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PRIVACY AND AUTONOMY: ON SOME MISCONCEPTIONS CONCERNING THE POLITICAL DIMENSIONS OF PRIVACY

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ABSTRACT. One of the most influential views in privacy scholarship is that privacy protects individual autonomy. On the early liberal view, the exercise of autonomy requires detachment from social and political life and privacy facilitates it. This view of privacy still informs current legal and political practice. As this view of privacy presupposes a tension between privacy and society, it is responsible for the underrating of privacy in legal and political practice. Over the last decades, liberal reflection on autonomy has shifted from the early liberal understanding of autonomy as calling for detachment from social life to the idea of autonomy as socially embedded. This development has brought about a corresponding adjustment in the liberal concept of privacy: privacy has come to be seen as a social rather than merely an individual interest. The social turn in thinking about privacy has gone a long way to change the problematic image of privacy in legal and political practice. It has not gone far enough, however, to draw conclusions regarding the political relevance of privacy. I argue that we should understand autonomy as politically embedded. Revised along these lines, privacy has a political value: when we claim privacy, we do not make a claim to withdraw from political life, but rather make a claim to protect certain forms of political engagement.

When it comes to addressing issues of privacy protection, public discourse as well as policy-making and legal practice lean on the traditional liberal view of privacy. This view of privacy, first articulated in the works of, by now classic, privacy scholars such as Alan Westin and Stanley Benn,¹ has its source in specifically liberal ideas defending individual rights against the claims of the collectivity as such.² On this

¹ Westin (1967) and Benn (1984).

² Galison and Minow (2005, p. 278) and Cohen (2013, pp. 1904–1907).

view, privacy is seen as a shield protecting individual autonomy.³ Privacy protects the individual interest in autonomy because it carves out a space around individuals in which they can direct their lives as they see fit irrespective of social and political pressures: informational privacy restricts access to an individual's personal data by setting limits to the acquisition, possession and spread of information about her; decisional privacy removes personal commitments and choices from interference by the state and society at large.

This view of privacy presupposes a tension between privacy and society. For this reason, the association of privacy with individual autonomy has resulted in the underrating of privacy in policy-making and legal practice. As Kirsty Hughes observes in her analysis of the jurisprudence of the European Court of Human Rights, the association of privacy with individual autonomy has done poor service to privacy in actual legal practice.⁴ In cases in which privacy conflicts with other values such as public security or freedom of speech, privacy understood as the protection of individual autonomy has little political pull: whereas public security or freedom of speech are perceived by the court as essential interests of a democratic society, an autonomy-based interest in privacy denotes a merely personal interest similar to other individual interests lacking of political relevance such as 'physical and psychological integrity' and 'personal development'.⁵ In effect, protecting individuals' privacy against political interests in freedom of speech or security seems to be a luxury that society can ill afford. Similar observations drive Daniel Solove's remarks:

The interests aligned against privacy—for example, efficient consumer transaction, free speech, or security—are often defined in terms of their larger social value. In this way, protecting the privacy of the individual seems extravagant when weighed against interests of society as a whole.⁶

Commenting on recent public debates on privacy protection in Great Britain, Annabelle Lever observed that insisting on protecting individual interests in privacy against freedom of speech is even seen

³ Privacy has also been associated with other individual interests: dignity, material well-being, reputation, self-development, bodily integrity, capacity to pursue intimate relations (for overview: Solove, 2008).

⁴ Hughes (2015).

⁵ Hughes (2015, pp. 232, 237, 241).

⁶ Solove (2008, p. 89).

as a threat to democratic society.⁷ In a nutshell, the classic liberal understanding of privacy has given privacy a bad name. As Julie Cohen put it:

Privacy has an image problem. Over and over again, regardless of the forum in which it is debated, it is cast as old-fashioned at best and downright harmful at worst – anti-progressive, overly costly and inimical to the welfare of the body politic. (...). Privacy's bad reputation has deep roots in privacy theory (...) which is infused with the commitments of liberal political theory, first and foremost of which is a conception of the self as inherently autonomous.⁸

In this paper, I explore the image problem haunting privacy in political and legal practice and contend that liberal discourse on privacy has sufficient resources to address it. Since Westin's and Benn's writings, liberal reflection on autonomy has undergone important changes, which, in turn, forced modifications to the concept of privacy. This conceptual development, if taken far enough, can pave the way to a new understanding of privacy capable of changing the problematic image of privacy prevailing in current legal and political practice. In particular, I argue that it enables us to conceive an autonomy-based interest in privacy as a political rather than merely an individual interest.

Although the body of work exploring various dimensions of privacy is considerable, a systematic reflection on what is politically at stake in protecting the private sphere in which individuals exercise their autonomy has been rare. We can regularly encounter remarks linking privacy to various instruments by means of which political relations are pursued,⁹ but they fail to sufficiently explore the nexus between political relations, privacy, and individual autonomy. My argument intends to push the liberal privacy discourse forward in this respect.

I proceed as follows. I briefly recall the early liberal concept of autonomy that informed the classic liberal privacy discourse such as explicated in the views of Westin and Benn. I indicate the way the liberal concept of autonomy has since been revised. Of particular importance here is the liberal shift from the early liberal understanding of autonomy as calling for detachment from social life to the idea of autonomy as socially embedded. This shift in the liberal

⁷ Lever (2015, p. 162).

⁸ Cohen (2013, pp. 1904, 1906–1907).

⁹ See Sect. II.

concept of autonomy has brought about a corresponding adjustment in the liberal concept of privacy. Privacy has come to be seen as a social rather than merely an individual interest, a view that resonates in the recent turn in thinking about the social dimensions of privacy. Scholars endorsing this perspective have done important work to demonstrate that privacy stands on an equal footing with social interests in, for example, public security or freedom of speech.¹⁰ One reason why privacy still struggles with an image problem is that these developments have not been taken far enough to draw conclusions regarding the political relevance of privacy. To fill this gap in liberal privacy discourse, I extend the argument from the social embedding of autonomy to the context of political life, arguing that autonomy is not only socially embedded, but also politically embedded. Just as the social embedding of autonomy defies the image of privacy as deprived of social relevance, so, I submit, the political embedding of autonomy defies the image of privacy as deprived of political relevance.

I. AUTONOMY AND PRIVACY IN LIBERAL DISCOURSE: FROM SOCIAL DETACHMENT TO SOCIAL EMBEDDING

The liberal self that privacy protects is defined in terms of its capacity for autonomy. In the classic form of this view, autonomy is presented as negative liberty: an absence of external social and political constraints on behavior. Privacy protects individuals' autonomy so understood because it facilitates their detachment from social roles, relations, practices and institutions in which they live and act. Conceptualized as 'a right not to participate in collective life',¹¹ privacy preserves a space around individuals that shelters them from societal and political pressures. We find this early liberal view of privacy in Alan Westin's classic definition of privacy: 'Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society'.¹² Another articulation of this idea is Clinton Rossiter's:

¹⁰ See essays included in Roessler and Mokrosinska (2015).

¹¹ Emerson (1970, p. 549).

¹² Westin (1967, p. 7).

Privacy (...) can be understood as an attempt to secure autonomy (...), if necessary in defiance of all the pressures of modern society. (...). It seeks to build an unbreachable wall (...) against the entire world. The free man is a private man, the man who (...) feels no overriding compulsion to share everything (...) with others.¹³

The view of privacy attached to the early liberal view of autonomy as social detachment pits individual interest in autonomy against social and political interests. So understood, privacy has no social or political value. On the one hand, the benefits that privacy confers on individuals appear to be socially and politically irrelevant as they are bestowed on individuals disengaged from social and political life. On the other hand, privacy may have a social and political disvalue as it makes it possible for individuals to withhold information relevant to the pursuit of those benefits we traditionally associate with society, such as law enforcement, public security and implementation of social justice.¹⁴

Whereas this early liberal view of privacy still informs legal and political practice, it has been contested in liberal discourse. The liberal idea of autonomy as detachment from social life clashed with developments in the social sciences which emphasize the social nature of the self.¹⁵ As these empirical findings have come to inform philosophical reflection, the attack on the early liberal concept of the autonomous self has been mounted from several theoretical angles. Thus communitarianism pointed out that individuals' identities contain an essential reference to their social position and identification with others *viz.* gender, race, culture, religion, national identity, citizenship.¹⁶ Feminism, criticizing the overly individualistic character of the early liberal model of an autonomous self, emphasized the formative power of personal and social relationships.¹⁷ The thrust of these arguments has been the following: given that (1) autonomy is the ability to direct one's actions from within values and commitments central to one's identity, and (2) people's identities are constituted by a variety of social roles, relations and practices then (3) the exercise of autonomy cannot demand detachment from social

¹³ Rossiter (1958) in: Westin (1967, p. 34).

¹⁴ Communitarians endorse this line of critique when they argue that privacy allows escaping the obligations of social life (Etzioni, 1999).

¹⁵ Cohen (2012, p. 110).

¹⁶ Sandel (1982).

¹⁷ MacKenzie and Stoljar (2000).

life. Detachment from those social elements central to one's identity would alienate one from one's core commitments and, hence, undermine one's autonomy.

In response to these arguments, liberals have dropped the idea that autonomy and social life are antithetical. They have come to emphasize the social and interpersonal dynamics that shape the exercise of autonomy and acknowledge that social roles, relations and practices such as those related to gender, race, religion or national identity are a condition of individual autonomy.¹⁸ These developments in the liberal discussion of autonomy have resonated in the liberal discourse on privacy. Privacy scholars have acknowledged the need for revising the concept of privacy along the lines of the revised concept of autonomy.¹⁹ Recognizing that autonomy presupposes patterns of social interdependence, they have come to argue that privacy protects autonomy by protecting the integrity of those social patterns. On this view, privacy does not secure detachment from social life, but rather protects social engagements that make autonomy possible.

Julie Cohen's and Beate Roessler's works are examples of recent attempts at reconceptualizing the classic liberal concept of privacy.²⁰ Cohen distances herself from the early liberal view of the autonomous self. 'The liberal self who is the subject of privacy theory and privacy policy-making', she says, 'does not exist'.²¹ Drawing on Irwin Altman, Cohen argues that the self emerges through processes of social interaction.²² As the autonomy of such a socially constructed self cannot be conceived separately from the social contexts forming

¹⁸ See, for example, Kymlicka (1989), for a redefinition of autonomy in response to such challenges.

¹⁹ See, for example, Schoeman (1992), Regan (1995), Inness (1992), Allen (1999), Roessler (2005), Steeves (2009), Cohen (2012, 2013), Roessler and Mokrosinska (2013) and DeCew (2015).

²⁰ Cohen (2013), Roessler (2005) and Roessler and Mokrosinska (2013). An early revision of the classic liberal view of privacy is present in the work of Schoeman (1992). Schoeman argues that autonomy is an opportunity to participate in various social groups. Autonomy is threatened if the individual's membership in one group is threatened by social pressure applied on her by virtue of her membership in another group. Privacy protects autonomy by ensuring that social control exercised by social groups remains compartmentalized, i.e., kept internal to the particular association exerting it. By ensuring that an individual's membership in one association is not threatened by social pressure applied on her by virtue of her membership in another, privacy empowers the individual to live by values rooted in social settings of her own choosing.

²¹ Cohen (2013, p. 1905).

²² Altman (1975).

it, privacy cannot protect autonomy by separating the self from society:

Within contemporary social theory, the separation between self and society (...) does not exist. From that perspective, a robust theory of privacy requires an understanding of the process by which selfhood comes into being and is negotiated through contexts and time.²³

Roessler's discussion of privacy provides an example of how the traditional liberal concept of privacy can be adjusted to accommodate the idea of the social embedding of autonomy. In Roessler's view, family and intimate relations are among social practices that are formative of an autonomous self. From this perspective, saying that privacy protects autonomy is to say that privacy also protects the practices in which the agent exercises her autonomy. Hence, besides privacy of *individuals*, we should also speak of privacy of *relations*; in the particular context of Roessler's discussion, the object of privacy is not only the individual but also the family and intimate relationships in which an individual develops and exercises her autonomy.²⁴ In further discussion of the link between social relations and privacy, Roessler and Mokrosinska, drawing on the account of relational privacy developed by Fried and Rachels,²⁵ argue that privacy not only protects but also constitutes social relations that are a condition of autonomy:

Social roles and practices create and provide a social framework in which the exercise of autonomy becomes meaningful. Privacy, by regulating social roles, practices and relations, facilitates the social conditions of the meaningful exercise of autonomy. (...). [P]rivacy [is] also necessary for the constitution (...) of social roles, relationships and (...) social practices [that make the exercise of autonomy possible].²⁶

Cohen's and Roessler's views, while significantly different, move away from the early liberal view of privacy, according to which privacy protects an individual's autonomy by securing individual detachment from social life. What their arguments make clear is that if individual autonomy is socially embedded, then it makes no sense to say that privacy protects autonomy by isolating the individual from her social contexts. We should rather say that privacy protects

²³ Cohen (2012, p. 114).

²⁴ Roessler (2005, pp. 133–134).

²⁵ Fried (1968) and Rachels (1975).

²⁶ Roessler and Mokrosinska (2013, pp. 779, 774).

autonomy by protecting the social contexts which make the exercise of individual autonomy meaningful.²⁷

Current legal and political debates on privacy lag behind these developments in liberal privacy discourse. This is unfortunate given that the concept of privacy revised along these lines answers the concerns regarding the social irrelevance of privacy voiced in those debates. Whereas the early liberal view of privacy implied a tension between individual privacy and social life, no such tension is involved in the view of privacy revised along the lines of the modified liberal concept of autonomy. First, to the extent that privacy protects social practices that are the condition of autonomy, it is not the case that privacy and social life are antithetical. Second, it is not the case that privacy is deprived of social relevance. In protecting social practices, privacy facilitates forms of social life. And if, as Roessler and Mokrosinska argue, privacy not merely facilitates but also constitutes social contexts, then the role of privacy for society is not only of an instrumental, but also of a constitutive character.²⁸ In both cases, privacy has social value:

[p]rotecting individual privacy means not only that the rights of individuals are protected, but also that different forms of social interaction are safeguarded. Besides its value for individuals, privacy also has an irreducibly social value.²⁹

So far I have sketched the development in the liberal reflection on autonomy and explored its impact on the liberal discourse on privacy. Privacy, understood along the lines of the revised idea of individual autonomy, protects the social engagements of individuals rather than disengages them from social life. In the next section, I want to explore the link between privacy and autonomy in the political domain. My claim is that autonomy presupposes patterns of political interdependence and that privacy protects autonomy by protecting the corresponding political practices.

²⁷ There is important work in recent privacy scholarship that emphasizes the social dimension of privacy but does not make use of the socialized concept of autonomy. Instead, it focuses on, for example, the relevance of context, spaces, bodies and relationships in explaining the social value of privacy, cf. Rachels (1975), Regan (1995), Inness (1992), Allen (1999), Nissenbaum (2010), Cohen (2013) and Steeves (2009). As my argument in this essay focuses on the link between autonomy and privacy, I will not discuss them here.

²⁸ Mokrosinska (2014, pp. 371–372).

²⁹ Roessler and Mokrosinska (2013, p. 772).

II. TOWARD A POLITICAL ACCOUNT OF PRIVACY

Until relatively recently the role of privacy in political life has been rather neglected by privacy scholars. In particular, the social turn in thinking about privacy as constitutive of social conditions of autonomy has not yet found its political counterpart in privacy discourse.

Most existing defenses of privacy in politics emphasize that privacy arrangements facilitate various instruments by means of which political relations are pursued. For example, according to Thomas Nagel, privacy norms take disruptive issues off the political agenda, which helps secure the peaceful character of the political decision-making process.³⁰ Ferdinand Schoeman has pointed to the role privacy plays in maintaining the integrity of political associations.³¹ Many have followed Annabelle Lever's claim regarding the role of privacy in facilitating political participation of socially vulnerable groups, who, due to a historically or socially disadvantaged position, are uncomfortable with the existing forms of political expression.³² A number of scholars have argued that the exercise of privacy creates conditions for the enhancement of independent political judgment and in this way contributes to the formation of citizens' political preferences and reasoned political discourse.³³ In this context, Helen Nissenbaum has reminded us that privacy is built into the voting process in the form of secret ballots. Privacy serves the purpose of voting in that it forestalls attempts to influence the electoral choice of voters and ensures that voters' electoral choices reflect their genuine preferences.³⁴

According to these arguments, what is politically at stake in protecting the private domain in which individuals exercise their autonomy is the efficiency of political participation and decision-making processes. Yet, as defenses of the political role of privacy, these instrumental arguments are weak. First, the political role they ascribe to privacy is contingent upon the historical and cultural conditions of specific societies, such as the existence of socially dis-

³⁰ Nagel (1998).

³¹ Schoeman (1992).

³² Lever (2005, p. 15) and Roberts (2015, pp. 339–340).

³³ Gavison (1980), Simitis (1987, p. 734), Cohen (2000, pp. 1426–1427), Regan (1995, p. 225), Lever (2005, p. 15) and Roberts (2015, p. 339).

³⁴ Nissenbaum (2010, pp. 176–177).

advantaged groups or the practices of voter manipulation. Such features are characteristic of some societies but not others and, thus, it is not clear whether privacy plays this instrumental role in all liberal-democratic societies. Moreover, the political status they ascribe to privacy is provisional. Privacy does not have a political status on its own but only as a way of facilitating forms of political participation and decision-making. If other and better ways to secure these aims were found, no political reasons for privacy protection would be needed.

Given the contingent and provisional status these arguments ascribe to privacy in political life, the question arises whether a more solid ground for the political value of privacy can be found. Few privacy scholars have moved beyond the instrumental approach to privacy in politics and argued that privacy is implicated in the fundamental commitments of a democratic state. One notable example is Annabelle Lever. According to her, what is politically at stake in protecting privacy is democratic equality.³⁵ Especially relevant in the context of my argument is a recent defense of the political value of privacy proposed by Andrew Roberts.³⁶ According to his account of privacy, what is politically at stake in privacy protection is political autonomy viz. citizens' self-governance. Roberts places his argument in the republican tradition. He argues that privacy protects autonomy understood as freedom from dominating power. One form of dominating power, he argues, is possessing information about persons. From this perspective, privacy is a condition of autonomy because it enables individuals to control what information about them can and cannot be accessed and collected. Without such control, self-governance is impossible. Roberts also offers an interesting argument to the effect that privacy is an intrinsically political norm. On his view, people can exercise control over access to information about them, in other words, they can be autonomous, only if they 'themselves define the boundary between the public and the private spheres'.³⁷ A collective determination of the boundary between the private and the public is predicated upon people's participation in political decision-making processes that settle the norms governing access to information among them. Hence, privacy

³⁵ Lever (2012, 2015).

³⁶ Roberts (2015).

³⁷ Roberts (2015, p. 337).

is an intrinsically political norm in that its scope and content is the product of political processes that engage citizens.³⁸

Just as Lever, Roberts makes a strong case for the political role of privacy by arguing that privacy is of an intrinsic rather than merely of an instrumental value for political life. Below I argue that a liberal account of privacy can provide us with an equally strong case for the political value of privacy. Extending the liberal argument that privacy is constitutive of *social* autonomy, I argue that privacy is constitutive of *political* autonomy of citizens in a liberal democracy. I situate my argument in political liberalism. Following political liberals, I argue that, (1) autonomy is anchored in the practice of public justification, which I explain below. In previous work, I have argued that, (2) privacy is implicated in the concept of public justification.³⁹ Drawing on these two points, I argue that privacy preserves the conditions of individual autonomy by preserving the integrity of political practices governed by public justification.

III. POLITICAL LIBERALISM AND THE POLITICAL EMBEDDING OF AUTONOMY

Autonomy means self-governance: people are autonomous if they live their lives according to their own reasons. To be autonomous in the political domain means to be subject only to such policies and laws that we can endorse as our own. Under conditions of pluralism that characterize modern societies, however, the possibility of autonomy so understood is not self-evident. People in our societies often disagree about what policies and laws our societies should adopt. If you propose laws and policies that I cannot accept as my own (or vice versa), my autonomy is in danger: if laws are adopted that I cannot endorse as my own, I am not self-governing (or vice versa). Is individual autonomy possible under conditions of plurality and disagreement?

The question of how autonomy is possible under conditions of pluralism and disagreement is the main challenge for political liberals to resolve. They phrase the problem in Kantian terms: disagreement is a moral problem because it undermines the equal moral freedom of individuals. When there are several competing conceptions of the

³⁸ Roberts (2015, p. 337).

³⁹ Mokrosinska (2014).

good in the community, unilateral enforcement by an individual of her favored view is inevitable. However, such a unilateral imposition infringes on the equal freedom of those who hold competing views.⁴⁰ If we want to make sure that people live autonomous lives, political liberals argue, we need to organize political life according to the principle of public justification.⁴¹ Public justification requires that whenever we decide what laws and policies to adopt we must appeal to arguments that can be accepted by all: it refers to principles that are neutral between different moral views about the good life that divide citizens. As Charles Larmore puts it, public justification refers to 'principles of association which individuals have reason to affirm together despite deep substantial disagreements setting them apart'.⁴²

Not every personal view of the good life, not every lifestyle, commitment, or action, and not every piece of personal information has a place in the political realm governed by public justification. Some lifestyles and commitments, for example, religious beliefs, concern issues that are objects of irresolvable controversy. Bringing such contentious issues into the spotlight of public attention and judgment would provoke disagreement and, thereby, destroy rather than establish common ground. Exposing information meant to bring such personal commitments to collective attention would have a similar effect. To establish common ground, the material brought under collective attention should allow the people concerned to find principles with which to conduct their lives together and bypass their disagreements. Therefore, the liberal commitment to public justification constrains the material that individuals and groups acting in their political capacity can bring to the attention of others. Firstly, this commitment limits the considerations that individuals might wish to employ in deciding matters of mutual concern (for example, when casting votes in elections or asserting group demands on common resources) to considerations which others could reasonably accept. Secondly, it requires that individuals engaged in the processes of decision-making which concern the organization of their life together refrain from asserting claims in terms that others could not accept. Public justification is, then, a practice of mutual restraint:

⁴⁰ Gaus (1996, pp. 182–184).

⁴¹ Waldron (1993, pp. 57–58) and Rawls (1996).

⁴² Larmore (2003, p. 380).

Free and equal individuals affirm the political principles that constrain them.

By defining the political realm in terms of public justification, political liberals address the danger which the fact of pluralism and disagreement poses to individual autonomy. In requiring public justification for principles governing political life, liberals ensure that only those laws and policies are adopted that can be accepted by all. In ensuring that all are governed by laws that they themselves can endorse, public justification ensures that all are self-governing. In that sense, public justification is a condition of autonomy in the political domain.

I have argued so far that autonomy in the political domain is anchored in the practice of public justification. We can exercise autonomy in the political domain only if we participate in the practice of public justification: only if each of us, in deciding matters of mutual concern, restrains ourselves from appealing to reasons that others cannot accept can each of us remain self-governing. Now I want to return to the question of privacy. I argue below that privacy protects autonomy because it is involved in the practice of self-restraint in public justification. Conceptualizing privacy in terms of public justification presents privacy as an inherently political norm; seeing it as a condition of political autonomy enables us to see it as a political interest. This approach may provide a stronger basis for privacy protection than the traditional liberal view prevailing in current legal and political practice.

IV. PRIVACY: PROTECTING POLITICAL CONDITIONS OF AUTONOMY

Based on the understanding of public justification outlined above, the commitment to public justification in politics rules out certain personal commitments and actions as objects of mutual interference among individuals acting in their political capacity. Similarly, it rules out certain personal information as an object of mutual scrutiny. On pain of endangering politics as common ground, such material, and the corresponding information, should be withheld or, if known, left unacknowledged. In sorting out what material is appropriate or inappropriate for individuals to introduce into the political forum so that each can retain an equal degree of self-governance, public justification sets out rules of concealment and disclosure between

individuals acting in their political capacity. Insofar as this requires that individuals withhold certain personal material, I submit, political association based on public justification involves privacy arrangements. Insofar as these rules prescribe that personal commitments, views of the good life and lifestyle be kept off the political domain and not scrutinized or interfered with, they are decisional privacy arrangements. Insofar as they prescribe that certain personal information be kept off the political domain and not be monitored, they are informational privacy arrangements. In other words, the material that public justification requires us to keep out of each other's faces is private for the purposes of political life. Privacy, understood as mutual restraint on access and self-disclosure, is the flip-side side of public justification.⁴³

V. HOW MUCH PRIVACY DOES POLITICAL AUTONOMY REQUIRE?

I have argued that, (1) public justification is a condition of autonomy in the political domain, and that, (2) privacy is the flip-side of public justification. If we accept these arguments, then we are committed to the conclusion that, (3) privacy, as the flip-side of public justification, is the condition of political autonomy exercised by liberal citizens. What must remain private between individuals in order to ensure that each is self-governing in the liberal political realm?

The scope of privacy needed to ensure that each individual is subject only to such laws that she can accept reflects the scope of the material that public justification relegates off the political realm. In other words, the material that fails public justification identifies the material that should be kept private for the sake of preserving the political autonomy of each. Unlike the traditional view, the realm of privacy so designated is not defined in terms of any substantial concerns, such as home or domestic life; rather, it is constructed out

⁴³ Brettschneider (2007) resorts to the idea of public justification in order to account for the right of privacy. In his view, however, privacy is not a requirement of public justification, but a *prima facie* right that exists prior to political life and, thus, prior to the principle of public justification (2007, p. 75). It is the boundaries of this pre-political right to privacy that are determined in the process of public justification. On my view, privacy is a requirement of public justification. This position makes my account of the political value of privacy stronger than Brettschneider's. First, I claim below that privacy, as the flip-side of public justification, is a condition of liberal legitimacy, the claim that Brettschneider stops short of making. Second, I claim that privacy is both a political duty and a political right whereas Brettschneider (2007, p. 84) is critical about conceiving privacy as a duty. For a yet different account of privacy in terms of public reasons see Cohen (2002, pp. 52–57), who adopts a Habermasian framework.

of reasons that people cannot reasonably accept as governing their life together.

What people can and cannot reasonably accept is a matter of well-known controversy among liberals. However, there is a consensus that one fails public justification if one rejects the aim of pressing one's claims on others in terms of reasons that others could accept. Claims that fail public justification in this way are, in the liberal idiom, unreasonable.⁴⁴ What is unreasonable, then, frames the domain that should be held back from the political forum and privatized. Generically, all views that deny the equal status and freedom of some (groups of) individuals fall into this class. Race and gender discrimination are examples of unreasonable commitments and actions. Incapable of organizing common life, such views should be confined to private quarters. Appealing to such views in political arguments injects material into the political realm that undermines the integrity of the political realm as common ground and violates political autonomy predicated on public justification. The privatization of the unreasonable is a version of the liberal tolerance paradox: just as the commitment to equal freedom commits liberals to tolerate the intolerant as long as their intolerant views are kept off the political realm,⁴⁵ so it requires them to tolerate the unreasonable as long as their unreasonable views are kept off the political realm and do not influence it.

Above I have identified one class of material that fails public justification and should be kept private if people are to exercise autonomy in the political domain. However, failures of public justification are not confined to renouncing the aim of justification, and so the scope of privacy required for the sake of political autonomy is broader than the one sketched so far.

A person may strive to justify her claims to others but fail nonetheless. This is the case when the justification offered appeals to beliefs that others, who adhere to different worldviews, cannot be expected to endorse. For liberals, substantive claims failing public justification in this way should not be invoked in the political decision-making process. Their proper place is the privacy of personal or associational life but not the realm of liberal citizenship. In effect, many substantive beliefs and commitments, important though they

⁴⁴ Rawls (1996, p. 49).

⁴⁵ Rawls (1971, p. 220).

are to people's self-understanding, will be depoliticized and set aside as private issues. Exactly what material is depoliticized and set off as private depends on the model of public justification one endorses.

There are two general approaches to public justification.⁴⁶ In the first approach, public justification is a constraint on the content of reasons to which individuals can appeal in the political domain; it admits only those substantive views upon which all reasonable worldviews could converge.⁴⁷ The substantive views that divide individuals fail the public justification test and should be set aside as private:

When you and I learn that we disagree about one or another dimension of the moral truth, we should say nothing at all about this disagreement and put the moral ideas that divide us off the conversational agenda of the liberal state. In restraining ourselves in this way, we need not lose the chance to talk to one another about our deepest moral disagreements in countless other, more *private* contexts.⁴⁸

On this content-oriented model of public justification, in a society characterized by pluralism and disagreement, religious beliefs are granted the status of privacy: given that they are the subject of disagreement, they fail the public justification test. Appealing to them in political arguments threatens the political autonomy of those who do not share them and injects material into the political realm that undermines the integrity of the political realm as common ground.⁴⁹ Privacy, then, insulates religious beliefs from public exposure, scrutiny, and interference. The same holds for other material about which people, who adhere to different worldviews, can disagree, such as sexual morality.

One qualification is in order. The de-politicization of substantive views about which citizens disagree could be taken to suggest that all disagreement is privatized in liberal politics. This is not the case. What is privatized and relegated off politics is an appeal to reasons that others cannot accept and not all cases of disagreement are of

⁴⁶ Chambers (2010)

⁴⁷ Ackerman (1989).

⁴⁸ Ackerman (1989, p. 16). Emphasis changed.

⁴⁹ Liberals qualify this claim in various ways. For example, Rawls allows comprehensive doctrines about which citizens disagree to enter the political domain provided that, in due course, the policies they support are supported by properly public reasons (Rawls, 1997, pp. 783–787). Audi, who focuses on religious beliefs, allows religious appeals if they are backed up by sufficiently motivating, generally acceptable reasons which he identifies with secular reasons (Audi, 2000, pp. 75–78).

that sort. Now it is possible that people disagree but appeal to mutually acceptable reasons. The disagreement arises here from what Rawls calls the burdens of judgment: due to the complexity of the evidence or the variety of life experiences that bear on judgment, individuals may interpret, apply, and rank reasons differently.⁵⁰ Insofar as individuals formulate their conflicting positions in terms of reasons that all sides can accept, reasonable disagreement properly belongs to the political domain. A classic example is the disagreement about abortion. If pro-life and pro-choice advocates formulated their claims in terms of reasons that their adversaries could not accept, for example, in terms of religious or metaphysical claims about the status of the fetus, the disagreement about abortion, on the logic of political liberalism, would be relegated off the political domain and privatized. Yet, as long as both pro-life and pro-choice advocates formulate their claims in terms of reasons that their adversaries can accept viz. the value of life and the value of freedom respectively, it properly belongs to the political domain.

Whereas the first model of public justification sets a constraint on the content of reasons, the second model sets a constraint on the process of reasoning whereby citizens arrive at substantive political decisions. What material is excluded from the political forum depends on how people engage with each other's arguments and respond to them. As Cristina Lafont, an exponent of this approach, argues, what material is let into or out of the political forum depends on (1) whether objections based on public reasons are advanced against appealing to it in political decision-making processes, and (2) whether there is any convincing way to answer these objections.⁵¹ For example, Lafont argues, citizens can publicly advocate a ban on same-sex marriage on the basis of religious reasons against homosexuality, provided that they address any objections against such a policy based on the political value of equal freedom. Unless next time around they are willing to have their freedom diminished, they must come up with a convincing explanation of how is it that the ban on marriage they propose is an acceptable policy as regards the group of homosexual citizens but not others.⁵² In this procedure-

⁵⁰ Rawls (1996, pp. 54–58).

⁵¹ Lafont (2009, p. 132).

⁵² Lafont (2008).

oriented model of public justification, then, citizens cannot determine in advance what material is and is not capable of justification; that depends on which reasons have survived the scrutiny of public deliberation. Correspondingly, the scope of privacy is not determined in advance either. Thus, appeals to religious beliefs in advocating a ban on same-sex marriage are depoliticized and set off as private only if those citizens advancing religious reasons against homosexuality fail to answer objections that such a policy violates equal freedom. If no objections are raised, or if the objections are answered convincingly, introducing them into the political decision-making process does not endanger others' autonomy and the political rationale for privatizing these issues is absent.

The scope of liberal privacy depends, then, on the model of public justification one endorses. Whereas I have no space to engage in a comprehensive comparative assessment of the two models, I would like to suggest one reason for favoring the procedure-oriented over the content-oriented model of public justification as an anchor of liberal privacy. The reason is that the former better addresses the critiques of privacy in a liberal state launched by feminist scholars.

The feminists have argued that the liberal postulate of neutrality and the duty to refrain from opening political discourse to certain questions and arguments can be used to keep off the political agenda matters that embody and perpetuate existing inequalities. One sphere that liberals traditionally declared off the political domain is the sphere of domestic life; given the disagreements regarding various models of family life, the commitment to public justification seemed to commit liberals to privatizing it. Starting with Catherine MacKinnon's powerful critique, feminists have argued that, by marking this domain as private, liberal privacy serves male power and conceals women's exploitation and abuse.⁵³ The view of privacy I have reconstructed in political liberalism seems to fuel this feminist critique in yet another way: I have argued that the material that counts as private from the perspective of liberal politics is identified by its failure to pass the test of public justification. Given that gender-based discrimination with its denial of the equal status of women

⁵³ MacKinnon (1989, pp. 161–162). The thrust of her critique was that the private domain should be rejected and collapsed into the public realm, eliminated or “exploded” (MacKinnon, 1989, p. 191). Other feminists insisted that the boundaries between the private and the public should be redrawn (Allen, 1988; Roessler, 2005; DeCew, 1997).

cannot pass the public justification test,⁵⁴ it would be relegated off the political domain and classified as private. The feminist could argue that this argument, in granting privacy protection to sexists, is a plea to create a protected haven for sexists so that they discriminate against women without disruption.

My response to these concerns is twofold. First, I argue that liberals are not committed to privatizing the domestic sphere as long as they endorse the procedure-oriented model of public justification. Second, I argue that, independently of the model of public justification they endorse, they are not committed to privatizing the practices of abuse and violence.

With respect to the status of domestic life in a liberal state, the concern is that given the disagreement on the models of family life, the commitment to public justification would commit liberals to privatizing the domestic sphere of life. The privatization of this sphere would conceal and perpetuate its sexist practices of abuse and violence. While this critique applies to the content-oriented model of public justification (though, as I argue below, privatizing domestic life would not imply privatizing the abuse and violence it may happen to involve), it does not apply to the procedure-oriented model of public justification. On this latter model of public justification whether domestic life is privatized depends on (1) whether any views regarding domestic life are advanced in the political forum, (2) whether they meet with objections based on public reasons, and (3) whether these objections are convincingly answered. This political set-up invites feminists to stage in the political forum their critiques of the existing patterns of domestic life and to propose ways to address the wrongs they involve.⁵⁵ If they succeed in providing a public reasons defense of their critique and proposals for reform, not only is the sphere of domestic life not privatized, but the feminist cause to address the wrongs present in the domestic sphere is advanced rather than thwarted.

I have argued, against the feminist critiques, that liberals are not committed to privatizing the sphere of domestic life. I want to argue now that *even if* the domestic sphere were privatized, this would not imply that the abuse and violence it may happen to involve would be

⁵⁴ Rawls (1997, p. 771) and Hartley and Watson (2010, p. 7).

⁵⁵ Brake (2004, pp. 306–309).

privatized too. First, in the spirit of John Stuart Mill's harm principle,⁵⁶ liberals are prepared to allow the state to interfere with the individual's private domain in order to prevent harm that he causes to others. Thus, insofar as adherence to sexist commitments engenders domestic violence, private sexism can become a matter of political concern. Second, recall that liberals ascribe priority to political rights and duties over other social commitments that individuals may have.⁵⁷ Given their priority over other commitments, a violation of political rights cannot be justified in terms of other social commitments. This means that private sexism can become a matter of public concern when it involves violations of others' political rights or leads to discrimination in the political sphere.⁵⁸ In this spirit, Linda McClain points out that the liberal state can intervene to secure women's equal citizenship and basic liberties. She refers to antidiscrimination laws such as the Violence Against Women Act which properly protects women against 'private' violence.⁵⁹

I have argued that the liberal model of political relations involves privacy arrangements. Privacy as the flip-side of public justification is a means to ensure that each individual acting in her political capacity is autonomous, that is, only subject to such laws that she can accept. The scope of privacy that protects political autonomy reflects the model of public justification and I have argued that adopting the procedure-oriented model has advantages over the content-oriented model. Before drawing implications regarding the political status of privacy so understood, two more comments regarding the scope of liberal privacy are in order.

First, the circumstances in which the norms of privacy obtain correspond to the range of application of public justification. On the classic Rawlsian approach, the requirement of public justification is limited to 'constitutional essentials and questions of basic justice'.⁶⁰ Others, like Larmore, claim that the rationale for public justification requires applying public justification to the issues of daily politics. Given that the point of public justification is to legitimize the use of coercion to those subject to it, almost all state action is in need of

⁵⁶ Mill (2003, p. 68).

⁵⁷ Rawls (1996, pp. 30–31), Larmore (1990, pp. 349–351) and Hartley and Watson (2010, p. 20).

⁵⁸ Hartley and Watson (2010, p. 20).

⁵⁹ McClain (1998, p. 110).

⁶⁰ Rawls (1996, 227–230).

public justification, since almost all state action is backed by coercive power.⁶¹ Whereas I cannot discuss this position here, I will endorse it for the remainder of the essay. Adopted for the purposes of my argument, this position implies that the norms of privacy are binding across an equally broad political spectrum.

Second, as with public justification, the norms of liberal privacy do not bind individuals in the non-political sphere of what Rawls calls the 'background culture' of civil society, that is, the culture of 'daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams' and professional groups.⁶² As long as individuals act in civil society, unreasonable and comprehensive personal beliefs failing the public justification test need not be kept private (they may be public with respect to the members of a given group or association who share them). In the non-political domain of civil society, individuals' autonomy is not protected by the political account of privacy I outline in this essay. In that regard, theories of privacy, such as Cohen's or Roessler's, which focus on the domain of social life broadly conceived rather than specifically on its political realm, may apply.

VI. AUTONOMY AND THE POLITICAL VALUE OF PRIVACY

I have said that the undervaluing of privacy in current legal and political practice has its source in the concept of autonomy traditionally associated with privacy. In this essay I have explored the contours of a revised view of privacy that responds to this concern. Placing my argument in the conceptual framework of political liberalism, I have provided an example of how we can amend the concept of autonomy associated with privacy so that we can improve privacy's image in policy-making and legal practice.

The concept of privacy I have developed retains the link between privacy and individual autonomy that is at the core of the classic liberal view of privacy. However, against this classic view of autonomy, I have argued that autonomy does not involve a detachment from political life. To the contrary, autonomy means engagement in political life viz. the practice of public justification. This means that when we claim privacy by way of protecting our

⁶¹ Quong (2013) referring to Larmore (1999).

⁶² Rawls (1996, p. 220).

autonomy, we do not make a claim to withdraw from political life, but rather make a claim to protect certain forms of political engagement. On this argument, unlike on the traditional liberal view of privacy, privacy does not undermine political association, but instead actually facilitates it.

The revised view of privacy calls into question the lower status that current political and legal practice grants to privacy as compared to other values such as public security or freedom of speech. Policy-making and legal practice rest on the assumption that privacy has no political value because it marks an individual interest deprived of political significance or even opposed to interests typically associated with political society. Having argued that privacy is the flip-side of public justification, I have shown this assumption to be unfounded. Given that the practice of public justification is the condition of political autonomy and given that privacy protects the practice of public justification, it is not the case that privacy and political life are antithetical, but just the opposite: privacy has a political function. My argument, of course, does not deny that privacy may conflict with other interests such as public security or freedom of speech. What it makes clear, however, is that the balance between privacy and public security or freedom of speech is not determined in favor of the latter because, just as public security or freedom of speech, so also individual privacy may be protected for the sake of political society rather than at its expense.

I close my argument by drawing attention to the normative status of privacy in political practice. I have argued that privacy, understood as a condition of mutual restraint on access and self-disclosure, is the flip-side of public justification. Public justification invests privacy with a normative dimension. First, given that public justification ensures that individuals are self-governing in the political domain, privacy is a right that individuals have in virtue of their right to self-governance that privacy, as the flip-side of public justification, realizes. It is a right to have others refrain from accessing certain material about us (for example our religious beliefs) and a right to have others refrain from disclosing similar material about themselves. Second, privacy is also a duty. The duties that privacy im-

poses upon us correlate to the rights it establishes: they are duties to refrain from accessing certain material about others (for example their religious beliefs) and duties to refrain from disclosing similar material about ourselves when acting in our political capacities. Recall in this context that political liberals tie the concept of public justification to a duty that falls on individuals as members of political societies. Rawls speaks here of a ‘duty of civility’, which is a moral duty grounded in equal freedom: individuals have to explain to one another how the principles and policies they advocate can be supported by reasons which everyone can reasonably accept.⁶³ If, as I have argued, privacy is implied in public justification, then respect for privacy is an aspect of that duty.

Does this imply anything about enforcement of privacy norms? Public justification, which ensures that individuals subject to political power remain autonomous, is not merely a consideration for individuals, groups, and institutions to take into account when acting in the political realm; it is the condition of political legitimacy.⁶⁴ Indeed it is a condition of the political realm more generally because for liberals, the lack of public justification characterizes the non-political condition of a state of nature: ‘The moral flaw of the state of nature (...) is that we act without [public] justification’.⁶⁵ The constitutive role of public justification and individual autonomy in the political order can be seen as an argument in favor of the legal enforcement of the constraints that public justification imposes on action in the political realm. That privacy is the flip-side of public justification argues in favor of the legal enforcement of privacy norms.

Insisting on the mandatory character of privacy and its legal enforcement is a departure from mainstream liberal privacy discourse.⁶⁶ The resistance of liberal privacy scholars to understanding privacy in terms of a (legally enforceable) duty follows from conceptualizing privacy with reference to individual autonomy viz.

⁶³ Rawls (1996, p. 217).

⁶⁴ Waldron (1993, pp. 57–58) and Rawls (1996, p. 217).

⁶⁵ Gaus (1996, p. 182). See also Wall and Klosko (2003, p. 10).

⁶⁶ Only Allen (1999) defends this position, but the phrasing of her defense in terms of privacy paternalism has been criticized as inconsistent with the otherwise liberal dimensions of her account of privacy, see Roessler (2013, p. 15).

individual will, intentions, or desires as when privacy is understood in terms of control over access,⁶⁷ unwanted access, or desired inaccessibility.⁶⁸ The thought is that as long as privacy is a matter of an exercise of autonomous will, intentions or desires, it can be autonomously waived; if it can be waived in the exercise of autonomous agency, it cannot be the subject of a (legal) duty and enforcement.

This liberal resistance to conceptualizing privacy as a duty is not entirely justified however. Conceptualizing privacy with reference to individual autonomy does not imply that the degree of access to the individual and her self-disclosure is entirely a matter of the individual will, intentions or desires. Earlier in the essay, I called attention to the fact that liberals are prepared to place restrictions on the agent's autonomous action if that action harms other agents. This argument is relevant in the present context: given that our privacy practices can be worrisome because of the harm they do to others, placing restrictions upon the individual's will, intentions and desires regarding the content and scope of her privacy can be justified. This argument is particularly compelling when we understand privacy as having social or political value because in this context individual privacy violations affect not only the individual herself but social relationships and practices upon which her privacy is predicated. Roessler recognized this point when discussing reasons for privacy enforcement in the context of personal information disclosures on social network sites:

If I publish everything about myself in a lifelog (...) it might also be harmful to myself; however, this would not, in itself, be a sufficient reason to stop me from my publishing activities. A good liberal reason to stop me from doing so would be if I harmed others in their freedom and autonomy.⁶⁹

A similar argument holds for the political account of privacy I have developed. I argued that individuals can exercise autonomy in the political domain only under conditions of mutual restraint on the material they introduce to the political domain. Privacy, as mutual restraint on access to information about ourselves and about others, and as mutual restraint on self-disclosure, is the flip-side of autonomy so understood. The interdependence built into the idea of political autonomy means that privacy cannot be unilaterally waived without

⁶⁷ Westin (1967), Moore (2013) and Roessler (2005).

⁶⁸ Moreham (2005).

⁶⁹ Roessler (2013, p. 18).

undermining the autonomy of others. A unilateral abandonment of privacy (for example, unilateral disclosure of and appeal to one's religious commitments in political argument) would harm others' interests in autonomy. In the light of this argument, liberals, in the spirit of Mill's harm principle, are committed to make privacy an object of (legal) duty and enforcement.

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