

## PRIVACY AS VIRTUE

School of Human Rights Research Series, Volume 81.

The titles published in this series are listed at the end of this volume.

# PRIVACY AS VIRTUE

## Moving Beyond the Individual in the Age of Big Data

Bart VAN DER SLOOT



Cambridge – Antwerp – Portland

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and Ireland:*

NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7 PP  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe and all other countries:*

Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*

International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832  
Email: info@isbs.com

Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data

© Bart van der Sloot 2017

Cover image: Allégorie des Vertus, Allegri Antonio (1489-1534) © RMN-Grand Palais (musée du Louvre) / Hervé Lewandowski

The editor and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-505-2

D/2017/7849/61

NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

# CONTENTS

## Chapter I

Introduction.....	1
-------------------	---

## Chapter II

The Transformation of the Right to Privacy and the Right to Data Protection.....	11
--	----

1. Introduction.....	11
2. The right to privacy.....	13
2.1. Right to complain.....	17
2.2. Interests.....	23
2.3. Assessments.....	29
2.4. Enforcement.....	35
3. Data Protection.....	39
3.1. Obligations of the data processor.....	48
3.2. Rights of the data subject.....	52
3.3. Assessments.....	55
3.4. Enforcement.....	65
4. Conclusion.....	69

## Chapter III

The Challenges for and Alternatives to the Current Privacy Paradigm.....	71
--	----

1. Introduction.....	71
2. The challenges Big Data poses to the current legal paradigm.....	71
2.1. Big Data and Data Protection.....	72
2.2. Focus on the individual.....	75
2.3. Regulation through legal means.....	76
3. How the ECtHR is gradually moving beyond the individualized privacy paradigm.....	81
3.1. Reasonable likelihood (hypothetical harm).....	82
3.2. Chilling effect (future harm).....	85
3.3. <i>In abstracto</i> claims (no individual harm).....	88
3.4. Conventionality.....	92
4. Alternatives for the current privacy paradigm in the scholarly literature.....	96
4.1. Constitutive interests.....	97
4.2. Group and collective interests.....	99

4.3. Potential harm . . . . .	101
4.4. Agent-based theories . . . . .	103
5. Analysis . . . . .	105

**Chapter IV**

**Developing an Alternative Privacy Paradigm through Virtue Ethics . . . . . 107**

1. Introduction . . . . .	107
2. Virtue ethics and legal regulation . . . . .	108
2.1. Virtue ethics . . . . .	108
2.2. Virtue ethical approach to the legal realm . . . . .	114
2.3. Building blocks for an alternative privacy paradigm . . . . .	127
3. Counterarguments against adopting a virtue ethical approach to privacy . . . . .	129
3.1. The correlation of rights and duties . . . . .	130
3.2. Is-ought fallacy . . . . .	135
3.3. Action guidance . . . . .	140
4. Conclusion . . . . .	143

**Chapter V**

**Embedding a Virtue-based Approach in Privacy Regulation . . . . . 145**

1. Introduction . . . . .	145
2. Minimum requirements . . . . .	147
2.1. Regulating ‘data’ . . . . .	148
2.2. Applying the rule of law test in abstracto . . . . .	156
2.3. Regulating the analysis phase . . . . .	160
3. Aspirations . . . . .	167
3.1. The limits of aspirations overriding privacy interests . . . . .	168
3.2. Aspirations directed at promoting human freedom . . . . .	172
3.3. How to embed aspirations in a juridical framework . . . . .	177
4. Analysis . . . . .	181

**Chapter VI**

**Conclusion . . . . . 187**

1. Main argument . . . . .	187
2. Outline of this book . . . . .	192
3. Conclusions . . . . .	196

<i>Bibliography</i> . . . . .	201
-------------------------------	-----