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A Proposal to the
Office of the Privacy Commissioner of Canada's
Contribution Program

GUILT BY ASSOCIATION:

Canada, Identity Cards and the Myth of Privacy

by

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Guilt by Association

This is a proposal to the Office of the Privacy Commissioner of Canada (OPC) to carry out a thorough investigation of the Card Cartel. Lyon & Bennett write that "a 'Card Cartel' involving the state, corporations and technical standards appears to be involved in the production of new identity card systems." (p. 4, 2008) As of late 2010, the government of Canada has yet to adopt an identity card system for its citizens, but as documented by Clement *et al.*, multiple initiatives at instituting a National ID Card have already been attempted in Canada. (p. 233, 2008) By applying scholarly frameworks to the identity card issue, we can help people to understand why they should be concerned about the Card Cartel. The OPC's mission is "to protect and promote the privacy rights of individuals." ("Mandate", 2008) It is important, then, that we work on opening up the public conception of privacy. Most citizens feel that they have nothing to hide and, therefore, should not be concerned about what is being done with their data. But, as Solove notes, "the problem with the nothing to hide argument is the underlying assumption that privacy is about hiding bad things." (p. 764, 2007) We need to help Canadian citizens understand that privacy is not just about hiding bad things.

As a National ID Card has yet to be established in Canada, we will concentrate our analysis on its *de facto* substitute – the driver's license. In Canada, an extreme case of function creep has allowed the driver's license to become used for much more than identifying a person's ability to drive a vehicle. Whenever a person's age needs to be verified, such as in a nightclub or liquor store, the driver's license is generally used. An anecdote by da Costa *et al.* nicely captures the new reality of this function creep:

Guilt by Association

"The woman hands over her license to the clerk, but what happens next surprises her. On this day, it is not business as usual. Instead of looking for her date of birth, the clerk swipes the driver's license through a small machine under the cash register. The young woman does a double take; had she handed over her credit card by mistake? When she takes her card back, she studies it closely. Yes, indeed, it is her driver's license, but for the first time she notices a magnetic stripe on its back side, one very similar to that of her credit card." (p. 70, 2006)

This new situation is problematic because citizens are left in the dark about what is actually being done with their data by governments and corporations; it perpetuates a power imbalance. After the information on that driver's license is fed into the liquor store's database, chances are very good that it will also be fed into another database, and another database, and another. How is one to understand the possible effects of all this rampant aggregation? Solove writes, "aggregation means that by combining pieces of information we might not care to conceal, the government can glean information about us that we might really want to conceal." (p. 766) Another important point is that of exclusion, which is "the problem caused when people are prevented from having knowledge about how their information is being used, as well as barred from being able to access and correct errors in that data." *(ibid.)* So certain consumers, for instance, will be offered "the benefits of tailored products" (Crang & Graham, p. 797, 2007) while others, for unknown reasons, will be left by the wayside. The example of 10-year-old homeschool student Alistair Butt somehow being placed on Canada's no-fly list nicely

illustrates the sometimes absurd results of exclusion. (Canwest, 2007) It has been theorized that no-fly lists are assembled using data aggregated from various, seemingly benign sources. (British, n.d.) So one's transactions at a mall or even grocery store may very well have an impact on whether or not they are placed on a no-fly list.

But the obfuscations so effectively created by the Card Cartel are not only of concern for commercial and security reasons. They are also of concern for a much deeper reason – identity construction. The aggregated information used by these companies allows them to hegemonically construct subject positions without ever directly communicating with the subjects themselves. Claritas Inc., for example, is a company that has built a fortune by combining different types of data and selling the aggregated information to advertisers. Based on this data, Claritas may decide to classify one's neighbourhood as being comprised of "Metropolitan Strugglers" or "Educated Urbanites." (Parker *et al.*, p. 912, 2007) Companies will then start advertising to these neighborhoods in ways that reinforce and reify the previously abstract subject positions. Social networking sites, with their targeted advertising, are particularly good at identity construction. "Tickle.com uses the information they collect to target girls with personalized advertisements," Steeves writes. "Jenna took [an online test and] was told that she values her image, so [Tickle] recommended that she visit e-diets, one of their advertisers, to prep her body for success." (p. 175, 2006) The Tickle.com example highlights how, using aggregated data, companies are able to effectively "steer the emergence of the self to facilitate a business agenda." (p. 186) But the reach of

hegemonic identity construction is not merely confined to the realm of those who are considered to be impressionable, such as children and young people. Social groups give rise to an individual's "unity of self," *(ibid.)* and so effectively embedding consumer messages into them will always have powerful effects. Campbell, for instance, writes about how advertisers on the gay culture websites PlanetOut.com and Gay.com were able to essentially dictate to its users what constitutes "gay man-ness." (p. 678, 2005) Campbell writes, "a social consequence of this target marketing model is that it reduces gays and lesbians to a singular axis of identity, disregarding the ways in which sexuality intersects with race, ethnicity, class, gender and religion." *(ibid.)* For the sake of belonging to a community, this highly simplified, singular axis of identity tends to be embraced by the infinitely more complex individuals who have joined the website. Similarly, people by and large passively allow their driver's license to be swiped through card reader after card reader and, afterwards, fail to question why they have been classified in particular ways. The classification, however, is often an extreme simplification that fails to address the true diversity underlying the subject(s).

This becomes problematic when the constant simplification of a subject position is allowed to perpetuate indefinitely. The point is not that these classifications are inaccurate, it is that they are gross simplifications. So while the people in these neighbourhoods may very well be accurately classified as "Metropolitan Strugglers" or "Educated Urbanites," those classifications, no doubt, only capture one very superficial dimension of each neighbourhood. By allowing this type of classification to perpetuate

itself indefinitely and without protest, a negative precedent is set. Companies, then, will

continually look upon each neighbourhood through that one very narrow lens and,

thereby, keep delivering products and services to satisfy that particular type of need. But

suppose a greater need resides in one of these neighbourhoods, a need that is not

being addressed by a government agency or private company. The remedy would not

be to enhance privacy but, rather, to enhance communication with the public and private

sectors. That way, companies would be given the opportunity to offer products and

services that are of greater use to the community. Enhanced communication may be

possible with those fortunate enough to be living in "live zones" where the informational

infrastructure is already in place, but for those living in "dead zones" with little technical

mobility, communication will be particularly difficult. (Burrows & Ellison, p. 324, 2004)

But the core issue here is not even the lack of technical infrastructure in certain

communities; rather, it is the widespread sense of hopelessness that allows citizens to

passively accept that the Card Cartel, and nobody else, makes these classificatory

decisions. But it does not, necessarily, have to be this way. Citizens need to think

beyond the apparent triviality of allowing one's driver's license to be swiped. They need

to realize that such a practice might not be immediately consequential, but in the

aggregate, it can become very meaningful, and potentially harmful to not only the

individual citizen but to the collective. Rather than bluntly advocating privacy and

releasing less and less data, however, a more sophisticated solution would be to

facilitate the creation of alternative worlds for new modes of meaning-making.

Guilt by Association

Butler offers a useful idea on how to facilitate the creation of alternative worlds – by openly acknowledging the artificiality of the subject position. Butler wants to emphasize that gender does not precede the actions that create it, (p. 318, 1998) and this concept can be related to identity card issues. Butler uses the concept of drag as a tool for uncovering artificial constructs. She writes, "the professionalization of gayness requires a certain performance and production of a 'self' which is the *constituted effect* of a discourse that nevertheless claims to represent that self as a prior truth." (p. 310) Similarly, the Card Cartel claims to represent the prior truth of its subjects. The corporations and government agencies that issue these identity cards tend not to openly acknowledge that they are actively constructing peoples' identities through their processes. In turn, people tend not to realize that their identities are in fact being shaped by identity card processes.

As Kelly Gates writes in her paper about the U.S. Real ID Act, "no amount of technological development can transform national identity from a mediated process to an already accomplished fact. Unfortunately, this will not stop the ID enthusiasts from trying." (p. 231, 2008) In the world of identity card politics, she emphasizes, individual identity is not something that exists *a priori* but is "produced in the act of documenting it." *(ibid.)* For Butler, drag explicitly reveals that "there is no 'proper' gender, a gender proper to one sex rather than the other, which is in some senses that sex's cultural property. Where the notion of the 'proper' operates, it is always and only *improperly* installed as the effect of a compulsory system." (p. 311) Similarly, it would likely also be

fruitful to devise a technique for exposing the artificial nature of identity card constructs. Such a technique would enable more people to realize that identity card processes are not to be taken lightly and in fact have the power to constitute and reify identities. Once more people begin to understand that identity cards are not merely passive instruments that reflect preexisting truths but are, in fact, active tools that artificially shape identities, the Card Cartel may finally begin to face some resistance.

Chauncey writes about how men in New York's gay community in the 1930s and '40s had devised "subcultural codes to make contact and communicate with one another throughout the city." (p. 189, 1994) This is one example of a technique that enables alternative modes of meaning-making, as it allows two people to essentially see the same occurrence, but read it differently. So the act of merely asking a man for the time had become known to the gay community as no less than a subtle solicitation for sex. Chauncey writes,

> "The man who made such a request could rest assured that anyone unaware of its coded significance would simply respond to it straightforwardly, since men often asked men for such things, while a man interested in responding to its hidden meaning would start a conversation." *(ibid.)*

The development of such local forms of meaning-making to counteract the hegemonic impositions of the Card Cartel would likely be fruitful. But, admittedly, the group affected by identity card politics is much different than the group affected by gay discrimination in the 1930s and '40s. The gay community wanted to keep their

alternative modes of meaning-making secret and confined. It was dangerous, even, to allow this alternative world to break outside the boundaries of the gay community. But keeping these local constructions hidden away from the Card Cartel is not likely to do any good. Once these alternative worlds have been created, they need to be explicitly publicized and advertised. Keeping such protestations hidden will only allow for the perpetuation of the Card Cartel's hegemony. But once it becomes widely known that a community thinks of itself in ways counter to the capitalistic discourse imposed upon it by the Card Cartel, then institutions will have the opportunity to potentially support that community in more agreeable ways. So how can these alternative worlds be effectively pushed into the public eye? For this, a number of scholars recommend the creation of artistic works. Let us now turn to an examination of their ideas.

McGrath writes, "the desirability of data representation is undermined by the nightmare of the good citizen that he or she will suddenly and unknowingly be made other." (p. 161, 2004) So while upstanding citizens like Alistair Butt hope that electronic databases will portray them favourably such that they can board an airplane, they can never be sure as to whether or not they have suddenly entered the realm of the excluded "other." The Card Cartel is essentially structured upon the mysterious and opaque infrastructure of electronic databases. McGrath considers this opaque infrastructure to be representative of what he calls "perceived space," as opposed to the more immediate, physical realm of "lived space." (p. 11) McGrath's project, essentially, is to work on counteracting the permanence of perceived space. He sees perceived

space as having the potential to instill a kind of false consciousness in a populace if it is not approached with sufficient skepticism and criticality. One means of publicizing this skepticism and facilitating the creation of alternative conceptions of space is through artistic projects. Mona Hatoum's *Corps étranger* installation, for instance, creates "a new space, a space previously unimagined, and in an impossible relationship to hegemonic space ... Hatoum's piece penetrates the boundary of this not-to-be-seen [space] and explores what happens when it becomes seen." (p. 144) When the Card Cartel, then, decides that one particular group of people are to be classified as "Metropolitan Strugglers," alternative modes of meaning-making have to be devised if that dominant, hegemonic perception is to be challenged. Artistic projects can, often, have the power to provide this kind of counteraction. Crang & Graham discuss a variety of innovative new media projects, such as Murmure, that attempt to "show how pervasive technologies do not have to pacify us as consumers but can allow us to claim and mark our territory." (p. 807) Such projects tend to argue that "the most valuable and relevant content about local places for local people is not going to come from media companies, but directly from their peers and neighbours." (p. 808) This sentiment can easily be related to the Card Cartel. Proactive citizens could create spaces to counteract the Card Cartel's hegemonic practices by devising similarly powerful artistic statements.

Foucault writes, "the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power." (p. 201, 1977) He continues, "whenever one is dealing with a multiplicity of

individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used." (p. 205) The panoptic schema has no doubt been applied very effectively by the Card Cartel. Much like the panoptic guard who may or may not be there, citizens never know when they might be subjected to the exclusionary gaze of the Card Cartel. Citizens therefore internalize this panoptic gaze, monitoring themselves to ensure that they appear as "normal" as possible. Otherwise, if they do not appear normal enough to the Card Cartel, they may be subjected to a form of "guilt by association, within which 'risky' identities are designated." (Amoore, p. 26, 2008) It has been surmised, for instance, that ten-year-old Alistair Butt was placed on the no-fly list merely because he shares a name with someone who is genuinely considered to be a threat. When questioning the airline, the boy's parents were told to change his name. (Canwest, 2007) The boy, then, was essentially deemed guilty by the Card Cartel merely due to a superficial association with a notorious name.

"The ID card system exposes the individual to the pressures of normalization and conforming to the state power in order to be desirable citizens." (Ogasawara, p. 108, 2008) The panoptic schema, then, engenders a kind of self-surveillance in its citizens that compels them to strive to be normal. Moreover, Mehmood asserts that "whenever members of a nation-state try to 'see' its population through lenses that are made to 'register' only 'normal' and/or 'abnormal/deviant' populations, more often than not, people respond by becoming more 'normal.'" (p. 118, 2008) By attempting to conform to what the Card Cartel considers to be normal, citizens are passively accepting a

hegemonic imposition. This can prove to be problematic for a number of groups within society. Let us now turn to an examination of how conforming to hegemonic discourse in this way can have highly detrimental effects on a marginalized group.

In order for Alistair Butt to take advantage of the privileges of normality, i.e. being allowed to fly, he would, essentially, have to abdicate the pleasures of an outlier position. That is, he would have to change his name, which might very well carry deep, familial significance for him. One's birth name is usually not something that can be treated with triviality and easily tossed away, as the airline recommends. To provide a similar illustration, Berlant & Warner write about the dangers that many in the New York City gay community faced as they attempted to conform to the regulations imposed upon them by rezoning:

> "Queers [were] forced to find each other in untrafficked areas because of the combined pressures of propriety, stigma, the closet, and state regulation such as laws against public lewdness. The same areas [were] known to gay-bashers and other criminals. And they are disregarded by police." (p. 551, 1998)

By attempting to conform to this commercialized discourse that disallowed any gay-related businesses "within five hundred feet of a house of worship, school, or day-care center," *(ibid.)* the gay community put itself in harm's way. Previously, the gay men who frequented these businesses had used them "to map a commonly accessible world, to construct the architecture of queer space in a homophobic environment, and to cultivate a collective ethos of safer sex." *(ibid.)* Those who conform to the pressures of

normalization imposed upon them by the Card Cartel might find themselves in a position of similarly debilitating loss. Alistair Butt, for instance, would have to lose his name, which constitutes a core part of his identity and might very well carry much significance for him and his family. But how can we confront the hegemonic without being subsumed by it? In the case of the queer project, Berlant & Warner recommend supporting forms of personal living that are "public in the sense of accessible, available to memory, and sustained through collective activity." (p. 562) Again, we can see here that the scholarly recommendation is not to simply enhance privacy for the affected group. Rather, it is to enable the creation of an alternative world that is public and therefore visible.

But we must also realize that there is a point at which one can become rendered "too visible," and therefore the visibility project should be approached cautiously. Nurses, for instance, designed a classification system called the Nursing Intervention Classification (NIC). They hoped that this system would "sensitize the entire health care sphere to the contribution nurses make and to the well being of patients." (Bowker & Star, p. 252, 1999) However, the nurses soon realized that this sort of system could potentially have some very negative consequences for them. For instance, the NIC "might be used against nursing professionalization in some computerization and surveillance scenarios." *(ibid.)* Hospital administrators could use the NIC to curtail costs, allocate resources, and potentially downsize nurses. Similarly, the subjects of the Card Cartel might still want to conceal certain aspects of themselves while trying to become visible in more agreeable ways. So while enhanced privacy should not be the ultimate

objective in the struggle against the Card Cartel, pure visibility is not necessarily a sufficient outcome either. It seems clear, then, that an important consideration for subjects in their project to counteract the hegemonic impositions of the Card Cartel will be how to determine what should be kept private in the creation of visibility.

By losing sight of informational norms of appropriateness and informational norms of distribution, (Nissenbaum, p. 138, 2004) we are in danger of perpetuating a power imbalance that will, doubtlessly, benefit the Card Cartel and disadvantage the public at large. Nissenbaum holds the view that "privacy is contextual integrity; that in any given situation, a complaint that privacy has been violated is sound in the event that one or the other types of the informational norms has been transgressed." *(ibid.)* Norms of appropriateness can be likened to the aforementioned situation in which a cashier at a liquor store asks for the buyer's driver's license and proceeds to swipe it through a card reader. In that case, the generally accepted norm is that it is appropriate for the seller to demand knowledge of the buyer's date of birth. However, by swiping the entire card through a reader, the seller may very well also know the buyer's full name, home address, driver's license number, height, sex and any other information that happens to be on that card. But, unfortunately, most buyers have lost sight of these norms of appropriateness and, when requested, simply allow their card to be swiped without questioning the practice. While this is no doubt a problem, the issue becomes multiplied greatly when one considers that the informational norms of distribution have also been disregarded. Nissenbaum defines this set of norms as the "movement, or transfer of

information from one party to another or others." (p. 140) One can only wonder about where that driver's license information actually goes after being swiped through the card reader. Is it merely retained in the liquor store's internal database and not transferred elsewhere? If it is transferred elsewhere, then which companies have the information and how is it being used by them? These are the currently unanswerable questions of the information age.

Informational norms of distribution, then, have not only been disregarded, they have not even been defined in the first place. What becomes of norms of appropriateness once they become lost in the complexity of the Card Cartel, with its myriad electronic databases and data aggregation schemes? Are the norms that applied in the context of the liquor store lost, and therefore invalidated, in the confusion of the Card Cartel? What are the norms of distribution that should apply to this newly aggregated information? Nobody, much less the lady who just wants to get hammered on Smirnoff or the cashier who just wants to earn a paycheck, seems to know how to answer these questions. The distribution simply *happens*, and questions are not asked. The only norms, therefore, that might emerge out of this unfortunate combination of apathy and opaqueness are entrenched, embedded norms that are not necessarily determined in any way by the public. Rather, these norms of distribution are determined by the commercial interests of the Card Cartel.

Solove provides a clear explanation of why this problem of secondary use - "data collected for one purpose being used for an unrelated purpose without people's

consent" (p. 770) - is problematic for society. He writes,

> "In *Dyer v Northwest Airlines Corp.*, data was disseminated in a way that ignored airline passengers' interests in the data despite promises made in the privacy policy. Even if the passengers were unaware of the policy, there is a social value in ensuring that companies adhere to established limits on the way they use personal information. Otherwise, any stated limits become meaningless, and companies have discretion to boundlessly use data. Such a state of affairs can leave nearly all consumers in a powerless position." *(ibid.)*

By ignoring norms of appropriateness and failing to clearly define norms of distribution, then, a power imbalance is perpetuated that creates a very real societal harm. It should be realized that the entrenched norms of distribution that the Card Cartel might successfully apply around these transaction situations are not necessarily just or right or in the public interest. To remedy this hegemonic imposition, Nissenbaum proposes "that entrenched norms be compared with novel practices that breach or threaten them, and judged worth preserving, or not, in terms of how well they promote not only values and goods internal to a given context, but also fundamental social, political, and moral values." (p. 146) It is entirely likely that what the Card Cartel is doing with much of this aggregated personal information does not correspond very well with "fundamental social, political, and moral values." If the OPC, other government agencies, and NGOs were to work together in calling attention to this issue and demanding more transparency from the Card Cartel, new informational norms of

distribution could potentially be constructed that are not so one-sided and serve the

public interest in a more substantial way. It may be determined by the public that norms

of appropriateness established in the context of a liquor store should hold across all

contexts. On the other hand, many of the technological solutions offered by the Card

Cartel, such as geographic information systems, can potentially be very useful for the

public and so some flexibility across contexts will likely be reasonable. But the public

should be given a greater opportunity to determine the extent of this flexibility, rather

than leaving the definition entirely up to the Card Cartel.

Solove says that "privacy is not reducible to a singular essence; it is a plurality of

different things that do not share one element in common but that nevertheless bear a

resemblance to each other." (p. 756) Likewise, Nissenbaum urges us to consider the

particular context when thinking about privacy rather than trying to reduce the concept

to a singular essence. (p. 119) Understanding, then, that one should be concerned

about privacy even if one has nothing to hide is an important step to take. But the idea

that privacy concerns will be ameliorated by upholding the classic definition of privacy

as "the right to be let alone" (Solove, p. 755) is, essentially, a myth. Merely attempting to

hide ourselves away from the gaze of surveillance space is not only impractical in the

21st century, it is also unproductive. Instead of constantly trying to be "let alone," then,

we should direct our energies toward constructing alternative modes of meaning-making

that are public, not private. Just as the aforementioned artistic projects created new

kinds of space in public, citizens must concentrate on finding ways in which the

surveillance techniques of the Card Cartel can be refashioned, redefined, and repurposed to be used in a more productive and egalitarian manner. As McGrath states, we need to start "thinking about agency among the subjects of surveillance society ... [but] agency is not likely to be one of limitation. It is not likely to grow out of calls for an enhanced right to privacy, but rather involves a consciousness of and engagement in the prosthetic structures of surveillance." (p. 97) By actively working on the construction of new forms of spatial representation, citizens may finally be able to provoke the Card Cartel into considering collective interests at least as seriously as commercial ones.

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