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Three Dimensions of Privacy

Beate Roessler

In what follows, I want to look at a systematic account of privacy in which I differentiate, explain, and discuss three dimensions of privacy. Conceptions of privacy based upon a concept of autonomy or individual freedom provide the most interesting and forward-looking possibilities for a conceptualization of the term. Three such dimensions of privacy should be distinguished. These dimensions – not realms, not spaces – of privacy serve to protect, facilitate, and effectuate individual liberties in a variety of respects. Freedom-oriented theories of privacy are to be found within the whole range of theories of privacy, from those that deal with the privacy of (intimate) actions to those concerned with informational privacy or the privacy of the household. It makes sense, therefore, to discuss these different aspects of freedom and privacy individually.

1. Decisional privacy

It is only in recent years that decisional privacy, or the privacy of actions, has been a specialist term in the literature. A decisive factor here was the ruling of the US Supreme Court in the *Roe v. Wade* case, where for the first time in US legal history women were granted a right to physical, sexual self-determination and to terminate a pregnancy, this being grounded upon an appeal to a *right to privacy*. As the explanation formulated by Justice Blackmun famously put it, 'this right to privacy (...) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy' (*Roe v. Wade*, 410 US 113 [1973] 153). This verdict and the discussions that preceded and followed it were hugely influential upon the conceptualization of privacy not only in the United States. As a result, feminist theory has treated sexual freedom of action, the privacy of intimate and sexual acts, and the woman's right of sexual self-determination as central elements in the theory of privacy. Decisive significance is given to the *privacy of the body* (Gatens 2004). This includes the woman's newly won right to conceive of her body as private to the extent that she can decide for herself whether or not to bear a child, and thus enjoys rights of reproductive freedom.

The idea of physical privacy in the sense of the privacy of actions that concern the intimate sphere of women and men lies at the heart of decisional privacy. We should here mention two further central aspects of this form of privacy, therefore, both of which also concern the link between sexuality, the body, and identity, and are decisive for the societal coding and meaning of decisional privacy: these relate to the issues of sexual harassment and sexual orientation.

Both protection from sexual harassment and the respect for diverse sexual orientations form aspects of decisional privacy because and to the extent that it is the privacy of the body that is here vulnerable to infringement (the most comprehensive discussion in Cohen 2002).

The reason that privacy with respect to intimate, sexual decisions is considered so vital is that these decisions form the core of very general decisions that may have far-reaching consequences in terms of who one wants to be and how one wants to live: the core, in other words, of one's freedom to form one's own authentic identity.

When decisional privacy is placed within such a context and understood as serving to secure the possibility of a self-determined, authentic life, of individual projects, individual ways of life, and an individual practical identity, it becomes clear that it is called upon to secure autonomy not only in one's most intimate sphere, but in private acts and behaviour in public contexts too. It emerges, that is, that the protection of decisional privacy is necessary so that freedom in social space and with respect to other individuals in society can be enjoyed in such a way that modes of action, ways of life, and projects can be pursued without undesired interference from others. Restraint, inattention, reserve, and indifference – as forms of respect for this decisional privacy – are expected from others when it comes to the private aspects of the life a person leads in public. One must here of course distinguish very different aspects of decisional privacy according to their social context, but the argument underlying the claim to protection of such privacy remains structurally the same. If one understands a person's self-determination and autonomy to consist in her right to be the (part-)author of her own biography, among other things this must mean that within very different social contexts the person can demand that her decisions and actions should be respected (in the sense that they are 'none of your business') both by social convention and state law. The limits to such privacy are regulated by convention and of course subject to constant renegotiation, yet this sort of respect for a person's 'privacy' – in public contexts as well – is especially relevant for women. The spectrum of decisional privacy thus extends from reproductive rights to freedom of conduct in public space (see Roessler 2017 on decisional privacy and religious freedom).

2. Informational privacy

Discussion about informational privacy also goes back to the interpretation of the US Constitution, in this case beginning with an essay written by Justices Warren and Brandeis after what they felt was an invasion of privacy by intrusive paparazzi at the wedding of Warren's daughter (in 1890). It was here for the first time that the *right to be left alone* was described as a constitutional right to pri-

vacancy in the sense that information about a person is worthy of protection even when it involves something that occurs in public. This is grounded in an appeal to the protection of individual freedom and thus known as the *right to be left alone* (Warren and Brandeis 1890).

Of course, there have been enormous technological advances that have *radically transformed* not only the possibilities for keeping people under surveillance but also our concepts of privacy as well as freedom and autonomy, and that threaten to continue to do so. Especially in the age of Big Data, the surveillance of people as consumers by companies and social platforms, as well as the surveillance by the state is a permanent threat to or violation of informational privacy (Mayer-Schoenberger and Cukier 2013; Morozov 2013).

The idea of informational privacy, however, also incorporates a further framework. At issue here is not only the question of not wanting to have one's smartphone or other devices tapped, one's data kept or sold, or to be kept under surveillance, but also the more general point that people like to keep the knowledge that others have of them under control and within limits they can expect. This brings to light the deep-seated connection between informational privacy and autonomy: people like to have control of their own self-presentation and use the information others have about them to regulate their relationships and thus the roles they play in their various social spaces. If everyone knew everything about everyone else, differentiated relations and self-presentations would no longer be possible, and nor would autonomy and the freedom to determine one's own life. As the German Federal Constitutional Court argued as early as 1983:

A person who cannot tell with sufficient certainty what information concerning him in certain areas is known to his social environment, or who is unable to assess in some measure the knowledge of his communication partners, may be substantially restricted in his freedom to make plans or take decisions in a self-determined way. (BVerfGE 65, 1 [43])

This form of privacy is relevant, first, in friendships and in love relationships, and serves both as protection of relationships and as protection *within* relationships. In some theories of privacy, this even constitutes the very heart of privacy, 'relational privacy' guaranteeing the opportunities for withdrawal that are constitutive for an authentic life (Fried 1968; Rachels 1975).

Of central importance nowadays, however, is the fact that we now live in the *digital society*. Overwhelming evidence suggests that new information and communication technologies (ICTs) are radically transforming our social and political relations: Twitter, Facebook and other social media are changing the ways the

public sphere functions, 'Big Data' is accumulating ever more personal information, and whistle-blowers like Edward Snowden use privacy-enhancing technologies (PETs) to reveal 'deep' secrets states strive to shield from public scrutiny. Today, information is increasingly gathered by employers, security agencies, Internet service providers, online businesses, social networking sites (SNS), and citizens themselves on a tremendous scale. Mobile and wearable computing and reconfigurable sensor networks are used ubiquitously and are converging in an Internet of Things. This new confluence of socio-technical practices will lead to amassing ever-larger quantities of data, large parts of which relate to traceable persons, a development which has been described as a revolution in the history of information technologies (Floridi 2015). On the background of the essential link between individual autonomy and informational privacy, the protection of informational privacy in the digital society thus becomes ever more important as well as challenging.

3. Local privacy

With local privacy, we have now come to the classic, traditional place of privacy, its most genuine locus: one's own home, which for many people still intuitively represents the heart of privacy. It is within our own four walls that we can do just what we want, unobserved and uncontrolled (see Roessler 2017).

Yet it should be made clear from the outset that this form of local privacy is not derived from a 'natural' separation of spheres but from the idea that one of the vital conditions for protecting individual freedoms in modern liberal democracies is to be able to withdraw to within one's own four walls. This has nothing to do with 'nature', but a great deal to do with the notion that (culturally or conventionally constructed) opportunities for withdrawal are a constitutive element of a person's freedom.

Two different aspects of privacy are of relevance here: solitude and 'being-for-oneself' on the one hand, and the protection of family communities or relationships on the other.

People seek the solitude and isolation provided by the protection of their private dwelling in order to avoid confrontation with others. This brings us back to the privacy of the body and the desire to shield one's own body from the sight of other people, thus securing a realm of completely personal intimacy that may even be bound up with feelings of shame. Another aspect of such privacy comes to light, however, in the work of literary models such as Virginia Woolf or George Orwell, for both of whom the privacy of the room – the privacy to write or think – is a precondition for the possibility of self-discovery and an authentic life (Orwell 1954; Woolf 1977).

Secondly, and in a classic sense of the word, local privacy offers protection for family relationships: the privacy of the household provides the opportunity for people to deal with one another in a different manner, and to take a break from roles in a way that is not possible when dealing with one another in public. As is known, however, this dimension or sphere of privacy is especially prone to generate potentials for conflict. From the outset, this has been a particularly important starting-point for feminist criticism, which has associated this realm and the understanding of privacy that accompanies it with the oppression of women on account not only of the gender-specific division of labour, but also domestic violence, and in general the idea that one's home constitutes a pre-political space. What this means, however, is that in discussions about this local form of privacy it is especially important to recall the meaning and function of privacy, which is to protect and facilitate freedom and autonomy, and more specifically to protect and facilitate *equal* freedoms and *equal* opportunities to lead a rewarding life, for women and men alike. Conflicts can here arise with traditional conceptions of privacy as the loving family haven, which have nothing to do with demands for justice or equal rights (as Honneth 2004 argues; contrast Rawls 1999). Yet it should be clear by now that traditional conceptions of the gender-specific division of labour have nothing to do with a protection of privacy that is oriented towards the protection of individual freedom, and that such a reconceptualization thus has repercussions for the justice of the family (Okin 1989 and 1992).

To conclude, let me point out just one of the future problems: In recent debates on privacy, in addition to the focus on privacy as a social value (Solove 2011; Nissenbaum 2010; Roessler and Mokrosinska 2015), the Snowden leaks have highlighted the constitutive relevance of *privacy for democracy* and the ways in which violations of privacy undermine democratic citizenship. This debate around the democratic value of privacy already started in the 1970s, focusing on privacy as a 'constitutive element of a democratic society' (Simitis 1987, 732). The debate gathered momentum especially after the new surveillance laws and massive intrusions of privacy following 9/11. Different authors have analysed the ways in which these intrusions directly influence the democratic political process and change political relations within a society (Hughes 2015; Goold 2010; Solove 2008). It has also been pointed out that the presumption of innocence, one of the cornerstones of the democratic rule of law, is in danger with mass surveillance turning every democratic subject into a potentially guilty object (Roessler and Mokrosinska 2013). However, the precise nature of the relation between privacy and democracy, despite first attempts at conceptualization, remains in need of systematic conceptual and normative reconstruction. Democracy relies upon citizens who value their autonomy, both in public and in private. Threats to privacy, therefore, are always also threats to democracy.