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CONTROL OVER PERSONAL DATA, PRIVACY AND ADMINISTRATIVE DISCRETION IN EUROPE AND THE USA: THE PARADOX OF ITALIAN “DATA PROTECTION AUTHORITY”

MARCO A. QUIROZ VITALE*

I. INTRODUCTION

A. PRIVACY AND THEORIES OF “CONTROL” IN EUROPE AND THE UNITED STATES

The right to confidentiality and privacy and the right to fair and proper processing of personal data have become integrated into the legal culture in both Europe and the United States and both are gaining a strong footing in Latin America.¹ Recognition of these rights is now presumed by most legal discourse that illustrates the extent of the laws on this topic. The personal right to privacy is usually affirmed as a new right: its modern articulation is conventionally considered to be in the December 1890 publication by Samuel D. Warren and Louis D. Brandeis, titled *The Right to Privacy*.² Furthermore, the personal right to privacy is now routinely asserted in information societies (characterized by the prevalence of the personal computer and other forms of

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1. See generally RED IBEROAMERICANA DE PROTECCIÓN DE DATOS, <http://www.redipd.org/index-ides-idphp.php> (last visited June 19, 2014).

2. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

communication that are increasingly interrelated).³ The issue of privacy intersects broadly with the amount of control that a person has over his or her personal data once this information travels through new cybermedia (where it can be adapted, altered, and reconstructed by operations that have nothing to do with the personal wishes of its subject).⁴

As a result, theories that are predominantly descriptive or normative in nature that attempt to address these privacy concerns of “secrecy” and “control” have met with increasing success in the judicial camp and elsewhere. According to traditional analysis, “descriptive” models describe confidentiality as a state or condition that a person may preserve or lose under certain circumstances or may possess to a certain extent.⁵ But, “normative” models of privacy refer to what “should be” and are based on moral duties or political claims.⁶

In this context, a descriptive model of confidentiality defines privacy as a condition under which an individual is protected from another person’s physical access to him with regard to his personal data or third-party interest.⁷ The Israeli philosopher of law, Ruth Gavison, asserts a similar conception of privacy as “limited access to the self,” according to which the consent to privacy as well as the respect for secrecy and anonymity are conditions of confidentiality.⁸ However, these often-desirable conditions are threatened by the distorted use of new technologies; studies of the Internet and communications via social networks or email are the object of a growing debate and attention, as Gavison’s earliest studies clearly anticipated.⁹

The interpretation of privacy as “secrecy” is another aspect of the broad conception of confidentiality as “limited access to the self” insofar

3. See generally DAVID LYON, *SURVEILLANCE SOCIETY: MONITORING EVERYDAY LIFE* (2001).

4. David Lyon uses the terms “super-panopticon” and “hyper-surveillance” to describe the gap created as we entered the age of electronic communication and data banks. Besides the modern forms of visibility, a second wave of modernity (or post-modernity) has established new types of visibility, in which surveillance no longer directly affects bodies *per se* but rather the codified information that applies to physical subjects. *Id.*

5. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV., 1087, 1143 (2002).

6. *Id.* (discussing the conceptualization of the term “privacy”). “Therefore, determining what the law should protect as private depends upon a normative analysis, which requires us to examine the value of privacy in particular contexts. To do this, we must focus on our practices specifically, the nature of privacy in these practices, the role that privacy plays in these practices, and the ends that these practices further. Thus, the value of privacy is an important dimension of conceptualizing privacy.” *Id.*

7. Glenn Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROBS. 319, 325 (1966).

8. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421, 438 (1980).

9. *Id.*

as the possibility of blocking third-party knowledge of private information is an effective way of blocking access to the self.¹⁰ Revealing secrets or information previously undisclosed to third parties is a significant but only partial aspect of the issue that has found eminent approval in American jurisprudence.¹¹

Consequently, there is no lack of “normative” definitions based on the concept of the secrecy of information that allude to the possibility of legitimate actions by individuals or groups without the obligation of revealing or accounting for these actions. A similar interpretation posits the intersection of the sphere of privacy with the social environment (the self, the couple, membership associations) within which the individual is allowed to choose what information will not be disclosed.¹²

It has been correctly observed, however, that the notions of privacy and secrecy are not coextensive: military secrets can be non-private or public in scope, and some private information, like an entrepreneur’s solvency, may be publicized.¹³ The mere fact that confidential information has lost its dimension of secrecy does not necessarily mean that it may be used regardless of the consent or beyond the means of control of the individual to whom it refers.¹⁴ Arising from the lack of consensus on the definition of privacy as a sphere in which information is secretly guarded, the most well-received theories of privacy now address the issue of “control.”¹⁵ It has been noted that privacy and publicity are not incompatible; the sole function of privacy may be to assure individuals of their control over certain aspects of their lives.¹⁶ These theories are based on the notion that privacy is the control over one’s private information because it is considered a manifestation of one’s personality.¹⁷ Consequently, such extensions of the self must be protected, just as the notion of property protects our other material or intellectual goods.

Evidently, there is a relationship that exists between this formulation and the values that inform the view of privacy as self-protection. The applicability of this particular conception, however, is more limited

10. Solove, *supra* note 5, at 1106.

11. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Roe v. Wade*, 410 U.S. 113 (1973).

12. AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 196 (1999); see also Amitai Etzioni, *A Liberal Communitarian Conception of Privacy*, 29 J. MARSHALL J. COMPUTER & INFO. L. 419, 421 (2012).

13. Solove, *supra* note 5, at 1109.

14. *Id.*

15. See JULIE INNESS, *PRIVACY, INTIMACY AND ISOLATION* 6 (1992).

16. *Id.* at 41.

17. MARCO A. QUIROZ VITALE, *DIRITTO ALLA PRIVACY E DIRITTO DI ASSOCIAZIONE, PLURALISMO E CONFLITTO TRA DIRITTI FONDAMENTALI* 42 (2012).

and specific (so-called “informational privacy”), just as its applications based on the safeguarding of secrets are used instrumentally with regard to the elimination of the greatest threat to *access to the self* in a communication society.¹⁸

Many “descriptive” definitions of privacy revolve around a benign concept of control.¹⁹ Miller, for instance, points out the significance of privacy in relation to the ability to control the circulation of information: this attribute is fundamentally important to the enforcement of the right to confidentiality.²⁰ Fried, too, shows how privacy is not so much the absence of our personal data at the disposal of others as the control that we can exert over our most personal information, those facts that allow us to interweave relationships of respect, faith, love, or friendship.²¹ Such a definition is of course largely “prescriptive” since it shows that respect for privacy is “necessary” to the cultivation of basic human relationships.²²

Alan Westin’s assertion is one of the most often cited “prescriptive” definitions of privacy based on the concept of control: “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.”²³ Many other authors share a similar formulation,²⁴ which the philosopher Adam D. Moore reaffirms more generally to include the notion of “use” as well as “access.”²⁵ The right to confidentiality is the right to control the access and use of locations, bodies, and one’s most private personal information.²⁶ According to Moore, the normative definition of control is based on both of these profiles: “A privacy right is an access control right over oneself and information about oneself. Privacy rights also include a use or control feature – that is, privacy rights allows me exclusive use and control over personal information and specific bodies or locations.”²⁷ When privacy is properly respected, it serves to guarantee the health and well-being of those who – by exercising control over themselves, their personal space and their bodies –

18. *Id.* at 47.

19. *Id.* at 51.

20. ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTER 25 (1971).

21. Charles Fried, *Privacy*, 77 YALE L. J. 475, 482 (1968).

22. *Id.*

23. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

24. See, e.g., ANITA ALLEN, WHY PRIVACY ISN’T EVERYTHING, FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY (2003); Ruth Gavison, *Information Control: Availability and Control*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 113 (1983).

25. ADAM D. MOORE, PRIVACY RIGHTS. MORAL AND LEGAL FOUNDATIONS 16 (2010).

26. *Id.*

27. *Id.*

have the ability to assert their own self-representation as human beings endowed with reason and free will.²⁸ The force of Moore’s definition makes it one of the most sophisticated and effective among theories of “control.” Moore’s definition also defends itself well against the most prevalently waged criticisms: it is not overly restrictive since it includes not only a narrow definition of information but also locations and the objectivity of the body. In comprehensible terms, it clearly circumscribes the kind of information and environments that come under the protection of the right to confidentiality and available forms of control.²⁹

B. PRIVACY BETWEEN IDENTITY AND FREEDOM

The concept of confidentiality or privacy as “control” has found favor, especially in the Old World. Whitman observes that, in Europe, privacy is considered mainly as the expression of the demand for respect for human dignity.³⁰ What distinguishes the European approach to the issue of privacy from the American view is its affinity with the right to one’s own image, name, and reputation.³¹ It implies a concern for what is considered to be the individual’s right to be able to determine one’s own personal data and the power to exercise control over the distribution and circulation of his or her personal data.³² In Whitman’s interpretation, Europeans have developed a special awareness of the importance of defending one’s public image, which theoretically translates into the subject’s right to be perceived by others however he or she wishes to be presented to others.³³ Europeans seem somehow to be horrified by public humiliation and the embarrassment that is a consequence of the pillory of the self in the current informational society.³⁴

Citizens of the United States are more concerned with defending personal liberty and autonomy, especially with respect to governmental interference.³⁵ The two contrastive attitudes reveal the presence of diverging social norms where the right to privacy creates heterogeneous spheres of immunity, even among social groups who largely share the same culture and basic values.³⁶ Whitman brilliantly delineates these

28. *Id.*

29. *Id.*

30. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L. J.* 1151, 1167 (2004).

31. *Id.*

32. *Id.* at 1161.

33. *Id.*

34. *Id.* at 1162.

35. *Id.* at 1214.

36. *Id.*

cultural differences:

When Americans seem to continental Europeans to violate norms of privacy, it is because they seem to display an embarrassing lack of concern for public dignity – whether the issue is the public indignity inflicted upon Monica Lewinsky by the media, or the self-inflicted indignity of an American who boasts about his salary. Conversely, when continental Europeans seem to Americans to violate norms of privacy, it is because they seem to show a supine lack of resistance to invasions of the realm of private sovereignty whose main citadel is the home – whether the issue is wiretapping or baby names. The question of public nudity presents the contrast in piquant form. To the continental way of seeing things, what matters is the right to control your public image – and that right may include the right to present yourself proudly nude, if you so choose. To the American mind, by contrast, what matters is sovereignty within one’s own home; and people who have shucked the protection of clothing are like people who have shucked the protection of the walls of their homes, only more so. They are people who have surrendered any ‘reasonable expectation of privacy.’³⁷

II. THE SOCIO-LEGAL PROBLEM OF “PRIVACY”

A. THE FUNCTION OF PRIVACY AND SOCIAL STRUCTURE

The socio-legal analysis of the issue of privacy requires that it be redefined as a “problem” in modern society, either in order to reach an understanding of the proposals to regulate a series of social relationships by legal standards or to assemble the contradictions brought about by excessive governmental regulation.³⁸ In the work of traditional sociologists, Robert K. Merton’s writings on the function of privacy in social groups are among the most lucid and cogent.³⁹ From a functionalist point of view, his study is remarkable because it confronts and frames the issue in sufficiently cohesive contexts—the members of a group according to Etzioni’s definition⁴⁰—but the analysis is free from ideological bias.⁴¹ Moreover, Merton introduces concepts of the control over information into the analysis that in turn explicitly evoke the concept of power and provide a structural explanation of the function of privacy that is not limited to recording how various socially defined

37. *Id.* at 1162.

38. QUIROZ VITALE, *supra* note 17, at 52.

39. *See generally* ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (1967).

40. ETZIONI, *THE LIMITS OF PRIVACY*, *supra* note 12.

41. QUIROZ VITALE, *supra* note 17, at 64.

environments of confidentiality are revealed in various cultures.⁴²

Merton demonstrated that “knowability” and the awareness of the existence of specific rules and values of a group is much more than an empirical fact, a point on which there is general agreement.⁴³ Above all, this recognition is a sociological problem that is closely tied to the visibility of behavioral patterns that conform more or less to prevalent rules and, conversely, to the level of privacy that individuals are entitled to in relation to social norms.⁴⁴ Mechanisms exist for every social group that allow the rules and conduct of the group to be observed by elite members; the function of these devices is to give the elite greater knowledge than the other members possess of the rules and types of behavior that are effected in the referenced social environment.⁴⁵ For Merton, the group leaders’ maintenance and exercise of power implies that they systematically use all available means of providing detailed information on the conduct of others without being able to push to an extreme position of unlimited visibility and observability of all behavior.⁴⁶ The American sociologist rejects this extreme hypothesis, which corresponds to a social structure that is not only authoritarian but above all totalitarian in contrast to the values of a democratic society.⁴⁷ So, the sociological analysis of functionalism only seems to be descriptive. It assumes a prescriptive dimension insofar as it confirms that the function of privacy is to limit the use of mechanisms that, while ensuring the structural demand of visibility, would give rise to dysfunctional consequences if taken to an extreme.⁴⁸ In particular, Merton shows how excessive use of mechanisms of visibility or surveillance⁴⁹ inevitably generate resistance from other members of the group that can be defined as the need for privacy.⁵⁰ Real or presumed rifts between the interests of the group leaders and its members represent increasing resistance. In the case of excessive knowledge of social dynamics, dysfunctional effects can impact the same system of control. Nonetheless, Merton introduces an evaluative and prescriptive element by

42. MERTON, *supra* note 39, at 429.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *Id.* at 90.

49. Increasingly, the topic of surveillance in advanced modernity tends to encompass a sociologically autonomous area of study whose problematics extend beyond the limits of privacy. *See* DAVID LYON, *THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY* 274 (1994). However, since the problems still seem to be closely interrelated, it seems justifiable to consider them as a whole in a general theory of privacy. *Id.*

50. MERTON, *supra* note 39, at 429.

categorically excluding the possibility that the *optimal* level of visibility in terms of efficiency could overlap with the highest level, which would signify complete observability of the behavior of the members of the group.⁵¹ The implied value here is the rejection of totalitarian organizations that erode human dignity by denying, completely, privacy.

Consequently, Merton proposes a general explanation and finds shortcomings in the usual analyses inspired by cultural relativism. According to these analyses, every society establishes social rules that define the optimal level of visibility and observability of the behavior of its members, and this level varies from one culture to another.⁵²

In this regard, Merton formulates the hypothesis that the “need for privacy” and the rules that define a discrete or intimate space in complex societies—rules that prevent representatives of authority from observing specific types of behaviors—guarantee the function of tolerance.⁵³ Complete, ongoing, and immediate adherence to the rigid norms of a group would only be possible in a social void that has never existed, nor could it survive in any society known to mankind. For Merton, the social function of tolerance is discharged by a certain number of minor infractions that go unobserved, or at least are not recognized as such.⁵⁴ From a structuralist-functionalist point of view, the function of privacy is therefore to reduce stressful situations (in a kind of civil war between informers and revenge seekers) that would otherwise be provoked by stringent social control as a consequence of perfect visibility, in a society in which most persons have distanced themselves from a literal and inflexible application of its rules.⁵⁵

There are secondary consequences, however, of the existence of certain zones of confidentiality that are incident to the same social structure. The reduced visibility brought about by the practice of privacy may influence, for instance, the behavior of new members of the group or neophytes who may not recognize other members’ real behavior vis-à-vis the current formal rules of conduct. On the other hand, a zone of immunity from the sanctions imposed for non-adherence to the formal rules that have referred to as “privacy” creates conditions for developing non-conformist behavior among well-integrated members of the group. In this sense, privacy, as Merton’s theory of social groups implicitly suggests, not only serves to “veil” what is perceived as an undesirable total visibility of behavior, but is also the condition for the “unveiling”

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 398.

55. *Id.*

or disclosure of requests for social change.⁵⁶ Another active function of privacy (conceived as unratified space in which selective activities also lean, by autonomous choice, toward new values) is to allow a non-conformist majority to represent basic values and interests more effectively than a conformist majority.⁵⁷

B. PRIVACY AND ELECTIVE ACTION IN MODERNITY

As described above, the origin of the right to privacy is closely related to the affirmation of the social structures of early modernity. We stipulate that early modernity corresponds to the first great transition that occurred in Europe in the seventeenth century, characterized by the decline of “sacred societies” and the advent of secularization.⁵⁸ The right to privacy as defined in traditional societies, and outlined herein, is dominated by three basic characteristics: the prevalence of prescriptive actions; the perpetuation of tradition; and scant differentiation between institutions. The “new right” to privacy is among the consequences of the affirmation in modern times of three opposing characteristics: institutional differentiation; the prevalence of elective action; and the institutionalization of change.⁵⁹

Not coincidentally, the noted Italian sociologist Gino Germani⁶⁰ uses the example of the choice to marry, a personal choice, to illustrate aspects of elective action in modernity as opposed to traditional society.⁶¹ Within the frame of reference of a traditional society that is predominantly characterized by prescriptive action, the decision to marry is indeed accepted by the subject but without the connotation of an individual choice.⁶² Oppositely, but in a similar context, the decision would be considered a collective one insofar as it is the business of the clan or an issue related to the extended family as a primary group.⁶³ Within these parameters, the status of the married couple constitutes the normative nucleus that controls the choice of one’s life partner. In other words, the characteristics ascribed to the betrothed will be determinant, while the element of volition, which may exist, need not

56. *Id.*

57. *Id.*

58. QUIROZ VITALE, *supra* note 17, at 78.

59. *Id.* at 81.

60. Gino Germani (1911-1979) was Monroe Gutman, Professor of Latin American Affairs at Harvard University and Professor of Sociology at Naples State University in Italy. GINO GERMANI, *THE SOCIOLOGY OF MODERNIZATION 1* (1981).

61. *Id.* at 12.

62. *Id.*

63. *Id.* at 119.

have any effective impact on the decision to marry.⁶⁴ *Status* (or caste or social class in a society where upward mobility is blocked) prescribes a unique course of action in choosing a future spouse with only a slight margin of variation due to incidental circumstances that may appear in each specific case.

According to this theory of modernization, the great European transition in the eighteenth century radically altered these forms of social action.⁶⁵ In a modernized society, behavior described as an “arranged marriage” or “the servitude of the glebe” (an extreme case) would be considered socially inappropriate.⁶⁶ Within the framework of elective action, the normative system operates differently in these examples. In a fully modernized society, the choice to marry or not is completely autonomous; it is left to the individuals who reserve the option to generate their own rules of conduct in this regard and control the processes by which they take action. In so doing, they affirm their relative independence from the primary group to which they belong (family, peer group).

The existence of a social meta-norm dictates choice. Furthermore, to be socially appropriate, the choice must be made according to specific standards that may vary historically and geographically and may include one’s skills, profession, the economic demands of the family nucleus and its social relationships. In this profile, social action tends to become increasingly more autonomous as the individual’s zones of freedom gradually multiply. The standards by which choices are made become less regulated by others and more the product of the same social actor’s decisions to orient his or her life in particular directions. The case of marriage is emblematic: in the past, the choice of celibacy had to be justified by strong religious reasons, whereas today it is possible to choose not to marry but to live with a life partner without provoking specific social reactions of disapproval. A personal and carefully considered choice, however, must be made. From this perspective, privacy is an expression of modernity that both allows and obliges social actors to make autonomous personal choices and decisions.

Germani describes a continuum in which we can identify multiple “mixed” types of social action where profiles of prescriptivity and electivity co-exist.⁶⁷ At the extremes of this continuum we find two *pure* types of action: the prescriptive and the elective.

64. *Id.* at 88.

65. *Id.*

66. *Id.*

67. *Id.* at 118.

In modernity, privacy is progressively more clearly characterized as a zone reserved for individuals where they are free to make choices for which others cannot be deemed responsible.⁶⁸ Such an option would have been unthinkable in a traditional society where a strong normative nucleus left little latitude for the subject’s individual decisions. Contrarily, modern society is characterized by elective action in which the autonomy of the subject is exalted and the individual is expected to self-determine the rules of his or her own conduct.⁶⁹ In American and European legal culture, personal decisions are the most authentic example of autonomy. In a traditional society, individual action leads to collective decisions that rarely express individual wishes. The presence in the western world of immigrants from countries where the process of modernization has stalled localizes the stark contrast between elective and prescriptive action in the sphere of personal choices. Clothing, sexuality or the choice of one’s life partner are issues that involve an extended family or class for groups that affirm pre-modern social norms and values. As a result, they cannot be relegated to the level of personal choice. Clan members’ reactions to modern choices of attire, sexual behavior, or co-habitation by certain members are sometimes extremely violent because the validity of the normative system that controls the group with which the clan identifies has been jeopardized. In such pre-modern normative systems, personal decisions are attributable to the group, although it is of course the individuals themselves who marry, procreate, or begin working.

In this context it becomes very difficult to support neo-communitarian positions like Etzioni and Selznick’s that attempt to reconcile individual rights, whose affirmation they see overlapping with the advent of liberalism, with the requirements of a community. In fact, the logic of the community insists that values and objectives be shared, a condition that enables the construction of a rigid normative nucleus.⁷⁰ For this reason, ethnic groups are typically very cohesive, religious groups are fundamentalist, and villages can impose strict premises for decision-making to such an extent that behavior inspired by the group often contrasts with the interests of the individuals who are involved in the process, although the individuals act as the “custodians of the standards and values” of the community. In this normative framework, it is normal that individual interests and values must be subtended to the demands of the group or the community to which one belongs.

68. QUIROZ VITALE, *supra* note 17, at 85.

69. GERMANI, *supra* note 60, at 120.

70. *Id.*

It is not surprising that for supporters of a neo-communitarian view of social relationships, autonomy over personal decisions represents a theoretical and practical problem that is difficult to resolve, for the simple reason that modern man no longer lives in a social environment where the stability of “natural things” is apparent. Belonging to a specific group is no longer all that is needed to guarantee coherence, and the integration of values and social standards of reference because in the same society different normative systems, making equal claims to validity, coexist or are in conflict. The psycho-social consequences of these changes is that members of a community are asked to choose consciously and deliberately the values and standards that will govern them.

The individual “must choose,” but to do so, he must first develop a self-sufficient personality. If he fails in this endeavor, as Germani has clearly demonstrated, modern man risks losing his own freedom and declining into less evolved states of unawareness, like fashion victims or the stereotypes promoted by mass media.⁷¹ Even worse, when people feel oppressed by the responsibility of choice, they may be tempted to accept new restraints on their own autonomy, as demonstrated by new religious sects and gangs of youths, to lighten the burden of responsibility for their own choices and live out their decisions more as a function of adhering to requests for loyalty to the group.⁷² Lawrence Friedman concurs with this equation of privacy with freedom of choice.⁷³

In modern society, privacy is the ability to opt for certain types of private behavior without suffering negative consequences. For Friedman, this includes the right to evanescence after voicing public support of a particular cause,⁷⁴ because individuals may change their minds. In any case, individuals must be able to manifest their opinions freely without fearing that a display of their thoughts today will come back to haunt them tomorrow. Of course this right has to do with the possibility, in the age of technology with the ability to create boundless data banks by means of computers endowed with enormous powers of calculation, every fact and the minutiae of everyone’s existence can be stored, cross-referenced, elaborated on, and extracted.

This view of privacy does not intend to protect “secrecy” per se or prevent specific facts from being known, since one might expect or anticipate that others share knowledge of the same facts (like participating in a civil rights march, requesting a loan to finance the purchase of

71. *Id.*

72. *Id.*

73. *See generally* LAWRENCE MEIR FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* (1990).

74. *Id.* at 181-82.

a car, or taking part in the activities of an amateur dramatic society). But it is correct to expect that this information not be used to discriminate against or disadvantage someone who has publicly displayed a personal choice. In other words, Friedman explains that several U.S. Supreme Court decisions on the issue of privacy, like *Roe v. Wade*,⁷⁵ are resolved by the right to effect private choices that are personal and individual in nature without coercion or negative consequences.⁷⁶

In light of these considerations, there are sufficient grounds for assuming that the right to privacy is part and parcel of the modern legal structures typical of open, democratic societies that propose to ensure the primacy of choice in those societies. In so doing, these structures prevent the individual from suffering the negative effects of ascribed features that are beyond his control and not the product of his own choices. Moreover, as a “positive liberty,” privacy sustains the broadest exercise of freedom of choice in specific environments of private choices (sexuality, abortion, marriage, children's education, etc.) and ensures that no choice—made within the panoply of what is socially appropriate in a particular sphere—is privileged with respect to other choices or, oppositely, penalizes the person simply for having instigated this choice.⁷⁷

Nonetheless, this profile of privacy also represents a social structure that enjoins individuals to make choices that remind them of their responsibilities. Private decisions have particular characteristics: they are extremely personal and inalienable; they cannot be delegated and are at the heart of a conception of modern man where dignity and freedom are interwoven. As conceptual concentric circles gradually expand out from this vital nucleus, choices fall increasingly into the outermost rings where they become less personal, urgent, and crucial. Non-tangible assets, such as one's image, name, expressions of creativity or talent, or even personal data, and their interrelationships, subjects, and individual rights to one's assets become more marketable, delegable, and deferrable. But to a certain extent and in variable degrees, the subject, who is at the center of these conceptual circles maintains (potential) control over the elements that have specified and may occasionally be called upon to decide his fate.

C. THE RIGHT TO PRIVACY: A COMPLEX CONCEPT

The right to privacy is a form of legal protection of an aspect of a person's life that is subject to change in the evolution of social spaces

75. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

76. FRIEDMAN, *supra* note 73, at 183-84.

77. *Id.* at 95.

and relationships between subjects, which in turn may influence others' perceptions of them. Rarely more than in the case of the protection of privacy does this right emerge as a variable that depends on society, except when it gives rise to undesired and unforeseen secondary consequences that make these rights in certain profiles an independent variable with respect to the society itself.⁷⁸ The first hypothesis states that in its original configuration, the "right to privacy" reflects the values and aspects of modern society. Beginning with the publication of Warren and Brandeis' essay in 1890,⁷⁹ confidentiality has assumed the form of an autonomous right that reflects the structural characteristics of modern western society. First and foremost, the two aspects that are described in an interesting American taxonomy as the *right to repose* and the *right to sanctuary* belong to this nucleus of privacy.⁸⁰ It is a question of negative liberty that, upon closer inspection, represents two sides of the same coin. Privacy acts as a physical or abstract diaphragm between the subject and the other individuals with whom he or she interacts. The right to tranquility indicates the extent to which it is legitimately possible to avoid any necessity of knowing about the behavior of others, and consequently to refuse to form an opinion regarding the aspects of their private lives that they choose to communicate to us.⁸¹ The right to sanctuary indicates the degree to which it is possible to prevent others from legitimately knowing about our own behavior in the most private circles of our relationships (love, friendship, and family) or within the physical or abstract perimeter that characterizes these relationships.⁸²

What links these two aspects is the fact that the individual is able to decide and therefore to choose which aspects of the personal lives of others may come into relation with our own person, which aspects of ourselves we do not wish to disclose to others as information and above all, which aspects should remain within the narrowest confines of our relationships (friends, relatives, the couple, or simply ourselves in an inner dialogue). For this reason, the right to choose includes several other abilities like exercising control over the objects or assets (material or immaterial) that directly and immediately convey intimate aspects of ourselves; knowledge of these things by a third party is a matter of

78. See generally RENATO TREVES, INTRODUZIONE ALLA SOCIOLOGIA DEL DIRITTO (1980); see MORRIS L. GHEZZI, LA SCIENZA DEL DUBBIO, VOLTI E TEMI DI SOCIOLOGIA DEL DIRITTO 15 (2009).

79. Warren & Brandeis, *supra* note 2.

80. Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*. 64 CAL. L. REV. 1447, 1450 (1976).

81. *Id.* at 1451.

82. *Id.* at 1456.

choice. For this reason, the dual component of the right to privacy as a negative freedom is structurally in conflict with other positive liberties, like the freedom of information, freedom of speech, religious freedom, and the right to administrative transparency, among others.

There can be no doubt that a person's sexual orientation is a topic that pertains to the fundamental importance of privacy as it is conceived in Europe and the United States, as well as South America and in many other countries that have been influenced by more modernized western countries. For instance, the right to privacy protects the right that the sanctuary of this sphere of a person's life be observed to avoid discrimination in the workplace. Rejecting this sanctuary, however, is also remanded to individual choice; a person may decide to engage in behavior that, in agreement with Merton, can be defined as non-conformist to affirm values and "life styles" that are different from the majority.⁸³ Public demonstrations like gay pride parades may be considered to be public declarations of one's sexual orientation with the intention of reaching the largest section of the public either directly or indirectly through media reporting. When viewed from the perspective of the right to privacy as sanctuary, such actions are perfectly legitimate. The rejection of the confidentiality of specific information related to the freedom of meeting, association, and public demonstration can give rise to celebratory fireworks and uninhibited manifestations. The control otherwise exerted over the delicate information about one's sexual orientation becomes clear when this orientation is publicly declared. But in the context of the right to be let alone, such behavior may be highly offensive. Residents on the streets where the march travels or families who are bombarded with bold images while watching television or reading the newspaper may be forced to confront a topic that they would rather have relegated to their most personal relationships. It might become a topic of discussion among friends; it could disrupt the harmony of a couple who otherwise agree on everything; parents could feel obligated to breach the subject of sexuality with their children at an inopportune moment, or in reference to behavioral models that they disagree with. In this way, the right to privacy as the right to live peaceably, without submitting to the desired effect of the intention of others to demonstrate and communicate their own innermost selves is violated.

Sexual orientation is not the only source of potential conflicts; any manifestation of one's "personal convictions" can create similar situations. An interesting precedent in Italian constitutional jurisprudence,

83. QUIROZ VITALE, *supra* note 17, at 85.

the Constitutional Court of Italy,⁸⁴ was asked to validate the legitimacy of a law regarding election announcements that prohibited use of a megaphone during the thirty days prior to the elections except to announce the place and time of a rally.⁸⁵ The norm⁸⁶ was found to be legitimate insofar as:

the intent of the regulation of forms of electoral announcements is not to prevent a political announcement from reaching the largest number of recipients, but rather to allow interested citizens who want to receive it completely to do so under conditions of tranquility, and attend rallies at the appointed time and place only in places of their choice.⁸⁷

In this case, not only did the court use respect for “the right to privacy” as a parameter of the constitutional legitimacy of a law, construing it as the right to public tranquility and to be let alone (i.e., the avoidance of outside intrusions), but it also found that the law enforced a reasonable balance between these claims and the opposing right, also ascribable to one’s private life, to freely express one’s political convictions. The expression of one’s convictions is legitimate and may take the form of an invitation to learn more, but it should not go as far as to forcefully impose awareness of them on others.

If the “right to be let alone” was not recognized, in other words, if there was not a sphere of private life where one was sheltered from outside interference, it would not be possible to have any real control over oneself and one’s individual choices. In a scenario *ad absurdum*, if we were required to know about, observe, and take a stand on the private choices of everyone around us, we would no longer be able to identify the relationships, objects, and thoughts that belong to our private lives.

If this line of reasoning is correct, then the third aspect of confidentiality, the right to the autonomy of choice or “the privacy of intimate decision”⁸⁸ or “expressive privacy”⁸⁹ is certainly a positive expression of freedom that completes and develops the notion of privacy as repose and sanctuary. The negative component of the preceding profiles of privacy (as freedom from intrusions by others and freedom from others’ curiosity about our private life) was grounded in the subject’s ability to judge and choose what outside information to reject and what “inside” information to keep secret in relation to the information that willingly

84. Corte Const. sez. un., 1985, n. 138, Giur. it. 1985, 1, 986 (It.).

85. *Id.*

86. Legge 1975, n. 130 art. 7,2 (It.).

87. Corte Const. sez. un., 1985, n. 138, Giur. it. 1985, 1, 986 (It.) (translated by author).

88. Bostwick, *supra* note 80, at 1466.

89. JUDITH WAGNER DE CEW, IN PURSUIT OF PRIVACY: LAW, ETHIC AND THE RISE OF TECHNOLOGY 77 (1997).

leaked from the private sphere. In this sense, privacy as the freedom to make autonomous personal decisions without the need to answer to others regarding one’s actions presupposes the existence of a private sphere in which the subject is released from interference and where only the subject knows the components of the decision. In this sense, it is conceivable that a choice could be made, for instance, without external interference and especially without the need to adapt to normative models of behavior imposed by the law or public authorities. The case in which a public authority, in order to ensure that racial integrity or genetic heritage be preserved, could decree which marriages might be performed and which ones violated the public interest to the extent that the concerned parties would be found ineligible, comes to mind. In *Loving v. Virginia*,⁹⁰ the U.S. Supreme Court definitively resolved the prohibition of interracial marriage by excluding the existence of a public interest supported by the reasonability of the law. The situation in *Loving* falls into the area of private decisions where every individual’s right to choose his or her course of action based on their introspective world of convictions, reflections, memories, knowledge, experiences, and other types of behavior that are as personal as the decision being made (without being conditioned by family, reference groups, or least of all, government) must be affirmed. This subjective world is the product of the deliberate selection of objects, locations, material and immaterial spaces and assets that, through the selective opening and closing of the social environment, have contributed to the constitution of the subject’s “private” and imaginary life.

III. THE EUROPEAN PRIVACY LEGISLATION AND THE ITALIAN PARADOX

A. EUROPEAN STANDARD ON THE PROCESSING OF PERSONAL DATA

This Article proposes a working hypothesis where the social structure of modernized and open societies, the social processes in which individual and voluntary choices characteristically prevail, and the affirmation of the right to privacy are deeply interwoven. After its confirmation in the United States, the right to privacy became widely internationalized, a process that enhanced the positive value of this right beyond the borders of North America.⁹¹

90. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

91. In fact, beyond the United Nations legal system, the internationalization of the right spread specifically to other modernized western countries, including South America. Almost all Latin American actions have included the right to privacy in their constitutions. See, e.g., CONSTITUIÇÃO FEDERAL art. 92 (Braz.); CONSTITUCIÓN POLÍTICA DE

The linear development of this right in early modernity seemed to tend toward the quantitative growth of legal standards to create a legal framework capable of ensuring conditions for the development of elective action in other social environments. In so doing, the propagation of elective action stimulated the affirmation and claim to individual rights, while the expansion of the area of these rights encouraged more and more people to participate in assuming individual and collective choices.

The hypothesis,⁹² is that if we put aside for a moment the reassuring and non-contradictory conventional representation of the right to choose that “frames” the issue for individuals and preserves its traditional function as a normative model in which prescriptive action prevails, we may hypothesize instead that the law itself also becomes gradually and less abruptly invested with the same social processes that transformed the economic, political, and cultural subsystem: institutional differentiation and specialization, the institutionalization of change, and the spread of elective action.⁹³ From a different perceptive then, one notices reflexive alterations of the right to privacy that are usually perceived as paradoxes, providing the following examples herein.

First, the speed of technological change stimulates a normative hyper-production and endless changes in the way privacy is enforced. In Europe, for instance, where guidelines have made the enforcement of the processing of personal data uniform and general, privacy laws are constantly being modified to tailor them to new threats to privacy, or else they are adapted to concurrent demands for information, communication, and business. In the United States, the insistence that privacy be protected has brought forth the growth of broad special legislation (the privacy of drivers, readers, consumers, and children, among other nascent forms) to such an extent that it is objectively difficult to disentangle them in the jumble of federal and state instruments of standardization and among the alternative standards produced by private autonomy.⁹⁴ The parameters have become confused, and the

COLOMBIA art. 15; CONSTITUCIÓN POLÍTICA DE EQUADOR art. 23; *see also Latin America Privacy Law*, LAW BRAIN, http://lawbrain.com/wiki/Latin_America_Privacy_Law (last visited June 5, 2014). Some countries (including Argentina, Mexico, Chile, Peru, and Uruguay) have passed *ad hoc* legislation that protects personal data. Other countries (like Brazil, Bolivia, Colombia, Costa Rica, El Salvador, Guatemala, and Chile) are working on new laws or reforms in this direction. *See* RED IBEROAMERICANA DE PROTECCIÓN DE DATOS, *supra* note 1.

92. *See* QUIROZ VITALE, *supra* note 17.

93. GERMANI, *supra* note 60, at 122-23.

94. *Overview of the Privacy Act of 1974*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/opcl/1974privacyact-overview.htm> (last updated Dec. 2012).

individual is exposed to uncertainty and a preponderance of external influences.

Next, continuous social change has unforeseen consequences that affect the legal system. As shown, the reversal with respect to the traditional conception of the right is clear, so change within the legal system is normal. Consequently, non-conformism⁹⁵ as a “motor of change” (although it is also a source of conflicts and lacerations) becomes acceptable behavior. In this way, the incessant production and substitution of the components that make up the normative nucleus of society unfold. Just like other institutions, the institutionalization of change also permeates and modernizes the normative and therefore also the legal spheres, and this action is evaluated positively. Thus, modern societies are subject to a *progressive basic legal pluralism*, since multiple references to different normative systems that are simultaneously valid and effective in the same place may coexist in the same social environment.⁹⁶ Within the framework of the same social structure, however, the cause of the existence of different but concurrent reference models cannot help but unfold in the context of the continuous social change that characterizes modern societies. In the general area of privacy, as this Article has attempted to demonstrate, different concurrent models of privacy compete and conflict with each other: privacy as secrecy in new social communities conflicts with the notion of privacy as free choice for advocates of laissez-faire politics. The European sense of privacy as dignity conflicts with the American notion of privacy as freedom. Global society recognizes the co-existence in the same physical space (as in the colonial period) of a legal pluralism based on the coexistence of groups who adhere to pre-modern values—like Islamic fundamentalists—and completely modernized social areas and radical areas that prefigure evolving post-modern scenarios. In such a situation, it is also inevitable that social actors come to the table with different cultural references as they confront the delicate topics of modesty, sexuality, and marriage. In such cases, the vicious circle in which the growing number of possibilities for making real choices contributes to expanding the right, and expansion of the right that makes new choices possibly short-circuits the process, the growing number of possibilities for making a choice is followed by proliferation of contradictory rights that problematizes the composition of different but interrelated normative worlds.

Further, the multiplication and specification of the right to privacy has created potential conflicts not only between the right to privacy and other rights with a comparable legal profile (the freedom of information

95. See MERTON, *supra* note 39, at 420.

96. QUIROZ VITALE, *supra* note 17, at 211-38.

and administrative transparency, for instance), but this phenomenon has also created internal conflicts between different social actors in the name of the same right to privacy.⁹⁷ For example, there is the protection of European employees' right to privacy (rightly praised by American scholars) that nonetheless conflicts with the standard that protects the security of the data from consumers of the services and merchandise offered by these employees.⁹⁸ The logistics of security require the adoption of measures that make it possible to trace operations and identify users; this necessarily implies complete, widespread, and pervasive control of workers' protocol. Furthermore, it cannot be denied that in the United States the same right to privacy may be invoked either to prevent intrusions into one's private life or to defend the authenticity and spontaneity of demonstrations of one's own personality. The two rights often conflict with each other: the person who proudly displays his homosexuality and does not allow others to meddle in his personal choices will ultimately invade the privacy of the parents who want their children to have a strictly heterosexual education. So the person who wants to defend his or her own value choices by renouncing their privacy and expressing their political ideas publicly using a megaphone on a parade float will inevitably intrude on another person's privacy, defined as the choice to eschew unwelcome or untimely proselytizing. In such cases, the virtuous circle of the right's trajectory is not created, and instead of opening to new possible choices, the multiplicity of privacy rights short-circuits again because the increasing number of possible choices is followed by a proliferation of rights that conflict with each other, inducing a reduction of the myriad of possible choices or inciting a bitter social conflict for which the right to privacy cannot offer a solution that is not self-contradictory or simply compromising.

Lastly, the most serious consequence of the affirmation of the right to privacy has appeared, unforeseen and unwanted, in Europe, but the magnitude of its seriousness has not yet been completely understood. European authorities now have expanded discretionary power to regulate the treatment of personal data in the Old World, in the absence of any compensatory increase of European citizens' ability to participate in these decisions, either through instruments of representative democracy or even less through forms of deliberative democracy.⁹⁹ To illustrate this problem, first it must be identified that the institutionalization of change and legal pluralism are undermining the *prescriptive ability* of the standards from the inside out, precisely because of the

97. *Id.*

98. *Id.*

99. *Id.*

rhythm of the internal transformation and change that characterizes all institutions, including the law. Even the legal standards that impose specific tasks indicating a single course of action that would guide people’s conduct may prove to be ineffective. In order not to lose its regulatory force, the right, like all other structural elements of the normative nucleus of modern societies, has become flexible and now tends to create areas of discretion, setting criteria and standards, and general principles of action that allow social agents to choose between different courses of action or inaction. Gustavo Zagrebelsky has used the expression “the Law by principles” to show how principles, precisely because they do not state how one should or should not behave under specific circumstances but instead provide criteria for taking a position *a priori* when confronted with unspecific situations, are the components of the right that is most appropriate for the conditions of a pluralistic society, which require uninterrupted rebalancing through transactions of values.¹⁰⁰ This is the only way that it is still possible to coordinate public and collective choices and harmonize the processes of autonomous action that overlap on a daily basis.

However, it must be emphasized that citizens’ freedom is jeopardized by the increase in discretionary power of administrative authorities who have been assigned the task of supervising the application of the right to privacy in the second wave of modernity.¹⁰¹ Because it is so difficult to grasp and control, it is referred to as the “fluid law.”¹⁰² The problem concerning the European authorities’ conduct in the area that controls the processing of personal data is so serious that some have even gone so far as to suggest abandoning the regulation of privacy based on the protection of individual rights and confronting the subject of privacy merely in a regulatory and systemic fashion.¹⁰³ The following section outlines the risks of this option.

100. GUSTAVO ZAGREBELSKY, *IL DIRITTO MITE* 172 (1992).

101. *See generally* MARCO A. QUIROZ VITALE, *IL DIRITTO LIQUIDO. LE DECISIONI GIURIDICHE TRA REGOLE E DISCREZIONALITÀ* (2012).

102. *Id.*

103. Viktor Mayer-Schonberger, *Beyond Privacy, beyond Rights – Toward a Systems Theory of Informational Governance*, 98 *CAL. L. REV.* 1853, 1853 (2010).

B. THE CASE OF ITALY: THE *AUTORITÀ GARANTE* (ITALIAN “DATA PROTECTION AUTHORITY” (DPA)) AND THE PATERNALISTIC CONTROL OF CITIZENS

1. The Processing of Personal Data in European and Italian Legislation

This Article will elaborate on the above-referenced paradox by discussing the explicit regulation assigned to a few specific categories of data by the European Parliament and the Council of the European Union in Directive 95/46/EC.¹⁰⁴ There is a rather close relationship between this Directive and the right to privacy insofar as this European instrument of legal regulation proposed, among other goals, to standardize the legislation of the European States in order to diminish “the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States.”¹⁰⁵ The core of the regulation especially focuses on data related to the disclosure of an individual’s most personal choices.¹⁰⁶ However, it is surprising that Article 8 of this Directive provides in general terms that “Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.”¹⁰⁷ In other words, the European States are bound to draw up legislation that prohibits any form of communication of so-called “confidential data,” that is not anonymous or used for a simple personal reason “by a natural person in the course of a purely personal or household activity,”¹⁰⁸ whatever this last phrase may actually mean.

Obviously, such a prohibition would have introduced a regime of pervasive governmental control over personal choices that would be incompatible with the constitution of all European nations, which is why Article 8 of Directive 95/46/EC proceeds to cite a series of cases that are exceptions to the rule.¹⁰⁹ Fortunately, these cases correspond to the standards that govern social relationships, in which the processing of “personal” data is not prohibited. The first and principle exception¹¹⁰

104. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L. 281).

105. *Id.*

106. *Id.* at ch. II, Sec. III.

107. *Id.* at art. 8, par. 1.

108. *Id.*

109. *Id.* at art. 8, par. 2.

110. According to Article 8 of the Directive, other cases in which the prohibition is inapplicable include “carrying out the obligations and specific rights of the Authority in

anticipated by the European legislation refers significantly to *consensus*, in other words, to the free choice of the individual whose data is in question. But the standard is ambiguous; processing is legitimate if “the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject’s giving his consent.”¹¹¹ So not even the consent of the interested party is sufficient grounds for lifting the prohibition?¹¹²

Current Italian legislation provides an example of this paradoxical situation.¹¹³ According to the Italian “Privacy Code,” it is legal to process “personal data” with the consent of the interested party.¹¹⁴ However, this is a necessity, but not a sufficient condition. Individual consensus must be incorporated by the prior authorization of the Italian *Garante* or “Data Protection Authority” (*DPA*)—the independent Italian administrative authority in charge of supervising the application of the standard in each specific case. This provision, which is mandatory within the scope of the original law, is absolutely impracticable because no administrative authority would be capable of releasing millions of authorizations for the resultant processing of “personal” data that takes

the field of employment law,” “to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent,” “processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects,” “the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims,” “processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.” *Id.* at 40-41.

111. *Id.* at 40.

112. According to the definition given in Article 2 of the Directive, “the data subject’s consent’ shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.” *Id.* at 39.

113. European directives concerning privacy were promulgated in Italy by Legge 31 dicembre 1996, no. 675 – Protection of persons and other subjects regarding the processing of personal data – and by its subsequent modifications; the regulation currently in force was dictated by the Decreto Legislativo 30 giugno 2003, no. 196, “CODICE IN MATERIA DI PROTEZIONE DEI DATI PERSONALI,” that abrogated all preceding standards. *Id.*

114. *Id.* at art. 23.

place daily in a country with a population of 60 million. The standard that “personal data may be the object of processing only with the written consent of the interested party and prior authorization of the DPA” displays the technical flaw defined by the philosopher of law Mario Jori as “ignorance of the facts.”¹¹⁵ Indeed, speculation that the DPA would be able to authorize each and every case of data processing on a daily basis clearly betrays a highly unrealistic view of the nature and amount of processing that would be required on this scale. As is often the case, unreasonable legal standards have been corrected by the DPA’s normative activity, by relaxing the requirement of general authorizations, it avoided paralyzing entire social areas and a generalized violation of the law.

Even in the absence of an “individual” authorization, processing is currently legal provided that it takes place within the parameters defined by a general authorization.¹¹⁶ The Authority adopted the initial general authorizations in the absence of an explicit legislative provision, ordering uniform annual or multi-annual regulations by subject category that over time have created a supplementary corpus of standards, like the praetorian edicts of Roman law, with respect to the law, as a way of obviating its real inapplicability. With Legislative Decree 123 in 2007,¹¹⁷ the Italian Government institutionalized the practice originated by the Authority by modifying Law 675 of 1996;¹¹⁸ the same provision is reproduced in the current Privacy Code.¹¹⁹ On the other hand, the DPA has also reiterated the first seven general authorizations to date without providing any continuity;¹²⁰ other authorizations have

115. Mario Jori, *Libertà di Parola e Protezione Dei Dati*, in VII RAGION PRATICA 109 (1999).

116. Subjection to a “general authorization” allows for only a few exceptions that concern only one category of social entity: religious denominations and ecclesiastical organizations.

117. Decreto Legislativo 30 giugno 2003, no. 123 (It.).

118. Legge 31 dicembre 1996, no. 675 (It.).

119. Decreto Legislativo 30 giugno 2003, no. 123, art. 40 (It.).

120. The earliest authorizations, in the current text are as follows: the authorization to process confidential data that is work related, Garante Authorisation no. 1/2012 (It.); the authorization to process appropriate data disclosing health condition or sex life, Garante Authorisation no. 2/2012 (It.); the authorization to process confidential data of formal associations and foundations, Garante Authorisation no. 3/2012 (It.); the authorization to process confidential data from free-lancers, Garante Authorisation no. 4/2012 (It.); the authorization to process the confidential data of various types of owners or proprietors, Garante Authorisation no. 5/2012 (It.); the authorization to process confidential data from private investigators, Garante Authorisation no. 6/2012 (It.); the authorization to process data of a legal nature by private individuals, public economical entites, and public subjects, Garante Authorisation no. 7/2012 (It.).

also been added over time.¹²¹ This type of *de facto* normative activity is justified by the loopholes in Italian law that do not regulate certain general hypotheses or else do so, according to Jori, by regulating some areas in an impracticable manner, so that the rules provided by the general authorizations are sometimes antinomic in relation to the law.¹²²

The official justification of the need to obtain not only the interested party’s written consent but also the Authority’s authorization (the authorization of a public entity that is independent of the state) is intended to avert a situation in which the most vulnerable subjects would be compelled to give up the protection guaranteed by law, by unwillingly consenting to processing that could be potentially damaging to their dignity or rights. This concern has been viewed by many as an expression of “paternalism” on the part of the legislator who has placed citizens who are considered unable to fend for themselves under the Authority’s protection.

Furthermore, the current system based on general authorizations betrays an intolerable fragility. If for whatever reason the general authorizations were not renewed or re-issued, we would have to confront the unpleasant need to apply the rules of the Privacy Code as they are written.

Excessive paternalism in Italian privacy law leads to the absurd consequence of submitting to administrative authorization the lawfulness of an intervention to protect a person’s life or physical safety¹²³ or

121. The most recently introduced authorizations that are still current are as follows: the general authorization for the processing of genetic data, Garante Authorisation no. 8/2012 (It.); the general authorization for the processing of personal data for the purpose of scientific research, Garante Authorisation no. 9/2012 (It.); the exemption from the obligation to give notice of the processing of genetic data by arbitration groups (Garante Deliberazione no. 259 (It.)); the general Authorization for the processing of data of a legal nature that is correlated with mediation that seeks to reconcile civil and commercial disputes (Garante Deliberazione no. 162/2011 (It.)); the authorization for the processing of personal data related to mediation that seeks to reconcile civil and commercial disputes (Garante Deliberazione no. 161/2011 (It.)).

122. On this point, Jori cites the highly specious provision that requires the Authority’s *prior* opinion vis-à-vis healthcare practitioners, even when a third party’s life or physical safety is at risk (which is still provided for by article 26, IV, b of the privacy code), whereas since its original publication in the G.U. (the official gazette of the Italian Republic), the Authority’s general Authorization no. 2/11 fortunately, and for obvious reasons, exempts healthcare practitioners from the requirement of requesting permission from members of the Authority in each instance by authorizing them “to process appropriate data regarding a person’s health or sex life, if this processing is necessary to save the life or for the physical safety of a third party.” *Id.*; Jori, *supra* note 115.

123. A strict interpretation of article 82.II of the code means that even healthcare practitioners are required to obtain *ex post facto* a right to information and consent from the interested party when it was not possible to obtain this permission beforehand due to

defend a right in court when this right is on par with the right to privacy. The general authorizations issued by the Authority reduce the stringency of the contradictions in the law, although the Authority's regulations are often antinomic in relation to those of the Privacy Code.

Contradictions in the standard also emerge in reference to the right of association.¹²⁴ If we assume for the sake of argument that General Authorization No. 3/2012 is not renewed on time, then we would have to conclude that political parties, trade unions, and religious and philosophical organizations would have to cease any and all processing while awaiting an administrative authorization, whose release expresses the Authority's broad discretion.

2. The Administrative Discretion of the Italian DPA and the Rights of the Individual

There are two types of "reactions" by jurists and theoreticians of the law regarding these changes in the Italian legal system. The first reaction is restrained and critical. As Jori has stated, the distinguishing characteristic of independent administrative authorities is that they are not bound by any relationship of bureaucratic subordination and are subject only to the law.¹²⁵ If the key points of the law in question are "too vague, contradictory, or inapplicable," the Authority may then cease to submit to the law in point of fact and become a surrogate for it, called upon at the very least to choose between possible opposing interpretations.¹²⁶ This would create problems not only concerning the legitimization of the enacted choices, but would also place the Authority outside the constitutional framework of the division of power. The original general authorizations by the Italian Authority of Privacy, and especially the current general provisions containing "guidelines" or "regulations" are all examples of para-legislative activity by which the administrative authority does not limit itself to specifying implicit orders in the general provisions of the law but also creates general abstract standards *ex novo* or binding standards that are applicable to all members or broad categories of subjects. According to Jori, who adopts Max Weber's definition,¹²⁷ they are practicing what is customarily

the emergency of the situation. Obviously, it is difficult to understand the value of consensus given after processing has already been done.

124. See QUIROZ VITALE, *supra* note 17.

125. Jori, *supra* note 115.

126. *Id.*

127. MAX WEBER, *ECONOMY AND SOCIETY* 1395 (Guenther Roth & Claus Wittich eds., 1968).

referred to as “the Justice of the Kadi.”¹²⁸

The constitutionalist Enrico Grosso has also raised criticisms that largely coincide with Mario Jori’s objections to the anomalous concentration of administrative tasks (particularly the “policing” of processing) performed by the head of a supervisory administrative authority, albeit an independent one, coupled with powers exercised para-normatively and after the fact as quasi-jurisdiction.¹²⁹ In the absence of any such power expressly assigned by the law, the production of standards has been developed especially through the innovative use of administrative instruments like authorizations, general administrative provisions, or other entities’ participation in the creation of standards. Consequently, Professor Grosso introduces the concept of *discretion* to frame the pragmatic activity of the Authority, who is constantly called upon to complete the design of the legislator.¹³⁰

Not all commentators, however, agree with the negative appraisal of the *modus operandi* adopted by the legislature. In fact, there is a second tier of studies that has culled some highly interesting elements from the new regulation of privacy. For instance, as Marta Cartabia has noted, it is true that privacy law has led us far afield from:

modes of producing standards theorized since the Enlightenment and legal positivism, in which a rational legislator, possibly of parliamentary stamp, was called upon to draw up a few clear and precise standards, preferably grouped in a one normative text, whenever it was necessary to reformulate the standard for a given area, or to bring into the legal universe an asset or a group of relationships that previously lacked any form of normative regulation.¹³¹

128. The Authority’s activity around *this* law was immediately anomalous, driven by incongruities and the inapplicability of the legal text that force it constantly to make corrections *praeter* or *contra legem*. Faced with a law that is so deeply defective technically, an independent authority plays a role that is completely different from the function of the supervisory authority of a correct and proper law on the technical level and must be evaluated in a very different way on the level of constitutionality and the guaranty of rights. In this specific case, the institutional figure that comes to light is far from new and is actually a very traditional figure in societies that precede judicial states. In political history he is usually called by the name of one of his most illustrious incarnations, the kadi (*qadi*), a civil judge in Muslim society. The kadi acts as a magistrate, administrator, and chief of police in societies where the notion of the division of powers was unknown, in which it was meaningless to ask if a decision was the creation or application of the law. Jori, *supra* note 115, at 144.

129. Enrico Grosso, *Autorità indipendente o autorità in onnipotente? Il potere normativo di fatto del Garante per la protezione dei dati personali*, in LA LEGGE ITALIANA SULLA PRIVACY. UN BILANCIO DE PRIMI CINQUE ANNI 172-73 (Mario Losano ed. 2001).

130. *Id.*

131. Marta Cartabia, *Le norme sulla privacy come osservatorio sulle tendenze attuali delle fonti sul diritto*, in LA LEGGE ITALIANA SULLA PRIVACY. UN BILANCIO DE PRIMI CINQUE

But this different way of regulating private material is partly determined by the extreme novelty of the normalized argument for the first time in our society; it is related to what Cartabia calls the “evolving factor,” or the speed of technological and social change that is constantly creating new problems or changing existing ones at a pace that the legislator cannot keep up with.¹³² With regard to this notion, Cartabia states:

it does not seem possible to consolidate the standards of privacy into a lasting defensive model over time; they seem rather to require constant monitoring by professionals in the area whose task is to apply standardizing regulations so as to ensure a timely adjustment of regulations that must constantly be updated.¹³³

From this perspective, the same recipients of these legal obligations, agents who work within a specific area of expertise (i.e., entrepreneurs in the communications, telephony, or publishing sector) must be consulted and involved in the process of applying the law. For this reason, the requirements of flexibility and collaboration dictate a redefinition of the framework of legal sources. Besides the general principles and sector regulations imposed by law, “a complementary regulatory body that adjusts and updates fundamental legislation, comprising several regulatory acts of varying weight and various provenance” must be developed over time.¹³⁴ Not only legislative decrees and new laws complete this picture, but also governmental regulations, the authoritative acts of the Authority, and the deontological codes that are “the fruit of a close collaboration between the categories involved in each instance and the DPA’s authority, among many other independent supervisory authorities, which becomes invested with normative powers.”¹³⁵

This new policy arrangement means that several quite diverse options, which will be briefly described, must be taken on. As an independent administrative authority, the Garante, or DPA, is endowed with the powers that have been described, ranging from administrative enforcement to the creation of standards, and from timely provisions regarding data security material to decisions regarding recourse, objections, and advisory warnings, among others. This configuration, in which the Authority acts to protect personality rights in an area where not only legal stipulations but also terms of jurisdiction are at play, is clearly incompatible with a conception of the principle of the division of

ANNI 62 (Mario Losano ed. 2001) (translated by author).

132. *Id.* at 66.

133. *Id.* at 67.

134. *Id.*

135. *Id.* at 68.

powers as a “separation of powers,” but it does not conflict with a different definition of the same principle as “a balance of powers.” If the separation of powers indeed calls for the three branches of government – the Legislative, the Executive, and the Judiciary – to be ascribed to separate powers, the Authority is improperly and intolerably “interfering” with the executive branch in matters that are reserved for other powers. As Guastini has recently written, the principle of the division of powers has in fact given rise to another constitutional type of organization that is based not on the separation but on a “*balance of power*;” it is much easier to frame the controlling authority’s new activity from the perspective of this alternative constitutional model.¹³⁶

The supervisory authority’s problematic subjection to the law and the legitimization of the choices it has effected in the context of the DPA’s broader administrative discretion lead us to confront the topic of changes to the law in advanced modernity and the propagation of a conceptual type of elective action in the legal subsystem. This is a vast topic that this Article can only briefly allude to here. We have attempted to demonstrate the phenomenon theoretically in a recent essay on legal and administrative decisions made in a setting where basic standards are intrinsically dependent on judgment. The topic of this Article allows us to show how the proposed conceptual forms of discretion may be activated and to evaluate the heuristic capacity of these hypotheses.

3. The Paradoxes of the “Liquid Law”

In Italy, privacy law allows us to examine an *aporia* that is characteristic of contemporary law. In this Article’s hypothesis, Liquid Law is increasingly presented as a corpus of provisional propositions. The propositions are equally interchangeable and this is regarded as normal. According to the institutionalization of change, the transformation becomes permanent in the context of the standards (imposed on judicial production) that regulate the constant substitution of the legal propositions. The pace and internal dynamics of change in the legal system in advanced modernity, which of course has always existed within the law, make this evolution perceivable to most onlookers, including the recipients of the same standards. But this perception significantly erodes the authority of the changes in the traditional sense of the power that resides in the shape of the law and its correspondence to a transcendent order.¹³⁷ This becomes very clear in the case of legislation around

136. Riccardo Guastini, *Un soggetto, un Diritto, un Giudice. I fondamenti teorici di una giustizia “non amministrativa,”* 29 DIRITTO PUBBLICO 41, 45 (2008).

137. Gustavo Zagrebelsky has already described this legal phenomenon as an “instability of the relationship between concepts, which is a consequence of the pluralistic inter-

privacy law, if one looks beyond the “historical” legislator’s probable inability, indecisiveness, and technical shortcomings to another, more subtle reason which has led some competent interpreters to look with interest at the possibility of intervening in a new area characterized by a high incidence of technological change with core standards that are programmatically provisional and simultaneously intended to be immediately replaced, not only by corrective and integrative decrees but also *de facto*, thanks to the constant paralegal decision making authority of the DPA. This new dimension of the law, which is referred to in this Article as the “Liquid Law,” is ordinarily based on general clauses, principles, and standards. In other words, it is based on a flexible and elastic groundwork of norms that opens up space for discretionary choices but also performs the role of regulating ends and means and their reciprocal relationship in society. Such a Liquid Law, however, cannot recommend a single course of action to be followed but much more problematically stimulates individual responsibility when individuals are faced with choices that concern their lives, precisely because the right itself has become less rigid and prescriptive.

As the aggregate of basic rights is based on the two fundamental values of human dignity and freedom, the right to privacy is an integral part of the Liquid Law in advanced modernity. As a legal institution, the right to privacy does not impose binding decisions, but functions according to the process of elective action that this Article has already addressed. It appears to create space for individual freedom, for autonomous decisions, and discretionary choices in the context of multiple possible courses of acceptable social action or inaction. From the decision-maker’s perspective, however, the spreading of elective action in the legal system serves to affirm a right characterized by broad forms of discretion in judicial decision-making, like the Authority’s decisions on issues of privacy. At first this appears to be a paradox. By supposedly expanding the field of autonomous choices and control over oneself, the same standard that reinforces the protection of an individual’s personal data contemporaneously creates a controlling authority endowed with broad and possibly uncontrollable margins of discretion. This gives rise to justifiable concerns, because the spread of administrative discretion may lead not only to unforeseen but also to unwelcome consequences. Indeed, ordinary citizens may find themselves exposed to pressure from trenchant disciplinary powers (not only administrative) that are difficult to control and—far from expanding the sphere of autonomous individual actions and decisions—actually constrict individual freedom.

play of parties involved in actual constitutional life,” and as a “liquid” or “fluid” legal dogmatic practice. ZAGREBELSKY, *supra* note 100, at 15.

We assume that the Authority in our country, the DPA, exercises its own powers, especially those that are formally and substantively administrative, but also para-normative and para-judicial, with a wide margin of discretion. But what is the true nature of this discretion? As all commentators have observed, the DPA’s role is to be the primary motivator of the complex protection afforded by national standards within the framework of European regulations.¹³⁸ This structure is ascribable to the conceptual type of “authorized discretion” and is compatible with the constitutional principle of the division of powers understood as a balance of powers. Although there are other discernible profiles of discretion under the aegis of the administrative authority, it is not in fact a question of *deviant discretion* or “*the discretion of the Kadi*” as the most severe critics have denounced it, but rather one of “self-assumed” discretion, which itself has been harshly criticized for its application in the absence of delegated powers or a legislative mandate that spells out objectives and limits in accordance with the legal stipulations.¹³⁹

Finally, as Enrico Grosso concludes, the DPA’s practice of “rule making,” which is activated by the mechanism described herein, has indirectly structured its own discretion by making its decisions more predictable and controllable, even in a legal setting.¹⁴⁰ As a result, the DPA’s administrative and para-judicial decisions are plainly established as the activation of standards; as such, they are recognized as signs of crypto-discretion. The opposite mechanism occurs when the legislator, armed with the pro-active decrees in the legal setting that issues the privacy code, receives the standards that originated with the DPA, redirecting his or her activity into the channel of authorized discretion. While recognizing that the current parameters of the DPA’s discretionary activity versus legislative regulations and self-regulation through deontological codes are uncertain and temporary, we must conclude that the DPA’s provisions currently constitute an indispensable source for the complete and realistic reconstruction of the embodiment of the law with reference to the correct processing of data in a cutting edge area where technological changes can suddenly occur and transform the context in which the standards instated by legislators operate.

138. QUIROZ VITALE, *supra* note 101.

139. The perhaps excessive breadth of “self-assumed discretion” exercised by the DPA is undoubtedly the effect of the significant critical urgency and technical defects of Italian law that have compelled the DPA to take on a supplementary, integrative, and corrective role that has simply served to make a socio-juridical phenomenon involving the law (i.e., the spread of discretion into the realm of the law) in “advanced modernity” even more obvious and extreme.

140. Grosso, *supra* note 129.

To illustrate the power of this critique, suppose hypothetically that an adult European citizen in Italy, in full possession of his faculties, wishes take part in the activities of a group to which he belongs whose members carry a rare disease. After registering the information relevant to their own specific malady, he wishes to receive a list of restaurants where dishes are prepared that are not counter-indicated in relation to his specific disease or a variation of a specific strain of the disease. However, the processing of his personal data is illegal and cannot be initiated without the DPA's prior authorization. Disregarding for a moment the connection of the processing of this information with a "general authorization," is the passing of judgment by a body of the central government—which is certainly the position of DPA as the supervisory authority of privacy—on the merits or non-merits of processing this data coherent with the affirmation of the right to privacy when its hypothetical decision is contrary to the wishes of the interested party? An American reader would undoubtedly be horrified by this prospect, and it is very unusual that to date few Europeans have brought the case forth. In our opinion, in order to forestall a possible violation of privacy by the "data controller," Italian law imposes a clear and present *vulnus* to the individual's privacy through the organs of the state. The configuration of the case is a complete antinomy.

One might object that such a case has not come about and will never be formulated because general authorizations are issued and renewed at the Italian Authority's discretion that facilitate the processing of personal data *ex ante*. Apart from the dubious legitimacy of the general authorizations, this solution is only apparent on its face. The conflict broadens, not only because of the *precarious* nature of the general authorizations that introduce an element of "unforeseeability" that deprives the physical personal subject's right of certainty and prejudices the legal person because their action is detrimental to the consolidation of fiduciary relationships, but above all, because most independent associations and all associations based on subjective inclination (including political, trade union, religious, or philosophical groups) are fully blocked from engaging in any activity (ranging from admitting members to the expulsion of the same members) if this activity is not anticipated by an administrative authorization. This happens precisely because the regulation of the processing of personal information and social relationships are coextensive.

The specificity of Italian law makes these consequences more obvious, but they are in fact ascribable to the same architecture of the European Union Directive¹⁴¹ that enables Member States to interfere

141. Directive 95/46/EC, of the European Parliament and of the Council of 24 Octo-

considerably in social relationships by imposing caveats on the processing of “personal” data and ambiguously formulating exceptions to these exclusions either by referring to the consensus of the data subjects (which is a necessary but not a sufficient condition)—“where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject’s giving his consent”¹⁴²—or by referring to the activities of social organizations who identify themselves by means of “personal” data.¹⁴³

The concreteness of the example this Article has given allows one to understand how the national and European standard regarding the processing of personal data, while justified by the requirement to protect the fundamental rights and freedoms of individuals, especially in the case of the right to confidentiality, runs the risk of provoking other consequences that are unforeseen, most likely unwanted, and contrary to the data subject’s wishes. Merton would probably describe this outcome as dysfunctional.¹⁴⁴

The individual authorization to process “personal” data granted by the controller of privacy, the DPA, brings about a condition under which in specific cases a person is deprived of the right to privacy, when privacy is understood as the claim to make unconditioned choices in several private spheres of the subject’s personality, such as allowing the processing of his or her data, even if the information remains within the social group to which the person belongs. Consequently, the citizen is placed under an administrative protection that, although the protection is justified by honorable intentions and affected scrupulously and conscientiously by the supervisory authority, is antithetical with respect to the function of privacy in society because it makes a broad range of social behavior and relationships visible and controllable by the State.

ber 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L. 281).

142. *Id.* at 40-41.

143. Among the exceptions to prohibiting the processing of “personal” data, we also anticipated the following loop-hole in a case where “processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.” However, each Member State had the ability to regulate these matters differently. Unfortunately, Italy has recognized the ability to process the data of members of social groups with specific objectives only in the case of religious denominations or organizations that adhere to the faiths recognized by the national legal order. Insert source. Decreto Legislativo 30 giugno 2003, no. 123, art. 26, par. 4 (It.).

144. ULRICH BECK ET AL., REFLEXIVE MODERNIZATION 92 (1994).

On the other hand, the general authorizations provided by Italian law complicate the issue and make the paradoxes inherent in the standard even more obvious. In fact, European regulatory legislation is itself responsible for establishing the necessary presence of independent administrative authorities in an area like privacy where subjective rights at the highest level of fundamental rights are ascribed to citizens. Ultimately, European Directive 95/46/EC¹⁴⁵ has regulated by administrative agencies a field where a person's human rights are at stake, and this action has opened the door to conferring broad authorized discretionary power to the supervisory authority—which is the case in Italy—whose boundaries have been gradually extended by forms of self-assumed discretion for the complex reasons that have been illustrated herein.

IV. CONCLUSION

It has become clear that we must reformulate our original juxtaposition of privacy in the Old World as the expression of human dignity and privacy in the United States as the expression of freedom from governmental intrusions. As the Italian example shows, the prevalent theory that justifies the recognition of the right to privacy with the demand that one be able to self-determine one's personal data, thereby making this action a manifestation of the power to exercise control over the circulation of one's personal information is not fully confirmed either by European or national legislation in Italy. Perhaps it is true, as Whitman asserts,¹⁴⁶ that American citizens reserve the preoccupation that Europeans harbor for aggression by the media for the risk of the inviolability of the home attempted by governmental agencies.¹⁴⁷ Nonetheless, the socio-legal critique makes it doubtful that the legislation inspired by European Directives may lead to effective control by social actors of their personal data. Furthermore, we must carefully reconsider the current opinion that in Europe, thanks to its different legal culture, legislation in the name of individual privacy has been developed that is more stringent than its American counterpart, which seeks to reduce the possibility of intrusion into one's private life by other private subjects (not only by the press and mass media but also by entrepreneurs who are able to collect and rework the personal data that we all disseminate daily in the course of everyday life). In the light of our

145. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L. 281) 31.

146. Whitman, *supra* note 30.

147. QUIROZ VITALE, *supra* note 101.

study, this opinion, too, has many grey areas and conceals bold paradoxes upon which the socio-legal critique can shed light.

In fact, by entrusting supervisory administrative authorities in various areas with excessive tasks, the legal culture in Europe—based on the dogmatic assertion of respect for individual identity and personality rights—has produced legislation that has compromised, ironically, the autonomy of its citizens and disproportionately expanded the discretionary choices of public administration.¹⁴⁸ As a result, the ideology of “control” over one’s personal data conceals a deep mistrust of legislators among its citizens with respect to their ability to self-determine themselves and defend their own rights. This apprehensiveness stands in the way of actualizing the right to privacy more maturely.

Using the apparatus of the sociology of law, this critical analysis may be useful in the delicate passage now under consideration toward a reform of European regulations of the topic discussed here, although European legislators are neglecting to discuss either the ideology of privacy or the selectively undisclosable information that it is not bound to reveal.

148. *Id.*

