A Framework for Analyzing Electronic Resources, Privacy, and Intellectual Freedom

Alan Rubel
Assistant Professor, School of Library and Information Studies, Program in Legal Studies, University of Wisconsin-Madison, 4259 H.C. White Hall, 600 N. Park St., Madison, WI 53706 USA. Email: arubel@wisc.edu.

The tension between the provision of electronic resources and patron privacy is widely recognized in the Library and Information Studies (LIS) literature. But how to assess trade-offs between patron privacy and access to electronic resources remains elusive. Typically, the LIS literature has understood patron privacy as a constitutive part of intellectual freedom, and has justified privacy protections by appeals to intellectual freedom. But expanded opportunities to use more and different types of resources appears at first glance to expand intellectual freedom, even if those opportunities also diminish intellectual freedom by diminishing privacy. This paper seeks to better understand this tension. It does so by drawing on the rich philosophical literature in order to analyze the concept of freedom. It offers a positive conception of freedom, and intellectual freedom, according to which freedom is a quality of agency. An agent is free only if she acts autonomously. Using that conception it offers a number of principles that can frame the relation between electronic resources, privacy, and intellectual freedom. The framework developed here provides the foundation for a larger project examining the link between freedom and privacy and for examining the privacy implications of a variety of library electronic resource practices.

Introduction

The tension between the provision of electronic resources and patron privacy is widely recognized in the Library and Information Studies (LIS) literature. But how to assess trade-offs between patron privacy and access to electronic resources remains elusive (Litwin, 2006; Corrado, 2000). The goal of this paper is to go some way toward addressing the tension by establishing an analytic framework for understanding privacy and intellectual freedom based on the substantial philosophical literature regarding freedom.

The gist of the issue is this. Traditionally, the LIS literature has understood patron privacy as a facet of intellectual freedom, and it is plausible that that there is some relation between information privacy and liberty or freedom (I use these interchangeably). And while certain types of electronic resource use may diminish patron privacy, thereby diminishing intellectual freedom, the opportunities created by such resources appear liberty enhancing. Any attempt to adjudicate between privacy loss and enhanced opportunities on intellectual freedom grounds must therefore provide an account of intellectual freedom capable of addressing both privacy and opportunity. That’s my task here. I will argue that intellectual freedom is best understood as a form of positive freedom, where a person’s freedom is a function of the quality of her agency. Using quality of a person’s agency as the lodestar, I set forth a framework for assessing tradeoffs like those encountered in the context of electronic resource provision.

This issue is at root about normative moral theory, and accordingly I approach it using a process of broad, reflective equilibrium. In this method, intuitive judgments in particular cases are not primary; rather, such judgments may be revised when they conflict with principles that we have good reason to accept (Rawls, 1999; DePaul, 2006). The problem at hand concerns the intersection of intellectual freedom and persons’ information privacy, specifically the view in the LIS literature that intellectual freedom is a partly of function of privacy and that intellectual freedom justifies privacy protections. Accordingly, the first goal of the paper is to provide an account of intellectual freedom that we have good reason to adopt based on the plausibility of underlying accounts of freedom simpliciter and which can ground privacy protections. The second goal of the paper is to explain how we should treat privacy issues that arise in use of electronic resources under that account of intellectual freedom.

The paper begins by describing two current practices in library provision of electronic resources. I then analyze several different philosophical conceptions of freedom, explaining why several of the most important views fail to provide a plausible account of intellectual freedom. Next, I offer a different account, and explain how that account provides a grounding for patron privacy. Drawing on this account I set out a number of principles for protecting intellectual freedom that can serve as a framework for evaluating electronic resources. The framework developed here provides the foundation for a larger project examining the link between freedom and privacy and for examining...
the privacy implications of a variety of library electronic resource practices.1

Two Issues

Two issues regarding library provision of electronic resources serve as a starting point for this paper. The first is library contracts with electronic resource vendors who offer customized services (e.g., the ability to create personal profiles, store articles, and record search histories). In a study of vendors of electronic resources to libraries, Magi has described a number of services by which such vendors may collect personal information from library patrons. For example, vendors may allow users to save searches to an individual profile, save preferences for search interfaces, send results to others via email with the user’s email associated, and so forth (Magi, 2010, pp. 256–57). Moreover, vendor privacy policies are highly varied and not necessarily consistent with library and information technology industry standards (Magi, 2010, pp. 263–67).

The second issue regards lending of e-books via Amazon’s Kindle service. Although libraries have provided access to electronic books for some time, in 2011 libraries began entering into agreements to provide patrons access to electronic books via Amazon’s Kindle service. That allows patrons to read books on Kindle devices and other devices (phones, tablets, laptops) with Kindle software. Borrowing books from libraries via Kindle requires registering for a Kindle account, logging in to that account, and allowing Amazon to track one’s borrowing. Moreover, because many people borrowing books via Kindle already have a Kindle or Kindle-enabled device, they already have purchased books for those devices from Amazon. Many of those people also buy other products via Amazon. Because borrowing of Kindle books is associated with one’s Kindle account, which is also associated with the rest of one’s account with Amazon, the books one borrows via Kindle are associated with lots more information attached to one’s identity (Goldberg, 2011). In turn, Amazon can combine that information with other information it has collected or purchased in order to make inferences about patrons or others borrowing or purchasing from Amazon. At least some libraries issue a warning to patrons borrowing Kindle books that the library privacy policies do not necessary apply.

Both personalization of electronic resources and borrowing electronic books to read in one’s preferred format have obvious attractions. Moreover, they would appear to increase persons’ freedom to do things intellectually, and hence should at least be candidate cases for expansions of intellectual freedom, regardless of effects on privacy. The question for this paper is how to evaluate tradeoffs between these two goods. Insofar as privacy is a constitutive element of intellectual freedom, we should be able to make an argument regarding the tradeoff in terms of intellectual freedom. But, as I’ll argue in the following section, that is not an easy task, not least because the meaning of ‘freedom’ is itself often unclear.

Intellectual Freedom and Privacy

The LIS literature has long analyzed privacy issues as a facet of intellectual freedom (IFLA, 1999; ALA 2010, 178). However, there are a number of different ways in which we can conceive of freedom generally, and intellectual freedom specifically. Whether, and the degree to which, privacy loss implicates intellectual freedom will turn on the proper conception of freedom. In this section, I analyze several of the most important philosophical conceptions of freedom and argue that each has important limitations. In the next section I argue for a different conception.

Negative Freedom

In liberal political theory and moral philosophy the predominant conception of liberty is negative liberty, or the absence of external constraining conditions on a person’s actions or states of affairs (Berlin, 1969; Carter, 2008). One’s negative freedom to (say) read a text would be limited by laws banning the text, laws prohibiting reading the text, and others’ physically blocking one from accessing the text (among other things). Her negative freedom to read that text would not be limited by her inability to read the language the text is in, to afford access to the text, or preoccupation with other matters.2 There are some reasons to favor the negative conception in our understanding of intellectual freedom. One reason is that any political or moral theory will place some importance on negative freedom—coercive threats, legal threats, and physical constraints are on any plausible view restrictions of liberty. Another is that it provides an account of the importance of core aspects of intellectual freedom: book bans and internet filters, for example, place constraining conditions on persons’ ability to access information, and the negative account explains why they diminish intellectual freedom. Moreover, the language of professional library documents reflects a negative conception of liberty. The ALA, for example, states that intellectual freedom consists in the ability to “seek and receive information from all points of view without restriction” (American Library Association, 2010).

However, defending privacy as a facet of intellectual freedom in this negative sense is problematic. In some cases, privacy loss may lead to harms to patrons, and create external obstacles to intellectual activities. However, loss of privacy does not by itself create a constraining condition on a person’s intellectual activities; one is not prevented from doing anything solely in virtue of information disclosure. Rather, for negative liberty to be affected by privacy loss, it must be due to some further impediment caused by the privacy loss—for example, by others denying a person some opportunity, material benefit, or other liberty (an issue to which I return below). Absent such further
constraints, privacy loss can only affect intellectual endeavors insofar as persons are affected by beliefs about their being observed—which is to say, psychologically. But psychological limitations are not external constraints, and hence they do not implicate negative liberty; rather, they implicate a form of positive liberty, to which I turn next.

Internal Positive Freedom

In contrast to negative conceptions of liberty, positive conceptions concern the ability to act with a degree of control over one’s life or in accord with what one values. One way to understand this sort of freedom is in terms of a person’s ability to act according to her higher-level desires. Suppose, for example, that Ari has a desire to read Infinite Jest; he likes David Foster Wallace’s writing, owns a copy of the book, and genuinely enjoys reading. However, Ari is obsessed (one might say addicted) to playing Call of Duty. He spends the majority of his waking hours playing, sneaks time playing while at work, loses sleep, and so forth. He recognizes that it is a problem, genuinely wants to do other things (especially read Infinite Jest), wishes he could tear himself away, disconnects his computer from the internet for periods of time, and so forth. But Ari always seems to find himself back in his gaming chair. There are no external constraints on Ari’s ability to read Infinite Jest. No one prevents him. He would suffer no loss from reading it. Nonetheless, Ari wishes to read it, wishes to read it instead of playing Call of Duty, and hence has a higher-order desire to read Infinite Jest. Yet his obsession makes him unfree to do so.

For Ari to become free to read Infinite Jest does not require that barriers be removed, but for Ari to gain something positive—namely control over his actions. The thing to be gained is internal to the agent, and his gaining control would make him free insofar as it would allow him to act on his higher-level desire to read Infinite Jest. Call this “internal positive freedom” (Berlin, 1969; Carter, 2008).

The internal positive freedom view is an attractive version of intellectual freedom for a couple of reasons. First, it can explain why effects upon a person’s intellectual habits implicate intellectual freedom even where there are no harms to a person’s other interests, well-being, opportunities, and so forth. This in turn provides an account as to why privacy losses can diminish intellectual freedom where that privacy loss affects one psychologically only. Put another way, the internal positive view explains why self-censorship due to others’ monitoring one’s reading can count as an impingement of freedom regardless of whether that monitoring loss leads to any distinct harms. A further advantage of the internal positive view is that it comports with several accounts of the underlying justifications for privacy protections in the name of intellectual freedom (see, for example, Blitz, 2005; Cohen, 1996; Richards, 2008).

Alas, despite its advantages, the account is unsatisfactory. The biggest liability is that on the internal positive view, shaping one’s higher-order desires preserves one’s freedom just as much as gaining the capacity act in accord with one’s previously-existing higher-order desires. So, for Ari to be internally positively free, which is to say for Ari to be able to act in accord with his higher-order desires and values, he could either forego playing Call of Duty (perhaps by ridding his house of gaming devices, canceling his internet access, putting his money in an inaccessible place, and so forth) so that he can actually sit down and read Infinite Jest, or he could change his higher-order desire to playing Call of Duty (perhaps by being counseled or brainwashed into thinking Call of Duty is the most important thing he could ever do). If he comes to view Infinite Jest as unimportant, and to view Call of Duty as particularly important, Ari would be internally positively free, even if he is driven as if by addiction to play Call of Duty in any case. Surely, though, his inability to do otherwise renders Ari unfree.

Another problem is that on the internal positive freedom view, lack of privacy could in some cases actually enhance freedom. Suppose, for example, that many people wish to read better books, watch more highbrow movies, and browse more enlightening corners of the Web. However, each of us is drawn to pot-boilers, Hollywood blockbusters, and perezhilton.com, despite our actual, higher order desire not to be. The internal positive account would allow that persons’ intellectual freedom could be increased where their reading, watching, and browsing habits are open for all to see: persons’ internal constraints (i.e., their being drawn to material they would rather avoid) could be overcome by using the power of others’ observation and disapproval to influence their behaviors for the better, on the criteria for “better” that the agents themselves would endorse. Note that this a problem for the internal positive view only insofar as it weakens the link between intellectual freedom and privacy.

So, although the internal positive account can explain privacy’s relation to intellectual freedom in a way that the negative account cannot, it is an inadequate account of freedom and it does not necessarily favor privacy protections over information sharing.

One Freedom

A number of commentators have rejected the distinction between negative freedom, or freedom from external constraints, and internal positive freedom, arguing instead that there is just one sense of freedom that accounts for both external and internal constraints (MacCallum, 1967; Nelson, 2005). On this type of view freedom is a three-part relation between an agent, an action the agent desires to take, and a constraint on that agent’s ability to take the
action. An agent is free insofar as certain possible constraints on her actions do not obtain. The advantages of this sort of view are important. Rather than arbitrarily marking off certain kinds of constraints as “external,” and hence liberty-constraining, and others as “internal” and not relevantly liberty-constraining is oddly artificial. It also can accommodate the fact that many constraints on liberty involve a combination of internal and external constraints.

So, the person who has suffered penalties for her actions has her negative liberty impinged, and where that leads her to act reluctantly even where no further penalties would result, her positive liberty is impinged.

But the one freedom view is still not an adequate account of intellectual freedom. Most important is that, like the internal positive account, it must interpret changes in one’s desires as preserving liberty. Moreover, it cannot accommodate the possibility that desire formation can impinge liberty, an issue to which I turn in the following section.

A Different Conception

There is another avenue. Rather than understanding freedom (and hence intellectual freedom) as a function of constraints upon actions alone, we can understand it as a *quality of agency* (Christman, 1991, 2005). According to this view a person P is free only if P acts autonomously. And hence, P is intellectually free only if P engages in intellectual activities autonomously. To say that one acts autonomously or engages in intellectual activities autonomously is to say that those actions are in important sense one’s own, based on one’s ability to self-govern, and in accord with one’s values to the extent that one sees fit. This view is compatible with the constraints-based views addressed above, insofar as constraints on one’s ability to act are limitations on persons’ autonomy.

What’s important about the autonomy view is that it demands more than freedom from constraints. To begin, it provides an account of how desire formation matters for freedom; where a person’s character, values, and desires are formed without the ability to consider and reflect upon reasonable alternatives. Consider the case of a person raised in oppressive circumstances. Suppose that Jules is raised in an insular community in which members of her social class are subservient, raised to have no aspirations beyond servitude, and provided no opportunities beyond servitude. Suppose also that Jules fully internalizes those values and wants to live accordingly. If Jules moves outside the community, to a place that protected equality across social classes, there would be no constraints on Jules’s ability to pursue options other than servitude. Nonetheless, due to the depth of her indoctrination, Jules may want nothing of the increased opportunity. It would seem that Jules is unfree, despite the removal of constraints. Freedom-as-autonomy provides an explanation as to why. Jules’s lack of freedom is a function of her upbringing, under which her desires, values, and character formed without ample opportunity to consider and reflect on reasonable alternatives. That is an affront to autonomy, not a constraint on desires.

Moreover, the autonomy view provides an explanation of the *importance* of constraints. Constraints do not matter, when they do, simply because they are constraints on something or other. Rather, they matter only when they impose limitations on things of value. The view offered here is based on the view that personal autonomy is important, and limitations on autonomy are at least prima facie morally bad.

This autonomy conception of freedom can explain how privacy loss can be freedom-impinging even where that loss is not accompanied by harms to one’s interests. Autonomy, as noted, includes the ability to act according to one’s reasons. The self-monitoring and potential self-censorship, or directing one’s intellectual activities, that may result from surveillance undermines the degree to which one’s actions and intellectual endeavors are based on one’s higher-order interests. Recall that the ability to account for such cases was a strength of the internal positive view. But there’s an important difference: the internal positive view alone must allow that changes in desires are every bit as freedom-preserving as acting in accord with one’s already-existing desires. But the autonomy conception recognizes that desire-formation under pressure is an affront to autonomy, and hence an affront to liberty. Thus, privacy loss will be liberty restricting regardless of whether one acts against one’s actual desires or changes those desires.

The autonomy is also important because it has an important corollary. It can explain why privacy loss impinges in cases of *surreptitious* surveillance. Much privacy loss takes place without persons’ being aware of it. But autonomy is about quality of agency—one’s ability to act according to one’s values as one sees fit. Where important information is unavailable or hidden, one’s ability to act according to one’s values is compromised. Moreover, where one is denied important facts about the world such that one is less able to make sense of it and one’s place in it, her autonomy is diminished (Hill, 1984). Whether one is being surveilled is such information, and hence surreptitious surveillance is an affront to liberty, properly understood (Rubel, 2007).

The Framework

Thus far I have explained that several important philosophical accounts of freedom are poor foundations for an account of intellectual freedom and offered the alternative view that we understand freedom, and hence intellectual freedom, as a quality of agency; liberty is a function of autonomy. The next question is how to translate this conception into a framework for evaluating tradeoffs that come with opportunity-enhancing tools that diminish patron privacy, such as personalized electronic resource
interfaces and lending electronic books via Kindle. To answer that question, I’ll describe several important demands of autonomy, then explain how those underwrite electronic resources uses.

As noted, autonomy refers to individuals’ ability to self-govern, to make choices about matters that are important to them according to their values as they see fit. Autonomy is valuable not as a function of mere choices, but as a function of good choices. The mere presence of choices does not by itself expand a person’s autonomy; adding lots of unattractive choices to a person’s lot does nothing to increase her ability to govern herself or incorporate values into her decisions as she sees fit (Raz, 1988, pp. 408–410).

Related, autonomy demands information sufficient to understand the world and make sense of one’s relevant alternatives. That is, autonomy demands that persons have important information regarding how to interpret their own situation. Deception and withholding important information from persons impinges autonomy not only when (and not only because) it affects how people act; it also impinges autonomy because it prevents people from seeing the world accurately, regardless of whether seeing the world accurately would change their actions.

Finally, autonomy demands that individuals be able to form their desires, values, and character amid reasonable opportunity consider relevant alternatives. That is the force of the example of the person raised in oppressive circumstances; such a case is problematic from the standpoint of freedom because the values and desires formed under those circumstances are likely to be severely circumscribed. Forming a desire to wholly subordinate one’s interests is problematic insofar as it is a function of circumscribed choices or oppressive influence; forming such a desire where one has reasonable opportunity to reflect on relevant alternatives (e.g., not subordinating one’s interests) is no affront to freedom-as-autonomy.5

These considerations regarding autonomy correspond to features relevant in considering whether technologies that both increase opportunity and decrease privacy comport with or threaten intellectual freedom. First, choice is not enough. For expanded options to actually increase intellectual freedom those options must actually allow users to do things that they wish to do, or could reasonably wish to do. So, personalized interfaces for databases must create something more than superficial changes. Put another way, any choices to use electronic resources that diminish privacy must be a choice amid attractive options. So, the mere fact that one can choose to use such a resource or not does not make that choice free in the relevant sense. Foregoing the use of tools of intellectual activity that are important is not an attractive option. And hence, where tools implicate privacy interests, analogous tools that do not diminish privacy must be available in order to secure intellectual freedom.

But attractive choice amid reasonable options is not enough to promote autonomy and hence intellectual freedom. Autonomy demands the ability to make choices according to one’s values as one sees fit. Such ability is not a mere ability in principle; rather, it is a practicable ability to understand and reflect upon alternatives. Notice—even notice that requires some sort positive affirmation by a user—is unlikely to provide a user the practicable opportunity to understand whether using a resource indeed comports with her desires and values. The notice that libraries give patrons borrowing Kindle books—notice given only after the patron has decided to borrow the book—does not seem to satisfy this requirement.

The ability to read and pursue lines of intellectual inquiry with sufficient opportunity to consider and reflect upon reasonable alternatives, as required under the autonomy conception of intellectual freedom demands more than an understanding of the content of one’s options. It also requires an opportunity to understand important facts about pursuing those options. That is, autonomy demands that persons have important information regarding how to interpret their own situation. Deception and withholding important information from persons impinges autonomy not only when (and not only because) it affects how people act; it also impinges autonomy because it prevents people from seeing the world accurately, regardless of whether seeing the world accurately would change their actions. Surreptitious surveillance is, hence, a threat to autonomy because whether a person’s intellectual activities are monitored is an important fact about the world (Hill, 1984; Rubel, 2007). Hence, electronic resources that create privacy concerns that are secret or obscure undermine intellectual freedom, properly understood.

The requirement that persons be able to develop desires, value, and character amid opportunity to consider and reflect on reasonable alternatives requires that persons develop intellectual habits with at most limited information disclosure. That is, there should be enough availability of different modes of information provision that no one need to obtain most information, or most information of any one type, subject to monitoring. That will be particularly important with respect to children.

Suppose, for example, that a library wishes to establish a system to provide homework help for children. In order to induce children to use the service, they develop an application for use on a social-networking site the children already use. But, as with all such applications (based on the network’s architecture), information collected will be sharable with other third parties. In other words, children’s intellectual activities would be subject to monitoring, tied to their social network account.6 One worry is that the users would develop habits, and hence desires, consistent with others’ monitoring. That is at least potentially a worry from the perspective of autonomy, which is threatened where
one’s desires and values are formed without opportunity to consider other reasonable options.

**Conclusion**

In some ways this framework may seem obvious; after all, it in some ways echoes extant views about protecting privacy and intellectual freedom. But I submit that it’s not. The most important reason is that, even though the LIS literature has linked intellectual freedom and privacy, for privacy protections to be justified by intellectual freedom demands an account of intellectual freedom that is plausible as an account of freedom and which actually explains how privacy affects that freedom. That can be provided on the autonomy view, but not on the other accounts of freedom that predominate the discourse in liberal political theory.

Moreover, the accounts of freedom (and hence intellectual freedom) discussed above cannot accommodate the limitations I suggest above. The negative account—which is the most widely advocated conception of freedom in the philosophical and legal literature—cannot ground any of the requirements for electronic resource use outlined. The internal positive account and the one-freedom account cannot ground prohibitions on surreptitious surveillance, or on surveillance that is merely difficult to determine, and (as noted) may actually favor diminishing privacy in some instances.

Of course, much remains to be specified about particular practices with respect to electronic resources. At the moment, Kindle lending is a small part of information provision, and choice remains wide. Likewise with personalized interfaces and services for electronic databases. But that is not to say it will remain so.

**References**


difficulties pinning down just what freedom is. That is, if privacy is justified by an appeal to intellectual freedom, there must be an account of privacy’s relation to freedom. My task here is to make the strongest philosophical case for the conceptual and justificatory link between intellectual freedom and privacy. In order for a particular account of intellectual freedom to work it must be an adequate of intellectual freedom and it should explain how privacy losses diminish intellectual freedom. This will in turn demand an explanation of why a number of possibilities are misguided, which is uncomfortable for those of us who value both freedom and privacy. Nonetheless, it is necessary in order to understand the issues and articulate the right (and hence, strongest) case for privacy as a facet of intellectual freedom.

One limitation of the negative conception is the difficulty of determining whether particular constraints are external to an agent or not. A person’s inability to read a text is in some circumstances not an external constraint, for example where the text is in a “dead” language. In other circumstances it is less clear, as when the person has been forced by economic conditions to work rather than attend school, and hence has not achieved the level of literacy needed to read a document most people in a society. See Cohen, others. This conceptual difficulty is in my view a mark against the negative freedom view, though others make a case for expanding the conception of negative freedom. See, for example, the works cited in the “One Freedom” section.

A classic criticism of this sort of view is the possibility of the “contented slave.” Suppose that Tasia is owned under a chattel slave law. Unlike most slaves, though, she is provided with substantial material support, is not required to work, and can come and go from her home frequently. As it happens, she does not wish to go frequently. She may have her every wish fulfilled, but as a matter of chance she never comes to wish to leave altogether. If she tried, she would be prevented. But because her desire is to stay, she does not try. There are no constraints on her actual desires. Hence, on the internal positive freedom view, Tasia is free. But that cannot be the case, for she is a slave; she would be prevented from doing something that it would be completely reasonable and morally permissible to do. That’s the very antithesis of being free. This despite some philosophers biting the bullet and allowing that the contented slave is free.

One might be tempted to attribute Tasia’s lack of freedom to there being a possible desire (i.e., to leave her owner) that is thwarted. But allowing that constraints on possible desires constitute losses of freedom renders the notion of constraints vacuous. Anything is a constraint on some possible desire. Even material wealth is a constraint on the possible desire to authentically experience poverty, but to call wealth liberty-limiting would render the concept of liberty meaningless (see Christman, 1991).

Of course it may be true that in this time and place internal positive intellectual freedom provides a reason in favor of strong privacy protections. But the fact that it may not always do so weakens the connect between intellectual freedom and privacy on the internal positive account. Because this project is to determine the strongest philosophically-defensible connection between intellectual freedom and privacy, that weakness provides a reason to search further.