

Pre-final version: final version can be bought here

<http://en.aup.nl/books/9789462984493-the-art-of-ethics-in-the-information-society.html>

Privacy as a Tactic of Norm Evasion, or Why the Question as to the Value of Privacy is Fruitless

Bart van der Sloot

Privacy aims at avoiding norms, whether they are legal, societal, religious, or personal. Privacy should not be regarded as a value in itself, but as a tactic of questioning, limiting and curtailing the absoluteness of values and norms. If this concept of privacy is accepted, it becomes clear why the meaning and value of privacy differs from person to person, culture to culture, and epoch to epoch. In truth, it are the norms that vary; the desire for privacy is only as wide or small as the values imposed. It can also help to shed light on ongoing privacy discussions. The ‘nothing to hide’ may be taken as an example.¹ If you have nothing to hide, so the argument goes, why be afraid of control and surveillance? The reaction has often been to either argue that everyone has something to hide, or to stress why it is important for people to have privacy. For example, it has been pointed out that people need individual privacy in order to flourish, to develop as an autonomous person, or to allow for unfettered experimentation. This, however, is in general rather a weak argument. For example, how have the mass-surveillance activities by the NSA undermined the personal autonomy of an ordinary American or European citizen? Moreover, many feel that national security and the protection of life and limbs is simply more important than being able to experiment unfettered in private. An often-heard rhetorical question is: “Who needs privacy when you are dead?” This essay will argue that there may be a stronger argument to make when the focus is turned around, namely not by looking at privacy as an independent value, which might outweigh or counter other interests, but as a doctrine whose essence it is to limit and curtail the reach and weight of other values.

To illustrate this point, this contribution will focus primarily, though not exclusively, on the evasion of public and legal norms, but the arguments made are no less valid for other types of rules.² This short contribution will give three examples of theories focusing on the freedom from the application of the public norm. Far from being exhaustive, three archetypical strands of this tactic will be discussed: the biblical Garden of Eden, the Arendtian interpretation of the Aristotelian household and the Lockean compromise between the tyranny of the patriarch and that of the monarch. In the first, there is no need for privacy as there is no morality. In the second, norms and laws exist, but cannot be applied to the private domain. In the third, norms and laws could be applied to the private sphere, but there

¹ See the insightful book about this argument: D. J. Solove, ‘Nothing to hide: the false tradeoff between privacy and security’, Yale University Press, New Haven, 2011.

² In general, three tactics of norm-evasion can be distinguished, namely by claiming a form of (1) negative freedom, (2) autonomy or (3) positive freedom. In the first category, privacy is deployed as a tactic of norm evasion by installing zones of non-normativity. In theories that describe privacy as enhancing personal autonomy, privacy functions as a tactic of norm evasion by creating zones of private normativity. Here a formal power is let or transferred to an individual or group to engage in private norm setting. Finally, in theories that describe privacy as a right to pursue a certain positive freedom, the public norm is opposed by a value-laden concept.

is no need to. What they have in common is that they can all be viewed as tactics of limiting or curtailing the reach of the public norm.

The Biblical Garden of Eden

An example of the dialectic relationship between norm and privacy can be found in the biblical Garden of Eden. When God made man and woman, ‘they were both naked, the man and his wife, and were not ashamed.’ The absence of shame signals an absence of both morality and privacy. Shame is the particular feeling man begets when not living up to a norm, either imposed by himself, by society, by the state, or by God. It is also the reason why animals, for whom there is no difference between is and ought, have neither shame nor a desire for privacy. Shame is always the mediating factor between norm and privacy. It is only in the next chapter of the bible that a rule or norm is introduced, namely the command of God not to eat from the tree of Good and Evil. It needs not be recalled that at this point, only the Lord has moral understanding, which makes him the ideal lawmaker but his subjects become transgressors by necessity. Without knowledge of good and bad, man is not only unaware of law’s underlying morality, but also incapable of grasping that violating God’s command is wrong.

When Adam and Eve eat from the tree and beget knowledge of good and bad, immediately a sense of shame and a desire for privacy arises: ‘the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.’³ In the biblical story, it is not the violation of the norm Adam and Eve are afraid of, as they are themselves the trespassers, but the fact that they understand that they have violated the norm. Particularly, it is their own nakedness, their own corporality, which is shameful to them; they cover their body and the Lord later clothes them with animal skins to hide their animal descent, of which their body is a remnant. God bans Adam and Eve from paradise out of fear that they would also eat from the tree of life. Man is now forever doomed to dangle between beast and God. Like God, man possesses knowledge of good and bad, while, like animals, remaining mortal. Like animals, man has bodily needs in order to keep him alive, both as an individual (eating, sleeping, defecation) and as a species (procreation), and similar to God, man has intellectual capacities enabling him to engage in rational discussion, have a moral understanding, and create norms and laws. In the history of mankind, this dual nature has always led to an inevitable tension, as man, either through *Imitatio Christi* or some other doctrine, has been urged to sublimate his first nature and substitute it for or suppress it by his second. The first nature is hence always a source of shame and is hidden in a private domain; it is their body, their animal descent, that shames Adam and Eve and that they try to hide. The body is and remains a pre-moral place.

The Arendtian Interpretation of the Aristotelian Household

This duality in nature was also at the centre of political thought in Greek philosophy. Similar to other creates (*zoē*), man was thought to have natural desires and needs, but as a *zoōn politikon*, man possessed *logos* and was inclined to live in political communities, ruled by reason and justice. According to Aristotelian ethics, to reach a state of happiness (*eudemonia*), man needed to reach a state of self-sufficiency (*autarkeia*), satisfy his intellectual needs, and long for completeness (*teleiōtēs*). For both Plato and Aristotle, the *polis* and its laws were necessary to fulfil man’s second nature, hence Plato’s rejection of the city of pigs and Aristotle’s thesis that the city-state comes into being for the sake of life but exists for the sake of the good life. Both also seemed to think that for exceptional men, philosopher kings, the god amongst men or the *megalopsuchus*, it was possible to fully

³ Genesis 3:7.

sublimate their first nature. Where both differed, however, was on the question of whether amongst less godly men, the first nature could be suppressed or sublimated though the guidance of the *polis* and its laws.

Plato famously thought it could, at least in the warrior class, for which all life was communal. The philosopher-kings were essentially destined to concern themselves with the rational side of man, adopt laws, and impose them on the rest of the community. The working class was engaged in providing the community with the necessities of life, such as food, shelter, and basic products. The warrior class was installed to preserve the community, both by protecting it from physical danger and through procreation. This communal essence led Plato to propose a life in which all meals, spouses, children, and property were shared, subjected to the communal interest formulated by the rules of the philosopher kings. The Aristotelian rejection was based on two communicating arguments. First, Aristotle renounced the Platonian suggestion of one communal interest, to be determined by the philosopher king. Rather than a unity, he believed the public domain to be a plurality of opinions of equal value. Second, the private domain was essentially a sphere in which the private interest prevailed. Although in a sense, all men have the same interest in survival, the shared interest is not a common interest but a private one. The private interest in self-sufficiency naturally prevails over the common interest: people take better care of their own interests, their own property, and their own children.

On this Aristotelian principle, the Arendtian concept of private and privacy is based. Arendt alludes to the sharp distinction between what was private (*idiom*) and what was communal (*koinon*) and to the separation of the household, as a place where self-sufficiency and *autarkeia* could be reached, from the public domain, where man's second nature could be fulfilled. For Arendt, this distinction is essentially one between necessity and freedom. Man's first nature imposes on him certain needs, which he cannot choose not to fulfil.

The distinctive trait of the household sphere was that in it men lived together because they were driven by their wants and needs. The driving force was life itself which, for its individual maintenance and its survival as the life of the species needs the company of others. That individual maintenance should be the task of the man and species survival the task of the woman was obvious, and both of these natural functions, the labor of man to provide nourishment and the labor of the woman in giving birth, were subject to the same urgency of life. Natural community in the household therefore was born of necessity, and necessity ruled over all activities performed in it.⁴

In contrast, freedom and justice dominate public life. Man, relieved from the necessities of life, enters the domain of plurality and choice. Normativity dominates the public domain because it is here that man's second nature — his rational and moral capacities — flourishes. The other way around, as only this domain is one of freedom and plurality, it is only here that man could do good or bad and that laws and norms are needed to guide behaviour. It is only when man has a choice that laws and norms have relevance. The household, being a place of necessity, is not subjected to these laws; thus in contrast to the Garden of Eden, norms do exist, but they *cannot* be imposed on the household. According to Arendt, what the Greek philosophers 'took for granted is that freedom is exclusively located in the political realm, that necessity is primarily a prepolitical phenomenon, characteristic of the private household organization, and that force and violence are justified in this sphere because they are the only means to master necessity — for instance, by ruling over slaves — and to become free.'⁵

⁴ Arendt 1998: 30.

⁵ Arendt 1998: 31.

The Lockean Compromise Between the Tyranny of the Patriarch and That of the Monarch

Locke's first of his Two Treatises on Government denounced Filmer's Patriarcha, in which he argued that God had transferred to Adam, e.g. the male, the natural and absolute authority to rule over the family, that this family was in fact a small commonwealth and that the only exception to the rule of the monarch over the greater commonwealth is that the patriarch over his family, which included the power to decide over life and death of his subjects. Locke's second treatise gives a description of the state of nature and the contract installing the political state, which, as far as relevant here, offers an alternative to Hobbes's Leviathan. For Hobbes, the natural condition was not one of authority and hierarchy, such as with Filmer, but one of radical equality, as every man and woman had but one concern: self-preservation. Famously leading to a war of all against all, the monarch was to be granted an absolute power. In contrast to Filmer, Hobbes let no private authority to the patriarch. The only room left to individual autonomy was where the public laws were silent (*silentium legis*), which was not an individual right but subject to the discretion of the monarch.

Locke denounced both positions, wanting to retain a private sphere but without the looming inequality and injustice following from Filmer's position. He did so essentially by treating the household as a peaceful society, where public norms and political authority could, but need not be applied.

Demonstrating that relations in the household can be peaceful, even if the power of life and death is not assigned to the adult male governing it, solves two problems at once. It proves that there exists at least one institution, the family, in which adults need not be controlled by an all-powerful rule; and it addresses the question of conflicting jurisdictions. If the power which the heads of households need to ensure order is not political, it will be compatible with the power of the magistrate, and heads of households will be entitled to maintain it even within the political association.⁶

Locke's argument goes as follows. Having first denounced any form of natural authority such as proposed by Filmer, Locke's starting position was very much egalitarian, like that of Hobbes. To change a Hobbesian state of nature, he introduced, besides the duty of self-preservation, the duty of preserving the human race. Man's first and natural society, the family, is especially concerned with this second duty, as it is installed, according to Locke, not merely with an eye on procreation, but the continuation of the species as a whole. Although this first society creates a paternal power, this does not come into conflict with the later installed political power. As 'these two Powers, Political and Paternal, are so perfectly distinct and separate; are built upon so different Foundations, and given to so different Ends',⁷ the paternal power is retained even in a political society. While the end of political society is the preservation of man, through the protection of life, liberty, and estate, the end of conjugal society is the preservation of mankind. While the first interest, self-preservation, as with Hobbes, leads to conflict and necessitates a civil society and political power, the second interest does not.

The essential difference between the conjugal and the political society is that in the first, political power is absent, which is defined by Locke as the power of law enforcement through punishment, essentially the power over life and death. The parents have 'no Power of Governing, i.e. making Laws and enacting Penalties on his Children',⁸ nor does the man have

⁶ Gobetti 1992: 67.

⁷ Locke 1998: §71.

⁸ Locke 1998: §74.

such power over his wife. Not only is private normativity and subsequent norm enforcement absent in the family, according to Locke, it is also a place of equality. Man and woman enter the conjugal society voluntarily and marriage is subjected in total to the contractual terms upon which they agree. Likewise, although not fully equal in factual terms, the child is under no obligation to obey his parents. His subjection to the parental authority is based on his (tacit) consent. The family remains this peaceful and harmonious place because of two reasons.

First, Locke proposes that if the private domain does become one of conflict, the family is simply dissolved. As man and woman have entered into marriage voluntarily, they have agreed on the terms and conditions. If these terms are violated, either one is free to dissolve the marriage. The same applies to any children. Although there might be an authority vested in the parents by the child, this gives them power only in so far as this is to the child's benefit. If they violate this rule, the terms of the tacit contract will be violated and the child is free to withdraw his consent. Second, and more important, Locke's description of the household is essentially one of paradisiacal peace. Although all family members are equal, they are not identical; rather, all are dependent upon each other. The male member of the family is dependent on his wife to give birth to their child and the woman is dependent on man because what separates humans from other animals, which also explains why humans have such long-lasting marital relations, is the fact that 'the Female is capable of conceiving, and *de facto* is commonly with Child again and Brings forth too a new Birth long before the former is out of a dependency for support of his Parents help.'⁹ Hence the father is needed to take care of both women and child. The child, in turn, is dependent on its parents for support, and vice versa, the parents wanting to fulfil their second natural duty must provide the child with protection and education. All members of the family thus understand that they are dependent upon each other and normally, conflict and coercion will be absent as a consequence. Consequently, public norms and political authority could hypothetically be applied on the household, but there is no reason to.

On the Value of Privacy

This contribution has suggested that one of the reasons why there is no dominant theory or explanation on the value of privacy and why the value of privacy differs from person to person, culture to culture, and epoch to epoch is that privacy has no value. Its essence is precisely that of limiting and curtailing norms and values; privacy is a tactic of norm evasion. The suggestion is that there is no unifying or common element in the various privacy theories that have been put forward so far, other than that they represent the other side of the coin of norms and values. The commonality between these theories is precisely that privacy is directed at curtailing and limiting norms. This might explain why the meaning and value of privacy seems to be a chameleon; it is not privacy that keeps on transforming, it is the norms that do so. It would take a book to exhaustively demonstrate this hypothesis, this contribution has merely made a small start by describing three theories in which privacy, the body and the private domain, serve as a place of non-normativity.

⁹ Locke 1998: §80.

References

Arendt, H. 1998. *The Human Condition*. Chicago: The University of Chicago Press. 30-31.

Gobetti, D. 1992. *Private and public: Individuals, households, and body politic in Lock and Hutcheson*. London and New York: Routledge. 67.

Locke, J. 1998. *Two treatises of Government*. Cambridge: Cambridge University Press.