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# The right to be let alone by oneself: narrative and identity in a data-driven environment

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## ABSTRACT

Privacy is predominantly understood as the right to be let alone by others. It protects an individual against intrusions upon the private sphere by governments, companies and fellow citizens and focusses on the right to withhold from them access to one's data, body or home. In the data-driven environment, the fact that others may have access to personal information will only be one concern; equally importantly, a person will be confronted with unwanted information about herself. Being frequently confronted with information about one's past, present and future fundamentally challenges an individual's capacity to form and maintain an identity, which depends on her ability to select and prioritise information about herself. This article suggests that the current privacy paradigm could be ameliorated by treating privacy not only as the right to be let alone by others, but in addition, as the right to be let alone by oneself. But before such a right could be introduced, a number of difficult questions need to be answered, such as the scope of the right, its legal-philosophical underpinnings and its relationship vis-à-vis countervailing interests.

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**KEYWORDS** Privacy; right to be let alone by oneself; narrative; identity; personal data

## 1. Introduction

In the current data-driven environment, increasingly many personal data are gathered, stored, inferred and created. A problem typically associated with the affluent availability of data is that others may gain access to private information about a person. The current legal regime addresses this issue by conferring on the individual a right to withhold from others access to her private information, home and body. An equally important, but less theorised, the problem is that the individual will be confronted with unwanted information

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about herself. Such information may regard her past, her present or her future.

For example, a photo stored on the web may confront a person with a particular aspect of her past that she has long forgotten about (an old love affair; an experimental gothic phase; an anorexic period);<sup>1</sup> personalised content may confront a person with information she was unaware of herself (a Big Data company may infer an adolescent's sexual preference on the basis of the music taste of online friends or infer a person's early pregnancy by analysing her online purchases, while she may not want to find out by being confronted with pregnancy-related advertisements or newsletters that presume a certain sexual preference);<sup>2</sup> data-analytics may accurately predict a person's future, while she may want to remain oblivious (e.g. a FitBit company informing a person that she is likely to suffer from Type 2 Diabetes if she continues her inactive lifestyle).<sup>3</sup>

There is an important difference between, on the one hand, the fact that I do not want you to know that I had an anorexic period when I reached puberty, and on the other hand, the fact that I do not want to be confronted with such information myself, because I want to forget about that painful period and move on with my life.<sup>4</sup> I may not even mind that, for example, my doctor knows that I suffer from an incurable disease, but I still may choose to invoke my right not to be informed about (incidental) medical findings.<sup>5</sup> A person who wants to prevent personal information from being communicated to herself does not necessarily want to prevent others from accessing or analysing that information.

Being confronted with unwanted information about oneself is more than a mere nuisance. It challenges in a fundamental way a person's capacity to form and maintain an identity. One of the most common ways to understand identity-formation is that it involves building a personal narrative. Like a biographer, we develop a story about ourselves, adding 'cohesion to our personality in time and contexts'.<sup>6</sup> A narrative serves to provide a rational and causal account of oneself. Through a personal narrative, we can understand and account for our actions and beliefs, both to others and ourselves.

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<sup>1</sup>A. Ghezzi, A. Pereira, C. Angela and L. Vesnic-Alujevic (eds), *The Ethics of Memory in a Digital Age* (Palgrave, 2014). J. Rosen, 'The Right to be Forgotten' (2012) 64 *Stanford Law Review Online* 88.

<sup>2</sup>D. Skillicorn, *Knowledge Discovery for Counterterrorism and Law Enforcement* (CRC Press, 2009). F. Zuiderveen Borgesius, *Improving Privacy Protection in the Area of Behavioural Targeting* (Kluwer Law International, 2015).

<sup>3</sup>[www.wrr.nl/binaries/wrr/documenten/working-papers/2016/04/28/big-data-in-de-zorg/WP019-Big-data-zorg.pdf](http://www.wrr.nl/binaries/wrr/documenten/working-papers/2016/04/28/big-data-in-de-zorg/WP019-Big-data-zorg.pdf).

<sup>4</sup>V. Sinason (ed.), *Trauma, Dissociation and Multiplicity: Working on Identity and Selves* (Routledge, 2013).

<sup>5</sup>E. C. A. Asscher and E. J. Koops, 'The Right Not to Know and Preimplantation Genetic Diagnosis for Huntington's Disease' (2010) 36 *Journal of Medical Ethics* 30.

<sup>6</sup>O. Van der Hart, E. R. S. Nijenhuis and K. Steele, *The Haunted Self: Structural Dissociation and the Treatment of Chronic Traumatization* (WW Norton & Company, 2006) 40.

But a personal narrative is never fully accurate, nor can it account for everything a person is or does. The capacity to self-narrate depends, among others, on an individual's ability to select and prioritise information about herself, as she cannot understand herself as merely a bundle of facts and figures. Just like a biographer cannot describe a person's life in its totality, as a mere chronicle of subsequent events, self-narration depends on 'self-summarization'.<sup>7</sup> In addition, because a personal narrative serves to give a rational and causal account of ourselves, choices that are made on the basis of non-rational or unconscious decisions will often be suppressed or rationalised in a personal narrative.<sup>8</sup> Because our personal narratives are flawed by definition, we are frequently confronted with narrative-disruptive information.

Being confronted with such information is obviously neither new nor problematic per se,<sup>9</sup> but both a quantitative and a qualitative difference emerges in the data-driven environment. Among others, the number of information-carriers has increased exponentially, meaning that information-confrontations, big and small, will occur continuously rather than incidentally; online information dissemination is not bound in terms of time or location, making information avoidance quasi-impossible;<sup>10</sup> and because the quality of data-analytics has consistently improved, the information about a person's present preferences and future conditions with which she is confronted will be increasingly accurate and concern progressively intimate aspects of her life.<sup>11</sup>

Because the individual is increasingly confronted with unwanted information about herself and because predictive information becomes ever more detailed and personal, her capacity to engage in self-narration and identity-formation is undercut. The legal regime, and in particular the right to privacy, aims at providing protection to a person's identity and personhood formation, but is unfit to address these challenge as privacy is generally conceived as 'the right to be let alone'<sup>12</sup> by governmental organisations, companies and fellow citizens or as the right to control the information about oneself that is communicated to others.<sup>13</sup> Such theories consequently mainly revolve around withholding others access to personal information, rather than focussing on the capacity to withhold information-

<sup>7</sup>J. Butler, *Giving an Account of Oneself* (Oxford University Press, 2005) 66.

<sup>8</sup>Z. Giora, *The Unconscious and Its Narratives* (New York University Press, 1992).

<sup>9</sup>M. Cavell, *Becoming a Subject: Reflections in Philosophy and Psychoanalysis* (Oxford University Press, 2007).

<sup>10</sup>V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2011). V. Mayer-Schönberger and K. Cukier, *Big Data: A Revolution that Will Transform How We Live, Work, and Think* (Houghton Mifflin Harcourt, 2013).

<sup>11</sup>R. Kitchin, *The Data Revolution: Big Data, Data Infrastructures & their Consequences* (Sage, 2014). L. Floridi, *The Philosophy of Information* (Oxford University Press, 2013).

<sup>12</sup>S. D. Warren and L. D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

<sup>13</sup>A. F. Westin, *Privacy and Freedom* (The Bodley Head, 1970). P. E. Agre and M. Rotenberg, *Technology and Privacy: The New Landscape* (MIT Press, 2001).

communication to oneself. This article will develop a theory that accounts for the various challenges to identity-formation triggered by the data-driven environment, and lay out the groundwork for a reconceptualization and reformulation of the right to privacy that also includes a right to be protected from information-communication to oneself – a right to be let alone by oneself. At the same time, it is clear that before such a right could ever be effective, a number of difficult questions need to be answered. This article will suggest a number of points for future research and map out some of the potentially more fruitful ways for developing a right to be let alone by oneself.

The structure of this article will be as follows. First, it will explain why narrative writing is an important but complex process, central to identity formation and preservation (Part 2). Then, it will discuss a number of limits to self-narration that make us imperfect story tellers (Part 3) and explain that this imperfection inevitably results in confrontations with narrative-disruptive information, for which we have developed various coping strategies (Part 4). Subsequently, this article will describe the effects of the data-driven environment on the process of identity-formation and -preservation (Part 5). This article will explain that although the right to privacy, aims at providing individuals with control over their data, its legal-philosophical underpinnings disallow it to adequately protect a person's capacity for self-narration in the 21st century (Part 6). That is why, this article concludes, privacy could be reconceptualised in a way that it also grants a person a right to be, metaphorically speaking, let alone by herself. It is clear, however, that this is not an easy task and requires answers to several difficult questions about the aims and formulation of the right to privacy and to a certain extent, of the legal paradigm as a whole (Part 7).

## 2. Narrativity

One of the most common ways to understand identity-formation is that it involves writing a personal narrative. Through a personal narrative, I can explain to you who I am, what my basic belief system is and why I do the things I do. For example, I cannot only construe why I conceive of myself as a liberal, which has its background in my concern for human rights, the environment and equality, but also explain why I voted conservative at one point in my life, namely because I believed the erstwhile leader of the liberal party to be a fraud.

A personal narrative integrates the different spatio-temporal experiences of personhood in one coherent story, not by suggesting unity, but by explaining how they are interrelated and connected.<sup>14</sup> Providing a causal link

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<sup>14</sup>T. Habermas and S. Bluck, 'Getting a Life: The Emergence of the Life Story in Adolescence' (2000) 126 *Psychological Bulletin* 748.

between one context and the other, between one moment in time and the other<sup>15</sup> makes our lives understandable. I can tell you not only that I took cello lessons when I was six, but also explain *why*, namely because I was moved to tears when I heard Rostopovich's interpretation of *Ritorno degli snovidenia* by Luciano Berio on the radio.

The linking pin between one set of events and another provided in our personal narrative is our sense of agency.<sup>16</sup> Being the author of one's personal narrative is not limited to describing all the different events and decisions by others that had an effect on you, as if you were a passive bystander observing the remarkable life of yourself. What made you you is typically attributed to the choices you have made or how you have dealt with worldly events that crossed your path.<sup>17</sup>

Our personal narrative does not only account for the different experiences we had in various times and contexts, as an author of our story, we are also able to adapt the personal narrative, in order to encapsulate various personal developments and experiences, even if they are more radical.<sup>18</sup> At one moment, I may describe myself as a devout Catholic, but five years later, I may see myself as a firm atheist.<sup>19</sup> Not only do our personal convictions and beliefs evolve over time, outer events that crossed our path beget a different meaning over time. For example, the near past will figure more prominently in a person's narrative than events from decades ago, even with respect to life-changing events. Static personalities are typically a sign of a personality disorder.<sup>20</sup>

In addition, a narrative also incorporates a person's future self. If I know that I will be suffering from an incurable disease in two years' time, that might alter how I behave and see myself right now.<sup>21</sup> Importantly, while on the one hand, the narrator tries to capture the actions of the agent in a coherent story, the narrator can also set milestones. Affiliation with a future version of oneself can be necessary to force a change in one's present behaviour.<sup>22</sup> I must, for example, already see myself as a non-smoker proper in order to stop my bad habit. If behaviour and identity align in full, a person would not change or only through events in the

<sup>15</sup>V. A. Kurki and T. Pietrzykowski, *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017).

<sup>16</sup>J. Adler, J. Wagner and D. McAdams, 'Personality and the Coherence of Psychotherapy Narratives' (2007) 41 *Journal of Research in Personality* 1179.

<sup>17</sup>D. McAdams, 'Narrative Identity' (2013) 22 *Current Directions in Psychological Science* 233.

<sup>18</sup>D. Carless, 'In the Boat but Selling Myself Short: Stories, Narratives, and Identity Development in Elite Sport' (2013) 27 *The Sport Psychologist* 27.

<sup>19</sup>J. Pals, 'Narrative Identity Processing of Difficult Life Experiences: Pathways of Personality Development and Positive Self-Transformation in Adulthood' (2006) 4 *Journal of Personality* 74.

<sup>20</sup>Sinason (n 4).

<sup>21</sup>J. J. Davenport, *Narrative Identity, Autonomy, and Mortality: From Frankfurt and MacIntyre to Kierkegaard* (Routledge, 2012).

<sup>22</sup>H. Ibarra and R. Barbulescu, 'Identity as Narrative: Prevalence, Effectiveness, and Consequences of Narrative Identity Work in Macro Work Role Transitions' (2010) 35 *Academy of Management Review* 135.

outer world. That means that although providing coherence is an essential functionality of a personal narrative, coherence is typically not achieved by remaining static, but aligning one's behaviour to the projected self-image.<sup>23</sup>

One final thing is important to stress. Although obviously, our life story cannot be fully detached from reality, there is a relatively large power to select and interpret facts that suit our self-image. People who really cannot sing join music contests on television; people clearly having a drinking problem genuinely believe that they are more sociable when drunk; and so on. Being in control of one's personal narrative means that as an author, you are the master of selecting and organising the facts and examples that are integrated with the narrative or are passed aside. There is consequently a double sense of agency: as a person living one's life (the agent) and as the author of one's personal biography (the narrator). Although they are connected, they are never on par. This will be explained in more detail in the next two Parts.

### 3. Limits to self-narration

Although most people are potent story tellers, there are a number of reasons why our personal narrative will always be imperfect. First, through a narrative, a person typically tries to provide coherence in time and contexts, while in fact none of us 'has one monolithic personality, despite the illusion that we do, [rather] we all have a number of selves developed from a very early age []'.<sup>24</sup> It is perfectly normal that I am both loud and extravagant when in a pub with friends and a caring and soft-spoken father at home.<sup>25</sup> The agent does not always reflect on whether its actions in one setting are coherent with the actions in another context, while the narrator has to deliver a story that includes the different actions in different situations.<sup>26</sup>

A second limitation stems from the fact that the capacity to self-narrate depends on an individual's ability to select and prioritise information about herself, as she cannot understand herself as merely a bundle of facts and figures. Just like a biographer cannot describe a person's life in its totality, as a mere chronicle of subsequent events, self-narration depends on self-summarization. If I would describe myself as the full person I am, then my life story would be as long as my life itself, the map would become as big as the territory. The meals I eat will typically not be included in my personal

<sup>23</sup>A. D. Brown, M. Humphreys and P. M. Gurney, 'Narrative, Identity and Change: A Case Study of Laskarina Holidays' (2005) 18 *Journal of organizational change management* 312.

<sup>24</sup>Sinason (n 4).

<sup>25</sup>K. Nelson, 'Narrative and Self, Myth and Memory: Emergence of the Cultural Self' in R. Fivush and C. A. Haden (eds), *Autobiographical Memory and the Construction of a Narrative Self: Developmental and Cultural Perspectives* (Lawrence Erlbaum Associates Publishers, 2003).

<sup>26</sup>S. M. Ritchie, G. Kidman and T. Vaughan, 'Role Identities in Narratives: Continuing the Story', (2007) 2 *Cultural Studies of Science Education* 259.

narrative, though to a person who self-identifies as a foody, this might be an important aspect of her narrative. For her, sports activities may not even figure out her sense of self, while being a huge Arsenal fan, I may see soccer as an essential aspect of who I am.<sup>27</sup>

This also means that the selection of facts I incorporate in my personal narrative is to a significant extent subjective, which is a third important limitation. The facts I select about my life may differ from those facts about me that you select.<sup>28</sup> For example, although I may see myself as a successful person, incorporating the various successes in life in my personal narrative to substantiate that story, you may see me as a failure, for which you could point to various alternative facts. Although I might think that one of the most important aspects of me is that I am a Science Fiction fanatic, to you, that might just be a funny little detail or perhaps even an illustration of how I try to escape the fact that my life is a failure by losing myself in futuristic dream worlds.<sup>29</sup>

Another limitation stems from the fact that our brain and memory are known to be fallible. We sometimes remember things completely different from how they happened, oftentimes because our memory has merged multiple events into one, made errors in terms of time and space or even erased events.<sup>30</sup> The same holds true with respect to information about our future self. For example, although we are marginally capable of seeing and accounting for how we have changed over time, we have substantial difficulty in grasping that our personality, preferences and belief system will fundamentally change again in the future.<sup>31</sup> In many respects, the future, like the past, is simply too complex to grasp and understand. The brain tends to filter and repress information to keep the personal narrative intact as much as possible.

A final example of the limits of our capacity to engage in self-narration lies in our beginning and end. The narrator cannot account for its own becoming. Thus,

Just as there is a performative and allocutory action that this 'I' performs, there is a limit to what the 'I' can actually recount. This 'I' is spoken and articulated, and through it seems to ground the narrative I tell, it is the most ungrounded moment in the narrative. The one story that the 'I' cannot tell is the story of its own emergence as an 'I' who not only speaks but comes to give an account of

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<sup>27</sup>S. Smith and J. Watson, *Reading Autobiography: A Guide for Interpreting Life Narratives* (University of Minnesota Press, 2010).

<sup>28</sup>P. Ricoeur, 'Narrative Identity' (1991) 35 *Philosophy Today* 73.

<sup>29</sup>D. C. Martin, 'The Choices of Identity' (1995) 1 *Social Identities* 5.

<sup>30</sup>R. Fivush and C. A. Haden (eds), *Autobiographical Memory and the Construction of a Narrative Self: Developmental and Cultural Perspectives* (Psychology Press, 2003). J. A. Singer, P. Blagov, M. Berry and K. M. Oost, 'Self-Defining Memories, Scripts, and the Life Story: Narrative Identity in Personality and Psychotherapy', (2013) 81 *Journal of Personality* 569.

<sup>31</sup>S. Crites, 'Storytime: Recollecting the Past and Projecting the Future' in T. R. Sarbin (ed), *Narrative Psychology: The Storied Nature of Human Conduct* (Praeger Publishers/Greenwood Publishing Group, 1986).

itself. In this sense, a story is being told, but the 'I' who tells the story, who may well appear within the story as the first-person narrator, constitutes a point of opacity and interrupts a sequence, includes a break or eruption of the non-narrativizable in the midst of the story. So the story of myself that I tell, foregrounding the 'I' who I am and inserting it into the relevant sequences of something called my life, fails to give an account of myself at the moment that I am introduced.<sup>32</sup>

The same essentially holds true for the end. As an author, I can never include my own end in my personal narrative. In that sense, I remain an open book to myself, an unfinished novel.<sup>33</sup>

In addition to these limits, we have a number of biases in our story telling, which although not absolute, influence how we conceive ourselves and understand the world around us. Four of those will be briefly touched upon, because they are relevant to understand the extent to which identity-formation is undermined in the data-driven environment.

First, our narrative is obviously influenced by events beyond our direct control that nevertheless leave a significant imprint on our life. Examples may include tragic events, such as a tornado destroying your home, but also positive ones, like winning a lottery.<sup>34</sup> Though we are not fully passive, these events are not the result of our or anyone's agency, or only marginally and indirectly so.<sup>35</sup> Although it is not impossible to include in one's personal narrative such an event as non-causally related to us, there is a bias towards assigning a sense of agency, either to ourselves (for example stressing that you have survived cancer by battling it, that you had picked your lucky number, etc.) or to an external agency, such as God. This is the agency-bias: intuitively, we tend to assign agency to explain worldly events.<sup>36</sup>

Second, we have a tendency towards explaining behaviour and feelings of others by referring to our own agency. An extreme example is child abuse, where the child is deprived of self-worth and agency and becomes a mere object of lust for another person.<sup>37</sup> Even in these extreme scenarios, there is a bias towards assigning a sense of agency to oneself (e.g. children of divorced parents often think they are to blame and make plans for bringing their parents together), or by providing a causal link between the actions of

<sup>32</sup>J. Butler, *Giving an Account of Oneself* (Oxford University Press, 2005) 66.

<sup>33</sup>M. P. Keeley and J. Koenig Kellas, 'Constructing Life and Death Through Final Conversation Narratives' in L. M. Harter, P. M. Japp and C. S. Beck (eds), *Narratives, Health, and Healing: Communication Theory, Research, and Practice* (Lawrence Erlbaum Associates Publishers, 2005).

<sup>34</sup>F. Rapport and P. Wainwright, *The Self in Health and Illness: Patients, Professionals and Narrative Identity* (CRC Press, 2016).

<sup>35</sup>S. Rimmon-Kenan, 'The Story of "I": Illness and Narrative Identity' (2002) 10 *Narrative* 9.

<sup>36</sup>D. Ezy, 'Theorizing Narrative Identity: Symbolic Interactionism and Hermeneutics' (1998) 39 *Sociological Quarterly* 239.

<sup>37</sup>M. R. Harvey, 'In the Aftermath of Sexual Abuse: Making and Remaking Meaning in Narratives of Trauma and Recovery' (2000) 10 *Narrative Inquiry* 291.

the other and one's own behaviour (e.g. 'I deserve this treatment, because I am worthless'). This is the self-centred bias: we have an intuitive inclination to aggrandise our own role in worldly events and to understand actions of others as consequences of our own behaviour or being.

A third bias is that personal narratives typically require a 'why', while such a 'why' can be absent, unknown to the person or can be beyond her control.<sup>38</sup> If asked why he did what he did and the murderer says 'I don't know', 'I guess it was just the testosterone speaking' or 'I just felt like it',<sup>39</sup> without providing further information, we tend to find such a narrative unsatisfactory and such a defence would certainly not be accepted in a court room, even though, in fact, these types of explanations might be nearer to the truth than typical elucidations provided through personal narratives in hindsight.<sup>40</sup> What these explanations have in common is that they either lack motive ('It was the testosterone speaking'; 'I just felt like it'), and do not provide a rational and causal link between the various dots in one's autobiography, or do not provide a causal link between A and B at all ('It just happened'; 'I don't know'), and thus do not provide coherence in context and time.<sup>41</sup> Although there are exceptions, in general, the narrator is expected to give a rational and causal explanation of events, even though her behaviour may not have been rational or she may not understand herself why she did what she did.<sup>42</sup> This is the rationality-bias: as a narrator, we tend to find explanations for our actions as an agent in our conscious thoughts and logical decisions.

A final bias is that a person tends to select those facts that fit her personal narrative, while ignoring others. This means that, for example, how I conceive of and describe my childhood may differ over time to correspond to the current version of my personal narrative.<sup>43</sup> That means that the childhood I am describing is not my childhood *per se*, rather, it is a reflection of who I conceive myself to be now, projected onto my childhood.<sup>44</sup> Suppose I was bullied at school. If later in life, I become something of a bully myself, I might point to my childhood experience and explain that I decided to become the aggressor rather than remain the victim. But if later in life, I become involved in an anti-bullying campaign, I may point to the

<sup>38</sup>M. A. Mills, 'Narrative Identity and Dementia: A Study of Emotion and Narrative in Older People with Dementia' (1997) 17 *Ageing & Society* 673.

<sup>39</sup>A. Caumus, *L'estranger* (Gallimard, 1998).

<sup>40</sup>L. E. Angus and J. McLeod (eds.), *The Handbook of Narrative and Psychotherapy: Practice, Theory and Research* (Sage, 2004).

<sup>41</sup>V. L. Vignoles, C. Regalia, C. Manzi, J. Gollidge and E. Scabini, 'Beyond Self-Esteem: Influence of Multiple Motives on Identity Construction' (2006) 90 *Journal of Personality and Social Psychology* 308.

<sup>42</sup>J. A. Holstein and J. F. Gubrium, *The Self We Live By: Narrative Identity in a Postmodern World* (Oxford University Press, 2000) 9.

<sup>43</sup>A. Giddens, *Modernity and Self-Identity* (Stanford University Press, 1991).

<sup>44</sup>K. C. McLean and M. Pasupathi (eds.), *Narrative Development in Adolescence: Creating the Storied Self* (Springer Science & Business Media, 2009).

same experience.<sup>45</sup> This is an example of confirmation-bias, ‘that is, our tendency to notice and assign significance to observations that confirm our beliefs and expectations, while filtering out or rationalizing away observations that do not.’<sup>46</sup>

#### 4. Self-conflict

Moments of self-conflict arise when a person is confronted with inconsistencies in her story.<sup>47</sup> Given that we are limited, both as an agent and as a narrator, and we have a number of biases when developing our personal story, we are confronted with narrative-conflicting information, big or small, on a daily basis. Generally, there are four strategies to deal with narrative-confronting information: changing one’s behaviour as an agent, integrating the information in one’s personal narrative, dissociating or suppressing the information or rationalising the behaviour.

When a person adapts her behaviour, the narrator is (more) successful in asserting its authority over the life of the agent.<sup>48</sup> When the narrator chooses to integrate, she adapts her personal story to the life of the agent. This means that when she is confronted with the same or similar information again, such will no longer conflict with her narrative and perception of herself.<sup>49</sup> While these two strategies remove the tension between the story of the narrator and the life of the agent, the two other strategies leave the disparity intact.

Dissociation or suppressing narrative-conflicting information entails either a conscious or unconscious choice to hide the information the person as an agent is confronted with from the person as a narrator.<sup>50</sup> As an example, some people remove the mirrors from their home to avoid confrontations with their overweight mirror-image or destroy the photos of them and their ex-lover.<sup>51</sup> A potentially more pathological form of

<sup>45</sup>M. Karlsson and A. C. Evaldsson, ‘It was Emma’s Army Who Bullied That Girl’: A Narrative Perspective on Bullying and Identity Making in Three Girls’ Friendship Groups’ (2011) 21 *Narrative Inquiry* 24.

<sup>46</sup>T. Metzinger, *Being No One: The Self-Model Theory of Subjectivity* (MIT Press, 2003) 9.

<sup>47</sup>R. Neimeyer, ‘Re-Storying Loss: Fostering Growth in the Posttraumatic Narrative’ in L. G. Calhoun and R. G. Tedeschi (eds), *Handbook of Posttraumatic Growth: Research and Practice* (Routledge, 2014).  
D. M. Wegner, *White Bears and Other Unwanted Thoughts: Suppression, Obsession, and the Psychology of Mental Control* (Guilford Press, 1989).

<sup>48</sup>D. Gadd and S. Farrall, ‘Criminal Careers, Desistance and Subjectivity: Interpreting Men’s Narratives of Change’ (2004) 8 *Theoretical Criminology* 123.

<sup>49</sup>J. Wigren, ‘Narrative Completion in the Treatment of Trauma’ (1994) 31 *Psychotherapy: Theory, Research, Practice, Training* 415. L. Gilmore, ‘Limit-Cases: Trauma, Self-Representation, and the Jurisdictions of Identity’ (2001) 24 *Biography* 128.

<sup>50</sup>R. A. White, ‘Dissociation, Narrative, and Exceptional Human Experiences’ in S. Krippner and S. M. Powers (eds), *Broken Images, Broken Selves: Dissociative Narratives in Clinical Practice* (Psychology Press, 1997).

<sup>51</sup>S. Krippner and S. M. Powers (eds), *Broken Images, Broken Selves: Dissociative Narratives in Clinical Practice* (Psychology Press, 1997).

dissociation is creating a sub-identity that has experienced a trauma while suppressing that sub-identity from the personal narrative.<sup>52</sup>

Rationalisation entails reinterpreting information in a way that fits the personal narrative. While when dissociating or suppressing information, we try to avoid the narrative-conflicting information or block that from our narrative, with rationalisation, we confront the information but typically shift the why or meaning of the information.<sup>53</sup> Rather than saying that I have gained a few pounds, I will stress that some of my clothes have shrunk when I washed them at too high a temperature;<sup>54</sup> rather than saying that I am an alcoholic, I'll stress that I am a social drinker;<sup>55</sup> rather than accepting that my father has done something horrendous by abusing me, I will say that I deserved his treatment of me or that it was his way of showing love for me.<sup>56</sup>

Each strategy has its own merits.<sup>57</sup> Though creating unity between the life of the agent and the story of the narrator is generally preferred, for relatively minor conflicts, in fact, a confirmation bias is a healthy response. If we did not, our personal narrative would have to be continuously adjusted to the point where self-summarization is no longer possible.<sup>58</sup> That is why small forms of information suppression and avoidance are normal to an average person.<sup>59</sup> '[A]ll human beings dissociate, and much of our dissociativeness is adaptive'<sup>60</sup> and consequently, everyday dissociative experiences are not associated with pathology or traumatic experience per se, but are rather common.<sup>61</sup> In addition, rationalising some of our behaviour might help keep an ideal image intact. Rather than saying that apparently, I cannot resist smoking and confirm the self-image of a smoker, I might say that by smoking a cigarette at a party, I have proved that I can limit myself to smoking at social events, or that it was the exception that proved the rule.<sup>62</sup>

<sup>52</sup>D. Roe and L. Davidson, 'Self and Narrative in Schizophrenia: Time to Author a New Story' (2005) 31 *Medical Humanities* 89. S. Raffard, A. D'Argembeau, C. Lardi, S. Bayard, J. P. Boulenger and M. Van der Linden, 'Narrative Identity in Schizophrenia' (2010) 19 *Consciousness and Cognition* 328.

<sup>53</sup>I. Craib, 'Narratives as Bad Faith' in M. Andrews, S. D. Sclater, C. Squire, A. Treacher and N. K. Denzin (eds), *Lines of Narrative: Psychosocial Perspectives* (Psychology Press/Routledge, 2000).

<sup>54</sup>K. Hall and V. Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11 *Legal Ethics* 137.

<sup>55</sup>J. Keady, C. L. Clarke, H. Wilkinson, C. E. Gibb, L. Williams, A. Luce and A. Cook, 'Alcohol-Related Brain Damage: Narrative Storylines and Risk Constructions' (2009) 11 *Health, Risk & Society* 321.

<sup>56</sup>K. G. Weiss, 'Boys Will be Boys' and Other Gendered Accounts: An Exploration of Victims' Excuses and Justifications for Unwanted Sexual Contact and Coercion' (2009) 15 *Violence Against Women* 810.

<sup>57</sup>H. Fang and G. C. Loury, 'Dysfunctional Identities' Can Be Rational' (2005) 98 *American Economic Review* 104.

<sup>58</sup>K. Atkins, *Narrative Identity and Moral Identity* (Taylor & Francis, 2010).

<sup>59</sup>S. Gallagher and J. Cole, 'Dissociation in Self-Narrative' (2011) 20 *Consciousness and Cognition* 149.

<sup>60</sup>J. Fisher, 'Dissociative Phenomena in the Everyday Lives of Trauma Survivors' (2001) *Annals of the Boston University Medical School: Psychol Trauma*.

<sup>61</sup>L. D. Butler, 'The Dissociations of Everyday Life' (2004) 5 *Journal of Trauma & Dissociation* 1.

<sup>62</sup>J. Diamond, *Narrative Means to Sober Ends: Treating Addiction and Its Aftermath* (Guilford Press, 2002). O. Taieb, A. Révah-Lévy, M. R. Moro and T. Baubet, 'Is Ricoeur's Notion of Narrative Identity Useful in Understanding Recovery in Drug Addicts?' (2008) 18 *Qualitative Health Research* 990. D. P. McAdams,

For situations in which a person is confronted with more substantial conflicts, integrating such information in the personal narrative is typically the best and most healthy response. If a person would not, she would be living with a constant discrepancy between the story of the narrator and fundamental aspects of her life as an agent.<sup>63</sup> But postponing the integrative moment can be healthy and indeed necessary when the truth is too difficult to deal with. A child that sees itself as a strong and autonomous being may find it too difficult to integrate the reality of being the victim of sexual abuse. The event is so determinative that if she would integrate it into her life story right away, the narrator would tend to write a personal story based on low self-esteem and a conflicted worldview. Some children do so, and adapt their personal narrative as they go along; others postpone the integrative moment and deal with the past when they are much older. This may have the added benefit that the event is integrated into a personal narrative that is already quite developed, at a moment when the person already lived her life as an autonomous person.<sup>64</sup>

The problem is that there is no way of telling which strategy is most appropriate at what moment in time. Different strategies work for different persons; persons may deploy different strategies in different situations. When I've smoked at a party against my desire to quit, it may be most healthy to rationalise that behaviour, leaving my ideal story intact, but it may also become a lame excuse for smoking at parties. Perhaps when my friends keep on confronting me with my mistake, I will be keenly aware of my weakness the next time, but it may also have the effect that I will avoid their company at parties or smoke in secret. What makes judging these strategies additionally complex is that the personal narrative is supposed to do different and sometimes conflicting things at the same time. For example, it is supposed to bring unity by describing and accounting for the actions of the agent, but also to adapt and steer that behaviour by setting milestones and creating an ideal image. Though there is a standard margin between fact and fiction that most people stay within, such is far from an exact science.

## 5. Omnipresence of the self

Though, as the previous paragraphs described, there are significant offline challenges to identity formation and preservation, the data-driven

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R. E. Josselson and A. E. Lieblich, *Turns in the Road: Narrative Studies of Lives in Transition* (American Psychological Association, 2001).

<sup>63</sup>M. L. Crossley, 'Narrative Psychology, Trauma and the Study of Self/Identity' (2000) 10 *Theory & Psychology* 7.

<sup>64</sup>S. J. Brison, 'Trauma Narratives and the Remaking of the Self' in M. Bal, J. V. Crewe and L. Spitzer (eds), *Acts of Memory: Cultural Recall in the Present* (University Press of New England, 1999).

environment intensifies these on a number of accounts. The goal of this Part is not to give an exhaustive overview of the various data-driven developments and techniques currently in place, nor to introduce cutting-edge technologies and potential futuristic applications. Rather, by giving a number of elementary and non-controversial examples, the aim is simply to illustrate the fact that identity-formation through narrative writing will be increasingly difficult and may even become elusive in time when the data-driven environment evolves as expected.

First, the total amount of information that is produced and stored globally has ballooned.<sup>65</sup> Estimates have it that between 1986 and 2008, information storage capacity has increased 100 fold and will continue to grow, at least at that pace.<sup>66</sup> Everything else being equal, the times a person will be confronted with narrative-conflicting information will run parallel with the amount of personal data collected and stored about our past, present and future. And because of the democratisation of data collection techniques, virtually everyone has the capacity to gather information about others.<sup>67</sup> Combined with the fact that such information is increasingly shared or made publicly available,<sup>68</sup> this means that the individual's capacity for self-summarization will be curbed. For example, if I say that I am the person that only listens to classical music, it is increasingly likely that there will be a person that can remind me of the fact that only 4 years ago, I shared photos of me at a Foo Fighters concert, or point to photos taken by others attending that concert, on which I figure in the background.

Second, not only the number of confrontations with narrative-conflicting information will consequently increase, but the intensity of such conflicts will also exacerbate, both because there is a trend towards gathering and storing data in audio and video clips rather than text, and those types of information carriers are known to have a bigger confrontational quality than text-based information,<sup>69</sup> and because, with the rise of smart homes, personal assistants and mobile devices that a person can take with her anywhere, information is recorded about intimate and private aspects of one's life that used to be left unrecorded:<sup>70</sup> the amount of beer I drink (recorded

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<sup>65</sup>[www.martinhilbert.net/worldinfocapacity.html](http://www.martinhilbert.net/worldinfocapacity.html).

<sup>66</sup>D. Reinsel, J. Gantz and J. Rydning, 'The Digitization of the World From Edge to Core', *IDC White Paper*, 2018.

<sup>67</sup><https://escholarship.org/content/qt2xr2r802/qt2xr2r802.pdf>.

<sup>68</sup>[webwereld.nl/nieuws/algemeen/en-grote-vrijwillige-privacyschending-opinie-3763210](http://webwereld.nl/nieuws/algemeen/en-grote-vrijwillige-privacyschending-opinie-3763210).

<sup>69</sup>A. K. Ku, 'Talk Is Cheap, but a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology' (2004) 45 *Santa Clara L. Review* 679.

<sup>70</sup>D. Townsend, F. Knoefel and R. Goubran, 'Privacy Versus Autonomy: A Tradeoff Model for Smart Home Monitoring Technologies', *2011 Annual International Conference of the IEEE Engineering in Medicine and Biology Society*, IEEE. A. Easwara Moorthy and K. P. L. Vu, 'Privacy Concerns for Use of Voice Activated Personal Assistant in the Public Space' (2015) 31 *International Journal of Human-Computer Interaction* 307.

by my smart refrigerator), the fights I have with my partner (recorded by Siri or Alexa), etc.

Third, the more distant an event is situated in one's past or future, the less dominant it should normally figure in one's life story. Preparing for one's end is typically more appropriate for an elderly person than for a 20-year-old fixated on her own demise. I may refer to my parents' divorce as a reason for failing high school but cannot use it as an excuse to ill-perform at work 20 years later.<sup>71</sup> People who fail to take appropriate account of the element of time, such as those with trauma, are unable to create that distance and relive a traumatic experience: e.g. a war veteran who wants to sit beside the door in restaurants in order to have an escape route projects the dangers of the war-zone on an entirely different time and context.<sup>72</sup> The capacity to create distance in time and contexts will be challenged by the fact that such elements are not factored in in data-driven processes; data about our distant past may feature as prominently in the data environment as information about our current behaviour, or even more prominently so.<sup>73</sup>

In addition, the data-driven domain cripples traditional coping strategies for dealing with confrontations with narrative disruptive information, which can be illustrated again by a number of non-controversial examples.

First, data are increasingly stored on external carriers, which have the emanation of neutrality and objectivity.<sup>74</sup> As the memory is known to be fallible, it is typically easier to preserve a narrative when conflicting information stems from the recollection of another person. When my personal narrative is such that I was a cool kid at school, it is easier for me to keep that story intact when my brother tells me that I was, in fact, bullied and often came home crying, stating simply that he is wrong, or explaining that it might have happened once or twice, but that these were the exceptions proving the rule. But when my brother can point to online photos or videos, my tweets or personal blog I kept at that time disproving my story, it will be substantially more difficult to stick to my story.<sup>75</sup>

Second, although in the pre-digital era, at least my partner and perhaps my neighbours knew about the marital disputes and the owner of the local liquor shop was a silent witness to my drinking habit, not until too long ago, data used to be stored locally, either in the memory of those we grew

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<sup>71</sup>E. G. Mishler, 'Narrative and Identity: The Double Arrow of Time' (2006) 23 *Studies in Interactional Sociolinguistics* 30. P. Ricoeur, *Memory, History, Forgetting* (University of Chicago Press, 2004).

<sup>72</sup>D. Spiegel, 'Trauma, Dissociation, and Hypnosis', (1990) 140 *Incest-Related Syndromes of Adult Psychopathology* 247.

<sup>73</sup>P. Korenhof, J. Ausloos, I. Szekeley, M. Ambrose, G. Sartor and R. Leenes, 'Timing the Right to be Forgotten: A Study into "Time" as a Factor in Deciding About Retention or Erasure of Data' in S. Gutwirth, R. Leenes and P. De Hert (eds), *Reforming European Data Protection Law* (Springer, 2014).

<sup>74</sup>M. Bloch, 'Internal and External Memory: Different Ways of Being in History' (1996) 215 *Tense Past: Cultural Essays in Trauma and Memory* 33.

<sup>75</sup>P. Goldie, 'One's Remembered Past: Narrative Thinking, Emotion, and the External Perspective' (2003) 32 *Philosophical Papers* 301.

up with or, but only to a limited extent, on external information carriers that were relatively immobile: the archives of newspapers, the school photo hanging on the wall of my high school or even the home videos that were safely stored in my parent's basement.<sup>76</sup> It was ultimately possible for me to begin a new life by relocating and avoiding the contexts in which those data were available. If a person was bullied at school, she could move and go to school in another town or if she wanted to avoid being confronted with her ex-lover living a perfect life with a new partner, she could move to another part of the country. In the data-driven environment, information dissemination is not bound in terms of time or location. The ease with which such data are currently shared makes information avoidance quasi-impossible.<sup>77</sup>

Third, not only are locational restrictions fading, contextual boundaries also fuse. The capacity to uphold different sub-identities in different contexts is undermined by the ease with which data about a person's sub-identity in one context can be recorded and taken over to other contexts.<sup>78</sup> If I am a formal person at work, but go to extravagant sex parties on the weekends, given the ease with which information can be collected and transposed through contexts, this is increasingly likely to come out.<sup>79</sup> Limiting certain aspects of ourselves to certain sub-identities and sub-contexts may consequently become increasingly difficult.<sup>80</sup> In addition, an important difference with the offline world is that personal profiles are no longer produced by different vendors with respect to different domains of life, such as the local liquor shop, the record shop and the library;<sup>81</sup> instead, Big Data tends to be based on decompartmentalisation, in which 'data from one domain is used for decisions in another domain',<sup>82</sup> such as that the colour of my couch may have a predictive value for my creditworthiness.

This brings us to the next point, namely that the position of quasi data monopolies of information intermediaries means that there will be fundamentally new challenges to narrative formation and preservation in the

<sup>76</sup>N. S. Marder, 'From Practical Obscurity to Web Disclosure: A New Understanding of Public Information', (2008) 59 *Syracuse Law Review* 441. D. S. Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' (2017) *University of Illinois Law Review* 1385.

<sup>77</sup>D. Lester, S. McSwain and J. F. Gunn III, 'Suicide and the Internet: The Case of Amanda Todd' (2013) 15 *International Journal of Emergency Mental Health and Human Resilience* 179. R. Penney, 'The Rhetoric of the Mistake in Adult Narratives of Youth Sexuality: The Case of Amanda Todd' (2016) 16 *Feminist Media Studies* 1.

<sup>78</sup>H. Nissenbaum, 'Privacy as Contextual Integrity' (2004) 79 *Washington Law Review* 119.

<sup>79</sup>S. Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 *Feminist Criminology* 22. D. K. Citron and M. A. Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345.

<sup>80</sup>L. Bullingham and A. C. Vasconcelos, 'The Presentation of Self in the Online World': Goffman and the Study of Online Identities' (2013) 39 *Journal of Information Science* 101.

<sup>81</sup>J. Haucap and U. Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?' (2014) 11 *International Economics and Economic Policy* 49.

<sup>82</sup>[www.wrr.nl/onderwerpen/big-data-privacy-en-veiligheid/documenten/policy-briefs/2017/01/31/big-data-and-security-policies-serving-security-protecting-freedom](http://www.wrr.nl/onderwerpen/big-data-privacy-en-veiligheid/documenten/policy-briefs/2017/01/31/big-data-and-security-policies-serving-security-protecting-freedom).

21st century, among others, because they have access to data about a person's past, present and future that that person may never have had. Again, it is impossible to exhaustively discuss the extent to which this is true.

To illustrate this point with respect to data about a person's past, reference could be made to the fact that among the most popular apps currently available are those for pregnant women, allowing them to track their own fertility and menstruation-cycle,<sup>83</sup> to count the kicks the foetus produces,<sup>84</sup> offer a smart contraction timer,<sup>85</sup> record foetal heartbeat,<sup>86</sup> measure weight and belly growth,<sup>87</sup> log the mother's weight and blood pressure changes<sup>88</sup> and when the baby is born, allow parents to track feeding sessions, sleep, activities, pumping, symptoms, temperature, medication and nursing duration<sup>89</sup> and to take videoclips and photos, upload medical files and ask health-related questions to parental communities.<sup>90</sup> When people grow up, they usually do not have access to these data about their first years themselves.<sup>91</sup>

With regard to information about our current preferences and behaviour, data-driven companies are increasingly able to uncover unconscious behavioural patterns and irrational belief systems that persons themselves are unaware of.<sup>92</sup> By registering which photos people click on or which videos they like, for example, a data-driven organisation can distil potential racial biases a person is unaware of herself and would fervently deny having when asked. To give another example, emotion detection now implemented in facial recognition technologies enables organisations to remotely measure physical phenomena e.g. body temperature, heart rate or facial features, analyse gait, or pupil dilation,<sup>93</sup> and derive from that emotional states.<sup>94</sup> The body often shows signs that signal emotions of which we are not necessarily aware of ourselves or that foreshadow such emotions we later feel.

Finally, without mediation, ordinary persons do not have the capacity to structurally gather and store information in the level of detail that technology

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<sup>83</sup>[www.oviahealth.com/apps](http://www.oviahealth.com/apps).

<sup>84</sup>[apps.apple.com/us/app/pregnancy-tracker-baby-bump/id1453373942](https://apps.apple.com/us/app/pregnancy-tracker-baby-bump/id1453373942).

<sup>85</sup>[apps.apple.com/us/app/pregnancy-and-due-date-tracker/id1144871267](https://apps.apple.com/us/app/pregnancy-and-due-date-tracker/id1144871267).

<sup>86</sup>[apps.apple.com/us/app/womb-beats/id1065038078](https://apps.apple.com/us/app/womb-beats/id1065038078).

<sup>87</sup>[apps.apple.com/us/app/pregnancy-tracker-and-baby-app/id990178211](https://apps.apple.com/us/app/pregnancy-tracker-and-baby-app/id990178211).

<sup>88</sup>[apps.apple.com/us/app/webmd-pregnancy/id600535431](https://apps.apple.com/us/app/webmd-pregnancy/id600535431).

<sup>89</sup>[apps.apple.com/us/app/baby-tracker/id1151052149](https://apps.apple.com/us/app/baby-tracker/id1151052149) [www.webmd.com/baby-app](http://www.webmd.com/baby-app) [play.google.com/store/apps/details?id=com.babycenter.pregnancytracker](https://play.google.com/store/apps/details?id=com.babycenter.pregnancytracker).

<sup>90</sup>[apps.apple.com/us/app/firstyear-baby-tracker-breastfeeding/id645810513](https://apps.apple.com/us/app/firstyear-baby-tracker-breastfeeding/id645810513).

<sup>91</sup>D. Lupton, *The Quantified Self* (John Wiley & Sons, 2016).

<sup>92</sup>D. Susser, B. Roessler and H. Nissenbaum, 'Technology, Autonomy, and Manipulation' (2019) 8(2) *Internet Policy Review* [doi.org/10.14763/2019.2.1410](https://doi.org/10.14763/2019.2.1410). M. Cristani, A. Vinciarelli, C. Segalin and A. Perina, 'Unveiling the Multimedia Unconscious: Implicit Cognitive Processes and Multimedia Content Analysis' (2013) *Proceedings of the 21st ACM International Conference on Multimedia*, ACM.

<sup>93</sup>[medium.com/@neurodatalab/every-beat-counts-comparing-remote-heart-rate-webcam-detector-to-wearables-d8d59aab863c](https://medium.com/@neurodatalab/every-beat-counts-comparing-remote-heart-rate-webcam-detector-to-wearables-d8d59aab863c) [arxiv.org/ftp/arxiv/papers/1702/1702.04235.pdf](https://arxiv.org/ftp/arxiv/papers/1702/1702.04235.pdf).

<sup>94</sup>J. Sujata, D. Madhava and K. Vishal, 'Facial Emotion Detection Technology: Concept, Marketing, Applications, Business Drivers and Challenges' (2018) 7 *International Journal of Engineering & Technology* 149.

companies do. In addition, these organisations are able to compare information about one individual with the profile of thousands and sometimes millions of others. When I share data about my heartbeats per second and my sleeping pattern, a company may be able to accurately predict that I may suffer from a heart attack in the coming months. Even if I would be able to minutely record my heartbeats, online purchases and sleep pattern, I would not have the tools to interpret what these data mean and derive relevant information from them and make valuable predictions about my future.

Taken as a whole, these trends mean there may come a point in time at which data-driven companies have more information about the average person than they do about themselves. Not only does the evolving information asymmetry mean that information intermediaries may be in a (theoretically) better position to write our personal narrative than we are (the domain of the narrator), they are in an increasingly unique position to influence our actions (the domain of the agent) as well. Because data-driven companies are increasingly capable of manipulating persons' emotions, thoughts and behaviour<sup>95</sup> and because they are increasingly able to successfully persuade an agent to perform actions that deviate from her personal narrative, they are not only able to see the disparity between a person's story and ideal image and her actual life and behaviour, they can also act on that disparity.

Although information intermediaries often promote themselves as helping the narrator align the actions of the agent to the personal story (e.g. 'get the better you out of you'),<sup>96</sup> many people have the opposite experience, e.g. that although they had planned to read a book at night, they have spent a night watching Netflix or gaming – again.<sup>97</sup> Conversely, because we intuitively like environments that confirm our world-view and personal narrative, we tend to navigate towards and stay longer in surroundings that do so.<sup>98</sup> When the agent operates in an environment that is designed to suit her conformation bias, it may be increasingly difficult for the narrator to adapt and transform her life story.<sup>99</sup> Though static personalities are unhealthy

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<sup>95</sup>E.g. [www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648](http://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648).

<sup>96</sup>[www.youtube.com/watch?v=0cBJj\\_tbHM](http://www.youtube.com/watch?v=0cBJj_tbHM).

<sup>97</sup>D. Kuss and M. Griffiths, 'Social Networking Sites and Addiction: Ten Lessons Learned' (2017) 14 *International Journal of Environmental Research and Public Health* 311. C. Schou Andreassen and S. Pallesen, 'Social Network Site Addiction-an Overview' (2014) 20 *Current Pharmaceutical Design* 4053.

<sup>98</sup>K. Rimella, G. De Francisci Morales, A. Gionis and M. Mathioudakis, 'Political Discourse on Social Media: Echo Chambers, Gatekeepers, and the Price of Bipartisanship', in *Proceedings of the 2018 World Wide Web Conference*. International World Wide Web Conferences Steering Committee. I. Cantador, A. Bellogin and P. Castells, 'Ontology-Based Personalised and Context-Aware Recommendations of News Items', in 2008 *IEEE/WIC/ACM International Conference on Web Intelligence and Intelligent Agent Technology*.

<sup>99</sup>E. Pariser, *The Filter Bubble: What the Internet is Hiding From You* (Viking, 2011). E. Bozdag and J. van den Hoven, 'Breaking the Filter Bubble: Democracy and Design' (2015) 17 *Ethics and Information Technology* 249.

and a sign of personality disorders, they are easier to control, manipulate and exploit than people with character traits and preferences constantly in flux.<sup>100</sup>

What makes these influences especially nifty is that having an understanding of our irrational belief systems and unconsciousness, data-driven organisations can use a person's biases to leave her sense of agency intact while exerting an increasing level of control. For example, what makes data-driven influences, such as nudging<sup>101</sup> and hypernudging,<sup>102</sup> so powerful is that by integrating design choices in a person's ecosystem and natural habitat, an agency-less environment is simulated (e.g. the elevator is moved to the back of a building to motivate us to take the stairs). Because of both our agency bias and our self-centred bias, the narrator will most likely fill the perceived agency-gaps by attributing agency to itself, keeping intact its feeling of control. With respect to the more visible influences, while not being oblivious to this fact, because of our rationality bias, we will have an inclination to attribute unconscious behaviour and manipulated decisions to our own conscious decision-making.

## 6. The right to be let alone

It is clear that writing our personal narrative will become increasingly difficult in the data-driven environment. If an individual's capacity to select and prioritise information about herself in her life story will continue to be quintessential to identity formation and preservation in the twenty-first century (and there is no reason to believe that it would not), either we will have to develop entirely new ways of identity formation and preservation that have adapted to and take into account the new data-driven reality, or a form of regulation should be put in place to effectively curb or adjust these developments. This paper will focus on one form of regulation, namely legal regulation, and discuss in particular the right to privacy, which is explicitly aimed at providing protection to a person's capacity to engage in identity formation and to develop her personality.<sup>103</sup> This Part will explain why the current fundamentals underlying the right to privacy disable it to adequately achieve that goal, pointing to several essential characteristics of the current privacy paradigm that are fundamentally at odds with

<sup>100</sup>S. Van der Hof and C. Prins, 'Personalisation and Its Influence on Identities, Behaviour and Social Values' in M. Hildebrandt and S. Gutwirth (eds), *Profiling the European Citizen* (Springer, 2008).

<sup>101</sup>R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin Books, 2009).

<sup>102</sup>K. Yeung, "'Hypnudging': Big Data as a Mode of Regulation by Design' (2017) 20 *Information, Communication & Society* 118.

<sup>103</sup>J. E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012). B. Van der Sloot, *Privacy as Virtue* (Intersentia, 2017).

the challenges to identity-formation and -preservation in the data-driven environment.

The current approach to privacy cannot be captured in one simple definition; legal practice differs from territory to territory and literature has offered a wide array of different approaches and understandings of the right to privacy. Still, three legal-philosophical presumptions (LPPs) are common to most of these doctrines and theories. (LPP1) The legal subject is perceived to be a singular entity; (LPP2) Legal rights and duties (as opposed to moral ones) are other-regarding; (LPP3) There is a double correlation between rights and duties. Besides these general legal-philosophical assumptions, the dominant approach to the right to privacy is based on three, partially corresponding, privacy-presumptions (PP). (PP1) The starting position for granting the right to privacy is that the right bearer's privacy interests are respected; (PP2) The threat of this starting point being disturbed is posed by other agents; (PP3) The right to privacy gives a right to control to the legal subject to preserve her privacy. These presumptions are challenged (c) by what has been described in this paper.

### **6.1. The first presumption**

(LPP1): At least for their legal affairs, legal subjects are seen and treated as singular. This implies that they are treated as one person and can only treat other persons as singular entities. A cannot plea that she did and did not want sex with B at the same time and unlike the moral domain, a subject cannot be the bearer of two conflicting legal duties at the same time. She cannot, for example, be under an obligation to take care of her children and have a restraint order prohibiting her to come within a 3 kilometre radius of them (a judge would need to make a determination either way). In addition, I cannot distance myself from the murder I've committed 20 years ago, claiming that the person I was back then was, both physically and psychologically speaking, fully different from the person I am today. To provide a final example, the legal subject as an agent and as a narrator are typically treated as one. When it is legally established that there is no coherence between the two, such as with insanity or mental disorders, a legal subject will typically be subjected to mandatory treatment, aimed at restoring unity between the two.

(cLPP1): It is unsure whether this presumption is still attainable when data-driven organisations have data about a legal subject's various sub-identities, the unconscious motivations of an agent and the disparity between the actions of the agent and the story of the narrator. On many accounts, they can challenge the unity of the legal subject and are able to demonstrate the disparity between the actions of the agent and the story of the narrator. This tension may become especially evident when data analytics are used

in courtrooms; for example, the defence might show that indeed, a person as an agent acted without an explicit choice by the narrator.<sup>104</sup> Importantly, the version of the right to privacy the legal subject would want to exercise is precisely aimed at maintaining a sense of disparity, imposing a duty on the other not to confront her with disruptive information in order to keep that disparity intact.

### **6.2. The second presumption**

(PP1): The starting position for granting privacy rights is typically one where the legal subject's interests are respected. A has control over her personal data and may decide to give her consent to B to process them; A owns a house and may decide to give B permission to enter it; A's bodily integrity is intact and she may decide whether B may have access to her body. Privacy rights are granted to a legal subject with as the presumed starting position the situation in which the interests of the legal subject are respected, rather than having a right to correct an undesired starting position. Obviously, I can ask you to leave my house when I so desire, but I can do so because you being in my house was dependent on my consent in the first place.

(cPP1): It is clear that this presumption is challenged in the data-driven environment, because information intermediaries will have more information about an increasing number of people than they do about themselves, among others because data-driven organisations have easy access to historical data, are able to infer personalised predictions from data profiles of thousands and sometimes millions of others and have invested in uncovering people's unconscious behaviour, irrational belief systems and signs that signal emotional states. Some of these data, a person never had access to herself. Predictions about a person's future can even be made without processing data about her, when such predictions are based on aggregated data profiles gathered about others. Consequently, the starting position is not one in which a person has control over the information about herself, but increasingly one in which other parties have information about a person she does not have.

### **6.3. The third presumption**

(LPP2): Immanuel Kant suggested there is a fundamental distinction between the legal and the moral realm, or what he called the doctrine of right and the doctrine of virtue. While legal obligations may be coercively enforced from outside the agent, ethical duties should not be externally

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<sup>104</sup>K. Rahnama, 'Science and Ethics of Algorithms in the Courtroom' (2019) *University of Illinois Journal of Law, Technology and Policy* 169.

enforced, as those are dependent on the agent's inner life.<sup>105</sup> In consequence, Kant thought virtues to be an important part of a moral theory, but he thought they could not be codified in law because they have no corresponding claim-right.<sup>106</sup> They are self-regarding. Though A can have a number of moral obligations to herself, A cannot have a claim right or a legal duty against herself, through which she can legally enforce herself, for example, to be a good person, to eat healthy meals or to give money to the poor. Self-regarding duties are moral duties, not legal ones. Similarly, another person cannot be required legally speaking to ensure that a person's moral duty to herself is respected, though it may be her moral duty to help others in this respect.

(cLLP2): This presumption is challenged in the data-driven environment because the other is not the problem as such, but can be merely a mediator of information, just as an object like a photo or a mirror. This in particular holds true for truthful but still unwanted information. This raises the question why a person would be under a legal obligation to abstain from information-communication of truthful facts, such as that a person may drink too much, used to be bullied at school or will presumably suffer from an incurable disease. It might be a moral duty of persons to abstain from such actions, but it is difficult to see why you should be under a legal obligation to not tell me that I am overweight when I really am overweight and why I should have a legal claim-right to that extent. In addition, and perhaps even more emblematic for this challenge is that a particular problem will be not so much the communication of shocking or shameful information, such as perhaps that I am overweight, but the continuous communication of unimportant and mundane information (yet-counter narrative), which hampers a person's capacity to self-summarise. It seems difficult to imagine a claim right to be withheld from very minor information-confrontations of this sort, although the accumulative effect of hundreds of minor information-confrontations a week may be significant as a whole.

#### **6.4. The fourth presumption**

(PP2): The danger against which privacy rights are typically said to protect the legal subject is against the potential intrusion of her privacy by others. The other may take the form of, for example, a law enforcement authority wire-tapping her communications or performing a body cavity search, businesses collecting personal data through cookies or selling such data to

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<sup>105</sup>I. Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996).

<sup>106</sup>A. L. Allen, 'An Ethical Duty to Protect One's Own Information Privacy?' (2013) 64 *Alabama Law Review* 847.

third parties, an ex-lover diffusing revenge porn or a friend posting an unwanted photo of her being slightly tipsy at a party on Facebook.

(cPP2): This presumption is challenged in the data-driven environment because a typical problem will be that I do not so much mind you having information about me, but that I do not want to be confronted with such information. For various reasons, I may not want you to know that I had an anorexic period when I reached puberty, but I may equally not want to be confronted with such information myself, because I want to forget about that painful period and move on with my life. I may not even mind that my doctor knows that I am suffering from an incurable disease, but still may choose to invoke my right to be shielded from incidental medical findings. A person that wants to prevent personal information being communicated to herself, not necessarily wants to prevent others from accessing or analysing that information.

### 6.5. The fifth presumption

(LPP3): Legal doctrine is based not only on the idea of a correlativity between rights and duties but typically on a double correlativity:<sup>107</sup> a right of A implies a duty of B and a duty of B implies a right of A. For example, if A borrows B's bicycle for 10 euros a month, B has a right to get 10 euro a month from A and A has a correlating duty to pay 10 euro a month to B; A has a right to use B's bicycle and B has a duty to lend A her bicycle for a month. Without such double correlativity, claim rights and duties would be null and void. If B has a right to require A to pay 10 euro a month, but A has no duty to do so, B will typically remain empty-handed. If B has a duty to pay 10 euro a month to A, but has no right to claim 10 euro a month, B cannot be forced to keep her duty.

(cLPP3): This presumption is challenged by the data-driven environment because narrative-conflicting information is often information the legal subject is unaware of herself. A can legally require B to stop calling her a prostitute because she knows B is calling her that and knows she is not. But A cannot legally require B to not communicate to her information she has unconsciously suppressed, precisely because she is not conscious of that information nor wants to be. Potentially, when A is truly successful in enforcing her claim right, avoiding any confrontation with such narrative-disrupting information, she might be able to suppress even the fact that she has suppressed that information (just like a person that has removed all mirrors from her home to avoid her self-image might tell herself that she had done so because she believes them to bring bad luck). Claiming a right vis-à-vis another person, however, becomes quasi-impossible when it regards inferred data that the legal subject is not consciously or unconsciously aware of and has never been confronted with.

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<sup>107</sup>W. N. Hohfeld, *Fundamental Legal conceptions* (Yale University Press, 1966).

## 6.6. The sixth presumption

(PP3): Privacy rights typically protect a person against the potential intrusions of other agents by granting a right to control. Although privacy rights are obviously not unlimited, e.g. the police may enter my home without my consent, the starting position is that they can't unless they have a legal basis and a concrete reason for doing so. Privacy is commonly described as a right to be let alone, the 'claim of individuals, groups, institutions to determine for themselves when, how, and to what extent information is communicated about them to others' or as 'the capacity to negotiate social relationships by controlling access to information about oneself'. In essence, the right to privacy allows me to protect my privacy by refusing you access to my home, body or data, if not trumped by other interests.

(cPP3): But, in situations of self-conflict, a legal subject's aim is not to control the data. She does not want to be in control of narrative-conflicting information and decide who to grant access to it; she wants to avoid being confronted with such information, preferably without having to invoke a subjective right, such as a right to be forgotten, which would precisely require her to deal with the information she is trying to block. This means that control, at least in its ordinary interpretation, is not the right instrument for protecting privacy and identity formation with respect to confrontations with narrative-conflicting information. Obviously, she wants some sort of control, but preferably without knowing what she wants to control.

## 7. The right to be let alone by oneself

This paper has explained that, although there are significant offline challenges to identity formation and preservation, the data-driven environment intensifies these on a number of accounts. For example, the explosion in the amount of personal data recorded and stored means that there will be manifold times when a person will be confronted with narrative-conflicting information. Because of the wealth of information and the tendency of information towards maximum entropy, a person's capacity for self-summation and the potential to experience different sub-identities in different contexts will be curbed. Confrontations with narrative-conflicting information will be increasingly intense, both because there is a trend towards gathering and storing data in audio and video, and those types of information carriers are known to have a bigger confrontational quality than text-based information, and because information is recorded about increasingly intimate and private aspects of a person's life. At the same time, traditional strategies for coping with informational conflicts, such as rationalisation and information suppression are crippled, because, on the

one hand, data are typically stored on external carriers, which have the emanation of neutrality and objectivity, and on the other hand, information dissemination is not bound by time, place or context and consequently, avoiding such information will be increasingly difficult.

In addition, there will be new challenges to identity formation and preservation in the data-driven environment. Information intermediaries may possess more information about a person's past and future than she does, these companies have the capacity to compare that information to the profiles of thousands or even millions of others, can integrate information about various aspects of an individual's life and have invested in analytical programmes that can uncover unconscious behaviour and irrational belief-systems. This means that there may come a point in time at which data-driven companies have more information about the average person than she does about herself, which means both that information intermediaries may be in a (theoretically) better position to write a person's personal narrative and are well-versed to influence her actions. What makes these new challenges especially invasive is that, due to the information asymmetry and access to parts of our unconscious dispositions and irrational biases, these influences can be disguised in a way that we are left with the suggestion that we are in control.

Although the right to privacy aims at providing protection to identity formation and preservation, there are a number of essential characteristics of the current privacy paradigm and legal paradigm in general that disable it from adequately dealing with the challenges discussed in this paper. More than 100 years ago, Warren and Brandeis concluded that

the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed--and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.<sup>108</sup>

Warren and Brandeis argued that the publication of information about a legal subject may harm her personality, as it may reveal aspects about her that she does not wish to be disclosed to others. They were concerned

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<sup>108</sup>Warren and Brandeis (n 12).

with stories in the yellow press and photo cameras, through which it was increasingly easy to collect, store and disseminate intimate details. In the data-driven environment, both a quantitative and a qualitative difference emerges. Not only can more and more data be gathered, stored and disseminated about aspects of a person's private life, data can also be produced on aspects of a person's life that she is not (consciously) aware of and wants to remain so. Perhaps even more so than publishing information about a person's intimate life, confronting a person with narrative-conflicting information can undermine her inviolate personality. That is why it is imperative to push the right to be let alone one step further and create a parallel right, a right, metaphorically speaking, to be let alone by oneself.

But before such a right could be introduced, a number of difficult questions need to be answered, such as its scope, its legal-philosophical underpinnings and its relationship vis-à-vis countervailing interests. The various legal-philosophical and privacy presumptions are so intrinsic to our common understanding of what law is and what legal claim rights do that developing an alternative will be a difficult and thought-provoking challenge. This final Part will start with a number of questions (q) with respect to the presumptions discussed in Part 6 and suggest a number of potentially more fruitful paths that could be developed in future research when formulating answers (a) to these.

### **7.1. The first question**

(qLPP1): Is it realistic to maintain the presumption of the unity of legal subjects or should a new legal paradigm also account for the situation in which such unity does not and never will exist? Should the legal paradigm keep its main focus on stimulating unity or should it also incorporate privacy as an instrument to cover up the disparity between different sub-identities and between the actions of the agent and the story of the narrator? To which one of the different sub-identities should a right be granted and on which of those can a duty be imposed?

(aLPP1) A small number of legal doctrines exist that do not suppose the unity of the legal subject. Perhaps best known in this respect is the Advance or Self-Binding Directive (SBD). These instruments allow a person to legally bind herself, an act that is often compared to Homer's *Odyssey*, in which Odysseus lets his crew tie him to the mast of the ship, so that he will not succumb to the irresistible song of the Sirens. Self-Binding Directives serve as a legal rope, so to speak, through which a person can bind herself in potential future situations. Such directives are typically used by people with bipolar disorders. In a state in which the legal subject 'is herself', she can ask others to interfere when she is not. Thus:

The individual identifies a typical set of behaviours which can be taken as firm indicators of an incipient and escalating episode of mania with associated harms. They might stipulate further conditions, such as how many of these behaviours must be witnessed before the directive is invoked. The SBD requests that, if they begin to manifest such behaviours, the following process should be followed: a) the behaviours are recognised by the clinical team as likely indicators of an incipient episode and they should be offered the treatment which the clinician and the SBD approves; b) if they refuse treatment, or act in such a way that that treatment is not happening, they should be immediately assessed for the lack of DMC-T [decision-making capacity for treatment]; c) assessors must use the behaviours and information given in the SBD to determine whether they consider the individual to be lacking in DMC-T; d) if the individual is found to be lacking in DMC-T on this basis, they should be subject to compulsory detention and treatment in line with recommendations which have been clinically approved on the SBD. This line should be followed unless new clinical information has come to light that justifies change in the clinical recommendation. The compulsory treatment would be overseen by Mental Health Act tribunals or courts in the usual way and part of the responsibility of the tribunal or court would be to ensure that the SBD is being respected.<sup>109</sup>

This legal doctrine provides a partial answer to (qLPP1) and potentially also to (qLLP2). Still, there are also a number of differences between this right and the situations in which it applies and the data-driven environment and a tentative right to be let alone by oneself. First, the goal of the SBD is to restore the unity of the legal subject, while a right to be let alone by oneself would aim precisely at retaining a sense of disunity. Second, the legal subject desires to bind herself, and the other accepts a duty to assist her in achieving that aim, while in the data-driven environment, neither will the legal subject typically take such an initiative, because she is unaware of or does not want to be confronted with her potential disunity, nor may data-driven organisations want to accept such a corresponding duty voluntarily (LPP3). Finally, and perhaps most importantly, the SBD is an accepted legal instrument for people with an established psychiatric disorder, while the right to be let alone by oneself would also apply to non-problematic forms of disunity.

## 7.2. The second question

(qLPP2) Is it realistic to maintain the presumption that rights and duties are other-directed or should a new legal paradigm also account for the situation in which the other only is the mediator and in which the underlying problem is that the actions of me as an agent do not conform to my story as a

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<sup>109</sup>T. Gergel and G. S. Owen, 'Fluctuating Capacity and Advance Decision-Making in Bipolar Affective Disorder – Self-Binding Directives and Self-Determination' (2015) 40 *International Journal of Law Psychiatry* 95.

narrator? If so, why should another person be under the legal obligation to refrain from confronting me with, in itself truthful, information about me?

(aLPP2): There exist legal doctrines in which others have a duty to protect a legal subject against herself. Such approaches are most common in vertical relations, but also exist in horizontal relationships. A gun shop owner that knows or should know that a person buying a gun will attempt to kill herself later that day may not only be under a moral duty but also a legal obligation to refuse such a transaction. In a similar vein, in many jurisdictions, a bartender may not provide alcohol to a customer who is clearly drunk already. Such prohibitions are partially aimed at the protection of the community and general interests but are also clearly concerned with protecting a legal subject against herself. Not only can a gun shop owner or a bartender who does not adhere to such a duty be penalised, a legal subject may also invoke a right against that person to nullify the transaction.

For example, a number of civil codes around the world incorporate the doctrine of abuse of circumstances.

Abuse of circumstances is legally present when someone who knows or should have known that another person might be induced to perform a juridical act because he is under the influence of particular circumstances, like a state of emergency, dependency, thoughtlessness, an addiction, an abnormal mental condition or inexperience, nevertheless has stimulated this other person to perform this juridical act, although what this someone knew or should have known, should have refrained him from doing so.<sup>110</sup>

When a contract is concluded under such terms, it may be terminated. The Principles of European Contract Law stipulate:

(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit.<sup>111</sup>

This type of legal doctrine may provide a partial answer to (qLLP2). However, such doctrines apply to situations in which there is a direct relationship between A and B, in which B can and should understand that A 'is not herself' (cLLP1). Such a direct relationship does not exist in the data-driven environment; at the same time, it is clear that certain data-driven organisations will be uniquely equipped to understand that A is not acting in her own best interest nor according to her own narrative (perhaps even better than she herself). But there are also a number of

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<sup>110</sup>[www.dutchcivillaw.com/civilcodebook033.htm](http://www.dutchcivillaw.com/civilcodebook033.htm).

<sup>111</sup>[www.trans-lex.org/400200/\\_/pecl/#head\\_71](http://www.trans-lex.org/400200/_/pecl/#head_71).

important obstacles for applying such right to the data-driven environment. The problem in the data-driven environment is determining what is in the best interest of A, or what A ‘actually’ wants. In particular, it might be problematic to give information intermediaries the power to decide over such matters and let the person herself be oblivious to those choices. Finally, in the physical environment, this type of legal doctrine would not require a person or organisation to abstain from sharing disruptive information. Rather, a bartender would typically say: ‘You are drunk, go home.’

### 7.3. The third question

(qLPP3): Is it realistic to maintain the presumption that rights and duties have a double correlativity or should a new legal paradigm also account for situations in which the legal subject cannot or does not want to rely on a claim right? If so, how can the other know what type of information not to communicate to the legal subject?

(aLPP3): There are doctrines in the legal domain that do not conform to the supposed correlativity between rights and duties. There are rights that do not have a correlating duty, such as the so-called ‘manifesto’ rights.<sup>112</sup> For example, Article 24 of the Universal Declaration of Human Rights holds: ‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’ The other way around, there are duties that have no corresponding claim right<sup>113</sup> — for example, Article 29 of the African Charter on Human and Peoples’ Rights provides that the individual has the duty, inter alia, to ‘preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, [and] to maintain them in case of need.’<sup>114</sup>

For the purposes of a right to be let alone by oneself, inspiration could be drawn from the doctrine of the duty of care. The classic reference here is to the obligation to act as a *bon père de famille*. In most jurisdictions, parents are under the legal obligation to take good care of their children and act as ‘a good parent’ or ‘good father’ would do. Similarly, many professional legal standards and codes of conduct are based on such duties of care. Doctors are under a legal obligation to act as ‘a good doctor’, that is, to act like a hypothetical virtuous doctor would act. Whether or not an agent has respected that duty is based in part on moral considerations. A duty of care does not adhere to Kant’s strict separation between the doctrine of law and the doctrine of virtue. Rather, the legal rule echoes a typical

<sup>112</sup>J. Feinberg, ‘The Nature and Value of Rights’ (1970) 4 *Journal of Value Inquiry* 243.

<sup>113</sup>L. Lazarus, B. Goold, R. Desai and Q. Rasheed, ‘The Relationship Between Rights and Responsibilities’ (2009) *University of Oxford, Ministry of Justice Research Series* 18/09.

<sup>114</sup>[www.achpr.org/legalinstruments/detail?id=49](http://www.achpr.org/legalinstruments/detail?id=49).

formulation found in virtue ethics in terms of virtue-rules (v-rules).<sup>115</sup> A virtue ethical rule could be ‘do as the most virtuous person would do’, ‘act as the best parent would do’, or ‘perform the work such as the best doctor would do’. Although there is a legal duty, there is no corresponding claim right of the legal subject.

Although these examples show that an answer to (qLPP3) is possible, therewith also addressing (qPP3), there are also a number of challenges that remain unaddressed. First, the manifesto rights and duties cannot be legally enforced, because they have no correlating duty or right. Second, duties of care can be attributed to agents in their role of father or doctor precisely because most of these agents already impose on themselves a moral duty to be the best father or best doctor possible, while not all data-driven organisations may share such moral conviction. Perhaps, certain data protection rules or fair information principles can also be treated as duties of care. Data controllers have a duty, for example, to keep information about a data subject correct and up to date, to process only those data necessary for a clearly defined purpose and to delete data when no longer necessary. Although there are correlating claim rights for data subjects, the data subject needs not to invoke its rights. Data controllers have such duties independently of whether legal subjects claim their rights and these duties can also be enforced by supervisory authorities, independent of any claim made by a legal subject. The problem with respect to the matter central to this paper, however, is that it would be difficult to develop a legal standard as to what people ought to know about themselves. Some people may not want to know what type of disease they may be suffering from in 20 years’ time, but many would want to know. Although some people will try to avoid information about their self, it may be in their best interest to confront such information and come to terms with themselves. The problem is that it is unclear what a potential duty of care in this respect would entail and quasi-impossible (and perhaps undesirable) for a governmental organisation to decide on such a matter.

#### **7.4. The fourth question**

(qPP1): Is it realistic to maintain the presumption of control or should a new legal paradigm also account for situations in which such a situation does not and has never existed? If so, can data-driven organisations be required not to store and infer data about people and should such a duty also be imposed on non-data-driven agents? Or should the legal realm take as the starting point the situation in which the legal subject is not in control of the data about her and may never be, and if so, how should the legal paradigm respond?

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<sup>115</sup>R. Hursthouse, *On Virtue Ethics* (Oxford University Press, 1999).

(aPP1) An example of a rule that does not take as starting point the situation in which the data subject is in control of her information and is not aimed at attaining that situation, but still provides protection to the legal subject, can be found in the well-known prohibition on automatic decision making in Article 22 of the European Union's General Data Protection Regulation. According to this provision, data subjects 'have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.'<sup>116</sup> It follows that data controllers cannot make decisions that significantly affect a person based on general information and correlations. A bank cannot deny a legal subject a loan merely because she falls in a certain category, such as that she lives in a certain zip code area, has a certain age and gender. In essence, B should always treat A as a unique individual with her own personal story and take account of her individual life and individual characteristics when making that decision.

Although this may provide an answer to (qPP1), the doctrine is not aimed at a situation in which the legal subject is confronted with the information as such, but only with the decision based thereon. Would she want to challenge that decision, A would have to ask how B has come to her decision, which may be something A may not want. In many instances, even the decision taken by B itself may reveal what type of underlying information she has about A. In addition, this doctrine does not give A a right to be treated according to her own prevailing narrative. Although A may provide the bank with information why, despite her general characteristics, she is trustworthy and unlikely to default, she has no right to demand from B to abstain from using inferred data or statistical correlations. A can also not ask B to abstain from making such general profiles or find such statistical correlations between personal characteristics and creditworthiness based on personal data of other legal subjects. Finally, the right contained in the GDPR only applies to decisions that significantly or legally affect a person, not to mundane and everyday types of information-confrontations.

### **7.5. The fifth question**

(qPP2): Is it realistic to maintain the presumption that privacy threats are posed by other agents or should a new legal paradigm also account for situations in which a person does not mind that others have information about her, but does not want to be confronted with her own past, present or future? Why should such be a legal right?

(aPP2) The right to be forgotten was made famous by the Google Spain case, in which information about a person's financial malaise, that had

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<sup>116</sup>[eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=NL](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=NL).

occurred decades ago, was digitalised and published online by a newspaper and could be found in the top list of Google's search results when entering that person's name.<sup>117</sup> The European Court of Justice did not find that the newspaper shouldn't have written the story or shouldn't have published it online, but turned to Google. The Court essentially judged this case under the data minimisation and storage limitation principles, stressing that the processing of these data was not necessary, proportionate and no longer relevant for the purposes for which they were collected. If Google is seen as providing a digital biography about a person, the problem was that this biography was outdated and incomplete. The right to be forgotten can also be applied to situations in which, at least in part, the problem is that A does not want to be confronted with information herself, such as embarrassing childhood photos or videos that may haunt a person for the rest of her life.

But, the right to be forgotten still mandates that A invokes an active claim right against B (cLPP3), having to be aware of the information she wants to block (cPP3). In addition, although this might provide an answer to (qPP2), the problem is that it can have as a consequence that the inequality between A and B is deepened and the power relationship changed. When A is doing silly things behind closed doors, not knowing that B is peeking through the keyhole, B's view of A is changed, while A cannot control or correct the image B has about her, which may be highly problematic.<sup>118</sup> The cure may be worse than the disease.

## 7.6. The sixth question

(qPP3): Is it realistic to maintain the presumption that the legal subject should gain control over her information or should protection also be provided through granting a right not to be confronted with information? If so, should such a doctrine still be approached from the perspective of the right to privacy?

(aPP3) There are legal doctrines that confer to an agent the right not to control data about herself, the right to be free from information. Such has been proposed, for example, in the non-official Charter of Digital Fundamental Rights of the European Union, which holds in Article 2 on Freedom: 'Everyone has the right to freedom of information and communication. This right is a cornerstone of a free society. It incorporates the right not to know.' In the medical context, such a right has already been recognised in some jurisdictions. Especially when new diagnostic tools are used, such as total genome sequencing, doctors may discover incidental or

<sup>117</sup>[eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0131](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0131).

<sup>118</sup>B. Roessler, *The Value of Privacy* (Polity Press 2005).

secondary findings. If A asks her doctor to test her blood for early signs of amyotrophic lateral sclerosis, her doctor may find that she is suffering from an untreatable form of cancer. A number of medical institutions allow patients to opt-out from being informed about such incidental findings.

It has been argued that autonomy encompasses more than the ability to make informed decisions; instead it is the ability to choose one's own life path, well informed but unencumbered by unnecessary or undesired knowledge. This conception of autonomy supports the idea that undesired knowledge is not beneficial for the person concerned, particularly when it concerns information that foreshadows an early and unpleasant death. Such information is likely to influence the making and execution of life plans substantially; it may induce depression, but also close off life plans that would otherwise have been considered. It may well frustrate fruitful life plans already in place.<sup>119</sup>

Such a legal doctrine allows the legal subject to maintain disunity between the life of the agent and the story of the narrator, in order to keep her personal narrative intact and thus provides an answer to (qLPP1) and it requires B to support A in that aim (qLLP2). The problem is not so much that the doctor has the information, but that the legal subject does not want to be confronted with it (qPP2). And the doctrine, rather than giving a right to control, gives a right not to be confronted with personal information (qPP3). However, there are also important differences between this right and what a right to be let alone by oneself would have to look like. For example, it is a legal right that the legal subject exercises, with a correlative duty of the doctor (qLLP3), and the starting position is such that the legal subject is in control of her own data (qPP1). In addition, a difference with a tentative right to be let alone by oneself is that the legal subject gives her data or tissue to the doctor to infer one specific type of information about her or to use it for general research purposes; she can simply indicate, using a catch-all formula, that she does not want to be informed about any other information that is found than the specific disease she wants to be diagnosed on or specify that she only wants to be information about diseases A, B and C.<sup>120</sup> Such, as has been explained, will be impossible in the data-driven environment.

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<sup>119</sup>Asscher and Koops (n 5).

<sup>120</sup>See about the difficulty of even properly conceptualizing and delineating a right to know and not to know in the medical context: R. Brownsword, 'New Genetic Tests, New Research Findings: Do Patients and Participants Have a Right to Know—and Do They Have a Right Not to Know?' (2016) 8 *Law, Innovation and Technology* 247; and R. Brownsword and J. Wale, 'The Right to Know and the Right Not to Know Revisited' (2017) 9 *Asian Bioethics Review* 3.

## 8. Conclusion

In conclusion, there are a number of obstacles that would need to be overcome before the introduction of a tentative right to be let alone by oneself. Although there are a number of directions that could potentially lead to fruitful answers to a number of the questions raised, they only provide solutions on specific points and aspects. Future research would need to unravel these and other dilemmas and determine whether it is possible to develop a claim right to be let alone by oneself and if so, how such a right could be conceptualised and delineated.

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## Notes on contributor

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