Control Yourself, or at Least Your Core Self

Lisa M. Austin

Version Post-print/accepted manuscript

Citation (published version) Austin, Lisa M., Control Yourself, or at Least Your Core Self (March 6, 2012). Bulletin of Science, Technology & Society, Vol. 30, p. 26, 2010.

Publisher's Statement Austin, Lisa M., Control Yourself, or at Least Your Core Self (March 6, 2012). Bulletin of Science, Technology & Society, Vol. 30, p. 26, 2010. Copyright © [2012]. Reprinted by permission of SAGE Publications.

Control Yourself, or at Least Your Core Self

Lisa M. Austin

Associate Professor, University of Toronto Faculty of Law

In February, Facebook quietly changed its terms of service and initiated another skirmish in what I will call the "control wars" over personal information (Raphael, 2009). Facebook's changes would enhance its control over users posted information, including material that had been deleted. The response was swift and angry. A Facebook Group, "People Against the New Terms of Service," (2009) has attracted over 130,000 members to pressure Facebook to revert to its old terms of use. The Electronic Privacy Information Centre (EPIC) threatened to file a complaint with the Federal Trade Commission. Facebook backed down.

This incident is interesting for many reasons. For one, it illustrates public anxieties regarding personal information. Tracked by public surveillance cameras, profiled by marketers, tagged by Facebook friends—increasingly we fear that information and communications technology has placed our personal information beyond our control. And, given that one of the most popular definitions of privacy is "control over personal information", any loss of control is viewed as a problematic loss of privacy.

The Facebook incident also highlights the accepted "solutions" to this problem. The way to halt the rapid erosion of privacy is to provide individuals with more control over their personal information. This has both a technological and a legal aspect. The technological aspect can be seen by the use of technology itself (a Facebook group) to mobilize individuals into an effective pressure group. The legal aspect can be seen through the threat of legal action. In fact, EPIC claims that this incident is evidence of the need for more comprehensive privacy laws in the United States (Raphael, 2009). Canada has such legislation, including the federal *Personal Information Protection and Electronic Documents Ac*t (PIPEDA), which aims to provide individuals with greater control over the collection, use and disclosure of their personal information. Even before this recent controversy, the Canadian Internet and Public Policy Clinic (CIPPIC) filed a complaint with the federal Privacy Commissioner alleging that Facebook was in violation of its obligations under PIPEDA (CIPPIC, 2008).

I am a supporter of comprehensive privacy legislation and, as a Facebook user, happy that Facebook reversed its decision. Nonetheless I think we should be concerned about the prevalence of "control" as the paradigm for both the problem of, and solution to, practices arising out of information and communications technology.

What interests me here is the striking parallels between contemporary privacy angst and technological fears from an earlier era. Like the "information age," the modern industrial age engendered dystopian visions of out-of-control technology, technology that did not simply herald a new age of freedom but rather brought with it new types of threats to human autonomy, health, communities and the environment. This spawned a great deal of academic commentary across many disciplines; I want to focus here specifically on the philosophy of technology and what it can both contribute to, and learn from, law's encounter with technology.

Hans Achterhuis (2001) usefully distinguishes first and second generation philosophers of technology. Perhaps the most influential philosopher of the first generation is Martin Heidegger. According to Heidegger, the instrumental conception of technology—that technology is simply a means that we create and use to further our chosen ends— blinds us to the true essence of technology. As he famously—and rather cryptically—argued," "the essence of technology is by no means anything technological." (Heidegger, 1993, p. 311). Instead, the essence of technology is more akin to what we might now call a cultural paradigm that conditions us to view the world as resources at our disposal Moreover, for him the essence of technology is intrinsically tied to the project of modernity itself. In this way, his work fits within a general category of primarily European thinkers who made technology an explicit theme in their reflections. They argued—although each in quite different terms—that the significance of modern technology does not lie in specific features of its machinery but rather in a kind of rationality and cultural milieu intimately linked with the project of modernity and the Enlightenment values that animate it but simultaneously threatening to undermine human freedom. In addition to Heidegger, Jacques Ellul (1990, 1964), Gabriel Marcel (1962), and members of the Frankfurt School (Horkheimer & Adorno, 1999) were all influential in this regard.

Second-generation philosophers of technology share a general rejection of instrumental definitions of technology but have largely tried to distance themselves from the strong dystopian flavour of these earlier more radical techniques.[1] According to these second-generation thinkers, earlier critiques fail because they are essentialist in talking about "Technology" rather than "technologies," and determinist because they see Technology as a threat to human freedom but fail to see the myriad ways in which human contexts and values shape and constrain the uses of technology. In a world where modern technology is ubiquitous and most often welcomed, they argue, we need a more nuanced view of technology, one that has a place to laud the victories of technology and a program for technological design that enhances democratic and ethical values. Indeed, as Hans Achterhuis has argued, second-generation philosophers of technology have largely taken an "empirical turn." (p.6)

This second-generation empirical turn can enrich legal discussions of technology by opening legal discussion to the insights of theorists from a variety of disciplines who have indicated that technology is in fact not neutral, that it often embodies important social and political values and therefore can have unintended and undesirable effects beyond simply physical consequences. It can also point to the ways in which we have the resources to think about, and build, technologies in a number of different ways and give us a richer basis upon which to think about law's role in this.

However, in distancing themselves from earlier critiques, second generation philosophers of technology have largely lost sight of the normative elements of earlier critiques. The danger is that in showing how technologies are shaped by a complex of social forces, as well as how they open up a plurality of options, these theories fall into a kind of descriptive obscurity. Indeed, Langdon Winner (2003) accuses some expressions of this "empirical turn" of ignoring—even disdaining—any normative inquiry into technology in favour of highlighting the interpretive flexibility of any particular technology. As Winner argues, "[i]n the late twentieth century a great many people—scholars and ordinary citizens alike—have begun to realize that the key question is not how technology is constructed, but how to come to terms with ways in which our technology-centred world might be reconstructed." What we want are norms by which to evaluate technologies, their design, implementation, and effects.

This is where legal scholars need to intervene.

What some of the legal debates regarding technology highlight is that it is not clear that the traditional normative strategies we might employ to evaluate technologies are adequate. And many of these normative strategies center on a particular idea of the self. For example, in his contribution, Frank Pasquale indicated that the question of the acceptance of self-enhancing technologies is not being driven by the technology itself but rather by a conception of the self that should be questioned. Kieran Tranter wrote of the need for alternative stories of self-creation.

These observations—with which I agree—suggest that we should rethink the empirical turn. What the first generation of philosophers of technology understood was that at the root of their questioning of technology lay the need to question the modern self itself. At the end of the day, this was Heidegger's message regarding technology: the instrumental definition of technology blinds us to the real essence of technology but the supreme danger of this is that we are thereby also blinded to the true nature of what it means to be a human being. Discussions of controlling technology – through law or other means—misses this entirely and in fact perpetuates a problematic view of the self.

I want to argue that this is exactly what is happening in many contemporary privacy discussions, where there is both an emphasis on issues of control and the invocation of an idea of a core self. As I will outline below, these ideas are connected and both need to be called into question.

One of the dominant definitions of privacy—particularly in the policy world but by no means confined there—is that of control over personal information. Certainly it influences data protection law in Canada, which requires organizations to obtain the consent of individuals for the collection, use and disclosure of personal information. One of the great advantages of such a model is that it does not limit protection to a particular sub-class of personal information such as information that is sensitive and intimate—"personal information" is simply information about an identifiable individual. This makes such models potentially more responsive to information practices that rely less on intruding into a sensitive sphere and more upon compiling pieces of information that, on their own, are not sensitive and may even be "public." However, the breadth of a control-model is also its Achilles heel: to create a workable scheme one needs many exceptions and without careful thought these may be clumsily introduced. Canada's experience with these regimes bears this out, and I have documented these problems elsewhere.[2]

For the purposes of this paper, I want to focus here on a particular strategy for limiting the breadth of a control-over-personal-information model of privacy that is popular in Canadian jurisprudence: the "biographical core." Canadian Supreme Court constitutional privacy jurisprudence, arising in the search and seizure context, has often endorsed ideas like control over personal information in relation to informational privacy. However, most of the real jurisprudential heavy lifting is in fact being done by a much narrower idea. Informational privacy is said to protect one's "biographical core of personal information," which has been defined as including "information which tends to reveal intimate details of the lifestyle and personal choices of the individual." (R v. Plant, 1993) This narrowing of personal information to one's biographical core is also present in data protection regimes, although less explicitly, because of the need to provide some personal information with stronger protection than other information (for example, this sometimes plays out in debates regarding the type of consent required or in how a balancing test is implemented).

I have pointed out this trend at a number of practice-oriented forums and usually get one of two responses. The first, from decision makers, is that of course they have to operate with some idea of a "biographical core" because some information is more sensitive than others and this is the only way to properly engage in a privacy risk assessment. The second, from various privacy advocates, is shock and dismay that the privacy community is reverting to an idea of sensitive and intimate information that seems wholly unsuited to meet current privacy challenges associated with information and communications technology.

I, however, think that privacy-as-protection-of-one's-biographical-core has far more in common with privacy-as-control-over-personal-information than simply its pragmatic use to narrow an overly-broad definition. They both draw upon a similar idea of the self.

This becomes readily apparent if we consider the work of Alan Westin in his influential book, *Privacy and Freedom* (1967). Westin is often cited for this classic privacy-as-control statement:

> Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. (p,7)

But Westin also goes on to write:

> privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve. … [E]ach individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others .(p.7)
>
> …
>
> The most serious threat to the individual's autonomy is the possibility that someone may penetrate the inner zone and learn his ultimate secrets, either by physical or psychological means. (p.33)

From this we can see that Westin's claims regarding control over information are in service of an idea of privacy as social withdrawal—an idea that lines up with more traditional privacy ideas such as the protection of secret, sensitive and intimate information. Moreover, this withdrawal is ultimately in service of the protection of an "inner zone" that parallels the Supreme Court of Canada's biographical core. Social interaction is something that is balanced *against* this need for withdrawal, something that is in constant tension with it—which echoes the difficulty that many judges have in understanding why someone might have a privacy interest in information that has been voluntarily disclosed to others, or in regards to something that has in some context been made "public."

There are other alternatives for thinking about the self and privacy. Suppose instead that we took up the challenge posed by some of the first generation philosophers of technology that we need to rethink the modern subject if we are to properly respond to the challenges of technology. Suppose, for example, that instead of the idea of an individual with an inner core transparent to itself upon solitary introspection, we posited a self that is in fact *formed through* social interaction. The point of privacy would not be to protect the conditions of social withdrawal in order to maintain the integrity of such a self—it would be to protect the conditions of social interaction in order to provide the basis for identity formation in the first place.

I am currently working on outlining an account of privacy such as this. Inspired explicitly by Goffman (1959), but influenced by many others, I want to claim that privacy should be understood in terms of protecting our capacity for self-presentation. This "self" that is presented may or may not be different in relation to different "others," may or may not be constituted through these relationships, and may or may not vary over time and across contexts in contradictory ways—in other words, it stays far away from positing anything like an "inner zone" or "biographical core." What becomes important is not the protection of different layers of an already-constituted self but rather an individual's ability to know the others to whom she presents herself—and even, in some case, to be able to choose these others. For example, if I take a photo of you in a public place and publish it in a magazine I have dramatically changed the nature of the others to whom you were presenting yourself—the "audience" shifts from the other people sharing this public space to the other people reading the magazine. This shift, I want to argue, undermines one's capacity for self-presentation and therefore raises at least a prima facie privacy claim—even though the photo was taken in "public" and even though it reveals nothing embarrassing or sensitive. [3]

There is, of course, much more to say and this is what my current work is focusing on. My point in this paper has been to try to show that the first generation of philosophers of technology raise an intriguing challenge to legal theorists regarding the need to examine the view of the self that we adopt in thinking about technological questions. I think that privacy law and theory would do well to rise to the challenge.

[1] See, for example, the work of Don (1993, 1990) and Andrew Feenberg (1999).

[2] For a detailed discussion, see Austin (2006).

[3] I have written elsewhere about the Canadian *Aubry* case, which has these facts. (*Aubry v Éditions Vice-Versa*, 1998). See Austin (2003).

References

Achterhuis, H. (Ed.). (2001). *American Philosophy of Technology: The Empirical Turn*. Bloomington and Indianapolis: Indiana University Press.

Austin, L. M. (2006). Is Consent the Foundation of Fair Information Practices? Canada's Experience Under *PIPEDA*. *University of Toronto Law Journal* , 56, 181.

---- (2006). Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices. *Canadian Business Law Journal*, 44, 21.

---- (2003). Privacy and the Question of Technology. *Law & Philosophy* 22, 119-166**.**

CIPPIC (2008). PIPEDA Complaint: Facebook. Retrieved from: http://www.cippic.ca/uploads/CIPPICFacebookComplaint_29May08.pdf.

Ellul, J. (1990). *The Technological Bluff*. Grand Rapids, Michigan: William B. Eerdmans Publishing Company.

----. (1964) .*The Technological Society*. New York: Vintage Books.

Feenberg, A. (1999). *Questioning Technology*. London: Routledge.

Goffman, E. (1959). *The Presentation of Self in Everyday Life*. Anchor Books.

Heidegger, M. (1993). "The Question Concerning Technology" In D. F. Krell (Ed.), *Martin Heidegger: Basic Writings*, 2nd, rev. and expanded ed. New York: HarperCollins. (Original work published in 1954)

Horkheimer, M. & Adorno, T. (1999) *Dialectic of Enlightenment*. New York: Continuum, 1999. (Original work published in 1944)

Ihde, . (1993). *Philosophy of Technology: An Introduction*. New York: Paragon House.

----. (1990). *Technology and the Lifeworld: From Garden to Earth*. Bloomington: University of Indiana Press.

Marcel, G. (1962). *Man Against Mass Society.* (G. S. Fraser, trans). Chicago: Henry Regnery Company.

People Against the new Terms of Service (2009). Retrieved from: http://www.facebook.com/group.php?gid=77069107432

Raphael, J. (2009, February 18). Facebook's Privacy Flap: What Really Went Down, and What's Next. *Today@PC World*. Retrieved from: http://www.pcworld.com/article/159743/facebooks_privacy_flap_what_really_went_down_and_whats_next.html.

Westin, A. (1967). *Privacy and Freedom*. New York: Ateneum.

Winner, L. (2003) Social Constructivism: Opening the Black Box and Finding it Empty. In R. C. Scharff & V. Dusek (Eds.), *Philosophy of Technology: The Technological Condition, An Anthology* (pp. 233-243).Oxford: Blackwell Publishing.

Aubry v Éditions Vice-Versa, 1 SCR 591 (1998).

R. *v Plant*, 3 SCR 281 (1993).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.