



UvA-DARE (Digital Academic Repository)

Privacy as human flourishing: could a shift towards virtue ethics strengthen privacy protection in the age of Big Data?

van der Sloot, B.

Published in:

Journal of intellectual property, information technology and electronic commerce law

[Link to publication](#)

Citation for published version (APA):

van der Sloot, B. (2014). Privacy as human flourishing: could a shift towards virtue ethics strengthen privacy protection in the age of Big Data? *Journal of intellectual property, information technology and electronic commerce law*, 5(3), 230-244.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <http://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Privacy as human flourishing

Could a shift towards virtue ethics strengthen privacy protection in the age of Big Data?

by **Bart van der Sloot**, researcher at the Institute for Information Law (IViR), University of Amsterdam, the Netherlands. This research is part of the project "Privacy as virtue", which is financed by the Dutch Scientific Organization (NWO).

Abstract: Privacy is commonly seen as an instrumental value in relation to negative freedom, human dignity and personal autonomy. Article 8 ECHR, protecting the right to privacy, was originally coined as a doctrine protecting the negative freedom of citizens in vertical relations, that is between citizen and state. Over the years, the Court has extended privacy protection to horizontal relations and has gradually accepted that individual autonomy is an equally important value underlying the right

to privacy. However, in most of the recent cases regarding Article 8 ECHR, the Court goes beyond the protection of negative freedom and individual autonomy and instead focuses self-expression, personal development and human flourishing. Accepting this virtue ethical notion, in addition to the traditional Kantian focus on individual autonomy and human dignity, as a core value of Article 8 ECHR may prove vital for the protection of privacy in the age of Big Data.

Keywords: Privacy, Big Data, Negative Freedom, European Convention on Human Rights

© 2014 Bart van der Sloot

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Bart van der Sloot, Privacy as human flourishing: Could a shift towards virtue ethics strengthen privacy protection in the age of Big Data? 5 (2014) JIPITEC 230, para 1.

A. Introduction

1 With the recent revelations by Snowden about the NSA, privacy and the value of privacy have once again moved to the center of public debate. While some argue that privacy is dead, others feel that it is now more than ever that privacy needs protection. What all agree upon is that the concept and value of privacy need careful rethinking, as the traditional approach to privacy seems unfit to address the threats posed by Big Data, cloud computing and profiling. Big Data, for the purpose of this study, is defined as gathering massive amounts of data without a pre-established goal or purpose, about an undefined number of people, which are processed on a group or aggregated level through

the use of statistical correlations. A reformulation of privacy and a shift in its underlying value would not be a novelty; privacy has changed its meaning, definition and scope many times. It is quite clear that in different epochs,¹ in different cultures² and in different situations,³ privacy plays a different role. What makes privacy even more difficult to grasp is that its value and meaning differs from person to person; what one would qualify as a violation of his privacy, the other would disregard as unimportant and trivial. Consequently, the value of privacy is difficult to grasp and define. Moreover, in contrast to autonomy, freedom, or dignity, which are commonly ascribed an intrinsic value, in literature,

privacy is almost without exception described as an instrumental value.⁴ Although there is no agreement among scholars in terms of which value privacy can be best defined, generally two concepts play an important role, namely negative freedom and autonomy.

- 2 The right to privacy was arguably first articulated by Warren and Brandeis, who coined the right to privacy as ‘the right to be let alone’.⁵ In the theories of Warren and Brandeis, as well as their contemporaries, the right to privacy is mostly described as instrumental to negative freedom. The right, for example, to be let alone in the privacy of one’s home ensures that one is free from interference from others, both individuals and the state. The ‘right’ to privacy is, in this sense, perhaps better defined as the ‘duty’ not to violate the privacy of others. Only if there are sufficient and concrete reasons for infringing on someone’s privacy- for example, by entering the home- can a person or state legitimately breach the protected sphere of negative freedom. This concept of privacy as instrumental toward negative freedom was dominant in the older privacy literature, but has many adherents nowadays, as well. Not surprisingly, privacy was and still is often defined as a doctrine related to the protection against abuse of power. For example, states were held not to infringe the privacy of individuals without sufficient reasons, without such interference being necessary, proportionate and effective. If they did disregard these requirements, they were simply held to abuse their powers.⁶
- 3 Another constant factor in privacy theories has been the suggestion that the protection of the private sphere is necessary for the development of the autonomous individual. Theories that link the respect for privacy to the development of autonomous individuals are dominant in the current privacy debate. They are defended predominantly by liberal scholars, who focus on the notion of control and informed consent of the individual. For example, Beate Roessler has built a theory around the argument that respect ‘for a person’s privacy is respect for her as an autonomous subject.’⁷ This focus on control and autonomy has been predominantly, though not exclusively, developed in privacy theories that focus on the processing of and control over personal information (informed consent).⁸ In medical cases, such as relating to abortion and euthanasia, this principle is known as ‘decisional privacy’; reference is often made to the decision by the US Supreme Court in *Roe v Wade*, in which a woman was granted the right to abortion as part of her right to privacy and bodily integrity.⁹ Finally, reference is often made to procedural requirements, such as access to information and a right to be heard, which strengthen a person’s autonomy and ensures that he can actively steer matters which affect his private or family life.

- 4 This article will discuss how the underlying value of privacy, and its scope, has changed considerably over time under the European Convention for Human Rights (ECHR). It will argue that the ECHR acknowledges both negative freedom (section 2) and autonomy (section 3) as important underlying values when discussing cases under Article 8 ECHR. It will then stress (section 4) that in more and more cases it goes beyond these classic notions and focuses, instead, on the protection of individual or group identity, personal development, and human flourishing. Finally, it will be discussed (section 5) that although human rights are often placed in a Kantian (deontological) framework, which focuses on individual autonomy and human dignity, it might be suggested that virtue ethics, to which the notion of human flourishing is connected, is a better framework to explain the Court’s focus on issues that go beyond the protection of negative freedom and autonomy. This shift towards virtue ethics might prove vital for privacy protection in the age of Big Data, in which two fundamentals of the current paradigm are increasingly put under pressure: the focus on individual rights and on individual interests. So is the remit of the paper both an explanation of the Strasbourg jurisprudence and a discussion of the potential value of virtue ethics for privacy protection in the age of Big Data.

B. Negative freedom

- 5 The European Convention on Human Rights was adopted in 1950 and in many respects arises from the ashes of the Second World War.¹⁰

It ‘is a product of the period shortly after the Second World War, when the issue of international protection of human rights attracted a great deal of attention. These rights had been crushed by the atrocities of National Socialism, and the guarantee of their protection at the national level had proved completely inadequate.’¹¹
- 6 Like the Universal Declaration on Human Rights, to which the European Convention makes explicit reference in its preamble¹² and on which it is based to a large extent,¹³ the Convention is primarily concerned with curtailing the powers of totalitarian states and fascist regimes. Not surprisingly, the travaux préparatoires of both documents, reflecting the discussions of the authors of both texts, are full of references to the atrocities of the holocaust and the other horrors of the past decades.¹⁴
- 7 For example, when discussion arose whether or not to include a right to marry and found a family, several delegates were outraged by the suggestion to delete such freedom from the Convention. ‘[The] majority of the Committee thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children

and young persons organised by these regimes, should be absolutely prohibited.¹⁵ Later, when doubts were again casted, this line was confirmed:

*'The outstanding feature of the totalitarian regimes was the ruthless and savage way in which they endeavoured to wipe out the concept of the family as the natural unit of society. If we delete paragraphs 10 and 11, I submit that we are accepting the validity of that philosophy. We are declaring that the Nazis were justified in everything they did to prevent some human beings from perpetuating their race and name.'*¹⁶

- 8 The principle concern of both the Declaration and the Convention is to protect individuals from the arbitrary interference with their rights and freedoms by intrusive governments. This rationale is even more prominent in the Convention than in the Declaration, because the former document only embodies so called 'first generation' human rights.¹⁷ While first generation or civil and political rights require states not to interfere with certain rights and freedoms of their citizens in an arbitrary way, socio-economic rights such as the right to education, to property and to a standard of living require states not to abstain from action, but to actively pursue and impose such freedoms by adopting legal measures or by taking active steps.¹⁸
- 9 Consequently, the original rationale for the Convention as a whole was laying down negative obligations for national states and granting negative freedom to citizens. Of all articles contained in the Convention, these rationales are most prominent in the right to privacy under Article 8 ECHR. Already under the Declaration, it was this Article that was originally plainly titled 'Freedom from wrongful interference'.¹⁹ Likewise under the Convention, the right to privacy was originally only concerned with negative liberty, contrasting with other qualified rights in which positive freedoms are implicit, such as a person's freedom to manifest his religion or beliefs (Article 9), the freedom of expression (Article 10) and the freedom of association with others (Article 11). Likewise, the wording of Article 8 ECHR does not contain any explicit positive obligation, such as, for example, under Article 2, the obligation to protect the right to life; under Article 5, to inform an arrested person of the reason for arrest and to bring him or her promptly before a judge; under Article 6, the obligation to ensure an impartial and effective judicial system; and under Article 3 of the First Protocol, the obligation to hold free elections.²⁰
- 10 The original rationale behind the right to privacy was granting the citizen negative freedom in vertical relations, that is the right to be free from arbitrary interferences by the state. Along this line, the Court still holds that the 'essential object of Article 8 is to protect the individual against arbitrary action by the public authorities'.²¹ Indeed, this focus still forms a substantial part of the case law of the ECtHR, among

others in relation to police investigations, when wire-tapping telecommunication or controlling other means of correspondence and when officials enter private houses in order to arrest a habitant or to seize certain documents or objects.²² It also plays a role when a case 'concerns the security of the state and the democratic constitutional order from threats posed by enemies both within and without.'²³ Such cases regard, for example, general surveillance measures by secret service organizations²⁴ or matters in which the territorial integrity of the state is at stake.²⁵ In addition, restrictions may be imposed on the privacy of prisoners, their right to correspondence, and the freedom to have regular contact with family members.²⁶ Finally, the protection of negative freedom in vertical relations plays a role when a state wishes to expel an alien who has been convicted for criminal activities, and has established a family life in that country, from its territory for reasons of maintaining order and preventing crime.²⁷

- 11 However, the Court has gradually diverged from the original approach of the Convention authors by accepting both positive obligations for national states and granting a right to positive freedom to individuals under the right to privacy. The element of positive liberty was adopted quite early in a case from 1976: 'For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. [H]owever, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.'²⁸ Likewise, from very early on, the Court has broken with the strictly limited focus of the authors of the Convention on negative obligations and has accepted that states may under certain circumstances be under a positive obligation to ensure respect for the Convention.²⁹
- 12 Consequently, while the original focus of the European Convention, in general, and the right to privacy, in particular, relied on negative obligations for states and the negative freedom of individuals, this rationale has weakened over time. The element of positive obligations for the state has brought with it that states are held, among others, to ensure adequate protection of privacy in horizontal relationships; for example, in relation to the prevention of violence and the protection of privacy in terms of data protection and family relations.³⁰ However, most prominently, it plays a role in matters in which the freedom of expression is used to infringe upon the privacy or reputation of another.

- 13 As discussed, the European Convention is based to a large extent on the Universal Declaration and likewise, Article 8 ECHR is based on Article 12 UDHR, which holds: ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.’³¹ Although all other concepts that appear in Article 12 UDHR are transferred to the European Convention, the right to protection against attacks upon one’s reputation and honor was explicitly rejected from the scope of Article 8 ECHR. The motive for this was that the authors of the Convention focused on vertical relationships, while most cases concerning reputation revolve around horizontal disputes. The protection from the attacks upon a person’s honor and reputation by or through the media consequently fell outside the scope of Article 8 ECHR. Instead of accepting it as a subjective right of the individual under the right to privacy, it was transferred to paragraph 2 of Article 10 ECHR, so that it became one of the grounds on the basis of which states could legitimately restrict the freedom of expression.³²
- 14 This sharp distinction has been honored in the early case law on Article 8 ECHR, in which it was held time and again that ‘that the right to honour and good name as such is not protected’ under the scope of the right to privacy.³³ However, gradually, the Court has accepted that under certain circumstances, a person may successfully put forward a case in which the respect for his reputation and honor is the central element. First, by gradually accepting the doctrine of positive obligations, the Court has held that States may be under the obligation to limit the freedom of speech in order to ensure respect for a person’s reputation and honor; for example, by guaranteeing a fair balance between the different interests of the individuals involved.³⁴ In more recent cases, the Court has come to accept that individuals may invoke their right to privacy when the behavior of public authorities affect their legitimate concerns; for example, when courts or governmental organizations make public certain private and delicate details about their behavior, mental status, or physical disabilities.³⁵
- 15 Finally, from 2007 onwards, the Court accepts matters under the scope of Article 8 in which the applicant complains of an infringement with his honor and reputation in horizontal relations, either because the state did not allow him to prevent certain publications or because he was unable to get sufficient compensation for defamatory statements. In the first case in which it overturned its earlier case law and diverged from the intentions of the Convention authors, that of *Pfeifer v. Austria* (2007), the Court referred to its earlier case law and held ‘that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological

integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.’³⁶ In *A. v. Norway* (2009), the Court finally extrapolated its views to the right to honor: ‘In more recent cases decided under Article 8 of the Convention, the Court has recognised reputation and also honour as part of the right to respect for private life. In *Pfeifer*, the Court held that a person’s reputation, even if that person was criticised in the context of a public debate, formed part of his or her personal identity and psychological integrity and therefore also fell within the scope of his or her “private life”. The same considerations must also apply to personal honour.’³⁷ Consequently, besides the protection of negative freedom in vertical relations, Article 8 ECHR also protects citizens from the actions and expressions of other citizens and/or companies.

C. Autonomy

- 16 Besides negative freedom, autonomy has become an important value underlying the right to privacy. This value plays a role especially in relation to three topics, namely data protection, medical issues and the fairness of custodial disputes. One of the rationales underlying the right to data protection, though far from the only one, is that of individual autonomy, connected to the notion ‘informed consent’. Under the EU’s Data Protection Directive, personal data may only be processed on a legitimate basis, such as the unambiguous consent of the data subject, which is defined as any freely given specific and informed indication of a person’s wishes by which the data subject signifies his agreement to personal data relating to him being processed.³⁸ These data must be processed in a safe and transparent manner and the processing must be necessary and proportionate.³⁹ Finally, the data subject has a number of rights, among others relating to being informed about the processing of his data, access to these data and the rectification, erasure or blocking of his personal data.⁴⁰ In the proposed General Data Protection Regulation, this focus on access and individual control will be strengthened, inter alia, by tightening the conditions for consent and by introducing subjective rights to control data, such as a right to be forgotten and a right to data portability, allowing individuals to request the deletion of data and to transport their Facebook profile to another social platform.⁴¹
- 17 Although Article 8 ECHR does not contain a reference to the protection of personal data, following the living instrument doctrine, the Court has been willing to accept a number of the notions essential to the right to data protection under the scope of the Convention.⁴² It has accepted, for example, that storing personal data, such as transcripts of telephone conversations, photos, hospital records or

bodily material, triggers the application of Article 8 ECHR, it has held that if a large collection of sensitive personal data is in government hands, in principle, the individual has a right to access such information and the Court has laid down certain limits on the use and transfer of personal data by and to third parties. Similar to most data protection rules, the Court has accepted that personal data may only be collected for specific and legitimate purposes⁴³ and has accepted a positive obligation for states to lay down adequate data protection rules.⁴⁴ Moreover, following the line that private life also protects one's public and professional life (explained in more detail later), the Court has been willing to apply Article 8 ECHR when it regards processing public data and professional communications,⁴⁵ which has allowed it to find that the systematic collection and storing of data by security services on particular individuals constituted an interference with these persons' private lives, even if that data was collected in a public place or concerned exclusively the person's professional or public activities.⁴⁶

- 18 The Court has accepted a number of notions connected to the idea of informed consent and control over data, among others by recognizing the right to be informed about covert surveillance, to have access to personal data, to correct them if false or outdated, and, under certain circumstances, to delete them. 'Also the Court recognized the right of individuals to have control, to a certain extent, of the use and registration of their personal information (informational self-determination). In this respect, the Court has considered and recognized access claims to personal files, claims regarding deletion of personal data from public files, claims from transsexuals for the right to have their 'official sexual data' corrected. Moreover, the Court has insisted on the need for an independent supervisory authority as a mechanism for the protection of the rule of law and to prevent the abuse of power, especially in the case of secret surveillance systems. In other cases, the Court demanded access to an independent mechanism, where specific sensitive data were at stake or where the case concerned a claim to access to such data. In *Peck*, in *Perry* and in *P.G. and J.H.* the Court acknowledged the basic idea behind the fundamental principle of purpose limitation in data protection, viz that personal data cannot be used beyond normally foreseeable usage. In *Amann and Segerstedt-Wiberg* the Court demanded that governmental authorities only collect data that is relevant, and based on concrete suspicions. Finally, in the *Rotaru v. Romania* judgment of May 4, 2000, the Court acknowledged the right to individuals to financial redress for damages based on a breach of Article 8 caused by the data processing activities of public authorities.⁴⁷
- 19 Consequently, autonomy and informational self-determination have been accepted as core rationales

underlying Article 8 ECHR in cases regarding the processing of personal data. There are also other cases in which these notions are considered essential, such as in the medical sphere. Such claims often focus on either the bodily or psychological integrity of a person.⁴⁸ It has been stressed by the Court that notions of 'personal autonomy and quality of life' underpin Article 8 ECHR in the medical sphere⁴⁹ and it has held, inter alia, that 'the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted [i.e. in medical cases], greater scrutiny be given to measures which remove the little personal autonomy that is left.'⁵⁰ This notion has been applied to a number of cases in the medical sphere. In a case which regarded the involuntary sterilization of a woman, the Court referred to the 'disregard for informed consent' and found a violation of Article 8 ECHR.⁵¹ In similar fashion, the notion of informed consent has played an important role in cases that regard the choice of the mother to get an abortion.⁵²

- 20 The Court has held that the desire to have a dignified end also falls under the scope of Article 8 ECHR. It emphasizes that, in these matters, self-determination and personal autonomy are essential principles for which regard should be had.⁵³ It accepted in this case that although 'no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'⁵⁴ Moreover, the Court has found that a gynaecological examination was imposed on the applicant 'without her free and informed consent', leading them to find a violation of Article 8 ECHR⁵⁵, and it has 'underlined that it is important for individuals facing risks to their health to have access to information enabling them to assess those risks. It has considered it reasonable to infer from this that the Contracting States are bound, by virtue of this obligation, to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of a planned medical procedure on their patients' physical integrity and to inform patients of these consequences beforehand, in such a way that the latter are able to give informed consent'.⁵⁶
- 21 Consequently, the rationale of self-determination, informed consent and autonomy are accepted in the Court's case law on data protection and medical issues. A final example of cases in which these principles play an important role is in judicial cases that regard custodial disputes. In these disputes, often between parents, it is the government's task to ensure a fair process; on numerous occasions, the Court deals with these elements not under Article 5 and 6 ECHR (guaranteeing the right to a

fair process), but directly under Article 8 ECHR. 'It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). [] The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.'⁵⁷

- 22 Most cases in which these procedural requirements play a role regard parental authority, such as with regard to the custody over a child by divorced parents or the placing in a foster home of children living in an unstable environment. It follows from the fact that the child's interest always prevails that if a parent is separated for an extensive period from his child, it is often not in the interest of the latter to be reunited with either his father, mother or both. From this fact follows an increased importance of a speedy and resolute process, since lengthy procedures may lead to the *de facto* determination of a case.⁵⁸ Moreover, a fair balance should be struck between the interests of the mother and the father. Although the Court has been reluctant to focus on substantive rights in such matters, it has granted both parents, inter alia, the right to be heard, to be informed in full about existing reports and documents, and to have their interests weighed in a fair and balanced manner.⁵⁹ The parents should thus be equally and fully informed and have an equal opportunity to defend their case before the national authorities and courts. The right to take part in the decision-making process regarding the future of his child enhances a person's autonomy and provides him with a possibility to exert control over and be informed about one's private and family life.
- 23 In the case law of the Court, however, these principles have also been increasingly adopted under the right to privacy in other matters, such as the loss of one's home due to destruction or expropriation,⁶⁰ cases in which immigrants are expelled⁶¹, and cases that regard the quality of the living environment. For example, the Court has held that where 'a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals'

rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act, or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.'⁶² Consequently, under Article 8 ECHR, citizens now have a right to actively steer and influence decisions that affect their lives in general.

D. Human flourishing

- 24 Although negative freedom and autonomy are thus important fundamentals underlying the right to privacy in the European Convention on Human Rights, in more and more recent cases, the Court focuses on the right to individual and group identity, the development of one's personality and the right to human flourishing. The Court has provided protection to a range of activities under Article 8 ECHR that it sees as essential to the right to personal development.⁶³ The obligation to wear prison clothes has been held to interfere with a prisoner's private life due to the stigma it creates.⁶⁴ The refusal of the authorities to allow an applicant to have his ashes scattered in his garden on his death was held so closely related to his private life that it came within the sphere of Article 8 of the Convention 'since persons may feel the need to express their personality by the way they arrange how they are buried'.⁶⁵ The Court has accepted that a person has a right to live and work in a healthy living environment.⁶⁶ And so one could go on. It goes too far to discuss all these cases. Four matters will be discussed instead: the protection of and freedom to develop one's personal identity, minority identity, relational identity and public identity.
- 25 *Personal identity*: As a general principle, the Court has held that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life as guaranteed by Article 8 ECHR.⁶⁷ It has on numerous occasions emphasized that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for one's personality.⁶⁸ Thus, the Court has accepted in its case law that the right to privacy includes, inter alia, the right to obtain information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.⁶⁹ The vital interest people have in

receiving the information necessary to know and to understand their childhood and early development may require states to adopt legislation facilitating a person's quest. Moreover, an adult may be forced to submit himself to paternity proceedings, for example, through DNA-tests, and sperm-banks may under certain circumstances be held to reveal the identity of a sperm-donor.⁷⁰

- 26 Besides the right to establish details of one's identity, it has been accepted that the right to respect for private life ensures a sphere within which everyone can freely pursue the development and fulfillment of his personality. 'The right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name'.⁷¹ In forming, creating, and maintaining one's identity, the Court has held that personal names may be of pivotal importance. Consequently, it has assessed cases under the scope of Article 8 ECHR in which a spouse complained that she had to adopt the surname of her husband, even though she was known by her maiden name in her inner circle and in professional relationships. The Court has also accepted that, under certain circumstances, children have the right to choose their forename or their surname, and, finally, the Court has granted that individuals have the right to alter their birth-given name.⁷²
- 27 The right to alter one's name has been of special importance to those wanting to change their identity, such as transsexuals. In this sphere, the Court has accepted that Article 8 ECHR not only provides the individual with protection of his bodily integrity, the right to privacy also guarantees the psychological and moral integrity of the person, which encompasses aspects of his physical and social identity.⁷³ Deriving from this notion, the Court has accepted the right of transsexuals to personal development and to physical and moral security in the full sense. It has strongly condemned European countries that did not accept the newly adopted identity and gender of transsexuals, leading to the situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other.⁷⁴ The Court has argued that in the absence of legal recognition of this newly adopted identity, either through a change in social appearance or through medical procedures, a 'conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety'.⁷⁵ Besides being able to adopt a new name reflecting the new gender, the Court has accepted that governments have a positive obligation to recognize a transsexual's new gender in official documents and official correspondence. National states need to change the gender in either the birth register or in other civil registers, among other things in order to allow transsexuals to marry

a person of the opposite sex, as some European countries prohibit same sex marriages.⁷⁶

- 28 *Minority identity*: Not only with regard to transsexuals, but more in general, the Court is hesitant to allow national laws that have the aim or effect of creating inequality among certain groups in society. The Court stresses that the respect for and the right to develop and express one's minority identity is of pivotal importance for a person to prosper and flourish. That is why, in contrast to its general approach, the Court has accepted that in this field, applicants may not only successfully complain about concrete harm and individual injury, but also about general policies and laws as such (so called *in abstracto* claims), without them having been directly applied to the applicants.⁷⁷ In this sense, these types of cases do not regard the protection of harm to an individual's negative freedom or autonomy, as the laws did not have any concrete effect on his private life, but they may hamper a person's interest in exploring his identity or developing his personality, which may be hampered through a social or legal stigma.
- 29 For example, a case was assessed in which the national legislator had adopted a prohibition on abortion and the applicant neither was pregnant nor had been refused an interruption of pregnancy. Still, the Court accepted that the legal regulation of abortion as such had to be considered an interference with the applicant's private life, so that she could successfully claim to be a victim.⁷⁸ Likewise, when a difference was made in national legislation between the inheritance rights of children born in and those born out of wedlock, the Government pointed out that the laws had not been applied to the applicants nor would they be in the foreseeable future and that they could consequently not claim to be a victim. The Court, however, held that the applicants were challenging a legal position, that of an unmarried mother and of children born out of wedlock, which affected them, according to the Court, personally.⁷⁹
- 30 This doctrine of victimship through the mere existence of a legal provision has been applied specifically with regard to the regulation of homosexual practices. In general, such regulations have been found to interfere with the private life of individuals due to the general stigmatization of homosexuality, leading to reluctance to disclose their sexual orientation and having a chilling effect in relation to engaging in sexual activities and developing their personality to the fullest. The Court has held, for example, that 'the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his

private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.⁷⁸⁰

- 31 Finally, the Court has also held that under certain circumstances, states may have a positive obligation to adopt wider liberties and freedoms for minorities in order to allow them to fully experience and develop their minority identity. For example, the Court has accepted that caravans and other mobile homes fall under the concept of ‘home’, which has had important consequences for Gypsies and other nomadic groups,⁸¹ who generally do not possess a fixed shelter or home.⁸² Subsequently, Article 8 ECHR has been interpreted to provide protection to the traditional life styles of minority groups.⁸³ Inter alia, the Court has been willing to accept ‘that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant’s stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.’⁸⁴
- 32 What is more, states may be under the positive obligation to take active measures to respect and facilitate the development of these minority identities. The Court has emphasized the ‘[] emerging international consensus amongst the Contracting States of the Council of Europe, recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community.’⁸⁵ This right to respect for minority life requires states to accept ‘that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases’ in order to allow them to fully explore, develop and express their identity, and that governments ‘should pursue their efforts to combat negative stereotyping of the Roma’, among others, because ‘any negative stereotyping of a group, when it reaches a certain level, is capable of impacting the group’s sense of identity, the feelings of self-worth, and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group’.⁸⁶
- 33 *Relational identity*: Furthermore, not only is the formation of one’s identity and the development of one’s personality essential under Article 8 ECHR, but also particularly pertinent to the right to privacy under both the Declaration and the Convention is that it provides protection for family life. Although the Declaration and especially the Convention primarily contain individual rights, the protection of the family sphere is best described as a ‘relational’ right which can only be enjoyed in association with others.⁸⁷ This element was heavily discussed by the authors of both documents, as the right to privacy was considered the most ‘private’ of all human rights and the relationships with the outside world would, according to some, be asymmetric to the right to protection of one’s private life, home, and correspondence.⁸⁸ Moreover, this element was seen as redundant as both documents contain a separate provision, Article 16 UDHR and Article 12 ECHR, laying down the right to marry and to found a family.⁸⁹ However, the protection of the family life was finally accepted as part of both Article 12 UDHR and Article 8 ECHR both because it was seen as essential to the right to privacy and because, in contrast to Article 16 UDHR and Article 12 ECHR, it granted protection to the already-existing family life, instead of founding it, emphasizing the character of a negative right.
- 34 Following the doctrine of the Convention as a living instrument, the Court has also provided protection under Article 8 ECHR to non-traditional families, including the relationship between non-biological parents and bastard or adoptive children, between parents and children who do not live together, and it has also provided protection to family life between children and grandparents or third parties, if there exist special emotional and psychological bonds.⁹⁰ Parents also have a right to maintain a family relationship with their children and states may have a positive obligation to ensure *de facto* contact between parent and child.⁹¹ The right to have access to one’s child is highly regarded by the Court, as it has held that the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, which is pivotal to the mutual exploration and development of their personalities.⁹² Prisoners have also been granted rights to maintain and develop family ties; for example, to have regular visiting hours to see their spouse and children. The Court has stressed that the right to establish and to develop relationships with other human beings also extends to the sphere of imprisonment⁹³ and that Article 8 ECHR requires states to assist prisoners as far as possible in creating and sustaining ties with people outside prison in order to promote prisoners’ social rehabilitation.⁹⁴ Such ties may extend beyond that of a traditional family, and includes contact and correspondence with friends and professional relationships. According to the Court, the respect for private life may include the encouragement of and

assistance to a prisoner to lead a good and useful life, to maintain his self-respect and a sense of personal responsibility, and to establish and maintain such relations with persons and agencies outside prison as may best promote the interests of his family and his own social rehabilitation.⁹⁵ Furthermore, although not yet accepting it as a subjective right under Article 8 of the Convention, the Court has expressed its favorable opinion towards prison systems that allow for conjugal visits.⁹⁶

- 35 The positive rights of citizens and positive obligations for states under Article 8 have led to a fast marginalisation of Article 12 ECHR, which is increasingly redundant. Article 8 provides protection to homosexual couples and families founded through adoption or artificial insemination, which are denied protection under the right to marry and found a family.⁹⁷ Subsequently, the right to found a family and establish legal modes of cohabitation are primarily approached from the perspective of Article 8, such as the desire to found a family through *in vitro* fertilisation⁹⁸ and in cases regarding the legal incapacity to marry.⁹⁹ Finally, not only do states have a negative obligation to protect the right to found a family under Article 8, they may under certain circumstances have a positive obligation to facilitate artificial insemination; for example, if this is a prisoner's only way to fulfill his desire to found a family with his spouse.¹⁰⁰
- 36 *Public identity*: The Court stresses that the right to establish and develop relationships with other human beings, especially in the emotional field for 'the development and fulfillment of one's own personality',¹⁰¹ is not limited purely to the private realm¹⁰² or the protection of one's sexual identity¹⁰³ as 'it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.'¹⁰⁴ The Court has held on numerous occasions that the right to privacy also provides protection to the full fulfillment and development of a person's identity in the public sphere. The Court has increasingly suggested that the private life and the public life, the private sphere and the public sphere and private activities and public activities are so intrinsically intertwined that both are provided protection under the scope of the right to privacy if this is essential to the development of an individual's public identity. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time. The Court has held that a search conducted at a private individual's home which was also the registered office of a company run by him amounted to an interference

with his right to respect for his home within the meaning of Article 8 of the Convention.¹⁰⁵

- 37 Similarly, the Court has accepted that correspondence over business telephones and conversations regarding professional affairs fall under the scope of the right to privacy.¹⁰⁶ This is so, according to the Court, because private life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'¹⁰⁷ and because Article 8 of the Convention 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.¹⁰⁸ Consequently, the notion of private life embodied in Article 8 ECHR includes 'activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.¹⁰⁹
- 38 This notion of personal development in external relationships and professional affairs has led the Court to accept many cases which solely or primarily regard professional conduct under the right to privacy. Among others, it has held that restrictions imposed on access to certain professions may have a significant impact on a person's private life¹¹⁰ and dismissal from office has been found to interfere with the right to respect for private life.¹¹¹ For example, the Court has held that the dismissal 'from the post of judge affected a wide range of his relationships with other persons, including the relationships of a professional nature. Likewise, it had an impact on his "inner circle" as the loss of job must have had tangible consequences for material well-being of the applicant and his family.'¹¹² Consequently, the protection of the working space and the personal development in the professional sphere have been accepted under the realm of privacy as protected by Article 8 ECHR.

E. Analysis

- 39 This article has discussed which value underlies Article 8 ECHR. Although there is no agreement among scholars in terms of which value privacy can be best defined, generally two concepts play an important role, namely negative freedom and autonomy. Negative freedom is the situation in which one is free from being acted upon by others. Autonomy revolves around a form of control, active influence or informed consent. In this article, three points have been made. First, that the origins of the Convention as a whole and the right to privacy in particular lie in defending a concept of negative freedom in vertical relations, that is between the state and the citizen. In this line, the Court still

holds that the ‘essential object of Article 8 is to protect the individual against arbitrary action by the public authorities’. This rationale is most apparent in security-related cases-- when wire-tapping telecommunication, when officials enter private houses in order to arrest a habitant or to seize certain documents or objects, with regard to general surveillance measures by secret service organizations, or matters in which the territorial integrity of the state is at stake. However, the Court has gradually diverged from the original approach by the Convention authors by accepting both positive obligations for national states and granting a right to positive freedom to individuals under the right to privacy. Consequently, states are held, among others, to ensure adequate protection of privacy in horizontal relationships. Most prominently, this development plays a role in matters in which the freedom of expression is used to infringe upon the privacy or reputation of others. Although the right to reputation and honor had been explicitly omitted from Article 8 ECHR by the authors of the Convention, in its case law from 2007 onward, the Court has nevertheless accepted it as a subjective right falling under the protection of privacy.

- 40 The second point is that more and more emphasis has been placed on the concept of autonomy. Although the Convention does not contain a right to data protection as such, the Court has accepted many of the core concepts that enhance the individual’s control over his personal data under the scope of Article 8 ECHR. Moreover, in matters in the medical sphere, such as relating to euthanasia, abortion and sterilization, the Court has stressed that the notions of ‘personal autonomy and quality of life’ underpin the right to privacy. ‘Informed consent’ is the basic concept with which it works. Finally, the ECtHR has also accepted that Article 8 ECHR contains implicit procedural requirements that enhance a person’s autonomy and control in (national,) judicial or administrative judgments that affect his private or family life. These requirements play an especially important role in cases revolving around parental authority and custody. The Court has granted parents, among others, the right to be heard, to be informed in full about existing reports and documents, and to have their interests weighed in a fair and balanced manner.
- 41 Finally, it has been argued that more and more cases concern a form of positive freedom, such as the right to explore, develop and express one’s identity, to found a family and maintain and develop family relations, to develop contacts with others, to experiment with one’s personality, and to flourish as a human being both in private and in professional environments. These matters seem to go beyond the traditional concepts of autonomy and negative freedom. For example, the idea that private life ‘encompasses the right for an individual to form

and develop relationships with other human beings, including relationships of a professional or business nature’, that it also ‘protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world’ and that activities of a professional or business nature fall within the scope of the right to privacy as it is in ‘the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world’, seem too far removed from negative freedom and autonomy, or even human dignity, to be able to explain the Court’s approach in a satisfactory manner.

- 42 It has been suggested that the notion of human flourishing, a key concept in virtue ethics, might instead be able to provide a solid theoretical explanation for the broad approach taken by the ECtHR.¹¹³ Human flourishing is directed at the optimal personal development a person can attain – it therefore knows virtually no boundaries, as almost everything could be instrumental to maximum flourishing, especially as what it is for a human to flourish may differ from person to person. For example, John Finnes has suggested that human flourishing embodies the protection of, inter alia, life itself; for example, in relation to health and safety, knowledge, excellence in work and play, friendship and self-expression.¹¹⁴ Consequently, it should be noted that human flourishing does not only focus on positive freedom, but sees negative freedom and autonomy-- for example, through safeguarding health and security-- as a precondition for personal development. This broad list of categories already comes quite close to the different matters the Court has provided protection to under the scope of Article 8 ECHR. Moreover, the specific focus on ‘the development and fulfillment of one’s own personality’, both in the private and in the public realm, seems aligned to the teleological approach of virtue ethics in which the focus lies on the inherent development toward optimal ends. Finally, the increased focus on positive obligations for the state, which already make up a substantial part of the cases concerning Article 8 ECHR, fits well in the virtue ethical paradigm, in which the state may have a duty to facilitate the human flourishing of its citizens (it might even be called its *raison d’être*). In contrast, such an active role by the state seems difficult to reconcile with the rationale of negative freedom and only in partial harmony with a focus on individual autonomy.
- 43 If it is accepted that human flourishing could provide a satisfactory explanation for the Court’s approach, this would mean that the established idea that human rights are grounded primarily in a Kantian (deontological) paradigm, which provides protection for human dignity, negative freedom, and personal autonomy, should be complemented

with the notion of human flourishing central to virtue ethics. Although Kant has often been called the father of human rights,¹¹⁵ Aristotle, the founder of virtue ethics, and virtue ethics may become a new and important addition to understanding the background, value, and scope of the right to privacy. This is not only of theoretical importance; it has practical significance for privacy protection in the age of Big Data. Adequate protection currently suffers from two important aspects of the present privacy paradigm. First, the current privacy paradigm is focused on individual rights. Second, it is focused on individual interests.

- 44 However, in Big Data processes, it becomes increasingly difficult to demonstrate harm to one's interests. Often, an individual is simply unaware that his personal data is gathered by either his fellow citizens (e.g. through the use of their smartphones), by companies (e.g. by tracking cookies), or by governments (e.g. through covert surveillance). But even if a person would be aware of these data collections, given the fact that data gathering and processing is so widespread and omnipresent, it will quite likely be impossible for him to keep track of every data processing which includes (or might include) his data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. And if an individual does go to court to defend his rights, he has to demonstrate a personal interest, that is personal harm, which is a particularly problematic notion in Big Data processes. For example, what concrete harm has the data gathering by the NSA done to an ordinary American or European citizen? This also shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality – while the traditional discourse is focused on individual rights and individual interests, data processing often concerns structural and societal issues. Connecting these types of processes to individual harm to one's autonomy, dignity, or negative freedom proves increasingly difficult. In reality, it seems that more structural and abstract interests are at stake.¹¹⁶
- 45 Virtue ethics could provide alternatives on both points. First, as has been stressed above, virtue ethics is not focused on individual rights or claims but on virtue-duties. It thus shifts from, what is called, a patient-based theory, in which the focus lies on the one being acted upon through, for example, a privacy violation, to an agent-based theory, which assesses the behavior of the actor of, for example, a privacy violation. The correlation between rights and duties (if you have a right, I have a duty to respect it) is broken. Agents should act in a virtuous manner and possess a virtuous character, whether somebody else has a right to it or not. The focus on character is especially important in virtue ethics. Not only are the consequences of actions assessed,
- the intentions and responsibilities of the agent also play an important role. Thus, if an agent acted in a way which may be called unvirtuous, for example negligent or uninterested, without any concrete damage or harm following from it, virtue ethics may still find that person culpable.
- 46 It takes a broader perspective on the responsibilities of the agent and takes as starting point the optimal or best behavior imaginable of an agent. For the state, this might lead to a number of positive obligations, not only to avoid actual and concrete harm but also to avoid abuse of power (connected to the virtue of temperance) and to be fully transparent about the use of power (connected to the virtue of honesty). Consequently, it shifts the focus from the citizen, having a subjective right, to the state, having an obligation to make sure that it acts in a good and transparent manner. Thus, even if Big Data processes, such as the data collection by the NSA or other intelligence services, do not amount to any concrete and actual harm of citizens, they may still conflict with virtue duties if the use of power was disproportional and intransparent (which indeed seems the case with the NSA). This solves the problem, signaled earlier, that it is becoming increasingly difficult to claim and invoke an individual right in the new technological environment.
- 47 Consequently, there is a shift from rights to obligations. This obligation is principally connected not to the interests of others but to the need to act as a responsible and virtuous agent (independent of any right or claim by others). Still, this does not mean that the consequences for others are excluded from virtue ethics. If a person wants, for example, to help his handicapped neighbor (as a virtuous agent should) by mowing the lawn and, though genuinely and thoughtfully goes about, fails at it (e.g. ruins the lawn), a virtue ethical theory would not judge that agent culpable. However, if he does not learn from his mistakes and ruins the lawn a second time, he may be culpable, as 'in an important sense agent-based moralities do take consequences in account because they insist on or recommend an overall state of motivation that worries about and tries to produce good consequences.'¹¹⁷ Consequently, the agent needs to improve himself if he is genuinely concerned with producing good results; it may even be so that a particular clumsy person or a person particularly bad at a certain task (e.g. mowing the lawn) needs to abstain from acting, even though the intentions are good. Furthermore, a person should obtain sufficient information to be able to make a careful and reasoned judgment. If an agent acts without making a reasonable effort to gather relevant facts, he is not qualified a virtuous agent.
- 48 Thus, the consequences of actions and the interests of others are partially taken into account. Still, these interests are different from the traditional

interests central to privacy theories and practice. Reference can be made to Feinberg who, defining harm as a setback to interests, distinguished between two types of interests. ‘According to one of these, a person’s more ultimate goals and aspirations are his more important ones: such aims as producing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully raising a family []. By a quite different and equality plausible standard, however, a person’s most important interests are by no means as grand and impressive as these. They are rather his interests, presumably of a kind shared by nearly all his fellows, in the necessary means to his more ultimate goals, whatever the latter may be, or later come to be. In this category, are the interests in the continuance for a foreseeable interval of one’s life, and the interests in one’s own physical health and vigor, the integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement [].’¹¹⁸ Consequently, the first category of, what Feinberg calls, ulterior interests are interests that protect the individual’s desire to attain the maximum gratifying life possible. By contrast, the second category of, what Feinberg calls, welfare interests protect everyone’s concerns regarding the minimum necessities of human life.

- 49 Privacy protection has always been linked to the protection of welfare interests. It is said to protect either a person’s negative freedom, autonomy, his human dignity or the ‘person as a person’, meaning his capacity to choose as a rational individual.¹¹⁹ These interests are the minimum conditions of a human (worthy) life, as without autonomy, dignity or respect for their rational capacity, people are treated not as humans but as animals. By contrast, human flourishing protects the individual’s interests in striving for the maximum gratifying life. Not only is there a difference between the character of these two rights, there is also an important difference on the matter of defining harm. Welfare interests, those connected to the minimum standards of human life, are shared (to a large extent) by every human being. They thus contain a relatively objective and verifiable component. Ulterior interests, by contrast, differ from person to person. What person A regards as a maximum gratifying life-- for example, hiking mountains-- may sound ridiculous to person B, who’s dream it is to write a novel. Ulterior interest are thus highly subjective and only the subject itself can reasonably assess whether these interests are hampered and to what extent.
- 50 Not surprisingly, many scholars increasingly focus on harm to ulterior interests, instead of welfare interests, when discussing privacy violations following from Big Data processes. Neil Richards has, for example, held that ‘surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance

of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas.’¹²⁰ He argues that in order to protect our intellectual freedom to think without state oversight or interference, we need, what he calls, “intellectual privacy.”¹²¹ Intellectual privacy protects a person’s freedom to develop one’s identity and personality to the fullest, by experimenting freely in private and in public, offline and online. The interests of a person to flourish to the fullest extent is clearly an ulterior interest. Richard also stresses the need for a subjective standard for determining harm, as he criticizes the American courts.

‘In Laird v. Tatum, the Supreme Court held that it lacked jurisdiction over the claims that the surveillance violated the First Amendment rights of the subjects of the program, because the subjects claimed only that they felt deterred from exercising their First Amendment rights or that the government could misuse the information it collected in the future. The Court could thus declare that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”’¹²²

- 51 On this point, the ECtHR seems to have an advantage. It grants protection to a wide variety of matters related, in general, to the development of one’s personality and identity, it accepts not only the protection of welfare but also of ulterior interests and it increasingly refers to abstract harm-- for example, following from a social or legal stigma-- to determine whether complainants have suffered from particular privacy violations, and to subjective harm. A move to virtue ethics could explain and facilitate this move. Of course, such a move triggers a number of questions and remarks. - Law is about actions and consequences. How can notions such as character and virtues play a role in this? - Can amorphous creatures, i.e. legal persons such as states, have a character or be called virtuous? - Who decides what virtuous behavior is and is it not dangerous to impose on others such an ideal? - Privacy is about autonomy and negative freedom, a theory that focuses on human flourishing should simply not be called a privacy doctrine. - Law should be codifiable and enforceable, virtue ethics is neither. - As always, further research is needed to determine how far these types of critiques are valid and, if so, insurmountable. Still, it needs to be pointed out that many of these question could also be directed at the case law of the Court, as its current approach to Article 8 ECHR already includes many virtue ethical notions as discussed in this contribution.
- 1 See among others: P. Aries and G. Duby (eds), ‘A history of private life’, Cambridge, Belknap Press of Harvard University Press, 1987.

- 2 See among others: S. van der Geest, 'Toilets, privacy and perceptions of dirt in Kwahu-Tafo'. In: S. van der Geest and N. Obirih-Opareh (eds), 'Toilets and Sanitation in Ghana: An urgent matter', Accra: Institute of Scientific and Technological Information (INSTI), CSIR, 2001. S. van der Geest, 'The toilet: Dignity, privacy and care of elderly people in Kwahu, Ghana'. In: S. Makoni & K. Stroeken (eds), 'Ageing in Africa: Sociolinguistic and anthropological approaches', Aldershot: Ashgate, 2002. B. Moore, 'Privacy: Studies in Social and Cultural History', M.E. Sharpe, New York 198. J.M. Roberts and T. Gregor, 'Privacy: A Cultural View' in: J.R. Pennock and J.W. Chapman, 'Privacy: Nomos XIII', Atherton Press, New York 1971, p. 199-225.
- 3 H. Nissenbaum, 'Privacy in context: technology, policy, and the integrity of social life', Stanford, Stanford Law Books, 2010.
- 4 D. J. Solove, 'Understanding privacy', Cambridge, Harvard University Press, 2008, p. 84.
- 5 S. D. Warren and L. D. Brandeis, 'The Right to Privacy', Harvard Law Review, Vol. IV, December 15, 1890, No. 5. pp. 193-220.
- 6 B. van der Sloot, 'Privacy in the post-NSA era: time for a fundamental revision?', *JIPITEC*, 2014-1. B. van der Sloot, 'Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation', *International Data Privacy Law*, 2014-4, p. 307-325. B. van der Sloot, 'Do privacy and data protection rules apply to legal persons and should they? A proposal for a two-tiered system', *The Computer Law & Security Review*, 2015-1.
- 7 B. Roessler, 'The Value of Privacy', Polity Press, Cambridge, 2005, p. 117.
- 8 A. F. Westin, 'Privacy and freedom', New York, Atheneum, 1967.
- 9 Supreme Court *Roe v. Wade*, 410 U.S. 113 (1973).
- 10 G. L. Weil, 'The European Convention on Human Rights: background, development and prospects', Leyden, Sijthoff, 1963.
- 11 L. Zwaak, 'General survey of the European Convention', p. 3. In: P. van Dijk et al. (eds), 'Theory and practice of the European Convention on Human Rights', Antwerpen, Intersentia, 2006.
- 12 It specifies: Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared.
- 13 The authors of the Convention began their deliberation on the basis of a 'short list' of the rights and freedoms contained in the Declaration. A.H. Robertson, 'Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme. Vol. 1 Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949', The Hague, Nijhoff, 1975.
- 14 See regarding the origins of the Universal Declaration among others: M.G. Johnson & J. Symonides, 'The Universal Declaration of Human Rights: a history of its creation and implementation, 1948-1998', Paris, Unesco, 1998. A. Eide & T. Swinehart, 'The Universal Declaration of Human Rights: a commentary', Oslo, Scandinavian University Press, 1992. A. Verdoodt, 'Naissance et signification de la Déclaration Universelle des droits de l'Homme', Louvain, Warny, 1964. N. Robinson, 'The Universal Declaration of Human Rights: its origin, significance, application, and interpretation', New York, World Jewish Congress, 1958. G. Johnson & J. Symonides, 'La Déclaration universelle des droits de l'homme: 40e anniversaire, 1948-1988', Paris, L'Harmattan, 1990.
- 15 A.H. Robertson, 'Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 2 Consultative Assembly, second session of the Committee of Ministers, Standing Committee of the Assembly, 10 August-18 November 1949', The Hague, Nijhoff, 1975, p. 220.
- 16 Robertson, vol 2., p. 90.
- 17 K. Vasak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights', UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.
- 18 See regarding the right to property protected under the First Protocol: C.B. Schutte, 'The European fundamental right of property: article 1 of Protocol no. 1 to the European Convention on Human Rights: its origins, its working and its impact on national legal orders', Deventer, Kluwer, 2004.
- 19 UN documents: E/HR/3.
- 20 H. Tomlinson, 'Positive obligations under the European Convention on Human Rights', <<http://bit.ly/17U9TDa>>, p. 2.
- 21 See among others: ECtHR, *Arvelo Apont v. the Netherlands*, application no. 28770/05, 3 November 2011, § 53.
- 22 ECtHR, *Keegan v. the United Kingdom*, application no. 28867/03, 18 July 2006. ECtHR, *Mancevschi v. Moldova*, application no. 33066/04, 07 October 2008.
- 23 S. Greer, 'The exceptions to Articles 8 to 11 of the European Convention on Human Rights', Council of Europe, 1997, p. 19.
- 24 ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987. ECtHR, *Klass and others v. Germany*, application no. 5029/71, 06 September 1978. ECtHR, *Erdem v. Germany*, application no. 38321/97, 05 July 2001.
- 25 ECtHR, *Slivenko v. Latvia*, application no. 48321/99, 09 October 2003. ECtHR, *Gulijev v. Lithuania*, application no. 10425/30, 16 December 2008.
- 26 ECtHR, *Nazarenko v. Ukraine*, application no. 39483/98, 29 April 2003. ECtHR, *Lich v. Ukraine*, application no. 41707/98, 29 April 2003.
- 27 ECtHR, *Boultif v. Switzerland*, application no. 54273/00, 02 August 2001. ECtHR, *Uner v. the Netherlands*, application no. 46410/99, 18 October 2006.
- 28 ECmHR, *X. v. Iceland*, application no. 6825/74, 18 May 1976.
- 29 A.R. Mowbray, 'The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights', Oxford, Portland, 2004. ECtHR, Case "Relating to certain aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968. ECtHR, *Marckx v. Belgium*, application no. 6833/74, 13 June 1979. ECtHR, *Marzari v. Italy*, application no. 36448/97, 4 May 1999. ECtHR, *Monory v. Hungary*, application no. 71099/01, 05 April 2005.
- 30 ECtHR, *Köpke v. Germany*, application no. 420/07, 05 October 2010.
- 31 UN Documents: A/C.3/SR.119. See for a full list of all documents on the drafting of the Universal Declaration: <http://www.un.org/depts/dhl/udhr/meetings_1946_nuclear.shtml>.
- 32 <[http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART10-CDH\(75\)6-BIL1338894.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART10-CDH(75)6-BIL1338894.pdf)>.
- 33 See among others: ECmHR, *Asociacion de Aviadores de la Republica, Mata et al. V. Spain*, 10733/84, 11 March 1985. ECtHR, *Saltuk v. turkey*, application no. 31135/96, 24 August 1999. ECtHR, *Marlow v. United Kingdom*, application no. 42015/98, 5 December 2000, application no. 28341/95.
- 34 ECmHR, *N. v. Sweden*, application no. 11366/85, 16 November 1986. See among others: ECmHR, *Rayayd and Unanua v. Spain*, application nos. 31477/96, 15 January 1997. ECtHR, *Minelli v. Switzerland*, 14991/02, 14 June 2005. ECtHR, *GourGuénidzé v. Georgia*, application no. 71678/01, 17 October 2006. ECtHR,

- Von Hannover v. Germany, application no. 59320/00, 24 June 2004.
- 35 ECtHR, L. L. v. France, application no. 7508/02, 10 October 2006.
- 36 ECtHR, Pfeifer v. Austria, application no. 12556/03, 15 November 2007, § 35.
- 37 ECtHR, A. v. Norway, application no. 28070/06, 09 April 2009, § 64.
- 38 Article 2 (h) & article 7 Data Protection Directive.
- 39 Recital 46 & article 17 Data Protection Directive. Article 10 Data Protection Directive.
- 40 Article 12 (b) & (c) Data Protection Directive.
- 41 <http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf>.
- 42 See for the classic cases: ECtHR, Peck v. the United Kingdom, application no. 4467/98, 28 January 2003. ECtHR, P.G. and J.H. v. the United Kingdom, application no. 44787/98, 25 September 2001. ECtHR, Halford v. the United Kingdom, application no. 20605/92, 25 June 1997. ECtHR, Perry v. the United Kingdom, application no. 63737/00, 17 July 2003. ECtHR, Klass e.a. v. Germany, application no. 5029/71, 06 September 1978. ECtHR, Malone v. the United Kingdom, application no. 8691/79, 02 August 1984. ECtHR, Gaskin v. the United Kingdom, application no. 10454/83, 07 July 1989. ECtHR, Leander v. Sweden, application no. 9248/81, 26 March 1987. See for more recent cases: ECtHR, Szulc v. Poland, application no. 43932/08, 13 November 2012. ECtHR, Avram and others v. Moldova, application no. 41588/05, 05 July 2011. ECtHR, Van Vondel v. the Netherlands, application no. 38258/03, 25 October 2007.
- 43 Following criteria specified in paragraph 2 of Article 8.
- 44 See in general: A.R. Mowbray, 'The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights', Hart Publishing, Oxford, 2004.
- 45 ECtHR, Copland v. the United Kingdom, application no. 62617/00, 03 April 2007. ECtHR, Halford v. the United Kingdom, application no. 20605/92, 25 June 1997. ECtHR, Amann v. Switzerland, application no. 27798/95, 16 February 2000.
- 46 See: ECtHR, Peck v. the United Kingdom, application no. 4467/98, 28 January 2003. ECtHR, Amann v. Switzerland, application no. 27798/95, 16 February 2000. ECtHR, Rotaru v. Romania, application no. 28341/95, 04 May 2000.
- 47 <http://www.vub.ac.be/LSTS/pub/Dehert/328.pdf>
- 48 ECtHR, Fyodorov and Fyodorova v. Ukraine, application no. 39229, 07 July 2011. ECtHR, Csoma v. Romania, application no. 8759/05, 15 January 2013.
- 49 ECtHR, Hristozov and others v. Bulgaria, application nos. 47039/11 and 358/12, 13 November 2012.
- 50 ECtHR, Munjaz v. the United Kingdom, application no. 2913/06, 17 July 2012, § 80.
- 51 ECtHR, N.B. v. Slovakia, application no. 29518/10, 12 June 2012. ECtHR, I.G. a.o. v. Slovakia, application no. 15966/04, 13/11/2012. ECtHR, V.C. v. Slovakia, application no. 18968/07, 08/11/2011.
- 52 See among others: ECtHR, P. and S. v. Poland, application no. 57375/08, 56 May 2011. ECtHR, Bosso v. Italy, application no. 50490/99, 05 September 2002. ECmHR, Brüggemann and Scheuten v. Germany, application no. 6959/75, 19 May 1976.
- 53 ECtHR, Haas v. Switzerland, application no. 31322/07, 20 January 2011. ECtHR, Koch v. Germany, application no. 497/09, 19 July 2012.
- 54 ECtHR, Pretty v. the United Kingdom, application no. 2346/02, 29 April 2002, § 61.
- 55 ECtHR, Juhnke v. Turkey, application no. 52515/99, 13/05/2008, § 82.
- 56 ECtHR, Csoma v. Romania, application no. 8759/05, 15 January 2013, § 42.
- 57 ECtHR, B. v. the United Kingdom, application no. 9840/82, 8 July 1987, § 63-64. ECtHR, R. v. the United Kingdom, application no. 10496/83, 8 July 1987. ECtHR, W. v. The United Kingdom, application no. 9749/82, 8 July 1987. ECtHR, Diamante and Pelliccioni v. San Marino, application no. 32250/08, 27 September 2011.
- 58 ECmHR, M. M. v. the United Kingdom, application no. 13228/87, 13 February 1990.
- 59 ECtHR, Karrer v. Romania, application no. 16965/10, 21 February 2012. ECtHR, Diamante and Pelliccioni v. San Marino, application no. 32250/08, 27 September 2011.
- 60 ECtHR, Buckland v. the United Kingdom, appl.no. 40060/08, 18 September 2012.
- 61 ECtHR, Alim v. Russia, appl.no. 39417/07, 27 September 2011. ECtHR, Liu v. Russia (no. 2), Liu v. Russia, appl.no. 29157/09, 26 July 2011.
- 62 ECtHR, Taskin and others v. Turkey, appl.no. 46117/99, 10 November 2004, § 119.
- 63 L. Loucaides, 'Environmental protection through the jurisprudence of the European Convention on Human Rights', British Yearbook of International Law, 2005.
- 64 ECmHR, McFeeley v. the United Kingdom, application no. 8317/78, 15 May 1980. ECmHR, X. v. the United Kingdom, application no. 8231/78, 06 March 1982.
- 65 ECmHR, X. v. Germany, application no. 8741/79, 10 March 1981.
- 66 See among others: ECtHR, Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia, application nos. 53157/99, 53247/99, 56850/00 and 53695/00, 26 October 2006. ECtHR, Gadeyeva v. Russia, application no. 55723/00, 09 June 2005. ECtHR, Guerra and others v. Italy, application no. 14967/89, 19 February 1998. ECtHR, Dubetska and others v. Ukraine, application no. 30499, 10 February 2011. ECtHR, Grimkovskaya v. Ukraine, application no. 38182/03, 21 July 2011.
- 67 ECtHR, Odievre v. France, application no. 42326/98, 13 February 2003.
- 68 ECtHR, Mikulic v. Croatia, application no. 53176/99, 07 February 2002. ECtHR, Gaskin v. the United Kingdom, application no. 10454/83, 07 July 1989.
- 69 ECtHR, Jäggi v. Switzerland, application no. 58757/00, 13 July 2006.
- 70 ECmHR, X. v. Austria, application no. 8278/78, 13 December 1979. See also: ECtHR, Phinikaridou v. Cyprus, application no. 23890/02, 20 December 2007. ECtHR, M. G. v. the United Kingdom, application no. 39393/98, 24 September 2002.
- 71 ECmHR, K. B. v. the Netherlands, application no. 18806/91, 01 September 1993.
- 72 See further: ECtHR, Tekeli v. Turkey, application no. 29865/96, 16 November 2004. ECtHR, Guillot v. France, application no. 22500/93, 24 October 1996. ECmHR, Salonen v. Finland, application no. 27868/95, 02 July 1997. ECtHR, Bijleveld v. the Netherlands, application no. 42973/98, 27 April 2000. ECtHR, G. M. B. and K. M. v. Switzerland, application no. 36797/97, 27 September 2001. ECtHR, Tjerna v. Finland, application no. 18131/91, 25 November 1994.
- 73 ECtHR, X. and Y. v. the Netherlands, application no. 8978/80, 26 March 1985.
- 74 ECtHR, Goodwin v. the United Kingdom, application no. 28957/95, 11 July 2002. ECtHR, B. v. France, application no. 13343/87, 25 March 1992.
- 75 ECtHR, I v. the United Kingdom, application no. 25680/94, 11 July 2002, § 57.
- 76 ECtHR, Schalk and Kopf v. Austria, application no. 30141/04, 24 June 2010.

- 77 ECmHR, Taura and 18 others v. France, application no. 28204/95, 04 December 1995.
- 78 ECmHR, Brüggemann and Scheuten v. Germany, application no. 6959/75, 19 May, 1976.
- 79 ECtHR, Marckx v. Belgium, application no. 6833/74, 13 June 1979.
- 80 ECtHR, Dudgeon v. the United Kingdom, application no. 7525/76, 22 October 1981, § 41. ECmHR, Johnson v. the United Kingdom, application no. 10389/83, 17 July 1986. ECtHR, Modinos v. Cyprus, application no. 15070/89, 22 April 1993. ECtHR, Norris v. Ireland, application no. 10581/83, 26 October 1988.
- 81 ECmHR, G. and E. v. Norway, application no. 9278/81, 03 October 1983.
- 82 See also: ECtHR, Ry and others v. Finland, application no. 42969/98, 18 January 2005.
- 83 ECmHR, Smith v. the United Kingdom, application no. 14455/88, 04 September 1991. ECmHR, Smith v. the United Kingdom, application no. 18401/91, 06 May 1993.
- 84 ECtHR, Chapman v. the United Kingdom, application no. 27238/95, 18 January 2001, § 73.
- 85 ECtHR, Aksu v. Turkey, application no. 4149/04 and 41029/04, 27 July 2010, § 49.
- 86 ECtHR (Grand Chamber), Aksu v. Turkey, application nos. 4149/04 and 41029/04, 15 March 2012, § 58 & 75.
- 87 See for the application of relational rights to informational questions: C. M. Emery, 'Relational privacy - a right to grieve in the information age: halting the digital dissemination of death scene images', *Rutgers Law Journal*, Spring, 2011, Vol.42 (3).
- 88 See for example one of the original proposals: E/HR/3
- 89 E/CN.4/AC.1/36 and E/CN.4/82/Add.12.
- 90 See for a more general overview: <<http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>>.
- 91 ECtHR, Diamante and Pelliccioni v. San Marino, application no. 32250/08, 27 September 2011. ECtHR, Kosmopoulou v. Greece, application no. 60457/00, 5 February 2004. ECtHR, Zawadka v. Poland, application no. 48542/99, 23 June 2005. ECtHR, Hoppe v. Germany, application no. 28422/95, 05 December 2002.
- 92 ECtHR, Keegan v. Ireland, application no. 16969/90, 26 May 1994.
- 93 ECmHR, McFeeley v. the United Kingdom, application no. 8317/78, 15 May 1980.
- 94 ECmHR, Wakefield v. the United Kingdom, application no. 15817/89, 01 October 1990.
- 95 ECtHR, Silver and others v. the United Kingdom, application nos. 5947/72 6205/73 7052/75 7061/75 ... more... 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, 25 March 1983.
- 96 ECtHR, Dickson v. the United Kingdom, application no. 44362/04, 04 December 2007.
- 97 See for a more general overview: <<http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>>.
- 98 ECtHR, Evans v. the United Kingdom, application no. 6339/05, 10 April 2007.
- 99 ECtHR, Lashin v. Russia, application no. 33117/02, 22 January 2013.
- 100 ECtHR, Dickson v. the United Kingdom, application no. 44362/04, 04 December 2007.
- 101 ECmHR, X. v. Iceland, application no. 6825/74, 18 May 1976.
- 102 ECmHR, Brüggemann and Scheuten v. Germany, application no. 6959/75, 19 May, 1976.
- 103 Laskey and others v. the United Kingdom, application nos. 21627/93, 21826/93, 21974/93, 21627/93, 21826/93 and 21974/93, 19 February 1997. ECmHR, X. and Y. the United Kingdom, application no. 9369/81, 03 May 1983. ECtHR, Dudgeon v. the United Kingdom, application no. 7525/76, 22 October 1981. ECmHR, S. v. the United Kingdom, application no. 11716/85, 14 May 1986.
- 104 ECtHR, Niemitz v. Germany, application no. 13710/88, 16 December 1992, § 29.
- 105 ECtHR, Chappell v. the United Kingdom, application no. 10461/83, 30 March 1989.
- 106 ECtHR, Stes Colas Est and others v. France, application no. 37971/97, 16 April 2002.
- 107 ECtHR, C. v. Belgium, application no. 21794/93, 07 August 1996, § 25.
- 108 ECtHR, Pretty v. the United Kingdom, application no. 2346/02, 29 April 2002, § 61.
- 109 ECtHR, Niemitz v. Germany, application no. 13710/88, 16 December 1992, § 29.
- 110 See among others: ECtHR, Sidabras and Dziautas v. Lithuania, application nos. 55480/00, 59330/00, 55480/00 and 59330/00, 27 July 2004. ECtHR, Coorplan-Jenni GMBH and Hascic v. Austria, application no. 10523/02, 24 February 2005.
- 111 ECtHR, Ozpinar v. Turkey, application no. 20999/04, 19 October 2010.
- 112 ECtHR, Oleksandr Volkov v. Ukraine, application no. 21722/11, 09 January 2013, § 166.
- 113 See further: M. C. Nussbaum, 'Capabilities and Human Rights', 66 *Fordham L. Rev.* 273, 1997.
- 114 S. Alkire, 'Dimensions of Human Development', *World Development* Vol. 30, No. 2, 2002, p. 186.
- 115 See among others: M. D. White, 'Kantian ethics and economics: autonomy, dignity, and character', Stanford, CA, Stanford University Press, 2011. I. Kant, 'The moral law: Kant's groundwork of the metaphysics of morals', transl. and analysed by H.J. Paton, London, Hutchinson Repr., 1981. I. Kant, 'The metaphysics of morals', translated and edited by M. Gregor, Cambridge, Cambridge University Press, 1996. See also the references to dignity: The Universal Declaration of Human Rights, Article 1. International Covenant on Civil and Political Rights, preamble.
- 116 B. van der Sloot, 'Privacy in the post-NSA era: time for a fundamental revision?', *JIPITEC*, 2014-1.
- 117 M. Slote, 'Morals from Motives', Oxford University Press, New York, 2001, p. 34.
- 118 J. Feinberg, 'Harm to others', New York, Oxford University Press, 1984, p. 37.
- 119 S. I. Benn, 'Privacy, Freedom, and Respect for Persons', p. 223-244. In: F. Schoeman (ed.), 'Philosophical Dimensions of Privacy: an Anthology', Cambridge University Press, Cambridge, 1984.
- 120 N. M. Richards, The dangers of surveillance, *Harvard Law Review* <<http://harvardlawreview.org/2013/05/the-dangers-of-surveillance/>>.
- 121 N. M. Richards, 'Intellectual Privacy', 87 *TEX. L. REV.* 387 (2008)
- 122 *Ibid.*, p. 1943.