mean data relations that enact or amplify forms of legally relevant social inequality. Thus, what might make Anna's data collection potentially wrongful is not (only) if Apricot collects it without her consent or uses it to manipulate Anna into buying something she does not need. Datafying Anna's pregnancy—or rather, the population of potentially pregnant people—is potentially wrongful if it rematerializes or amplifies the means by which pregnancy status is used to "do" pregnancy discrimination or contribute to systematic impoverishment and marginalization of women or other pregnant people. In other words, where data relations place people in positions of material or social subordination.

Rebecca Hamilton

Thank you Salomé. As you noted, the digital information economy vacuums up enormous quantities of data. How might we reconcile the potential conflict between data regulation that seeks to protect the privacy rights of individuals with the fact that violations of privacy go beyond the individual to the societal level? And thinking transnationally, what about the fact that societal level harms are likely to be viewed differently by different societies? If an individual approach to privacy protection is insufficient, what is the way forward? Asaf, with those questions in mind, let me turn to you next.

Remarks by Asaf Lubin[2]

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I want to thank the family of Detlev Vagts for supporting the now annual Detlev F. Vagts Roundtable on Transnational Law and thank Rebecca for convening all of us. I also want to thank Salomé for producing such thought-provoking scholarship that indeed deserves our every praise, and I only hope my remarks will do it justice.

In opening my short statement, I thought it appropriate to revisit some of Professor Vagts' own work. In his 1979 co-authored *AJIL* article, "The Balance of Power in International Law: A History of an Idea,"[3] which Detlev actually wrote with his father Alfred, the two gentleman claimed the following: "International Lawyers' capacity to devise better and stronger institutions for keeping the peace will depend on their capacity to understand power structures and the unintended, but often inevitable, consequences that can flow from moves that exert pressure on one point in an interrelated system."[4]

I want to propose a reading of Salomé's writing, in particular her groundbreaking *Yale Law Journal* article "A Relational Theory of Data Governance,"[5] which echoes the instructions left by Professor Vagts and his father Alfred. When Salomé writes about horizontal relations in the digital economy, what she is actually doing is uncovering the power structures that undergird our contemporary datasphere. She masterfully shows how datafication may lead to unfair wealth inequality that at once violates distributive ideals of justice and indexes, reproduces, and amplifies forms of social hierarchy.

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[3] Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AJIL 555 (1979).

[4] *Id.* at 580.

[5] Viljoen, *supra* note 1.

She does that by rejecting the now dominant individualistic approach to data governance and replacing it with what she calls a "population-level" analysis. By merely changing the lens, our point of view, from the individual data subjects to the society they form part of, Salomé reveals to us, international lawyers, new previously undiscovered sets of pressure points along the complex and interrelated system that makes up the datasphere. This also leads her to her normative claim, that we need to redesign our institutions so to appreciate data not as an individual medium but as a democratic medium which is a medium better suited, in her view, to embody broader societal interests.

But the point of my remarks is not only to show you that Salomé's work neatly embodies Professor Vagts' thinking. Instead, let me use the same article he wrote with his father to provoke Salomé to write a follow-up piece about the transnational implications of her proposals. After all, Detlev and Alfred's paper was about the balance of power and its place in law. It was about the extent to which international law incorporates the "constraints, expectations, and understandings" that countries face in "a multipolar worldwide arena."[6]

The move from individual digital rights to communitarian digital rights that Salomé proposes, while seemingly persuasive, comes with a set of transnational risks that I encourage Salomé to further develop in future works. After all, group identity and population-level identity is to some extent arbitrary, it is culturally specific and it is time-bound. Unlike the universal understanding of individual rights, collective rights have a murky place in customary international law. Indeed, the 1948 Universal Declaration of Human Rights, which is the framework of principles underpinning the modern international human rights system, made no explicit references to collective rights.

One reason for this is because a collective rights approach introduces a set of transnational collective headaches. Just try to apply Salomé proposals to the global order. If we are to prioritize the collective over the individual, we are potentially inviting a rejection of a universal minimum baseline of data subject rights and exchanging it for a far riskier competition between societies, all equally entitled on the horizontal plain to insist that their alternative data governance model is legitimate and should indeed control. Salomé assumes that the prescriptive implications from her relational theory of data governance is that democratic data institutions should naturally emerge. But just consider the expansive data localization policies, informational censorship frameworks, and government data access regimes, in countries like India, China, Russia, Nigeria, Indonesia, and, as we heard yesterday at the Assembly, the Philippines. These regimes are ones that treat data not as a democratic medium, but rather as an autocratic or at best anocratic medium. Are these data governance regimes not ringing the alarm bells for what could happen if we somehow prioritized collective, relative, and culturally specific approaches to data governance over an individualistic baseline? And what would be the implications on markets and the broader balance of power, if we incentivized further competition between jurisdictionally encroaching societally motivated data-hungry sovereigns and princes.

Also, let me push back against the assumption that Salomé makes in her paper that "individualist claims and remedies" can never address, population-level societal inequalities and grievances.[7] The United States and European Commission's Transatlantic Data Privacy Framework, announced on March 25, 2022[8] and implemented through Executive Order on October 7, 2022,[9] is the perfect example of that. Indeed the Executive Order proves that individual right claims and remedies can in

[6] Vagts & Vagts, *supra* note 3, at 579.

[7] Viljoen, *supra* note 1, at 584.

[8] White House Press Release, Fact Sheet: United States and European Commission Announce Trans-Atlantic Data Privacy Framework (Mar. 25, 2022), *at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-trans-atlantic-data-privacy-framework.

[9] White House Press Release, Fact Sheet: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework (Oct. 7, 2022), *at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework.

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fact generate larger societal effects. While the Executive Order is far from perfect,[10] it remains one of the most comprehensive U.S. foreign intelligence overhauls in history; certainly the first to be promulgated solely in response to external pressures and market demands that stem from such individual right claims. What Schrems was capable of doing, using the General Data Protection Regulation (GDPR) as his shield, should not be downplayed. He singlehandedly took down the biggest signals intelligence powerhouse in the world and forced it to reform its laws for the benefit of communities it did not previously cater to.

Look, I get it. We are all disenchanted with individual human rights law. We recognize that individual rights as a governing model comes with many, many flaws. Indeed, it is a myth to think there is some universal right to informational privacy or data protection, and the practice of states in the datasphere demonstrates just how frustrating the tension is between the mythical law in the books and the law in action. I also share Salomé's insightful concern about the collective harms that are generated by contemporary data markets. I just do not think we should be quick to reject the myth altogether as serving no purpose in this broader fight. Instead, I would invite Salomé to think more about transnational frameworks whereby we supplement our existing individual model with new collective approaches, without favoring one over the other. Such complementarity I think offers a better prescriptive solution to the current challenges we face in the datasphere.

Rebecca Hamilton

Thank you Asaf. Finally, Kirk, let us move to your presentation. No matter where in the world data regulation is taking place, there is an inevitable debate between taking a "sectoral approach" versus an "omnibus approach." To date, the United States seems to favor sectoral approaches. The European Union seems to be favoring omnibus approaches. Let us hear some concrete examples of the pros and cons of each approach. And is this sectoral versus omnibus the only way to think about this? What other options are out there?

Remarks by Kirk J. Nahra[11]

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U.S. privacy law often is criticized in comparison with international privacy regimes, particularly the European Union's General Data Protection Regulation. Parts of this criticism are fair, but, at the same time, U.S. privacy law provides meaningful protections in a substantial set of circumstances, and, on occasion, provides either "better" privacy protection than the GDPR or presents a more targeted approach to balancing appropriate privacy protections with other important public policy concerns. This balancing often is not a question of "consumers vs. industry" (although it certainly can be). In some situations—particularly in the health care settings that I will focus on—it often is a question of providing an appropriate balance between privacy interests and other policy interests that benefit both industry and consumers.

[10] *See, e.g.*, Elizabeth Goiter, *The Biden Administration's SIGINT Executive Order, Part I: New Rules Leave Door Open to Bulk Surveillance*, Just Security (Oct. 31, 2022), *at* https://www.justsecurity.org/83845/the-biden-administrations-sigint-executive-order-part-i-new-rules-leave-door-open-to-bulk-surveillance; Ashley Gorski, *The Biden Administration's SIGINT Executive Order, Part II: Redress for Unlawful Surveillance*, Just Security (Nov. 4, 2022), https://www.justsecurity.org/83927/the-biden-administrations-sigint-executive-order-part-ii.

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