ano 23 – n. 92 | abril/junho – 2023
Belo Horizonte | p. 1-260 | ISSN 1516-3210 | DOI: 10.21056/aec.v23i92
A&C – R. de Dir. Administrativo & Constitucional
www.revistaaec.com

A&C

Revista de Direito ADMINISTRATIVO & CONSTITUCIONAL

A&C – ADMINISTRATIVE & CONSTITUTIONAL LAW REVIEW

FORUM

A&C – REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL

IPDA
Instituto Paranaense
de Direito Administrativo

INSTITUTO DE DIREITO
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Rua Paulo Ribeiro Bastos, 211 – Jardim Atlântico – CEP 31710-430 – Belo Horizonte/MG – Brasil – Tel.: (31) 99412.0131
www.editoraforum.com.br / E-mail: editoraforum@editoraforum.com.br

Impressa no Brasil / Printed in Brazil / Distribuída em todo o Território Nacional

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A246 A&C : Revista de Direito Administrativo & Constitucional. – ano 3, n. 11, (jan./mar. 2003)- . – Belo Horizonte: Fórum, 2003-

Trimestral
IISSN impresso 1516-3210
ISSN digital 1984-4182

Ano 1, n. 1, 1999 até ano 2, n. 10, 2002 publicada pela Editora Juruá em Curitiba

1. Direito administrativo. 2. Direito constitucional. I. Fórum.

CDD: 342
CDU: 342.9

Coordenação editorial: Leonardo Eustáquio Siqueira Araújo
Aline Sobreira de Oliveira
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Projeto gráfico: Walter Santos

Periódico classificado no Estrato A3 do Sistema Qualis da CAPES - Área: Direito.

Qualis – CAPES (Área de Direito)
Na avaliação realizada em 2022, a revista foi classificada no estrato A3 no Qualis da CAPES (Área de Direito).

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A *A&C – Revista de Direito Administrativo & Constitucional*, é um periódico científico promovido pelo Instituto de Direito Romeu Felipe Bacellar com o apoio do Instituto Paranaense de Direito Administrativo (IPDA).

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Foi fundada em 1999, teve seus primeiros 10 números editorados pela Juruá Editora, e desde o número 11 até os dias atuais é editorada e publicada pela Editora Fórum, tanto em versão impressa quanto em versão digital, sediada na BID – Biblioteca Digital Fórum. Tem como principal objetivo a divulgação de pesquisas sobre temas atuais na área do Direito Administrativo e Constitucional, voltada ao público de pesquisadores da área jurídica, de graduação e pós-graduação, e aos profissionais do Direito.

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A cobertura temática da revista, de acordo com a classificação do CNPq, abrange as seguintes áreas:
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Indexação em Bases de Dados e Fontes de Informação
Esta publicação está indexada em:
- Web of Science (ESCI)
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A publicação dos artigos submete-se ao procedimento *double blind peer review*. Após uma primeira avaliação realizada pelos Editores Acadêmicos responsáveis quanto à adequação do artigo à linha editorial e às normas de publicação da revista, os trabalhos são remetidos sem identificação de autoria a dois pareceristas *ad hoc* portadores de título de Doutor, todos eles exógenos à Instituição e ao Estado do Paraná. Os pareceristas são sempre Professores Doutores afiliados a renomadas instituições de ensino superior nacionais e estrangeiras.

DOI: 10.21056/aec.v23i92.1810

Privacy, internet and pluralist democracy

Privacidade, internet e democracia pluralista

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Recebido/Received: 13.05.2023 / 13 May 2023.
Aprovado/Approved: 04.06.2023 / 04 June 2023.

Abstract: The aim of this study is to discuss some important criticism of digital rights, in particular of the right to privacy, by feminist and law economics scholars. Then, its relation to security and transparency is proposed. In particular, I argue that such theoretical lenses would help shed light on recent cases concerning controversial surveillance leaks, which highlight the deficiency of legitimacy as well as of the jurisdiction and ethical agency of leading democratic states: e.g. The NSA scandal. Finally, I will criticize this approach and will highlight some real treats to the fundamental rights when I consider the possibility of a pluralist democracy in the dimension of the Internet.

Keywords: Privacy. Security. Transparency. Feminism. Law and Economics. NSA.

Resumo: O objetivo deste estudo é discutir algumas críticas importantes aos direitos digitais, em particular o direito à privacidade, elaborados por parte da teoria feminista e do direito e economia. Em seguida, revisarei sua relação com a segurança e a transparência. Em particular, meu propósito é argumentar que tais aportações teóricas ajudariam a colocar luz sobre casos recentes relativos aos controversos vazamentos de notícias sobre vigilância, que destacam carência de legitimidade, assim como de jurisdição e agência ética dos principais estados democráticos: isto é o caso do escândalo da NSA. Por fim, laborarei algumas críticas a esta abordagem assim como destacarei algumas reflexões

Como citar este artigo/*How to cite this article*: STAMILE, Natalina. Privacy, internet and pluralist democracy. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 23, n. 92, p. 25-61, abr./jun. 2023. DOI: 10.21056/aec.v23i92.1810.

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sobre os direitos fundamentais, considerando a possibilidade de realizar uma democracia pluralista na dimensão da Internet.

Palavras-chave: Privacidade. Segurança. Feminismo. Direito e Economia. NSA.

Summary: **1** Introduction – **2** Feminism – **3** Law and Economics – **4** NSA – **5** Some remarks on transparency – **6** Some conclusions – References

1 Introduction

In an era increasingly affected by globalization, the Internet phenomenon would seem to play a determinant role. Indeed, the Internet has been recently defined as a big public space, or better still as the biggest public space that humanity has ever known. It is equipped with its own dimension and characteristics, and that is what distinguishes it from the traditional idea of public space, with the inevitable consequence of making it necessary to rethink some of the fundamental rights – such as, just to give some examples, privacy, freedom of expression or protection of sensitive information/data – and to highlight their very limits in face of these changes. Some authors have commented on the appeal of the internet and of the World Wide Web which, among others things, have "led to the design of a universe, in which content is an archive and in which form is that of a network. It became thought of as a space, where whoever wants to stay alone could achieve that and whoever wants to establish links and be part of a community could do that too".[1] But is that really so? Is it truly possible to choose whether to belong to such a community or to actually leave it?

The advent of the internet has undoubtedly reopened and rekindled the debate on the classical arguments of legal and political theory. This point of view could be summarized by referring to Giovanni Ziccardi's words. He states in his short book on legal informatics that "along with legal informatics as a means of 'digital literacy' and digital rights, there is a third field of research that has acquired increasing importance in the internet era. This third field approaches themes that are strictly linked to the classic ones of legal philosophy and theory [...] the advent of networks made fashionable again, through debates and questions relating to, for example, liberty rights (especially freedom of expression), the establishment of a relationship between anarchy and cyberspace regulation; between ethics, netiquette, and the legal code of conduct in the virtual environment and mass phenomena (such as

[1] All translations from Italian to English in the present chapter were made by the present author. See DURANTE, Massimo. *Il futuro del web*: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete. Torino: Giappichelli, 2007, p. 1.

peer-to-peer and the birth of online communities); between some problems related to digital identity, sex and new forms of relation, and virtual societies and communities within the network".[2] In addition, some authors highlighted the fact that legal and political philosophy, when confronting legal informatics, establishes a relationship that is not always easy.[3]

Therefore, in light of the relationship between law and legal informatics, could a space for freedom and responsibility be recognized for each single person inside the network? What are the contents and limits of concepts such as privacy and transparency? Has the web the power to impose legal effects? Could the interactions between individuals in the virtual agora happen in such a way that their autonomy and freedom, as well as democratic legitimacy and transparency, for example, could be safeguarded? Or should we elaborate new values? In particular, what kinds of issues do the new technologies raise regarding their delicate and complex relationship with ethics? But first, the analysis needs to address the important criticism regarding digital rights – in particular, the right to privacy – by feminists, law and economics scholars, and then propose a relationship between these rights, security and transparency. In particular, I am interested in discussing some critical aspects in relation to security while, exploring the issue of transparency only superficially. Thus, in this my study, the discussion related to transparency is not conclusive.[4] For this reason, it is worth emphasizing that an analysis regarding the right to privacy and all of its consequences in the legal system are conceptually and currently necessary to have a complete view of the problem and to reconstruct, in general, the concept of law and, specifically to contribute to a deeper understanding of the interplay between norms, practices and structures of transparency.

2 Feminism

2.1 The feminists have not always taken unified positions in the USA as also not in Europe and, especially, they have not always taken unequivocal positions regarding the same problems or phenomena[5]. According to Fineman, "when we

[2] See ZICCARDI, Giovanni. *Informatica giuridica*. Milano: Giuffrè, 2006, p. 74.

[3] See PATTARO, Enrico. La filosofia del diritto di fronte all'informatica giuridica. In: JELLAMO, Anna; RICCOBONO, Francesco (ed.). *In ricordo di Vittorio Frosini*. Milano: Giuffrè, 2004.

[4] For a fuller examination see: CHOI, Jay J.; SAMI, Heibatollah (ed.). *Transparency and governance in a global world*. Bingley: Emerald Publishing, 2012; STAMILE, Natalina; ANDRESANI, Gianluca. "Transparency in Internet Regulation and Governance: Arguments and Counter-Arguments with some Methodological Reflections", *Revista Brasileira de Estudos Políticos*, núm. 117, 2018, pp. 443-476; AUGUST, Vincent; OSRECKI, Fran (ed.). *Der Transparenz-Imperativ*: Normen, Strukturen, Praktiken. Wiesbaden: Springer VS, 2019 and esp. AUGUST, Vincent; OSRECKI, Fran. Transparency Imperatives: Results and Frontiers of Social Science Research. In: AUGUST, Vincent; OSRECKI, Fran (ed.). *Der Transparenz-Imperativ*: Normen, Strukturen, Praktiken. Wiesbaden: Springer VS, 2019, pp. 1-34.

[5] See CAVARERO, Adriana. Presentazione. In: MACKINNON, Catharine. Soltanto parole. Milano: Giuffrè, 1994, pp. I-X; CASADEI, Thomas (ed.). Donnem diritto, diritti. Prospettive del giusfemminismo. Torino: Giappichelli,

speak of feminism, it is necessary to clearly state that there are many differences within feminism – differences in approach, emphasis, and objectives – that make sweeping generalizations difficult. Recognizing that there are many divergences in feminist theory, it is nonetheless possible to make some generalizations".[6] Over the years, feminism has taken many different forms and has been defined and redefined several times, making it impossible for the observer to draw a coherent picture. However, it is possible to describe the goals and the methods of the collective action of feminists and also to indicate what the most important groups are, which are characterized by peculiar features and trends. Thus, it is important to specify what the meaning of Feminism is. The word Feminism, generally, refers to the academic work and practical actions developed by women at first in the United States and then in Europe.[7] The academic approach focused on separatism (of public and private sphere), criticism of patriarchy and gender roles, became the heritage of those activists who initially formed small groups, leading to the formation of the feminist movement.[8] Different is the Women Movement, because it refers to a broader movement of opinions and political interventions. At its base, the radical instances that came from the women movement were able to permeate a large number of social actors not initially concerned with specific feminist issues, such as trade unions, political parties and labor movements. Some important goals were to highlight the contradictions in traditional political practice, such as denouncing sex discrimination and claiming for equal opportunities.[9] This led to a specific movement aiming at organizing women in social groups which would express a feminine identity

2015; STAMILE, Natalina. "Appunti su femminismo e teoria del diritto. Una rassegna". *Ordines: Per un sapere interdisciplinare delle istituzioni europee*, núm. 2, 2016, pp. 301-329; STAMILE, Natalina. "Nenhuma, uma, cem mil vozes de mulheres. Discutindo Donne, Diritto, Diritti. Prospettive del Giusfemminismo de Thomas Casadei". *Revista Direitos Sociais e Políticas Públicas* (UNIFAFIBE), vol. 6, núm. 2, 2018, pp. 401-419; STAMILE, Natalina. "Igualdad, diferencia y teoría feminista". *Eunomía. Revista en Cultura de la Legalidad*, 18, 2020, pp. 9-28.

6 FINEMAN, Martha Albertson. "Feminist Legal Theory". *Journal of Gender, Social Policy and the Law*, vol. 13, núm. 1, 2005, p. 13.

7 For a comprehensive summary of "Feminism", see STAMILE, Natalina. "Appunti su femminismo e teoria del diritto. Una rassegna". *Ordines: Per un sapere interdisciplinare delle istituzioni europee*, núm. 2, 2016, at 301-329. The author gives "[...] an overview on feminism, attempting to highlight the numerous shades of meaning that the word "feminism" could assume and potentially evoke. At the same time, it indicates not only a social and/or political movement, but also a legal theory. In addition, when we speak of feminism, it is necessary to clearly state that there are many differences within feminism: difference in approach, emphasis, and objectives; that make sweeping generalizations difficult. Despite the many divergences in feminist theory, it is nonetheless possible to make some generalizations. This consideration would explain the multiple internal contradictions in the same feminist movement and also its many misunderstandings" (p. 301). See also CASADEI, Thomas (ed.). Donne, diritto, diritti. Prospettive del giusfemminismo, Torino: Giappichelli, 2015; FARALLI, Carla. Donne e diritti. Un'introduzione storica. In: CASADEI, Thomas (ed.). Donne, diritto, diritti. Prospettive del giusfemminismo. Torino: Giappichelli, 2015, pp. 1-13.

8 See CALABRÒ, A. Rita; GRASSO, Laura. *Dal movimento femminista al femminismo diffuso.* Milano: Franco Angeli, 2009.

9 See CALABRÒ, A. Rita; GRASSO, Laura. *Dal movimento femminista al femminismo diffuso.* Milano: Franco Angeli, 2009.

and a feminist consciousness.[10] In addition, it is important to pay attention to the following consideration: Feminism is a political movement with a dual dimension. On one hand, it is characterized by the awareness of the "female body" in a public and private context. In this sense, political action is expressed by a sort of self-analysis. On the other hand, Feminism moves in a traditional political context – from a different point of view nonetheless – regarding social conflict, aiming at changing the *status quo ante*. These two dimensions, or "two souls", of Feminism are combined and separated in different ways. In order to understand their dynamics, it is useful to pay attention to the fact, noted by Linda Gordon, that one important characteristic of feminism is that it represents the integration of practice and theory.[11]

2.2 The position of feminism with regard to privacy is ambivalent. According to Anita Allen, the privacy concept represents for feminism an object of criticism (a barrier to be overcome), and at the same time an instrument of women's liberation.[12] On one hand, the feminists consider privacy as a problematic ideal because it relies on the distinction between domestic and private spheres and it is identified with the latter, i.e. with the family, a context in which women are traditionally and legally subordinated. It is so because some structures of social and economic relationships determine the dependence of only some members, the women, of the household unit upon others. On the other hand, there is a different opinion inside the feminist field: there are those who consider privacy as an instrument to express the possibility to make your own decisions, independently from the other sex;[13] therefore as self-control, which however it depends on its recognition in the public space. It is relevant to emphasize that in the USA the right to privacy includes a number of situations that originated from the discussion which, since the sixties, has been attracting growing public attention to issues related to new themes such as the organization of domestic life, the management of reproduction and, more recently, security in the handling of personal data. Here, it is very useful to remember how the distinction is constituted which is designed to contain women there who are forbidden public space. It is not a measure of liberation but of limitation also historically for the private sector it is not empty, but it is defined by the public space, therefore by the heteronymous rules with respect to women. According to Allen, we can identify

[10] See CALABRÒ, A. Rita; GRASSO, Laura. *Dal movimento femminista al femminismo diffuso.* Milano: Franco Angeli, 2009.

[11] GORDON, Linda. "The Struggle for Reproductive Freedom: Three Stages of Feminism". In: EISENSTEIN, Zillah R. (ed.). *Capitalist Patriarchy and the Case for Socialist Feminism*, 1979, 107, 1.

[12] See ALLEN, Anita. Unpopular Privacy, Oxford: Oxford University Press, 2011, *passim*. In this book, the author "draws attention to unpopular privacy - privacies disvalued or disliked by their intended beneficiaries and targets- and the best reasons for imposing them in a freedom-loving society". Allen offers insight into the ethical and political underpinnings of public policies mandating privacies that people may be indifferent to or despise.

[13] It is evident that the main goal of Allen is to describe and comment on the different positions concerning the definitions of privacy and the meaning that this concept should take from (her) feminist point of view.

three aspects of privacy. The first is "*physical privacy*", which refers to the freedom of not being observed or from undesired physical contact. Western culture usually identifies "home" as the place where you can enjoy such freedom, ignoring the fact that the domestic sphere is often a place of violence and oppression. In addition, privacy corresponds to all areas of life in which the physical interaction, or actions related to bodies, have a fundamental role. The second is "*informational privacy*", and concerns secrecy, confidentiality and anonymity of information regarding everybody. The computer technology has inspired and inspires an expansive definition of privacy, which could also be called "practices of fair information". Such practices focus, for example, on: the protection of personal information from public exposition; the adoption of measures to verify and update information; the facilitation of individual access and the registration of information that is disseminated; the necessity of gaining consent before using such information, and so on.

And finally, the third is *"decisional privacy"*, which consists in the possibly to make decisions free from any interference. At the base of decisional privacy is the idea of a limited, tolerant and neutral government, but also the idea that everyone has dignity, autonomy and interests, by virtue of which they have lives and ties that they can choose freely. According to Allen, if we adopt this dimension of privacy, we would miss the fact that reality is quite different from the ideals posed by this dimension. Indeed, particular uses of decisional privacy seem to assume that social life is divided into two separate spheres, one private and the other public. But this approach to the interpretation of privacy is very ancient being born in the ancient Greece, where the distinction between *polis* and *oikos* could be found, which influenced the roman distinction between *res publicae* and *res privatae.* The public sphere concerned the free (male) person with citizenship entitlements such as participation to the collective government of the *res publica*, requiring the recognition of an economic status through the possession of private property. On the contrary, in the private sphere, women, children and slaves battled to survive in the economic context and sometimes even in the biological family context. This classical way of interpreting social life organized around these two spheres (private and public) still survives in our post-Enlightenment traditional western thought, where the private realm is considered valid mainly into household and family spheres and sometimes in intimate or in any case 'apolitical' associations. However, Feminists contend that, nowadays, it becomes clear that law and other regulatory and policy instruments define and mediate relations among individuals, and between individuals and the State both inside and outside the family realm. Therefore, the private sphere is permeated by the public sphere and it is not always possible to clearly delineate the boundaries between private and public. So the problem is: if the public context is pervaded by patriarchal ideas and institutionalized structures, *privacy*

rights reflects, in the same way, the ideal of a private, patriarchal sphere. Privacy would justify exclusive monopolies on social resources by men and would serve to strengthen the indifference of society towards violence and lack of economic and social resources that characterize the "private" lives of many women and children. Consequently, on one hand the feminists do not reject the implicit definition of the public-private dichotomy, because they reckon that privacy may include the right to ask questions of welfare in the private sector, and so they have argued that the dividing line between the two spheres could be the starting point – and especially modifying the public space – from which the autonomy of women could be increased. On the other hand, the feminists are skeptical regarding the possibility to define, evaluate and regulate privacy. For them, the crucial matter relates to the fact that: 1) privacy could be either considered a value or a fact, a right or a mere ethical instance or practice; 2) the various definitions of privacy may either describe an ideal situation or the actual use of this concept. Inside the feminist field, the main conflict is related to the conceptualization of privacy inside the family.[14] Therefore, the liberal feminists support privacy as a manner of women controlling their own lives, and at the same time privacy is considered a very dangerous concept. Why do many non-liberal feminists have such a negative consideration of privacy? Or better still, why do many feminists criticize so harshly the concept of privacy? According to Allen, it is possible to give an answer to this question by articulating it in the following three arguments. First of all, the feminists criticized the general idea that the sphere ('place') of women is only the private one and it is observed that the traditional familiar role has given women limited access to the public realm. To improve women's access and participation in the public sphere, feminists laid claims to this particular right. They have demonstrated how the ideal of a private sphere free from the interferences of the State could have liberating effects, despite the fact that the democratic western societies seem to regulate domestic life. For example, marriage and reproductive relationships are considered private, but at the same time they are controlled and disciplined by law. Secondly, privacy becomes a problematic concept since episodes of domestic violence seem to suggest that the strong interference – and sometimes even intervention – by the State in the traditional fields of family relations are indeed necessary.

Finally, the feminists highlight the fact that privacy is prone to have conservative implications, since it is based on the existence of a private sphere. In these circumstances, the intervention of the State is limited to cases of welfare conflicts, ignoring completely the reasons behind these conflicts.

[14] See ALLEN, Anita. *Unpopular Privacy*, Oxford: Oxford University Press, 2011.

In conclusion, it is evident that, according to Allen, the feminists have good reasons to criticize privacy because it is considered only a mere ideal and its practical applications are important elements to be monitored.

2.3 This leads to the arguments of Richardson on the relationships between privacy and feminism. In order to examine ways in which our experience of privacy is changing, Richardson is attentive to a particular image, which she considers to be at the heart of the traditional view of privacy in the West. She writes that "The traditional image of privacy evokes a picture of an individual, who sits at the center of a series of concentric circles that range from the most private to public. In the first circle is the individual's innermost thoughts, and those actions that Mill describes as 'self-regarding' (i.e. that do not encroach directly upon others). In the next concentric circle is the family and home. Outer circles then include work and civil society and in the outermost circle lies the realm of politics. In this image, the divide between public and private appears clear and is often related to a particular place: the home, work place, public buildings, parliament".[15] In this case, the second sphere relates to the family and domestic home but, from a traditional point of view, the focus is on a 'gendered' individual, i.e. the male head of the household. Richardson specifies that this was normal because "The private sphere of the home included *his* family but he was then able to go outside of this domestic sphere (into work, civil society and the realm of politics) and to act in public. In contrast, women were envisaged as situated within the private sphere of the home. (This is an ideal sketch and not a claim that working class women did not have to work.)".[16] But some authors highlight the fact that home was not a private place for women. They had to fight for a "room of one's own"[17] within home itself and nowadays this situation has not (much) changed. As a consequence, some authors suggest that this relationship has to be analyzed as a relationship between the individual and the State because this approach is more general and includes also the public/private dichotomy. For example, liberalism portrays the image of individuals not subject to the *undue* interference of the State in their private sphere.[18] But, Richardson notes that "liberals such as Rawls, despite their potentially progressive ideal image of free and equal persons, have still to learn that the family is not always a just or even a voluntary association. It is certainly not a voluntary association as far as children are concerned".[19] Therefore, according to Okin and Nussbaum, for example, a relevant

[15] RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 518.

[16] RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 518.

[17] This expression is used by Virginia Woolf as the title of one her famous novels.

[18] See RAWLS, John. *Political Liberalism*. New York: Columbia University Press, 2005.

[19] See RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 519.

aspect could be underlined: the patriarchal family may teach children a lesson in the "naturalness" of subordination that undermines other liberal ideals such as moral, education and democracy.[20] Okin, in particular, emphasizes the fact that the major works of such an important political theorist as Rawls are written from a male perspective that wrongly assumes that the institution of the family is outside the sphere of justice, as a fundamental free choice of human nature, as if it were outside the relations of power. She believes that the family perpetuates gender inequalities throughout all society, particularly because children acquire their values and ideas inside the sexist setting of the family, then grow up to enact these ideas as adults. If a theory of justice is to be complete, Okin asserts that it must include women and it must address the gender inequalities she believes are prevalent in modern-day families.[21] It is important to point out that the liberal equality model operates from within the liberal legal paradigm and generally embraces liberal values and the rights-based approach to law, although this model considers the issue of how the liberal framework operates in practice. This model focuses on ensuring that women are afforded genuine and substantial equality, as opposed to the nominal equality often given to them in the traditional liberal framework. It seeks to achieve this either by way of a more thorough application of liberal values to women's experiences or through the revision of liberal categories in order to take gender into account.[22] For all these reasons, liberal approaches to justice are criticized by Okin.

Albeit it is quite useful to analyze the discussions amongst the various approaches, it seems quite difficult not to acknowledge that privacy is changing as a consequence of being a dynamic concept and thus its perception is seen as a flow.[23] Maybe this is one of the most important and relevant reasons for which it could be considered that "The meaning of privacy in everyday life certainly does not reduce to the content of a legal right".[24] Hence, some authors have commented that privacy "may make claims as to what the law *should* enforce but the law is not always called upon to enforce moral beliefs".[25] In addition to this, it is also highly controversial what the very definition of privacy is. For example, Warren

[20] See OKIN, Susan. *Justice, gender, and the family.* New York, Basic Books Inc., 1989; NUSSBAUM, Martha. *Rawls and feminism in The Cambridge companion to Rawls*, edited by Freeman, Samuel. Cambridge: Cambridge University Press, 2002.

[21] See OKIN, Susan. *Justice, gender, and the family.* New York, Basic Books Inc., 1989.

[22] For a fuller examination see: FINEMAN, Martha Albertson. "Feminist Legal Theory". *Journal of Gender, Social Policy and the Law*, vol. 13, núm. 1, 2005, pp. 13-23.

[23] It is important to highlight that, of course the society changes with informatics and technology but it does not mean that the relations of power change.

[24] See RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 520.

[25] See RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 520.

and Brandeis describe privacy as "the right to be let alone".[26] Berlin (1969) talks about the overlap with negative freedom. Moreover, Richardson quotes Constant and Fried "To highlight that this is a liberal concept, it can be contrasted with the meaning of freedom for republicans, which entails being an active participant in democratic decision-making".[27] The image of the individual in some definitions of privacy moves beyond liberalism to neo-liberalism, embracing a view of ourselves as *homo economicus*. Fried starts with a picture of individuals as cut off from others, who therefore require a mechanism through which they can relate to each other. This mechanism is that of the market and he envisages the exchange of private information (in place of money and goods) as the basis of human interaction in intimate relationships. Without privacy, we are deprived of secrets that we can "spend" on those with whom we would be intimate.[28] For example, Tavani critically examines some classic philosophical and legal theories of privacy and distinguishes four categories: the no intrusion, seclusion, limitation, and control theories of privacy. Tavani states that the no intrusion theory of privacy consists of the right to be let alone and thus akin to negative liberty; the seclusion theory of privacy refers to the right to be inaccessible to others and thus akin to solitude; the limitation theory of privacy is associated to the right to restrict areas of knowledge about oneself and thus akin to secrecy; finally, the control theory of privacy refers to the right to be able to control the dissemination of information about oneself and thus it is akin to autonomy. Although each theory includes one or more important insights regarding the concept of privacy, he argues that each falls short of providing an adequate account of privacy. Tavani defends a theory of privacy that incorporates elements of the classic theories into one unified theory: the Restricted Access/ Limited Control (RALC) theory of privacy. Using an example involving data-mining technology on the Internet, Tavani tries to show how RALC can help us to frame an

[26] For a fuller examination see: WARREN, Samuel D.; BRANDEIS, Louis D. "The right to privacy". *Harvard Law Review*, vol. 4, núm. 5, 1890, p. 194; and also MARMOR, Andrei. "What Is the Right to Privacy?". *Philos Public Aff.*, 43, 2015, pp. 3-26.

[27] Unfortunately for women nothing changes. The point is that here an abstract subject is discussing *vis-à-vis* the definition of law, but the female subject is not considered.

[28] See RICHARDSON, Janice. "The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy". *Minds & Machines*, vol. 21, núm. 4, 2011, p. 520. Here the crucial point is what it means for women, i.e. the criticism of the liberal concept is because the division that has been made is a division of domination. For a fuller examination, see CONSTANT, Benjamin. *Political writings*. Edited by FONTANA, Biancamaria, Cambridge: Cambridge University Press, 1988; FRIED, Charles. Privacy [a moral analysis]. In SCHOEMAN, Ferdinand D. (ed.), *Philosophical dimensions of privacy an anthology*, Cambridge: Cambridge University Press, 1984 at 203-222. For a critique of this market-orientated approach to privacy see FLORIDI, Luciano. "Four challenges for a theory of informational privacy". Ethics and Information Technology, núm. 8, 2006, pp. 109-119. For a broader critique of the political implications of this view of ourselves as owners of "property in the person", such that aspects of ourselves are treated as commodities in a market, see MARX, Karl. *Capital*: Critique of political economy, Vol. 1 (New Ed.). Penguin Classics, 2004, PATEMAN, Carole. "Self-ownership and property in the person: Democratization and a tale of two concepts". *Journal of Political Philosophy*, vol. 10, núm. 1, 2002, pp. 20-53; COHEN, Gerard Allan. Self-ownership, freedom, and equality. Cambridge: Cambridge University Press, 1995.

online privacy policy that is sufficiently comprehensive in scope in order to address a wide range of privacy concerns that arise in connection with computers and information technology.[29] Tavani argues that "because privacy is difficult to define, it is often described in terms of, and sometimes confused with, such notions as liberty, autonomy, secrecy, and solitude. Privacy has been described as something that can be 'intruded upon', 'invaded', 'violated', 'breached', 'lost', 'diminished', and so forth. Each of these metaphors reflects a conception of privacy that can be found in one or more standard models or theories of privacy".[30] Nevertheless, Tavani is conscious that "Whereas some privacy theories are essentially descriptive in nature, others are normative. Many normative theories are rights-based, such as those that analyze privacy in terms of a zone or space that can be intruded upon or invaded by others. However, not all normative accounts necessarily presuppose a rights conception of privacy".[31] He goes on to argue that "some normative frameworks view privacy in connection with confidentiality that can be breached or trust that can be betrayed. Descriptive accounts of privacy, on the contrary, sometimes suggest that privacy can be understood in terms of a repository of personal information that when accessed by others can lead to one's privacy being diminished, or perhaps even lost altogether".[32] This leads to the view that it is more useful to see privacy in terms of interests that individuals have, rather than to think about privacy as a right.[33] Roger Clarke, for example, states that "privacy is best defined as the interest individuals have in sustaining a personal space, free from interference by other people and organizations".[34] As it will be argued below, in this study it prefers to clearly demarcate interests-based and rights-based conceptions of privacy.[35]

2.4 As Stein notes "The feminist search for a single approach has often begun with the two legal doctrines that have done the most to empower women over the last several decades: privacy and equality".[36] Feminists wrote in each area and their critiques of privacy and equality converge usually to a single claim: both reinforce

[29] For a fuller examination see: TAVANI, Herman T. "Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy". *Metaphilosophy*, vol. 38, núm. 1, 2007, pp. 1-22.

[30] See TAVANI, Herman T. "Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy". *Metaphilosophy*, vol. 38, núm. 1, 2007, p. 3.

[31] See TAVANI, Herman T. "Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy". *Metaphilosophy*, vol. 38, núm. 1, 2007, p. 3.

[32] See TAVANI, Herman T. "Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy". *Metaphilosophy*, vol. 38, núm. 1, 2007, p. 3.

[33] For a fuller examination see: DECEW, Judith Wagner. In *Pursuit of Privacy*: Law, Ethics, and the Rise of Technology. Ithaca, New York: Cornell University Press, 1997; COOLEY, Thomas. Treatise on the Law of Torts. Chicago: Callaghan, 1880.

[34] See CLARKE, Roger. "Internet Privacy Concerns Confirm the Case for Intervention". *Communications of the Association for Computing Machinery*, vol. 42, núm. 2, 1999, p. 60.

[35] See for example Herman T. Tavani who mentions a number of arguments referring to a conception of privacy based on interests.

[36] STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993, p. 1152.

the subordination of women to men. For example, Catherine Mackinnon criticizes the rhetoric of privacy because it reinforces, rather than challenges, the "separate spheres" ideology that has traditionally oppressed women;[37] Rhonda Copelon argues that "while privacy doctrine has made some gains for women possible, at the same time it has reinforced the original distinction between public and private that has been essential to the patriarchal differentiation of male from female, the family from the state and market, the superior from the inferior, the measure from the other";[38] and Lucinda M. Finley criticizes equality doctrine for being non-transformative because it is based on male norms of experience and perspective.[39] So the feminists criticize other approaches for being non-authentic and, as a consequence, women are forced to state claims in a way that may seem alien. So according to Stein "Some feminist scholars, writing about reproductive issues, call for a shift in analysis in procreative rights cases from privacy to equality, thus elevating equality as the one best doctrine to challenge women's oppression".[40] Especially Catherine MacKinnon considers that privacy is ill-equipped to focus on women's well-being; equal protection could be forcefully argued, instead MacKinnon.[41] It is important to underline that feminist critiques of privacy and equality are based on three grounds. A good summary is provided by Stein: "First, both the privacy and equality critics claim that the approach they are criticizing entrenches the 'separate spheres ideology', which has disadvantaged women throughout American history. Second, the privacy critics argue that placing abortion (or, presumably, any issue of importance to women) in the privacy framework allows jurists and others to consider it falsely as a sex-neutral issue, rather than claiming it as an issue that is profoundly related to the oppression of women. The equality critics make the opposite argument that, under an equality approach, issues of importance to women are often devalued as 'women's issues' (as it was an individual topic). Third, some members of both groups of critics argue that the approach they criticize fosters values of autonomy and independence of self that have been important to men, while ignoring values

[37] See MACKINNON, Catharine. Privacy V. Equality: Beyond Roe V. Wade. In: MACKINNON, Catharine (ed.). *Feminism Unmodified*: Discourses on Life and Law. Cambridge: Harvard University Press, 1987, pp. 101-102.

[38] See COPELON, Rhonda. Unpacking Patriarchy: Reproduction, Sexuality, Originalism And Constitutional Change. In LOBEL, Jules (ed.). *A Less Than Perfect Union*: Alternative Perspectives On The U.S. Constitution, NEW York: Monthly Review Press, 1983, p. 314.

[39] For a fuller examination see: FINLEY, Lucinda M. "Transcending Equality Theory: A Way Out of the Maternity and the Work-Place Debate". *Colum. L. Rev. 86*, 1986, pp. 1118-1182.

[40] STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993, p. 1154.

[41] See MACKINNON, Catharine. Privacy V. Equality: Beyond Roe V. Wade. In: MACKINNON, Catharine (ed.). *Feminism Unmodified*: Discourses on Life and Law. Cambridge: Harvard University Press, 1987, p. 102. For a general discussion of the feminist critique of privacy, see: MCCLAIN, Linda C. "The Poverty Of Privacy?", *Colum. J. Gender & L.*, vol. 3, núm. 1, 1992, pp. 119-174.

that have been important to women, such as interconnection and relationships".[42] Because really, they have at home a woman, thanks to the sexual contract, she seems to be outside justice.

The first argument, there enforcement of separate spheres, demonstrates that it is possible to divide the world into two distinct sides: public and private. The public side is the world of government and economic transactions, in which the power of the state has an important and decisive role.

On the other hand, the private side is characterized by family and home and it is conceptualized as free from state intervention. According to feminist approaches, this argument has been used to oppress women in several related ways. For example, it has been used to justify the exclusion of women from the public sphere with the consequence that women have been relegated only to the private sphere. In this way they were subordinated to the power of men because dependent on men for most social goods.[43] According to MacKinnon, feminist critics of privacy argue that the privacy doctrine reinforces the ideology of the separate spheres.[44] Indeed the scholar focuses on the assumption of non-interference by the government in the private sphere in order to guarantee autonomy to private citizens. As noted, for Stein – MacKinnon holds the same position – it is evident that the "privacy doctrine carves out a sphere relating to marriage, family, and heterosexual activity that is free from government interference. Yet at the same time, it entrenches the existing male-dominated power structure within the private sphere as *prima facie* simply because the power structure is not the direct result of governmental coercion".[45] Thus, one of the most important and relevant consequences is the private oppression of women since the right of privacy is really limited. The second argument is based on the identification of abortion as an issue about subordination of women. For example, MacKinnon criticized the privacy doctrine for its failure to situate abortion and the abortion right in the experience of women.[46] Feminists underline the impossibility for the privacy doctrine to transform the world into a less oppressive place for women because it turns their attention away from issues of sexual oppression and from the abortion issue as separated from questions about the role of the state. According to Stein, "This vision wholly ignores the sexual oppression that leads to unwanted

[42] STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993, p. 1160.

[43] For example, in the USA until 1942 women could not stand trial by themselves.

[44] For a fuller examination see: STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993 pp. 1152-1191; MACKINNON, Catharine (ed.). *Feminism Unmodified*: Discourses on Life and Law. Cambridge: Harvard University Press, 1987.

[45] See esp. STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993 pp. 1162.

[46] For a fuller examination see: MACKINNON, Catharine. Privacy V. Equality: Beyond Roe V. Wade. In: MACKINNON, Catharine (ed.). *Feminism Unmodified*: Discourses on Life and Law. Cambridge: Harvard University Press, 1987.

pregnancy, oppression that takes many forms from rape to the social conditioning that makes women unable to say no, or, worse, unable even to want to say no".[47] Finally, we have the third argument, which is ignoring values of women because its focus is on the fact that only traditionally male views are seen as independent and autonomous. At the same time, traditional female views on interconnection and flourishing through relationships are ignored. In general, we speak about cultural feminists and so Carol Gilligan identifies the expression "different voice" with the argument that women and girls often resolve moral dilemmas in a different way from men and boys. Specifically, Gilligan argues that whereas moral reasoning of men often refers to abstract rights (termed an "ethic of justice"), women often couch their analysis in terms of their responsibilities to others and to themselves (termed as an "ethic ofcare").[48] One consequence is that the focus on privacy would lead to a portrayal of everybody as, in some sense, atomized individuals with competing rights, rather than human beings whose very existence is rooted in profound interconnections with each other.[49] In light of these considerations, some feminists propose new ways to interpret and to formulate equality and privacy. Lucinda Finley, for example, talks about the opportunity to stop with the treating of "differences" as problematic. To do so, the author claims that it would be better to replace the word "differences" since this term, with its varieties or nuances, implies negative connotations.[50] Furthermore, lawyers and judges support claims for rights with a language of responsibilities.[51] Feminists have the merit of highlighting implied risks of privacy and equality doctrines and they have some interesting ideas and provide valid alternatives or solutions. Nevertheless, it seems that they do not develop such ideas to a satisfactory level. For example, to replace "equality arguments with arguments about nuances and responsibilities is that women's claims could lose the moral high ground of civil rights claims and appear to be simply the voice of one of many interest groups. Equality has been seen, albeit erroneously, as a politically neutral concept. Hence, it was and is useful as a general rallying cry. There is built-in moral appeal to such claims. In contrast, a direct demand as 'equal pay for equal work' that those in power listen to the disempowered inevitably seems political, because the claim is not grounded in any 'neutral principle', but instead is clearly directed

[47] See STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993 pp. 1162.

[48] For a fuller examination see: GILLIGAN, Carol. *In a Different Voice*: Psychological Theory and Women's Development. Cambridge: Harvard University Press, 1982.

[49] See STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993 pp. 1152-1191.

[50] See FINLEY, Lucinda M. "Transcending Equality Theory: A Way Out of the Maternity and the Work-Place Debate". *Colum. L. Rev. 86*, 1986, p. 1170.

[51] FINLEY, Lucinda M. "Transcending Equality Theory: A Way Out of the Maternity and the Work-Place Debate". *Colum. L. Rev. 86*, 1986, p. 1166.

at advocating the interests of a particular social group. Losing this high ground is a practical danger; it is questionable whether women have the political muscle to flourish if we become just another interest group".[52] In conclusion, Stein's argument "suggests that feminists need not seek out one doctrine or form of legal analysis to meet all feminist goals. Although feminists have illuminated real risks current legal doctrines present, the answer is not to abandon them for some other, better approach. Instead, to avoid even greater dangers, feminists must try to transform these doctrines. There is no reason why feminists must choose between privacy and equality or between equality and some other way of claiming entitlements. Instead, feminists can and should use the whole range of legal arguments available".[53]

3 Law and Economics

As noted by Posner, one of the most decisive aspects of privacy is the withholding or concealment of information. This aspect is of particular interest to the economist now that the study of information has become an important field of economics.[54] According to the economic analysis, two economic goods could be identified: privacy and prying, since everybody has information to spare and these information necessarily have a cost considering the fact that they are valuable for us or for other people. In lights of this, it could say that privacy and prying are final goods. But there is an alternative approach: privacy and prying as intermediate goods. This second way of defining privacy and prying is the only one, in Posner's view, viable for an economic analysis. So, one aspect of privacy becomes important: the property rights to private information. There are different types of private information and it is possible that people may desire to keep some of them concealed and not share them with others. Such information is not always discreditable. So, Posner notes that "in our culture, for example, most people do not like to be seen naked, quite apart from any discreditable fact that such observation might reveal. Since this reticence, unlike concealment of discreditable information, is not a source of social costs, and since transaction costs are low, there is an economic case for assigning the property right in this area of private information to the individual; and this, as we shall see, is what the law does".[55] And yet "the reluctance of many people to reveal their income is sometimes offered as an example of a desire for privacy that

[52] See STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993, p. 1186.

[53] See STEIN, Laura W. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality", *Minnesota Law Review 77*, 1993, p. 1155.

[54] For a fuller examination see POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, pp. 393-422.

[55] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 393.

cannot be explained in purely instrumental terms".[56] Another aspect to be taken into consideration is the privacy of communications, since it is necessary to consider the means by which others obtain personal information. It could be made a distinction between gathering private information by listening to private conversation through eavesdropping, and being present as third party. It could be noted that the language used is different in the first compared to the second case. On one hand, informal language could be used in the first case and formal language in the second. This aspect is not irrelevant because, for example, in the second case, it is possible to conceal important information in order to obtain the sale of goods. This, in turn, could ensue legal effects and not only economic ones.

In light of this, there is another useful and not entirely negligible reflection. According to Charles Fried, privacy is indispensable to create some private relationships such as friendship and love. There is trust at the basis of these types of relationships and if everything is known and disclosed, there is nothing to be taken on trust. But love and friendship, of course, could exist and flourish in societies where there is little privacy.[57] This analysis is not without limits and, as Posner noted "If ignorance is the prerequisite of trust, equally knowledge, which privacy conceals, is the prerequisite of forgiveness".[58] So, this way of interpreting privacy is highly complex and full of inevitable risks. For example, in these contexts, reputation is what others think of us, and we have no right to control the thoughts of other people, and the privacy helps us to do it. Equally we have no right, by controlling the information that is known about us, to manipulate opinions that other people hold about us.

3.1 With regards to personal or private information it could be considered those relationships regulated by tort law. Indeed, the violations of private information and personal privacy have different negative aspects. It could be identified, specifically, four cases: appropriation, publicity, false light, and intrusion. The first aspect refers for example to the case of using a photo or something without the consent of its owner. This is especially the case of advertising or gossip related to famous people. According to Posner "There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal".[59] In the doctrine there is an open discussion

[56] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 400.
[57] For a fuller examination see FRIED, Charles. *An Anatomy of Values*: Problems of Personal and Social Choice. Cambridge: Harvard University Press, 1970.
[58] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 408.
[59] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 411.

about the possibility to recognize the right of publicity,[60] but this is something really controversial because it is very difficult to forbid another person from using property just for trade purposes and without the owner's consent. The second aspect is similar to the first because the same photograph, used in advertising, might be used in the news columns. Apparently, it seems that there are no legal differences between the aspects of appropriation and publicity, and still there is a different legal treatment. The social cost of dispensing with property rights is greater in the advertising case than in the news case. And yet, as noted by Posner "in the news case the celebrity might use the property right in his likeness, if he had such a right, to misrepresent his appearance to the public-he might permit the newspaper to publish only a particularly flattering picture. This form of false advertising is difficult to prevent except by communalizing the property right".[61] And there is the consideration that "the case for giving the individual a property right may seem even more attenuated where the publicity is of offensive or embarrassing characteristics of the individual, for here publicity would appear to serve that institutionalized prying function which, as noted above, is important in a society in which there is a great deal of privacy facilitating the concealment of discrediting facts from one's fellows".[62] But we have to consider that there is the circumstance in which it is possible that somebody would want to conceal something or give limited information to us and also there is the case in which the information given has a limited or no social value.

The false light aspect concerns the circumstances that the newspapers or other news medium have distorted the facts. There is, of course, the legal remedy about the defamation but there is also an economic argument: "The argument is that the law can and should leave the determination of truth to competition in the market place of ideas".[63] The basis of this thesis is that there is always the possibility to correct the "false light". It is not certain but it is important because in the interest of the readers and the costs and benefits relate to them. To elucidate this point, Posner claims: "The analysis [...] suggests, incidentally, an economic reason why the law limits the rights of public officials and other 'public figures' to seek legal redress for defamation. The status of a public figure increases an individual's access to the media by making his denials newsworthy, thus facilitating a market, as distinct from a legal, determination of the truth of the defamatory allegations. The analysis may also explain, on similar grounds, the traditional refusal of the common law to recognize a right to recover damages from a competitor for false disparagement of his goods; the disparaged competitor can rebut untruthful charges in the same

[60] For a fuller examination, see BLOUSTEIN, Edward J. "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser". *N.Y.U.L. Rev. 39*, 1964, pp. 962-1007, esp. p. 1003.
[61] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 413.
[62] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 413.
[63] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 420.

advertising medium the disparager used".[64] Finally, the intrusion aspect concerns the hypothesis, for example, of eavesdropping what happens inside a home and then to publish it. Another example is a detective or paparazzo that follows someone everywhere. Following these examples, Posner states that "the common law does not limit the right to pry through means not involving interference with the subject's freedom of movement".[65] In light of this analysis we could affirm, without doubt, that legislation has an implicit economic logic but it is not enough to affirm that privacy has only economic justification.

4 NSA

In this part of the paper, I argue that such criticisms, described in a brief way, are deficient when dealing with privacy breaches in recent situations. These cases also concern controversial surveillance leaks which highlight the lack of legitimacy as well as of the jurisdiction and ethical agency of leading democratic states: i.e. the NSA scandal.

I start by summarizing the case. Everything began when Edward Snowden decided to make declarations and grant interviews, whose content, of course, did not pass unnoticed. The Snowden Affair began when he revealed the existence of the *Boundless Informant*, that picked up different and several materials and personal data. He was able to make these revelations because he had worked for more than one "service provider" of the NSA. He then decided to become a *whistleblower*. One of the reasons for this was that he no longer wanted to live in a world where everything is recorded. The Snowden Affair was analyzed by *The Guardian* newspaper, which published on June 16th 2013 the news revealing that GCHQ spied and eavesdropped on the communications that the G8 leaders held in London in 2009. In addition to that, between June 15 and 18, 2013, Apple, Facebook, Microsoft, and Yahoo admitted the digital transfer of a modest amount of their data to NSA.[66] First of all, Microsoft and Google required general attorney Eric Holder and director of *Federal Bureau of Investigation* (FBI) Robert Mueller to publish the precise number of requests and/or demands by the American control authority, which included also those coming from the *Foreign Intelligence Surveillance Act*. They obtained the permission to publish the data from American control authority but not the *Foreign Intelligence Surveillance Act*, which resulted on the disclosure of a minimal part of the real amount of surveillance, and certainly not in its entirety. Regarding Facebook, Zuckerberg wrote a post in his blog in which he asked for more

[64] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 420.
[65] POSNER, Richard. "The right of privacy". *Georgia Law Review*, vol. 12, núm. 3, 1978, p. 421.
[66] See http://mytech.panorama.it/sicurezza/prism-dichiarazioni-big-internet.

government transparency when private information is requested.[67] Thus, on June 14th 2013 Ted Ullyot, Facebook General Counsel, stated in a note

> [...] but particularly in light of continued confusion and inaccurate reporting related to this issue, we've advocated for the ability to say even more. Since this story was first reported, we've been in discussions with U.S. national security authorities urging them to allow more transparency and flexibility around national security-related orders we are required to comply with. We're pleased that as a result of our discussions, we can now include in a transparency report all U.S. national security-related requests (including FISA as well as National Security Letters) – which until now no company has been permitted to do. As of today, the government will only authorize us to communicate about these numbers in aggregate, and as a range. This is progress, but we're continuing to push for even more transparency, so that our users around the world can understand how infrequently we are asked to provide user data on national security grounds. For the six months ending December 31, 2012, the total number of user-data requests Facebook received from any and all government entities in the U.S. (including local, state, and federal, and including criminal and national security-related requests) – was between 9,000 and 10,000. These requests run the gamut – from things like a local sheriff trying to find a missing child, to a federal marshal tracking a fugitive, to a police department investigating an assault, to a national security official investigating a terrorist threat. The total number of Facebook user accounts for which data was requested pursuant to the entirety of those 9-10 thousand requests was between 18,000 and 19,000 accounts. [...] We will continue to be vigilant in protecting our users' data from unwarranted government requests, and we will continue to push all governments to be as transparent as possible.[68]

Indeed, on June 16, 2013, *Apple's Commitment to Customer Privacy*, states that

> Like several other companies, we have asked the U.S. government for permission to report how many requests we receive related to national security and how we handle them. We have been authorized to share some of that data, and we are providing it here in the interest of transparency. From December 1, 2012 to May 31, 2013, Apple received between 4,000 and 5,000 requests from U.S. law enforcement for customer data. Between 9,000 and 10,000 accounts or devices were specified in those requests, which came from federal, state and local authorities and included both criminal investigations and national security matters. [...] Apple has always placed a priority on protecting our customers' personal data, and we don't collect or maintain a mountain of personal details about our customers

[67] See http://mytech.panorama.it/sicurezza/prism-dichiarazioni-big-internet.

[68] For full details, see https://newsroom.fb.com/news/2013/06/facebook-releases-data-including-all-national-security-requests/.

> in the first place. There are certain categories of information which we do not provide to law enforcement or any other group because we choose not to retain it. For example, conversations which take place over iMessage and FaceTime are protected by end-to-end encryption so no one but the sender and receiver can see or read them. Apple cannot decrypt that data. Similarly, we do not store data related to customers' location, Map searches or Siri requests in any identifiable form. We will continue to work hard to strike the right balance between fulfilling our legal responsibilities and protecting our customers' privacy as they expect and deserve"[69]. It seems that there has actually been an increase in number regarding the Microsoft accounts because of Microsoft's U.S. Law Enforcement and National Security Requests for the last half of 2012 provided by John Frank, Deputy General Counsel & Vice President. In fact, Microsoft's Legal & Corporate Affairs department has stated: "This afternoon, the FBI and DOJ have given us permission to publish some additional data, and we are publishing it straight away. However, we continue to believe that what we are permitted to publish continues to fall short of what is needed to help the community understand and debate these issues. Here is what the data shows: For the six months ended December 31, 2012, Microsoft received between 6,000 and 7,000 criminal and national security warrants, subpoenas and orders affecting between 31,000 and 32,000 consumer accounts from U.S. governmental entities (including local, state and federal). [...] We appreciate the effort by U.S. government today to allow us to report more information. We understand they have to weigh carefully the impacts on national security of allowing more disclosures. With more time, we hope they will take further steps. Transparency alone may not be enough to restore public confidence, but it's a great place to start.[70]

Finally, Yahoo, in the publication called "Our Commitment to Our Users' Privacy", written by CEO Marissa Mayer and General Counsel Ron Bell, states that:

> We've worked hard over the years to earn our users' trust and we fight hard to preserve it. To that end, we are disclosing the total number of requests for user data that law enforcement agencies in the U.S. made to us between December 1, 2012 and May 31, 2013. During that time period, we received between 12,000 and 13,000 requests, inclusive of criminal, Foreign Intelligence Surveillance Act (FISA), and other requests. The most common of these requests concerned fraud, homicides, kidnappings, and other criminal investigations. Like all companies, Yahoo! cannot lawfully break out FISA request numbers at this time because those numbers are classified; however, we strongly urge the federal government to reconsider its stance on this issue. Democracy demands accountability. Recognizing the important role

[69] See http://www.apple.com/apples-commitment-to-customer-privacy/.

[70] See http://blogs.microsoft.com/on-the-issues/2013/06/14/microsofts-u-s-law-enforcement-and-national-security-requests-for-last-half-of-2012/.

> that Yahoo! can play in ensuring accountability, we will issue later this summer our first global law enforcement transparency report, which will cover the first half of the year. We will refresh this report with current statistics twice a year. As always, we will continually evaluate whether further actions can be taken to protect the privacy of our users and our ability to defend it. We appreciate – and do not take for granted – the trust you place in us.[71]

In contrast, Edward Snowden claimed disbelief in companies which did not know the way PRISM was used.[72] In fact, Snowden decided to blow the whistle about the fact that the NSA obtained millions of private data and information on conversations by providers and social networks because he *rightly* reckoned that they were indeed violations of privacy and transparency. It is widely believed that it is no understatement to call it a scandal considering the sheer numbers involved and the scope of such surveillance.

According to the analysis conducted in this paper, the justification for this conduct is based on the circumstance that privacy is not seen as a fundamental right, and so it is undermined by a misguided interpretation of the common good. This reflects a short-term view which would give prominence to public security. In this paper, I argue that privacy is a fundamental right and because of this, I examine two opposite case laws related to the NSA scandal. In light of this, it is necessary to acknowledge that these events culminated in a deep break inside the American case law. There are two contrary sentences related to this matters.

On one hand, federal Judge Richard J. Leon of the District of Columbia stated in his sentence in 2013[73] that the espionage program led by the NSA in order to eavesdrop on phone calls of American citizens was not legal. The judge then instructed official termination of the program, arguing that the fundamental right to privacy had been breached. In addition to that, Judge Richard J. Leon adopted the balancing technique to address the conflict among two or more fundamental rights. He based his decision on the argument that the NSA program clashed with the 4th amendment, which forbids some identification or information research beyond specific limits.[74] The lawyer Larry Klayman asked for the removal of all information concerning him and one of his clients from the database of the NSA. Therefore, the judge had to address the difficulties which this case presented, such as the national interest to the United States security *vis-a-vis* the individual interest of one

[71] See http://yahoo.tumblr.com/post/53243441454/our-commitment-to-our-users-privacy.

[72] See *The Guardian* and also http://blog.panorama.it/connessioni/2013/06/18/metti-una-chat-con-edward-snowden-si-quello-di-prism/.

[73] For a fuller examination, see Klayman vs. Obama, which is an American federal court case concerning the legality of the bulk collection of both phone and Internet metadata by the United States.

[74] The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

single citizen. Judge Richard J. Leon ruled that bulk collection of American telephone metadata likely violates the Constitution of the United States by stating: "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval [...] Surely, such a program infringes on 'that degree of privacy' that the founders enshrined in the Fourth Amendment".[75] And yet he adds that "almost-Orwellian technology [...] Records that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic – a vibrant, constantly updating picture of a person's life. [...] No court has ever recognized a special need sufficient to justify continuous, daily searches of virtually every American citizen without any particularized suspicion. The Government urges me to be the first non-FISC judge to sanction such a dragnet".[76] But the most important part of the argumentation used by the Court seems to be the following: "The Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack or otherwise aided the government in achieving any objective that was time-sensitive [...] Because of the utter lack of evidence that a terrorist act has ever been prevented because searching the NSA database was faster than other investigative tactics – I have serious doubts about the efficacy of the metadata collection program".[77]

Thus, the possibility of cyber-security is denied with this argument, since metadata is being analyzed nationally and because of how the querying process works. Furthermore, considering that the NSA supposedly cannot collect any metadata from a foreign phone number, there is no other way of querying which phone numbers it has contacted besides matching it with every phone number in the database. In short, the Government can use daily metadata collection to engage in repetitive, surreptitious surveillance of the private whereabouts of a citizen, even if the NSA database implicates the Fourth Amendment each time a government official monitors it. Of course, the conclusion of the court highlights the controversial relationship between privacy and security, on one hand, and privacy and transparency, on the other hand. This decision, however, would be far from the last word on the issue.

The U.S. government had six months to appeal to this decision. A court of appeals reversed the 2013 decision in the Klayman vs. Obama case, in which the NSA's collection of metadata from the plaintiffs' cell phones was considered a violation of their right to privacy. The Court of Appeal stated that the NSA's actions were in

[75] See http://edition.cnn.com/2013/12/16/justice/nsa-surveillance-court-ruling/. See also that the Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

[76] See the sentence Klayman vs. Obama, at. 61.

[77] See the sentence Klayman vs. Obama, at. 61.

fact constitutional. On August 28, 2015, the D.C. Circuit held that the plaintiff's failed to meet the heightened burden of proof required for preliminary injunctions. The case had been remanded back to the district court.

On the other hand, federal Judge William Pauley of the District Court of Manhattan considered this program legal and justified by the interest to public security and also, to some extent, justified by transparency and by the fight against terrorism. In this sentence, contrary to the one by Judge Leon, the court argued that privacy was not as much a fundamental right, or an absolute value or right in general.[78]

In this way, the Court seems to consider the scope of the right to privacy in relation to interests of security and argues, in particular, that the right to privacy must yield to these interests in the case of a direct collision. One consequence of this approach is it implies that security interests can justify infringements and violations of privacy rights. However, the same remarks, in general, could be raised in relation to other rights such as transparency. For these reasons, one of the aims of this study is to analyze, in a critical way, the collision of fundamental rights, more specifically of privacy, public security and transparency, and how it is possible to solve it.

The opinion of the Manhattan Court is that bulk collection of telephone data does not violate the constitution, thus totally contradicting Judge Leon's sentence which stated that the NSA's bulk collection program was likely to be proven unconstitutional and was "almost Orwellian" in scale. William Pauley said that privacy protections enshrined in the fourth amendment of the US constitution needed to be balanced with a government that must maintain a database of records in order to prevent future terrorist attacks, and affirmed that "the right to be free from searches is fundamental but not absolute [...] whether the fourth amendment protects bulk telephony metadata is ultimately a question of reasonableness".[79] The judge argued that Al-Qaida's "bold jujitsu" strategy to marry seventh century ideology with 21st century technology made it imperative for government authorities to be allowed to

[78] For a comprehensive summary of this issue, see HIMMA, Kenneth Einar. Privacy vs Security: Why is not an Absolute Value or Right. *San Diego Law Review*, vol. 44, 2007, esp. at. 859. For example, in the introduction the author argues that "The idea that we have a moral right to privacy that ought, as a matter of political morality, to be protected by the coercive authority of the law is of comparatively recent vintage [...] most people seem to believe that we have a moral right to informational privacy - informational and reproductive privacy are analytically and substantively distinct - that ought to be protected by the legal system. I think it is fair to say that the claim that we have such a right is, at this point in time, utterly uncontroversial among mainstream conservatives and liberals, even if the content of this right and the nature of the appropriate legal protection – constitutional or statutory – is contested [...] I conclude that the idea that privacy rights are absolute in the sense that they are never justifiably infringed, which is surprisingly common, is not only counterintuitive, but lacks any general theoretical support from any of the major mainstream theories of legitimacy. [...] Although an account that enables us to determine when security and privacy come into conflict and when security trumps privacy would be of great importance if I am correct about the general principle, my efforts in this essay will have to be limited to showing that the various theories of legitimacy presuppose or entail that, other things being equal, security is, as a general matter, more important than privacy".

[79] American Civil Liberties Union vs. Clapper (ACLU vs. Clapper).

push privacy boundaries and so he wrote: "As the September 11 attacks demonstrate, the cost of missing such a threat can be horrific [...] Technology allowed al-Qaida to operate decentralizedand plot international terrorist attacks remotely. The bulk telephony metadata collection program represents the government'scounter-punch: connecting fragmented and fleeting communications to re-construct and eliminate al-Qaida's terror network".[80]

In this sentence, it seems that he took a more sympathetic view of this relevance standard than many lawmakers in Congress, even though he acknowledged it was "problematic" that many were not aware of how widely the law was being interpreted before the disclosure of information by Edward Snowden - the NSA whistleblower. He stated that "There is no way for the government to know which particle of telephony metadata will lead to useful counterterrorism information [...] Armed with all the metadata, NSA can draw connections it might otherwise never be able to find. The collection is broad, but the scope of counterterrorism investigations is unprecedented".[81] Judge Pauley said his ruling did not mean it was right to continue with the program, which he acknowledged was a "blunt tool" that "imperils the civil liberties of every citizen" if unchecked. "While robust discussions are under way across the nation, in Congress, and at the White House, the question for this court is whether the government's bulk telephony metadata program is lawful. The court finds it is [...] But the question of whether that program should be conducted is for the other two coordinate branches of government to decide".[82]

Furthermore, the argument used by the Court in ACLU vs. Clapper reveals not only the collision among privacy, security and transparency, but also favoritism towards security. First of all, the appellants argued that the telephony metadata program was not authorized and even if the program was authorized by statute, it violated their rights under the Fourth and First Amendments[83] of the Constitution.[84] Consequently, the Court ruled in the following way: "the records of the metadata relating to their telephone communications violates their expectations of privacy under the Fourth Amendment in the absence of a search warrant based on probable cause to believe that evidence of criminal conduct will be found in the records. The government responds that the warrant and probable cause requirements of the Fourth Amendment are not implicated because appellants have no privacy

[80] American Civil Liberties Union vs. Clapper (ACLU vs. Clapper).
[81] American Civil Liberties Union vs. Clapper (ACLU vs Clapper).
[82] American Civil Liberties Union vs. Clapper (ACLU vs Clapper).
[83] See First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".
[84] See the sentence at note 79.

rights in the records. This dispute touches an issue on which the Supreme Court's jurisprudence is in some turmoil".[85]

So, since all the data collected by the NSA was voluntarily revealed to the phone companies by users, they could not expect it to remain private. However, another important point of the decision was established by the claim that the NSA's internal procedures prevented them from using the phone call metadata to violate the Fourth Amendment and, also, that NSA did not do any pattern analysis or automated data mining to extract additional information from the metadata. In addition, the judge was cognizant of the benefits of the surveillance program and argued that the program had successfully stopped terrorist attacks, as mentioned above. Finally, the judge concluded that even though the privacy concerns were not "trivial", the potential benefits of surveillance outweighed any considerations.

At this point, it is clear what are the different arguments used by the two Courts quoted. On one hand, Judge Richard J. Leon recognized that the National Security Agency program, which is systematically keeping record of all Americans' phone calls, most likely violates the Constitution, describing its technology as "almost Orwellian" and suggesting that James Madison would be "aghast" to learn that the government was encroaching on liberty in such a way. The government was ordered to stop collecting data on the personal calls of the two plaintiffs and to destroy the records of their calling history. On the other hand, federal Judge William Pauley considered terrorism investigation as the most important matter for its strong relationship with security.

The different and opposed decisions, of course, shed light on some questions worth discussing. First of all, there is an undeniable exigency to balance and to solve the collision among fundamental rights. Second, it emerges from the basic and known problem of balancing rights and fundamental principles, in which privacy, security and transparency are often in tension, with the Internet giving a new shape to it. The illustrative cases mentioned above are examples enabling the discussion of these problems.[86]

5 Some remarks on transparency

In addition to their focus on privacy and security concerns, the questions raised in the text address some central premises and arguments in relation to the concept of transparency. The recent events, undoubtedly, opened a new era of transparency,

[85] See the sentence at note 79.

[86] For example, see also the controversial decisions made by the Brazilian Courts of first instance that allowed the WhatsApp application to be temporarily blocked in Brazilian territory. See STAMILE, Natalina. "Sicurezza vs Privacy". In: TINCANI, Persio (ed.). *Diritti e futuro dell'Europa*, Milano: l'Ornitorinco, 2020.

although this spectacle of transparency is nothing new. Some authors noted that the concept of transparency is always empty of content and confused with the publicity or the right of access.[87] Transparency is characterized by its different uses and for this reason it reveals vague and ill-defined contours. It seems to have "two souls", one deriving from case law processing and the other having a theoretical-philosophical nature. It is defined as "*bon a tout faire*" principle without its own specific characterization or peculiarity and it is, often fatally, not very technical and practical.[88] However, the principle of transparency is considered a basis of the administrative democracy of the Rule of law, because it contrasts with everything that is in favor of personal interests or interests of small groups. That way, transparency is a kind of exigency to the impartiality, correctness and good conduct in general of the public administration, public institutions or bureaucracies. According to some authors, it is possible to describe transparency as a "*quid pluris*", because the public administration must operate in respect of correctness (formal and substantial) and with awareness that democracy needs an understandable explanation of the power.[89] Thus, transparency is not only a simple matter of procedural rules, but also, and especially, the comprehensiveness and justifiableness of the actions and behaviors observed by citizens, as Osrecki noted: "Hood calls this the 'populist-particularist' version of transparency, where citizens observe officials (in their public roles), but where officials are carefully restricted in observing citizens".[90] Consequently, transparency could be, potentially, the principle capable of reinforcing democracy, because it seems to be a criterion that encompasses both legitimate and correct behavior, so distinguishing functional deviance and corruption in organizational behavior. With this approach, one important goal is to create the "good governance". According to Osrecki and also some other authors,

> The most striking aspect of the *transparency-accountability-compliance* nexus is that it assumes that such measures increase the efficiency or legitimacy of agent behavior. On one hand, it is assumed that information disclosure and opening professional practice to public scrutiny increases trust in and legitimacy of public institutions [...] On the other hand, and more closely tied to the principal-agent vision of transparency and

[87] See for example, MARRAMA, Roberto. "La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo". *Dir. proc. amm.*, 1989, esp. p. 416. The author highlights that the transparency is instrumental to the publicity and to the right of access.

[88] MARRAMA, Roberto. "La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo". *Dir. proc. amm.*, 1989, esp. p. 418.

[89] See MANGANARO, Francesco. "L'evoluzione del principio di trasparenza amministrativa". *Astrid Rassegna* vol. 105, núm. 22, 2009, p. 4.

[90] See OSRECKI, Fran. "Fighting corruption with transparent organizations: Anti-corruption and functional deviance in organizational behavior". *Ephemera*, vol. 15, núm. 2, 2015, p. 342. For a full examination, see HOOD, Christopher. "What happens when transparency meets blame-avoidance?". *Public Management Review*, vol. 9, núm. 2, 2007, pp. 191-210, esp. at 196.

> anti-corruption, there is the 'Benthamian' or 'bureaucratic' [...] version of transparency. Here it is assumed that agents will behave better if being monitored and that this, in turn, would enhance organizational performance by inhibiting corruption, embezzlement, sloth, lavishness, goldbricking etc. [...] From this point of view, enhanced transparency, compliance, and accountability have only short term effects on efficiency during an adjustment period or if the outcomes to be accounted for are themselves flawed.
>
> In short, in the bureaucratic vision of organizational transparency it is argued that transparency, rule-following, and efficiency are mutually self-enforcing mechanisms.[91]

Here, the most relevant aspect of transparency is its relationship with privacy, security and surveillance in the new technological era. This relationship is nothing new, but the dynamic nature of technology has changed both how surveillance can be carried out and what can be monitored. The digital age has created new opportunities for communication and information-sharing, and the internet has facilitated the development of large amounts of communication data, or metadata, by and about individuals, including their personal information, their location, their online activities, and information about their e-mails and messages. Traditionally, surveillance had to be authorized by the judiciary, but with technology becoming more sophisticated, this safeguard is increasingly weakened or even eliminated. This has an evident impact on what is a correct and reasonable behavior of public institutions or of bureaucracies, and thus seems to generate a kind of deviance. In addition, it has the risk of directly contradicting a fundamental principle of the Rule of law, because it is impossible to protect it against intrusive government policies. According to Ellis, "The lack of judicial oversight extends even further. Many NSA surveillance programs are not subject to any external oversight. Even programs subject to congressional and judicial review lack real transparency and accountability [...] There is a staggering lack of due process in government surveillance programs. Individuals under scrutiny receive no notice nor have opportunities to contest. Telecommunications service providers who receive demands for records are generally prevented from notifying anyone about the demands. With few exceptions, operations are conducted secretly and individuals are never notified that the NSA or other agencies are collecting their data".[92]

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[91] See OSRECKI, Fran. "Fighting corruption with transparent organizations: Anti-corruption and functional deviance in organizational behavior". *Ephemera*, vol. 15, núm. 2, 2015, pp. 342-343. The author highlights that "Here, it is not directly argued that transparency increases organizational performance as this discourse is mainly concerned with information flows and the citizens' 'right to know what is going on'". For an extensive review, see ALBU, Oana Brindusa; FLYVERBOM, Mikkel. "Categories and dimensions of organizational transparency", paper presented at the 3rd Global Conference on Transparency Research, Paris, October 24-26, 2013.

[92] ELLIS, Mark. "Losing Our Right to Privacy: How Far is Too Far?". *Birkbeck Law Review*, vol. 2, núm. 2, 2014, p. 186.

From these few remarks, it emerges that transparency and the consequent violation of privacy are linked to the proportionality, which must be developed, as a principle, in three levels.[93] Thus, as Ellis noted "The bottom line is that global surveillance programs regularly fail to meet these requirements. Furthermore, under the legality principle, any limitation to the right to privacy must be prescribed by law. A state must not adopt or implement any measure that interferes with the right to privacy in the absence of an existing publicly reviewable legislative act, sufficient to ensure that individuals have advance notice of and can foresee its application".[94]

6 Some conclusions

First of all, in this paper I have so far argued that the criticisms by law and economics and feminist scholars need to be considered carefully. That is why the violation of such right(s) – including privacy – would undermine citizens' capacity to participate effectively in democratic politics. The consequence of this consideration is that we need to rethink certain categories – for example in relation to digital rights, especially at the legal and philosophical levels – in order to ensure their adequate protection and to establish any new limits. On one hand, the Internet is defined as an "information highway" because the exponential development of many sciences, especially Computer Sciences and Informatics, changed and continue to change people's habits and their means of communication.[95] On the other hand, the Internet as a virtual space is able to create responsibility and violations of the fundamental rights as well as outline new profiles in reference to privacy, transparency and democracy. So, as noted, it seems that the Internet is a new phenomenon that creates not only a theoretical and philosophical constructive debate, but also, and especially, a legislative one.[96] According to some authors it is possible to define

[93] For a comphensive summary of proportionality, see BERNAL PULIDO, Carlos. *El principio de proporcionalidad y los Derechos Fundamentales*, Bogotá: Universidad del Externado de Colombia, 2014. BARAK, Aharon. *Proportionality Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012.

[94] ELLIS, Mark. "Losing Our Right to Privacy: How Far is Too Far?". *Birkbeck Law Review*, vol. 2, núm. 2, 2014, p. 189.

[95] For a fuller examination see: AMOROSO FERNÁNDEZ, Yarina; SASSI, Manuela. Una esperienza multidiplinare: la storia costituzionale cubana. In: CIAMPI, Costantino; MARINAI E. (ed.). *Il diritto nella società dell'informazione*, Firenze: Istituto per la Documentazione Giuridica del CRN, 1998.

[96] It is important to highlight that this point is controversial. See, for example, PATTARO, Enrico; SARTOR, Giovanni. "Norms, Laws and the Internet", Paper presented to "II Congreso mundial de derecho informático", Madrid, 23-27/09/2002, esp. note 3, pp. 1-2. The authors write that «[...] an obvious statement and move into a controversial one. The obvious statement is that the Internet is a global phenomenon. [...] The controversial statement concerns the fact that the Internet needs a legal regulation. As we shall see in the following, attempts to use law to govern the Internet have been questioned in the past. There have been critiques concerning the feasibility of those attempts, but there have been also critiques concerning their opportunity and legitimacy».

the network (or Internet), in general lines, as an "autonomous space"[97] with the aim of developing and elaborating an internet right, or a right to internet, provided by a constitutional foundation and thus recognizing the possibility of having a constitutional basis for the governance of internet.[98] Stefano Rodotà,[99] perceiving the peculiarity of the Internet, claimed it is "the biggest public space that humanity has ever known"[100] with inevitable consequences. Regarding this aspect, Morrone has commented that "The Internet [...] becomes the 'new frontier of freedom of expression' (also because information that were inaccessible before, such as those about the exercise of power by States, now can reached every corner of the globe)".[101]

However, defining the Internet as a "public space" could raise some risks such as excessive control or a supervised and selected society in which the possibility of access to the World Wide Web varies. Morelli notes that: "The idea of the Network as an autonomous space could lead to its representation as a kind of *Wonderland* capable of exponentially developing human capabilities and enhancing the rights of the person, which up until a short time ago, were unimaginable".[102] But at the same time, there is also the risk of forcing the same rights through innovative modalities, in which the public and private entities continue to operate in a dominant position due to extraordinary resources, now offered to them by the same Network.[103] This approach has the advantage of grasping those elements capable of causing a strong and marked discontinuity between the past, the present and, perhaps, the future. Thus, it seems to indicate, as Castells suggested, "the rise of the network society" and, as the new concept of "The Informational City",[104] it is trying, in

[97] See for example: MORELLI, Alessandro. "I diritti e la Rete. Notazioni sulla bozza di Dichiarazione dei diritti in Internet". *Federalismi.it* – focus TMT 1, 2015, p. 2.

[98] For the concept of Internet *governance,* see DE MINICO, Giovanna. *Internet. Regola e anarchia*. Napoli: Jovene, 2012; MARONGIU, Daniele. *Organizzazione e diritto di Internet*, Milano: Giuffrè, 2013; POLLICINO, Oreste; BERTOLINI, Elisa; LUBELLO, Valerio. *Internet: regole e tutela dei diritti fondamentali*, Roma: Aracne, 2013.

[99] Stefano Rodotà was the first President of the Italian Authority for the Protection of Personal data and he was also President of the "European Group on Data Protection" and chairman of the scientific committee of the 'European Agency of Fundamental Rights'. On November 29, 2010, he presented to the Internet Governance Forum a proposal to discuss in the Italian Constitutional Affairs Committee the adoption of new Article 21a. The article in question is as follows: "Everyone has an equal right to access the internet, on equal terms, in ways technologically appropriate, and remove all obstacles to economic and social order".

[100] See RODOTÀ, Stefano. *Il mondo nella rete*. Quali diritti, quali vincoli. Laterza: Roma-Bari, 2014, p. 3.

[101] See MORRONE, Andrea. "Internet come spazio pubblico costituzionale. Sulla costituzionalità delle norme a tutela del diritto d'autore deliberate dall'Agcom". *Federalismi.it* – focus TMT 3, p. 4.

[102] MORELLI, Alessandro. "I diritti e la Rete. Notazioni sulla bozza di Dichiarazione dei diritti in Internet". *Federalismi.it* – focus TMT 1, 2015, p. 3.

[103] MORELLI, Alessandro. "I diritti e la Rete. Notazioni sulla bozza di Dichiarazione dei diritti in Internet". *Federalismi.it* – focus TMT 1, 2015, p. 3.

[104] See for example: CASTELLS, Manuel. The Informational City: Information Technology, Economic Restructuring, and the Urban Regional Process. Oxford, UK; Cambridge: Blackwell, 1989; and also Id.: The Internet Galaxy, Reflections on the Internet, Business and Society. Oxford: Oxford University Press, 2001. Castells concentrated upon the role of new technologies in the restructuring of an economy and he introduced the concept of the "space of flows", the material and immaterial components of global information networks used for the real-time, long-distance co-ordination of the economy.

some ways, to exceed the classic view of the relationship between law and city and reformulating the "Right to City".[105] Although this approach brings with it a certain appeal, especially for the new generations, at the same time it could be deceptive because it could lead to "an undermine of the many profiles of continuity with the past that characterize today's democratic institutional realities".[106]

Secondly, this chapter has turned its reflections to the "NSA affair". The perspective that I have adopted has served to highlight, without pretending to be complete, the different and always conflicting theories, arguments, and positions on privacy and the controversies that are connected to its discussion. The study has shown that definitions of interactions in the network and internet are not concerned with their undemocratic effects and potential tendency to emphasize the positive effects of the production and the diffusion of information, regardless of the will of the single individual and without any actual possibility for him/her to select what is reliable and relevant.[107] From this point of view, it could be easily objected that "internet allows only in a marginal way access to real information resources, resolving rather in a chaotic universe in which there is neither order nor communication".[108] On the other hand, there is the position that considers internet as something that is not able, in any way, to obey a determinate logic and, therefore, it could not have any kind of order (or, also, a predetermined one). Besides, we have to consider that the web structure, in general, could be able to reproduce the gap between developed and developing countries, with this gap being characterized not only in digital terms, but also, and especially, in economic ones. Thus, other risks would emerge at the same time, such as computer crimes, violations of copyright, and the consequences, in general, which derive from a cultural globalization that is unfolding without any rules.

Different is the theoretical position that focuses on the role of the individual and thus considers the web as a space where the single person could affirm and value him or herself. However, the virtual communities or social networks should not focus on the individual conceived as "a subject closed in its atomism", whose preferences could be anonymously aggregated with those of other individuals. This individual cannot be conceptualized as "a mere passive recipient of information and contents generated elsewhere" and, instead, should be conceptualized as actively taking part on this process and generating resources without being "subordinated

[105] For the concept of *right to city,* see LEFEBVRE, Henri. *Il diritto alla città*. Verona: Ombre Corte, 2014.

[106] MORELLI, Alessandro. "I diritti e la Rete. Notazioni sulla bozza di Dichiarazione dei diritti in Internet". *Federalismi.it* – focus TMT 1, 2015, p. 3.

[107] For a fuller examination see: DURANTE, Massimo. *Il futuro del web*: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete. Torino: Giappichelli, 2007; BARABÁSI, Albert. L., Link. *La nuova scienza delle reti*. Torino: Einaudi, 2004.

[108] See for example: DURANTE, Massimo. *Il futuro del web*: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete. Torino: Giappichelli, 2007, p. 11.

to the reduction of the transaction costs related to the access to the resources, to the centralized control of the shared activities in the web, to the stipulation of the commitments that presuppose inclusion in formal entities or institutions".[109] Hence, instead of focusing on the reduction of economic costs of the participation of the single individual, the emphasis should be on supporting the achievement of the "common good" and on contributing to the entire (cosmopolitan) community. Anyway, we could obtain a different kind of link between the individual and the (online) community, because the context could change, which is taking place on the virtual agora. Regarding this matter, it should speak of "*cooperative individualism*"[110] which would account for the differences and would engender the common good.

However, some objections would still have to be addressed. First of all, this argument does not deal, in a satisfactory way, with the fact that the internet is based on the fragmentation of social links, and that the community to which it refers would be a mere imitation since it would not be possible to communicate 'authentically', thus causing people who are already alone to remain alone. Therefore, the promises of democracy could remain unfulfilled. In fact, it would be difficult to imagine the development of a public sphere in the web due to, for example, the lack of democratic control of information or the lack of sharing of resources, which could support growth in developing as well as in developed countries. Also, such conception of the "common good" would have to bridge the theory/practice gap, because allowing the formulation and expression of individual opinions or preferences would be difficult (and hard to aggregate), due to the consequent fragmentation of difficulties in fostering an (online) *deliberative* public sphere.

In conclusion, it seems to exist the undeniable exigency to balance fundamental rights and also to have to argue how to solve this collision. Law has its own normative resources and has incorporated many moral basic principles (such as equality, equal respect, liberty and their procedural requirements) as legal principles. At this point, some considerations could be made on this matter, since the membrane between law and morality seems to be semipermeable, which can lead us to fall into "*inclusive positivism*".[111] This semi-permeability implies some complex problems regarding the nature of the norms and the nature of the concept of law.[112] Thus, as some authors noted, if one decision encompasses some moral reasons, the exigency of the legal justification for the decision, or one independent justification

[109] DURANTE, Massimo. *Il futuro del web*: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete. Torino: Giappichelli, 2007, p. 11 and ff.

[110] DURANTE, Massimo. *Il futuro del web*: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete. Torino: Giappichelli, 2007, p. 11 and ff.

[111] For a fuller examination, see Alexy, *La natura del diritto. Per una teoria non-positivista*, Esi, Napoli, 2015.

[112] For a comprehensive summary of the discussion on the nature of Law, see ALEXY, Robert. "The Dual Nature of Law", *Ratio Juris*, vol. 23, 2010, at 167-182.

for the norms or moral principles, seems impossible to satisfy. One consequence of this, for example, is that all justification is a moral justification and all legal obligation would be a kind of moral obligation.[113] At this point, it is important to highlight that logic, in general, and deductive logic, specifically, do not work well when faced with ambiguous, vague and plural normative cases. This is evident if it assumes that, when faced with ambiguous normative cases, logic does not provide an identification criterion of the best or the right test possible interpretation of the legal test. In the case of vague normative cases, it does not provide a criterion of decision related to the extension of concept or its significance. Finally, when there is a normative plurality, logic is not helpful in the decision of what the applicable norm is. That way, logic is only a criterion to control the validity of one inference and so it is compatible with the external justification and with hard and easy cases.[114] Thus, it can affirm, according to MacCormick, that the normative prepositions claim to consider the consistency, the coherence and the consequences of the decision.[115] To decide is not merely to deduce and the consequence is that, in order to have a comprehension of what the nature of the reasoning is, it is necessary to also comprehend the nature of logic. For this reason, the importance and the contribution of legal argumentation and practical reasoning are undeniable. On the contrary, not falling into the "inclusive positivism" makes the difference of trying to reach a coherent normative interpretation in the sense of what Dworkin calls "integrity"[116] or to what Alexy calls "moral correctness".[117] Thus, in this analysis "a case in which the authoritative material allows for two different interpretations, [but a] single additional argument is available, which is a moral argument that cannot either be reduced or traced back to a source".[118] At the same time, it is far from clear how an argument should balance all cases, because not any good moral argument will do it. In fact, moral correctness *simpliciter* is never searching for, but for moral arguments about how the law ought to be, which area different class of normative arguments. Finally, according to Alexy, the conditions of the discursive rationality which give expression to the values of freedom and equality can be made explicit by means of a system of principles, rules and forms of practical reasons.[119]

[113] For a full examination see: NINO, Carlos Santiago. *El Constructivismo ético*, Madrid: Centro de Estudios Constitucionales, 1989.

[114] See for example, MORESO, Josep Joan; NAVARRO, Pablo Eugenio, REDONDO, María Cristina. "Argumentación jurídica, lógica y decisión judicial", *Doxa 11*, 1992, pp. 247-262.

[115] For a fuller examination, see also MACCORMICK, Neil. "The Artificial Reason and Judgment of Law, Recthstheorie", *Beiheft 2*. Berlin, 1981, pp. 109-110. The author states: "Each side has to show that it seeks not some act of particular grace, but instead seeks what is right in the circumstances. But what is right in the circumstances is right for any such circumstances".

[116] See DWORKIN, Ronald. *Law's Empire.* Cambridge: Harvard University Press, 1986, esp. p. 176.

[117] See ALEXY, Robert. "On the Concept and the Nature of Law", *Ratio Juris 21*, 2008, pp. 281-299.

[118] See ALEXY, Robert. "On the Concept and the Nature of Law", *Ratio Juris 21*, 2008, esp. p. 295.

[119] For a fuller examination, see ALEXY, Robert. *A Theory of Legal Argumentation: The theory of Rational Discourse as Theory of Legal Justification.* Oxford: Oxford University Press, 1989.

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Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

STAMILE, Natalina. Privacy, internet and pluralist democracy. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 23, n. 92, p. 25-61, abr./jun. 2023. DOI: 10.21056/aec.v23i92.1810.