
Privacy as virtue: searching for a new privacy paradigm in the age of Big Data

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1 Introduction

Originally, privacy was conceived primarily as a duty of the state not to abuse its powers. It could not, for example, enter a private house without legitimate reason or reasonable suspicion that the owner of the house had engaged in, for example, criminal conduct. Gradually, however, privacy has been transformed into a subjective right of the individual to protect his/her personal interests, such as related to human dignity, individual autonomy and personal freedom. The same counts for data protection, which originally focussed on laying down rules and obligations for data controllers to process data fairly, transparently and safely, and which has subsequently been mostly interpreted as an individual right to control personal data.¹ This transition has also influenced the manner in which specific cases are assessed. Originally, the prime focus was on the question of whether the use of power in the course of a privacy or data protection violation in relation to the pursuit of a societal interest, such as for example national security or the economic well-being of a country, was at all necessary and proportionate. Now, the societal interest and the personal interest involved with a specific privacy violation are balanced and weighed against each other.

This shift from obligation to right, from societal and general interests to private and individual interests and from a necessity test to a balancing test has worked well for decades, as most privacy violations were targeted at specific individuals or small groups. However, in the current technological paradigm in which personal data are gathered, stored and processed on a very large scale, this paradigm is under pressure. Not only is it practically undoable for an individual to keep track of all data

1 See further: van der Sloot (2014): “Do data protection rules protect the individual and should they?”

collections which contain his/her personal data, his/her specific individual interest in these systems is increasingly difficult to substantiate too. This also influences the way in which the cases are commonly resolved by a court, namely by balancing the different interests, which becomes increasingly problematic, as both interests are often very vague and abstract in these types of processes. Moreover, the question is whether the mass surveillance and large scale collection and processing of personal data regards a relative interest; rather, it appears that sometimes an absolute interest is at stake, namely the prevention of abuse of power.

This contribution proposes to remedy this problem, not by going back to the original interpretation of the rights to privacy and data protection, but by suggesting a novel interpretation of both doctrines in which both the individual and the general (societal) interests are guaranteed. It does so, not by looking to rights or duties, but to virtues. A virtue is a disposition towards the good. It borrows from core concepts of virtue ethics to develop a new understanding of privacy: privacy as virtue. Virtue ethics can find a synthesis on all three contrasting points of the original and the current privacy paradigm. Instead of rights or duties, it focuses on virtues. Instead of societal or personal interests, it focusses on human flourishing. Instead of a necessity or balancing test, it focusses on the notion of prudence. All these points will be discussed and analysed in the following sections in more detail.

This contribution will continue as follows. Section 2 will briefly specify the three characteristics of privacy protection under the original paradigm: duties, general interests and the necessity test. Section 3 will continue by pointing out the three contrasting characteristics of privacy protection under the current paradigm: individual rights, personal interests and the balancing test. Section 4 will point out why the three pillars of the current privacy paradigm are unfit for the new technological reality, with developments known as Big Data. Section 5 will briefly discuss some core principles of virtue ethics, highlighting the virtues that could be of help in devising an alternative privacy paradigm. Finally, section 6 will analyse how virtue ethics can find a synthesis between the three contrasting fundamentals of the original and the current privacy paradigm, therewith ameliorating privacy protection and overcoming the problems the current privacy paradigm faces in the age of Big Data.

This contribution will focus on the protection of privacy, although most of what will be shown in sections 2, 3 and 4 also applies to the right to data protection.² In order to discuss one coherent system of privacy protection, this contribution will focus solely on the privacy paradigm under the European Convention on Human

2 See van der Sloot (2014): “Do data protection rules protect the individual and should they?”