

## Chapter 2

# Privacy and the Protection of Personal Data

### *Avant la Lettre*

*Ah, whoever it was who invented the idea of privacy, of a privacy, of a private home—was the greatest genius of all time.*

(Mekas 2010)

Rules on the processing of information about individuals originally surfaced in European countries under various labels: in 1970, the German federal state of Hesse adopted a seminal act concerned with the establishment of *Datenschutz* (translatable as ‘data protection’);<sup>1</sup> in 1973, Sweden approved an act named *Datalag* (or ‘Data Act’);<sup>2</sup> in 1978, France endorsed a law entitled *informatique et libertés* (‘computers and freedoms’).<sup>3</sup> The terminological creativity of data processing regulation breaking out in Europe during the 1970s was accompanied by a relative fuzziness in relation with the purpose, or purposes, targeted by these new provisions (Bygrave 2002, p. 8).

Eventually, however, all these norms and similar rules later emerging in Europe were to be formally designated as constituting ‘data protection’ laws, and officially ascribed to the objective of serving, primarily, something called ‘privacy’.<sup>4</sup> This chapter focuses on this word: privacy. It investigates its origins and significance, and its historical connections with the development of European rules on the processing of personal data.

## 2.1 Introducing Privacy

As a concept, privacy has been described as being ‘in disarray’ (Solove 2008), or prone to definitional instability (Bygrave 2010, p. 169). Scholars have elaborated many different theories about it, attesting of the multiple clusters of meaning surrounding the word.

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<sup>1</sup> See Chap. 3, Sect. 3.1.1, of this book.

<sup>2</sup> Ibid. Sect. 3.1.2.

<sup>3</sup> Ibid. Sect. 3.1.4.

<sup>4</sup> See, for instance: (Bennett 1992, p. 13; Bennett and Raab 2006, p. 19).

### 2.1.1 Mapping Privacies

An overview of the literature on privacy reveals the possibility to map out many of the most common acceptations of the term by dividing them into a few basic categories, corresponding to different meanings of the adjective ‘private’,<sup>5</sup> from which the English noun ‘privacy’ derives.<sup>6</sup> Schematically:

- a. privacy can be understood as protecting what is envisaged as private as opposed to public,<sup>7</sup> be it:
  1. conceiving of public as referring to governmental authority (the State), or the community or society in general (Duby 1999, p. 18); private is thus read as ‘not official’, or ‘not pertaining to the *res publica*’, for instance because specifically related to family life, or to the home;<sup>8</sup>
  2. envisioning public as what is shared, exposed, common, open to the other; private is thus read as belonging to a closed space or realm,<sup>9</sup> unexposed, hidden, confidential, concealed, secret (Duby 1999, p. 18), let alone, devoted to introspection,<sup>10</sup> generally inaccessible, or out of reach;<sup>11</sup> but
- b. privacy can also be understood as touching upon what is private in the sense of individual, personal, or one’s own: from this viewpoint, to claim respect for somebody’s ‘private life’ is to affirm their right to live as they choose, as opposed to controlled, alienated, or estranged (from society and from themselves).

This classification aims to illustrate that the meanings of privacy and private are sometimes construed in opposition to what is public, but not always. As a matter of fact, privacy as a legal notion—and particularly as a legal notion worthy of reinforced protection in certain legal systems—has often been pictured as associated with what is ‘private’ in the sense of individual, personal, one’s own (group B).

<sup>5</sup> The adjective ‘private’ derives from the Latin *privatus*. In Latin, *privatus* was typically used in contrast to *publicus* and *communis*, and meant ‘private, individual, own’ (*Dictionnaire Gaffiot Latin-Français* 1934, p. 1239), as well as ‘simple citizen’ (ibid.) and ‘withdrawn from public life’ (Schoeman 2008, p. 116).

<sup>6</sup> The English word ‘privacy’ was rarely used as such before the sixteenth century (Onions 1966, p. 711).

<sup>7</sup> The adjective ‘private’ surfaced in English in the fourteenth century, precisely meaning ‘not open to the public’, and in the fifteenth century with the sense of ‘not holding a public position’ (ibid.).

<sup>8</sup> The Latin *privatus* represented a particular usage of the past participle of the verb *privare*, originally meaning ‘bereave, deprive’, and from which stemmed for instance the French *priver*, defined in nineteenth century French dictionaries as referring to taking something away from the wild nature and taking it to the familiar space of the home (Duby 1999, p. 17). The Latin noun *privatum* referred to private assets, including the home, and the idiom *in privato* meant ‘inside the house’ (ibid. 18).

<sup>9</sup> Sometimes metaphorically. See, for instance: (Serfaty-Garzon 2003).

<sup>10</sup> Alluding to a *ius solitudinis*: (Pérez Luño 2010, p. 339).

<sup>11</sup> According to Gavison, ‘(i)n its most suggestive sense, privacy is a limitation of other’s access to an individual’ (Gavison 1980, p. 428).

From this perspective, privacy has notably been connected with freedom: some have described it as the fortress of personal freedom (Sofsky 2009, p. 53), what ensures a freedom to establish individual paths in life, and the potential to resist interferences with this freedom (Gutwirth 2002, p. 2), as individual freedom par excellence (Rigaux 1992, p. 9), or as the protection of freedom itself (Bendich 1996, p. 441). Privacy has also been attached to the notion of individuality, as such the outcome of a historical construction of the person (Lefebvre-Teillard 2003, p. 1151) originated in the early Christianity (Bennett et al. 2001, p. 280), developed through the Middle Ages, and consolidated with the Enlightenment and the advent of modern constitutionalism.<sup>12</sup> Privacy in this light would not just be about any boundaries separating what pertains to the State from the private lives of people, but rather a barrier sheltering individuals against the arbitrariness of State power. Through the idea of individuality, privacy would also be directly linked to autonomy (Bygrave 2002, p. 133).<sup>13</sup>

Privacy in the sense of serving the realisation of individuals' own lives has furthermore been coupled with the notion of human dignity. This view's basic assumption is that it is inherent to human condition to develop freely, and that, therefore, human dignity must presuppose the acknowledgement of a degree of self-determination (Pérez Luño 2010, p. 324). Here, individuality is identified with the full development of personality (Edelman 1999, p. 509), a concept associated with the notion of personhood, or the quality of being a human being. Privacy, full development of the personality and personhood are sometimes also connected to (and through) the concept of identity,<sup>14</sup> a multifaceted notion<sup>15</sup> with several potentially relevant meanings: in particular, identity can be envisioned as personality, or individuality,<sup>16</sup> but also as what allows for identification (or individualisation) (Bioy 2006, p. 74), in the sense of being the sum of personal identifiers.<sup>17</sup> Identity, however, is also sometimes addressed as a key to refine the relation between privacy and freedom (Hildebrandt 2006).

In comparative constitutional law, the recognition of a right to privacy as a unitary right is a late phenomenon (Ruiz Miguel 1992, p. 76). It was preceded by the enshrinement of other notions such as the inviolability<sup>18</sup> of the home, or

<sup>12</sup> In Anglo-Saxon thinking, a major reference in this context is the notion of liberty as individual autonomy developed by John Stuart Mill, in his work *On Liberty* (Stuart Mill 1948). See also: (Ruiz Miguel 1992, p. 7; Pérez Luño 2010, p. 329).

<sup>13</sup> Autonomy is sometimes envisioned as closely related to freedom and self-determination (De Hert and Gutwirth 2003, p. 95).

<sup>14</sup> See, for instance: (Rodotà 2009, p. 22; Kahn 2003).

<sup>15</sup> As attempts to circumscribe it can be mentioned the concepts of identity-in-transformation (Luhmann 1998, p. 37), or the 'ipse' and 'idem' dimensions discussed by French philosopher Paul Ricoeur, highlighting that identity is dependent both the perception of the self as unique, and the continuity of space and time, or what is shared with others (Ricoeur 1990).

<sup>16</sup> See, notably: (Pino 2006).

<sup>17</sup> These two basic facets of identity can be traced back to the writings of John Locke (Locke 1998, pp. 200–202 especially).

<sup>18</sup> Historically sometimes referred to as 'sanctity' of the home. On the origins of legal 'sanctity' as inviolability (and its relation with 'sanction'), see: (Thomas 2011, pp. 62–63).

confidentiality of correspondence, legal notions in some cases later regarded subsumed into a general right to privacy, understood then as an umbrella right.<sup>19</sup>

The conceptual ramifications of different understandings of privacy sometimes overlap. It can be argued, for instance, that for individuals to be effectively able to live freely, they need to be assured that some facets of their lives are to remain undisclosed. In point of fact, features such as the inviolability of the home, or confidentiality of communications (which might appear as prime examples of the significance of the private/public distinction as per group A), have in reality surfaced historically associated with personal freedom (as in group B) (Martínez Martínez 2004, p. 62).<sup>20</sup> Respect of privacy as the individual's own life is also often depicted as requiring that persons are ensured a place, or a time, to be on their own ('in private') in order to allow for personal reflection and for the development of personal attitudes.<sup>21</sup> To be free, individuals would need that some facets of their lives are kept private, out of reach.

Conversely, the conceptual ramifications of different views on privacy can also occasionally conflict. There are conceptions of privacy that warn against granting an excessive emphasis to concrete understandings of what is private as opposed to what is public; some scholars have indeed advanced the idea that for persons to be effectively (free) individuals, they cannot be detached from what is social, and public.<sup>22</sup> To enjoy a private life in the sense of a life of their own, individuals would need more than a 'merely private' life: privacy shall consequently include the dimension of the individual directed towards the exteriority, or towards the other (Ruiz Miguel 1992, p. 5). To be free, individuals must not to be kept apart.<sup>23</sup>

Different conceptions of privacy and related legal notions rely sometimes on coincidental terminology, generating some ambiguities. The term 'sphere' is a prime example of this. Political scholars have often used the image of concentric spheres to describe different degrees of individuals' connexion to the polity: they have depicted the existence of an intimate sphere, a private sphere, a social sphere, or a

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<sup>19</sup> Describing privacy as an umbrella term: (Solove 2006, p. 486).

<sup>20</sup> See also: (Hansson 2008, p. 110).

<sup>21</sup> For US sociologist Charles Wright Mills, for instance, privacy 'in its full human meaning' referred to the possibility of individuals to transcend their milieu by articulating their own private tensions and anxieties, and, to the extent that mass media in general, and television in particular, encroached upon such private articulation of resentments and hopes, they were to be regarded as a 'malign force' causing privacy's destruction (Wright Mills 2000, p. 314).

<sup>22</sup> German sociologist Norbert Elias, for example, emphasised that what transforms children into specific, distinct individuals are their relations with others, and that the different structures of interiority shaping individual consciousness are precisely determined by the outside world (Elias 1991, p. 58 and 65). The exclusionary effects of the private/public distinction have notably been discussed in relation to the detrimental consequences for women (Bennett and Raab 2006, p. 21). From this perspective, the qualification of what is private emerges as not neutral, but imposing that some issues must be kept hidden, and tends to exclude women from the public life of decision-making or social interactions. See, notably: (Scott and Keates 2005; Halimi 1992, p. xiii and xiv).

<sup>23</sup> Or de-prived of 'public life'.

public sphere.<sup>24</sup> The image of the sphere, however, has also been used to convey the idea of something that is not primarily about enclosing, demarcating or obscuring, but rather about allowing for operations by the outside to take place (Sloterdijk 2007, p. 28),<sup>25</sup> contributing in that way to subjectivity.

The usages of words related to ‘spheres’ are as a matter of fact numerous.<sup>26</sup> In German constitutional case law, an influential legal theory has emerged since the late 1950s. It is known as the ‘theory of the spheres’.<sup>27</sup> On the basis of this theory, the German Federal Constitutional Court envisaged a series of concentric circles, or spheres, delineating different areas based on distinct degrees of the private (Alexy 2010, p. 236): the *Individualsphäre*,<sup>28</sup> the *Privatsphäre*,<sup>29</sup> and the *Intimsphäre*.<sup>30</sup> The term *Intimsphäre* builds upon the German word derived from the Latin *intimus* (Coronel Carcelén 2002, p. 19), which also resulted in the English word ‘intimacy’ (nowadays rarely used in legal writing),<sup>31</sup> and evolved in other languages to form words more often used as synonymous with privacy, such as the French *intimité* (Bureau de la Terminologie du Conseil de l’Europe 1995, p. 321), or the Spanish *intimidad* (Coronel Carcelén 2002, p. 19).

The German Federal Constitutional Court abandoned the theory of the spheres in 1983, but the doctrine has nonetheless deeply marked both German and non-German literature.<sup>32</sup> In Germany, the doctrine sometimes refers to the right enshrined by Article 8 of the ECHR as *das Recht auf die Privatsphäre* (or ‘the right to private sphere’) (Frowein 1985, p. 195),<sup>33</sup> even if it can also be called the *Anspruch auf Achtung seines Privatlebens*, or ‘right to respect for private life’ (Frowein 1985, p. 194). Some other European legal orders have integrated legal notions based on cognates of the word sphere. The Dutch Constitution, for instance, grants individu-

<sup>24</sup> See, notably: (Arendt 1998, p. 38). For Arendt, modernity blurred the old borderline between the private and the public understood as ‘political’, and actually decisively replaced the ancestral private sphere with something preferably labelled as a ‘sphere of intimacy’, as well as the long-established public/political sphere with a new sphere of the social, whose content was regarded by the ancients as a private matter. See also: (Habermas 1992, p. 55).

<sup>25</sup> On alleged misconceptions of individuality as including the notion of dreams locked inside the body, or the impenetrability of the self: (Sloterdijk 2007, p. 263).

<sup>26</sup> Their metaphorical extensions are also many. See, for instance: (Beslay and Hakala 2007).

<sup>27</sup> Or ‘*Sphärentheorie*’. See, notably: (Doneda 2006, p. 67).

<sup>28</sup> Translatable as ‘social sphere’ (Alexy 2010, p. 236), or ‘*sphère de l’individualité*’ (Robert 1977, p. 266).

<sup>29</sup> That can be translated as privacy, as ‘a broader sphere of privacy’ (Alexy 2010, p. 236), or as ‘*sphère du privé*’ (Robert 1977, p. 266).

<sup>30</sup> Translatable as ‘the innermost sphere’, ‘inviolable sphere of intimacy’, or ‘absolutely protected core are of private life’ (Alexy 2010, p. 236), or ‘*sphère de l’intimité*’ (Robert 1977, p. 266).

<sup>31</sup> Despite maintaining a sense of ‘familiarity’ and ‘confidence’, the English ‘intimacy’ eventually also acquired an extra meaning, related to sexual intercourse (Coronel Carcelén 2002, p. 19).

<sup>32</sup> Noting its importance for the Italian Frosini: (Martínez Martínez 2004, p. 205).

<sup>33</sup> See, interpreting the case law on the theory of the spheres as the basic German formulation of the right to privacy: (Riccardi 1983, p. 245).

als a *recht op eerbiediging van zijn persoonlijke levenssfeer*, which can be translated as a ‘right to respect for their personal sphere of life’.<sup>34</sup>

The German theory of the spheres had been developed in the context of the German Federal Constitutional Court’s doctrine on the existence of a general right to personality, or *das allgemeine Persönlichkeitsrecht*,<sup>35</sup> recognised on the basis of a joint reading of German constitutional provisions on the inviolability of human dignity,<sup>36</sup> and on the right to free development of personality.<sup>37</sup> The general right to personality represents what some have described as a fundamental freedom (Rigaux 1990, p. 16), encompassing a right to general freedom of action (Alexy 2010, p. 223), that some regard as a right to privacy (Krause 1965, p. 516). The notion of a general right to personality also generates some disorientation. This general right should not be confused with the notions of civil rights of personality or ‘personality rights’, sometimes portrayed as a sort of human rights recognised by civil law, and which the literature has also often linked to privacy discussions (Brügemeier 2010, p. 6). Although the legal category of personality rights is apposite in certain legal systems, such as the German<sup>38</sup> and the Austrian,<sup>39</sup> its pertinence to address privacy issues in other legal orders has been powerfully disputed.<sup>40</sup> In this sense, it has notably been argued that reliance on the notion of rights of personality creates normative and normalising effects, problematic for an understanding of privacy as freedom (Gutwirth 2002, p. 40).

The legal relevance of the distinction between what is private and what is public has been contested because of the complexities of distinguishing the private from the public (Turkington and Allen 1999, p. 8),<sup>41</sup> and but also because of the difficulties of ever identifying something that could be regarded as completely, hermetically private (Rigaux 1990, p. 16).<sup>42</sup> While some scholars defend that, despite the lack of general agreement on the dividing line between the private and the public, a division must exist (Blume 2002, p. 1), others have insisted on the fact that even in public contexts a certain privacy should be protected (Nissenbaum 2010),<sup>43</sup> and others prefer to replace the image of a division between the public and the private with the notion of a continuum in which privacy and publicity would be the ideal-typical

<sup>34</sup> Article 10 of the Dutch Constitution (since 1983).

<sup>35</sup> The recognition in Germany of a general right to personality has been linked to the traditionally limited protection granted through civil remedies (Rigaux 1997, pp. 139–140).

<sup>36</sup> Article 1(1) of the 1949 Fundamental Law of Bonn.

<sup>37</sup> *Ibid.* Article 2(1).

<sup>38</sup> In reality, Germany has witnessed many controversies on rights to personality, since the early nineteenth century (Strömholm 1967, p. 29).

<sup>39</sup> On this subject: (Universidad del País Vasco, Cuatrecasas, and Mainstrat 2008, p. 3).

<sup>40</sup> See for instance: (De Schutter 1998, p. 58; Tulkens 2000, p. 28).

<sup>41</sup> Observing that ‘for the vast majority of possible conflicts a clear distinction between private and public persons, documents, premises and activities cannot be made’ (Strömholm 1967, p. 74).

<sup>42</sup> Concluding that should thus be privileged an idea of privacy emphasising the position occupied by the individual: (Rigaux 1990, p. 696). Echoing this reasoning: (Kayser 1995, p. 15).

<sup>43</sup> Nissenbaum actually refers to the existence of ‘powerful moral reasons’ obliging to limit the flow of private information in public (2010, p. 217).

endpoints (Nippert-Eng 2010, p. 4). Others still have designated the private/public boundary as an ‘impossible distinction’ (Derrida 1994, p. 146).<sup>44</sup>

But there is yet an additional important acceptance of the word privacy that is not grounded on any reading of the adjective private, and must be added to the above classification: privacy as control upon personal information.

## 2.1.2 (Re)defining Privacy in the US

The originality and significance of the conception of privacy as control upon personal information is best understood by taking into account the context of its historical surfacing. This account reveals the importance of the construction in the US of the so-called ‘computers and privacy’ issue.

### 2.1.2.1 US Privacy Before Computers

The expression ‘right to privacy’ entered the world of Anglo-American legal writing in 1890,<sup>45</sup> when US authors Samuel Warren and Louis Brandeis advanced its existence in a now famous article, unambiguously titled ‘The right to privacy’ (Warren and Brandeis 1890).<sup>46</sup> Warren and Brandeis build up their conception of a US right to privacy partially on English case law of the first half of the nineteenth century, which had indeed witnessed the use of the word privacy, even though only incidentally (Rigaux 1990, p. 13). They also claimed that the right had already found expression in the law of France, namely in the French *Loi relative à la presse* (‘Law of the Press’) of 11 May 1868, which prohibited the publication of facts related to the ‘*vie privée*’ of individuals<sup>47</sup> unless the facts were already public, or were published with the individual’s consent (Warren and Brandeis 1890, p. 214). Warren and Brandeis summarised the content of the right they supported equating it with the formula ‘the right to be let alone’ (Warren and Brandeis 1890, p. 214).<sup>48</sup>

In 1960, another US scholar, William L. Prosser, published an influential article in which it reviewed the acknowledgement of a privacy tort in common law since the publication of Warren and Brandeis’s piece. Prosser described the recognition of four types of privacy tort: the intrusion upon a person’s solitude or seclusion; the appropriation, for commercial purposes, of a person’s name, likeness, or personality; the public disclosure of embarrassing private facts about a person; and the publicity that places a person in a false light in the public eye (Prosser 1960).<sup>49</sup>

<sup>44</sup> See also: (Gaston 2006, p. 11).

<sup>45</sup> See among others: (Strömholm 1967, p. 25; Rigaux 1992, p. 139).

<sup>46</sup> The article establishes the need for the legal recognition of the right to privacy by giving reasons largely centring around the practices of newspaper press. See also: (Pember 1972; Glancy 1979, p. 1).

<sup>47</sup> ‘*Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d’amende de cinq cents francs*’ (Warren and Brandeis 1890, p. 214).

<sup>48</sup> The formula is generally attributed to Thomas M. Cooley.

<sup>49</sup> See also: (Emerson 1979).



Privacy protection in the US was eventually developed not only through tort law, but also through constitutional law, which grants protection of individuals against the government. Although the US Constitution does not mention any right to privacy as such, various aspects of privacy are nowadays regarded as protected by the judicial interpretation of its provisions.<sup>50</sup> Brandeis himself became eventually judge of the US Supreme Court, from where he argued that the drafters of the US Constitution already recognised a right to be let alone in front of the State, and that this particular right was the widest and most esteemed of all.<sup>51</sup>

In 1965, the US Supreme Court explicitly declared that individuals have a constitutional right to privacy, located within the penumbras or zones of freedom created by an expansive interpretation of the US Bill of Rights.<sup>52</sup> From this perspective, the right to privacy can be regarded as a right to be free from government interference, growing out of the idea that there must be some freedoms beyond any State control, even in a democracy (McWhirter and Bible 1992, p. 33). This right to privacy would encompass both a negative or shielding protection, and a right to autonomy and self-determination (Pino 2002, p. 135) (for instance, by ensuring a right to abortion).<sup>53</sup>

By the mid 1960s, the term ‘privacy’ had thus acquired in the US two major meanings: on the one hand, it was used from the perspective of civil law as a synthetic reference to a system of torts (covering the intrusion in the private affairs of the person, the disclosure of private facts, or the use of a person’s image); and, on the other hand, it appeared in the area of constitutional law as referring to the right for individuals to refuse interferences from public authorities (Pino 2002, p. 135).

### 2.1.2.2 Computers and Privacy

The linkage between computers and privacy as a matter worth of specific official attention, framed as the ‘computers and privacy’ issue, materialised as such in the US around 1965 (Westin 1970, p. 315). Electronic data processing machines had appeared in the US market a decade before (Westin and Baker 1972, p. 12). Prior to the 1960s, however, there had been practically no mention of any particular connec-

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<sup>50</sup> Such as the First Amendment (freedom of speech, religion and association), the Third Amendment (which protects the privacy of the home by preventing the government from requiring soldiers to reside in people’s homes), the Fourth Amendment (freedom from unreasonable searches and seizures), and the Fifth Amendment (privilege against self-incrimination), as well as, more occasionally, the Ninth Amendment, which states that the ‘enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’; due process and equal protection clauses also provide shields for privacy interests (Fisher 1995, p. 1172; Solove et al. 2006, pp. 33–34).

<sup>51</sup> See in particular Brandeis’ dissenting opinion in the case *Olmstead v. United States* (277 U.S. 438).

<sup>52</sup> In the landmark 1965 judgment for *Griswold v. Connecticut* (318 U.S. 479), on the possibility to obtain birth control information. See: (McWhirter and Bible 1992, p. 59; Solove et al. 2006, p. 34).

<sup>53</sup> The landmark case on this subject is of 1973: *Roe v. Wade* (410 US 113, 1973). See: (Freedman 1987, p. 73).



tion between the deployment of computers and the endangerment of privacy (Westin 1970, p. 298). This was so even though the level of computerisation in organisations was already advancing quickly (Westin and Baker 1972, p. 12), and even if the late 1950s had already witnessed some occurrences of popular resistance to the processing of data related to individuals. For instance, religious and civil liberties organisations had raised protests against a proposal to introduce in a census<sup>54</sup> a question about religious preferences, arguing that it would have constituted a violation of the guarantees of freedom of religion and separation of Church and State, as well as a direct invasion of privacy of conscience (Westin 1970, p. 302). Discussions on the possible deployment of a universal personal identification system had also generated uproar (Westin 1970, p. 304). But it was only in the 1960s when computers began to be highlighted as a potentially important societal threat; more particularly, what was put forward as a threat was the automated processing of information on individuals that computers were capable of sustaining, and of trivialising.<sup>55</sup>

Computer specialists were the first to alert that computers' rapid and inexpensive processing of information, coupled with the increased availability of data to government agencies and private organisations, could carry with them some dangers (Westin 1970, p. 299),<sup>56</sup> notably to privacy. The first computer specialist forewarning of such a possible impact upon privacy might have been the president of a Californian company, Bernard S. Benson.<sup>57</sup> In 1961, Benson warned that more and more disparate information about individuals was being stored in computers without anybody noticing, but that the data could one day be fed into a single apparatus, leaving individual's privacy at the mercy 'of who or what controls the machine' (United Press International (UPI) 1961, p. 8).

In 1964, the American author Vance Packard<sup>58</sup> published *The Naked Society*, a book on the threats of then-emerging technologies, among which he pointed out the menaces of computerised filing. Packard echoed Benson's warnings on the machine's potential impact on individual privacy (1971, p. 49). In his view, however, emerging technologies appeared to endanger not only privacy, but also, and especially, numerous other rights such as 'the right to be different', 'the right to hope for tolerant forgiveness or overlooking of past foolishness, errors, humiliations, or minor sins' (what he described as the Christian notion of the possibility of redemption), or 'the right to make a fresh start' (Packard 1971, p. 23).

It was nonetheless the notion of privacy that increasingly gathered attention. By the beginning of the 1960s, debates had erupted over the impact on privacy of

<sup>54</sup> The 1960 US Federal Decennial Census.

<sup>55</sup> Noting that actually some security actors such as the US National Security Agency (NSA) had been at the forefront of research on computing: (Ceruzzi 2012, p. 38).

<sup>56</sup> Westin also refers to Richard W. Hamming, who had been involved since 1945 as a computer expert in the US research project for the production of an atomic bomb, and had warned since 1962 of some societal threats linked to the advent of computers.

<sup>57</sup> The Benson-Lehner Corporation, of Santa Monica, a company that developed data processing systems (United Press International (UPI) 1961, p. 8); also mentioned in: (Westin 1970, p. 299).

<sup>58</sup> Packard had acquired a relative notoriety in the US in 1957 with a book on the advertising industry, titled *The Hidden Persuaders* (Sawyer and Schechter 1968, p. 812).

various (then) new techniques and technologies—especially, electronic eavesdropping, psychological testing, and the use of polygraphs for lie detection. It was rather common in those days to insist on the idea that any new challenges for privacy were not being raised by vague scientific developments, or by ‘esoteric new discoveries’, but by very concrete (and increasingly pervasive) items embodying technological progress: for instance, battery-powered microphones, portable tape recorders, telephones that could be connected to a single main line, or high-resolution cameras (Ruebhausen 1970, p. xi).

In the context of this general preoccupation with the likely impact upon privacy of modern gadgets, in 1962 the Special Committee on Science and Law of the Association of the Bar of the City of New York<sup>59</sup> proposed to undertake a formal inquiry into the question (Ruebhausen 1970, p. ix). Noting how advances in electronic, optical, acoustic, and other sensing devices seemed to challenge individual privacy, the Special Committee on Science and Law placed the direction of this inquiry in the hands of Alan F. Westin, an expert on the topic of wire-tapping who had been writing about invasions of privacy for many years.<sup>60</sup> While the inquiry unfolded,<sup>61</sup> debates on privacy flourished across the US, and events and literature on the subject started to proliferate (Westin 1970, p. 312). Many of these manifestations were directly or indirectly attributable to the inquiry (Ruebhausen 1970, p. xi).

Formal support to incorporate the issue of computers into privacy debates arrived during this period: more precisely, in 1965, when a Subcommittee of US Congress, officially named the House Special Subcommittee on Invasion of Privacy of the Committee on Government Operations, chaired by Cornelius E. Gallagher,<sup>62</sup> added to the list of its agenda items the topic of computerisation (Westin 1970, p. 315). What brought the Subcommittee to that specific problem were various proposals envisaging the creation at federal level of ‘data banks’ centralising information about individuals already in the hands of federal authorities (Westin 1970, p. 316).<sup>63</sup> These proposals embodied the threat of massive quantities of information

<sup>59</sup> The Special Committee on Science and Law had been set up in 1959, following a previous experience in establishing a committee of lawyers to concern themselves with atomic energy (Ruebhausen 1970, p. viii).

<sup>60</sup> As well as Professor of Public Law and Government at Columbia University (Ruebhausen 1970, p. x).

<sup>61</sup> The research included a survey of the privacy-invading capacity of modern science, an exploration of the meaning of privacy, and an analysis of the interaction of the individual’s claim to a private personality, society’s need to acquire information and to control individual behaviour, as well as of new technology (Ruebhausen 1970, p. x).

<sup>62</sup> Gallagher had been particularly concerned with the impact upon privacy of the use of polygraphs for lie detection, and with personality tests being inflicted upon employees and job applicants (Gallagher 1965).

<sup>63</sup> The proposals came from social scientists and government officials. The Executive Committee of the American Economics Association had recommended in 1959 to the US Social Science Research Council that it set up a committee to discuss the preservation and use of economic data. The committee issued a report on the subject in 1965, which it forwarded to the Bureau of the Budget for consideration (Sawyer and Schechter 1968, p. 812). A Budget Bureau consultant, Edgar S. Dunn, Jr., was asked to prepare a report on the matter. He recommended implementation of a national data centre. See: (Dunn 1967).



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