towards questioning our values of shame, biographical guilt and public adequacy that privacy was constructed to protect us from<sup>70</sup>.*

*Olivier Glassey: Mutual privacy and online distributed social identities* Other references:

Garfinkel, S., and Russell, D. *Database Nation: The death of privacy in the 21st century* O'Reilly & Associates, Sebastopol, CA, 2000.

**Counter argument-** Still in the perspective of the redefinition of public/private spheres, we should mention the interesting view of another speaker at the Lift 10 conference: Olivier Glassey. His analysis is based on the use of online social network. He in fact underscores a renewal in the creation of private spheres and conceptualizes the idea of co-constructed private spheres. Olivier Gassey thus proposes an alternative to the post-privacy model, shedding light on the getting more complex interactions between public and private spheres.

*The massively popular use of social computing challenges the traditional perceptions and boundaries of privacy. Hybrid forms of private/public communication spaces in social networks are becoming new experimental fields for users as individuals and groups. Beyond the too simplistic diagnostic of the end of the private sphere, innovative individual or collective strategies emerge and alternatives attitudes are co-existing and sometimes conflicting online. The presentation will look at those different privacy sub-cultures in the making and explore tensions between individual presentation of the self and collective construction of social identity. It will link the issue of privacy to the roles of short and long term distributed memory (reputation, forgiveness) in order to understand the emergence of co-constructed private spheres in the context of social dynamics at play on and offline.<sup>71</sup>*

**Private stakeholders' investments in privacy: Real ethical commitment or self-disclosure strategies?**

**Issue:** The development of the online economy raises concern regarding consumers' privacy. Private stakeholders' interests lie in consumers' transparency so as to better address the characteristics and needs of the "target"; however, privacy policies have rapidly been developed by private stakeholders to guarantee their customers a certain level of anonymity. Debates notably concern the underlying motives of such "privacy investments", which may not always be carried out out of ethical commitment.

**Argument 1-** According to some authors, the investment in privacy by private stakeholders is a demonstration of an ethical intent to built trust.

<sup>70</sup> Christian Heller, "Post-privacy", Session on the redefinition of privacy, Lift 10 Conference <http://www.liftconference.com/lift10/program/talk/christian-heller-post-privacy>

<sup>71</sup>Olivier Glassey, "Mutual privacy and online distributed social identities", Session on the redefinition of privacy, Lift 10 Conference <http://www.liftconference.com/lift10/program/talk/olivier-glassey-mutual-privacy-and-online-distributed-social-identities>



*Trust is based on an assured belief that another person displays integrity, veracity, justice, and other aspects of ethical behavior, and will continue to do so. Building up trust requires an investment of time and energy.[...]*

*[...] building trust does require every online entity to address security and privacy. Nearly every site now has a privacy policy, and most start with the words "Your privacy is important to us."<sup>72</sup> Consumers, however, evaluate this promise in light of many factors. One of those factors is the visible investment in privacy that a company makes, ranging from the obvious, like the use of seal programs, to the less obvious, like the type of information the site is collecting, and how that information is used<sup>73</sup>. These cues may not be consciously examined or analyzed, but consumers continue to show a great reluctance to offer their personal information online because they neither trust, nor are willing to rely on, the promises made. Investment in privacy resembles an investment in brand- it is a method of signaling concern for the things that concern the consumer and demonstrating that the investor plans to be around for a while.[...]*

*Amazon.com was one of the first e-tailers to consider issues of privacy in a prominent way<sup>74</sup>. They issued a privacy policy with quite a few promises in it<sup>75</sup>. It is unclear whether this elaborate privacy policy helped their phenomenal rise. More recently, Amazon.com issued a new privacy policy that removed some of those protections<sup>76</sup>. This will have a substantial impact on the ability of companies to make believable promises—this is akin to a defection, and destructive of trust. As of this writing, it is unclear if the Federal Trade Commission will initiate action to force compliance with the old policies. Such action could offer a degree of reliance<sup>77</sup>.*

#### Reference:

Ian Goldberg, Austin Hill, Adam Shostack, "Trust, Ethics and Privacy" (April 2001) 81-2 *Boston University Law Review* 407 available at <http://www.cypherpunks.ca/~iang/pubs/tep.pdf>

<sup>72</sup> There are literally thousands of websites with those exact words, and thousands upon thousands more with a variation of them. See, e.g., *InvesTools.com* (visited February 4, 2001) <<http://www.investools.com/cgi-bin/IT/boilerplate/privacy>> ("It is our intent to build a long-term relationship with you based on trust, and as your trusted source for investment advice we cannot afford to break that bond with you at any time."); *Funeralvalue.com* (visited February 4, 2001) <<http://www.funeralvalue.com/privacy.html>>; *Webcommend.com* (visited February 4, 2001) <<http://www.webcommend.com/privacy.html>>. In: Ian Goldberg, Austin Hill, Adam Shostack, "Trust, Ethics and Privacy" available at <http://www.cypherpunks.ca/~iang/pubs/tep.pdf>

<sup>73</sup> The Center for Democracy and Technology's Guide to Online Privacy advises consumers to scrutinize a site's privacy policies with specific questions about the collection and use of information about the visitor. See Center for Democracy and Technology, *CDT's Guide to Online Privacy* (visited February 4, 2001) <<http://www.cdt.org/privacy/guide/start/privpolicy.html>>; see also FEDERAL TRADE COMMISSION, *PRIVACY ONLINE: A REPORT TO CONGRESS 7-14* (1998) (outlining fair information practice guidelines designed to allow companies to address consumer concerns about privacy). In: Ian Goldberg, Austin Hill, Adam Shostack, "Trust, Ethics and Privacy" available at <http://www.cypherpunks.ca/~iang/pubs/tep.pdf>

<sup>74</sup> See Valerie Lawton, *Net Firms Must Assure Privacy*, *TORONTO STAR*, April 3, 1998 at E2 ("[Ontario privacy commissioner Ann] Cavoukian notes one of the most successful Internet merchants—bookseller Amazon.com—has strong privacy policies, including a promise not to sell lists of what people are buying."); Ellen Messmer, *New Wave of 'Net Marketing' Invades Consumer Privacy*, *NETWORK WORLD*, Oct. 21, 1996 at 42 (noting, in 1996, that "some Websites, such as 'Net bookseller Amazon.com Books, do post privacy policies and provide a way to opt-out, but most still do not"). In: Ian Goldberg, Austin Hill, Adam Shostack, "Trust, Ethics and Privacy" available at <http://www.cypherpunks.ca/~iang/pubs/tep.pdf>

<sup>75</sup> Amazon does not sell, trade, or rent your personal information to others." See *Electronic Privacy Information Center, Old Amazon.com Privacy Notice (prior to September 2000)* (visited February 1, 2001) [http://www.epic.org/privacy/internet/amazon/old\\_policy\\_0900.html](http://www.epic.org/privacy/internet/amazon/old_policy_0900.html)

<sup>76</sup> "In the unlikely event that Amazon.com, Inc., or substantially all of its assets are acquired, customer information will of course be one of the transferred assets." *Amazon.com Privacy Notice* (visited January 30, 2001) <http://www.amazon.com/exec/obidos/tg/browse/-/468496/103-9093305-0522210>

<sup>77</sup> Ian Goldberg, Austin Hill, Adam Shostack, "Trust, Ethics and Privacy" (April 2001) 81-2 *Boston University Law Review* 407 available at <http://www.cypherpunks.ca/~iang/pubs/tep.pdf>

**Counter argument-** Privacy investments by private stakeholders form in fact a part of self-disclosure strategies. Private actors would not consider privacy protection as an ethical requirement but would integrate it as part of their marketing practices.

*An important benefit offered by the Internet is the opportunity to personalize communications and offerings to individual consumers (Alba et al. 1997). To exploit this opportunity, companies must collect information about the needs and preferences of individual consumers. [...]*

*Self-disclosure is defined as the quantity (breadth) and quality (depth) of personal information that an individual provides to another (Jourard 1971). Considerable psychological and marketing research has examined the phenomenon of self-disclosure (Altman&Taylor 1973; Berg 1984; Collins & Miller 1994; Cozby 1973; Daher & Banikitos 1976; Dindia & Allen 1992; Jourard 1971; Moon 2000) . In general, this research adopts a social exchange theory perspective (Thibaut & Kelley 1959, Ajzen 1977) suggesting that self-disclosure, like other interpersonal behaviors, is engaged in and interpreted in terms of the costs and benefits to the individuals. Moon (2000) has found that individuals interact with sources of electronic communications in the same way they interact with other people. Thus, interpersonal theories on self-disclosure apply to electronic as well as to interpersonal interactions.*

*[...] the benefits of self-disclosure are receiving personalized communications and offerings based on the consumers' individual needs. The costs, or risks, of self-disclosure lie in the possibility that the company receiving the personal information will pass it along to a third party, and that this third party will use it in a manner detrimental to the consumer. For example, the third party might send unwanted messages or offer products and services that embarrass the consumer. [...]*

*Some approaches that companies can take to alter the consumer's cost-benefit analysis and encourage self disclosure are: (1) developing a reputation for trustworthiness, (2) provide a comprehensive privacy policy indicating how the disclosed information will be used, and (3) offering a reward for disclosing the information<sup>78</sup>.*

*Reference:*

Eduardo B. Andrade, Velitchka Kaltcheva and Barton Weitz, "Self-Disclosure on the Web: The Impact of Privacy, Reward and Company Reputation" 29 *Advances in Consumer Research* 350. Available at <<http://warrington.ufl.edu/mkt/docs/weitz/Andrade,%20Kaltcheva,%20Weitz.pdf>>

*Other references:*

Culnan, M.J., and Bies, R.J. "Consumer Privacy: Balancing Economic and Justice Considerations," *Journal of Social Issues* (59:2) 2003, p 323. Available at <<http://www3.interscience.wiley.com/journal/118833370/abstract>>

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<sup>78</sup>Eduardo B. Andrade, Velitchka Kaltcheva and Barton Weitz, "Self-Disclosure on the Web: The Impact of Privacy, Reward and Company Reputation" 29 *Advances in Consumer Research* 350. Available at <http://warrington.ufl.edu/mkt/docs/weitz/Andrade,%20Kaltcheva,%20Weitz.pdf>