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Rethinking algorithms as to capture the Gestaltist dimension of privacy rights

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Privacy as identities

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- ❑ Privacy, in general, is an essentially contested concept, but group privacy is *not* an essentially oxymoronic one: privacy is about the individual in motion as a social being and a politico-relational animal through multiple and unstable groups of belonging (and social expectations related thereto), both in daily life and through one's lifetime
 - ❑ In the age of big data, privacy laws need to rethink groups as to ensure members' awareness of affiliation scrutiny by algorithms: from interaction control to prediction of connections portfolio → knowing groups, members, and potential inferences
- ❑ Group privacy as a holistic non-divisible interest (like human security), to counter privacy harms which enjoy no individual-based form of remedy or redress when:
 - ❖ Actions are taken against individuals "automatically" because of group classifications altogether
 - ❖ New inferences are drawn from group affiliations (data related to other current or even previous/future affiliates)
- ❑ Individuals: right in rem; Individuals in a group: right in rem + right in personam → the combination of all members' rights in rem + the mutual right in personam is the new relational, Gestaltist dimension which is proper and exclusive to groups
- ❑ For these reasons, being "granted" by law a self-standing individual form of privacy only equates to circumventing the problem: it cannot capture that novel dimension → right to group privacy vs collective right to privacy as individual entitlement to group rights vs group entitlement to individual rights (aggregated bundles of individual privacy rights)

The ontology of a group

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- ❑ Groups as a structural necessity in legal doctrine, yet mostly confined to the business lexicon on the tension between natural and legal persons (see e.g. debate on piercing the corporate veil)

- ❑ Algorithmically speaking, categories of groups:
 - ✓ algorithm-independent (also available in reality, even the virtual one) vs algorithm-created (artificially built for the sake of analytical convenience or accident) → the two are often interconnected via “group segmentation” (artificial group within voluntary group, and vice versa) for unfathomable and uncontrollable statistical purposes
 - ✓ zooming on the algorithm-created ones: created by the original algorithms themselves vs relatively uncontrollable ones which are by-products of algorithms’ heuristics and self-improvement
 - reidentification algorithms: data either useful or anonymised/aggregated
 - ✓ stable vs temporary
 - ✓ purposeful vs accidental → the algorithm might base its decisional outcomes on our accidental associations, which might even be created by the algorithm itself via its supposedly cumulated “experience”

- ❑ Gestaltist groups as ontologically distinct from other groups (“collectivities”)

But why does this matter, in practice?

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- personalised groupings of voters' segments sold to the highest bidder for electoral or meddling purposes
- toxic pools, data pollution, etc.
- marginalisation, deliberate minority targeting, echo-chambers, self-confirmation by iteration and insulation
- from surveillance to dataveillance (collective; individuals across groups of belonging) → deviation from standard patterns; chilling effects → distorted customary law
- contracting out of social functions to private entities or anyway algorithmic decision-making procedures (example: Gaza)
- supervised/unsupervised learning and artificial grouping choices
- algorithms operate alienated redistribution of reality components
 - "sorting" them by fragmentation and compartmentalisation
 - by augmentation or reduction (complexity management)
 - because of this, these groups' identity undergoes a process of compelled redefinition which is often resisted by their members and/or contrary to the latter's interests, intents, priorities, choices, expectations, and aspirations

No gains in fairness or balance; meanwhile, shortcomings as for opacity and unaccountability → individuals forming groups created by algorithms themselves and associated to third entities are unaware, dispersed, unfamiliar to each other and sometimes even isolated from one another, thus unlikely to seek remedies – let alone starting a lawsuit against algorithms' creators or operators, whose liabilities are anyway unclear and fraught with loopholes.

Eventually, what is "sensitive" for an individual might not be for a group and vice versa. I might be harmed as a group member, although claiming an individual harm stand-alone would be either unpersuasive or non-pursuable altogether.

Non-individual privacy in legal scholarship

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Previous attempts:

- US: Bloustein
- Europe (UvA + OII): Floridi, Mantelero, Mittelstadt, Pagalli, etc.

... This is not by chance!

Still, four shortcomings:

- not tailored to algorithms (or at least, algorithm-generated groups)
- no consistently clear demarcation between groups and collectivities
- not channelled through a coherent theory to fully appreciate the differences
- no right-by-right analysis of “group” vs “collective” rights

In need of an extra-legal theory

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Gestalttheorie

Continental Europe; cognitive psychology; configuration, pattern; XX sec

- the rule of the whole (Prägnanz) → much more than the sum
- Gestalt law of proximity → “objects or shapes that are close to one another appear to form groups”
- halo/horn effect → spillover (splitting), individual bias, stereotype
 - experimental suspicion, experiential truth

Missing out on group privacy rights

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- European Union
 - from Data Protection Directive to GDPR
 - from e-Privacy Directive to e-Privacy Regulation
 - Data Protection Directive for Police and Criminal Justice Authorities (aka "Directive on Data Protection in Criminal Matters" or "Police Data Protection Directive")
 - EU Charter of Fundamental Rights ↔ ECHR (Council of Europe)
- United States
 - California Consumer Privacy Act
 - personal privacy exception in Freedom of Information Act; California Constitution; Fourth Amendment right to privacy
- public international law and international human rights law
 - ICCPR
 - binding treaty on business and human rights
 - indigenous rights: group or collective?

What about the East though? China as an in-house outsider

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- Cultural bias? Would Westerners even care about group privacy?
- At odds, is there an “Asian way” to privacy regulation? Cf. human rights and Asian values literature
- At any rate, what is “Asia”? The strange case of China ...
- The EU, the US, and China: dignity, freedom, security?
- From a panopticon to a “panspectron”
- The cybersecurity omnipresence: vertical vs horizontal privacy
- 2020 CAC’s Provisions on the Governance of Network Information Content Ecology (http://www.cac.gov.cn/2019-12/20/c_1578375159509309.htm), Arts. 10-12



Spelling out the group shape of privacy-related rights to...

- ✓ dissociation
- ✓ correction oversight
- ✓ ignore one's future
- ✓ self-preservation
- ✓ a group-tailored explanation
- ✓ be informed

- ✓ forget (and "not to be forgotten")
- ✓ honor (reputational sovereignty)
- ✓ data portability
- ✓ discretion on formal and informal ties/memberships
- ✓ informational self-determination
- ✓ redress (before non-automated justices)

Challenges ahead

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- exact demarcation between group and collective rights and (legal) interests
- cultural sophistication and proximity in addressing non-individual conceptions of privacy entitlements
- codification of privacy-related rights that address the Gestaltist dimension of privacy without eroding the individual or collective ones, which might be equally enforceable and relevant depending on the circumstances

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Thanks!

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