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## Privacy and Terror: Some Remarks from Historical Perspective

### Abstract:

In this essay I will investigate if in the discourse on different ideas of privacy the reference to the obvious abuse of personal data in totalitarian states is necessary or if we are able to debate both necessity and limits of privacy without having to refer to this extreme example. The aim is to show that the experience of terror has been fundamental for the European tradition.

### Agenda

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## Introduction

In his essay "Privacy and the Varieties of Moral Wrong-doing in an Information Age" (1997) M. J. Van den Hooven remarked that "it seems somewhat odd to say that the Nazis invaded the privacy of the Dutch Jews. They murdered, tortured innocent human beings." By help of this historic example he wanted to point out to the fact that sometimes we tend to saying "privacy" when actually individual safety is meant. In the context of the essay the example is used to differentiate our understanding of privacy and to work out appropriate solutions for the various problems which meet in the field of privacy.

Basically supporting this approach and estimating this example as appropriate, I used this quotation for an essay – and was surprised when in a peer-review there was the remark that this example was "socially charged" and thus inappropriate. On the one hand, I could understand the objection, as the essay was not on National-Socialist crime but on "Business Ethics". Insofar I was thankful for the advice, for my intention had not been to blacken the names of those who are in support of a different idea of privacy – even if I consider it insufficient – by accusing them of speaking out for a totalitarian police state. On the other hand, I considered the objection somewhat confusing, as the reference to the National-Socialist rule of terror still seems to be a common worst-case-scenario of a society without privacy and without any kind of privacy protection. By this, I do not even try to state that the above mentioned example does not look odd. But at the same time it looks as odd to me not to care about withdrawing the protected zone "privacy" in totalitarian states, as – to again use the example of National Socialism – I consider the availability of data and the lack of any kind of data protection one of the foundations of National-Socialist mass-murder: without knowing which person belongs to which part of the population, discrimination against a certain part of the population and its extinction is impossible.

In the following, I will investigate if in the discourse on different ideas of privacy the reference to the obvious abuse of personal data in totalitarian states is necessary or if we are able to debate both necessity and limits of privacy without having to refer to this extreme example. Doing this, I will – at least as far as liberalism is concerned – stress the significance of the experience of terror in the French

revolution, something that seems to be forgotten in American tradition.

## The Problem of "Privacy" – European vs. US-American Strategies on Solution

In this essay I like to focus on the differences between European and US-American ideas of privacy, referring to Lawrence Lessig who both in his volume "Code and other Laws of Cyberspace" and in his essay "Privacy as Property" demands an American solution as an alternative to the European tradition of privacy protection. In the following, I will take over these comparisons.

Certainly, it means to simplify matters strongly if there is talking about only two lines of tradition. On the one hand, we must presume that both in Europe and in the USA different ideas of privacy and conceptions of legality were and still are expressed. On the other hand, there is the question if also other, non-western ideas of privacy should be discussed. Particularly the latter must be strongly emphasized if we think of the global basic technology of the internet. Especially some approach like Lessig's, who considers technology and law a unity, could be interpreted as being a kind of cultural imperialism, for by adjusting a certain technology to the normative ideas of a different culture it gets to be the bearer of a certain ideology at the same time. Indeed, also due to this I will concentrate on two western ideas in the following to point out to the fact that even within western liberalism there exist different ideas of privacy. At the same time, this discussion offers a chance of necessarily turning our attention to further positions.

According to Lessig, the American way of solving the problem of "privacy in the internet" is in the possibility of defining who shall be entitled of have access to one's own personal data. With this, the exchange of data shall be mostly automatic and shall stay in the background of the real exchange of information. Data protection is strongly emphasized insofar as any other people's possibility of having access to these data is restricted by law and technology. This turns against the European idea that certain data should be protected anyway, as he offers to the user the possibility of specifically disclosing such data. Thus, ways of doing business are made possible which in the view of European tradition at least look questionable. In this way, European tradition is doubted as being outmoded –

a view which is also shared by German authors (e. g. Kuhlen 2000).

Lessig's American sketch deviates from European tradition also as he grants to the state the right of controlling any kind of communication. By help of technology and law and in the name of safety the state shall be entitled to utilize data, discretely and staying in the background. The internet shall be organized like an airport which also can only be entered after strict security checks (Lessig 1999, 156f). The last aspect seems to contradict the European idea which understands data protection as a possibility of restricting the state's access to personal data. This difference may be due to different historic experience of withdrawing privacy.

### The Gap in the Genealogy of Privacy

By "Public Goods, Private Goods" (2001), Raymond Geuss offered a genealogy of privacy which shows a remarkable gap. Thus, in his chapter on liberalism he stresses the central role of religious freedom in John Stuart Mill's thoughts. But he does not look at the experience of a totalitarian kind of democracy after the French revolution. On the other hand, in "Two Concepts of Liberty" (1969) I. Berlin points out that Mill's view not at last must be understood to be a reaction to Rousseau and the French revolution.

This gap is remarkable insofar, as in the introduction of the German issue Geuss places Berlin – together with other authors (Max Weber, F. A. von Hayek, J. Habermas, R. Rorty, M. Walzer a. o.) – into a tradition which was seriously influenced by Mill's study "On Liberty". But why does he not take seriously his resumption of negative historic experience but focuses on the aspect of religious freedom?

Besides the fact that the idea of tolerance might well be historically connected to religious freedom, I think that here it is important to look at Geuss's aim. His aim is to show that there is not such a thing as the *one* difference between privacy and public, which might justify, for example, different criteria for private or public behaviour. I do not think that he wants to doubt privacy itself. But by reducing his thoughts to single aspects of privacy he comes very close to this, when, for example, he comments on the "Right to Privacy", as it was demanded by Warren and Brandeis (1890), that their main motivation might well have been writing a report on Warren's wife. Surely it cannot be denied that writing a report on Warren's wife might have

played some role for the authors. This aspect has already been mentioned by a. o. Miller (1973, p. 205) and Wunden (1994, p. 173). But also it does not look possible to deny that this very seriously written article goes far beyond the special problems of the married couple Warren. Here it looks to me as if Geuss rashly deduces the incorrectness of a statement from the possibility of analyzing its historical conditions.

Indeed, especially Warren's and Brandeis's essay makes clear that liberal distinction of the private and the public sphere is not only about defending privacy as a privileged place of self-discovery. It is at least as important to secure the quality of the public sphere, from where information about the private sphere shall possibly be banned as a kind of trivial information: "When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance" (Warren/Brandeis 1890). Thus, the two authors emphasize the triviality of privacy which does not make it appear to be a suitable matter of media public. Concerning this, triviality must also be interpreted to be part of the protective function of privacy (Nagenborg 2004). In my opinion, this deliberate triviality of the private sphere is not taken seriously enough by Geuss, as his reconstruction of privacy aims to much for defending a field which is especially worthy of protection.

Triviality being a desirable quality of private life is difficult to understand if one does not have in mind the opposite, i. e. a society in which no action is trivial at all. Just this must be said about the time of the French revolution, particularly about the terror by the Jacobins, when expressing private interests or retreating to privacy was enough to be considered counter-revolutionary. Thus, it was not at last this expanding kind of public where everything was declared a matter of public interest, which in the 19<sup>th</sup> century opened the eyes for the necessity of distinguishing privacy from public (e. g. see Hunt 1992).

These experiences then were the background against which the totalitarian states of the 20<sup>th</sup> century were interpreted by liberal thinkers like Berlin. Thus, the gap in Geuss's genealogy is symptomatic.

## Liberalism and Totalitarianism

If Berlin recalls the origins of the liberal approach of privacy to come from the time of terror, this is not only to recall some forgotten aspect. At the same time, he shows a way out of the crises of liberalism, as it was perceived after the end of World War II.

On the one hand, World War II could be interpreted as a struggle between liberal and totalitarian, anti-liberal states. The victory of the liberal states lead to the question, in what way liberalism was to be re-defined towards social security and economic equality. Behind this challenge there was and still is the question, in how far a wrong interpretation of liberalism might have contributed to the coming up of totalitarian states (see e. g. Schapiro 1964). Today, such a share of responsibility by liberalism is emphasized, e. g. by P. Berman in his volume „Terror and Liberalism“ (2003). Berman´s analogy of the totalitarian challenge of liberal democracy and the Islamist rejection of the western idea of development has rightly been questioned, among others by H. Münkler (2004). But here his view is of interest as it helps to achieve a better understanding of I. Berlin´s specific accomplishment: by emphasizing the Jacobins´ terror being a fundamental historic experience for liberalism, Berlin is able to tell an alternative history of liberalism, in which the struggle between liberalism and totalitarianism does not start as late as in the 20<sup>th</sup> century. Of course it is still possible to state that totalitarian movements were able to make a profit from liberal tolerance but at the same time it gets clear that we must distinguish different kinds of liberalism from each other. At least some liberal philosophers – Mill and Constant – are accepted by Berlin for having recognized the problem. Thus, general criticism of liberalism seems to be invalid and a fundamental distinction between different kinds of liberalism seems to be necessary.

Concerning this, it is a widely discussed question by what the different kinds of liberalism are put together. Since 1989, this has been asked not only concerning foreign policy. But doing this, we must not fail to see that also concerning one of the focal questions of liberalism, i. e. the relation of citizen and state, there are different views. In this field, the European tradition seems to distinguish itself by restricting the state a. o. by emphasizing the demand of privacy. The American tradition, on the other hand, considers the state a guarantor of freedom which for defending the fundamental values of liberalism and in the interest of the community is allowed to ignore individual demands,

maybe at the same time protecting privacy from interventions by others. The European tradition emphasizes the possibility that democracies might end up as totalitarian systems while the American tradition emphasizes the idea that a liberal society should be protected from totalitarian tendencies and threats by every means.

In so far, the experience of terror has been fundamental for the European tradition while the US-American tradition can point out to the positive experience of its own past. Thus, to make this difference clear, terror must be taken into consideration for the dialogue of the two traditions.

## Some Conclusions

Now, the significance of terror in the European tradition should not be understood in the way that American tradition does not know the problem of totalitarian democracy. It is only that in my opinion it is dealt with on a different level: while in Europe the state´s power is restricted by data protection acts in order to hem totalitarian tendencies, in the American tradition trust in the democratic state seems to be more distinctive, which is thus considered a guarantor of protecting privacy and a protection from totalitarian tendencies.

In the dialogue of the two traditions it is as important not to generally castigate surveillance as being totalitarian as not to dismiss the reservations against controlling the internet as a space of communication as being hesitant and indecisive. Both approaches must be interpreted as being a fundamental part of each tradition. Concerning this, I imagine it to be quite helpful even for the defenders of the European tradition to recall that kind of liberal tradition pointed out to by I. Berlin.

At the same time it may still seem “odd” that privacy is discussed and defended against the already mentioned background of historic experience. Many data, whose exchange Lessig wants to make possible by his sketch, are considered rather trivial in our society. But just because of this we should remember that trivializing privacy is a means of protection to protect us from a society without anything being trivial.

## References

*Berman, P.: Terror and Liberalism. New York: W. W. Norton 2003.*

- Berlin, I.: *Zwei Freiheitsbegriffe*. In: I. Berlin, *Freiheit. Vier Versuche*. Frankfurt a. M.: S. Fischer 1995. (German Edition of: *Four Essays on Liberty*, 1969)
- Geuss, R.: *Privatheit*. Frankfurt: Suhrkamp 2002. (German Edition with an added introduction of: *Public Goods, Private Goods*. Princeton University Press 2001)
- Hunt, L.: *Französische Revolution und privates Leben*. In: P. Ariès, G. Duby, eds.: *Geschichte des privaten Lebens*. 4. Band. Edited by Michelle Perrot. Frankfurt am Main: S. Fischer 1992.
- Kuhlen, R.: *Die Konsequenzen von Informationsassistenten*. Frankfurt a. M.: Suhrkamp-TB Wissenschaft 1999.
- Lessig, L.: *Code and other Laws of Cyberspace*. New York: Basic Books 1999.
- Lessig, L.: *Privacy as Property*. In: *Social Research*, Vol. 69, No. 1, pp. 247-269.
- Miller, A. R.: *Der Einbruch in die Privatheit*. Neuwied, Berlin: Luchterhand 1973. (German Edition of: *The assault on privacy*)
- Münkler, H.: *Im Banne falscher Analogien*. *Die Zeit* 22/2004.
- Nagenborg, M.: *Privatheit unter den Rahmenbedingungen der IuK-Technologien* (Dissertation, 2004). (in print)
- Van den Hoven, M. J.: *Privacy and the Varieties of Moral Wrongdoing in an Information Age*. In: *Computers and Society*, September 1997, pp. 33-37.
- Warren, S. / Brandeis, L.: *The right to privacy* (1890). In: F. Schoeman, ed.: *Philosophical Dimensions of Privacy*, Cambridge: Cambridge University Press 1984, pp. 75-104.
- Wunden, W.: *Grenzen des öffentlichen Zeigens – Privatheit als Element einer Kultur der Öffentlichkeit*. In: W. Wunden, ed., *Öffentlichkeit und Kommunikationskultur*. Hamburg, Stuttgart: Steinkopf; Frankfurt a. M.: Gemeinschaftswerk der Evangelischen Publizistik 1994, pp. 165-179.

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