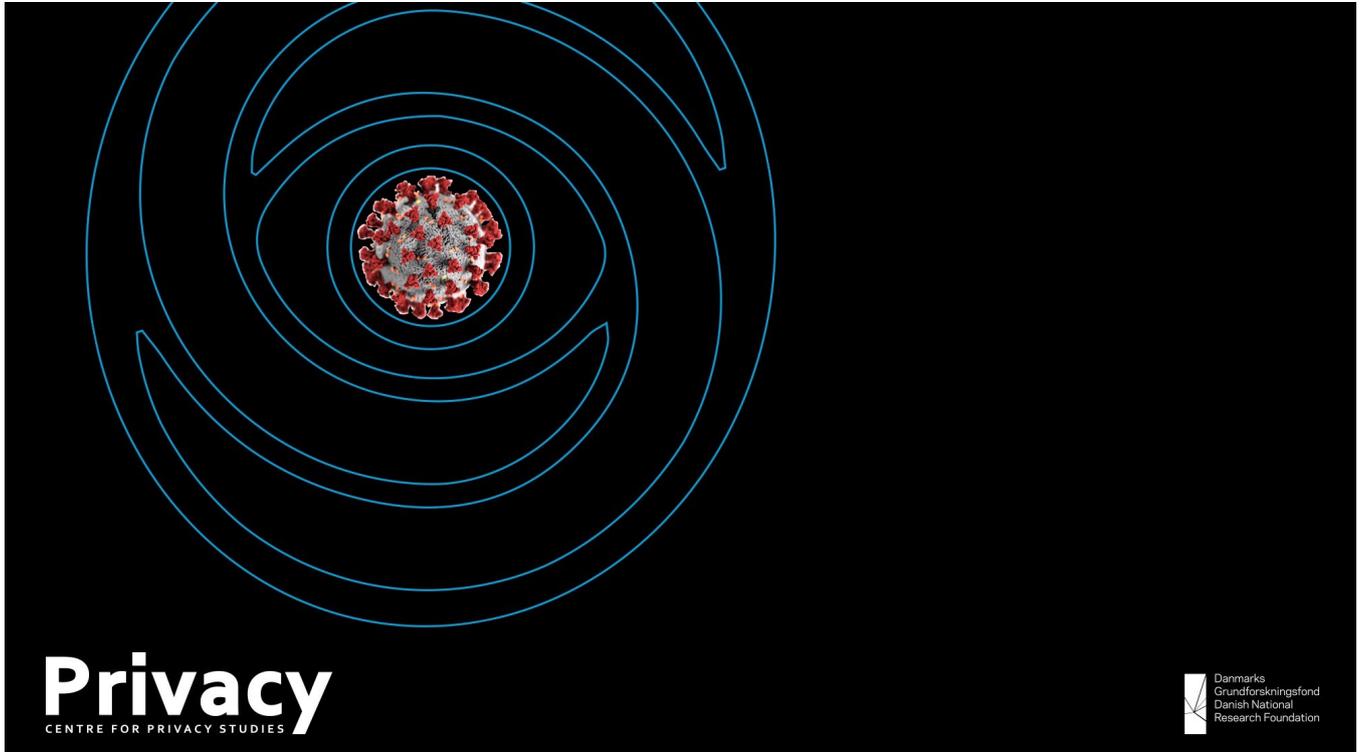


Privacy in Pandemics



How Privacy Studies Reveal Historical Research as “Essential Service” in Public Health Crises

The Centre for Privacy Studies (PRIVACY) was created by its director, Mette Birkedal Bruun, to reinvigorate historical research and reaffirm its importance for current debates and decision-making. The topic of privacy is excellent in that respect because it is relevant for the present as well as the past and because it is so intricate a subject that it requires true interdisciplinary collaboration. This is what PRIVACY is doing in its daily activities: gathering historians of architecture, art, sex and gender, law, medicine, society, politics, philosophy, theology to analyse historical sources together. Our aim is to reveal the variety of notions of privacy in early modern Europe.

Like everyone else in the “non-essential services” sector, we privacy scholars have been sent home by the coronavirus pandemic to live through this historical global event. We live the same experience as everyone else, but we cannot help reflecting on the irony of being forced into privacy, so to speak. It was already part of our research hypothesis that privacy is more than just a concept and more than just a right that simply can be found in texts. We also approach privacy as a feeling, a space, a representation, and sometimes an invisible presence or absence. However, it is new to us to actually experience privacy and/or the lack of it through a public health crisis. This situation imposes eerie effects on us as we see history repeat itself from the sources we study during the day about early modern plague pandemics to the news we read in the evening. It also compels us to reflect upon the past in real-time with an unusual sense of urgency.

Academia is sometimes referred to as an “ivory tower” because of the luxury it offers to retreat from the real world and ponder intellectual problems that may benefit the whole of humankind in a distant future. This activity required to muffle the so-called “noise” of daily politics and the issues brought to the agenda by the news cycle guided by

commercial interests; leaving other pressing issues out. We have now been physically forced out of our ivory tower by the lockdown. University buildings are closed. Libraries are closed. Laboratories are closed. Even the choice-place of work for an existentialist philosopher, a café, is closed. Much like the professors we study at the University of Helmstedt in the seventeenth century, we are teaching students in our home and we have our library for our research in our home, albeit digitally. But the home becomes also the kindergarten, the school, the gym, the everything to the risk of being a black pit.

Historians need some sense of imagination to recreate a past that is irremediably gone and translate it into contemporary terms for an audience to experience it. Will the historian's imagination be stimulated even further by this event? One can, more or less live a re-enactment of some early modern European middle-class woman whose place of work is the home, never being able to leave or have a moment of solitude. Or perhaps of a monk confined in a monastery. One can experience noisy neighbours 24/7, perhaps issues of smell, knowing that one is being heard and even seen through windows. Fear, frustration, monotony, boredom, discontent, powerlessness facing death and economic stagnation. Conflicts exploding or fomenting. We accept losing liberties, but for how long? We are told to make sacrifices for the common good, but how long can we, with centuries of individualism embedded in us, tolerate this? Should we accept massive surveillance and overgive our right to privacy in the name of public health? Where would we draw the line? We accept granting further power to the executive for taking necessary emergency measures, but how much and how long can centuries of democratic development survive it? We listen to experts, scientists, doctors, but we suddenly get confused when we realise that they disagree among themselves, so some turn to conspiracy theorists and charlatans. How long can centuries of rationalism survive existential threat? Millenniums of literature have developed our understanding of someone else's condition and made us more empathetic, but how long does empathetical understanding survive in front of empty shelves in the supermarket's toilet paper and flour aisles?

These questions that scholars asked in their "ivory tower" are suddenly questions that decision-makers must ask as well; and answer immediately. Not only politicians and medical practitioners, but everyone. We are confronted as democratic societies with obscure moral dilemmas and philosophical questions such as the "trolley problem." There are not enough respirators in the Italian hospital to treat all patients in respiratory difficulty. Who should get them? Answering implies a taking a moral stance, that is involving a question of *Justice: What is the right thing to do?*, as Michael Sandel famously asked?¹ It turns out, some doctors took a utilitarian turn and chose to save the patients with the statistically most likelihood to survive.² Governments have decided on various strategies, some even changing along the way, when faced with the choice of setting sail towards Scylla or Charybdis. A timely reminder of the etymology of government, from Latin *gubernare*, from Greek *kybernan*, "to steer or pilote a ship." What is the lesser of two evils? Lockdown of society and confinement creating an economic crisis but saving lives or letting people go about as usual to maintain the economy, but at the cost of many human lives? Is criticism still a healthy part of political debates in times of public health crisis or should there be consensus to speed up urgent live-saving measures?

The humanities have for some years been cut down from education budgets. There has also been a lot of discussion about the "bonfire of the humanities".³ This has not always been so, and we need the humanities to govern. Harvard offers Michael Sandel's popular course "What's the right thing to do?" to all undergraduates,⁴ because those who will study, for instance, medicine will have to make ethical or moral decisions and need to know what options they have: utilitarian or Kantian? Not long ago, in the UK, the best education for future civil servants was considered to be the classics or history. Oxford famously created the subject Philosophy, Politics, Economics (PPE), which is a degree that "rules Britain."⁵ In France, elite civil servants are trained at the École Nationale d'Administration (ÉNA), created after World War II out of a sense of failure from previous bureaucratic elites. A famous part of the entry exam is *culture générale*, which is the ability to demonstrate a wide range of knowledge in the humanities and apply it to analyse social and political questions in order to offer an educated answer typically involving moral dilemmas. Like Oxford's PPE degree, it has been criticised for reproducing a class-divide and lack of diversity among elites. For this reason, among others, this exam will be abolished.⁶ This seems, however, to confuse the issue of representativity of graduate candidates and the test of the knowledge of the humanities needed for civil service. This problem must be tackled before university studies so that children coming from less educated homes have the same access to this knowledge. There is no doubt in my mind that faced with such an event as coronavirus, political and administrative elites with a large education in the humanities (history, philosophy, literature, classics, anthropology, religion) are better equipped

¹ Sandel, Michael (2010). *Justice: what's the right thing to do?* New York: Farrar, Straus and Giroux.

² https://www.repubblica.it/cronaca/2020/03/08/news/petrini_oggi_la_scelta_di_chi_curare_richiede_regole_certe_-250594687.

³ <https://aeon.co/essays/the-role-of-history-in-a-society-afflicted-by-short-termism>.

⁴ <http://justiceharvard.org>.

⁵ <https://www.theguardian.com/education/2017/feb/23/ppe-oxford-university-degree-that-rules-britain>.

⁶ <https://www.bvoltaire.fr/jean-messiha-la-suppression-de-lepreuve-de-culture-generale-nivelle-par-le-bas-le-recrutement-des-hauts-fonctionnaires/>. <https://www.marianne.net/debattons/editos/ce-que-nous-raconte-la-future-suppression-du-concours-de-culture-generale-l-ena>. <https://www.lefigaro.fr/vox/societe/suppression-de-la-culture-generale-a-l-ena-on-acheve-bien-l-esprit-critique-20191220>.

to make tough decisions.

In our lifetime the pandemic and the response to it are “unprecedented” indeed.⁷ However, history shows precedent and perspective. Will there be heighten disease surveillance and will countries without socialised medicine finally adopt universal health care, which happened after the Spanish flu in 1918?⁸ Will there be socio-economic change on the scale of the fourteenth-century plague?⁹ Philosophy offers moral solutions to questions of growing inequality laid bare by the coronavirus.¹⁰ Literature offers perspectives on human behaviour in pandemics with Defoe or Camus,¹¹ and shows how to stay sane in confinement with Boccaccio.¹² The classics offer a word of caution with one of the greatest historians on the end of Athenian democracy.¹³ How should we, as citizen, feel about our governments being counselled by experts without someone from the humanities? In France, the scientific committee advising the government is composed of 11 members, out of which 2 are not natural scientists but an anthropologist and a sociologist.¹⁴ The UK chose to maintain secrecy over its advisory committee, until it was leaked to be composed exclusively of scientists and 21 scientists and two Downing Street political advisers.¹⁵ Germany enrolled only a minority of scientists and many scholars from the humanities, including historian of science Jürgen Renn, to tackle a “systemic crisis” from all angles in a newly published report on the coronavirus.¹⁶

We need the humanities to make sense of our modern global life and to be able to make difficult democratic choices. Privacy Studies, because of its interdisciplinary nature, covers a wide range of the humanities. PRIVACY focuses on historical questions within the early modern period and Northern Europe, but many other disciplines are involved in privacy studies including social sciences and computer sciences. The notion of privacy has become a central one for understanding our societies. For instance, at the PRIVACY IARU summer school in August 2019, we had students from Australia, Europe, Japan, Singapore and the US, sharing their different privacy experiences from their home country. Students from Japan and Singapore expressed not having the same understanding of privacy than non-Asian ones. The level of surveillance and monitoring of individuals as a direct answer to the public health crisis may be related to the understanding and practice of privacy. Asian countries have less qualm about using personal data to track their citizens.¹⁷ But public health may trump private liberties even in countries with the oldest tradition for them.¹⁸ Privacy may be a universal right, but it is also a local concept, changing and evolving with time.

In the following interventions by PRIVACY scholars, we encounter a short sample of the range of issues and questions that privacy studies makes us consider. They have a strong potential for informing our present “human condition”, as Arendt would put it, and making better decisions. They show how the humanities matter for contemporary issues.

Anni Haahr Henriksen kicks off with an appropriate parallel between today’s coronavirus confinement measures and 1563’s plague lockdown measures. The same measures of confinement in the homes, the same stop to economic life, the same inequalities between the rich and the poor, the same concern for public health as a common good for which to sacrifice private needs. But different understandings of privacy and therefore acceptance and discussions of the common good, public health, public authority and the private sphere.

Natacha Klein Käfer examines the plague epidemics under the angle of scientific knowledge. Should private knowledge of cures and medical equipment that could potentially save lives be made public? We see, today, these discussions resurfacing together with other moral dilemmas, particularly with the case of 3D printing of respirator valves, but they are not new.

Natalie Patricia Körner considers the visual representation of privacy based on observing past and present traditions of iconology, lockdowns, the limitations of the private life (also described by Hannah Arendt), invasions of privacy, and digital surveillance. The padlock is a curious choice that was used to lock infected citizens in their home during the 1665 plague in London and is used to represent digital privacy today.

Paolo Astorri uncovers the tension between privacy and public morality that lies in extensive knowledge by the judicial power of our private life through increase surveillance. Modern technology allow digital surveillance, but the question of whether a judge should use this knowledge and decide according to evidence or conscience is a long and unresolved one, as examples from the early modern age show.

— Frank Ejby Poulsen

⁷<https://www.cnet.com/news/johns-hopkins-pandemic-expert-says-coronavirus-covid-19-is-totally-unprecedented/>.

⁸<https://www.bbc.com/future/article/20181016-the-flu-that-transformed-the-20th-century>.

⁹<https://www.historyextra.com/period/medieval/the-black-death-the-historians-view/>.

¹⁰<https://www.irishtimes.com/culture/are-we-all-kantians-now-the-covid-19-effect-on-moral-philosophy-1.4229595>.

¹¹<https://lithub.com/what-we-can-learn-and-should-unlearn-from-albert-camus-the-plague/>.

¹²<https://www.newstatesman.com/2020/03/coronavirus-survive-italy-wellbeing-stories-decameron>.

¹³<https://slate.com/news-and-politics/2020/03/thucydides-plague-athens-coronavirus.html>.

¹⁴<https://www.franceinter.fr/societe/coronavirus-qui-sont-les-onze-membres-du-conseil-scientifique-qui-conseille-le-gouvernement>.

¹⁵<https://www.theguardian.com/world/2020/apr/24/revealed-dominic-cummings-on-secret-scientific-advisory-group-for-covid-19>.

¹⁶https://www.leopoldina.org/uploads/tx_leopublication/2020_04_13_Coronavirus-Pandemie-Die_Krise_nachhaltig_überwinden_final.pdf.

¹⁷<http://ateneo.edu/udpo/article/covid-19-and-privacy-in-asia>.

¹⁸<https://www.theguardian.com/politics/2020/apr/12/uk-app-to-track-coronavirus-spread-to-be-launched>.

Privacy & Plague: Reading a 1563 Plague Order during the Current Covid-19 Crisis

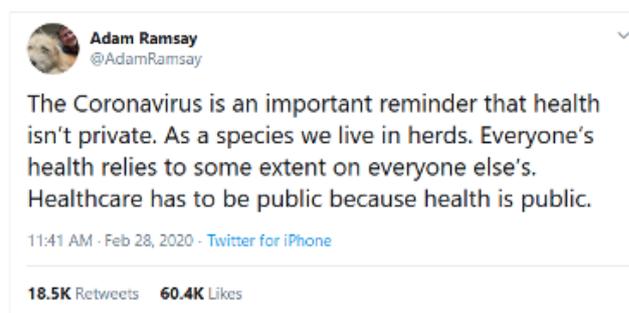
by ANNI HAAHR HENRIKSEN

At the Centre for Privacy Studies we investigate notions of privacy in early modern Europe in the period between 1500-1800. Needless to say, the question of how to contain and abate epidemics was an issue of concern in this period also. My own focus at the Centre is on the City of Westminster during the rule of Elizabeth I (1558-1603), whose reign saw several visitations of the plague.

In February 2020, I started seeing one of my old sources, a 1563 Plague Order for the City of Westminster, in a new light. I realised with a mix of intrigue and disbelief that the draconic measures of the Elizabethan Plague Order were not just the emergency measures of the early modern state, they were the measures of the modern state. In the week that has passed since the Danish Prime minister, Mette Frederiksen, declared a lockdown in Denmark on 12 March 2020, the similarities have only become more pronounced. From my home desk, history has seemed to warp and repeat itself. In all this, one thing seems certain: measures for fighting against epidemics have not in their essence changed since the 16th century, but surely, notions of privacy have.

The otherwise little used word “quarantine”, originally a forty-day period of isolation, has rapidly moved from passive periphery to active centre stage in our daily vocabulary. Across the globe, the spread of the Corona Virus is intensifying by the day. And country after country joins the ranks of those with citizens that are affected by the contagious disease. Throughout these countries, the dual-method for dealing with the threat of mass contagion is simple: quarantine and a tracking down of every person with whom the sick citizen has had contact. These precautions, the isolation of an individual, either in the individual’s home, or as we have seen, in hotel resorts, hospitals or even a cruise liner, and the searching out of the person’s movements, activities, and daily interactions, are, from society’s point of view, necessary for the common good. But to the individual citizen, they are also direct, physiognomic, spatial, and informational invasions on the individual’s personal privacy.

Is health a public or a private issue? According to a recent tweet by the influential eco journalist, Adam Ramsay, the case is clear:



We might identify this form of logic as a “common good” sort of argument that reminds us of the prevalence that the benefit of the many takes over the benefit of the few.

You might ask what the plague in the 16th century has to do with a virus epidemic in 2020. Well, for one, they have the quarantine in common. Second, they share a similar rhetorical focus on “the common good” as well as a complementing vilification of private interest. Finally, they share a fundamental shift in the balance of power between individual and state. A shift that is perhaps best understood as an invasion or annexation of territory that the state had more or less formally relinquished to the private citizen, but in cases of emergency reclaim to their absolute domain. It is difficult to talk about rights and privacy in 16th century England, but we might, by negative inference, be able to detect the thresholds that the state saw fit to regulate and invade in emergencies. Thresholds that it might not otherwise have bothered with.

The 1563 Plague Order for City of Westminster

“

Fyrst we wyll and command you in the name of our sayde soueraigne Ladye . . . to . . . shutte up both . . . doors and wyndowes towards the streates or common ways by the space of fortie dayes.

”

– Plague Order, 1563

Secretary of State, William Cecil, issued in March 1563 a Plague Order. It commands the civic officials of Westminster to shut up any houses with infected members, placing the sick and their households in quarantine. In the Order, clear rules for disregarding the quarantine are delineated. That is, should a member of the household be let out or should a visitor or customer be let in that same person would be “committed to the upstockes”

¹⁹Indeed, Newman writes that “In 1636, quarantine was a still a relatively new policy to England”. Kira L. S. Newman, “Shutt up: Bubonic Plague and Quarantine in Early Modern England”, *Journal of Social History of Crime, Corruption, and States* (Spring 2012, pp. 809-834), p. 809.

for about seven days and then brought to the “common gayle” to remain there for a full forty-day quarantine.

In 1563, quarantine measures were still relatively new in England.¹⁹ With new visitations, new means were developed to perfect quarantine measure. One of the improvements was the building of pesthouses, or of pest fields, as in the case of the parish of St. Martin’s in the Field. Pesthouses were places to which sick members of a household could be sent for the remaining duration of their life, or in some happy cases, the duration of the quarantine. The infected households in question would still be shut up, but with a significantly smaller risk of catching the disease themselves. Before the pesthouses were used, households would simply be shut up with all of the inhabitants inside, sick or not. In a household of, say, seven, even if only one person were ill, the entire household would be put under quarantine until the house was opened again forty days later.

How many, we might wonder, would survive such conditions? The local parishes of Westminster were the centre of organising everything from shutting up houses, taking away the dead, detecting the infected, collecting money for charity, and doling out “victuell and fuell” to the “persons shutte up and forbidden to come abrode.”²⁰ The number of deaths during the 1563 plague are fraught with uncertainty, but based on the parish registers of Westminster and London, scholarship on the period estimate a 1000 deaths per week for several months.²¹ According to Cox, the parish of St. Martin in Field noted a total of 177 burials in 1563, “145 of which are followed by the word peste.” This might not seem like a daunting number, but according to the parish registers yearly burials would be in the tens and twenties, not in the hundreds. Albeit taken from different parishes, Cox’s table of deaths in five London parishes (1562-1564) gives us some idea of drastic increase in burials in 1563.

	Burials.		
	1562	1563	1564
All Hallowes, London Wall .	15	85	8
St. Antholin	15	83	21
St. Mary, Aldermary . .	13	128	9
St. Mary, Woolnoth . .	15	88	8
St. Nicholas, Acon . .	5	58	8
St. Peter’s, Cornhill . .	19	169	18

Figure 1 – John Charles Cox, *The Parish Registers of England*, p. 145.

²⁰England And Wales., By the Quene. Whereas Thinfection of the Plague and Pestilence Doth at This Present Remayne and Continue within the Cities of London and Westminster .., Early English Books Online (Imprinted at London: in Powles Church yarde by Rycharde Jugges and John Cawood, printers to the Quenes Maiestie, 1563)

²¹John Charles Cox, *The Parish Registers of England* (London Methuen, 1910), p. 144.

²²Kira L. S. Newman, “Shutt Up: Bubonic Plague and Quarantine in Early Modern England”, *Journal of Social History*, vol. 45, issue 3 (2012), 80934, p. 811.

²³Newman, p. 823.

Looking into praxis: Newman’s work on the 1636/37 bubonic plague

The 1563 Plague Order informs us to some extent of how the state reacted in the face of emergency (quarantine measures, punitive regulation and organisation of poor relief for the quarantined), but it does not tell us anything about how the people reacted. Did they keep the quarantine? And if not, how were such trespassing detected and monitored?

The early modernist, Kira L. S. Newman, seeks to answer some of these questions in her excellent research on the bubonic plague in 1636-37 London and Westminster. The question of whether or not quarantined citizens respected their quarantine is answered with a resounding “no” in Newman’s sources. Watchmen were posted outside houses and on corners to keep an eye on the infected households and make sure that none left or entered. In fact, Newman’s sources show a whole list of necessary occupations taken on by the local parishes. The documents from the parish of St. Martin in the Field are particularly detailed and describe the expenses towards a whole corpus of “nurses, watchmen, bearers and searchers.”²²

Perhaps unsurprisingly, Newman’s investigations show that it was not the poor, nor the wealthy, that broke their quarantine, or tried to bribe the searchers not to report on an infected member of the house or bribe the watchmen to look the other way when customers and visitors came calling. No, it was the industrious middle-class. The tailors, the shoemakers, the shop keepers, the innkeepers and other forms of small business owners whose livelihood were pulled from down under them with the severe restrictions on mobility and heavy death tolls in their clientele.²³

Newman writes that “There was a conspicuous absence of the poorest from the Session Rolls.” The poor, she argues, would be given “victuell and fuell” free of charge and therefore might have had less incentive to disregard quarantine orders. But not all poor people had a home or space to share that was theirs. What did the poor people that rented rooms do? The answer to this question is vividly given in the 1563 plague order: they were not shut up. They were shipped out.

Rhetoric and vilification

“*And further, where it is evidently known that in the sayde Citie of Westminster, there be greater numbers of people inhabytyng, and as it were swarmyng in every rome, than can reasonably have their sustentation by their honest*

labours or trade of lvyng, by reason that for gredinesse and lucre many owners or tenauntes of houses, do take into them other inhabitants and famylyes, to dwell in some part of their chambers, shoppes, cellers, or leanetoos, paying for the same also such excessyue weekly, or other kynde of rentes, as they can not mayntayne them selves in sekyng the same by sundry kyndes of disorder.

”

– Plague Order, 1563

This section of the order is so strikingly rich in its portrayal of the social situation in Westminster. Its portrayal of private property and of private greed vs. public good showcases a system that did not have the state apparatus to deal with overpopulation, nor, significantly, the means to contain the spread of the infection. The reasons for Westminster’s overpopulation are compound. For one, Westminster was the seat of power. When Westminster was not visited by the plague, parliament, the royal court and the legal courts were open for courtiers and those with political and legal affairs from all of the country. The wealthier of these would have houses in Westminster for this specific purpose. Similarly, the well-connected would stay with wealthy friends. Everyone else would have to rent houses, rooms, or beds according to their means and status. In turn, such activity brought in servants or demanded that temporary servants be taken on for the duration of a stay, meaning that those in need of a job, or wanting to sell their goods at the market would flock to Westminster too.

Unlike the lockdowns of France, Wuhan and Italy, the City of Westminster was not shut up nor locked down. Much like Boccaccio’s group of imaginative noblemen and women in *The Decameron*, the rich fled to their country houses and the poor remained in the city. All those that in the state’s eyes were “swarming in every rome” were sent back to where they came from. And those that defied these orders, perhaps in an attempt to make some extra money by continuing to lend out their “shoppes, chambers, cellars or leanetoos” were publicly shamed for their private interest - their “greedinesse and lucre”. Additionally, those that did rent a place, be it in a shop or chamber - were deeply vilified in the Lord Secretary’s descrip-

tion. It is unthinkable by the logic laid out in the Order, that such persons would be able to sustain themselves by an honourable profession. The Order’s careful wording evoke powerful images of greedy self-interest and dehumanised hordes of criminals, endangering the health of the city.

The connection that Lord Burghley forges between greed and private interest is by no means novel. In the Acts of Parliament, we see an even more directly expressed vilification of private interest as “private greed”, “lucre”, “profit” and “gayne”. The table below gives an overview of non-formulaic priv*-words, in the Acts of Parliament from 1547 to 1603.²⁴

Vagrants, day-labourers, season workers and their families were, according to the Plague Order, thrown out of their homes, be they rented or lent. Those with permanent settlement in Westminster on the other hand were, if suspected of being infected, shut up in their home, or in the case of servants, in the home of their master. In

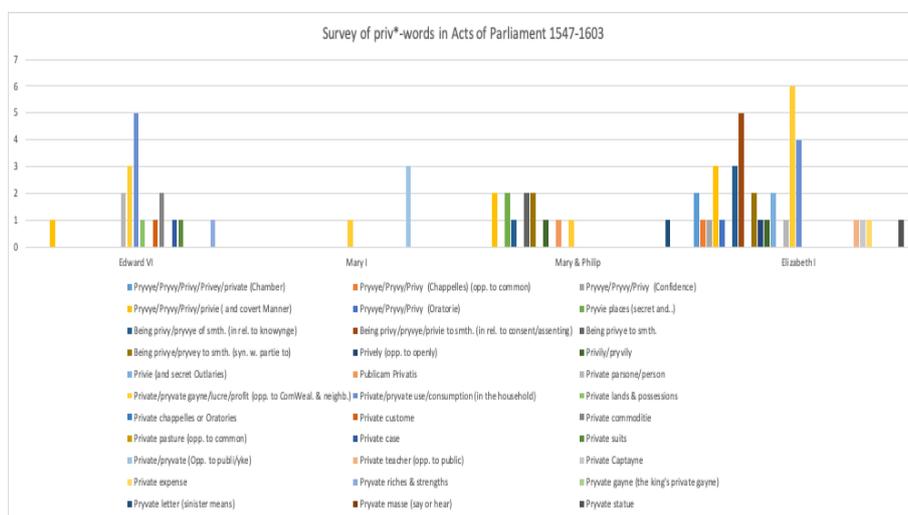


Figure 2 – The diagram shows the number of occurrences of priv*-words (words that have their root in the Latin privatus) across the reigns of Edward VI (1547-1553), Mary Tudor (1553-1558), and Elizabeth I (1558-1603).

the first case, such action robbed citizens of the roof over their heads. In the latter case, it robbed citizens of their personal mobility. The Plague Order from 1563 is unambiguous and unapologetic in its intrusion into private property. The privacy to do what you want - with and in - your property or lodging is unflinchingly interfered by the authorities when the state is in a state of emergency.

Health Status to be or not to be publicly marked?

With twenty-first century eyes, these actions are very serious potential violations to personal freedom and privacy. But that does not mean that twenty-first century govern-

²⁴The data is mined from *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts, 10 vols (Dawsons of Pall Mall, 1810), IV, PART I*. The diagram shows the number of occurrences of priv*-words (words that have their root in the Latin privatus) across the reigns of Edward VI (1547-1553), Mary Tudor (1553-1558), and Elizabeth I (1558-1603).

ments have not enforced similar measures in states of emergency. In Denmark, we have all been encouraged to work from home and stay indoors and in this moment of writing, all shops, cafés, bars and restaurants are being shut down.

An Emergency Act was passed this week in the Danish Parliament. The Act was passed with a unanimous vote across the political parties. One thing, however, was fiercely debated before the Act was put through; namely, the inviolability of private property. In the Act, the government wants to have the possibility to grant officials the right to search and enter private property without a search warrant. No such permission has been given, but it is now in the government’s arsenal, should circumstances call for such drastic measures. Turning to another example of state muscle-flexing, the French prime minister, Emmanuel Macron, has placed the entire country under a lockdown during which non-essential excursions will be fined.

In the province of Hangzhou, a new system of classification has been introduced to control citizen’s movement and determine their virus status and thereby assess their right to mobility.²⁵ The app, Alipay, is used to give citizens a health code: Green is good and gives free access to public space and transport, yellow means seven days’ isolation and red results in a 14-day quarantine. The status of your health is based on your movements and the people you’ve been in contact with. All trackable through the app. As with so many of the measures now put in place, we find historical equivalents. None are found in the 1563 Plague Order, but the plague order from 1578, not directed at plague in Westminster but in the countryside, gives an Elizabethan example of publicly marking health status. In the order, it is explained that those quarantined at their farms are allowed to care for their livestock and manure their fields. But it is also noted that such persons “be neverthesse retrained from resorting into companie of others either publicaly or privately during the said time of the restraint, and to wear some marke in their uppermost garments, or beare white rods in their hands at such time as they shall goe abroad”.²⁶

In the case of the app Alipay, used in China, the concerns in terms of privacy and mobility tracking are of course significantly more far-reaching. Emergency Acts are rushed through parliament in countries across the world and as much as such emergency legislation is for the benefit of the common good, citizens also voice valid concerns.

Privacy in a State of Emergency

In a recent article in the *L.A. Times*, the newspaper answered a question about governmental infringement on the private sphere: “What can the government force people to do in the name of containing the coronavirus?”²⁷ We might notice the overt hostility and scepticism in verbal phrasing of the question. The word “force” springs to our attention, but also the formulation “in the name of” indicates a deep mistrust towards state interference. What this question brings to mind is the monopoly on legitimate violence vested in the state. The monopoly on legitimate violence is one of the defining aspects of Max Weber’s understanding of statehood. The 1563 Plague Order and the rampant Covid-19 crisis remind us that this monopoly is constantly negotiated across the different zones of society as perception of what pertains to the public domain expands and contracts. In France, parliament started out by advising its citizens to stay indoors and avoid social engagements and physical contact. When these advisory precautions were disregarded, the state instead enforced a strict curfew that the law enforcement now is tasked with controlling the adherence to.

What we might conclude from looking at epidemic induced states of emergency from sixteenth century England to the present globalized world is that in cases of emergency the public sphere becomes more elastic as it expands to regulate more and more aspects of society. At the Centre for Privacy Studies, we are particularly interested in notions of privacy in the overlaps and thresholds between different societal zones. A visualization of these societal zones in a non-emergency state could look something like figure 3.

But as the headline of the *L.A. Times* article manifests, the proportional interrelation between the zones undergoes a significant, if not dramatic, shift in cases of emergency. In the following figure, the heuristic zone “state/society” encompasses all the other ones:

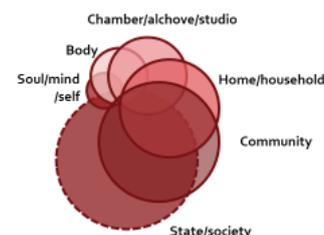
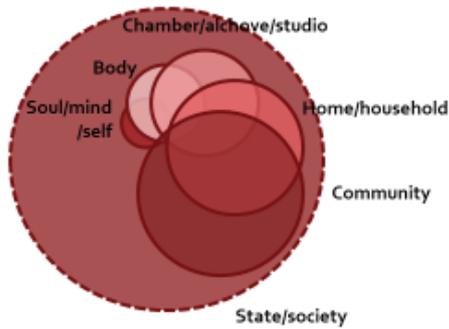


Figure 3 – Visualisation of the heuristic zones of research by PRIVACY.

²⁵<https://www.nytimes.com/2020/03/01/business/china-coronavirus-surveillance.html>

²⁶England and Wales. Sovereign (1558-1603: Elizabeth I), Orders, Thought Meete by Her Maiestie, and Her Priuie Councell, to Be Executed throughout the Counties of This Realme, in Such Townes, Villages, and Other Places, as Are, or May Be Hereafter Infected with the Plague, for the Stay of Further Increase of the Same Also, an Aduise Set Downe Vpon Her Maiesties Expreesse Commaundement, by the Best Learned in Physicke within This Realme, Contayning Sundry Good Rules and Easie Medicines, without Charge to the Meaner Sort of People, Aswell for the Preservation of Her Good Subjects from the Plague before Infection, as for the Curing and Ordering of Them after They Shalbe Infected., Early English Books, 1475-1640 / 1483:04 (Imprinted at London: By Christopher Barker, printer to the Queenes most excellent Maiestie, [1578?], 1578).

²⁷<https://www.latimes.com/science/story/2020-03-02/coronavirus-government-restrictions-legality>



Naturally, the measures against epidemics have changed, but quarantine and disciplinary actions towards those who disregard the quarantine remain core measures and have been so for over five hundred years. During this period, our notion of privacy in northern Europe has changed dramatically, especially in the past two hundred years. And worries about what the state might force you to do are expressions of this. But predominantly, citizens seem to agree with Adam Ramsay: Health is a public issue. Such status legitimises the expansion of the public sphere in cases of health emergency today and historically. The question then is whether our more developed notions of privacy matter in emergency situations. When it comes to state nullification of private spheres, be they personal, informational or spatial, has the situation over the past five hundred years merely changed from ignorance to informed consent?

Epidemics and the issue of private knowledge

by NATACHA KLEIN KÄFER

Keeping potentially life-saving knowledge in “private” seems to be a very contemporary issue. Owning patents over crucial medication or equipment is the “norm” of the medical and pharmaceutical industry. In the academic circles, efforts of making science open must face the ever-present question of profit, as well as the assurance of status and influence within knowledge communities. It is such a present concern that I could not help but remember one of the healing practitioners I came across in my work on privacy in early modern Dresden.

This practitioner was the Leipzig physician Caspar Kegler (c. 1461-1537). I had encountered Kegler’s name in many of the manuscript pharmacopoeias I had been collecting in order to understand early modern medical networks. His name always appeared in plague remedies, showing that he had a surprising level of specialization for an early sixteenth-century doctor. However, it was only through the work of Erik A. Heinrichs, *Plague, Print, and the Reformation: The German Reform of Heal-*

ing, 1473-1573 that I was able to really understand the impact of Kegler’s recipes in the circulation of medical knowledge in the 16th and 17th century.

After becoming a doctor in 1511, Kegler established himself as a remedy maker, producing and selling his medicines at his shop at the Leipzig City Hall. This activity was usually exclusive to apothecaries, so a physician taking over this market was not common at the time. He advertised his remedies in cheap prints like pamphlets and booklets, a new endeavor in the Leipzig print market. He took the chance to seek printers to spread his “plague regimens” after Duke Georg I of Saxony enforced a ban on Luther’s works in 1521. Printers were in need of new “popular” texts to disseminate after the reader-grabbing Lutheran texts were banned. By using the more accessible forms of print, Kegler was able to spread healing knowledge to the literate laypeople, gaining popularity thanks to the accessible tone of his medical treatises and pamphlets.

Kegler also counted on the endorsement of local authorities. He stressed in his prints how the Leipzig city council requested his regimens to be published as a way to help the population in the face of a series of epidemics in the early sixteenth century. In the 1529 version, he proclaims that Duke Georg I himself urged him to divulge his medicines. Kegler was trusted to give medical advice to the masses, providing health regimens as well as spiritual guidance. Moreover, he offered new medicines for the plague.

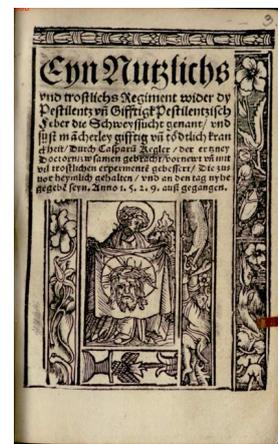


Figure 4 – Caspar Kegler, *Eyn Nutzlichen vnd trostlichen Regiment wider dy Pestilentz*. Leipzig, 1529.



Figure 5 – Opening of the 1529 Leipzig edition.

Epidemics tend to push the boundaries of medical knowledge, making people desperate for new solutions. Kegler's new medicines incorporated learned alchemy and artisanal techniques. In the hands-on space of the laboratory, Kegler was able to refine his recipe for aqua vitae, a potent distillate which was particularly popular in times of plague. His medicines relied on experimentation to prove their efficacy, instead of the traditional reliance on the authority of ancient Greek methods. This rhetoric worked well with its intended audience since Kegler continued to highlight the experimental aspect of his concoctions in all subsequent prints. Alchemical/experimental medicine was about to take over the medical discourse of sixteenth-century Germany.

Kegler's resourcefulness and innovative use of new technologies could be compared to the contemporary example of 3D-printed respirator parts. News revealed that there was a point during the spread of Covid-19 in Italy when there were not enough respirator valves for all the patients that required treatment.²⁸ When the original manufacturer could not supply extra valves, volunteers developed improvised solutions. Cristian Fracassi and Alessandro Ramaioli made use of 3D printers to create a version of the medical device. According to a report, they initially got in touch with the manufacturer to request the blueprints but were refused, being told that the file was the company's private property.²⁹ Without the blueprints, Fracassi and Ramaioli had to reverse-engineer the device in order to print unauthorized copies of the patented valve. After successful tests, they donated 100 of these 3D-printed valves to the hospital. Speculation about a possible lawsuit for infringement of the patent caused online outrage, raising the question of how we deal with proprietary knowledge in case of emergency such as the current pandemic.

However, we cannot neglect the fact that Kegler's whole enterprise relied heavily on secrecy. His pamphlets contained several recipes for plague remedies. These

recipes became so popular that they were copied into manuscript pharmacopoeias, surviving in several German archives. However, his most potent and famous medicines were kept as a family secret. When asked to reveal how

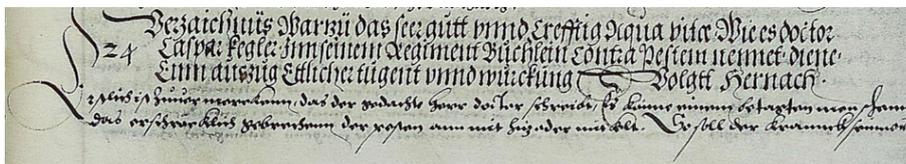


Figure 6 – Manuscript with Kegler's advice on the use of Aqua Vitae (Ludwig VI. von der Pfalz *Rezeptsammlung* - Universitätsbibliothek Heidelberg, Cod. Pal. germ. 192; 15701572 [Nachträge bis nach 1579], 198r).

to prepare his famous "plague electuary", Kegler instead explained that the complex process required specialized equipment and unique ingredients (including unicorn horn), being too hard to replicate without first-hand supervision. However, there is no definitive evidence that the recipe was ever revealed even to skilled specialists outside of the Kegler family. Secrecy was Kegler's way of maintaining ownership of his recipe, making "Doctor Caspar Kegler's Electuary" a branded and recognizable remedy in the following decades. After Kegler's death, his family continued to advertise his remedies, issuing reprints of his pamphlets as well. His sons continued the secrecy trope, saying that only Kegler's children had the correct original formula.

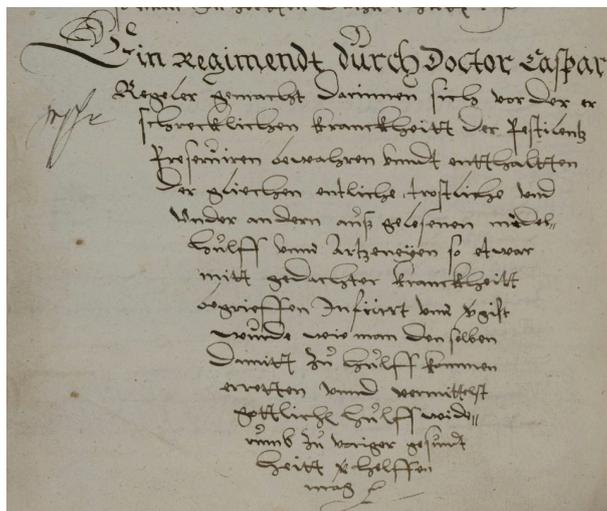


Figure 7 – Manuscript copy of Kegler's Plague Regiment (*Rezeptsammlung* - Universitätsbibliothek Heidelberg, Cod. Pal. germ. 204; 4. Viertel 16. Jh., 190v).

This healing knowledge was seen as private property of the Kegler family, and they made use of their political influence in order to keep it this way. In Dresden, Caspar Kegler the grandson gained the favor of Elector Christian II. Christian II praised Kegler's electuary, proclaiming that only Dr Caspar Kegler's descendants had the correct recipe, while also giving Caspar Kegler the grandson sole privilege to print his grandfather's work. To this day, although there are recipes that claim to be Kegler's unicorn electuary, it is impossible to verify if they are accurate since the original has never

been revealed. The strict secrecy of the Kegler family and the supporting privileges received from their political patrons turned "Dr Caspar Kegler's Electuary" into forgotten knowledge.

²⁸<https://www.forbes.com/sites/amyfeldman/2020/03/19/talking-with-the-italian-engineers-who-3d-printed-respirator-parts-for-hospitals-with-coronavirus-patients-for-free/>

²⁹<https://www.theverge.com/2020/3/17/21184308/coronavirus-italy-medical-3d-print-valves-treatments>

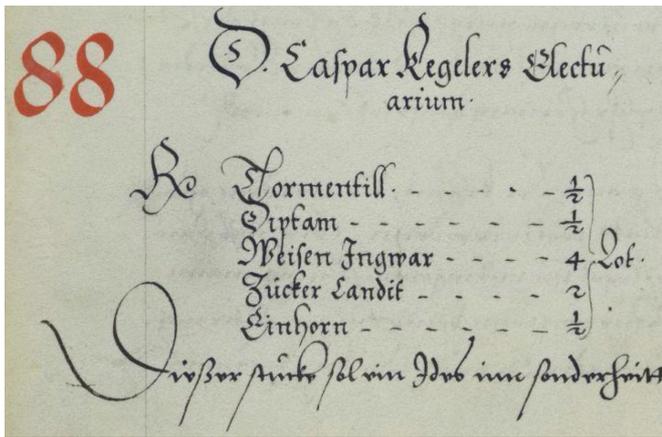


Figure 8 – Pharmacopoeia claiming to have the recipe of Kegler’s Electuary (Arzneibuch SLUB Mscr.Dresd.App.2975, 1550-1586, 3v).

On the other hand, Kegler’s open recipes being copied and adapted in subsequent manuscripts show us that knowledge grows as it is shared. I think the past has a lot to reveal about the question of proprietary knowledge. By looking at how societies dealt with knowledge being “private property”, we can inform the decisions we make today. Who benefited from private knowledge in the past? What were the consequences of private knowledge to those societies? How tragedies and emergencies affected how knowledge was treated? Posing these questions to the past can illuminate the paths we are taking for the future marked by the pandemic. Kegler and other examples from history show us that humans are resourceful, and even the hardest of times can be the grounds for important discoveries. It is up to us to not let our knowledge be forgotten.

Privacy, Corona, and the Padlock

by NATALIE PATRICIA KÖRNER

These are extraordinary times to reflect on privacy, as the corona virus has sent us into isolation. Worldwide, millions of people are struggling with a privacy that was not a choice: lockdowns, stay-at-home orders, quarantines, curfews and isolation are a new public reality that has put privacy issues under strain. In this blog entry, I will reflect on the effect of Covid-19 on privacy a volatile concept that is hard to define or visualize and therefore difficult protect.

Privacy denotes that experience which withdraws from the eyes, the ears, the hands and the judgement of others. Privacy also withdraws from definition and visualization. As a complex, multilayered and shifting concept,

³⁰Cesare Ripa, *Iconologia ovvero Descrizione di diverse Imagini cavate dall’antichità et di propria inventione*, Roma, appresso Lepido Facij, 1603.
³¹(Warren and Brandeis, 1890, p. 193).
³²At the time of writing, Italy alone charged 40 000 of the 60 million curfewed inhabitants with lockdown violations. See for example: Lorenzo Tondo, “Italy Charges More than 40,000 People with Violating Lockdown,” *The Guardian*, March 18, 2020, sec. World news, <https://www.theguardian.com/world/2020/mar/18/italy-charges-more-than-40000-people-violating-lockdown-coronavirus>.

it resists being pinned down, be it verbally or visually. In stark contrast to this inherent ambiguity, privacy is usually visualized with a padlock in the media. A google image search and more precisely, a stock photo data bank search for “privacy” results mostly in padlock related images. Figure 1 shows how (digital) privacy is often pictured with a variation of a padlock that is composed of “0” or “1” symbols, in reference to the binary digits (bits) underlying all digital information. Photos, as opposed to renderings, often feature simple metal padlocks the kind you can buy or borrow at public libraries or swimming pools for your locker.



Figure 9 – Fig. 1: Shutterstock stock footage for “privacy”.

If we read stock images as modern-day emblems– and the Shutterstock or Getty websites as a modern-day interpretation of Cesare Ripa’s (ca. 1555-1622) famous emblem book *Iconologia*–then the visual communication of privacy is linked to the archetypical padlock.³⁰ This choice of an icon that is tied to binaries, such as open or closed, mine or not mine, accessible or inaccessible, inside or outside, is somewhat surprising, because privacy relies precisely on all the nuances that lie between these kinds of opposing extremes.

Instead of privacy, the padlock evokes confinement two states that have become strange bedfellows during the current corona crisis, which is dominated by headlines related to lockdowns. Private homes are taking on a new meaning during this pandemic: rather than places of refuge for our “right to be let alone”³¹ they are now standing in for office space, day cares, schools, gyms, restaurants, cafés, etc. Most importantly, they are places of confinement: The home is now the only place where millions of citizens globally are allowed to be.³²

Relating to the context of both privacy and corona, the padlock played a ghastly role in a past pandemic. During

the devastating bout of bubonic plague in 1665 in London (75000 plague deaths in London that year), the home as prison was a dreadful reality. Robinson Crusoe author Daniel Defoe devotes a significant portion of his account of the plague in *A Journal of the Plague Year* (1719), to those who were locked into their homes because of the disease. For example, the narrator remembers the following anecdote:

“

*At another house, ... a whole family was shut up and locked in because the maid-servant was taken sick. ... [S]o the door was marked with a red cross, a padlock on the outside, ... and a watchman set to keep the door, according to public order.*³³

”

– Daniel Defoe

The family was thus doomed to infection: locked in, to death, at home. Some such prisoners escaped by distracting or even killing their guard, and by fleeing through back doors, back alleys and neighbors' gardens. The narrator is empathetic “as the people shut up or imprisoned so were guilty of no crime, only shut up because miserable.”³⁴

While in 1665 the looming danger of a closed padlock and terminal confinement in private terrified the public, today, the privacy padlocks are opened to monitor and contain the virus: Amidst the deeply troubling accounts of exponentially increasing death tolls, overwhelmed hospitals, a collapsing global economy and ever-tightening lockdown rules, there is little room for coverage about privacy infringements.³⁵ Yet these transgressions are the side effects of global collaborations between cellphone companies, social media corporations, public transport providers and governments. In many countries, anonymized cellphone metadata is currently helping governments to monitor citizen movement.³⁶ For example, in France and in Germany this metadata is used to assess curfew and social distancing adherence. Spain, South Korea, China, and Taiwan have launched apps to track Covid-19 cases and to provide their citizens with information on whether they have come into close contact with known carriers.³⁷ In these instances, private data

³³A *Journal of the Plague Year*, by Daniel Defoe.

³⁴Ibid.

³⁵See for example: “Commission Tells Carriers to Hand over Mobile Data in Coronavirus Fight”, POLITICO, March 23, 2020, <https://www.politico.eu/article/european-commission-mobile-phone-data-thierry-breton-coronavirus-covid19>.

³⁶During a public health emergency, GDPR (Europe's General Data Protection Regulation) changes. See for example “Coronavirus Adds an Extra Layer of Challenge to Collection and Handling of Health Data Under the GDPR”, CPO Magazine, March 23, 2020, <https://www.cpomagazine.com/data-protection/coronavirus-adds-an-extra-layer-of-challenge-to-collection-and-handling-of-health-data-under-the-gdpr/>.

³⁷For a collection of instances of data infringement in response to Covid19 see “Tracking the Global Response to Covid19”, Privacy International, accessed March 22, 2020, <https://privacyinternational.org/examples/tracking-global-response-covid-19>.

³⁸David M. Halbfinger, Isabel Kershner, and Ronen Bergman, “To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data,” The New York Times, March 16, 2020, sec. World, <https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html>.

³⁹Ibid.

becomes public as individuals' health status and personal movements are revealed.

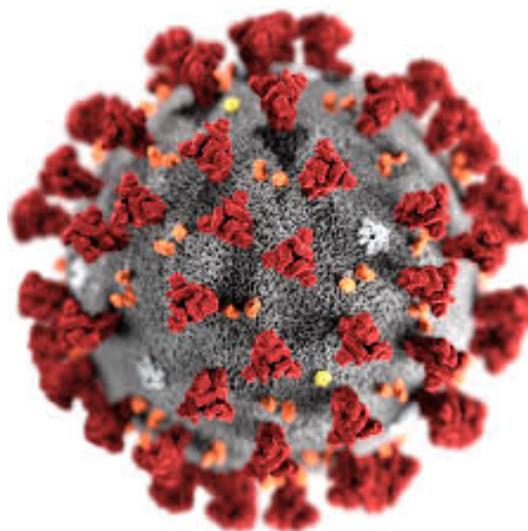


Figure 10 – Typical corona stock footage. This image is for example used by the Danish police to visualize Covid-19.

Some of the extraordinary efforts, that are only legal during “states of emergency”, have brought to light previously undisclosed data hoarding practices. For example, Covid-19 responses have revealed to the Israeli public that since 2002, Shin Bet, the country's Internal Security Agency, has been collecting cellphone metadata. This includes subscriber identity, the identities of call recipients and initiators, account payments and geolocation information.³⁸ So far, Shin Bet had “never disclosed details about what information it collects, how that data is safeguarded, whether or when any of it is destroyed or deleted, who has access to it and under what conditions, or how it is used.”³⁹ Now this data trove has come into the limelight, because Prime Minister Benjamin Netanyahu authorized Shin Bet to use the data to identify and inform citizens who were in close contact with known virus carriers.

The virus has turned private data the geolocation and the health of individual citizens into a public concern, as individuals now depend on society to act on their behalf. This attitude resonates with a Hong Kong-based technology lawyer's explanation of the use of private data for China's “close contact app”: “data is not seen

as something to be locked down, it's something that can be used.”⁴⁰ Also outside China, the accepted use of private data in a public health emergency point to a shift in perception: Governments or corporations, usually seen as inappropriately gathering and using private data on citizens and consumers, are now the ones who can safeguard individuals by appropriating private data and imposing protective measures on the population.⁴¹ In 1985, sociologist Barrington Moore Jr. described the reason for this type of fluidity about the preservation or privacy in psychological terms:

“*The desire for privacy, in the sense of protection or escape from other human beings, emerges when an individual becomes subject to social obligations that that individual cannot meet or does not want to meet. On the other hand, this desire for privacy can evaporate if the person develops a feeling of dependence on the people who are the source of the onerous obligations.*”⁴²

– Barrington Moore Jr.

While the corona crisis has created a (temporary) shift in the perception of privacy and data politics, it has also brought privacy and solitude, usually a desirable quality enjoyed only rarely, into an uneasy excess. Much media coverage has been devoted to the loneliness caused by prolonged solitary stays at home in lockdown. But beyond seclusion, there is a more drastic implication to a privacy: Without other people and a public life, meaninglessness quickly prevails. In the confining privacy of our homes, even if it is experienced with family members, we suddenly feel that deprivation inherent in privacy, that is at odds with the usual positive connotations of privacy as human right. Hannah Arendt reminds us that during the Greek and Roman antiquity, before Christian ideals of interiority came to the fore, privacy was on par with privation: “the absence of others” was a total deficit.⁴³ A private life was a life that could never amount to anything concrete. In private, the human being could not fully appear. She explains that

“*everything that appears in public can be seen and heard by everybody and has the widest possible publicity. For us, appearance something that is being seen and heard by others as well as by ourselves constitutes reality. Compared with the reality which comes from being seen and heard, even the greatest forces of intimate*

lifethe passions of the heart, the thoughts of the mind, the delights of the senses lead an uncertain, shadowy kind of existence unless and until they are transformed, deprivatized and deindividualized, as it were, into a shape to fit them for public appearance. [] The presence of others who see what we see and hear what we hear assures us of the reality of the world and ourselves.”⁴⁴

”

– Hannah Arendt

Can we understand the usage of anonymized data for corona curbing measures as a way of bringing “deprivatized and deindividualized” private actions out of their “shadowy” existence into meaningful and useful public reality? The virus, which spreads beyond all thresholds that demarcate private and public life, disrupts not only everything that forms part of our public lives work, entertainment, educational and health institutions, parliaments, etc. it also reconfigures previously unquestionable privacy needs. Although an open padlock might be more appropriate, the corona virus is visualized as a sphere surrounded by spikes. The visuals vary in color and in detail: a few resemble massage balls, some feature furry spikes, others sprout small clusters of suction cups. A Covid-19 virus closeup image tells us nothing about exponential contagion rates, death tolls, respirator shortages, inflatable temporary hospitals, closed borders in a borderless Europe, indefinitely staying at home, cancelled weddings and postponed funerals. Thinking with Arendt, this image remains as unreal as the data produced by a life spent completely in private.



Figure 11 – The author enhanced a Shutterstock photo used for visualizing digital privacy: The privacy padlock is unlocked by an incoming stream of coronavirus renditions to release a steady flow of digital data.

⁴⁰“China Launches Coronavirus ‘close Contact’ App,” BBC News, February 11, 2020, sec. Technology, <https://www.bbc.com/news/technology-51439401>.

⁴¹For more, see “The Value and Ethics of Using Phone Data to Monitor Covid-19,” Wired, accessed March 25, 2020, <https://www.wired.com/story/value-ethics-using-phone-data-monitor-covid-19/>.

⁴²Barrington Moore Jr., “Privacy,” *Society* 35, no. 2 (February 1998): 28799.

⁴³Hannah Arendt, *The Human Condition*, 2nd ed. (Chicago and London: The University of Chicago Press, 1958), 58.

⁴⁴*Ibid.*, 50.

Covid-19 then has a double effect in relation to our private lives: First, it confines many of us to the private realm of our homes which are now subject to a pre-capitalist multiplicity of activities and the eyes of our co-workers and friends through cameras and screens. Second, as the widespread, virus-caused “state of emergency” has affected the management of private data, citizens seem relatively willing to trade the ownership of their private data for the greater good especially because this data is now immediately and non-commercially useful in unprecedented ways. Temporarily, our public lives are lived from home and our private data is treated as belonging to society at large.

In Dafoe’s account of the London plague, public authorities could lock in citizens into their private homes turning houses into jails. Households could also lock themselves in, turning private property into fortresses. Today, private data is unlocked for public health. And private homes are unlocked to cater for a variety of functions, far beyond private leisure and inhabitation. Dafoe’s capitulation on the desolate imprisoning of plague-ridden households rings true also for today’s unlocking of private matters under governments in states of emergency: “But it was authorized by a law, it had the public good in view as the end chiefly aimed at, and all the private injuries that were done by the putting it in execution must be put to the account of the public benefit.” The current unusual situation of quarantine and movement monitoring once again draws attention to privacy as an ever-shifting construct, that continuously requires close contextualization and care.

Public Morality or Privacy?

by PAOLO ASTORRI

The Coronavirus crisis offers many points of reflection about privacy. One major issue is represented by the increasing governmental powers of surveillance. Arguing that surveillance will prevent the spread of the novel Coronavirus (COVID 19) governments are starting to use apps, drones, and other forms of technology that erode the citizen’s right to privacy.⁴⁵

It is not a novelty that technology is accused of going against the right to privacy. Ten years ago the founder of Facebook already stated that privacy is no longer a social norm. But now governments can use technology

to control the movements of citizens.⁴⁶ At the moment, apps and similar instruments seem to be restricted to health needs and time-limited. But what happens if governments choose to use them permanently and for other needs? For example, the police might determine whether the author of a crime was actually on the crime-scene. Public authorities might be able to know where we are and use this information in a trial (e.g. to sanction violations of the lockdown).

What happens if a piece of information about our “private” life becomes public? What happens if public authorities use this information in a civil or criminal process?

These questions about the boundaries between public and private were, albeit in a different way, also discussed in the medieval and early modern period. Judges might have had to decide whether to use information obtained outside of the trial, without the observance of processual rules, to decide a case. For example, suppose that Titius has claimed that Caius owed him a large sum of money by virtue of a contract concluded in Paris. The judge knows for sure that Caius was not in Paris at that time. The evidence against Caius is therefore false. But is the judge allowed to use this information?

Strictly speaking, processual rules did not allow that. Judges were only allowed to use evidence introduced by the parties. But judges were both legally and morally responsible for pronouncing the right decision. They were not only demanded to comply with processual rules, but also to obey their conscience. They answered for their acts before God. The salvation of the soul was a deep concern and a wrong decision could send the judge’s soul to hell.⁴⁷ The dilemma at hand, then, was whether the judge should base his decision on evidence or conscience.

The most influential Catholic theologian, Thomas Aquinas (1225-1274) famously affirmed that the judge exercises a public function and for this reason should only use his knowledge as a public person, not what he knows as a private person. Procedural order must have rigid limits and what the judge knows privately, outside of the trial, must not be used. Aquinas distinguished divine judgment (God knows the truth) from human judgments, which are regulated by processual rules and aim to processual truth.⁴⁸ Following the path charted by Aquinas, the Spanish Catholic jurist and theologian Diego de Covarrubias y Leyva (1512-1577) stated that a judge could lawfully pronounce a sentence on the exclusive basis of the evidence, even if this was against what he knew privately.⁴⁹

⁴⁵<https://www.wsj.com/articles/coronavirus-paves-way-for-new-age-of-digital-surveillance-11586963028>.

⁴⁶<https://theconversation.com/digital-surveillance-can-help-bring-the-coronavirus-pandemic-under-control-but-also-threatens-privacy-135151>.

⁴⁷James Q. Whitman, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial* (Yale University Press, 2008); Wim Decock, “The Judge’s Conscience and the Protection of the Criminal Defendant: Moral Safeguards against Judicial Arbitrariness” in Georges Martyn and others (eds.), *From the Judge’s arbitrium to the Legality Principle* (Duncker & Humblot, 2013), 69-94.

⁴⁸Thomas Aquinas, *Summa theologiae*, IIaIIae, q. 67, a. 2.

⁴⁹Judit Bellér, “De insontibus non condemnantis. Conflitti di coscienza del giudice nella giurisprudenza tardo-medievale” (1991) XXI, n.2, *Materiali per una storia della cultura giuridica*, 299-300. Diego de Covarrubias y Leyva, *Variarum ex iure pontificio regio, et caesareo resolutionum* (Venetiis, 1565), lib. 1, 7-10.



Figure 12 – Oldendorp. From Jean-Jacques Boissard, *Bibliotheca chalcographica*

The great Lutheran jurist Johann Oldendorp (1486-1567) argued instead that the judge should avoid a lie.⁵⁰ Saying something that differs from what we know is a lie. If we know that someone is innocent, we have to act accordingly. Aquinas separated a conscience formed through a man's personal knowledge from a conscience formed according to public judgment.⁵¹ Oldendorp responded that the judge cannot have a double conscience. Conscience cannot be divided. A judge should draw on his conscience. Along the same lines, the Reformed theologian Markus Friederich Vendelin (1584-1652) affirmed that nobody is obliged to condemn an innocent or acquit a guilty publicly or privately (*innocentem damnare et nocentem absolvere privatim vel publice, nemo tenetur*).⁵² What the judge knows in private should correspond to his public decision.

Early modern theologians and jurists also brought Pontius Pilate into this debate. Pilate knew that the high priests had handed Christ over to him out of jealousy. Should he have used this (private) information and acquitted Christ? According to the famous Wittenberg theologian, Friederich Balduin (1575-1627), Pilate knew that the high priests' accusations were false and that he had condemned an innocent to death.⁵³ Some years later, Johann Steller (1641?), a jurist from Jena, affirmed instead that Pilate should be excused because he was acting as a magistrate and therefore had to follow the accu-

sations of the high priests..⁵⁴

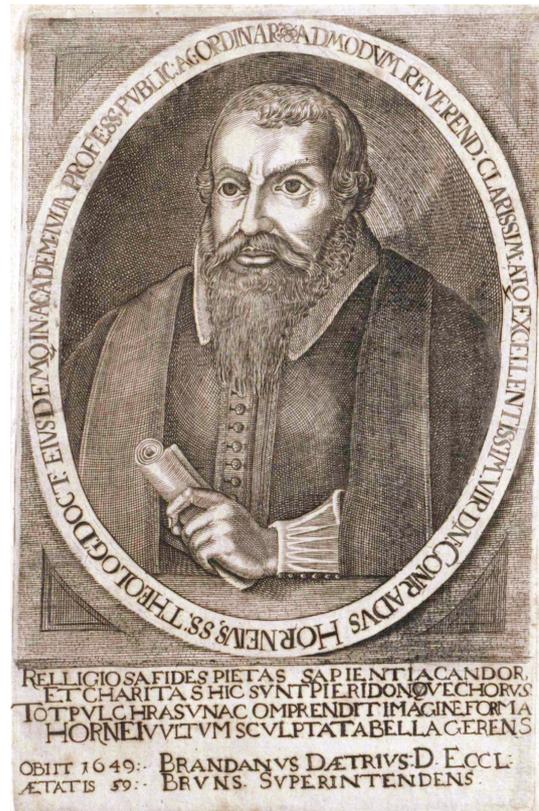


Figure 13 – Konrad Horneius (1590-1649)

Conscience or evidence? The Helmstedt Lutheran theologian, Conrad Horneius (1590-1649) observed that the judge who ignores what he knows privately can be a liar and condemn an innocent to death. On the other hand, however, considering the life of a private man in a judgment could destroy processual order and lead to the dissolution of the state.⁵⁵ To Horneius, judicial powers should be regulated by processual rules that forbid judicial arbitrariness. These rules must have limits that safeguard private life.

Early modern scholars continued to debate this issue without providing a definitive answer. Nonetheless, their contribution can help us to reflect on the possible outcomes of the Coronavirus crisis. Overwhelming judiciary powers might sound morally promising: they might be instrumental in avoiding an unjust sentence or help to convict a criminal that otherwise would not be punished. But they can also lead to a devastating invasion of privacy. Which aspect should be prioritized? The moral necessity to pursue truth or the defense of our privacy?

Public authorities are starting to use apps that control our movements in order to prevent the spread of the

⁵⁰Johannes Oldendorp, *De iure et aequitate disputatio forensis* (Francofurti, 1611), 137138.

⁵¹Thomas Aquinas, *Summa theologiae*, IIaIIae, q. 67, a. 2.

⁵²Markus Friederich Vendelin, *Philosophia moralis*, (Hardervici, 1654), 685.

⁵³Friederich Balduin, *Tractatus de casibus conscientiae* (Wittenbergae, 1628), 1174.

⁵⁴Johann Steller, *Defensus Pontius Pilatus* (Dresdae, 1674), tertium caput nn. 92100.

⁵⁵Konrad Horneius, *Philosophiae moralis sive civilis doctrinae de moribus libri IV* (Francofurti, 1633), 629.

novel Coronavirus. Through these apps, authorities are able to know about our location. Should this information become public or should it remain private? Should the law grant public authorities the right to use this information in a trial?

Our privacy is proportional to the powers the public authorities have to control us. An increase in their powers means a decrease in our liberty. By admitting these apps as legal means of proof, the states will build extensive surveillance systems. They will collect and use our geolo-

cation data. On the other hand, the restriction on our liberty might also have positive effects. Digital surveillance might facilitate the repression of crimes and help judicial authorities to avoid the conviction of an innocent.

There is a tension between privacy and public morality. Privacy might prevent the public authority from pursuing the common good (in this case the public health). As such, it might be seen as a selfish right. But, then, why is it so important for us?