

Is there a general right of non-disclosure?

by Stavros Tsakyrakis¹

1. Introduction

What information about ourselves do we owe each other? What information about ourselves are we justified to withhold from others? Do I have the right to keep my name secret or my face covered? What about my address, my age, my income, my medical or criminal records? Do I have the right to keep secret my feelings, my religion, my political affiliation or my sexual preferences? What about my fingerprints or my DNA? In an age of revolutionary advances in information technology, when everyone with a simple computer can create databases that were not available even to sophisticated secret services twenty years ago, the old issue regarding the limits of public and private sphere has acquired new prominence. It was in fact those new technological developments that prompted the European Union to enact Directive 95/46/EC that regulates the processing of personal data. The stated aim of the Directive was the protection of the right to privacy, and most European countries enacted laws pursuant to it. But, of course, the fact that the processing of data is now easier does not change the basic premise of the issue; namely which information about oneself does someone have the right to withhold from others

Recent years have witnessed the emergence of an influential approach to this issue. According to this approach, all persons have a general right to control information about themselves. The most characteristic way to exercise this right is by consenting to certain information being made available to or used by third parties. But the approach under consideration does not insist that consent is necessary in all cases. Information may be obtained and used absent consent, provided that certain conditions are met. Importantly, it must be shown that the availability of this information or its use for a specific purpose serves an important public goal. In this case, the right manifests itself not through consent, but rather by placing of the burden of proof on those who seek to obtain or use the information. It thus operates as a *prima facie* right, which may be outweighed or overridden by competing considerations. In this exercise, different kinds of information will attract greater or weaker protection. Thus, for instance, certain data may be more sensitive than

¹ The author thanks Pavlos Sourlas, Grégoire Webber, and especially Dimitris Kyritsis for their valuable comments.

others. But this does not negate the baseline that we have a prima facie right to control all information. I shall call this putative right the ‘general right of non-disclosure’.²

This approach is deeply problematic, and in this chapter I shall criticize it. More specifically, I shall argue that, even if it is construed as merely prima facie, a general right of non-disclosure blows privacy out of proportion and fundamentally misunderstands the place of the individual in society. To this effect, I shall sketch an alternative understanding of sociability, which remains essentially liberal while emphasizing the importance of sharing information. Non-disclosure has an important, though circumscribed, role in this understanding. I shall then briefly show how the idea of *liberal sociability* may be employed by the European Court of Human Rights in its interpretation and application of Article 8 of the Convention. My aim is not necessarily to show that the proposal outlined here furnishes a more satisfactory response to concrete cases. In fact, it may well be that we reach the same conclusion, whether our starting point is a general right to non-disclosure subject to proportionate limitations or the idea of liberal sociability. But this overlap in outcome should not conceal the profound differences of principle

2. Liberal sociability

Our assessment of a putative general right of non-disclosure must be based on an understanding of social cooperation and the place of individuals in it. It thus takes us to the basics of political philosophy, to the fundamental questions about what a political society is and what kind of union it demands from its members.

In his *Politics*, Aristotle invites us to consider what things are common in a political society, as part of his critique to Plato’s collectivity. The possibility of not having anything in common is *a priori* excluded, since otherwise there will be no community at all.³ Is it right then to think, as Plato did, that the more things are in common (women, children, property), the more complete, the more united is the political society? Aristotle contends that this view mistakes the kind of unity a political community is capable of being. Instead of identifying the common elements that could constitute a distinct type of community, it actually seeks to import into political society the common elements of a

² The description of this right that I outline here is meant to echo a more general philosophy of rights that has become more or less the orthodoxy in continental Europe. According to this philosophy, rights offer prima facie protection, subject to limitations that pass a proportionality test. I have argued against that philosophy in S. Tsakyrakis, ‘Proportionality: An assault on human rights?’ 7 *Int’l J. Const. L.* 468-493 (2009).

³ Aristotle, *Politics*, Book II, Chapter I, 1261a.

family or, if possible, of a single human being. However, political society is not a huge family or a super human. On the contrary, it is a unity of a completely different nature from the nature of the more particular associations and individual human beings, of which it is comprised. Hence, the common elements of a political society should be traced in the distinct characteristics and the distinct purposes of political organization.

Contemporary societies do not, however, form an organic unity, as contemplated both by Plato and by Aristotle. They are not called upon to realize the consummation of human beings through common action, but rather to guarantee the conditions necessary for the attainment of a good life by individuals. Contrary to the classical tradition, contemporary societies have individuals as their starting point. Still individuals share things in society. It would be rather paradoxical to think that, just because individuals are the starting point of societies, the less they share the better a society becomes. It would be rather paradoxical for any society to seek the maximum disaggregation of its members. If, as Aristotle says, sharing everything is a destructive principle for the polis, sharing nothing is obviously similarly destructive. In the first case instead of a political community we envisage a family or a super person; in the second case instead of a political community we envisage a collection of Robinson Crusoes. If individuals' well being is not a matter of collective praxis, neither is it a matter of isolation.

Our moral outlooks reflect this tension. To show this, I shall first consider more intimate relationships, before moving on to large-scale social structures such as political communities. The sharing of everything is detrimental even in erotic relationships, as Aristotle himself acknowledged in his comment on Aristophanes' description of the union of man and woman.⁴ To strive to become one flesh, to stick together forever does not lead to the consummation of a couple, but to its destruction. Of course, a couple will share plenty of things, much more than two fellow-citizens. However, it is not always the case that, the more the couple share, the better their union will be. For instance, we do not think it is appropriate for one to read the other's mail or expect from the partner the disclosure of all her thoughts. Furthermore, we think that these constraints do not undermine the relationship but actually make for a meaningful interpersonal relationship. This is because we believe that couples consist of distinct human beings, who maintain a degree of individual autonomy, and thus the existence of one is not totally absorbed by the existence of the other. In other words, the recognition of autonomy is not only a value in itself, but also a parameter of sociability.

⁴ Aristotle, *Politics*, Book II, Chapter IV, 1262b.

Let's now broaden the canvass. The recognition of human beings as moral persons, who are not subsumed under a collective entity, constitutes not only a basic premise of close interpersonal relationships, but also an organizing principle of social cooperation in general. We may roughly distinguish social cooperation in the context of what I will call activities aiming at mutual advantage on the one hand, and sociability aiming at the realization of one's conception of the good on the other hand. The former include most of the activities in public space, economic transactions for example, and consist in numerous social relations of each member of the society with others. The latter include the more intimate relations with certain people. Although the various social relations are not separated with insurmountable fences, since cooperating for mutual advantage and seeking the personal good depend on the rules that govern a well ordered society, yet we can distinguish different aspects of sociability based on the role of individual choice or consent. Thus participation in social relations aiming at one's personal good as well as their precise content depends to a great extent on the choice or consent of individuals. Different couples have different arrangements about who will do the dishes or cook dinner, for example. Consider, by contrast, the more numerous social relations that fulfill the task of everyday cooperation for mutual advantage. Some of them are with people we do not even know, others are consensual. I don't know for example the bus driver or the person who sits next to me on the bus but I may choose from whom to buy my coffee. But even in cases where the consensual element is more prominent, the nature and content of those relationships are based on a pre-existing matrix of rules and mutual expectations.⁵

Finally, over and above those more specific forms of social cooperation, individuals share a common end, namely the collective achievement of justice, for only just public institutions allow everyone to realize his or her more particular aims. Thus, Rawls insists that "[...] the sociability of human beings must not be understood in a trivial fashion. It does not imply merely that society is necessary for human life, or that by living in a community men acquire needs and interests that prompt them to work together for mutual advantage in certain specific ways allowed for and encouraged by their institutions".⁶ Dworkin likens the collective agent that represents all members of the political community with an orchestra. An orchestra depends, obviously, on the contribution of the

⁵ It is true that cooperation for mutual advantage consists of relations that also aim at the advancement of one's personal good. But this is no argument against my distinction. What fixes the distinction is not the *object* or *aim* of one's involvement in a type of social activity but its taking place in a context that reduces transaction costs and thus facilitates large-scale interaction.

⁶ John Rawls, *A Theory of Justice*, 1999 p. 458.

individual musicians, but its performance has a life of its own which is more than the aggregate of the brilliance or the merits of its members. The best musicians in the world will not become an orchestra by just being together on stage. They should aim to a collective enterprise and follow rules that make it possible. “It is the orchestra that succeeds or fails” says Dworkin, although [...] “the success or failure of that community is the success or failure of each of its members”.⁷

In a political community there is a level of integration of all citizens which is neither superficial nor instrumental. It includes the participation to the formation of the government as well as the formal acts of government through its legislative, executive and judicial institutions. These acts constitute the communal life of the political community just as music constitutes the communal life of an orchestra. At the same time these acts set the rules for the fair social cooperation of all citizens.

For present purposes, it is important to note that our participation in a political community is in principle independent of the actual consent or choice of the individuals. So are the terms of our participation. The rules that govern public institutions reflect either the general moral principles of political association or collective decisions made in accordance with those principles; they are not fashioned to match individual preferences.

Having sketched different domains of sociability, I now wish to make some suggestions about the rules regulating the sharing of information within each domain. Sociability does not necessarily involve sleeping with each other but it surely means sharing information with others, and what this entails more specifically varies across different contexts. In principle there is no ground to keep secret any information concerning the end of justice. That would be like thinking that an orchestra can function if the violinist refuses to reveal his musical skills. Similarly social cooperation for mutual advantage requires the sharing of some information. With regard to this information, its availability cannot be made dependent on our consent to disclose. For, otherwise social cooperation cannot be achieved. Our skills and education cannot be kept secret in a job market. Our name and address cannot be kept secret, if we use the post. Or to go back to one of my previous examples, I want to know if the bus driver has an appropriate driving license or whether the person who sits next to me has the flu or not.

But, as was pointed out, the collective achievement of justice and social cooperation for mutual advantage do not and should not encompass all features of a human life. In a theory of liberal sociability there is room

⁷ Ronald Dworkin, *Sovereign Virtue*, Harvard University Press, 2000, p. 225. Dworkin notes that the orchestra example was offered by Rawls in his book *A Theory of Justice*, 1999, p. 459 (note). Rawls refers also to the orchestra example in his *Political Liberalism*, Columbia University Press, 1993, p. 204.

for each person to pursue their personal good at some distance from other people except those with whom one has chosen to share this pursuit. It seems appropriate that information that concerns such aims be kept secret from broad public knowledge, if a person that it refers to wants to withhold it. This is so, not only because of the value of being able to pursue the more personal aspects one's own good. It is also because such a constraint is consistent with the idea of a meaningful sociability. A helpful example to prove this is sexual preferences or fantasies. Thomas Nagel has argued convincingly that it would be a disaster if we tried to make sexuality a public matter. "The sexual republic is a huge population of individuals with different often incompatible fantasies and imaginations", he says and points out that "we do not inhabit a common sexual world in the sense –limited, to be sure- in which we inhabit a common natural, or economic, or medical, or military, or educational, or even artistic world."⁸ His conclusion is that any attempt to make sexuality a public matter will result in useless tension and disputes since on these issues no collective response is necessary or possible. Keeping information on these issues private not only serves individual interests but makes social interaction more meaningful.

3. Against the general right of non-disclosure

What are the more general lessons to be drawn from this brief exploration of the idea of liberal sociability? Here I shall first offer a critical conclusion and then I shall explain how liberal sociability accounts for the protection of what has come to be known sensitive data.

Why is the notion of a general right of non disclosure misguided? If (as I have tried to demonstrate) social cooperation is not always and at all levels optional and—consequently—if it requires the sharing of information, then one cannot begin with an all-inclusive right of non-disclosure of personal data. What idea of society do we have in mind, what kind of social cooperation, in which each member is the owner of all information concerning his person, name, address, skills, income, opinions etc.? I may have to reveal my age or skills in order to find a job but in principle this is personal data. I may have to reveal my revenues for taxation but otherwise this is a personal data that nobody else should know. This is a very impoverished idea of society and social cooperation.

But this is precisely the idea that seems to be espoused by the data protections laws that were enacted in the past twenty years that have lumped together all information about a person under this general right. In some countries this has led to incredible claims and farfetched rulings from data protecting authorities. In Greece, for example, the collecting of

⁸ Thomas Nagel, *Concealment and Exposure*, Oxford 2002, p. 47.

data such as the names, telephone numbers and addresses of friends of a political party was found illegal, because no permission was sought for processing of these data. Moreover, state employees have claimed that their salaries should be concealed, students that grades in high school or university should not be made public, even drivers, who have infringed the traffic code, have claimed that it is forbidden to have the plates of their cars photographed. Such rulings or claims reflect a conception of extreme individualism. Taken to its extreme, this conception deems the total stifling of the flow of information as a social ideal.

I mention these examples to illustrate a certain trend. It must be emphasized, though, that my interest is not with individual cases or decisions. In fact, it is readily acknowledged that the present system introduces some flexibility, insofar as it allows the collection and processing of data or the disclosure of information, provided that an appropriate justification is offered. But this allocation of the burden of proof suffers from the same philosophical defect. The sharing of information is an inevitable and necessary feature of sociability and, indeed, a constitutive element of the collective achievement of justice and of cooperation for mutual advantage. We do not do justice to this feature, if we structure our moral and legal discourse in a way that makes room for a general individual interest not to be 'seen', which competes with an opposite societal interest to 'see'. Quite plainly, there is no such individual interest. So, if anything, it must be the individual that bears the onus of showing that the concealment of information is necessary for his personal good and/or compatible with a meaningful sociability.

It may be objected to my claim so far that, even if the notion of a general right of non-disclosure is not philosophically coherent, it seems to provide better results in certain cases than liberal sociability. Consider the special protection it accords sensitive personal data, which include racial or ethnic origin, political opinion, religious beliefs, and trade union membership, health condition, sexual life, criminal records. How does liberal sociability protect them? It is reasonable to suppose that religious beliefs and sexual life aim to personal good and should enjoy special. However, it is not similarly evident on what ground political opinions, membership of a trade union or criminal records should be susceptible to special protection. Data regarding these issues seem to pertain to the communal life in which every one takes part. If this is true, the presumption is in favour of having such information open to every one rather than concealed.

This seems to put proponents of liberal sociability in a tight corner. We want these things to be protected. But, on what basis will this be achieved, if we reject a general individual interest not to be seen? The answer I propose has two components. First, I want to stress that social

cooperation for mutual advantage only dictates the sharing of information for certain purposes; consequently, what is appropriate in one context is not appropriate in another. Many categories of sensitive data concern data that are appropriately disclosed in certain circumstances but may be withheld in others. It may well be then, that the special protection afforded them aims to police these boundaries. Second, and perhaps more importantly, I want to argue that the basis for the special protection of sensitive data lies in considerations that cannot be subsumed under any single principle and at any rate have very little to do with privacy. Often, these considerations are a matter of individual right. Thus, the right of convicted persons to conceal their criminal record is intended to facilitate their re-integration into society, which is dictated by the concern and respect that political society owes them. Other times, these considerations do not reflect an individual right but some other important moral value. So, for instance, the secret ballot promotes genuine democratic participation; it is premised on the thought that the political process is likely to be distorted, if this information is not concealed. This may also be the case with regard to the non-disclosure of trade union activity. In all these examples, the right to non-disclosure is justified by appeal to specific judgments about the way a certain piece of information is likely to be used, if disclosed, given certain assumptions about the features and tendencies of this or that society, as well as about the likely effects of such use.⁹ But it is not justified by appeal to any putative general individual interest to control information pertaining to one self. Recall, by way of contrast, the case of sexual preferences. The concealment of the relevant data is indeed a matter of right in a well ordered society. For, sexual life need not and probably should not be shared within the community as a whole.

Let's examine some individual claims of right to privacy that came before the European Court of Human Rights and how the Court dealt with these claims. In the case of *S. and Marper v. United Kingdom*¹⁰ fingerprints, cellular samples and DNA profiles of the applicants were taken by the police during a criminal investigation and although the charges against the applicants were dropped, the authorities refused to destroy the data. The complaint was that the retention of the data "interfered with their right to respect for private life as they were crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their

⁹ I follow here the analysis of the structure of rights offered by T.M. Scanlon. See his 'Rights, Goals and Fairness' and 'Freedom of expression and categories of expression' reprinted in *The Difficulty of Tolerance* (Cambridge, Mass.: Harvard University Press, 2003).

¹⁰ *S. and Marper v. United Kingdom* Judgment of 4 December 2008 (Grand Chamber).

control”¹¹. All three kinds of data did not include relevant information concerning the physical and psychological integrity of the person. But since cellular samples and DNA profile contain some information and raise fears about their future use with the potential advance of scientific methods, we better limit our discussion to fingerprints which reveal only the identification of a person and nothing else. Does the retention of fingerprints constitute an interference with the right of privacy?

The answer of the UK courts was negative and the Government argued that “their retention did not interfere with the physical and psychological integrity of the persons; nor did it breach their right to personal development, to establish and develop relationships with other human beings or the right to self-determination.”¹² The Court conceded that fingerprints “constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint”, but observed that “this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances”.¹³ The Court concluded that “the retention of fingerprints on the authorities’ records in connection with an identified or identifiable individual may in itself give rise, notwithstanding their objective and irrefutable character, to important private-life concerns.”¹⁴

The Court failed to elaborate what kind of important private-life concerns were in play. It is hard to imagine how the retention of fingerprints interferes with the pursuit of an individual’s personal good. Apparently the decisive factor for the Court was the possibility of identification of a person through his fingerprints. Nevertheless such identification mainly concerns social activity and has no obvious connection with one’s personal good. In the same vein the retention of various kinds of data, such as a passport or photos, driver’s license, car plates, would equally raise private-life concerns. This kind of argumentation supports not a right to privacy but rather a right to hide in society and only serves to vindicate the criticisms of liberalism levelled by Marx and the communitarians.

Ironically though, in cases where the core of “personal good” (sexual preferences) was at stake, the Court displayed more scepticism. In the case of *Laskey, Jaggard and Brown v. UK*,¹⁵ which concerned sadomasochistic activities, while the Court held that there had been an

¹¹ Ibid, Para 60.

¹² Ibid, Para 63.

¹³ Ibid, Para 84.

¹⁴ Ibid, Para 85.

¹⁵ *Laskey, Jaggard and Brown v. UK*, Judgment of 20 January 1997.

interference with the right of privacy, Judge Pettiti, in his concurring opinion, was of the view that there was no question of privacy at all: “In my view, that Article (art. 8) was not even applicable in the instance case. The concept of private life cannot be stretched indefinitely.” His conclusion was that “the protection of private life means the protection of a person’s intimacy and dignity, not the protection of his baseness or the promotion of criminal immorality.”¹⁶

Regardless of the outcome of *Marper*¹⁷ and *Laskey* it seems to me that the above mentioned arguments lack a coherent approach of what information calls for protection under the right of privacy. Most obvious of all, neither case can be understood against the standard of liberal sociability.

4. Conclusion

I have argued that there is no general individual interest to control information about oneself. Therefore, we should reject the notion of a comprehensive right to non-disclosure, even if this right is taken to be merely *prima facie*. I have argued, by contrast, that a philosophy of human rights should accept human sociability, while insisting that the political community does not encompass all features and dimensions of human life. My claim has yielded the following simple principle: In the general scheme of social interaction, which includes the collective achievement of justice, social cooperation for mutual advantage, and the pursuit of one’s personal good, it is only with regard to the latter that we can talk of a right to privacy. Assuming that this line of argument is correct, it can shed light on the meaning of “the respect of private life” under Article 8 of the European Convention of Human Rights in the following sense: one has no right in general to withhold information about oneself but this right is limited to information regarding strictly the pursuit of one’s personal good. A state may choose to circumscribe the

¹⁶ Ibid, Concurring Opinion of Judge Pettiti. While Judge Pettiti thinks that privacy can’t be stretched to include sexual practices, Kate Beattie has no doubt that fingerprints raise an issue of privacy: “One of the curiosities of the UK court judgments in *S and Marper* was their reluctance to find that retention constituted an interference with art. 8 rights at all. Six UK judges (Rose L.J. and Leveson J. in the Divisional Court and all members of the House of Lords save for Baroness Hale) considered that there was no interference with art. 8 or were prepared to acknowledge at most only a very modest interference, seemingly for the purposes of proceeding to the justification analysis under art. 8 (2). It is commonplace that there is no longstanding tradition of privacy protection in English law and these judgments attest to this, at times, it would seem betraying an impatience with the very suggestion of privacy concerns in this context.” See Kate Beattie, *S and Marper v. UK: privacy, DNA and crime prevention*, E.H.R.L.R. 2009, 2, 232.

¹⁷ In fact one may find other issues at stake in *Marper*. See Liz Campbell, *A right-based analysis of DNA retention: “non-conviction” databases and the liberal state*, Crim. L. R. 2010, 12, 889-905.

sharing of other kinds of data should it consider it instrumental to the protection of certain social values. But this choice is not a matter of a right to privacy. Its justification is based on its relation with other social values or rights.