Privacy: A Political Approach

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Abstract

This thesis is concerned with two central questions on the subject of privacy: (1) how should we conceptualize privacy? And (2), on what basis can laws and regulations to protect privacy be justified? The goal of this thesis is to provide an account of privacy that is both more persuasive than existing accounts and more capable of meeting the challenges to privacy in the modern day.

The first part of the thesis advances the argument that privacy is a normatively dependent concept. A normatively dependent concept is defined as a concept that relies on outside normative frameworks for its meaning or value. This thesis argues that privacy has this quality because it exists in a relationship of opposition to "the public" and thus lacks any essential characteristic other than being not-public, not-visible, or not in the common view. An examination of four historic reformulations of what it means to be private, spanning two thousand years of western history, confirms that privacy has shifted considerably over time and that attempts to essentialize it are misplaced. In addition, the modern disarray of the privacy debate—characterized by deep disagreement over both the definition and the purpose of privacy—reflects privacy's normative dependence and in particular reveals our over-reliance on liberal-individualist conceptions of privacy that wrongly prioritize consent and control.

The second part of this thesis argues for adopting a wholly new approach to understanding privacy: the political approach. More specifically, this thesis argues for abandoning traditional liberal frameworks in favor of demonstrating how privacy supports central features of modern democracies, such as the ability to form a distinct political identity, the right to free expression, and the right of free assembly. Furthermore, this thesis argues that democracy even presupposes an "epistemic veil" of privacy around citizens, which motivates the practices of deliberation and voting. It can thus be shown that a commitment to democracy entails a commitment to certain privacy rights—a finding that circumvents the difficulty in establishing a common basis for privacy protections by appealing to all citizens who live under democratic regimes. In abandoning familiar

understandings of privacy, the political approach to privacy does away with the problematic emphasis on consent, adapts privacy to an ever-changing surveillance environment, addresses prominent critiques of privacy rights, and provides a common basis of justification for future privacy legislation.

I don't see myself as a hero, because what I'm doing is self-interested: I don't want to live in a world where there's no privacy and therefore no room for intellectual exploration and creativity.

— Edward Snowden, to *The Guardian* in 2013

I don't wanna hear 'bout invasion of privacy
I had a feeling, it turns out you lie to me.

— Cardi B, "Thru Your Phone" on *Invasion of Privacy* (2018)

Introduction

In Jan van Eyck's 1434 oil painting the *Arnolfini Portrait*, a fifteenth century Italian merchant holds the hand of his young wife. The viewer of the painting is confronted with a private scene: a married couple alone with each other, situated not only at home but in the bedroom, the most secluded of domestic spaces. There is the sense that one is intruding, seeing something one has no right to see, as the couple takes no notice of the observation—unlike the small dog at their feet, who gazes back at the viewer, alert. The bed, the posture of the figures toward each other, the possible pregnancy of the wife: all evoke notions of domesticity, the private.

But the public world, much like the viewer, creeps into the bedroom unbidden. To the left, near the man, a window suggests the outside world of commerce, politics, and public action, while to the right—the woman's side—one sees the bed, a symbol of intimacy. The mirror at the back of the room, which reflects the figures back to themselves as though seen from the outside, evokes the ceremonies through which the private self prepares for public presentation: grooming, adornment, and masking. The man's position between his wife and bed, on one side, and the window, on the other, suggests that the two worlds of public and private are co-reliant rather than hermetically sealed. But what is the nature of this relationship? And what are its implications for the modern viewer?[1]

Van Eyck's painting highlights the ambivalent nature of privacy. In some ways, it reifies traditional understandings of the private sphere: as the domestic preserve, the space of intimacy, the woman's dominion.[2] Yet it also links the private with the public, suggesting that the private world is in some way constitutive of public duties. Privacy seems at once limiting and enabling. The sense of violation evoked by the intrusion of the viewer implies that privacy is sacred and worthy of protection, but the window and mirror indicate that attempts to isolate the private

[1] I am grateful to Geoffrey Shaw for bringing this painting to my attention.
[2] Note that "sphere," a geometric shape, evokes the spatial element of privacy as "the home."

sphere from its public context are fruitless. Indeed, the painting calls the viewer to consider whether privacy can even be understood as one essential thing, or whether it is open-textured, reliant on one's perspective. Caught between the warm intimacy of the scene and its gendered implications, one might also ask: is privacy an important aspect of an engaged life, or does it mask oppression? What is privacy, and why is it so difficult to pin down?

500 years from the *Arnolfini Portrait*, these questions remain unresolved. Modern privacy concerns tend to focus on data and surveillance, rather than bedrooms: Edward Snowden's 2013 revelations of NSA snooping were intended to shock the international conscience and shore up support for privacy rights.[3] Here, it seemed, was proof that we had given up too much, too fast. But to fight for privacy today is a difficult task, made all the more difficult by the vagueness of the concept. What is the link between the privacy of a married couple in their bedroom and the privacy of personal data? What can we weigh against the potential for catastrophic terror attacks or the presence of a sexual predator?[4] What, in short, are we protecting, and on what basis?[5]

The literature on privacy rights is vast and growing, but each successive voice brings less clarity than before. The ethicists, law professors, and theorists who have weighed in on the debate seem to agree on little other than the importance of discussing privacy. More than this thin consensus is needed. Our current inability to think clearly about privacy lays the groundwork for its ongoing attenuation in our lives and our ambivalence about the proper scope of legal

[3] See Glenn Greenwald and Ewen MacAskill, "NSA Prism program taps in to user data of Apple, Google and others," *The Guardian*, 7 June 2013. Accessed 28 February 2017. https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data (This source provides the quote at top of thesis.); Glenn Greenwald, Ewan MacAskill, and Laura Poitras, "Edward Snowden: the whistleblower behind the NSA revelations," *The Guardian*, 11 June 2013. Accessed 28 February 2017. https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance.

[4] Megan's Law, a federal law requiring states to notify the public of the whereabouts of sex offenders (a significant invasion of privacy), was passed in response to the brutal kidnapping, rape, and murder of seven year-old Megan Kanka. See Matt Bai, "A Report from the Front in the War on Predators," *Newsweek*, 19 May 1997. Accessed 28 February 2017. http://europe.newsweek.com/report-front-war-predators-173122?rm=eu.

[5] For an excellent discussion of the modern confusion around privacy, see Amanda Hess, "How privacy became a commodity for the rich and powerful," *The New York Times*, 9 May 2017. Accessed 15 May 2017. https://nyti.ms/2pqIBB8.

protections. These challenges demand an account of privacy—and, relatedly, privacy rights—that is fit for the modern age.

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Achieving conceptual clarity on privacy is difficult. The first difficulty is definitional. One of the most remarked-upon, yet least theorized, aspects of privacy is the radical diversity of its definitions. The modern literature on defining privacy is vast, typified by debates over whether privacy is principally about limiting access[6] or enabling choice,[7] and whether it is primarily concerned with information[8] or decision-making[9] or merely separation from others.[10] This is to say nothing of the many different historical reformulations of privacy. Though many scholars are aware of the interminable debates over privacy's definition, few have sought to bring any sort of conceptual analysis to bear on privacy.[11] Rather, most have resorted to arguing for the merits of their preferred definition over others, either by appealing to intuitions, selectively using history, or deconstructing the alternatives.[12]

This dissertation will adopt a different approach. To debate privacy's definition and value, it is first necessary to understand what type of concept it is. I will employ the notion of "normative dependence" to describe the concept of privacy: it is dependent on outside frameworks (whether

6 See, *e.g.*, Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, N.J.: Rowman and Littlefield, 1988); Ruth Gavison, "Privacy in the Limits of the Law," *Yale Law Journal* 89.3 (1980), 421-471; C. Keith Boone, "Privacy and Community," *Social Theory and Practice* 9 (1983); and Madison Powers, "A Cognitive Access Definition of Privacy," *Law and Philosophy* 15.4 (1996).

7 See, *e.g.*, Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967); Elizabeth Beardsley, "Privacy, Autonomy, and Selective Disclosure," in *NOMOS XIII: Privacy*, eds. in J. Roland Pennock and John W. Chapman (New York: Atherton, 1971), 56-70; James Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4 (1975); Charles Fried, "Privacy," *Yale Law Journal* 77.3 (1968), 475-493; Adam Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania: Pennsylvania State University Press, 2010); Edward J. Eberle, "The Right to Information Self-Determination," *Utah Law Review* 2001 (2001), 965-1016; Stanley Benn, "Privacy, Freedom, and Respect for Persons," in *NOMOS XIII: Privacy*, 1-26; and others.

8 See, *e.g.*, William Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12.4 (Autumn, 1983), 269-288; also "Recent Work on the Concept of Privacy," *American Philosophical Quarterly* 20.4 (October 1983), 341-355.

9 See, *e.g.*, Julie C. Inness, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1996) and Beate Rössler, *The Value of Privacy* (Cambridge, U.K.: Polity Press, 2005) for arguments that privacy must include a decisional-freedom component.

10 Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975).

11 Daniel Solove's use of Wittgenstein's notion of "family resemblances" to describe the plurality of privacy conceptions is a notable exception. See Daniel J. Solove, "Conceptualizing Privacy," *California Law Review* 90.4 (Jul. 2002), 1087-1155; and *Understanding Privacy* (Cambridge, M.A.: Harvard University Press, 2008).

12 See, *e.g.*, Adam Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania: Pennsylvania State University Press, 2010), for an example of all three.

moral or political) to have normative content. To make this argument later, it will be useful here to introduce a distinction—hitherto overlooked in the privacy literature—between the *concept* of privacy and any particular *conception* of privacy. Rawls famously makes this distinction in his theory of justice, writing that although individuals rarely agree on "the principles that should define the basic terms of their association" they nonetheless understand the need for such terms.[13] The various principles for assigning basic rights and duties are therefore what Rawls terms "conceptions" of justice, while the common understanding that such principles must exist, regardless of what they are, constitute the "concept" of justice. Put another way, the concept is the model, of which the conceptions are many competing types. Rainer Forst, following Rawls, has referred to a concept as the "central semantic components" that sit underneath various "ideas or notions" (conceptions) of something.[14]

A concept of privacy is therefore the barest, most inclusive definition of what privacy is. It is the formulation of "the private" that sits at the intersection of all competing definitions. Though I will elaborate on this definition further in chapter one, the concept of privacy used in this thesis is the following: *privacy is the state of being removed or withdrawn from what is public, common, or in the common view*.[15] The basis for conceiving of the concept of privacy in this way is two-fold. The first is logical: to have the notion of the private, one must first have the notion of the public or common, or what is visible before others. Privacy presupposes a community from which one removes oneself. Without the notion of a common life in the presence of others, there is no coherence to calling anything "private." The second reason is linguistic: the root of privacy is the Latin *privatio*, or "taken away," which also forms the basis of words like "deprivation" and "privation"—both of which emphasize a lack or absence. Privacy is the lack of something that

13 John Rawls, *A Theory of Justice* (Cambridge, M.A.; Belknap Press of Harvard University Press, 1999 [1971]): 5.
14 Rainer Forst, *Toleration in Conflict: Past and Present*, trans. Ciaran Cronin (Cambridge, M.A.: Cambridge University Press, 2013): 17. Forst later writes: "The 'concept' includes the central semantic contents of the concept, whereas 'conceptions' are specific interpretations of the elements contained within the concept." Forst also uses the term normative dependence in a similar fashion to how I will use it in this thesis, though our purposes in using this term are different.
15 This description of the concept of privacy is different from my definition of privacy, which I will introduce in chapter three, and which is a function of the political conception of privacy that I will defend in this thesis.

pre-exists it (i.e., a public of some form). All competing conceptions or definitions of the private presuppose a public world against which the private world is comprehended.[16] This feature of the concept of the private—that it is parasitically oppositional to a notion of the public—will be a recurring theme in this thesis, as it helps to explain privacy's normative dependence and frames the appeal of my political approach to privacy justifications.

A conception of privacy is an elaboration of the concept that fills out the content of it. It answers questions like the following: What is the nature of the public or the common from which one is withdrawn? What is the purpose of withdrawal versus engagement? Who participates in common or public life, and who is barred from doing so? Why? Does either the public or the private take normative precedence? Yet the distinction between a concept of privacy and a conception of it is elided in the literature on privacy rights. Though the former is a formal category, providing the conceptual limits, the latter is what theorists typically have in mind when they write about privacy: the specific metes and bounds of the private sphere, the normative considerations that it provokes, the interests it protects, and how it ought to be weighed against other interests. Debates about privacy are debates between theorists who hold different conceptions of it, but they are conducted as though what they are contesting is the concept of the private itself. What is missed in this exchange is both that the *concept* of the private itself is the least dispositive aspect of the debate over privacy, and that resolving disagreement over various *conceptions* of privacy will take more than simply asserting competing interests.

The conflation of concept and conception in the privacy debate should not be taken to exhaust all—or even most—of the conceptual issues in understanding privacy. Rawls himself admitted that this distinction "settles no important questions."[17] Indeed, it raises an additional issue: *how* to adjudicate between the plurality of privacy conceptions. Because of the possibility for

[16] The starkly different normative duties assigned to the public and private spheres—typical of liberal conceptions of the public and private—are not a necessary extrapolation of this basic definitional opposition. That is, although to claim something as private is by definition to claim it as not-public, the same act may be private or public depending on circumstance, and the same duties or expectations may attend regardless of its status.
[17] Rawls, *supra* note 13.

competing conceptions, the "private sphere" seems to cover a multitude of facially disconnected phenomena, including our desires for seclusion, anonymity, respect, autonomy, intimacy, liberty, control, and dignity. There are, broadly, two main responses to such diversity. The first is to seek a common grounding for all of these concerns, a single analytical lens through which to interpret desires that, on the face of it, may have little to do with one another. This common lens can either be a single definition that is at the root of all privacy concerns (with many possible justifications for protecting privacy), or could be a single justification that grounds each of the various privacy interests we have.[18] The appeal of this approach is straightforward: if we can isolate a single grounding for these concerns or a single interest that captures the variegated dimensions of privacy, then we will have a better sense of what we are fighting for, how morally persuasive it is, and whether it can ground something as powerful as a moral right. Reducing privacy to a single justification is analytically clear and powerful in its simplicity; it offers the chance to unify our disparate intuitions into a single normative framework.

The second response is to insist that privacy could, in fact, have something to do with all of these desires; that they all are, or can be, constitutive elements of what we would call "the private sphere" in certain societies; and that to focus on merely one justification or one definition is to ignore important, irreducible aspects of people's interests in privacy and dismiss certain conceptions out of hand without justification.[19] My strategy here is closer to this second approach. Though the pull of a unitary privacy conception or rights-justification is understandable, what we gain in simplicity we lose in accuracy and insight. Rather, we can better understand the concept of "privacy" if we abandon our traditional allegiance to understanding it as essentially one thing, and instead recognize that the concept of privacy itself is open to being employed to preserve any

[18] The former, for example, would be the argument that privacy is principally about *access* (to ourselves, information, etc.), and we have multiple reasons for caring about this. See, *e.g.*, Ruth Gavison, "Privacy in the Limits of the Law," *Yale Law Journal* 89.3 (1980), 421-471. The latter would be the argument that whatever privacy is about, it is justified by our desire to live autonomous lives. See, *e.g.*, Beate Rössler, *The Value of Privacy* (Cambridge, U.K..: Polity Press, 2005).

[19] See, *e.g.*, Solove, *Understanding Privacy, supra* note 11.

number of different interests. We should welcome this conceptual and justificatory diversity, not reject it.

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Still, this pluralism presents its own difficulties. We will need to determine on what basis we can pass laws to protect privacy, if it means different things to different people. We will also need standards to help us decide on one justification or definition over others, if we admit the viability of multiple contenders. As will become clear, these difficulties are more surmountable than those of unitary approaches. But a plural approach raises other questions, most importantly: how does this way of thinking about privacy contribute to our ability to articulate its value and thus protect it? More specifically, how does it help citizens in particular political contexts concretize their commitment to privacy as something worth fighting for?[20]

This dissertation attempts to answer these questions. The broad argument can be stated up front: privacy should be understood in relation to the specific political ideals and institutions that govern any given society. That is, the conception of privacy best suited to upholding a robust regime of privacy protections is what I will call a *political conception of privacy*.

This conception is "political" in two senses. It is political, first, in that it eschews wholly philosophical or moral approaches to privacy in favor of utilizing those institutions or ideals that sit at the intersection of competing worldviews, and thus can be endorsed by all members of a political body. This is political in the Rawlsian sense: the political of "political liberalism."[21] It is a pragmatic attempt to provide a common basis for understanding privacy, regardless of one's other commitments—a public conception of the private. But it is also political in that it expresses privacy's value in terms of expressly political ideals, and thus creates a justification for privacy

[20] That privacy might be something "worth fighting for" is a contestable assumption. As chapter one will indicate, the belief that privacy is valuable and in need of protection is a relatively modern one. Though I will argue that privacy is indeed worth fighting for—at least for democratic states—for now the reader may simply assume that *if* we are interested in protecting it, then at the very least we will need to be clear about what it is we are protecting.
[21] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005). I do not mean here to endorse Rawls's project of political liberalism as a general governing philosophy, but only to adapt this use of political to describe the conception of privacy I am advancing.

protections that appeals to collective, communal values, rather than to individual ones. That is, it is political in that it directs our attention to our political landscape: the rights, duties, representative bodies, and structures we have instituted to govern ourselves. This use of "political" follows Jeremy Waldron's exhortation for more "*political* political theory."[22] To pursue a political conception of privacy entails both articulating privacy as a public value and also employing arguments that are endorsable by the widest range of interlocutors.

My argument therefore holds that appealing to some individual interest that we find valuable (whether autonomy, intimacy, liberty, or whatever) to justify protections of privacy is not the best approach. Such approaches to privacy are common in the literature, though some theorists—mindful of the shortcomings of individualistic justifications—have advocated for a more political or social appreciation of privacy's value. Priscilla Regan, Daniel Solove, Kirsty Hughes, and Ferdinand Shoeman, for instance, have written of how privacy contributes to and maintains our social world.[23] Annabelle Lever has argued for privacy rights on the basis of democratic principles,[24] rather than on the basis of some immutable right that we hold as individuals *qua* individuals; Dorota Mokrosinska and Neil Richards have similarly explored how privacy contributes to holding public officials accountable, ensuring freedom of expression, and creating the conditions for genuine deliberation.[25] And Jean L. Cohen has explored privacy's role in resolving the tension between democratic unity and a plurality of perspectives and experience

[22] Jeremy Waldron, "*Political* Political Theory," *The Journal of Political Philosophy* 21.1 (2013), 1–23. Waldron writes: "Even if our main preoccupation remains with justice, liberty, and equality, we still need to complement and inform that work with an understanding of the mechanisms through which these ideals—these ends of life—will be pursued. This is what I mean by *political* political theory—theory addressing itself to politics and to the way our political institutions house and frame our disagreements about social ideals and orchestrate what is done about whatever aims we can settle on" (8-9).

[23] See, *e.g.*, Regan, Solove, and Hughes in *Social Dimensions of Privacy: Interdisciplinary Perspectives*, eds. Beate Rössler and Dorota Mokrosinska (Cambridge, U.K.: Cambridge University Press, 2015); also Ferdinand David Shoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992).

[24] Annabelle Lever, "Privacy Rights and Democracy: A Contradiction in Terms?" *Contemporary Political Theory* 5.2 (2006), 142-162; *On Privacy* (New York: Routledge, 2012); *A Democratic Conception of Privacy* (AuthorHouse, 2013); "Privacy, Democracy, and Freedom of Expression," in *The Social Dimensions of Privacy* (*supra*), 162-180.

[25] See, *e.g.*, Mokrosinska and Parsons, Bennett, and Molnar in *Social Dimensions of Privacy: Interdisciplinary Perspectives* (*supra* note 23); also Neil Richards, *Intellectual Privacy* (Oxford: Oxford University Press, 2015).

(which she calls the question of "difference" in a democratic system).[26] These writers are a welcome exception to the general rule that privacy is conceived of in terms of individual interests, and they point toward an understanding of privacy in terms of its social or political value.

This thesis contributes to this new argumentative landscape in two primary ways. First, it builds the conceptual language that is necessary to debate competing privacy claims. The theorists investigating privacy from a political perspective have not drawn a distinction between a concept of privacy and a conception of privacy, nor have they considered privacy's normative dependence. As a result, they have failed to articulate adequately what it means to support a political or social conception of privacy against competing conceptions. Rather, they have argued that privacy *just is* valuable for our social or political arrangements, the same way other theorists argue that privacy *just is* valuable for autonomy or intimacy—swapping one normative framework for another. However, because privacy is normatively dependent, as I argue, attention to *which* normative framework is used to understand privacy is at least as important as demonstrating the role of privacy in that framework. And answering that set of questions—i.e., why we should use a political conception over other possible conceptions—requires first having the conceptual language I will develop in chapter one.

It has long been noted that privacy is "relative" in this regard, but the methodological implications of this observation have not been adequately explored. The benefits of my conceptualization of privacy as normatively dependent are numerous. It helps to explain the historical evolution of privacy as well as the modern-day diversity in privacy conceptions across cultures. It should not surprise us that privacy has shifted so much across time and across boundaries, because the philosophies (political and otherwise) used to understand it have shifted considerably. As Jeff Weintraub has pointed out, the public/private dichotomy actually comprises "not a single pair opposition, but a complex family of them, neither mutually reducible nor wholly

[26] Jean L. Cohen, "Democracy, Difference and the Right to Privacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (New Jersey: Princeton University Press, 1996), 187-217.

unrelated" and each of which arises "from different (often implicit or only partly conscious) theoretical languages or universes of discourse, each with its own complex historical cargo of assumptions and connotations."[27] By drawing out and making explicit the ways in which these discourses have shaped our conceptions of privacy, we can help to explain the panoply of approaches that typifies the modern privacy discourse. We can also more effectively address prominent critiques of privacy by showing that they, too, are reliant on various commitments that are only contingently—but not necessarily—part of the concept of privacy, and thus can be revised to address changing realities.

Second, this thesis will apply the political conception of privacy to a particular political system: that of a democracy. The analysis of how privacy contributes to democratic ideals has been explored most prominently by Lever, who has written that a measure of privacy is implicit in the democratic ideal of the respect for individuals as moral equals.[28] But where Lever has taken a philosophical approach, I offer an institutional one. Modern democracies are comprised of a panoply of different institutions such as parliaments, courts, and the press, but also more basic institutions like free expression, voting, and deliberation. Howsoever these institutions are ideologically justified, they nonetheless constitute commonly-accepted features of modern democratic states and democratic freedoms. The political conception of privacy as applied to democracies will show how privacy functions to fortify such institutions, and that threats to privacy are therefore threats to the institutional integrity of democracy itself. It is, in short, a pragmatic approach that aims to relate privacy to our shared and actual political commitments. This approach has numerous benefits over other (non-political) approaches to understanding privacy, as we shall see.

[27] Jeff Weintraub, "The Theory and Politics of the Public/Private Distinction" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 1-42: 2, 3.
[28] Annabelle Lever, *A Democratic Conception of Privacy* (AuthorHouse, 2013).

This dissertation proceeds as follows. In chapter one, I lay the conceptual groundwork for understanding privacy. Recognition of the normative dependence of privacy (1) frees us from remaining tied to any single conception, (2) focuses our attention on the context in which privacy is understood, and (3) recommends that we take political considerations as primary in justifying privacy rights. To illustrate this conceptual feature of privacy, I examine four historical conceptualizations of "the private" in the West:[29] the classical approach of ancient Greece and Rome, the "Christian" approach of the Church from Late Antiquity through the Middle Ages, the "liberal" approach that took root in the United States, and the "romantic" approach that developed post-Enlightenment. In this discussion, my aim is not to document the history of the evolution of privacy (this task has been tackled already)[30] but to bring to light how privacy is intricated with its normative landscape by illustrating four distinct ways it has been conceptualized in the past. In addition, I discuss the use of history more broadly in scholarly work on privacy. Which histories are used, which are ignored, and whether history is considered relevant to understanding privacy are all decisions that reveal the mutability of privacy and its tendency to be refashioned for particular projects. The lessons of history are presented not as interesting, but prescriptive. They belie the claim that privacy can be analyzed in isolation from socio-cultural and political factors, and they encourage an account of privacy that is consonant with its normative dependence.

In chapter two, bearing the historical lessons in mind, I undertake a clarifying and critical examination of the existing literature on privacy and privacy rights. Starting with Samuel Warren's and Louis Brandeis' seminal 1890 *Harvard Law Review* article "The Right to Privacy," I categorize both the primary definitions of privacy and the primary justifications for privacy's value that have been proffered by theorists and legal scholars in the last several decades. In addition to debates

[29] An account of the history of privacy across cultures would be fascinating, but is beyond the scope of the present work. Despite this historical blind spot, it is my hope that my methodological approach is more accommodating to non-western attitudes to privacy than other approaches, in that it demands an attention to culture and context in order to conceptualize privacy.

[30] For just one example, see the five-volume *A History of Private Life*, edited by Charles Duby and Philippe Ariès (Cambridge, M.A.: Harvard University Press, 1987-1991).

over the proper definition, theorists likewise disagree on whether privacy serves mainly to preserve autonomy or liberty, to facilitate intimacy and personal relationships, to enable human flourishing more broadly, to enable various social features of our world, or to realize various political (democratic) freedoms.

My critique of these accounts is two-fold. First, many theorists fall into the reductionist trap of attempting to isolate the "core" of privacy (definitionally or otherwise) and therefore fail to account for the multiplicity of privacy concerns in the modern age. Such arguments often result in little more than theoretical boundary-drawing, with no clear connection to the actual use of privacy. I argue that we should not be surprised by this disarray, given both privacy's normative dependence and the host of normative commitments that could be used to understand it. Theorists will disagree on privacy for as long as they differ in their normative commitments, and the concept of the private provides few resources for adjudicating between competing conceptions.

Second, I show that many of these accounts of privacy are—unsurprisingly—dependent on a notion of liberal individualism. Despite some recent attempts to articulate a more social approach to privacy, the liberal approach (which chapter one demonstrates is a particular historical development) continues to dominate much of contemporary privacy thinking. It has resulted in a plethora of prominent privacy scholars who define privacy as a capacity of control or defend privacy on the basis of its ability to ensure autonomy.[31] The dominance of this view can be seen in its influence over policy: notice-and-consent based regulations to protect privacy—which rely on informing individuals about how their information will be used and then proceeding after receiving consent—form a key part of privacy regulations around the globe, from the Fair Information Practice Principles (FIPPs) in the United States to the General Data Protection Regulation in the EU.[32] It is a sustained argument of this thesis that such allegiance to consent,

[31] See, *e.g.*, *supra* note 7 and Rössler, *supra* note 9.
[32] Federal Trade Commission, "Privacy Online: A Report to Congress" (1998): https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf; "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing

which is traceable to the liberal-individualist approach to privacy, is ill-suited to tackling today's privacy challenges. By tracing many modern approaches to their roots in the liberal approach to privacy, I show that this weakness is a contingent feature of privacy—and thus can be abandoned in favor of something better.

In chapter three, I advocate for a political approach to privacy. This approach articulates privacy's value according to how it upholds our political institutions, rather than understanding privacy through a philosophical ideal (such as liberalism). There are two important implications to this approach. The first is definitional. Because I argue that privacy can only be understood in relation to particular social contexts and political systems, any adequate conception of privacy will need to have a definition that takes this into account. I argue the definition of privacy that best accounts for normative dependence is the Legitimate Access Definition of privacy, which defines privacy as a state in which one's self cannot be legitimately accessed or acted upon by others, either epistemically or physically. The second implication is that there is no basis for a moral (or pre-political) right to privacy. This recognition does not preclude constructing a robust regime of privacy rights, but these rights will have to be based on privacy's political value, and not its intrinsic worth to us as individuals.

Though the political approach to privacy could be adapted for any political regime, I focus on democracies. Other theorists, as I have noted, have made arguments illustrating how privacy supports democracy and democratic rights, but they have largely presented these arguments as supplementary evidence, while maintaining a basically liberal-individualist approach to privacy. Instead, I treat democracy as a normative framework and show how privacy supports democratic institutions. Democracy contains a set of institutions relating to *participation* in governance as well as a set of institutions relating to the *epistemic conditions* of governance. The former set of ideals have to do with the conditions that must obtain for participation in democratic governance, and I focus

Directive 95/46/EC (General Data Protection Regulation)" *Official Journal of the European Union* L119 (4 May 2016), 1-88: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

on three: the ability to develop political identities, the existence of a system of free expression, and the ability to organize freely. I will argue that privacy plays a pivotal role in each of these aspects of democratic governance and therefore is an integral aspect of the participatory commitments of democracy.

However, democracy also proceeds from a particular epistemic condition. An overlooked aspect of the democratic ideal is the implicit judgment that a government cannot know more about its citizens than the citizens know about their government. Voting is, among other things, an information gathering exercise premised on an imbalance of epistemic access, where citizens periodically reveal to their government what their preferences are. Moreover, it is important that these preferences be "considered preferences": this is why town halls, assemblies, or parliaments (premised on speaking to one another) are features of all modern democracies. Privacy, I will argue, maintains the "epistemic veil" in a democracy that motivates core institutions like voting and deliberation. In this way, privacy not only supports core participatory elements of democracy, but it also forms a presupposition of democratic governance itself.

In chapter four, I illustrate the benefits of the political conception of privacy. I argue that this way of thinking about privacy faces lower justificatory burdens than other conceptions because it obviates the need to justify a (controversial) doctrine such as the primacy of the individual or the existence of the autonomous self, and rather mobilizes the resources of democracy to justify privacy protections. A major advantage of my approach is that it de-prioritizes the use of consent in privacy regulation. The political approach does not measure a privacy harm in terms of whether it abrogates consent, and it does not seek to remedy privacy harms by instituting practices of notice and consent. Rather, it asks whether the practice derogates the democratic structure of society, and, if so—regardless of whether the practice is consensual—recommends instituting structural protections (e.g. banning targeted political advertising on social media). The political conception of privacy also has the best resources to articulate and remedy the harms of our surveillance environment. Through a survey of current scholarly work on surveillance, I illustrate that a political

conception of privacy avoids the pitfalls of other approaches and rises to the challenge of countering the pervasiveness and fluidity of modern surveillance.

I close the chapter by showing how the political conception helps to meet three distinct categories of privacy critique: the reductionist critique, the communitarian critique, and the feminist critique. The reductionist critique of privacy was made most prominently by Judith Jarvis Thomson in her "The Right to Privacy," in which she argued that all so-called privacy rights are covered by—and therefore reducible to—other already-existing rights, like the right to property.[33] Communitarians attack the atomistic individualism they perceive to be at the heart of privacy, resisting privacy rights on the grounds that they would simply codify unhealthy trends away from community-oriented politics.[34] Feminists have argued that the definition of the public and private spheres fall on gendered lines, thus relegating women to a space where their political power is limited and where domination and exploitation can be obscured.[35] Though these critiques are diverse and therefore require diverse responses, a common theme will reappear in my approach: many privacy critiques take for granted what are ultimately contingent features of privacy. Indeed, the political understanding of privacy hits at the heart of the feminist critique, which I take to be the most trenchant. If we understand privacy not as spatial sphere of protection that covers the home, but as a constituent part of our political freedoms, then we can construct privacy protections that enhance, rather than diminish, the ability of women to take part in politics and hold real power.

By encouraging us to articulate the value of privacy in terms of how it contributes to our particular political arrangements, this thesis takes it from the abstract realm of universal theory and makes it concrete and particular—and thus, ultimately, more persuasive.[36] To advocate for this

[33] Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs* 4.4 (1975), 295-314.
[34] See, *e.g.*, Richard Hixson, *Privacy in a Public Society* (New York: Oxford University Press, 1987); Richard Sennett, *The Fall of Public Man* (London: Penguin, 1978); and Amitai Etzioni, *The Limits of Privacy* (United States: Basic Books, 1999).
[35] See, *e.g.*, Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, M.A.: Harvard University Press, 1989); Carol Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford: Stanford University Press, 1989); Susan M Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); and Anne Phillips, *Engendering Democracy* (Pennsylvania State University Press, 1991).
[36] Michael Walzer has made a similar point about the role of the social critic, which he has likened to that of a judge: the critic proceeds by "interpreting" the existing social mores, laws, and moral understandings to pronounce

approach to privacy protections is not to give a full-throated endorsement to moral relativism. It is, rather, to acknowledge the unique character of privacy: how it is—perhaps more so than any other concept so situated in the pantheon of treasured western rights—"dependent" on contingent norms to an extent that makes universalization inappropriate and unhelpful.

I contend this approach provides a robust path forward while crucially making space for different approaches. Specifically, while it helps us to mount a particular defense of privacy in the American context, it leaves open that other countries may take a different path. For example, privacy is nowhere more under siege than in China. But to criticize China's privacy policy requires a much deeper argument than simply asserting some universal right to privacy that has not been respected. It requires, rather, understanding how the Chinese approach to privacy is informed by a different political system and social contract than is at work in Europe and the U.S., and therefore how privacy is used—or abridged—in response to these political commitments. These commitments may themselves be worthy of criticism; if this is the case, however, then our critique is *not* that China has failed to meet some trans-contextual privacy standard, but that its approach to privacy is illustrative of a political system whose principles or practices we find morally questionable for independent reasons. I see it as an additional benefit of my approach that it leaves open the possibility for a diversity of privacy policies around the world while also encouraging cross-national or cross-cultural privacy discourse to abandon bland, unsupported assertions of privacy "rights" that garner little universal consensus.

judgment on a power relation or political arrangement. A key insight of Walzer's work is that critique done in this way—rather than from the "outside" or via some sort of divine inspiration—is not just methodologically more sound, but also more persuasive to those who ultimately have to hear the critique and implement it. Michael Walzer, *Interpretation and Social Criticism* (Cambridge, M.A.: Harvard University Press, 1993).

Chapter One: Privacy in historical context

Withdrawal from what is common or public view has not always been a human aspiration. Ancient notions of man's calling emphasized living in community with one another: "It is not good for man to be alone," God is said to have mused after creating Adam. "I will make a helper suitable for him."[1] Hannah Arendt has noted that, for the Romans, "to live" and "to be among men" were synonymous, as were "to die" and "to cease to be among men."[2] Life itself was about community, not solitude. The real puzzle is to understand how we have arrived at the present day—how it came to be that the private world should dominate so much of our lives and become a site of such anxiety, contestation, and value.

The goal of this chapter is not to construct an exhaustive chronicle of the history of private life, nor to provide an account of the history of privacy to compete with those already written.[3] I have, rather, three more limited aims. The first is introduce a particular way of conceptualizing privacy. As previously indicated, privacy is both conceptually and linguistically defined in opposition to the public: i.e., to what is visible, representative, publicized, or held in common. As such, it has indeterminate normative content. I will argue that privacy is, therefore, a "normatively-dependent concept": that it is baked into the concept of privacy itself that it will "depend on" outside normative frameworks for coherence. I intend to sustain this argument against the notion that privacy is either unitary, on one end, or "essentially contested," on the other. That is to say, though the structure of the concept of privacy (something opposed to or taken away from the public view) can be isolated, for any thick conception of privacy (what it means to be removed

1 Genesis 2:16 (NIV Translation). See, also, Hannah Arendt's discussion of this passage in *Love and St. Augustine*, eds. Joanna Vecchiarelli Scott and Judith Chelius Stark (Chicago: University of Chicago Press, 1996 [1929]), 98-112.
2 Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958): 7.
3 The literature examining the emergence or practice of privacy in various historical contexts is too vast to list. Of those works purporting to take a longer historical view of privacy, the titles are fewer; several that deserve mentioning are: *A History of Private Life*, vols. I-V, edited by Charles Duby and Philippe Ariès (Cambridge, M.A.: Harvard University Press, 1987-1991); David Vincent, *A Short History of Privacy* (Cambridge, U.K.: Polity Press, 2016); Barrington Moore, *Privacy: Studies in Social and Cultural History* (New York: M. E. Sharpe, 1984); Jean Bethke Elshtain, *Public Man, Private Woman* (Princeton: Princeton University Press, 1981). Norbert Elias's *The Civilizing Process* (Oxford: Blackwell Publishers 1939) remains a classic examination of the development of manners, etiquette, and other methods of tact, reserve, and withholding in Western societies.

from view, whether this is valuable or debasing, who is entitled to it, and so forth) we will need to appeal outside the concept of privacy itself. This feature of privacy has implications, I contend, both for how we interpret the current state of disarray that typifies the modern privacy debate, and for how we approach the task of articulating privacy's value and therefore of justifying laws to protect it.

Second, I support this conceptualization by outlining four of privacy's historic reformulations.[4] I examine four major developments in the conceptualization of the private sphere: the "classical" approach of ancient Greece, the "Christian" approach from late antiquity through the Protestant Reformation, the "liberal" approach that predominates today, and the "romantic" approach of the 19th century. These are by no means the only important eras in the development of privacy as we understand it, but they offer particularly useful historical resources for understanding the normative dependence of the concept of privacy. They also offer four distinct models of the private (and public): as the domestic (vs. political), as the interior (vs. the world), as personality (vs. society), and as the individual (vs. the state). Who is entitled to—or suffers from—privacy, what the private sphere covers, and whether it should be enlarged or diminished are all questions whose answers depend the social and political contexts in question.[5] I therefore follow Raymond Geuss in taking for my object of study "some deeply entrenched contemporary item or phenomenon… that presents itself as unitary and coherent in that all its parts fit together smoothly and naturally." I aim to dispel this illusion.[6]

4 My approach is therefore to use a study of the past to inform future action. In this I draw inspiration from historians Jo Guldi and David Armitage, who have called to return to "long-term thinking" in lieu of the "short-termism" that so often typifies history research. See Jo Guldi and David Armitage, *The History Manifesto* (Cambridge, U.K.: Cambridge University Press, 2014): "The sword of history has two edges, one that cuts open new possibilities in the future, and one that cuts through the noise, contradictions, and lies of the past" (13).

5 My focus is on the *concept* of privacy, and not the term "private" itself. Much of what we now consider to be part of the private sphere has used other terms: domesticity, solitude, isolation, and so forth. This terminological diversity testifies to the ever-shifting boundaries of the private, but it also should not prevent us from attributing different features to a single concept.

6 Raymond Geuss, *Public Goods, Private Goods* (Princeton: Princeton University Press, 2003): viii-ix. On the public/private distinction in particular, Geuss writes: "Disparate components—conceptual fragments, theories, folk reactions, crude distinctions that are useful in highly specific practical contexts, tacit value assumptions—from different sources and belonging to different spheres have come together historically in an unclear way and have accumulated around themselves a kind of capital of self-evidence, plausibility, and motivational force. The

The third and final aim is to illuminate how the history of privacy is told, used, or ignored by modern writers to support conceptualizations of privacy useful for their present purposes. The vast majority of writing on privacy has been published since the second half of the twentieth century, including some of the historical commentary that I will be using below. But this literature stands in an uneasy relationship to the history of privacy. Some writers selectively choose which historical period is relevant for getting at the "root" of privacy; others see little reason to look to the history of privacy at all, and thereby uncritically reflect modern presumptions about the private. Whereas the former group provide no tools for adjudicating between different historical understandings of private and public, the latter risk essentializing contingent aspects of privacy by ignoring its variegated history. I will look at three prominent historical accounts of the relationship of private and public—Hannah Arendt's *The Human Condition*, Jürgen Habermas's *Structural Transformation of the Public Sphere*, and Reinhart Koselleck's *Critique and Crisis*—to demonstrate how a different conception of what is private and what is public can emerge depending on how one tells the historical story. I will then show how dis-attention to history—and in particular to overlooked histories—can blind one to the contingency and narrowness of modern privacy conceptions.

1.1 Privacy as a normatively-dependent concept

The concept of privacy has historically taken on many different nuances: as the prerogative of the individual versus the preserve of the domestic sphere, as an essentially negative versus a positive domain, as an internal aspiration versus an external condition, and as a question of visibility versus a question of representation. Even today, as we will see in chapter two, significant disagreement remains over how to define privacy and how to justify laws to protect it.

unreflective use of distinctions such as this one restricts our possibilities of perceiving and understanding out world" (10).

The definitional disarray of privacy has thus led to debates about how to treat privacy as a concept. Some have attempted to reduce privacy to a single interest or value in the attempt to impose a level of "conceptual discipline." William Parent's two influential articles defining privacy as a "condition of not having undocumented personal information about oneself possessed by others" are the most famous examples of this approach, but versions of it proliferate in the literature.[7] Attempts to impose parsimony on the messy reality of privacy are, however, arbitrary and often ignorant of history. Everyday usage of privacy reveals its composite texture, as it is invoked in situations as diverse as the activities of lovers in their beds to the confidentiality of personal financial information. Simply *willing* that privacy be about only a narrow set of issues (e.g., intimacy) does not make it so.[8] As will be discussed in the subsequent chapter, this sense of arbitrary line-drawing—which places some clearly private interests or activities "outside" the private sphere simply for the sake of clarity—is a by-product of a liberal-individualist approach to privacy that requires identifying which individual interests are benefitted in order to articulate the purpose of privacy. Such a strategy falls victim to the trap of the intuitions game: what strikes some as clearly at the core of privacy may not appear this way to others, and there are few tools for bridging this gap.

Conversely, some have argued that privacy cannot, by definition, have such a unitary nature. Such authors maintain that privacy is "essentially contested," much as other concepts like justice, liberty, and democracy.[9] W.B. Gallie coined the term "essentially contested" to describe concepts for which "there is no one clearly definable general use… which can be set up as the correct or standard use" and thus "the proper use of which inevitably involves endless disputes about their

7 William Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12.4 (Autumn, 1983), 269-288; and "Recent Work on the Concept of Privacy," *American Philosophical Quarterly* 20.4 (October 1983), 341-355.
8 Julie C. Inness, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1996).
9 See, *e.g.*, Deirdre Mulligan, Colin Koopman, and Nick Doty, "Privacy is an essentially contested concept: a multi-dimensional analytic for mapping privacy," *Phil. Trans. R. Soc. A* 374: 20160118 (2016). Adam Moore also refers to privacy as an "essentially-contested concept" in some of his work, though he does not make the explicit argument for this view. See Adam Moore, "Defining Privacy," *Journal of Social Philosophy* 39.3 (Fall 2008), 411-428.

proper uses on the part of their users."[10] Of course, an essentially contested concept cannot be contested all the way down; otherwise, it would not be possible to say that a *single* concept was essentially contested, because there would be no way to distinguish rival conceptions from wholly different concepts altogether. Rather, essentially contested concepts are the subject of endless contestation over their "uses," to borrow Gallie's term.[11] Gallie sets out four necessary features of any essentially contested concept:

i. *Appraisiveness*: The concept "signifies or accredits some kind of valued achievement."
ii. *Internal complexity*: Though its "worth is attributed to it as a whole," it contains multiple different elements and can be viewed from multiple different perspectives.
iii. *Various describability*: As a result of its internal complexity, the concept can be described by disputants in different ways, depending on which elements they emphasize.
iv. *Openness in character*: The concept "admits of considerable modification in the light of changing circumstances."[12]

In addition to these four necessary features, which Gallie frames as the most important ones, he adds that disputing conceptions must recognize the validity of rival conceptions and thus must be deployed both "aggressively and defensively" (v).[13] Further, to distinguish essentially contested concepts from "radically confused" concepts, Gallie adds that (vi) there must be a single authoritative exemplar, acknowledged by all contestant users of the concept, and (vii) the continual competition should plausibly contribute to sustaining or developing the concept "in optimum fashion."[14]

Gallie takes as his paradigmatic examples of essentially contested concepts *democracy*, *art*, and *Christianity*. The central notion is that everyone has an idea in their own heads about what constitutes the best democracy, or the best work of art, or the best way of living as a Christian; but

[10] W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56 (1955-56), 167-198: 168, 169.
[11] Others have utilized the distinction between a "concept" and a "conception," the latter being equivalent to the "use" of a concept. Thus an essentially contested concept is a single concept that admits of many different rival conceptions. This can, of course, be applied to privacy, as has been indicated. But the relationship between a concept and its conceptions, under Gallie's formulation, remains unclear. For further discussion, see Christina Swanton, "On the "Essential Contestedness" of Political Concepts," *Ethics* 95.4 (1985), 811-827.
[12] Gallie, *supra* note 10, at 171-172.
[13] *Ibid.*
[14] *Id.* at 180.

though everyone has a sense that there is some ideal type "out there" in theory—some perfect democracy that is worth striving toward—the complexity of the concept and the inherent reasonableness of conflicting accounts of it make it virtually impossible for there to be any sort of agreement on the best conception. On the skeptical view, essential contestability might be cause for believing that there simply *isn't* a truth of the matter, and our most important disagreements are fundamentally irresolvable.[15] Gallie, however, takes a rather more optimistic approach, arguing that recognition of essential contestation would result in "a marked raising of the level of quality of arguments in the disputes of the contestant parties."[16] The hope, then, is that recognizing an essentially contested concept as of this type would improve the debate, such that the contestants would acknowledge what is at stake and bring forth the best versions of the competing conceptions.[17]

With these considerations in mind, one can imagine how the case might be made that privacy is an essentially contested concept. Features ii-iv seem particularly apt: if the subsequent historical discussion shows anything, it is that privacy is an internally complex concept, capable of being very different things to different people—like a diamond rotating under light—and prone to changing considerably according to historical and social context. This is true also of how privacy is discussed in contemporary discourse, in which terms such as informational privacy, decisional privacy, bodily privacy, and spatial privacy all purport to describe the same thing.[18]

But the "openness" or "various describability" of the concept of privacy cannot be pushed too far. The openness of privacy refers properly to the various *conceptions* of privacy that are available to us, depending on the normative framework we use to understand it. But the *concept* of

15 See, *e.g.*, William Connolly, *The Terms of Political Discourse* (John Wiley & Sons, 1993): 40.
16 Gallie, *supra* note 10, at 193.
17 Interpreters of Gallie's theory have suggested, further, that the concept in question may not necessarily have to be considered a valued achievement (i) so much as a valued solution to a particular problem. Jeremy Waldron, for instance, has argued that "the rule of law" could be conceived of as an essentially contested concept in that what is at stake is the answer to a central challenge ("how to make law rule, rather than men") which seems impossible to answer. See Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy* 21.2, "In the Wake of Bush v. Gore: Law, Legitimacy, and Judicial Ethics" (Mar. 2002), 137-164: 157.
18 See Mulligan et al., *supra* note 9, esp. pp. 6-8.

privacy, as we have seen, is not so open. It is defined in opposition to some pre-existing community or public. This delimits the concept of privacy. We must first have a society of individuals before we can speak of what it would mean to withdraw from or close oneself off to this society. Though there isn't a conceptual basis—normative or otherwise—to structure what we mean by "the private" except for its being *not* other things (not public, not open, not subject to the scrutiny of others, and so on), this feature of privacy nonetheless provides the limits within which to understand it. It forecloses an isolated analysis of privacy itself and directs our conceptual energies toward understanding how the private stands in relation to the public.

Consider also the appraisiveness feature, according to which privacy must be a kind of valued achievement. There is considerable disagreement over whether privacy can or should be considered inherently normative in this sense.[19] Numerous theorists have argued that privacy *must* be inherently neutral as a concept, as this is the only way to adjudicate second-order (moral) claims to privacy rights.[20] The historical record is not kind to the argument that "typical debates over privacy share the common assumption that privacy is a good thing to have, that it is good for society or at least for the individual,"[21] as some have argued. On the contrary: these assumptions are modern, contingent, and debatable. In the classical conception of privacy, the notion that one would seek privacy as a "valued achievement" is incoherent. And some feminists have long noted that the private sphere has been used to silence or minimize female political participation; for some women, it was precisely *escaping* privacy that was a valued achievement.[22] It is thus not at all clear that privacy fulfils two of the four necessary features of an essentially contested concept.

19 See, *e.g.*, Robert C. Post, "Three Concepts of Privacy," *Georgetown Law Journal* 89 (2001), 2087-2098, in support of the contention that one cannot craft a truly neutral definition of privacy, and Adam Moore, "Defining Privacy," *Journal of Social Philosophy* 39.3 (Fall 2008): esp. 413-414, against this argument.

20 See, *e.g.*, Madison Powers, "A Cognitive Access Definition of Privacy," *Law and Philosophy* 15.4 (1996): "[Providing a neutral definition of privacy] enables us to understand privacy in a way which does not pre-empt questions about its value or desirability. The implication is that a claim that someone has experienced a loss of privacy can be treated as a purely factual matter, but the claim that a loss of privacy constitutes a violation of privacy rights requires explicitly normative arguments which can justify treating a loss of privacy as a morally or legally significant event" (374).

21 Mulligan et al., *supra* note 9, at 5.

22 See, generally, Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford: Stanford University Press, 1989); Catharine McKinnon, *Toward a*

A similar objection can be levelled at the belief that labelling privacy "essentially contested" will contribute to a higher quality of discourse on the concept. Certainly debate over privacy since the mid-century—when the philosophical literature began to proliferate on the subject—has not contributed to any sort of distillation of the concept, nor has it elevated the plane of engagement. Rather, as Daniel Solove has recently noted, privacy remains "a concept in disarray."[23] This record leaves little to recommend the idea that recognition of privacy as essentially contested will clear the air, especially if one considers that the position that privacy is essentially contested will itself be contested by those who think it is either more unitary, on one end, or radically confused, on the other. And this result should be particularly concerning. The purpose of conceptualization should not be merely to try to find the perfect theoretical mapping of a given concept, but rather to find a way to think about it that moves the debate forward in some way. Unitary definitions, for all their drawbacks, at least hold out the *potential* of clearing the air and distilling away rival conceptions. To consider privacy essentially contested, on the other hand, seems merely to invite further contestation and debate, with no clear purpose.

I propose, therefore, to view privacy as a *normatively dependent* concept. Rainer Forst has used this term to describe the concept of toleration, and, indeed, the parallels between the concepts of toleration and privacy are striking. Forst notes, for instance, that "the demand for toleration is not situated above or beyond social disputes but emerges within them, so that its concrete shape is always tied to a particular social and historical context."[24] As the next section will make clear, this description could be applied word-for-word to privacy. Forst resists categorizing toleration as an essentially contested concept for two reasons: first, that to do so would imply (incorrectly) that there are "no clear standards of use" for the concept of toleration; and second, that to do so would overlook that the specific nature of the contestation over toleration is over *justifications* for

Feminist Theory of the State (Cambridge, M.A.: Harvard University Press, 1989); and Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989), among others.

23 Daniel J. Solove, *Understanding Privacy* (Cambridge, M.A.: Harvard University Press, 2008): ch. 1.

24 Rainer Forst, *Toleration in Conflict: Past and Present*, trans. Ciaran Cronin (Cambridge, U.K.: Cambridge University Press, 2013): 2.

toleration, and not over the essential elements of what qualifies as toleration itself.[25] What toleration requires, in short, is "independent normative resources in order to have a certain substance, content, and limits."[26] The important quality about toleration is therefore not that it is essentially contested, but that the way one thinks about it requires criteria that are "freestanding and higher-level," and resolving disputes about toleration will require, first, a debate over such higher criteria.[27] My project is, however, not the same as Forst's. I seek here not to provide a universal normative justification for privacy, as Forst seeks for the concept of toleration, but to shed light on the irresolvable differences in how privacy is conceived and what these differences—so often ignored or else perfunctorily acknowledged—mean for modern privacy debates.

Privacy's normative dependence derives, as I have written, from its oppositional character. It lacks a positive organizing feature to help adjudicate between different conceptualizations. To have a private is to have a public, and vice versa.[28] My contention is that this feature of privacy is intrinsic to it, and that attempts to essentialize privacy are ultimately attempts to interpret it within a single framework (to adopt a particular conception) without having to provide a justification for using that framework. The normative dependence of privacy means that it undertakes dramatic transformations according to social or historical context, and it necessitates explicit reference to an outside set of political or moral commitments when describing privacy or locating its value—thus liberal privacy, or romantic privacy, or the privacy of the ancient Greeks, and so on. The parasitically oppositional nature of privacy provides enough conceptual structure to rule out essential contestability, but not enough to help us choose between different conceptions. This is the nature of normative dependence.

[25] *Id.* at 32-34.
[26] Rainer Forst, "Tolerance as a Virtue of Justice," *Philosophical Explorations* 4.3 (2001): 196.
[27] Forst, *supra* note 24, at 33-34. Here and in previous writings, Forst suggests that a proper conception of *justice* is necessary to provide this higher-level criterion.
[28] As mentioned, though I maintain that public and private are *by definition* opposed to one another, I do not claim that this dichotomy must necessarily entail the disparate political commitments that typify the "public/private dichotomy" in liberal thought. Indeed, I question the usefulness of drawing such a stark normative distinction, and, as I will discuss in chapter four, I offer an approach that does not reify this dichotomy needlessly. Nonetheless, if we are to maintain that the terms public and private have any meaning at all, then we must view their meanings (whatever they may be) as opposite ones.

One might wonder how this makes privacy different from any other adjacent concept, such as justice or liberty. It might be argued that all major moral and political concepts are enmeshed in their contexts in this manner. If so, all the better. That's no reason not to apply this analysis to privacy, which suffers more than other major political concepts from the antipodes of extreme essentialization or extreme relativism. If one result of the argument I have presented here is that a similar analysis can be fruitfully applied to other canonical concepts in political theory, then that is a happy outcome.

But there is still reason to treat privacy as exceptional in its normative dependence, in comparison with adjacent concepts. Forst's analysis of toleration notwithstanding, it is likely that many other major concepts in political theory are indeed essentially contested, liable to complete reinterpretation according to their historical or social context. Privacy's inherently oppositional character—its necessary counterposition against a conception of the public—gives it a distinct conceptual structure. It is limited. In contrast to justice or liberty, for example, one cannot conduct an analysis of the private without first understanding key aspects of the public culture in question and the normative commitments that inform this culture. Indeed, it is very often the case that ideas about justice, goodness, liberty, and so on *themselves* form the normative backdrop that it is necessary to account for before understanding privacy. Moreover, privacy is uniquely constituted by social custom and practice in ways that make moral argument inappropriate or unappealing. Is it *wrong* that some societies—contemporary and historical—have different privacy conceptions? Very often, the answer will be "no," and if it *is* wrong, one will have to appeal outside privacy's jurisdiction (precisely to concepts like justice and fairness) in order to make the case.

The daily ritual of navigating private and public spaces—and all the shades in between—relies on a host of socially contingent practices and rules that will vary from society to society.[29] Even in societies with liberal approaches to privacy, there will be distinctions in the conventions

[29] For example, the use of head coverings, the rules regarding defecation, and etiquette governing appropriate topics of conversation.

covering intrusions into others' lives and the acceptability of publicizing certain facts. The very fabric of the social world is woven through with variant privacy norms. Such variations are not attributable to differences in the overarching normative frameworks that govern how people think about privacy, but rather lie outside the realm of moral justification. They are simply social facts, colored by cultural differences regarding bodies, manners, presentation, and shame.[30] They are, nonetheless, valuable to us: they provide the structure by which we understand ourselves in relation to others, and they play a role in self-expression, community building, and social cohesion.

Privacy is therefore normatively-dependent *in two senses*. The first sense is similar to the way Forst means it: privacy requires additional, outside normative resources in order to take shape. But the second sense is that privacy makes use of *social* norms in its specific instantiations.[31] This is a claim not about the (higher-order) context of justification, but about the constitutive make-up of any privacy conception. The development of privacy is as much about the evolution of mores and social expectations as it is about changes in ethical or political priorities. Modern privacy encompasses the rules of engagement, etiquette, and social interaction that are learned and subsequently taught in each generation. So-called "private interests," far from being universal human aspirations, are the culmination of a long process of "psychic conditioning," much of which took place during the fragmentation and subsequently consolidation of power that occurred in Europe during the period stretching from Late Antiquity through the Middle Ages.[32] The very basis of a certain mindset—one with the internal resources necessary to reflect on one's actions, to develop restraint and control, to learn and replicate social rules—that might be considered the quintessentially "private" mindset was dependent on the transformation of the political sphere from one of diffuse power to one of centralized, concentrated power.[33] That is, even the murky

[30] See, e.g., Carl Schneider, *Shame, Exposure and Privacy* (Boston: Beacon Press, 1977).
[31] A social norm, again, is not a normative justification for action, but a habit or custom of social behavior that may vary from culture to culture and time period to time period.
[32] Yves Castan, François Lebrun, and Roger Chartier, "Figures of Modernity," in *A History of Private Life III: From the Renaissance to the Enlightenment*, ed. Roger Chartier (Cambridge, M.A.: Harvard University Press, 1989), 13-160: 16.
[33] Norbert Elias, *The Civilizing Process* (Oxford: Blackwell Publishers, 1994 [1939]). Elias writes that "the moderation of spontaneous emotions, the tempering of affects, the extension of mental space beyond the moment into the past and future, the habit of connecting events in terms of chains of cause and effect" are "different aspects of the same

substrate of learned and inherited social skills that instantiate privacy ideals (the giving of space, the practice of tact and reserve, the verbal and physical rules of etiquette that create social distance) can be seen as dependent on certain political structures, rather than essential elements of the human experience.[34] If humans truly do need privacy, it may be because we have *learned* to need it.

The recognition that privacy is a normatively dependent concept therefore helps to bridge the explanatory nature of this thesis with the prescriptive nature. This chapter makes the case that it is reasonable to treat privacy as normatively dependent. The historical record testifies to the ways in which shifting norms have changed how people think about the private sphere. But in arguing that we ought to conceive of privacy as normatively dependent, I am laying the groundwork for an argument about how we ought to value privacy in the modern day, and thus how we ought to justify and articulate demands for its protection. Because any justification of privacy will have to utilize higher-order normative principles, I argue that we should choose those principles that apply to the entire organization of society—i.e., we should justify privacy according to how it upholds our political commitments, such as our democratic institutions. This approach not only accords with what we know to be true about privacy (it is empty of any normative content that we can otherwise appeal to), but also shows real promise by focusing our attention to the ways in which privacy violations degrade our public institutions and our ability to participate in political life.

What is the evidence, then, that we are justified in viewing privacy as normatively dependent? The following section will outline four historical permutations of private and public to demonstrate how privacy shifts according to different normative commitments.

transformation of conduct which necessarily takes place with the monopolization of physical violence, and the lengthening of the chains of social action and interdependence" (448).

[34] Some have argued that there is a pre-cultural, animalistic impulse that sits beneath our desires for privacy. See, *e.g.*, Westin, *infra* note 199, esp. 8-11, and Moore, *infra* note 199, esp. 33-56. It is difficult to assess such claims. Certainly it seems true that other creatures exhibit behavior that indicates the need for space from others; but whether this behavior is a cousin of the human need for privacy, or whether it stems from similar impulses, seems impossible to determine. At the very most, it would indicate that there is at the root of human privacy concerns a very basic physical need not to live in inhumanely cramped conditions, shackled to the constant company of others. But this does not get us very far in explaining—or justifying—extensive modern privacy protections.

1.2 Four historical approaches to privacy

The four approaches outlined below are, by necessity, simplified. Yet each brings out important differences in how privacy has historically been conceived, and, taken together, they show a distinct evolution in our relationship to the private. In the classical conception, for instance, the private was synonymous with the household, the domestic. To be private was to experience an external constraint on the reach and import of one's actions—a constraint concretely instantiated by the walls of the abode, which shielded private persons such as women and slaves from public view. Yet in the liberal conception, which arose millennia later, to be private was to exist in a sphere protected from the power of the state, demarcated now by the theoretical apparatuses of the law and individual rights. The move from the classical approach to the liberal approach represented a shift along many dimensions. Where privacy once meant the home, it now meant the individual. Where it once symbolized restraint within, it now required constraints from without. Where its opposite was once visibility, its opposite was now representation. Where once it required veils, it now required rights. Each of these shifts represented (at times radical) revisions of the private.

Yet because privacy is defined in opposition to the public, to talk about the private means to necessarily counterpose it to a conception of the public—whether that public is a "public sphere," as in Habermas's conception, or simply the common political life of a community. Each discussion of a new approach to privacy will therefore also indicate a new approach to the public. As the notion of the public (the held-in-common, the visible, and so forth) shifted over time and between communities, the notion of what it meant to be private did also, reflecting different normative priorities and commitments. The table below summarizes each public-private pair in the four conceptions I will discuss. It may be useful to return to the table throughout the discussion to help keep track of the distinctions I introduce, bearing in mind how these distinctions illustrate the normative dependence of privacy.

Four Approaches to Privacy

Classical approach	**Christian approach**
Private = the *domestic* Public = the political	Private = the *interior* Public = the world
Romantic approach	**Liberal approach**
Private = *personality* Public = society	Private = the *individual* Public = the state

1.2.1 The classical approach

One historical model for thinking about the private comes to us from 5th century Athens. Here, as Arendt has famously observed, the worlds of public and private were strictly divided and organized hierarchically—public above private. What was private was the household (*oikos*), a sphere of brute biological necessity in which "men lived together because they were driven by their wants and needs."[35] The public was the active political life of the polis itself, conducted largely in the courts and the Assembly of adult male citizens (*ekklesia*), a "sphere of freedom" in which men were able to surmount their animal natures and act together as humans.[36] The two did not mix. In the private sphere, women and slaves took care of the pre-political needs of life: preparing food, tending to the home, raising a family. The household was a place of economy and (re)production, where men and women became subservient to their physical limitations. Conversely, in the active and agonistic life of the *polis*, free men confronted each other as equal participants in the political project of self-rule. Arendt writes:

> In ancient feeling the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something, and even of the highest and most human of man's capacities. A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian had chosen not to establish such a realm, was not fully human.[37]

35 Arendt, *supra* note 2, at 30.
36 *Ibid.*
37 *Id.* at 38.

The Athenian conception of the private sphere was thus negative, emphasizing not what could be cultivated in solitude but what was lost outside the clamor of public life. Jean Bethke Elshtain echoes Arendt's interpretation. Noting that the Greek term for the private was *idion*, Elshtain writes that "the private person or *idiot[es]* was a being of lower purpose, goodness, rationality, and worth than the *polites* or public citizen who belonged to and participated in the city."[38] Participation in the public life of the city was considered the realm of speech, and therefore of argument and truth, rather than simply the realm of wants or desires.[39]

To exist outside of the *polis*, then, was to be "deprived… of a way of life in which speech and only speech made sense and where the central concern of all citizens was to talk with each other."[40] Indeed, private communication was considered "without meaning," the "babble of the ignorant."[41] It is no coincidence, in Elshtain's view, that women in Plato's Greece were both entirely private and entirely excluded from pursuing questions of truth and justice. To be a member of the household only was to be excluded from the public forum; and to be excluded from participation in public life was to be excluded from precisely those activities that distinguished man from animal. In his "Funeral Oration," for instance, Pericles boasts of the public-spiritedness of Athenian citizens, declaring: "We do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all."[42] An orientation to publicness was a condition of Athenian life.

To be sure, the Athenians recognized that they could not do entirely without a space out of the public eye. The ability to discover one's higher purpose in politics depended on having a full stomach and a place to lay one's head. However, though the privacy of the home was considered natural, if undesirable, the privacy of the individual was seen as disordered. Larry

38 Jean Bethke Elshtain, *supra* note 3, at 22.
39 Josiah Ober, *The Athenian Revolution* (Princeton: Princeton University Press, 1996): 23-28.
40 Arendt, *supra* note 2, at 27.
41 Elshtain, *supra* note 3, at 24-25.
42 Pericles "Funeral Oration" in Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (London: Penguin, 1972), 143-51. Accessed online at: https://online.hillsdale.edu/document.doc?id=355.

Peterman, for instance, has remarked that "the essentially private person in the classical conception is suspect politically, his way of life—or afterlife as for Odysseus—a repudiation of the goods that form the horizon for the ancient city… in its best form."[43] The hierarchy was always clear: the world of politics and free citizenry used the private sphere as the springboard from which to grasp at higher meaning.[44] Indeed, to be private was to lose an essential aspect of being human. Aristotle, in upholding the ontological priority of the city over the individual, writes that "one who is incapable of sharing [taking part in community]…is no part of a city, and so is either a beast or a god."[45] Likewise, in his *Laws*, Plato casts suspicion on the place of secrecy or privacy in society, writing: : "Where [men] have no insight into each other's characters and are kept in the dark about them, no one will ever enjoy the respect he merits or fill the office he deserves or obtain the legal verdict to which he is entitled."[46] He goes on to describe his "ideal society" in terms very similar to his famous descriptions in *The Republic*:

> You'll find the ideal society and state, and the best code of laws, where the old saying 'friends' property is genuinely shared' is put into practice as widely as possible throughout the entire state. Now I don't know whether in fact this situation—a community of wives, children and all property—exists anywhere today, or will ever exist, but at any rate in such a state the notion of 'private property' will have been by hook or by crook completely eliminated from life.[47]

Nowhere do we see a reverence for domestic life, an appreciation for the solitude necessary for developing interiority, the primacy of private property, or an acknowledgment that the reach of

[43] Larry Peterman, "Privacy's Background," *The Review of Politics* 55.2 (1993): 228. Peterman argues that the public/private distinction thus does not as neatly track the city/family distinction, as Arendt maintains. "Family and civic matters are no doubt distinguishable in ancient thought, and one may say that the ancient association in its earliest manifestations puts family before city," Peterman writes, "but it is too far a stretch to isolate the family from the city or place the one in opposition to the other" (227).

[44] Arlene Saxonhouse has commented that Arendt downplays the extent to which the public sphere was dependent on the private sphere: "Arendt's idealized vision of the ancient city is impossible precisely because she ignores what the ancient Greeks understood so well: the interdependence of *polis* and *oikos*, of public and private, an inter-dependence demanded by the ever-present threat of war" (Arlene Saxonhouse, "Classical Greek Conceptions of Public and Private" in *Public and Private in Social Life,* eds. Stanley Benn and G. F. Gaus (London: Croom Helm, 1983), 363-383: 381).

[45] Aristotle, *Politics* I.3, 1253a28-30, trans. Carnes Lord (Chicago: Chicago University Press, 2013). The choice of "beast or god" is telling here: such a man is either a beast, in that he is driven purely by bodily needs, or a god, in that he has no need for community.

[46] Plato, *The Laws*, trans. Trevor J. Saunders (England: Penguin Books, 1970): 738d-e, or pp. 206-207.

[47] *Id.* at 739, or p. 207. *C.f.* Plato, *The Republic*, trans. Desmond Lee (England: Penguin Books, 2003): 416d-417e, or pp. 118-119; also 457c-461e, or pp. 168-173.

politics has necessary and stringent limits. Rather than the notion that politics exists to enable freedom in the private sphere—a later, liberal notion—we have the opposite: that the private sphere exists so that men are free to engage one another in the public sphere.

This conception of privacy, strange to modern ears, stems from a particular set of political commitments;[48] and if men are intended to live together as political animals, then only those who participate in the life of the *polis* can be said to attain their highest good. Such participation, in turn, is equally distinctive, requiring the ability to debate and reason with fellow citizens in the *ekklesia* as well as various compulsive public duties carried out by private citizens, such as the provision of triremes and the food and pay for the crew.[49] Public life simply *was* the life of the Athenian free male, and the private took whatever was left. It is from this notion of the public as the *ekklesia* that we have inherited the conception of public life as that which is "visible to everyone," a phrase which to modern ears rings with the threat of exposure and ridicule, but to Athenian ears would have been the very foundation of action and judgment. The idea that men bear pre-political—"God-given" or "natural"—rights, which function to delimit the public sphere and sanction a realm of private prerogative, is nowhere to be found in Athenian thought.[50] To be private was to experience the constraint of the domestic, and not to enjoy the restraint of the state.

Much of the Athenian approach to private and public was taken up by the Romans—who gave us, of course, the roots of the words "private" and "public" to begin with: private from the Latin *privatio*, or "taken away," and public from *publicus*, the "common," "of the people/state." What one was "taken away" from, in Roman law, was the *res publica*, the "public thing." And indeed Roman law recognized the distinction between private and public. Emperor Justinian's 6th-century summa of Roman laws and jurisprudential opinions, the *Corpus Juris Civilis*, holds: "Public law is that which regards the condition of the Roman commonwealth; private that which pertains

48 Elshtain, *supra* note 3, at 44.
49 Moore, *supra* note 3, esp. 97-107.
50 Josiah Ober, "Quasi-Rights: Participatory Citizenship and Negative Liberties in Democratic Athens," *Social Philosophy and Policy* 17.1 (2000), 27-61: 30.

to the interests of single individuals."[51] Still, it is difficult to pin down what the *res publica* was. The *publicus* originally encompassed arms-bearing men, who were considered to be the citizens of Rome, in which case the *res* would be simply their property: the swords, wagons, carts, money, and conquered lands. But later evolutions broadened the concept, such that *res publica* went from meaning the common property of the army to the considerably more abstract common good of the citizens of Rome—or the "commonwealth."[52] Yet even this is misleading, for "although the Romans had a clear notion of the common good, they had no concept of 'the state' as a separate abstract structure of powers, distinct from an actual set of people who held those positions of power."[53] That is, though Romans could and did distinguish between a man as a private citizen and a man in his duties as a magistrate with authority or common matters, they did not conceive of the state as anything other than this collection of magistrates and officeholders—and the lines were frequently blurred.

The Romans, therefore, both adopted and transformed Greek conceptions of the private and public. If for the Greeks the public sphere was one of action and debate, then for the Romans it was the common good of the republic: the property, wealth, and interests of those who ruled, and the officials who had authority over such domains.[54] These different flavors of the public, in turn, resulted in different takes on what was private. Though for both the Greeks and the Romans the private sphere was the home, and therefore could not compete with the opportunities of the public sphere, for the Romans this public/private distinction tracked the *capacity* in which one acted—the authority one had—while the for the Greeks it marked the *quality* of one's actions. While the Greeks emphasized privacy as a retreat from publicity before others (a question of

51 *Corpus Juris Civilis*, TIT1.4. Accessed at: https://droitromain.univ-grenoble-alpes.fr/Corpus/just1.gr.htm#1. ("Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet.")
52 Raymond Geuss, *Public Good, Private Good*, *supra* note 6, at 35-37.
53 *Id.* at 41.
54 Geuss has also made this distinction, observing that "it is a highly debatable, substantive claim, not a tautology, to assert that everyone affected by certain decisions should have even minimal cognitive access to those decisions… The history of early Rome was marked by a serious struggle about the publicity of the law that applied to everyone. Only after a series of prolonged and often violent confrontations was the principle established that the laws that applied to all (and were in that sense 'public') ought also to be made known to all (displayed 'in public'), rather than being part of the secret knowledge of the aristocratic holders of various priesthoods" (*id.* at 53).

visibility), the Romans foreshadowed the idea that what was private was a question of one's relation to a public body (a question of representation). The Greek ideal was one in which *all* men acted in a public capacity via participation in the Assembly; but the Romans—with their vast empire and population—had given up on this notion of active citizenship. To be a Roman citizen was, by the first and second centuries A.D., to be a member of a group who entrusted the direction of the commonwealth to a smaller set of senators and consuls. To be private meant, therefore, not necessarily to be *aneu logou* in the Greek sense (deprived of the faculty of speech),[55] but more simply not to share in the commonwealth of Rome.

The classical conception of privacy, as exemplified in the Athenian *polis*, thus emphasized privacy as a domestic sphere, centered on the physical home and withdrawn from the life-giving visibility of the public. If this conception feels foreign, it is because later historical reformulations of the private and public would shift in response to a changed normative landscape. The Christian approach to privacy, examined next, provides a bridge to more modern conceptions.

1.2.2 The Christian approach

Following the collapse of the Roman Empire, the Christian Church quickly arose as an alternative authority in the fragmented political world of Late Antiquity (200-700 A.D.). The primacy of the public sphere dissipated without the ideology and military might of the Senatus Populusque Romanus (SPQR), and the Germanic tribes that took over had different notions of the private and public worlds.[56] Gone were the *res publica* of Rome and the *ekklesia* of Athens. In their place blossomed individual kingdoms and private interests, "joined together in a provisional partnership perpetuated by victory."[57] The feudal estates that evolved from this landscape

[55] Arendt, *supra* note 2, at 27.
[56] Michael Rouche, "The Early Middle Ages in the West," in *A History of Private Life I: From Pagan Rome to Byzantium*, ed. Paul Veyne (Cambridge, M.A.: Harvard University Press, 1987), 411-548: 419. Rouche writes that the *res publica*, "a notion requiring a certain capacity for abstraction, was incomprehensible to barbarians. There was no such things as a 'barbarian state,' because barbarism… was a quality of soldiers, who bristled at the slightest injury and knew only violent emotions" (419).
[57] *Id.* at 420. Deprived of resources, the public sphere dwindled into nothing: "The private appropriation of what had once been direct public taxes was so successful that historians often disagree about whether the dues paid by peasants on various large Carolingian estates were originally public or private."

formalized the "privatization" of the public sphere. As a result, the model of political life was the seigneurial relationship.[58] The functions of the "state," such as it was, were conceived of as duties that individuals owed to their lord—or, equally, what sons owed to their fathers.[59] The privatization of the public world had the effect of confusing the two in the opposite direction: households became centers of public power and display. The "essentially privative trait of privacy" that Arendt remarked upon in Athens, which persisted in Roman thought, was slowly being muddied: various ceremonial public acts took place in the great halls of aristocratic families in northern France, whose social relations blended the public and private freely according to the type of guests present.[60] There was no longer the (singular) public and the private; there were now different publics to which one could devote one's private energies. After centuries under Roman rule, the peoples populating Europe were awakening to a new political imagination, with profound repercussions for their notions of private and public responsibilities.

It is in this chaotic world—full of crumbling power structures and shifting social mores—that we find the burgeoning influence of the Church, which imparted a new conception of the private. Though the Church nurtured individualistic impulses, its early years were marked by a degree of appropriation from Roman religious rites, which were almost wholly public ceremonies and lacked a sense of individual introspection.[61] Peter Brown writes that "the Christian community,

58 Georges Duby, "Introduction," in *A History of Private Life II: From Feudal Europe to the Renaissance*, ed. Georges Duby (Cambridge, M.A.: Harvard University Press, 1988), 1-32: 9.

59 For a far more comprehensive account of political relations in early to late medieval Europe, see Susan Reynolds, *Fiefs and Vassals* (Oxford: Clarendon Press, 1994). So-called "feudal" relations were not, of course, uniform across time or place. They varied between different regions and, as Reynolds documents, changed considerably over time, as kingdoms consolidated and bureaucratic institutions (or echoes of them) began to form. Nonetheless, the point here is less about the precise level of state centralization in medieval Europe than it is about the dramatic fragmentation of political power following the collapse of the Roman Empire. No matter the lens one takes, political life in Late Antiquity and the early Middle Ages is much more partial and personal.

60 Georges Duby, Dominique Barthélemy, Charles de la Roncière, "Portraits," in *A History of Private Life II*, *supra* note 58, 33-310: 63.

61 Early Christians were, it is important to note, Greeks and Romans; they therefore borrowed heavily from these cultures in both their religious practices and their conceptualizations of core concepts, such as "faith." Thus some scholars might dispute that there is anything inherently individualistic about Christian faith, especially in its very early years, since its early adherents would have been utilizing languages and concepts from the dominant Greco-Roman culture in which they were situated. See, *e.g.*, Teresa Morgan, *Roman Faith and Christian Faith* (Oxford: Clarendon Press, 2015). See also Peter Brown, *The Rise of Western Christendom* (Oxford: Blackwell Publishers, 1996): "Unlike the ferocious individual self-grooming of the philosopher, the handling of 'sin' in Christian circles was a communal concern… And reparation was not purely a personal matter" (29). Nonetheless, as will be shown,

growing up parallel to the ancient city, had created through its public ceremonies its own sense of a new form of public space, dominated by a new type of public figure [the bishop]."[62] Brown also documents the pervasive changes in daily life that began to occur in the Late Antique period as a result of the growing clout of what had initially been seen as a heretical bunch of Jewish preachers, writing that the "breakthrough of divine energy" had "revolutionary effects… [and] subtly loosened the molding of classical culture and of the habitual sanctions of behavior."[63] Men now divided their allegiances: "Christian doctrine drained the public state, the empire, of its claims to divinity and omnipotence and to being the only ordering principle in the world."[64] Larry Siedentop's account of early Christian philosopher Origen's moral argument with Celsus highlights this feature of the early Church: "Origen… argued for a society that recognized moral limits to the claims of public power, invoking a sphere of individual responsibility that transcended the traditional duties of citizenship."[65] By the sixth century, "a man was defined by his religion alone. He did not owe allegiance to a state; he belonged to a religious community."[66] An alternative moral authority to that of imperial governors or (more abstractly) the secular community encouraged the leading of an apolitical life. For the private to be "elevated," to borrow Elshtain's term, the public had first to lose its perch.[67]

Still, the influence of the Church consisted in more than challenging secular authorities. Over a several hundred year period, it also elevated the interior life as an essential component of saving faith. Against this interiority, the Church contrasted the external world—the mundane, non-sacred, and potentially corrupting power of everything that existed outside the individual's

regardless of individualistic impulses (or not) of the very early church, it quickly became the source of justifications for retreat from the world, as confession became private and introspection the key to salvation.

62 Peter Brown, "Late Antiquity," in *A History of Private Life I*, *supra* note 56, 235-312: 280.

63 Peter Brown, *The World of Late Antiquity* (London: Thames and Hudson, 1971): 52-53.

64 Elshtain, *supra* note 3, at 60.

65 Larry Siedentop, *Inventing the Individual* (London: Penguin Group, 2014): 76-77. In this way, according to Siedentop, Christian thinkers laid the groundwork for liberalism.

66 Brown, *supra* note 63, 186.

67 "The private sphere, that 'lesser' realm of necessity in Greek thought, was lifted from Greek contempt and elevated to an importance and honor once reserved exclusively for the sphere of 'freedom', that public space within which male citizens debated important things and were heroes together." (Elshtain, *supra* note 3, 58)

relationship with God and his representatives on earth. Consider the evolution of the practice of confession. Early Christian directives about the absolution of sin required public events, such as joining an order of penitents, and largely lacked a personal component. In the sixth century, however, Celtic monks had proposed private penance with auricular confession as a means of making the Christian faith more compatible with Germanic notions of personal honor.[68] By the Fourth Lateran Council in 1215, private confession to a priest had become a formalized ritual of Catholicism. St. Augustine, a North-African bishop writing in the fourth and fifth centuries, provided a model in his *Confessions*, an account of his journey of faith. One of Augustine's central tasks was to know himself—not as a physical being or an object of Socratic reflection, but as fleshy, desiring individual:

> So I turned my gaze to myself and said to myself, 'who are you?' and I replied, 'a human being.' And look—my body and the soul in me are at my service; one is exterior and the other interior. Which of these two should I have used to seek my God? For by now I had used my senses to look for him from the earth beneath to the heaven above, as far as I could send the beams of my eyes as my emissaries. Better look to the inner self. (X.9) [69]

Augustine's elevation of the inner self, which is completely unreachable by others, is radical against the backdrop of a classical world that prized debate and engagement. Augustine established room for a conception of privacy distinct from what we see in the classical world: a space epistemically—not just circumstantially—inaccessible to others. And he blessed this space as the proper object of reflection and veneration, a world into which we must peer to pursue a relationship with God. The essentially negative appraisal of privacy gave way to something more positive. Privacy was the site of the divine encounter.

For some, the call to "follow Christ" required a physical turning inward to complement the spiritual one. The Middle Ages were marked by the rise of apostolic orders that focused on asceticism and emotional devotion, such as the orders founded by St. Francis of Assisi (c.1181–

[68] Rouche, "The Early Middle Ages in the West," *supra* note 56, at 528.
[69] Augustine, *Confessions, Volume II: Books 9-13*, trans. Carolyn J.-B. Hammond, Loeb Classical Library 26 (Cambridge, M.A.: Harvard University Press, 2016): 83.

1226) and St. Dominic (1170-1221). These orders represented a complete renunciation of the conviction that men ought to be public, political creatures. Members devoted themselves to a life of poverty and prayer. Yet they also eschewed private property and condemned acquisitive desires, sharing all goods in common and depending for their livelihood on the generosity of alms-givers and local churches.[70] The Franciscans and Dominicans, moreover, were itinerant, traveling widely and staying in churches or the homes of well-wishers; later orders more completely embraced the renunciation of the world, retreating almost entirely into convents and monasteries.[71] Nonetheless, devotional orders embodied the conviction that one's private pursuit of salvation could be a consuming endeavor, completely crowding out public involvement.

Withdrawal from the world found perhaps its ultimate expression in the lives of anchorites—or anchoresses, as they were often female.[72] From the Greek *anachorein*, "to withdraw," anchorites chose to be shut up in cramped cells from which they would never re-emerge, "enclosed as a corpse in a grave after the administration of Extreme Unction and the recitation of prayers for the dying," to spend the rest of their days in prayer and meditation.[73] The administration of last rites was both symbolic and practical: symbolic, in that the anchorite would become dead to the world, and practical, in that the cell in which the anchorite lived—the very ground on which

[70] John Moorman, *The Franciscan Order* (Oxford: The Clarendon Press, 1968): 14-15. Mooreman writes later that apostolic and devotional orders modelled on the Franciscans would in subsequent years even refuse Christian burials to friars who at their death were discovered to have kept items or clothing for themselves. (502)

[71] As Michael Robson notes, paying lip-service to the rejection of public affairs was different from the practice of doing so: many friars achieved such stature in their community that they ended up performing quasi-public duties, such as mediating disputes and serving as ambassadors of their communities. See Michael Robson, *Franciscans in the Middle Ages* (Woodbridge: Boydell Press, 2006): 3. Peter Brown has argued that ascetic "holy men" played a similar role in Late Antiquity. See Peter Brown, "The Rise and Function of the Holy Man in Late Antiquity," *The Journal of Roman Studies* 61 (1971), 80-101. Brown admits in later work, however, that his depiction of the importance of such men on Christian practice was "somewhat larger than life" (Peter Brown, "The Rise and Function of the Holy Man in Late Antiquity," *Journal of Early Christian Studies* 6.3 (Fall 1998)).

[72] *Hermits and Anchorites in England, 1200-1550,* ed. E.A. Jones (Manchester: Manchester University Press, 2019): 8. That the most private of Christian practices would also be one of the most female is not, of course, a coincidence. Jones even titles ones of his chapters "A Cell of One's Own," invoking Virginia Woolf's famous text on privacy for women who wished to write (see *infra* note 123).

[73] Anne Savage, "The Solitary Heroine: Aspects of Meditation and Mysticism in *Ancrene Wisse*, the Katherine Group, and the Wooing Group," in *Mysticism and Spirituality in Medieval England*, eds. William F. Ponnard and Robert Boenig (Cambridge, U.K.: D.S. Brewer, 1997), 63-83: 67.

he or she prayed without cease—would become an eventual grave.[74] The *Ancrene Wisse* ("Anchoresses Guide"), a 13th-century guide to the anchoritic life, was addressed to three sisters who chose to become anchoresses while young and unmarried, seeking a life of complete enclosure and contemplation; however, as Cate Gunn notes, "much of the advice given in the text was applicable to the wider community of pious laity living in the world."[75] That is, though anchorites and anchoresses represented an extreme, they were also an ideal—indicating that complete withdrawal from the public world was not to be viewed as undesirable, but holy.[76] And there was ample Biblical support for this view: consider Elijah's solo journey up Mt. Horeb, John the Baptist's living in the wilderness off locusts and wild honey, or Jesus's temptation in the desert for forty days and forty nights.[77] Anchorites saw their decision to withdraw from the world not as a departure from Christian norms, but as their truest fulfilment.[78]

The elevation of the interior life that blossomed in anchoritic and mystic practices is exemplified in the climactic event of the Protestant Revolution. German priest Martin Luther (1483-1546) led a revolt against the Catholic Church, affirming the primacy of direct, personal

[74] "The rite for enclosing an anchorite ends with the door to the cell being blocked up, and in some cases the solitary really was walled into his or her cell… or at least securely locked in" (*Hermits and Anchorites*, *supra* note 72, at 44).

[75] Cate Gunn, *Ancrene Wisse: From Pastoral Literature to Vernacular Spirituality* (Cardiff: University of Wales Press, 2008): 3. Gunn argues thus that the *Ancrene Wisse* was intended to be a work of vernacular spirituality, or "devotional or spiritual writing in the vernacular that was accessible to lay readers as well as religious" (4).

[76] "Solitary life was generally considered to be worthy of the highest religious respect, since it was successfully attainable only for a very few…" (Savage, *supra* note 73, at 70). Anchorholds, the cells of anchorites, were often in the middle of community life, almost invariably inside a wall in the parish church; and anchorites were dependent on the wealth of a patron to survive (see *Hermits and Anchorites in England*, *supra* note 72, at 42, 53-58). In this sense they could never withdraw completely from community life, and they sometimes received visitors or supplicants outside their windows (if they had any) to give counsel. But the world was not to be welcomed. As Savage writes, "the anchoress will often have before her the prospect of the world from which she has isolated herself. Although enclosed, she is surrounded by this dangerous world, like a person on a very small island in an extremely turbulent sea… The sounds, sights, and inhabitants of the outside world, with their demands for her attention, will constantly harass and afflict her" (71). Proximity to the public was intended to heighten the desire for withdrawal from it, and not to provide an avenue for worldly engagement.

[77] 1 Kings 19; Matthew 3:1-5; Matthew 4:1-11, respectively.

[78] Many anchorites, consumed by the inward expression of their faith, were also mystics. Christian mystics linked the personal experience of God explicitly with solitude and silent contemplation. See Patrick Grant, *Literature of Mysticism in Western Tradition* (London: MacMillan Press, 1983). In the *Incendium Amoris*, his account of his mystical journey (the "fire of love"), mystic Richard Rolle extolled the virtues of the solitary life: "Forsooth he that chooses solitary life for God, and leads it in good manner, is not near woe but fair virtue; and the name of Jesu shall continually delight his mind; and the more they dread not to take that life without man's solace, the more shall it be given them to be gladdened with God's comforting" (Richard Rolle, in *The Incendium Amoris of Richard Rolle of Hampole*, ed. Margaret Deanesley (Manchester: University Press, 1915): Chapter XIII).

relationships with God in the theology of the Church and rejecting practices that were more communal or mediated by priests.[79] For Luther—and the millions of believers who followed in his stead—"the public world could never serve as the locus of human identity and a place within which human beings could act communally towards worthy shared ends."[80] Private prayer and solitary reading of Scripture, considered the foremost responsibilities of the believer, were encouraged via Luther's translations of the Bible from Latin into vernacular German. His preaching radically simplified the Christian life to one of faith and Scriptural study.[81] Adherence to the public authority of the Catholic Church and to widely-shared traditions were rejected as essential faith practices.

In the Christian conception, therefore, preserving privacy meant more than simply entering into certain physical spaces; it meant pursuing an internal state, one in which quiet and solitude permitted a conversation with God.[82] No longer associated with merely external activities—such as the duties of domestic life—privacy became associated with qualities of the mind and soul. The Church had an individualizing effect, especially in the fractured power relations of the feudal age: "The extreme parceling out of public authority that was a feature of early feudalism, so that the idea of a public jurisdiction almost disappeared into a property right, opened the way for a redefinition of the nature and grounds of public authority," Siedentop observes. "It enabled the church, under the papacy, to insist that the primary unit of concern and subjection was no longer the family, tribe, or caste, but the individual."[83] Yet at the same time, the Church also encouraged

[79] "Based on justification by faith, universal priesthood, and the exclusive authority of the Bible, the Protestant Reformation placed each believer in a direct relation with God and enjoined the faithful to read and question the Bible every day, since it contained the word of God" (Castan, Lebrun, and Chartier, *supra* note 32, at 100).
[80] Elshtain, *supra* note 3, at 84.
[81] Martin Luther, "Twelfth Sunday After Trinity, Second Sermon" in *The Sermons of Martin Luther, The Church Postils*, Vol. 4, "Sermons on Gospel Texts for the 1st to the 12th Sundays after Trinity," trans. John Nicholas Lanker et al. (a reproduction of Vol. 13, *The Precious and Sacred Writings of Martin Luther* [Minneapolis: Lutherans in All Lands, 1904])(reprinted by Baker Books, 1982, 1995).
[82] Nonetheless, the association of privacy with certain spaces endured through many liturgical and architectural features of Christianity: the confessional, the use of shrouds and screens, the cloisters of churches and monasteries, and so forth.
[83] Siendentop, supra note 65, at 225. Siedentop writes later: "What stands out from fourteenth-century writings about both church and government is the extent to which the image of society as an association of individuals was gaining ground… The primary unit of subjection to authority was identified as the individual. A corporate conception of society was rapidly waning" (293).

familial and communal ties. Even those who withdrew from the world were divided on this question: cenobitic monks (from the Greek *koinon*, "common," and *bios*, "life") withdrew into a communal environment, in which personal privacy was minimized, while eremitic (*eremos*, "desert" or "wilderness") monks sought to live a solitary existence.[84] Thus, though an individualizing element was introduced to the conception of privacy, the private sphere nonetheless retained its link to a notion of shared domestic space.

One final observation is in order. In the early modern period, as governments attempted to wrestle with the thorny question of religious plurality, the Church prompted further transformations in the content of privacy, particularly with regard to the question of visibility versus representation. Recall that the classical conception of privacy considered the private to be that which was not publicly visible. Arash Abizedah has written persuasively that early modern Europeans, wrestling with religious conflict, began to separate two senses of publicness: one of "publicity" and one of "representation." Recognizing the ardor with which individuals held their religious beliefs, but seeking to uphold the unitary will of the sovereign, Hobbes and other early moderns argued that the one need not entail the latter—that religious practices that were open to others could be labelled "private" because they were not representative of the sovereign's will, an articulation of the existence of a private conscience that Origen had postulated several centuries earlier.[85]

Because of this distinction, one could be public in one sense (open and visible) while remaining private in another sense (not representative of the will of the community).[86] This distinction is readily comprehensible to modern readers, for whom the word "private" self-evidently applies to activities such as religious ceremonies or political campaigns, which are visible

[84] Diana Webb, *Privacy and Solitude in the Middle Ages* (London: Hambledon Continuum, 2007): 12; *Hermits and Anchorites in England, 1200-1550, supra* note 72, at 2-3.
[85] Arash Abizedah, "Publicity, Privacy, and Religious Toleration in Hobbes' Leviathan," *Modern Intellectual History* 10.2 (2013): 277. *Cf.* Ben Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge, M.A.: Harvard University Press, 2010).
[86] *Id.* at 286. Abizedah summarizes the paradoxical nature of this support for toleration: "…by drawing on the new distinction between public and private worship, early modern practices of tolerance paradoxically enabled the state, under circumstances of ineliminable religious pluralism, to *protect* the religious uniformity of public life" (280).

yet not considered representative of the public authorities. But it is an innovation, if Abizedah is right, of thinkers like Hobbes in the mid-seventeenth century. The private, therefore, no longer meant only—or even—that which is not visible to others, but rather that which does not represent the state's authority or power.

The development of the private confession, the renunciation of worldly concerns in devotional orders, and the privileging of the inner life all illustrate the changes wrought by the Christian conception of privacy. Man's inner world became the site of spiritual renewal and struggle, a realm to be carefully examined and tended to. As a result, a "new conception of private life developed imperceptibly in the midst of the gregarious family. From now on privacy meant being oneself among others, in one's own room, at one's window, with one's own property, one's own purse, and one's own faults—recognized and pardoned—as well as one's own dreams, inspirations, and secrets."[87] The Christian conception of privacy opened the door for an emphasis on the individual that later, secular movements would develop more fully. The private sphere, formerly the degraded realm of necessity, was now the site of a personal encounter with God. Its potential was infinite.

1.2.3 The liberal approach

As Abizedah indicates, the individual and his relationship to the state became central concerns of liberal thinkers in the wake of religious conflict in early-modern Europe. Of course, saying what exactly liberalism *is* can be difficult.[88] Will Kymlicka notes that there is a difference between the philosophy articulated by John Locke and John Stuart Mill—what we might call "classical liberalism"—and the more recent political theories espoused by John Rawls and Ronald

87 Georges Duby and Philippe Braunstein, "The Emergence of the Individual," in *A History of Private Life II*, *supra* note 58, 507-632: 533.

88 For an excellent discussion of the difficulties of using the term "liberal," see Duncan Bell, "What is Liberalism?" *Political Theory* 42.6 (2014), 682-715. In the following I will be using the term "liberal" to apply to thinkers like John Locke, J.S. Mill, and John Dewey, without meaning to claim that this attribution exhausts the possibilities for understanding "liberalism" as any coherent philosophical commitment.

Dworkin, which we might call "political liberalism."[89] But it is worth examining what the first proponents were saying, and how their philosophy has impacted subsequent thinking about the relationship between individuals and their governments—and, thus, between the private and public spheres. What emerges from Locke and Mill is a conception of the person as a rights-bearing individual who consents to the formation of a limited government in order to protect his fundamental interests, foremost among these being his property. Under the liberal approach, privacy is a feature of a normative framework in which politics comes second, individuals matter first, and respecting the line dividing public and private is an important element of individual freedom. The private thus takes on the meaning of that which pertains to the *individual* (his property, his rights, his interests), opposed to a public world that in its most articulated form is represented by official state authority.

In his *Second Treatise of Government*, Locke sketches a contract theory of government in which free individuals voluntarily come together to form a government for the purpose of securing their property and establishing a fair mechanism of dispute resolution. Central to this theory is that each man owns himself and his labor: "Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his."[90] This self-ownership, in turn, gives rise to the right of property;[91] and fair enforcement of the laws and resolutions of disputes over property are the basis for political society.[92] The result is that political power is, under the Lockean conception, highly limited to what Locke calls the "public good": "It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects."[93] It might be said that Locke thereby

89 Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989): 10.
90 John Locke, *The Second Treatise of Government* (reprint New York: Dover Publications, 2002 [1689]): V.27, 12-13.
91 See, *e.g.*, *id.* at V.44 and V.45, 20-21.
92 *Id.* at VII.87: "But because no political society can be nor subsist without having in itself the power to preserve the property, and, in order thereunto, punish the offences of all those of that society; there and there only, is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it" (39).
93 *Id.* at XI.135, 62.

"bifurcated" what classical thinkers had considered a singular realm of politics, placing the public sphere on par with other voluntary associations—e.g. marriage and employment—and reserving a vast range of activity for the private discretion of individuals.[94] In so doing, Locke made use of the notion of "civil society" in which men had "civil interests," a sphere which was outside the legitimate control of the sovereign but was not removed from the company of other men: private, but visible.[95] The dividing line that most concerned him was that between a citizen and the state authorities, rather than between individuals themselves.

John Stuart Mill takes up the mantle from Locke 170 years later with a sustained investigation into the nature of the "private" sphere that Locke allows for in his theory.[96] Whereas for Locke the existence of this sphere was ontologically prior to government and therefore a contractual constraint on it, for Mill there is a positive sense in which the private sphere is where man's creative potential lies. In addition to his "harm principle," a theory of government in which intrusions on individuals" (private) lives can only be justified to prevent them from harming others,[97] Mill presents a vision of a flourishing society in which all individuals—not merely government officials—refrain from intervening needlessly in each other's lives: "But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation."[98] Such broad private license is not merely normatively required by some notion of

[94] See, *e.g.*, Eric Claeys, "The Private Society and the Liberal Public Good in John Locke's Thought," *Social Philosophy and Policy* 25.2 (2008), 201-234.
[95] John Locke, *A Letter Concerning Toleration* (reprint New York: Dover Publications, 2002 [1689]): "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency of the body; and the possession of outward things, such as money, lands, houses, furniture, and the like" (118).
[96] Though, of course, Mill rejects the conceptual tool of a "contract" as a means of describing the relationship between the individual and society. See chapter four, "On the limits of the authority of society over the individual," in J.S. Mill, *On Liberty*. In *On Liberty and other writings*, ed. Stefan Collini (Cambridge, U.K.: Cambridge University Press, 2003 [1859]): 75.
[97] *Id.* at 13.
[98] *Id.* at 15.

limited government; it is, rather, an intrinsic ingredient in the formation of individuality.[99] If, then, for Locke we *ought* to be let alone, for Mill it is *good* that we are let alone.[100]

The legacy of such thinkers in political thought is profound, but perhaps nowhere more so than in the United States.[101] The "Declaration of Independence"—itself a statement of animating principles, though not a governing document—uses language redolent with Locke's influence, arguing that governments are instituted to protect private rights such as the "pursuit of happiness" and thus lose their legitimacy when they encroach too much. In *Democracy in America*, his lengthy commentary on the early American republic, Alexis de Tocqueville captured the insistent individualism of the American mindset: "The inhabitant of the United States learns from birth that he must rely on himself to combat the ills and trials of life; he is restless and defiant in his outlook toward the authority of society and appeals to its power only when he cannot do without it."[102] The broad discretion that liberalism grants to individuals to direct their lives, coupled with its formal constraints on the legitimate exercise of state power, gave rise to a conceptual decoupling of "state" and "public," the latter being the broadest expression of that free associational activity that Locke described as "civil interest."[103] What is therefore "private" is much

99 For instance, Mill writes: "It is the privilege and *proper condition* of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way" (*id.* at 58, italics mine). And later: "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation" (63).

100 Mill can be seen as marrying Locke with romantic thinkers, who emphasized not the *right* to be let alone so much as the spiritual and emotional benefits of such privacy. See section 1.2.4, below.

101 On the centrality of liberalism to American political thought, see Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, & World, Inc., 1955). Hartz writes that all of American political thought and development can be understood from two basic facts: "the absence of feudalism and the presence of a liberal idea" (20). Hartz's influential thesis has been roundly debated in the literature on American political development, and I will not rehash it here. Yet both Hartz and his critics agree that liberalism has played a prominent, if not dominant, role in the development of political thought in the U.S. For two illuminating critiques of Hartz, see James Kloppenberg, "Requiscat in Pacem: The Liberal Tradition of Louis Hartz," in *The American Liberal Tradition Reconsidered*: *The Contested Legacy of Louis Hartz*, ed. Mark Hulliung (Kansas: University Press of Kansas, 2010), 90-124; and Rogers Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *The American Political Science Review* 87.3 (1993), 549-566.

102 Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (reprint New York: Harper Collins, 1969 [1835, 1840]): 189.

103 See, *e.g.*, John Dewey, *The Public and its Problems* (Ohio: Ohio University Press, 1954 [1927]): "The lasting, extensive and serious consequences of associated activity bring into existence a public. In itself it is unorganized and formless. By means of officials and their special powers it becomes a state. A public articulated and operating through representative officers is the state" (67).

more difficult to tell. The home and family life, certainly; but also one's business enterprises, one's political affiliations, and one's involvement in what Alan Wolfe has called "communities of interest, identity, and belief."[104] A entire range of visible, otherwise "public" activities fell outside the range of state oversight or control and thus became classified as "private," or not representative of the coercive power of the state.[105]

The liberal approach to privacy is thus, in many ways, opposite to the classical approach. Liberal thinkers prized the private sphere as the arena of worthwhile human activities, including those related to politics; they conceived of the individual as the bearer of pre-political rights, and therefore understood privacy as an individual's prerogative; and they were concerned with protecting a sphere of activity from government influence or coercion. Liberals emphasized the external dimension of privacy, especially because of its association with property: it was a barrier, a line across which the government was not intended to cross, rather than a means to protect an ineffable inner quality of man like his "personality." As such, the liberal conception of privacy views the state with suspicion, whereas the romantic conception, as we will see, directs attention to the intrusive presence of one's neighbors. The liberals saw themselves as protecting man's freedom (later privacy writers would use the term autonomy); what one did with this freedom was a secondary question. And, above all, the liberal conception of privacy was about identifying and reifying the boundary between the *individual* and the state.

James Q. Whitman has written that the American embrace of liberal ideals, contra their more hesitant European peers, is exemplified by the differences between American and European approaches to privacy law in the modern day. He characterizes the differences as those between a

104 Alan Wolfe, "Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 182-203: 197. Wolfe notes that a defining feature of such communities is that they are both "collective" (i.e. public in the visible sense) and "not authoritative for the entire society" (i.e. not public in the representative sense).

105 As noted earlier, the roots of this distinction can be traced back to early-modern debates over religious toleration. But liberal thinkers extended this distinction into a formalistic conception of the legitimate purview of government, rather than maintaining it as a pragmatic concession. For further discussion of the early-modern genesis, see Arash Abizedah, *supra* note 85.

"dignity" approach to privacy and a "liberty" approach, resulting in an American preoccupation with state power and police and a European focus on "one's position in society."[106] Though Whitman locates the genesis of these differences in the European—and especially French and German—aristocratic heritage, which is mostly absent in the United States, we might also conceptualize them as the differences between a fundamentally romantic and a fundamentally liberal approach to understanding privacy.[107]

The deep penetration of liberal thought in the American consciousness might also help to explain some of the cruel idiosyncrasies of the American approach to privacy. Consider: though "Americans had from their earliest history enjoyed a good deal of freedom from the intrusions of state and society," as Sarah Igo notes, "these rights stood out against the utter lack of such safeguards for the marginalized and the disenfranchised," particularly enslaved people.[108] But a conception of privacy based on liberal thought would quite obviously trace the distinctions that liberals make between rights-bearing and non-rights-bearing individuals, the latter having no claim whatsoever to privacy; and this distinction in turn would trace the (liberal) distinction between property-holders and non-property-holders. Consider also that a key touchpoint of the American revolution was the violation of property rights (whether through unjust taxation or the quartering of British troops in American homes), even though "eavesdropping, gossip, and other forms of meddling were part and parcel of life in small communities" in the States.[109] What privacy was in America—what it covered and who was entitled to it—was thus highly dependent on the dominant conception of the relationship between the individual and the state. Igo concurs:

[106] James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty," *Yale Law Journal* 113 (2004), 1151-1221: 1160-1164. In a separate article, Whitman argues that the concept of "dignity" helps to explain a host of differences between European and American legal thought, not just privacy. See James Q. Whitman, "'Human Dignity' in Europe and the United States: The Social Foundations," *Human Rights Law Journal* 25 (2004), 17-23.
[107] Indeed, Whitman points to the failure of the Warren and Brandeis conception of privacy to take root in American legal thinking (which instead has taken an essentially Fourth Amendment approach) as the failure of "continental" conceptions of privacy to transplant in the American context (*id.*, esp. 1202-1208). Whitman makes use of the German concept of "personality," which he believes Warren and Brandeis utilized in their famous formulation. As we will see in section 1.2.4, below, this was a romantic concept.
[108] Sarah E. Igo, *The Known Citizen* (Cambridge, M.A.: Harvard University Press, 2018): 19-20.
[109] *Ibid.*

> Arguments about privacy were really arguments over what it meant to be a modern citizen. To invoke its shelter was to make a claim about the latitude for action and anonymity a decent, democratic society ought to afford its members. Responses to that claim exposed the fault lines of civic membership. Which citizens, after all, could be entrusted with privacy, and therefore be liberated from official scrutiny?[110]

That privacy is a proxy for other, more fundamental commitments—and thus must be understood in light of those commitments—is an animating principle in this thesis. Whitman also stresses this conception of privacy, writing that "there is no such thing as privacy *as such*. The battle, if it is to be fought, will have to be fought over more fundamental values than that."[111]

Liberalism is not, of course, the only relevant influence on American conceptions of privacy. But liberalism has a profound grip on how we think about privacy. It colors our resistance to classical paeans to "political man," which denigrated the private life; it results in our conviction that the language of individual rights is best suited to privacy concerns; it emphasizes notice and consent as key elements in regime of privacy protections; and it animates a conviction that freedom and human flourishing find their roots in private associations, rather than public projects. Whether or not such convictions about privacy are true or useful will be discussed in subsequent chapters. For now, what is important to note is that they are *contingent* convictions—that this way of thinking about the private sphere is parasitic on a broader normative commitments, and that history illustrates alternative ways of thinking about such problems.

Indeed, the hegemony of liberal thought is such that modern privacy commentators infrequently examine whether the very conception of privacy they are utilizing is intrinsic to privacy at all. Absent the liberal presumption of the moral justifiability of private property, for example, we lose the notion that anyone has a "right" to wall off their home from others. To be sure, the

110 *Id.* at 3.

111 Whitman, *supra* note 106, at 1221. For discussions of how privacy operates in non-Western contexts, see Leslie K. Haviland and John B. Haviland, "Privacy in a Mexican Village" in *Public and Private in Social Life*, *supra* note 44, 341-361; Marc Garcelon, "The Shadow of the Leviathan: Public and Private in Communist and Post-Communist Society," in *Public and Private in Thought and Practice*, *supra* note 104, 303-332. For an examination of how different cultures have resulted in variations in privacy conceptions even within the West, see Kristina Orfali, Chiara Saraceno, Ingeborg Weber-Kellermann, and Elaine Tyler May, "Nations of Families," in *A History of Private Life V: From the First World War to Our Times*, eds. Antoine Prost and Gérard Vincent (Cambridge, M.A.: Harvard University Press, 1991), 415-594.

argument can be *made* that these are important human interests, and therefore that privacy serves a vital function in society. But the point is precisely that the plane of engagement will have to sit, as it were, *above* privacy—it will have to be about the reasonability of liberalism, for example, as against the many other political philosophies that could and have commanded our attention. Were we to adopt, as Arendt presumably thought we should in *The Human Condition*, something like the attitude of the Greeks, we would have a very different take on the demands of privacy than we currently do. That we have not done so says much more about our commitment to liberal thought than it does about our commitment to privacy *per se*.

1.2.4 The romantic approach

Yet the liberal approach to privacy is not the only influence on modern conceptions. A fourth conception of privacy—what we might call the "romantic" approach—emerged as a response to the significant changes in European life that took place from the fourteenth through eighteenth centuries, such as the growth of the "state" as a recognizable theoretical apparatus and the Enlightenment. Drawing on the sanctification of the inner emotional life that the Christian conception introduced, and reacting to the excesses of the Enlightenment, romantic writers wrote of an inner "inviolate personality" that required protection against the public world of *society*, which encompassed both the lively urban sociability of Europe's growing cities and the increasingly potent power of centralized states. Romantics celebrated both the affective life of the family and the solitary life of the individual as characteristics of a private world in need of protection. In so doing, they provide us with another historic reformulation of what it means to be "private," one that endures today.

Enlightenment philosophy emphasized the use of reason, which required private study for cultivation, but for public ends—a distinction that Kant famously drew.[112] To be a citizen in the

[112] "The public use of one's reason must always be free, and it alone can bring about enlightenment among mankind; the private use of reason may, however, often be very narrowly restricted, without otherwise hindering the progress of enlightenment. By the public use of one's own reason I understand the use that anyone as a scholar makes of reason before the entire literate world. I call the private use of reason that which a person may make in a

new political environment required a certain type of mindset, one capable of "thinking publicly" when required, of mapping distinctions in one's role (as father, worker, citizen) onto mental divisions: private reason and public reason. An increasingly literate population coupled with a growing "Republic of Letters"—a trans-national community of Enlightenment philosophers who engaged in political critique—culminated in the French Revolution, where the "dare to know" was weaponized into a sustained assault against the sanctity of the private sphere.[113] Resuscitated through the Christian Middle Ages from its low status in classical thought, the inner life of man was now seen as ripe for indoctrination. It was no longer sufficient simply to think freely and rationally in order to be a citizen; one had to think *properly*.[114] The new citizen was the patriot, his heart laid open before the Republic, his will completely aligned with the community's. Factional politics or dissent of any kind were synonymous with conspiracy.[115] Even styles of dress—*le costume*—adopted a political meaning, and wealthy patriots began buying "revolution beds" or "federation beds."[116] In his address to the Convention on 5 February 1794, Robespierre emphasized that the necessary interior quality for patriotic citizenship was virtue ("la virtu"), drawing explicit parallels to Greece and Rome. To inculcate virtue required the sublimation of one's private will to public interest.[117]

civic post or office that has been entrusted to him" (Immanuel Kant, "What is Enlightenment?" 30 September 1784. Accessed at: http://www2.idehist.uu.se/distans/ilmh/Ren/idehist-enlighten-kant02.htm).

113 For a fuller discussion of the Republic of Letters and its role in mobilizing political criticism, as well as how this form of criticism resulted in the excesses of the French Revolution, see Koselleck, *infra* note 182.

114 Michelle Perrot, "Introduction" in Lynn Hunt and Catherine Hall, "The Curtain Rises," in *A History of Private Life IV: From the French Revolution to the Great War*, ed. Michelle Perrot (Cambridge, M.A.: Harvard University Press, 1990), 7-94: 9.

115 "There could be no mediation between the state and the individual by parties or interest groups; but individuals were expected to accomplish interior, private revolutions that mirrored the revolution taking place in the state. As a consequence, private life was intensely politicized; the public threatened to engulf the private" (Hunt and Hall, "The Curtain Rises," *supra* at 13).

116 *Id.* at 18, 21.

117 Maximilien Robespierre, "Sur les principes de morale politique," Address to the Paris Convention. 5 February 1794. Accessed at: http://www.worldfuturefund.org/wffmaster/Reading/Communism/rob-ter-french.htm: "Il est vrai encore que ce sentiment sublime suppose la préférence de l'intérêt public à tous les intérêts particuliers ; d'où il résulte que l'amour de la patrie suppose encore ou produit toutes les vertus : car sont-elles autre chose que la force de l'âme qui rend capable de ces sacrifices ? & comment l'esclave de l'avarice & de l'ambition, par exemple, pourrait-il immoler son idole à la patrie ?"

The assault on the private sphere did not last, however. In response to the excesses of the Jacobins, and in the calmer aftermath of the Revolution, the private sphere regained a position of prestige in the nineteenth century, where the sanctity of the inner world once again emerges—this time not as an expression of religious piety, but as the "inviolate personality" of the romantics. Indeed, for some historians the nineteenth century is where "privacy" as an intelligible concept originates. The century is capped off by Warren's and Brandeis's *Harvard Law Review* article in 1890 that many legal scholars consider the beginning of the legal discussion of the right to privacy in the United States. Though an honest reckoning with the history of privacy requires going much further back, it is true that "privacy talk" blossomed in a century that followed the excesses of the French revolution and that grappled with the sterility of Enlightenment thought and the alienation of labor in an industrial age. Yet contradictory and complex trends dominated whether privacy was associated with the sanctity of the home or the flourishing of the individual. Both reflected different notions, sometimes in tension with each other, about what political demands could be made upon citizens, as well as what was worth protecting.

No longer construed as merely the realm of necessity, as in the classical conception, the home took on central importance as a moderating influence on political passions and the site where the labor force was produced. During the Revolution, the notion that one's private life had important repercussions for politics had resulted in a reign of terror; after the fact, that same notion resulted in a sustained interest in protecting the family as the inculcator of the moderate virtues of citizenship.[118] The private sphere, seen as part of the domestic sphere, was thus sanctified and controlled at the same time. The state increasingly regulated family life, taking a renewed interest in child welfare and tightly controlling the proper expression of sexuality.[119] Yet it also elevated the

118 Michelle Perrot and Anne Martin-Fugier, "The Actors," in *A History of Private Life IV*, *supra* note 114, 95-338: "The atom of civil society, the family administered private interests whose development was essential to the power of states and the progress of humanity… As the crucible of national consciousness, it inculcated symbolic values and memories of the nation's founding. It fostered citizenship as well as civility" (111).

119 For a provocative discussion of Victorian Era sexuality mores and the role of the state in regulating sexuality, see Michel Foucault, *The History of Sexuality*, Vol. 1 (1976), trans. Robert Hurley (London: Penguin Books, 1998): esp. 1-51, 133-159.

status of family life, at times casting itself as the guardian of private life *against* private interests or private individuals who would seek to demean or corrupt it. The domestic sphere had thus come full circle: rather than constituting the antipode to a fully realized political community, as in the classical conception, it had by the nineteenth century become integral to it. In both instances, its value was dependent on prevailing notions about the components of a healthy political body. And in both instances, identification of the "private sphere" with the "home" threatened to eclipse the privacy of the individual: "Vast areas of life were defined as lying outside the family, hence as being suspect. In these areas the rules of private life were blurred, and even the right to privacy was in doubt."[120]

Against the family, the individual re-asserted herself in the nineteenth century, even if the state was slow to recognize her.[121] Centuries of religious confession had resulted in a mindset that carried over into the secular sphere, where ledgers of personal belongings, diaries, and records of personal habits proliferated. New first names were introduced at an accelerating rate, indicating burgeoning desires to separate individuals from their families.[122] Even within the increasingly protected domestic preserve, individuals longed for a private space: a "room of one's own."[123] Such desires were given intellectual cover by a collection of poets, novelists, and essayists that collectively have come to comprise the "romantics." These writers articulated a vision of the private sphere that celebrated its potential to sanctify and protect an inner quality of man that they saw as increasingly under attack in an industrializing, de-personalized world.[124]

120 Perrot and Martin-Fugier, "The Actors," *supra* note 118, at 241.
121 Michelle Perrot, "Introduction" in Alain Corbin, "Backstage," in *A History of Private Life IV*, *supra* note 114, 451-668: 454.
122 Corbin, *supra* at 457.
123 Virginia Woolf would later crystallize these demands in a series of lectures at women's colleges at Cambridge University. See Virginia Woolfe, *A Room of One's Own* (London: Penguin Books, 1928). "…[A] woman must have money and a room of her own if she is to write fiction" (4).
124 Indeed, some have argued that the inward turn championed by the romantics stemmed precisely from the belief that emotion and personality had been drained from broader commercial relations. Alan Silver, for instance, has written that the existence of a private sphere characterized by deep affective potential therefore "requires the very impersonality of the public world of bureaucratic administration, contractualism, and monetized exchange against which it is culturally distinguished" (Alan Silver, "Two Different Sorts of Commerce" in *Public and Private in Thought and Practice, supra* note 104, 43-74: 44). On this reading, the prevailing consensus that privacy is the realm of intimacy is a historical accident.

Whether acknowledged or not, many of the romantics were drawing on the individualist emphasis of the Church, especially post-Reformation. Isaiah Berlin, for instance, traces the roots of romanticism to the pietist movement, which was a branch of Lutheranism emphasizing scriptural study and a personal relationship with God.[125] But rather than highlighting the personal relationship with God or emphasizing the private as a retreat from a corrupting and sinful world, romantic writers divorced the supernatural element and kept the habit of mind. They were "preoccupied with the epistemological and moral importance of feeling and imagination" and "developed a distinctive notion of the individual."[126] The romantics excavated what they saw as the inner *personality* of each individual: the moods, emotions, and expressive capacity that form the backbone of a truly humane life. Nurturing this personality required protecting it from the attempts of others to intrude on, record, or manipulate it. Privacy thus transformed into a tool for nurturing something the romantics believed to be compromised in their urbanizing environments. And these environments spanned national boundaries: from Germany (Friedrich Schleiermacher, Alexander von Humboldt, Johann Wolfgang von Goethe) to England (Samuel Coleridge, Robert Southey, William Wordsworth, Lord Byron) to France (François René Chateaubriand, Alphonse de Lamartine) to America (Henry David Thoreau, Ralph Waldo Emerson).

For the Europeans, the turn to feeling and imagination was not merely a vision about individual flourishing, but also a political project. John Morrow writes: "The romantics' insistence that the relationship between the state and its subjects was a consequence of belief, not contract or fear, was a key element in their attempt to replace a legalistic conception of the state with one that relied upon the creation of a sense of communal identity." This was the state as "based on affective, other-regarding values such as love, not on legal arrangements that were designed to

125 Isaiah Berlin, *The Roots of Romanticism* (London: Chatto & Windus, 1999): 36. Berlin also writes that romanticism is "the largest recent movement to transform the lives and thought of the Western world" and "the greatest single shift in the consciousness of the West that has occurred" (1-2).
126 John Morrow, "Romanticism and political thought in the early nineteenth century," in *The Cambridge History of Nineteenth Century Political Thought*, eds. Gareth Stedman Jones and Gregory Claeys (Cambridge, U.K.: Cambridge University Press, 2011), 39-76: 39.

protect individual interest."[127] As such, a public sphere that required affective investment necessitated a private sphere in which the organs for such investment could be nurtured and protected.

American romantics, meanwhile, were more apt to stress isolation from society, even principled resistance to it. Thoreau, in his essay on "civil disobedience," exhorted his readers to be "men first, and subjects afterward."[128] Later, in his account of his two-year solitary retreat to a cabin on Walden Pond in Massachusetts, Thoreau praises his "little world all to [himself]," writing that "there can be no very black melancholy to him who lives in the midst of Nature and has his senses still."[129] His friend Emerson (in whose cabin he sojourned during the writing of *Walden*) similarly encouraged retreat from the company of men and communion with nature, writing that "the greatest delight" of such activities is "the suggestion of an occult relation between man and the vegetable."[130] But physical seclusion was a means to accessing an inner resolve. The romantics saw in both Enlightenment philosophy and in statist Absolutism an abnegation of the unpredictable and uncontainable efforts of the human spirit. In addition to "the Will"—the freedom and agency of the human mind—Berlin writes that the romantics emphasized "the fact that there is no structure to things, that you can mold things as you will—they come into being only as a result of your molding activity—and therefore [they embodied] opposition to any view which tried to represent reality as having some kind of form which could be studied, written down, learnt, communicated to others, and in other respects treated in a scientific manner."[131]

Whether stressing the affective ties of man and state or encouraging a retreat into the New England woods, then, romantic writers succeeded in marking off man's inner emotional life as a sacred space, the fount of both political wisdom and moral fortitude. After centuries of dominance

[127] *Id.* at 53. Morrow contrasts the political vision of Robert Southey—"for whom the benefits that the states produced… were aspects of a complex relationship that was underwritten by affective and moral qualities"—with the liberal vision in which states generated dry political obligations. (47)
[128] Henry David Thoreau, "Civil Disobedience," in Open Road Media (2015 [1849]), 6.
[129] Henry David Thoreau, *Walden* (The Floating Press, 2008, 1854): 172-173.
[130] Ralph Waldo. *Nature*. 1826. Reprint Project Gutenberg E-Book, 2009: 12.
[131] Berlin, *supra* note 125, at 123.

by the church, the sanctity of the individual's messy and pre-rational will had found a secular defense. Modern privacy conceptions, especially in their emphasis on property and control, can be easily traced back to John Locke and the birth of classical liberalism. But alongside this popular conception of privacy we see also the notion of peace, repose, and the sanctuary of the home; we see the modern hostility to an intrusive and demeaning press; and we see the emphasis on intimacy and on the ability of individuals to lead lives of meaning and purpose. This latter conception owes its stature, in part, to the work of the romantics. When Warren and Brandeis spoke in 1890 of man's "inviolate personality," and championed a corresponding "right to be let alone" in order to protect that personality, they were standing on a body of romantic work that had established the existence of such an entity in the first place.[132] In his later dissent in *Olmstead v. United States*, Brandeis wrote that the makers of the Constitution "recognized the significance of man's spiritual nature, of his feelings and of his intellect" and they "[t]hey sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[133] Indeed, David Rosen and Aaron Santesso have argued that the "modern, spiritual apprehension of privacy" captured by Warren and Brandeis owes its existence to romantic poets, like William Wordsworth, who saw in privacy the very basis for individual self-making.[134]

It is up for debate whether respect for inviolate personality has been adequately translated into law, as Rosen and Santesso rightly point out. But what cannot be denied is that the idealization of the private sphere as the sanctuary of man's most vulnerable and human qualities has penetrated modern conceptions of privacy in the west, complementing the familiar liberal notion of privacy and opening up a new vista of human qualities for political relevance. The private sphere has transformed, at this point, from the realm of the household economy (the classical approach), to

132 Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890), 193-220.
133 27 U.S. 438, 277 (1928) (Brandeis, J., dissenting).
134 David Rosen and Aaron Santesso, "Inviolate Personality and the Literary Roots of the Right to Privacy," *Law & Literature* 23.1 (2011), 1-25: 15. It is worth noting that Rosen and Santesso view subsequent attempts by legal theorists to transform "inviolate personality" into workable law as corruptions of the original insight, which utilized an "ethico-religious" notion of individuality rather than a conception of harm to the "reasonable person" and his reputation (17-19).

the site of an encounter with God (the Christian approach), to a realm protected from state interference (the liberal approach), to the wellspring of individuality in the midst of the family (the romantic approach). The romantic conception of the private emphasized both the inner life of the individual and the affective ties of the domestic sphere: but in both cases it rejected the classical emphasis on the "privative" trait of privacy and embraced the notion that privacy was the precondition for a flourishing interior life. Today, when we seek solitude or bemoan the crass intrusiveness of the press, we (often unknowingly) invoke the legacy of the romantics.

1.3 Telling the histor(ies) of privacy

An examination of four historic reformulations of the concept of the private thus reveals considerable mutability in what it means for something or someone to be private. It is the contention of this chapter that this flexibility indicates the normative dependence of the concept of the private, that is, its enmeshment with and reliance upon other commitments for normative content, which stems from privacy's conceptual opposition to the public.

But we can also illuminate this feature of privacy by examining how the history of privacy is told. If it is told at all (a turn to history is not, tellingly, a common strategy in modern theorizing about privacy), the history of the private and the public often starts from some original state in which both were properly conceived. Seyla Benhabib has termed this feature a "nostalgic trope" in theorizing about the public sphere:[135] the solutions for the present might be found in the politics of the past. Yet where one starts the story, which story is told, and the lessons one draws from it are highly instructive, especially insofar as they reveal how privacy transforms according to the normative commitments of the story-teller.[136] Just as examining historical permutations of the

135 Seyla Benhabib, "The Embattled Public Sphere: Hannah Arendt, Jürgen Habermas, and Beyond," *Theoria* 44.90 (1997), 1-24: 1.

136 Noting the "curiously timeless quality" of Habermas's account of the bourgeois public sphere, Jonathan Barry writes: "If we begin with late eighteenth-century moments, whether they be Kant's moment of Enlightenment or the French Revolution, then we tend, naturally, to look back into the eighteenth century to find either contrasts by which to sketch out modernity or new developments by which to explain its growth. Yet if we abandon this perspective (with its implications of history as linear) and prepare to range more freely over the past for transformations of public and private, then we can begin to postulate other chronologies" (Jonathan Barry, "A

private can illustrate its normative dependence, so, too, can an examination of how the history of privacy is told. Privacy's normative dependence affects not just its actual historical evolution, but also the historiographical attempts to interpret this evolution.

Arendt's *The Human Condition,* Habermas's *Structural Transformation of the Public Sphere*, and Koselleck's *Critique and Crisis* all aimed to critique modernity via an exploration of the past, and in particular via a reconstruction of different ways of conceptualizing the private, the public, and the relationship between the two. All three texts were written by roughly contemporary German authors who were interested in how the tragedy of twentieth-century German politics could be explained by or interpreted through larger historical trends, and particularly through the Enlightenment.[137] Understanding what was public, what was private, and what the relationship between the two should be were central concerns for each. By comparing these texts, we can see how variously the history of the public and the private can be told—how some parts emphasized and others obscured—from the perspective of different normative frameworks.[138] We can also see how the history of the private and public can serve certain purposes over others. I will conclude by highlighting the histories that are often not told (of women, the poor, and the non-white), which might challenge the dominant narratives in useful ways.

1.3.1 Hannah Arendt: private, political, and social

The "classical" conception of the private sphere outlined earlier in this chapter is heavily indebted to Arendt's work, and in particular to her use of classical (Aristotelian) philosophy to critique modernity. As we saw, in Arendt's reading the Athenian *polis* structured the private in a particular way: it corresponded to the household, the seat of the domestic economy, while public

Historical Postscript," in *Transformation of the Languages of Public and Private in the Eighteenth Century*, eds. Dario Castiglione and Lesley Sharpe (Exeter: University of Exeter Press, 1995), 220-237: 222-223).

137 See, *e.g.*, Peter Verovsek, "Integration after totalitarianism: Arendt and Habermas on the postwar imperatives of memory," *Journal of International Political Theory* (September 2018), 1-23; and Jason Edwards, "*Critique and Crisis* Today: Koselleck, Enlightenment, and the Concept of Politics," *Contemporary Political Theory* 5.4 (November 2006), 428-446.

138 To clarify: the aim is emphatically *not* to reduce the historical claims of these writers to fictions constructed in support of their ideological commitments. Indeed, as my use of Arendt earlier may indicate, there is much to admire in their historical analyses. The aim is rather—and more humbly—to interrogate why these writers are choosing to tell the histories they are telling, and how this history can be contextualized in light of their larger projects.

life was properly *political* life. Arendt is clear-eyed about the costs of this set-up, and in particular how it relied upon the labor of slaves and the subordination of women.[139] But she discusses the Greek conceptions of private and public at length to contrast them favorably against modern ones, which have invested the private with the gravitas that formerly was reserved for the public. Arendt's project is, in part, to rescue an older and radically different sense of what was public and private—and what these terms meant—in order to destabilize the hegemonic modern conceptions that are the focus of her critique.[140]

One of Arendt's primary claims is that the plurality of the human condition "is specifically *the* condition… of all political life."[141] According to Arendt, plurality allows us to approach objectivity. It is only in the view of others that we can began to understand reality, which must be gleaned from the perspectives of many.[142] In the public sphere, men can properly know things together they cannot know singly.[143] Arendt thus sees in the *polis* the basis for a type of democratic judgment, one that grounds "truth" not in some philosophical standard but in the multiplicity of perspectives that come into the public sphere.[144] To seek this truth by turning inward is the fatal error of modernity that the Greeks were loath to commit.[145] Political life is thus not ultimately about conformity to a general principle or the seeking of transcendental truth (both capable in isolation from others) but about action in the company of one's peers. And it is this sense of free

139 Arendt, *supra* note 2, at 31-32.
140 One commentator on Arendt writes that what Arendt "deplored in modernity" was "its subjectification of the real, its privatization of the public world, [and] its lack of worldly freedom"—in short, a romantic conception of the (private) self (Carolina Armenteros, "Hannah Arendt, Rahel Varnhagen and the Beginnings of Arendtian Political Philosophy," *Journal of Jewish Thought and Philosophy* 8.1 (1999), 81-118: 91).
141 Arendt, *supra* note 2, at 7 (emphasis in original).
142 "The presence of others who see what we see and hear what we hear assures us of the reality of the world and ourselves, and while the intimacy of a fully developed private life… will always greatly intensity and enrich the whole scale of subjective emotions and private feelings, this intensification will always come to pass at the expense of the assurance of the reality of the world and men" (*id.* at 50).
143 "Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position. This is the meaning of public life, compared to which even the richest and most satisfying family life can offer only the prolongation or multiplication of one's own position with its attending aspects and perspectives" *(id.* at 57).
144 For a useful discussion of the relationship between plurality/publicity and truth in Arendt's writings, see Linda Zerilli, *A Democratic Theory of Judgment* (Chicago: University of Chicago Press, 2016): esp. chapter four, "Objectivity, Judgment, and Freedom."
145 The Greeks understood that "our feeling for reality depends utterly on appearance and therefore upon the existence of a public realm" (Arendt, *supra* note 2, at 51).

action (*praxis*), which is the purpose of Aristotle's political life (*bios politikos*), that Arendt wants to rescue. Action requires the presence of others, "cannot even be imagined outside the society of men."[146] This was the promise of political life in the *polis*—to transcend work and labor and enter into a world of action, which was entirely free by virtue of its separation from necessity.[147]

That we in the modern world blur such distinctions is a function of what Arendt calls "the rise of the social," or the "admission of household and housekeeping activities to the public realm."[148] Once the activities associated with necessity left the "shadowy interior of the household," the meanings of public and private changed irrevocably.[149] Politics was no longer about the action of free men, but about the management of society; we exchanged "action" for "behavior."[150] Privacy, meanwhile, took on the meaning of intimacy in direct response to the growth of the social.[151] The modern age consequently "discovered how rich and manifold the realm of the hidden can be under the conditions of intimacy."[152]

The point of this reconstruction is not to provide a basis for critiquing Arendt's reading of history (though this can be done),[153] but to draw out the inter-connection between Arendt's

146 *Id.* at 22.
147 Arendt writes, for instance, that the term "political economy" would have been a "contradiction in terms" for the Greeks, as whatever was economic (related to labor or work) "was a non-political, household affair by definition" (*id.* at 29)
148 *Id.* at 45.
149 *Id.* at 38.
150 "It is decisive that society, on all its levels, excludes the possibility of action, which formerly was excluded from the household" (*id.* at 40).
151 It is worth noting that Arendt acknowledges the "non-privative" characteristics of privacy, in particular that it offers a "hiding place from the common public world" (*id.* at 71). Benhabib has interpreted Arendt's appreciation for privacy's shielding function as an affirmation of "the home," distinct from mere intimacy, as a place in which the self can "unfold capacities, dreams, and memories" (Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks, C.A.: Sage Publications, 2003): 213). But what is striking, even on this interpretation of Arendt's "phenomenological account" (211) of the importance of privacy in providing a counter-balance to the public, is that Arendt portrays the value of the private as inhering in its ability to prepare the self for public action. Arendt writes, for instance, that the purpose of a hiding place is to preserve "the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense" (Arendt, at 71). That is, even when Arendt is at her most affirming of the value of privacy—even when she abandons the language of unfreedom and biological necessity—her presentation of the private is reliant on an assumption of eventual public action. This inclination is underscored by her distinction between privacy and intimacy, the latter of which she critiques.
152 Arendt, *supra* note 2, at 72.
153 See, *e.g.*, Ober, *supra* note 39, at 145: "Arendt's polis, strictly divided between the private realm of necessity and economics and the public realm of freedom, action, and politics, had no place for the social interaction that blurred the distinction between citizen-warrior and the laborer-householder. Arendt's polis was an ahistorical ideal, based in large part on her own reading of Aristotle's *Politics*."

historical presentation of the concepts of private and public and her broader project. Arendt's conviction that action is the essence of political life leads her to tell a story in which the modern world departed from an idealized model of the Greek *polis* in pursuit of a monolithic "social" existence that distorts both our private and public lives.[154] But absent a starting point of the Greek *polis*, we have no reason to assume that Arendt's division of the modern world into an intimate private realm, an attenuated public realm, and an enlarged social realm makes sense. Her decision to tell this story from the perspective of the *polis* conditions, from the outset, the possibilities available to us. For instance, Arendt is quite clear that Rome, and in particular Roman Christendom, is not an appropriate historical model, not least because of the faulty Latin substitution of "social" for the Greek "political," which has obscured what Arendt believes to be a fundamental distinction.[155] Omitting a discussion of Roman conceptions of private and public makes sense, however, only if the point of using history is to bolster a particular (Greek) conception, and not to provide a full account of the role of privacy in antiquity.

That is, it makes sense if we see Arendt's use of history as *storytelling*—as a strategy of using history to ground a particular judgment of politics—and not primarily as a method of inquiry in the nature of the private.[156] If we start the story in the Christian Middle Ages, for instance, the sanctification of the inner emotional life not only takes place earlier than it does in Arendt's telling, but it also constitutes the normative inverse of Arendt's condition of publicity: truth is found

[154] Benhabib critiques the tendency to cast Arendt as merely "a political philosopher of nostalgia, an antimodernist lover of the Greek polis." (Benhabib, *supra* note 151, at xxv). However, Benhabib admits that to complicate this narrative we must "decenter the place of *The Human Condition* in our reading of Hannah Arendt." I therefore mean here not to comment on Arendt's political commitments as a whole—though surely they are articulated eloquently, if not completely, in *The Human Condition*—but to comment specifically on the text and Arendt's use of history in it to bolster a particular interpretation of politics.

[155] *Id.* at 23-24, 28-29.

[156] This is in keeping with Arendt's work. Benhabib writes that Arendt considered herself first and foremost a storyteller: "The vocation of the theorist as the storyteller is the unifying thread of Arendt's political and philosophical analyses from the origins of totalitarianism to her reflections on the French and the American revolutions to her theory of the public space and to her final words to the first volume of *The Life of the Mind* on *Thinking*" (Seyla Benhabib, "Hannah Arendt and the Redemptive Power of Narrative," *Social Research* 57.1 (1990), 167-196: 186). See, also, Taran Kang, "Origin and Essence: The Problem of History in Hannah Arendt," *Journal of the History of Ideas* 74.1 (2013), 139-160: "A recognition of the importance of narrative in Arendt's thought allows us to better appreciate both her approach to history and her reasons for arguing for the novelty of certain historical phenomena" (141).

inward, not outward. The public sphere represents the confused clamor of men, not the truth of God. Or, from the perspective of a modern liberal conception of public and private, the Athenian world represents a tyrannical devouring of private liberties by public ones, a worship of politics that sacrifices individual rights on the altar of public action.[157] On whatever cut, the telling of history turns out not to be a neutral exercise of excavating some forgotten truth, but a way of advancing a normative argument about the private and the public. That privacy can be utilized in this way suggests viewing it as reliant on these normative commitments rather than as embodying some trans-historical truth.

1.3.2 Jürgen Habermas: the bourgeois public sphere

The particularity of Arendt's vision can be better grasped by comparing her account to Habermas's. If Arendt's golden age in *The Human Condition* is the Athenian *polis*, then Habermas's in *The Structural Transformation of the Public Sphere* is Europe (primarily Britain, and to a lesser extent France and Germany) in the eighteenth century.[158] Habermas is primarily interested in the rise (and fall) of a liberal bourgeois public sphere, capable of reasoning and reaching consensus about issues of common concern. The story he tells about the historically specific actualization of a public sphere in eighteenth century Europe is, like Arendt's story, as much an articulation of a particular normative vision as it is a compelling historical account.

Habermas's interpretation of the concept of the private is driven by his analysis of the concept of the public. He starts by observing that in the feudal High Middle Ages, public and private were not separate spheres of social action so much as separate labels.[159] Publicness (conveyed via symbols, ceremonies, and insignia) was a mark of power rather than an arena of

[157] See, *e.g.*, Benjamin Constant, "The Liberty of the Ancients Compared With That of the Moderns," in *Benjamin Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge, U.K.: Cambridge University Press, 2007 [1819]), 307-328.

[158] Habermas's engagement with Arendt is clear from the first pages of the work, in which he reconstructs her account of the *polis* and *oikos* in Greek thought; likewise, his emphasis on the decoupling of economic activity from the household in early modernity makes reference to Arendt's analysis of the social world. See Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger (United Kingdom: Polity Press, 1989): 3, 19.

[159] *Id.* at 7, 8.

activity. Yet, because of the need to manage and direct early trade capitalism, the state began to divorce itself from the public representation of its power, which in turn became objectified as "public authority," characterized by permanent administration and continuous state activity.[160] This "depersonalized state authority" that was set up to manage the economy initiates the important transformation that Arendt picked up: the household shifts its economic activities into civil society (Habermas's term for Arendt's "social" world), and in return an intimate private sphere is fostered in the home.[161]

It is in the "audience-oriented subjectivity of the conjugal family's intimate domain" that Habermas locates the genesis of the public sphere.[162] Freed from the constraints of necessity, private individuals "viewed themselves… as persons capable of entering into [purely] human relations with one another";[163] this new subjectivity, when exercised, created "a public sphere in apolitical form—the literary precursor of the public sphere operative in the political domain."[164] This reading public eventually turned its burgeoning critical capacities on the state itself, creating "public opinion," or the (supposedly) apolitical judgment of politics.[165] Kant's public reason was actualized, on Habermas's account, in the bourgeois public sphere, which consisted of private persons reasoning about public ends.[166]

According to Habermas, this is both a laudatory achievement and a historical anomaly, one not fated to last. Habermas thus devises, much like Arendt, a tripartite schema for eighteenth century society. The private realm included civil society (the realm of commodity exchange and

160 *Id.* at 18.
161 *Id.* at 19.
162 *Id.* at 28: "The public's understanding of the public use of reason was guided specifically by such private experiences as grew out of the audience-oriented subjectivity of the conjugal family's intimate domain. Historically, the latter was the source of privateness in the modern sense of a saturated and free interiority. The ancient meaning of the 'private'—an inevitability imposed by the necessities of life—was banned, or so it appears, from the inner region of the private sphere, from the home, together with the exertions and relations of dependence involved in social labor."
163 *Id.* at 48.
164 *Id.* at 29.
165 *Id.* at 102: "The critical process that private people engaged in rational-critical debate brought to bear on absolutist rule interpreted itself as unpolitical: public opinion aimed at rationalizing politics in the name of morality."
166 *Id.* at 104-106. See, also, Kant, *supra* note 112.

social labor—Arendt's "social" realm) and the intimate conjugal family; yet it also encompassed a second, more ambiguous realm: the "authentic public sphere" in the political realm, which "through the vehicle of public opinion… put the state in touch with the needs of society."[167] This public sphere of private persons existed in the grey zone between the purely private family and the state.[168] The third realm, what Habermas calls the "sphere of public authority," was the state itself.[169]

Habermas devotes much of the rest of *Structural Transformation* to how this bourgeois public sphere gradually disintegrated under conditions of late-stage capitalism. But it is instructive to make a few comments at this point. First, notice how, even in Habermas's account, the private sphere has few—if any—essential characteristics. By turns, it is a realm of economic production, a feature of feudal power relations,[170] a place of intimate reflection, and the corrupted arena of passive media consumption.[171] That privacy could undergo such dramatic transformations is hardly remarked upon. But it is a startling confirmation of the parasitical opposition of private to public. John Brewer, in his commentary on Habermas, notes that in the *Eighteenth-Century Short Title Catalogue* there are 7,607 items in which "public" or "publick" appear on the title page, yet merely 1,594 in which "private" does. Brewer writes that this disparity "alerts us to an important feature of the term 'private' in this period, namely its residual character, the degree to which it is what the public is not."[172] Privacy shifts depending on the perspective of the viewer. From the perspective of the lone individual, a small gathering is public; from the perspective of the state, it may be seen

167 *Id.* at 31.
168 Jürgen Habermas, "The Public Sphere: An Encyclopedia Article (1964)," *New German Critique* 3 (Autumn 1974), 49-55: "The bourgeois public sphere could be understood as the sphere of private individuals assembled into a public body, which almost immediately laid claim to the officially regulated 'intellectual newspapers' for use against the public authority itself" (52).
169 Habermas, *supra* note 158, at 30.
170 Habermas breezily declares that in the High Middle Ages "an opposition between the public and private spheres on the ancient (or the modern) model did not exist" (*id.* at 5).
171 *Id.* at 157: "The economic demands placed upon the patriarchal conjugal family from without corresponded to the institutional strength to shape a domain devoted to the development of the inner life. In our day this domain, abandoned under the direct onslaught of extrafamilial authorities upon the individual, has started to dissolve into a sphere of pseudo-privacy."
172 John Brewer, "This, that, and the other: Public, Social, and Private in the Seventeenth and Eighteenth Centuries," in *Shifting the Boundaries: Transformation of the Languages of Public and Private in the Eighteenth Century*, *supra* note 136, 1-21: 8.

as private, co-extensive with civil society.[173] Whatever the label, it is not from within but from outside of the private that we must define its metes and bounds.

Habermas's account also differs from Arendt's in important respects, even when they cover the same ground. Where Arendt sees a shrinking of the political, Habermas envisions the birth of a genuine public sphere.[174] Habermas himself comments on this difference between his work and Arendt's earlier philosophy, noting that the "background to her favored conceptual dichotomies between public and private" is a stylization of her image of the Greek *polis* to "the essence of politics as such."[175] For Habermas, on the contrary, rational discourse oriented to consensus is the *sine qua non* of the essence of politics.[176] He thus sees in the eighteenth century a historical example of an ideal type.[177]

But, of course, that Habermas sees a public sphere arising from the private and Arendt does not is *also* a function of Habermas's normative commitment to rational deliberation (rather than action) as the cornerstone of politics.[178] Moishe Postone observes that Habermas seems to assume that a modern democratic order would seek to "realize the ideals expressed, in ideological form, in the bourgeois public sphere"; but, importantly, this assumption "must either attribute transcendental status to historically constated ideals or seek ontologically to ground those ideals in

173 *Id.* at 9.

174 Keith Baker summarizes the differences well: "The creation of the public sphere that Habermas describes was understood as a distinctive feature of modern society rather than a recovery of the model of the ancient polis. Its members were construed as private individual dispersed throughout society, not as citizens of a republic gathered in common in a political forum; they participated in the critical discussion leading to the formulation of a rational, consensual judgment, not in the agonistic struggle for the formation of a common will" (Keith Baker, "Defining the Public Sphere in Eighteenth-Century France: Variations on a Theme by Habermas," in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, M.A.: MIT Press, 1992), 181-211: 188).

175 Jürgen Habermas, "Hannah Arendt's Communications Concept of Power," *Social Research* 44.1 (1977), 3-24: 14.

176 See, *e.g.,* Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, M.A.: MIT Press, 1996 [1992]); "Three Normative Models of Democracy" in *The Inclusion of the Other: Studies in Political Theory*, eds. Ciarin Cronin and Pablo de Greiff (Cambridge, M.A.: MIT Press, 2002).

177 Craig Calhoun, "Introduction: Habermas and the Public Sphere," in *Habermas and the Public Sphere*, *supra* note 174, 1-42: 9. Baker also notes the "profound ambiguity" between Habermas's depiction of the public sphere either "as a discursive category expressing a normative ideal or as an actually existing social reality" (Baker, *supra* note 174, at 183).

178 Habermas famously notes, for instance, that "Arendt sees a yawning abyss between knowledge and opinion that cannot be closed with argument." (Habermas, *supra* note 175, at 23) Whether this abyss exists, of course, is not a historical but a theoretical question; therefore, whether the agonistic *polis* or the consensus-oriented bourgeois public sphere is an appropriate model is also a theoretical question, for which history can only provide examples.

the nature of social life."[179] The interiority of the private that is for Arendt the consolation prize for a shrinking of the political is for Habermas the very basis for a realm of public criticism. In sum, history cannot settle the definition of the public and the private.[180]

1.3.3. Reinhardt Koselleck: private critique, public hypocrisy

A comparison between Habermas's account of the eighteenth-century Enlightenment and that of Koselleck in *Critique and Crisis* underscores this point. Koselleck's task in *Critique and Crisis* is to situate the utopian, moralist vision of 20th century totalitarianism (both fascism and communism) in the critical milieu of Enlightenment Europe.[181] He writes that the development of a realm of critique was a response to the Absolutist State, and in particular was made possible by the doctrine of *raison d'état*, which claimed a rationalistic (that is, amoral) basis for state authority.[182] Excluding morality from politics, conceived initially as a solution to the carnage of the Religious Wars, had the effect of creating a "private inner realm" in which morality—and not state interest—was the appropriate medium of judgment.[183] Moral authority was thus separated from political authority, and man's private self could reject what his public self was obliged to obey.[184]

179 Moishe Postone, "Political Theory and Historical Analysis," in *Habermas and the Public Sphere*, *supra* note 174, 164-177: 167, 168.

180 Commenting on his own work thirty years after its original publication, Habermas admits as much. He writes that the temptation "to idealize the bourgeois public sphere in a manner going way beyond any methodologically illegitimate idealization of the sort involved in ideal typical conceptualization" must be met with an acknowledgement of "the civilized barbarisms of the twentieth century." Thus, "the normative foundations of the critical theory of society [must] be laid at a deeper level. The theory of communicative action intends to bring into the open the rational potential intrinsic in everyday communicative practices… Such a tack no longer restricts the search for normative potentials to a formation of the public sphere that was specific to a single epoch" (Jürgen Habermas, "Further Reflections on the Public Sphere," in *Habermas and the Public Sphere*, *supra* note 174, 421-462: 442).

181 "To Koselleck the essence of modern totalitarian 'ideology' in all its varieties was an exclusively moral vision, self-deluding in its blindness to its own political will to power and self-righteous in its refusal to grant moral legitimacy to 'political' alternatives… Koselleck sought the genesis of this pathology in this Enlightenment…" (Anthony J. La Vopa, "Conceiving a Public: Ideas and Society in Eighteenth-Century Europe," *The Journal of Modern History* 64.1 (March 1992), 79-116: 83).

182 Reinhardt Koselleck, *Critique and Crisis* (Oxford: Berg Publishers Limited, 1988): 15-17.

183 *Id.* at 53. *Cf.* Abizedah, *supra* note 85.

184 Koselleck associates the exclusion of morality from politics with Hobbes (21), but the enlargement of a realm of conscience to a realm of "moral" (or philosophical) law with Locke: "By his interpretation of the philosophical law Locke gave a political charge to the interior of the human conscience which Hobbes had subordinated to State policy. Public actions were now not merely subject to the authority of the State but at the same time to the moral authority of the citizens. What Locke had thus put into words was the decisive breach in the Absolutist order, the order expressed in the relationship of protection and obedience" (*id.* at 58). Habermas largely recapitulates this explanation of the separation of morality from politics in order to introduce the relationship between Locke's "Philosophical Law" and the bourgeois public sphere's "public opinion." See Habermas, *supra* note 158, at 90-108.

When this moral authority turned its sights on the state itself, it transformed into political criticism—even if it did not recognize itself as such. Koselleck writes that "political criticism was contained not only in the moral judgments as such but also in the effected separation of moral and political jurisdiction: the moral tribunal became political criticism not only by subjecting politics to its stern judgment, but vice versa as well, by separating itself as a tribunal from the political sphere."[185] Absolutism thus created the sphere that would come to critique it, then destroy it.[186]

To Koselleck, however, this critique was hypocrisy. In setting themselves up as moral authorities and not as political actors, Enlightenment critics were merely shrouding their own political objectives. Dena Goodman summarizes the turn: "Criticism became hypocrisy, and the critic became the usurper of sovereign authority, employing the terms of neutrality and objectivity in order to seize power for himself."[187] For Koselleck, the social structures that most exemplify the hypocritical criticism of the Enlightenment are Pierre Bayle's Republic of Letters and the Masonic lodges. But where Habermas sees a thriving public sphere, characterized (at least in principal, though not in practice) by a spirit of equality and publicity, Koselleck sees—particularly in the lodges—collections of secret, private persons elevating themselves to an authority above the state.[188] The use of secrecy (or what Koselleck calls "the secret") by the Masonic lodges, ostensibly a method of self-protection against a hostile political order, merely served to mask the political ambitions of those who saw themselves as objective critics.[189] Koselleck writes:

> What the secret made possible was one's seclusion from the outside world, which in turn led to a form of social existence which included the moral qualification to sit in judgment on that outside world. The medium of the secret widened the private conscience into a society; the society came to be a large conscience, a conscience of the world from which the society voluntarily excluded

185 *Id.* at 101-102.
186 *Id.* at 151:
187 Dena Goodman, "Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime," *History and Theory* 31.1 (Feb. 1992), 1-20: 3.
188 "The Masonic lodges amounted to the formation—typical of the new bourgeoisie—of an indirect power within the Absolutist State. Surrounding them was a self-made veil: the mystery. The silence…; the taciturnity; the commitment to secrecy were, for the Masons, obligatory determinants of the nature of their society" (Koselleck, *supra* note 182, at 70).
189 "The secrecy papered over the fact that their work on behalf of morality would inevitably lead into the political sphere. The purposes of the arcanum, to protect and make possible the moral work of the Masons, was joined by yet another function, that of hiding the indirect political nature of that activity, and in that role it is part of the true content of the arcanum itself" (*id.* at 89)

> itself by way of the secret. In their rejection of politics the Masons simultaneously established themselves as the world's better conscience.[190]

Anthony La Vopa observes that the "tragic irony" of the secret was that "it allowed the 'private' subject to exercise his conscience critically without accepting political responsibility."[191] Whether Koselleck's account is an accurate or convincing historical analysis is, again, not relevant to our purposes. What is important to note is Koselleck's portrayal of the institutions in which criticism took place. Habermas's authentic public sphere is Koselleck's hypocritical private power.[192] Though they train their focus on the same historical developments, they fashion from these developments a different terrain of private and public. For Koselleck, who is wary of the moralist excesses of the twentieth century, private associations of individuals who come together to critique the state can only be seen as rival political factions, regardless of the language used; for Habermas, these associations are the site of the formation of reasoned public opinion, which is the only legitimate basis for controlling the state. Koselleck identifies a public sphere of the state and a private sphere of individual conscience; the gradations in between he labels semi-publics in political competition with the state. For Habermas, the public sphere exists in a grey zone between intimate (apolitical) family life and public state authority. And neither Koselleck nor Habermas makes explicit reference to a third and competing social sphere, as Arendt does, which devours the private and public spheres.[193]

1.3.4 Telling other histories

For all three authors, the decision to tell one historical story was also—by necessity, but also strategically—a decision *not* to tell other stories. Joan Landes's feminist critique of Habermas,

190 *Id.* at 83.
191 La Vopa, *supra* note 181, at 87.
192 "Koselleck assumed a strict dichotomy between the public sphere of the absolutist state and the private space formed by the new social milieus" (*id.* at 89.)
193 Goodman's discussion of Koselleck and Habermas also includes the work of Philippe Ariès and Georges Chartier, the two French editors of the five-volume *Histoire de la vie privée* (*The History of Private Life*) on which I draw heavily in this chapter. Goodman, underscoring the point being made here, argues that the histories told by Habermas, Ariès, and Koselleck about the private and the public in the eighteenth century "emerged as answers to very different questions and within independent intellectual traditions" (Goodman, *supra* note 187, at 11).

for instance, alleges that "the bourgeois public is essentially, not just contingently, masculinist."[194] The historical exclusion of women (and property-less men) from participation in the formation of public opinion belies the claim that the bourgeois public sphere was a space of reason and persuasion, rather than power, and therefore undermines the very feature that on Habermas's account separates the public sphere from merely private associations.[195] Landes draws attention to "counter-institutions" that don't make the cut for Habermas's public sphere: the "cafés, musées, and lycées" of London's Grub Street, a hub for impoverished writers and publishers, as well as the salons of France, which were predominantly run by women (*salonnières*).[196] These histories challenge the notion that a unitary public sphere existed, rather than a plurality of what Nancy Fraser has called "subaltern counterpublics." As Fraser contends, the historical narrative of the unitary public sphere is "informed by an underlying evaluative assumption, namely, that the institutional confinement of public life to a single, overarching public sphere is a positive and desirable state of affairs, whereas the proliferation of a multiplicity of publics represents a departure from, rather than an advance toward, democracy."[197] Drop this assumption, and new histories open up. Indeed, such counterpublics challenge all aspects of the liberal bourgeois public sphere: who can be admitted, which interests are legitimate, even the designations of "private" and "public" themselves.[198]

This is not a merely historiographical concern. Choosing which history of privacy to tell or whether to turn history at all has ramifications for how we think about it in the modern day. For many modern commentators—indeed, for most of the theorists who will be discussed in the

194 Joan B. Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithaca: Cornell University Press, 1988): 7.
195 *Id.* at 43.
196 *Id.* at 24-25, 55. *Cf.* Goodman, *supra* note 187, at 14-20.
197 Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, *supra* note 174, 109-142: 122.
198 *Id.* at 123, 129, 130. See, also, Geoff Eley, "Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century," *Habermas and the Public Sphere*, *supra* note 174, 289-339: "It is important to acknowledge the existence of *competing* publics not just later in the nineteenth century, when Habermas sees a fragmentation of the classical liberal model of *Öffentlichkeit*, but at every stage in the history of the public sphere and, indeed, from the very beginning" (306). Eley also notes that "the specification of a public sphere necessarily implies the existence of another sphere that's private…" (317)

next chapter—acknowledging the variegated history of privacy is considered irrelevant to their projects. Unlike Arendt, Habermas, and Koselleck, they choose to ignore, rather than to selectively use, the rich history of privacy. If they reach back at all, it is to Warren's and Brandeis's 1890 article. This historical amnesia has led to the blasé assumption that privacy *just is* about certain modern concerns, such as the spread of personal information.[199] But, as David Sklansky has noted, an over-reliance on information-based notions of privacy leads to neglecting other potential aspects of privacy, such as physical inaccessibility.[200] Privacy may, of course, have something to do with information. But arguments that equate privacy with informational control or inaccessibility *simpliciter* are possible to make only by ignoring historical evidence to the contrary. At the very least, they would seem to require an account of why privacy means this *now*, to us, and whether older interpretations have any enduring relevance. Very rarely do contemporary privacy scholars attempt to give this account.

The answers to these questions may reveal the normative or ideological assumptions undergirding privacy-talk today. Mary Anne Franks argues persuasively that the contemporary anti-surveillance movement, concerned as it is with controlling or protecting personal data, reflects largely middle-class concerns: online shopping, banking, and search engine habits, for example.[201] Proper attention to the history of surveillance in marginalized communities—especially poor and non-white communities—would change the "outsized focus on matters of informational privacy," invasions of which "pale in comparison to those routinely inflicted upon marginalized groups, including the physical harassment and brutality young black men suffer at the hands of police, the scrutiny and criminalization of everyday activities by homeless individuals, and the epidemic of

199 For examples of accounts of privacy that emphasize its relation to information, see Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1968); James Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4 (1975); Charles Fried, "Privacy," *Yale Law Journal* 77.3 (1968), 475-493; Adam Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania: Pennsylvania State University Press, 2010); Edward J. Eberle, "The Right to Information Self-Determination," *Utah Law Review* 2001 (2001), 965-1016; Randall P. Bezanson, "*The Right to Privacy* Revisited: Privacy, News, and Social Change, 1890-1990," *California Law Review* 80 (1992), 1133-1175; and William Parent, *supra* note 7.

200 David Alan Sklansky, "Too Much Information: How Not to Think About Privacy and the Fourth Amendment," *California Law Review* 102.5 (October 2014), 1069-1121.

201 Mary Anne Franks, "Democratic Surveillance," *Harvard Journal of Law and Technology* 30.2 (2017), 425-489: 451.

sexual assault and harassment of women generally and domestic violence victims in particular."[202] To "democratize surveillance," alleges Franks, would require attention to the histories we often ignore—histories that would complicate the narratives we often tell to explain present concerns about privacy.

A number of scholars have endeavored to tell precisely these histories. One is the history of privacy and poverty. Robin Morris Collin and Robert William Collin have documented the lack of privacy that the poor suffer from in comparison to wealthier Americans, arguing that this imbalance is a result of a privacy conception in which privacy interests are considered "commodities which are protected only to the extent that the person claiming privacy has the money to pay for the material goods and benefits that are required to exercise privacy."[203] Khiara Bridges, in *The Poverty of Privacy Rights*, likewise argues that poor mothers do not possess privacy rights "because society, and thus the law, presumes that their enjoyment of privacy will realize no value or a negative value."[204] Bridges links this state of affairs to a normative commitment that she claims undergirds most U.S. law, which she calls the "moral construction of poverty" as a function of behavioral or moral failings.[205] Another story is the history of privacy and domestic abuse. Riva Siegel, for instance, has argued that contemporary judicial language about "affective" or "domestic" privacy developed to preserve norms of domestic violence in the home.[206]

Finally, a number of authors have sought to tell the story of privacy and racial domination. Franks draws a link between the "routine inspection and exposure" of black bodies under slavery and the invasive conditions of the modern carceral state in the U.S., which disproportionately

[202] *Id.* 429.
[203] Robin Morris Collin and Robert William Collin, "Are the Poor Entitled to Privacy?" *Harvard Blackletter Journal* 8 (1991), 181-219
[204] Khiara M. Bridges, *The Poverty of Privacy Rights* (Stanford, CA: Stanford Law Books, 2017): 12. Bridges focuses on the violations of information, familial, and decisional privacy rights that poor mothers undergo when they seek welfare benefits or (in failing to apply for welfare) are subject to raids by Child Protective Services.
[205] *Id.* at 37-64.
[206] Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privilege," *Yale Law Journal* 105.8 (June 1996), 2117-2207. See, also, a mid-nineteenth century case about wife beating in North Carolina, *State v. Rhodes* 61 N.C. 453 (1868): "For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber."

affect black Americans.[207] Simone Browne has pioneered theorizing about race and surveillance. In *Dark Matters: On the Surveillance of Blackness*, she argues that "racism and antiblackness undergird and sustain the intersecting surveillances of our present order."[208] Browne tells the history of the *Brooks* slave ship, the *Book of Negroes*, the branding of enslaved peoples, slave passes and runaway notices, and lantern laws in 18th century New York City to demonstrate that how Americans think about privacy and surveillance has always been infected by antiblack racism. From the vantage point of this story, surveillance is at least as much about the management of bodies and movement as it is about information.

The histories we tell (and don't) therefore matter to how we think about privacy. Often, the turn to history is illuminating, helping to illustrate the genealogy—noble or otherwise—of modern privacy conceptions. Yet it is equally as often an opportunity to select one story over others, creating a picture of the nature of privacy that is incomplete or, worse, misleading. For those who use history as a guide to the present, the danger will always be that we obscure present normative commitments by claiming historical objectivity. For those who ignore history, the danger is that we universalize curious features of modern life and neglect the possibility of re-imagining privacy, as it has been reimagined many times in the past. We can and should reflect on how privacy has transformed over many thousands of years of history; but we should equally be wary of concluding from this history that we can identify a single viewpoint on privacy. The normative dependence of privacy means that how it has historically been understood and how this history has been told are both dependent on broader normative commitments. Discerning what these commitments are, and whether they should be preserved, is an important task for scholars interested in privacy. There is no single story to tell about the private and the public.

[207] Franks, *supra* note 201, at 441-443.
[208] Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015): 8-9.

Chapter Two: The modern landscape

What it means to be withdrawn from the public or common view can vary considerably. In order to defend a new approach to privacy, it will be necessary to first document the strengths and deficiencies in the existing contemporary attempts to define or justify it. As indicated in the previous chapter, most modern philosophical accounts of the nature of privacy (definitional) or its value (justificatory) implicitly adopt a liberal framework, foregrounding notions like control and autonomy. Others, centering on relationships and inaccessibility, import something of the romantic conception of privacy. Though one goal of this chapter is to indicate the shortcomings of popular definitions or justifications for privacy, a broader aim is simply to make clear that the differences between authors stem from the normative commitments they bring to the task of understanding privacy. If privacy is a normatively dependent concept, we should expect to see significant irresolvable disagreement about how to define and value it based on the normative frameworks in play. This is exactly what we see. Any debate over privacy inevitably filters down into a debate over which interests or goods we take as primary in filling out the content of the private and the public. This is why a definition does not do the important work of understanding privacy. Anyone can draw a line; articulating reasons for drawing the line where we do, in service of what goals, is the tricky bit.

What we seek from a good definition of privacy (i.e., a specification of the concept of privacy as withdrawal from the public) is therefore that it be broad enough to accommodate the multiplicity of different everyday uses of privacy without committing us to any particular *conception* of privacy—that is, any particular normative framework—and without losing sight of its enmeshment with community standards and mores. In short, we seek a definition that reflects privacy's normative *and* norm dependence. What we seek from a good justification for privacy is that it give us a reason to value privacy in a range of different contexts, that this reason be acceptable to the broadest range of people, that it track the harms of privacy violations, and that it be strong enough to sustain a regime of privacy protections (laws, civil rights, regulations, etc.).

In the first section of this chapter, I will outline the multiple contending definitions for privacy and comment on the central weaknesses of each before indicating which attempts show most promise. I see potential in privacy definitions that view privacy as a form of "inaccessibility" of the self, as they allow for a broad range of privacy concerns without introducing a problematic notion of control. In the following section, I will discuss the various justifications or "groundings" for privacy protections—some of which are justifications for a right of privacy, others of which are simply philosophical explorations of the value of privacy—in a similar fashion. Such justifications give the clearest evidence of the normative frameworks at play. Of course, justifications for privacy and definitions of privacy can be tightly interlinked. But they need not be, and it can be fruitful to discuss them in isolation.[1] By the end of the chapter, it will become clear that the disarray of the modern privacy debate is attributable to ignorance of privacy's normative dependence, and that few of the existing attempts to define privacy or explain its value contend adequately with the implications of this conceptualization of privacy. Thus left unmoored, we are free to adopt a new (political) approach to privacy, which I will introduce in chapter three.

2.1 Definitions

2.1.1 "The right to be let alone"

In what is now seen as the birth of American legal and political investigation into the notion of privacy rights, Warren's and Brandeis's 1890 article "The Right to Privacy" sought to investigate what might be gained by granting American citizens the "right to be let alone."[2] Though the explicit topic under consideration for Warren and Brandeis was, as they state, the "right" to

1 An autonomy-based justification for privacy will naturally pair with a definition of privacy as a form of control (over information, the body, and so forth). But it can also be paired with a definition of privacy as inaccessibility. That is, any definition of privacy can theoretically cut across multiple different conceptions of privacy or justifications for privacy protections. Discussing the definition and the justification concurrently conflates the independent reasons we might have to reject both. Thus, though we may reject autonomy-based justifications because they tend to recommend control-based definitions, we also have reasons to reject such justifications independently of concerns over control.

2 Warren, Samuel and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890), 193-220. Though many (falsely) credit Warren and Brandeis with coining this phrase, it is properly attributed to a lesser-known American jurist named Thomas Cooley. Warren and Brandeis acknowledge Cooley in their original article.

privacy, and though the focus of their article was to discover whether such a right could be granted via the existing state of case law,[3] their argument implicitly endorsed a certain definition of privacy: namely, that it consisted in the *state* of "being let alone." The phrase is powerful in its use of ordinary language and common intuitions. Indeed, we often invoke just such a notion—"Leave me alone!"—when claiming a right to privacy, whether from prying family members or an intrusive reporter. But it is instructive to ask: just what does it mean to be let alone, and does this cover all of what we mean when we speak of privacy?

On the face of it, identifying privacy as the state of "being let alone" is too broad and under-defined to be of much use. What aspects of our lives can be covered by the umbrella concept of being let alone, and when can we justifiably expect such treatment? Warren and Brandeis supply their own answer via a litany-of-evils exercise:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle…[4]

It is useful to understand such a passage in light of its context: it is widely believed that the writing of the article was instigated by intrusive press coverage of the personal social engagements of Mrs. Warren.[5] But the passage is worth considering on its merits as well. It reveals that the focus of the right to be let alone is, principally, that of preserving the sanctity of our inner emotional lives, safeguarding "inviolate personality." The authors write:

[3] "It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual ; and, if it does, what the nature and extent of such protection is" (*id.* at 197).
[4] *Id.* at 196.
[5] A prominent and oft-recounted version of this viewpoint identifies the instigating affair as the marriage of Warren's daughter. See, *e.g.*, Hyman Gross, "Privacy and Autonomy," in *NOMOS XIII: Privacy,* eds. J. Roland Pennock and John W. Chapman (New York: Atherton, 1971), 169-181: 177; and, most famously, William L. Prosser, "Privacy," 48 *California Law Review* (1960), 383-423: 423. But Rosen and Santesso point out that Warren's daughter would have been a mere child at the time, and other reports indicate that the issue was the publication of guest lists to Mrs. Warren's soirées. See David Rosen and Aaron Santesso, "Inviolate Personality and the Literary Roots of the Right to Privacy," *Law & Literature* 23.1 (2011), 1-25.

> These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not be assaulted or beaten, the right not be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed… The principle which protects personal writings and all other personal productions…against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[6]

Even when we cannot prove harms—as in libel and defamation—and even when we cannot sue for property-rights infringement, we may yet have a claim: the intrusion into the most sensitive and intimate aspects of our lives constitutes a distinct and identifiable wrong. Privacy, then, is the state of not being accountable to others in our emotional or physical presentation, being free from inquiry or observation with regard to matters of "personality."

Warren and Brandeis express here in early form what is called in contemporary accounts a "dignitary" interest in privacy.[7] The right to be let alone derives its power from the idea that the inherent dignity (personality) of individuals requires being able to exercise discretion over who intrudes into our lives. The historic roots of inviolate personality and the notion of dignitary privacy can be found, as I've written, in the work of the romantics. It is therefore worth observing that what the two authors take to be intrinsic to privacy is, on the contrary, a recent and contingent development. That is to say, one must adopt a fundamentally "romantic" mindset to find their argument persuasive; and to reject aspects of the romantic mindset—to reject, for example, that man's inner emotional life requires the protection of withdrawal, rather than the refinement of public scrutiny—would be to reject *ipso facto* this defense of privacy.

Though there is clearly something very intuitively appealing about this definition, it raises more questions than it answers. A notion of privacy as "being let alone" in order to protect one's emotional interiority will not help us resolve questions about state surveillance, which is often conducted unnoticed and therefore has negligible impacts on our ability to conduct our personal

6 Warren and Brandeis, *supra* note 2, at 205. See also Brandeis's dissent in *Olmstead v. United States* 27 U.S. 438, 277 (1928) (Brandeis, J., dissenting).
7 See, *e.g.*, Robert Post "Data Privacy and Dignitary Privacy: *Google Spain*, The Right to be Forgotten, and the Construction of the Public Sphere," *Duke Law Journal* 67 (2018), 981-1072.

lives. Recall that Warren and Brandeis have in mind protection from a gossip-prone and intrusive society. In their attempt to define a zone of privacy against this class of intrusions, they strip us of tools for analyzing overreach from the government—a different class of intrusions. Their account similarly fails to capture the ways in which we invoke privacy to cover aspects of lives that we consider personal yet not intimate, such as financial or medical information. Indeed, by justifying a right to privacy on its instrumental harms to our freedom as emotional agents, yet maintaining a definition as broad as "being let alone," Warren and Brandeis reveal a tension: there are many instances in which being "let alone" is *itself* type of damage to our psyches. Consider a prisoner in solitary confinement or a child banished to her room. Both are clearly being let alone, yet Warren and Brandeis would surely resist an argument that they had the "right" to such treatment. They do not have the resources within their article to grapple with such cases.

With deference to the enormous intellectual debt we owe to Warren and Brandeis for creating the conditions for an on-going debate in U.S. law over the proper way to protect privacy, it is time to move beyond "being let alone" as a paradigm for privacy.

2.1.2 Spatial / locational privacy

One of the oldest and most familiar conceptions of privacy is that of *spatial* or *locational* privacy,[8] embodied in the English common law dictum that "a man's home is his castle."[9] Spatial privacy requires that certain physical spaces be marked off from public intrusion. The intuition behind this definition is that individuals require a reprieve both from governmental authority and from public attention.[10] Some of the first amendments to the U.S. Constitution, for instance, concern the rights of citizens to refuse entrance to their homes and to be free from unwarranted

8 This understanding of privacy is sometimes referred to also as "local" privacy. See, *e.g.*, Beate Rössler, *The Value of Privacy* (Cambridge, U.K.: Polity Press, 2005): esp. 142-168.

9 The phrase was coined by English jurist Sir Edward Coke in *Semayne's Case*, 5 Coke Rep. 91, 77 E.R. 194 (1604), which concerned the circumstances under which sheriffs could enter the homes of English citizens. The phrase comes from the following: "…the house of every one is to him as his castle and fortress, as well for his defence [*sic*] against injury and violence as for his repose."

10 When reworked, a spatial definition of privacy could also be seen as a "separation-based" account of privacy, as opposed to a "control-based" definition (to be discussed).

searches or seizures of, among other things, their "houses and effects."[11] The spatial conception of privacy is also linked closely both to ancient notions of privacy as the household and to the Lockean conception of private property as an inviolable check on government power. It is therefore connected to liberal conceptions of privacy. The physical presence of property provides a conceptually distinct sphere from the public spaces of town halls, parks, courthouses, legislative assemblies, and so forth. The boundaries of property mark the edges of legitimate government coercion, save for exceptional circumstances (e.g., the commission of a crime).

The pre-theoretic appeal of this conception is three-fold. First, it provides a clear and simple demarcation between the public and private spheres by making the two coterminous with actual physical spaces: what is private is simply what happens behind the walls of one's home. Second, it retains the classical distinctions, which relied upon physical spaces (the home vs. the *ekklesia*) to distinguish between the private and public aspects of citizens' lives. Third, it draws on engrained sympathies for private property and the linkage between property and freedom. Even in the modern age, in which so many privacy concerns stem from the spread of information, the appeal of the notion of spatial privacy—that there is a *place* that is properly non-public—endures.[12]

Yet this definition of privacy by itself will not work. First, it is unsuited to handle modern privacy concerns, especially those concerned with the transmission of information. To adopt a spatial definition of privacy would be to deprive us of useful language for talking about private information—whether the details of our intimate lives or the details of our bank account—at precisely the historical moment when we most need a coherent way to account for the protection of sensitive personal data. Even if we were to discount modern technological advances that make data collection and surveillance central human concerns, the spatial account of privacy does not

[11] U.S. Const., amends. III and IV. They read, respectively: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law," and "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
[12] Julie Cohen discusses the appeal of the language of "visibility" that persists among privacy scholars, even when they resist spatial conceptions of privacy. See Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven: Yale University Press, 2012), esp. 120-126.

help us to make sense of even ordinary intuitions about the privacy of certain information. Surely what makes a conversation between two spouses private is not the fact that they are having the conversation within their own home, but the fact that the subject matter they are discussing is not anyone else's concern. Precisely what counts as "someone else's concern" is, of course, part of the definitional challenge; but it is difficult to see how a spatial definition could help us with this, other than to counter-intuitively insist that anything we do outside certain physical boundaries is fair game.

More fundamentally, this definition seems contingent and arbitrary: why should privacy depend on the presence (or absence) of certain physical structures? Outside certain delimited spaces, can we not have any reasonable expectation of privacy? Such arbitrariness leaves spatial definitions of privacy unable to muster resources against feminist privacy critics who rightfully point out that, for women, the home has often *not* served as a place of privacy and refuge, but rather an arena of personal contestation against oppression.[13] Though the focus of the feminist critique of privacy is to problematize the public-private dichotomy, it also serves to bring up another deficiency of this notion of privacy: it cannot easily admit of degrees of privacy *within* private spaces, such as the privacy of the bedroom within the house. At the very least, to nuance spatial privacy in the ways necessary to capture our intuitions would seem to require some outside standard to adjudicate what makes some spaces more or less private than others. These concerns with the spatial conception of privacy might also be considered deficiencies of liberalism more broadly, which is so intimately linked to the protection of property.[14]

13 See chapter four, section 4.2.3.

14 More recent manifestations of the spatial definition of privacy define it not in relation to actual geographic places, but instead to a "zone" of privacy. See Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975): 317. While this definition avoids the some of the pitfalls of the spatial definition, it is both too broad and too specific. It is too broad in that we are given no indication of how we are meant to choose which activities, behaviors, relationships, or modes of being are covered by this "zone" of privacy. One suspects that any attempt to choose amongst the many possibilities and then post-facto justify such decisions would end up relying on arguments about the nature or purpose of such activities, in which case it would be revealed that the notion of a "zone" of privacy was doing no theoretical work at all, other than to conveniently group together our privacy concerns. Yet the definition is also too narrow, for it identifies such a zone with our interests in not "being continually alert"—implying a justification similar to the Warren-Brandeis concerns, and therefore vulnerable to the same critique.

2.1.2 Decisional privacy

One of the most frequently-invoked definitions of privacy, especially in the legal field, concerns the conditions under which we make certain decisions.[15] This definition of privacy is called *decisional privacy*. The basic notion is that certain intimate decisions—such as whether to take contraception[16] or whether to have an abortion[17]—merit protection from intrusion or from outside influences.[18] As with spatial privacy, decisional privacy is commonplace in our language, where we regularly invoke the idea of "private decisions" or "private matters" with regard to subjects like childrearing, sexual relations, procreation, and a wide range of lifestyle choices. It has also been invoked, as indicated, by the U.S. Supreme Court, which based its legal reasoning in at least three seminal cases—*Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*—on the foundation of decisional privacy, arguing that inherent in the nature of certain decisions was a degree of privacy, and therefore the expectation of protection from state influence. Its pedigree in liberal philosophy also runs back at least to one of its most championed prophets, J. S. Mill, who wrote: "But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation."[19]

However, this definition of privacy has in mind much more than simply a lack of societal or governmental coercion. What's at stake are social attitudes and collective interpretations, as well as our ability to be free not just from coercion (negative liberty) but from social judgment. Beate

15 See, *e.g.*, Anita Allen, "Taking Liberties: Privacy, Private Choice, and Social Contract Theory," *University of Cincinnati Law Review* 56 (1987), 461-491.
16 Griswold v. Connecticut 381 U.S. 479 (1965); Eisenstadt v. Baird 405 U.S. 438 (1972)
17 Roe v. Wade 410 U.S. 113 (1973)
18 Jean Cohen links decisional privacy to the construction of a self-identity: "Privacy rights conferring decisional autonomy over certain personal matters secure to the individual a sense of control over her self-definitions and over the decision regarding which aspects of herself she will bring into play at which times and with whom" (Jean L. Cohen, "Democracy, Difference and the Right to Privacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (New Jersey: Princeton University Press, 1996), 171-218: 204).
19 John Stuart Mill, "On Liberty," in *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge, U.K.: Cambridge University Press, 2003): 15.

Rössler is particularly astute on this point, noting: "Restraint, inattention, reserve, and indifference—as forms of respect for this decisional privacy—are expected from others when it comes to the private aspects of the life a person leads in public."[20] Thomas Nagel also defends the "element of restraint" as a necessary social condition of a civilization typified by a plurality of life pursuits.[21] At the root of decisional privacy is, often, some conception of the autonomous individual, and what it means for one to be the author of one's own life.[22]

There are two main difficulties with understanding privacy as decisional privacy. The first is that this definition of privacy is incomplete. Decisional privacy is action-oriented: it is concerned with the conditions under which we take certain actions. But it cannot help us make sense of informational privacy, which is concerned with what facts about us are known by other people, regardless of what our life projects are; nor is it particularly useful in understanding our interests in solitude, peace, secrecy, and anonymity, except where such concepts intersect with the freedom to carry out our life plans. Not all of our privacy concerns have to do with being able to make decisions, or being able to act in certain ways without scrutiny. To rely solely on a framework of decisional privacy will deny us the tools for understanding other privacy violations.

The second difficulty is that the decisional privacy framework lends itself to a consent-based model of privacy regulation. This is a broader feature of privacy conceptions that are dependent on a liberal framework for their content and justification: they operate on an understanding of human harm in which consent—or, as will be shortly discussed, "control"—plays a central role in adjudication. Under this normative framework, whether or not an action is justified can depend entirely on whether the recipient of the action consents to it. In this context, that means the harm from violating decisional privacy is not that one might be giving bad advice to the person whose privacy one has violated, nor that one might occasion a bad decision, but that the intervention in the individual's life is non-consensual. Extending the liberal, consent-based

20 Rössler, *supra* note 8, at 84.
21 Thomas Nagel, "Concealment and Exposure," *Philosophy & Public Affairs* 27.1 (1998).
22 Rössler, for example, bases her argument for privacy on autonomy.

model to privacy, however, fails to attend to the possibility that privacy harms might accrue *regardless of whether the individual consents*. This oversight is particularly toxic in the present age, in which individuals routinely consent to the use of their personal data because they are not aware of the potential harms that use of the data by third parties exposes them to. A framework of decisional privacy has difficulty capturing the harms from such consensual privacy violations (indeed, it would not label them violations at all). Thus, though decisional privacy is useful for focusing our attention to the ways in which privacy helps to preserve certain spheres of free action, it cannot be the overall lens through which we conceptualize privacy.

2.1.3 Control-based definitions

Many modern theorists have sought to define the private realm using the language of choice and control. The central insight here is that privacy is not merely about passively existing in a certain state (of privacy, or non-exposure to others), but it's more accurately understood as possessing a capacity of control—whether over information, access, or the conditions of observation. Much like spatial and decisional privacy, control-based definitions spring from a liberal-individualist approach to privacy; they are thus vulnerable to the same criticism that giving individuals control over their privacy does not always help them preserve it, both because people may not be inclined to preserve their own privacy and because they may be prevented from making informed decisions about it. It will be useful first to outline the various threads of the control-based family of privacy definitions before commenting on their insufficiency.

(a) Control over information about ourselves

Alan Westin, in his seminal *Privacy and Freedom*, was the first and most influential defender of the conception of privacy as a "control right" over information, writing that privacy is "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what

extent information about them is communicated to others."[23] Since his original articulation, a number of important thinkers have echoed Westin's vision in various permutations. Elizabeth Beardsley has written that privacy consists in the capacity for "selective disclosure" of facts about our lives, which she justifies by linking such control to our ability to live autonomous lives.[24] James Rachels similarly echoes the notion of privacy as control over personal information, arguing that without such control (and therefore without privacy) we would be unable "to create and maintain different sorts of social relationships with different people";[25] Charles Fried has also advanced a conception of privacy based on control over information, arguing poetically that such control is the "necessary atmosphere" for the flourishing of respect, trust, and love, just "as oxygen is for combustion."[26] And more recent writers, noting concerns about the spread of personal information and data, have emphasized informational control as central to privacy.[27]

(b) Control over access

Others define privacy as the state of control over access to oneself. Irwin Altman, for example, has written that privacy consists in "selective control of access to the self or to one's group."[28] Julie Inness also embraces this definition in her work *Privacy, Intimacy, and Isolation*, writing that privacy consists in control over personal information, control over physical access, and control over decisions about our actions, where the conjoining factor in each instance is that such information, access, and decision-making must be about *intimate* aspects of our lives.[29] Robert

23 Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1968): 7.
24 Elizabeth Beardsley, "Privacy, Autonomy, and Selective Disclosure," in *NOMOS XIII: Privacy* (*supra* note 5), 56-70.
25 James Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4 (1975): 326
26 Charles Fried, "Privacy," *Yale Law Journal* 77.3 (1968), 475-493: 478. Later, he writes: "Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves" (482).
27 See, *e.g.*, Adam Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania: Pennsylvania State University Press, 2010); Edward J. Eberle, "The Right to Information Self-Determination," *Utah Law Rev*iew 2001 (2001), 965-1016; Randall P. Bezanson, "*The Right to Privacy* Revisited: Privacy, News, and Social Change, 1890-1990," *California Law Review* 80 (1992), 1133-1175.
28 Irwin Altman, "Privacy—A Conceptual Analysis," *Environment and Behavior* 8 (1976): 8.
29 Julie C. Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, 1996). She also writes: "Rather than understanding privacy's content in terms of intimate access *and* intimate decisions, we should draw together these seemingly disparate areas: privacy's content covers intimate decisions, including the agent's decisions concerning intimate access to herself (including informational access) and her decisions about her own intimate actions" (69).

Gerstein has also advanced a definition of privacy based on control over access, arguing that such control is necessary in order to form intimate relationships at all.[30] And Rössler has written that privacy broadly construed consists in control over access, whether to information, physical proximity, or decision-making.[31] A common feature of control-over-access definitions is the worry that limiting privacy to a state of control over information alone would leave us without a coherent way to describe what we intuitively feel to be privacy violations that nonetheless have little to do with the exchange or transfer of personal information, such as repeated incursions that violate our solitude without transmitting any additional information to the offender (the "Peeping Tom").

(c) Control over the conditions of observation

A third and final category of control-based definitions of privacy can be loosely described as control over the conditions of observation, or control over the grounds on which people may interact with us. Stanley Benn, in making his famous argument linking privacy with respect for persons, describes the notion of control over the conditions of observation thus: "The present question… is whether any moral principle will provide a quite general ground for a *prima facie* claim that B should not observe and report on A unless A agrees to it."[32] He goes on to ground his argument in the conviction that "to *conceive* of someone as a person is to see him as actually or potentially a chooser,"[33] underscoring the link between privacy and our ability to control—choose for ourselves—the conditions through which people observe us. In a similar vein, Jeffery Johnson has advanced the idea that privacy is principally about having the control to keep certain areas of our lives immune from "the evaluative judgment of others."[34] Johnson's conception of privacy is a species of the control-over-access definition, with a specific interpretive lens: what is at stake in

30 Robert Gerstein, "Intimacy and Privacy," *Ethics* 89.1 (1978): 76-81.
31 Rössler, *supra* note 8, at 8.
32 Stanley Benn, "Privacy, Freedom, and Respect for Persons," in *NOMOS XIII: Privacy* (*supra* note 5), 1-26: 4.
33 *Id.* at 8.
34 Jeffery Johnson, "Privacy and the Judgment of Others," *The Journal of Value Inquiry* 23.2 (1989), 157-168.

privacy is the type of access that would allow evaluative judgments to be made. In either case, as Johnson notes, the "notion of control is central to the concept of privacy."[35]

(d) Problematizing control

Associating privacy with control has a long and respected pedigree. However, there are good reasons to resist this classification. The first is related to our concerns with liberal, consent-based frameworks for understanding privacy: to associate privacy completely with control is to ignore that individuals may suffer privacy harms even when they have control over the situation, and vice versa. To prioritize consent in this way suggests that the solution to modern privacy concerns is giving more opportunities for individuals to consent (or not) to uses of their data. Indeed, as previously indicated, this is the guiding philosophy of the EU's General Data Protection Regulation of 2016, which relies heavily on the notion of informed consent for the protection of consumer data.[36]

Yet the provision of many modern-day services relies on the collection and aggregation of data, and individuals rarely have the time or energy to read consent notices.[37] Often the choice is between using the service and consenting to their data collection, or not using the service at all. Given such a choice, many opt simply to give up their data. The potential costs seem murky and diffuse compared to the immediate benefit of access to a website, source of credit, or media platform. Insisting on "consent" in such circumstances does little to address the purported harms of the privacy violation: the use of personal data to manipulate elections, for instance, as happened during the 2016 U.S. presidential election. In short, the proposed solution and deterrent to privacy

[35] *Id.* at 157.
[36] "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)" *Official Journal of the European Union* L119 (4 May 2016), 1-88: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN. "Consent" is mentioned 72 times in the document.
[37] In a recent survey of internet users in the EU, 98% of users said they click through consent notices either without reading the text at all (72%) or reading it very quickly and incompletely (26%). See Wanda Presthus and Hanne Sørum, "Are Consumers Concerned About Privacy: An Online Survey Emphasising the General Data Protection Regulation," *Procedia Computer Science* 138 (2018), 603-611: 607.

violations for control-based definitions (presenting opportunities to give or withhold consent) does not address the modern harms of privacy violations, because individuals give their consent freely.[38]

Putting aside the inappropriateness of the control framework to address modern privacy concerns, there are also issues on a conceptual level. Though privacy clearly *implicates* control, to *identify* privacy with control invites a litany of evocative counter-examples. Consider a sailor marooned on an island or a child who has been banished to her room for punishment: both experience privacy in a real sense. Yet neither the sailor nor the child has control over this experience. Insofar as seclusion and solitude are species of being in a state of privacy, and insofar as such states can be compelled, one can unravel the threads linking privacy to control. Conversely, it is quite easy to think of examples of people who are clearly in control of their personal information or the access to themselves yet are not enjoying privacy, such as the social media over-sharer who broadcasts his inner monologues on Facebook or the performance artist who lives in a glass box on public display.[39] Both have exercised control over the terms on which people encounter their emotional and physical selves, yet this control has resulted in the *loss* of privacy.

Advocates of the control definition of privacy have a reply to such examples: these people can be said to exist in a private state because they had the *choice* to expose themselves so publicly. The state of privacy is having control over such experiences, the thinking goes, not necessarily always choosing to forego public exposure; it is because the Facebook sharer and the performance artist could have *refused* to engage in these acts that we can say they are (or at least were) in a private state. On the other hand, control advocates argue, the sailor and the child in her room cannot be

[38] The importance of moving beyond a control or consent-based framework for privacy regulation will be discussed more fully in chapter four, section 4.1.1.
[39] For an example of the latter, see Matt William, "Tilda Swinton sleeps in glass box for art installation at MOMA," *The Guardian,* 24 March 2013. Accessed 21 November 2017. https://www.theguardian.com/film/2013/mar/24/tilda-swinton-glass-box-moma.

said to enjoy privacy. They may be in isolation, but we can—and should—differentiate between people who are isolated from others and people who are in a state of privacy.[40]

Our response to such rejoinders is two-fold. First, insisting on linking privacy to control so intimately simply invites linguistic and conceptual confusion. What we seek is a way to define the state of privacy, to understand what people can mean when they say that something is "private" or someone is experiencing "privacy." Insisting that the Facebook sharer and the performance artist are still enjoying privacy because the conditions of control are met strips us of the ordinary language we would use to describe such behavior. It impoverishes our ability to separate the state of privacy from control over that state, because the two become collapsed into the same notion.

Second, control definitions require drawing fine shades of distinction between things like seclusion, isolation, merely "being alone," and being in a state of privacy, arbitrarily identifying this last condition with control while exempting the others. While, to be sure, these are not entirely coterminous concepts, the insistence that they are categorically *distinct*—an argument used to differentiate, for instance, the prisoner in solitary confinement from the hermit who has chosen to move alone into the woods—seems manufactured specifically to justify the control definition. These problems are only amplified for advocates of the control-over-information definition, for they must also justify their choice of *which* information should be included[41] as well as explain why physical and emotional access do not fall under their umbrella of privacy claims.

These problems are significant for the control-based definition. It is clear that privacy does, in many instances, implicate our ideas of control. Perhaps it is true that in ideal conditions individuals experience privacy only when and how they choose to do so. But to locate the core concern of privacy in control—and, indeed, to conflate it absolutely with control—is to strip away

[40] Some simply argue that to describe the situations as "private" is meaningless (see, e.g., Rössler, *supra* note 8, at 7). But this argument, like the others, conflates the moral desirability of the situation with the presence or absence of privacy. It is entirely consistent to claim both that forced isolation is morally undesirable (except, perhaps, as a form of justified punishment) and that it does, necessarily, create a state of privacy.

[41] The response, of course, will be that privacy consists in control over *personal* information. But this specification scarcely helps, for then a standard for what qualifies as personal information will have to be created, and it is difficult to see how such a definition can be given without relying on descriptions that invoke privacy without using the notion of control—which would undermine the case for identifying privacy with control.

nuance and to do violence to our ordinary linguistic descriptions. People in control of their own information and access regularly engage in properly non-private acts, and people with questionable control over such aspects of their lives regularly enjoy some measure of privacy. Indeed, we live in a world in which the degree of control we have over many aspects of our lives is tenuous, given both the increasing technological complexity of the modern age and developments in neuroscience that call into question the extent to which we consciously direct our thoughts and actions.[42] Recognizing this complexity while preserving our ability to speak meaningfully about privacy and its role in our lives is only a problem for those who adhere dogmatically to a control definition.

2.1.5 Access definitions

Noting the concerns with control-based definitions of privacy, many theorists have advocated for a definition of privacy centered on the idea of "access," where to be in a state of privacy is to be inaccessible in a number of different senses (regardless of one's control over the situation). Such definitions play out in three camps mirroring the control definitions: informational access, access to the self, and cognitive or epistemic accessibility. As we will see, access definitions show a great deal of promise, especially in their independence from control or consent and their capacity to encompass a wide range of potential privacy concerns. But the current definitions in the literature fail to motivate their own premises, eschewing the presence of any normative framework while sneaking it in behind the curtain. This charade of neutrality is regrettable and unnecessary. It deprives us of the ability to adjudicate between different competing access definitions, which seem to arbitrarily choose certain interests as part of the protection of privacy while leaving other interests out. The Legitimate Access Definition, which I will outline and defend in chapter three, builds on the family of access definitions while incorporating a clear normative standard for deciding which concerns are considered "private" concerns.

[42] Kerri Smith, "Neuroscience vs. philosophy: Taking aim at free will," *Nature* 477 (2011), 23-25. Published online 31 August 2011: http://www.nature.com/news/2011/110831/full/477023a.html. See, also, Benjamin Libet, "Unconscious cerebral initiative and the role of conscious will in voluntary action," *The Behavioral and Brain Sciences* 8 (1986), 529-566.

(a) Informational access

The most influential advocate of defining privacy in terms of informational access is William Parent. In two important articles published in 1983,[43] Parent defines privacy as "the condition of not having undocumented personal knowledge about one possessed by others."[44] He goes on to define "personal" knowledge as comprising both a broad, socially-contingent meaning[45] as well as a specific, context-sensitive meaning.[46] Parent defends this definition of privacy on the grounds of conceptual clarity. Finding all control-based definitions inadequate for reasons similar to those explicated above, and rejecting the broader "access to self" based definitions that I will outline momentarily, Parent advances his informational access argument as a way to isolate the "distinctive and unique" meaning of privacy.[47] He goes to great lengths to map out what he believes to be the relevant conceptual space, identifying liberty, autonomy, peace, health, property, solitude, seclusion, secrecy, and anonymity as distinct concepts that should be surgically removed from our definition of privacy.[48] Parent writes that the failure to distinguish between these related but distinct concepts "bespeaks a kind of conceptual bankruptcy."[49]

(b) Access to the self

Rejecting the narrow interpretation of informational access that Parent has advanced, a number of theorists define privacy in terms of inaccessibility to various dimensions of the self. Ruth Gavison has argued for the notion of privacy as "limited accessibility" in "the extent to which we are known to others, the extent to which others have physical access to us, and the extent to

43 William Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12.4 (Autumn, 1983), 269-288; "Recent Work on the Concept of Privacy," *American Philosophical Quarterly* 20.4 (October 1983), 341-355.
44 Parent, "Privacy Morality, and the Law," *supra* at 271.
45 "…facts about a person that most individuals in a given society at a given time do not want widely known about themselves" (*id.* at 271-272).
46 "…facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don't care if these same facts are widely known about themselves" (*id.* at 272).
47 *Id.* at 271.
48 Parent, "Recent Work on the Concept of Privacy," *supra* note 43, at 347-348.
49 *Id.* at 348-349.

which we are the subject of others' attention."[50] She later restates these three conditions as "secrecy," "anonymity," and "solitude."[51] Anita Allen follows similar reasoning, writing: "Personal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others."[52] She summarizes this as a person's being inaccessible "physically, dispositionally, and informationally."[53] Similarly, C. Keith Boone writes that privacy is "the state of limited access by others—most of the time voluntary, but sometimes imposed—to certain modes of being in a person's life."[54] Though these theorists emphasize or include slightly different concepts, their overall mission is to craft a value-neutral definition of privacy that does justice to its variegated instantiations in our daily lives.[55] They thus self-consciously reject both control-based definitions—for reasons similar to those above—and overly restrictive definitions, such as Parent's notion of informational accessibility.

(c) Cognitive or epistemic accessibility

Finally, some theorists resist both the Parent approach of informational accessibility and the Gavison/Allen/Boone approach of inaccessibility to the self. Madison Powers, for instance, has argued that the anti-reductionist approach of Gavison and Allen leaves the reader without "criteria for choosing among these competing limited access definitions," while the overly-narrow approach of Parent cannot account for "cognitive access to a person which produces no new information."[56] Instead, Powers advocates for something of a middle ground: privacy is a state of limited "cognitive access," where cognitive access is accessibility to the minds of other people (and

[50] Ruth Gavison, "Privacy in the Limits of the Law," *Yale Law Journal* 89.3 (1980), 421-471: 423.
[51] *Id.* at 428. Gavison thus, *contra* Parent, sees such concepts as implicated in privacy, rather than distinct from it.
[52] Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, N.J.: Rowman and Littlefield, 1988): 15.
[53] *Id.* at 16.
[54] C. Keith Boone, "Privacy and Community," *Social Theory and Practice* 9 (1983): 6.
[55] Gavison writes, for example: "The desire not to preempt our inquiry about the value of privacy by adopting a value-laden concept at the outset… requires that we reject attempts to describe privacy as a claim, a psychological state, or an area that should not be invaded" (Gavison, *supra* note 50, at 425). Boone, also seeking a neutral definition, further writes that unitary conceptions of privacy "are insufficient because they imply that the whole can be understood by the part, that one avenue of understanding comprehends, or comes close to comprehending, the full meaning" (Boone at 5).
[56] Madison Powers, "A Cognitive Access Definition of Privacy," *Law and Philosophy* 15.4 (1996): 375-376, 378.

the organs that inform those minds).[57] This definition is broader than Parent's because it includes access in which no new personal facts are learned.[58] But it is also narrower than Gavison's and Allen's definitions, as it reduces them to variations on the same theme (cognitive access).[59] George Panichas, in a recent paper on privacy, utilizes a similar notion of "epistemic access," which he defines as the ability to "gather information, form beliefs, or have knowledge of or with respect to someone else."[60] He goes on to define privacy as "an individual's freedom from those intrusions in or by which, contrary to his preferences and reasonable expectations, and without his permission, (1) another or others gain disruptive epistemic access to that individual, or (2) another or others gain either simple or disruptive epistemic access to, and acquire personal information about, that individual."[61] This definition draws on the same intuition as Powers's definition—that privacy is centrally about cognitive or epistemic accessibility—while emphasizing the intrusive nature of such access, which Panichas claims adds a layer of psychological harm.[62]

(d) Building on the access definitions

One of the self-proclaimed strengths of the access definitions of privacy is that they are neutral with regard to the value of privacy, in contrast to the normatively-laden control definitions, which, it is claimed, impede unbiased moral reasoning about the merits of privacy by incorporating control at the outset (who doesn't want control over her life?). However, though privacy is normatively dependent, it is not normatively neutral. In fact, privacy's normative dependence *precludes* neutrality, as privacy requires the provision of normative resources to assume a specific

57 *Id.* at 378-379.
58 *Id.* at 378.
59 Thus, Powers writes: "The necessary and sufficient conditions for what Allen's own theory counts as a privacy loss in all three dimensions has been shown uniquely to involve increased cognitive access to a more fundamentally informational aspect of the person" (*id.* at 382). In short, the three types of access that Allen identifies are, in Powers's estimation, merely species of cognitive access.
60 George Panichas, "An Intrusion Theory of Privacy," *Res Publica* 20 (2014), 145-161: 154.
61 *Ibid.*
62 "So it would seem that all privacy intrusions have an epistemic component, either immediate or prospective, and that it is in the combination of this component with the sometimes powerful psychological aversion to another or others being positioned to gather, actually gathering, or disseminating information about oneself that significant losses of privacy are best understood" (*ibid.*).

articulation. All of the access definitions must specify which aspects of our lives are covered by the umbrella of privacy—that is, which aspects of our lives deserve the *prima facie* expectation of protection and non-interference. Between Boone, Gavison, Powers, Parent, Panichas, and Allen we cover just about the gamut of human concerns. Yet they disagree on which interests should be included under this umbrella. I suggest that these differences can be explained by the normative commitments of the writers, and, further, that this should not be surprising or troubling. What's at issue are distinct human goods: the information about our lives, the physical autonomy of our bodies, the sacredness of our emotions and intimate lives. Privacy is utilized to preserve and protect such goods under an overarching normative framework. Even an expressed commitment to a neutral privacy definition cannot overcome the inherently value-laden nature of such a concept. To get to the point of a definition, one must start with a normative framework. But it is precisely because proponents of the access definition of privacy justify it partly on the grounds of its purported neutrality that it is important to raise the issue of non-neutrality on this question. If access definitions are superior to control definitions, then it is not on the basis of their (non-)neutrality.

But we have good reason to believe access definitions *are* superior to control definitions in their ability to incorporate a wide range of concerns that we commonly associate with privacy. Unlike the control, decisional, and spatial definitions, access definitions are not forced into counter-intuitive theoretical compromises in order to maintain their integrity, nor do they necessarily implicate liberal conceptions of consent or control. As Gavison's and Allen's accounts clearly demonstrate, they are capable of accommodating concerns about physical accessibility, the transmission of personal information, and the desire for intimacy, all of which are invoked in privacy discussions. Parent and Powers notwithstanding, many theorists who adopt the notion of privacy as limited access are decidedly anti-reductionist in this regard, maintaining that we cannot understand privacy better by reducing it to some single core. In other words, access definitions can be utilized with virtually any overarching normative framework. They are not inherent to a

particular moral or political philosophy, the way other definitions seem to be. It is tempting, then, to believe that our present task is simply to choose which of the access definitions is most intuitively appealing.

Unfortunately, none of the definitions on offer is quite satisfying. Parent's narrow construal of privacy as informational inaccessibility leaves out instances of cognitive access that do not result in the transmission of new information or personal facts. Yet few would maintain that a spy who learns no new information in the course of his surveillance is not still guilty of infringing on his target's privacy. However, Powers's attempt to reduce privacy concerns to various instances of cognitive access becomes so reductive as to lose its appeal. In seeking to ground all our privacy concerns in this "fundamentally informational" aspect of the world, Powers claims that access to someone's emotions, preferences, and desires, any sort of access by the five senses, as well as merely paying attention to someone, all count as forms of "cognitive access."[63] But if cognitive access is so broad as to cover virtually all of our ways of interacting with others, what do we gain by reducing privacy to this dimension? It is no virtue of a theory to achieve parsimony by subsuming a series of distinct claims under an overly-broad unifying concept.

Allen, Gavison, and Panichas, while avoiding some of these issues, nonetheless offer us no criteria for choosing between their various grab-bags of privacy concerns. Panichas sneaks in the heavily norm-laden language of "freedom" and "intrusions" to describe privacy, without giving us any sense of *why* we ought to care about this purported freedom from epistemic intrusions. Gavison and Allen, likewise, give us no indication of why their specific concerns should be included in the concept of privacy. Boone claims that his definition is crafted specifically to avoid the "pitfalls" of other definitions, which gives the distinct impression that its purpose is not to capture the true essence of privacy, but rather to chart a narrow course through, as Boone phrases it, "the Scylla of reductionism or the Charybdis of generalization."[64]

[63] See Powers, *supra* note 56, at 380-384.
[64] Boone, *supra* note 54, at 6.

In sum, the central deficiency of access definitions is that they are *principally unmotivated*. In their expressed commitment to neutrality, theorists who utilize an access definition of privacy present us with a list of human concerns worthy of the banner of privacy without any argument as to why these concerns, specifically, should receive the *prima facie* protection of privacy. The strength of access definitions—flexibility in the face of various normative frameworks—is also their vice: they leave us with no standards for deciding which framework is appropriate. The question of the content of privacy is also a normative question, requiring justification. Access theorists have already tilted the playing field by marking out certain human activities as "private," thereby requiring those who wish to gain access to provide arguments in justification.

In assuming a normative position while explicitly denying that they have done so, access theorists fail to provide a motivation for why their specification definition of privacy—the different forms of accessibility they choose to include—should prevail.[65] What access definitions purport to offer is a sanitized definition of privacy, but what we get instead is a definition with normative concepts snuck in without justification: an inconclusive grab-bag of aspects of our life to which one cannot have access if we are to have privacy. It is thus not that access definitions get the content of privacy *wrong*—for surely anonymity, seclusion, secrecy, epistemic accessibility, intrusions, reserve, etc. are all important considerations—so much as that they abdicate their more important responsibility: to explain both *what* privacy is and *why* it is this way. A definition should, at the very least, avoid leaving us with more questions than answers.

[65] Playing out the hypothetical argument may prove instructive here. Suppose an advocate of the access definition argues that informational inaccessibility is an aspect of her privacy definition. She maintains that all she has done is provide a neutral definition of privacy, and it remains to be seen whether we can justify protections of informational inaccessibility. A critic comes along and says, "information about individuals is a public and social concern, and is not part of privacy." (For a version of this argument, see Richard Posner, "The Right of Privacy," *Georgia Law Review* 12.3 (1977), 393-422.) The access theorist protests. But how does she protest? Presumably, she makes an argument about how people *in fact* care about the privacy of their information, or how common usage of privacy shows that we apply the concept to cover information about ourselves. But this move would simply evade the question: *why* do we care about informational accessibility, and why do we believe information is part of privacy? Surely the access theorist must do more than simply state this is the case. What's illuminating here is that the critic has used the exact same theoretical move that she has: he has simply declared that the public sphere includes a certain aspect of our lives, just as she has claimed that the private sphere does so. If her move is valid, so is his. Yet how are we do adjudicate this question of private vs. public domains over our lives? It seems inevitable that we will need further arguments about the role, function, and value of concepts like personal information, intimacy, secrecy, etc. in our lives. Access theorists deny themselves this avenue at the definitional stage.

2.1.6 Toward a broad conception of privacy

We have looked at several potential definitions of privacy. In each instance, we left unsatisfied with the account, either because of an overly unitary focus, an unmotivated dependence on a particular philosophical framework, a reliance on consent or control, or a mismatch between the stated goals of the definition and its practical use to privacy theorists. Though this survey of the literature may serve to confuse more than enlighten, we can draw out several lessons. The first is to reject what Madison Powers calls the "reductionist" account of privacy: that there is a single concept that encompasses all of our privacy concerns.[66] We saw in chapter one that the historical record belies the claim that privacy has ever been about one single interest. Now a review of modern approaches confirms this argument.

However, in adopting an anti-reductionist approach to the definition of privacy, we have also seen that we will need to provide a normative account—a framework to give structure to privacy. To label something "private" is both an act of social interpretation and a normative declaration. It is grounded in the social practices and customs of the community, and it creates a presumption of protection by establishing the claim that something is "off limits." We cannot separate such a designation from a more complete explication of the role and value of privacy, and how it might be justified (or not). Access definitions, though laudable in their breadth, fail to grapple with such a justification, leaving us without the theoretical tools to understand *why* something might be properly called "private." We will thus need a definition of privacy that is appropriately broad, yet not arbitrarily drawn. We will need a definition of privacy that touches on much of what the previous definitions have identified, yet in a way that does not trade in accuracy for simplicity or deny its own normative dependence. In the subsequent chapter, I will offer a new definition of privacy—the Legitimate Access Definition—which avoids the pitfalls described above.

[66] This is different from the reductionist critique of privacy (famously made by Judith Jarvis Thomson), which denies the existence of a right to privacy in the first place. See Powers, *supra* note 56, at 371-372.

First, however, I will survey various *justifications* that have been given for valuing and protecting privacy. These arguments purport to explain what is so important about privacy, and why it might merit varying degrees of protection, whether in the form of privacy rights (moral or legal) or in the form of societal investment. I will be reviewing these justifications critically, with particularly emphasis on the trap of unitary justification and with an eye toward demonstrating how they are reliant on various other moral commitments.

2.2 Justifications

Before addressing the specific arguments different writers have made, it is worth noting at the outset the two camps into which theorists generally fall: those who believe that privacy protections can be justified for *intrinsic* reasons, and those who believe they can be justified for *instrumental* reasons. Those in the former camp—a minority—believe that privacy is justified on its own: that it cannot be justified by appeal to other values, but that it possesses in itself its own justification, and indeed may be necessary to realize other values.[67] Charles Fried prominently adopts this justification of privacy.[68] Those in the latter camp, the instrumentalists, believe that privacy is justified by its utility in achieving other desired human goals, such as intimacy, dignity, or some notion of well-being. Unsurprisingly, I do not find this distinction either useful or necessary, and bickering over privacy's classification does not get us very far in understanding it. It is more fruitful to engage with individual justifications on their merits, regardless of whether they adhere to an intrinsic or instrumentalist conception of privacy protections, rather than to allow such classifications to count either for or against a given justification.

I will also postpone—for now—a discussion of privacy rights. The writers to be shortly discussed vary in their approach to privacy protections, but the majority support some form of

[67] Some theorists have split these two arguments even further, identifying "intrinsic" arguments as those which hold that the value of privacy is grounded in privacy itself, and "functional" arguments as those which hold that the value of privacy is grounded in some other norm or value, even if privacy is not instrumental in achieving this value. See, *e.g.*, Rössler, *supra* note 8, at 67.
[68] See Fried, *supra* note 26.

rights regime for protecting privacy, and many would further assert that privacy is both a moral and a legal right. It is useful to first critically examine the justifications given for privacy protections at all before addressing the form these protections ought to take.

2.2.1 Respect for persons, autonomy, and self-concept

Perhaps the most prevalent justification of the value of privacy, given the hegemony of liberal thought, is the notion that it is in some respect tied to our nature as autonomous individuals, capable of forming our own life plans and carrying out a vision for our lives. This idea is argued in slightly different forms by different authors. Stanley Benn, for instance, has argued that privacy protections can be grounded on "the more general principle of respect for persons."[69] Benn writes that observing or intruding on an individual without his consent treats him as an object, abnegating his autonomy to choose the conditions on which he will engage with the world.[70] The wrong in violating privacy is not merely the perceived intrusion, then, but the fundamental disrespect of the individual as "actually or potentially a chooser," thus making even unnoticed spying an affront to autonomy.[71]

Other theorists have emphasized autonomy in different ways. Rössler writes that "we value (certain forms of) privacy for people in liberal-democratic societies because without the protection of privacy it is not possible to make sense of the idea of individual freedom and autonomy that is basic and central to liberal democracies."[72] We care about freedom in liberal democracies, Rössler contends, really in the sense that we care about the freedom to be autonomous agents;[73] autonomy,

[69] Benn, *supra* note 32, at 8.
[70] *Id.* at 4, 8-9.
[71] "Covert observation—spying—is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man as engaged on an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him" (*id.* at 10). Herman Gross indicates a similar concern with how a lack of control over the conditions of observation can violate a person's autonomy, writing that the central concerns with privacy are "increasingly serious usurpations of a person's prerogative to determine how he shall appear, to whom, and on what occasion" (Gross, *supra* note 5, at 173).
[72] Rössler, *supra* note 8, at 44.
[73] Rössler writes: "Individual freedom thus permits a certain attitude to oneself. It permits—and demands—a form of self-determination and reflection on who one would like to be, what sort of person one wants to understand oneself as, what sort of life the good one is for oneself" (*id.* at 52).

in turn, requires that we identify with the choices we make, and privacy provides the background condition in which we can be said to have this type of autonomy.[74] In a slightly different argument, Joseph Kupfer maintains that "autonomy requires a conception of the self for which privacy is indispensable,"[75] this concept being "[a concept] of oneself as a purposeful, self-determining, responsible agent."[76] Kupfer marshals a host of sociological and empirical information to argue that privacy plays a necessary role in allowing individuals to build and sustain this self-concept and thus to act as autonomous agents.[77]

What are we to make of these various autonomy-based justifications? Privacy theorists seem have captured something important to privacy: that it in some sense implicates our ability to direct our own lives, free from the influence or coercion of others. Regardless of what can be said for the coherence of the notion of "autonomy," the idea that we should be able to develop and pursue our projects without undue coercion from others is at the heart of the liberal tradition—and therefore it sits at the heart of all conceptions of privacy that are influenced by this tradition. But can we go so far as to *ground* privacy protections on autonomy, or to argue that the value of privacy is principally its ability to promote autonomy? Should the framework upon which privacy *depends* be a liberal one that foregrounds autonomy?

I do not think it should be. Consider Benn's argument, according to which we cannot be considered autonomous choosers if the conditions of our choosing are determined from the outside. As Lloyd Weinreb points out, the dichotomy Benn employs is simply false.[78] We exist in a world in which our positionality varies constantly and seamlessly between object and subject, and in which the conditions of our acting—the conditions of our "choosing"—are in part

74 *Id.* at 65, 72. Rössler uses a control-based definition, which pairs naturally with autonomy-based justifications.
75 Joseph Kupfer, "Privacy, Autonomy and Self-Concept," *American Philosophical Quarterly* 24 (1987): 81. He writes that it is "difficult to articulate what is good about privacy without connecting it to other, more basic, goods," yet affirms that privacy's value cannot be contingent on providing these goods. His position, he states, rests in between the two camps.
76 *Id.* at 82.
77 *Id.* at 82-84. Kupfer relies on studies of prisons by sociologist Erving Goffman as well as psychological studies of children. See, *e.g.*, Erving Goffman, *Asylums* (New York: Anchor Books, 1961) and Jean Piaget, *The Moral Judgment of the Child* (New York: Basic Books, 1966).
78 Lloyd L. Weinreb, "The Right to Privacy" *Social Philosophy and Policy* 17.2 (2000): 39.

determined by forces outside our control, and in part determined by our own wills. As Weinreb writes: "Autonomy does not require that one's self-determined actions be exercised in an undetermined context; one must determine his actions for himself, but he is not and need not be free to determine all its consequences. On the contrary, autonomy is consistent with, even in the end dependent on, a determinate—that is to say, not self-willed—background order."[79] It is therefore a mistake to claim that we need space away from the observation of others (privacy) in order to maintain autonomy. It is both theoretically possible and practically likely that, if we experience autonomy, we do so in conditions of both privacy and non-privacy.

Moreover, *observation* is not the central concern when it comes to "respect for persons." It is not at all clear how observation actually precludes an individual from forming and carrying out his life projects.[80] Of course, knowledge of observation might change his behavior; but then Benn would be forced to admit that skillful observation, which goes undetected, is unobjectionable. Strikingly, however, Benn omits any discussion of shame in his argument. What most would object to in being observed without permission—especially in intimate moments—is not that some metaphysical standard of autonomy has been denied to them, but that such observation makes them feel ashamed. Indeed, it is common for people to respond to the revelation of covert observation with "I have nothing to hide," a retort intended to communicate that the fact of observation has no bearing on their choices or sense of self-direction *precisely because* they do not feel shame in being observed. In short, the evidence doesn't match the diagnosis. Seeking to understand privacy in the context of a normative framework that prioritizes autonomy, Benn ignores explanations that more readily cohere with how people respond to privacy violations.

[79] *Id.* at 37.

[80] With regard to secret spying, Benn writes: "Covert observation—spying—is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man as engaged on an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him… He may be in a fool's paradise or a fool's hell; either way, [one] is making a fool of him" (Benn, *supra* note 32, at 10-11).

Both Kupfer and Rössler, as mentioned, explicate privacy's role in "giving space" to individuals to develop a conception of who they are and how they wish to live their lives. For Rössler, this aspect of privacy is intrinsic to the value of privacy itself: we value privacy precisely because it is the norm that safeguards this capacity. Kupfer's account is more instrumental, relying on empirical evidence of privacy's salutary effects on the construction of self-conception. We can press several issues against both of them. The first is the tenuous empirical and conceptual link between privacy and autonomy. It is clear, again, that privacy *can* promote autonomy; but it is equally clear that autonomy can exist in conditions of non-privacy.[81] To claim that privacy is necessary for autonomy in the way that Rössler and Kupfer argue would be to argue that the vast majority of humans who have ever lived did not live autonomous lives simply by virtue of the fact that their societies did not prize privacy as highly as we peculiar modern humans do or understood it in a different way. There is something culturally myopic about the claim that without specific Western guarantees against intrusion and surveillance we are not able to live autonomous lives. The human impulse to choose our life projects and create lives of meaning, though certainly aided by privacy (howsoever defined), can and has survived its abrogation.

Kupfer's response to such criticisms is to argue that one needs more than empirical counter-examples to dispute his claims; one needs to create an alternative *account* of how autonomy can develop without privacy.[82] But conceptual linkages to the opposite conclusion are also easily made.[83] As the communitarians remind us, we are socially embedded beings, fundamentally shaped

[81] For a lengthier critical response to the idea that violations of privacy necessarily undermine autonomy, see James Stacey Taylor, "Privacy and Autonomy: A Reappraisal," *The Southern Journal of Philosophy* 40 (2002), 587-604. In this article, Taylor makes the argument, as I have above, that the much more difficult claim that covert observation undermines autonomy must be defended, and he goes on to show that at best it can be shown that covert surveillance only *contingently* affects autonomy, but need not do so *necessarily*.

[82] See Kupfer, *supra* note 75, at 81: "A satisfactory rejection of my view, however, would require more than empirical counter-examples (such as people growing up with little privacy but lots of autonomy). What would also be needed is an alternative *account* of how autonomy does indeed develop in these unprivate circumstances. This would involve a rival moral psychology with perhaps its own philosophical analysis of self-concept."

[83] Consider, for instance, that we construct much of the scaffolding for our identities in childhood, when we arguably experience less privacy than at any other point in our lives. The material from which we fashion an idea of who we want to be is socially formed and exogenously provided: norms and mores, language, taught beliefs, and patterns of behavior.

by the communities and cultures in which we find ourselves participants.[84] Seeking autonomy by walling off the world may be fundamentally self-defeating. If, as Kupfer argues, forming an autonomous self-concept requires that one "project himself into a variety of possible futures… [which are] 'his' futures, shaped around his desires, potentially at odds with the desires or wishes of others,"[85] then it is both empirically and conceptually possible to decouple autonomous self-conception from privacy, regardless of how useful privacy might be in general. At the very least, if there *is* some intrinsic link between the two, it is a very minimal conception of privacy that can be justified: an expectation of tolerance, a respect for people's ability to make their own choices, but not a robust restraint of intrusion on the individual.

Rössler's justification for privacy relies on the simple observation that we are better able to see ourselves as the authors of our own lives when we are free from the observation, censure, and coercion of others. The question, however, is more fundamental than whether privacy is important or useful for creating such conditions. Rather, we must answer the question: what might privacy be *grounded* in? That is, what are we protecting when we protect privacy? This is where the last domino in the autonomy arguments must fall. Autonomy is too empirically questionable and conceptually messy to provide an adequate grounding for a wide array of privacy protections. Recent research in neuroscience casts doubt on the extent to which we are, in the Rösslerian sense, self-directing agents.[86] If we base privacy protections on our commitment to individualistic autonomy, therefore, we leave it vulnerable to a growing body of research that questions the extent to which we can accurately see ourselves as autonomous agents.

Even if we argue, as Rössler undoubtedly would, that the *fiction* of autonomy is more

[84] For various versions of the communitarian argument, see Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, U.K.: Cambridge University Press, 1989); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981); Michael Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12.1 (Feb. 1984), 81-96. *Cf.* Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989).

[85] Kupfer, *supra* note 75, at 83.

[86] See *supra* note 42; Chun Siong Soon, Marcel Brass, Hans-Jochen Heinze, and John-Dylan Haynes, "Unconscious determinants of free decisions in the human brain," *Nature Neuroscience* 11.5 (May 2008), 543-545; Itzhak Fried, Roy Mukamel, and Gabriel Kreiman, "Internally generated preactivation of single neurons in human medial frontal cortex predicts volition," *Neuron* 69 (2010), 548-562.

important than its metaphysical veracity, we must ask what the fiction of autonomy does for generating privacy protections in the modern age. Here, the concerns over choice and consent that worry us in the control-based and decisional definitions of privacy will crop up again. Constructing an account of privacy on the foundation of autonomy makes it difficult to describe what goes wrong when people consent to privacy violations that we might nonetheless see as harmful. It might be said that the hallmark of privacy violations today is not the non-consensual mining of personal data but, rather, the consensual, unknowing, and occasionally eager participation of individuals in the sharing of these data.[87] At the very least, it is clear that autonomy-based justifications for privacy will lead naturally to privacy regulations that center "notice-and-consent," for, if the purpose of privacy is to enable autonomy, then giving people control over their privacy is the best tool for ensuring their autonomy. Such regulations, as will be discussed at greater length in chapter four, are inadequate for the modern day, in which data about individuals is pervasive, de-personalized, and liquid, and in which making informed decisions about such data is nearly impossible.[88] Even if we are unpersuaded by the difficulties inherent in the notion of autonomy, therefore, we should be reticent to use it as the foundation for privacy protections when its preferred tools are insufficient to meet current needs.

As I've mentioned, we should not abandon the idea of autonomy altogether. It is true that privacy protects those aspects of our lives that fall under its domain, and such protection is often indispensable to enabling free association, a diversity of pursuits, the development of original thought, and a host of other socially beneficial properties. What we must abandon, however, is the argument that privacy should be *reduced* to its association with autonomy. This link is particularly seductive because we have come to associate privacy with liberal notions about individual autonomy and control; but this link is not inherent to privacy, and its limitations are evident. The

87 See, e.g., Daniel J. Solove, "Privacy Self-Management and the Consent Dilemma," *Harvard Law Review* 126 (2013), 1880-1903.
88 Kevin Litman-Navarro, "We Read 150 Privacy Policies. They Were an Incomprehensible Disaster," *The New York Times*, 12 June 2019. Accessed 13 June 2019: https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

articulation and need for privacy arises only in community with others; our understanding of it should be, I will argue, similarly socially sensitive. To work from the ground up from a theory of the individual in isolation from the community will miss important attributes of the role of privacy in our lives.

2.2.2 Liberty

Closely related to arguments linking privacy to autonomy are those that link it to a liberty interest. As indicated, J.S. Mill's argument in *On Liberty* for the "freedom of tastes and pursuits" constitutes one formulation of this interest. The Millian notion of non-interference in the lives of others is properly about the legitimate scope of government, but embedded in his argument is the conviction that allowing others to coerce our actions—whether by the law or by social censure—would be an intolerable reproach on our liberty as individuals.[89] Because revealing our private lives to others opens us up to just such coercive action, privacy is seen as an important bulwark in securing our liberty to live our lives as we see fit. Privacy protections, then, might be justified as necessary to secure individual liberty. The Scanlonian notion of a "zone" of noninterference is a modern example of how Mill's ideas about liberty can be translated into the language of privacy, as are arguments about how privacy violations can reduce someone's "negative freedom."[90]

The central difficulty with the liberty justification of privacy protections is also its principal intuitive appeal: it captures our fear of what we would not be free to do if we knew that someone were watching, or what we could be stopped from doing with the information that someone might acquire about us through snooping or surveillance. In Mill's world, we desire the freedom to live our lives without forcing ourselves to conform to the ideas or expectations or other people; in the

[89] "With regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violate any specific duty to the public, nor occasions perceptible hurt to any assignable individual but himself; the inconvenience is one which society can afford to bear, *for the sake of the greater good of human freedom*" [emphasis mine] (Mill, *supra* note 19, at 82.)

[90] For an example of the latter, see Boudewijn De Bruin, "The Liberal Value of Privacy," *Law and Philosophy* 29.5 (2010). De Bruin utilizes the following definition of negative freedom: "I am unfree to perform some action, A, if someone interferes with my performance of A or if someone has the disposition to interfere with my performance of A if I were to attempt to perform A" (511).

modern age, the worry of governmental power over its citizens is more primary.[91] But the linkage between surveillance and liberty is tenuous. Skillful surveillance often goes undetected, and the liberty justification of privacy protections is about action. What we are worried about is not the invasion of privacy per se, but rather what might follow *after* the privacy violation—the coercive or abusive behavior that might subsequently ensue.

Consider, for instance, the unlikely scenario of a highly surveilled society which nonetheless had strict and well-respected laws against governmental interference in citizens' lives, essentially making the surveillance a massive but harmless fact-finding operation. How might the notion of liberty be invoked to resist such an apparatus, especially if the citizens are as free to live their lives (perhaps freer) than in societies with less surveillance? If the citizens have no idea that this surveillance apparatus exists? The fact of the matter is that we can do virtually *anything* while under surveillance, especially if we are unaware of it. The vast majority of the U.S. and U.K. publics were unaware of the extent of their governments' surveillance and meta-data collection until the Snowden revelations in 2013. The danger, then, with basing our protection of privacy solely on our defense of liberty is that we may provide justification for more covert surveillance measures.[92]

A republican notion of liberty as non-domination (rather than the liberal "liberty as non-interference") might be thought to avoid some of the issues mentioned above.[93] As Cécile Laborde and John Maynor write, "[t]o be free, on the republican view, is to be free from arbitrary power."[94] Thus, even in a world in which our liberty is not actually interfered with (a "benign master" who rules our lives without constraining our actions), a republican would argue that we can be unfree

91 As has been indicated in chapter one, James Whitman usefully points out that associating privacy with liberty is a rather American phenomenon, not as widely shared by those in Europe. See chapter one, note 106.
92 We will see also in chapter four that the nature of modern surveillance is such that citizens often actively participate in it—even "consent" to it. This dynamic puts the liberty argument for privacy into even more trouble. See chapter four, section 4.1.2.
93 For two seminal accounts of the republican conception of liberty, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997) and Quentin Skinner, *Liberty Before Liberalism* (Cambridge, U.K.: Cambridge University Press, 1998).
94 Cécile Laborde and John Maynor, "The Republican Contribution to Contemporary Political Theory," in *Republicanism and Political Theory*, eds. Cécile Laborde and John Maynor (Oxford: Blackwell Publishing, 2008), 1-30: 2. See, also, Pettit, *Republicanism*, at 63-65, indicating that under the republican view of freedom, one can be free even if interfered with (so long as it is non-arbitrary), and one can be unfree even if left alone.

just if someone holds arbitrary power over us.[95] Recognizing the merits of this approach, some writers have explored the possibility of grounding privacy in a notion of republican non-domination, arguing that it circumvents the problems of liberty as non-interference articulated above by capturing the harms of covert surveillance.[96] Under a republican conception of liberty, privacy thwarts the ability of others to exercise dominating power over us (e.g., via the collection of personal information), and not just the ability of others to interfere in our lives. Thus, even if we are unaware of the privacy invasions, they can still register as harms under a republican conception.

The republican liberty interest in privacy is a provocative, if under-developed, justification for privacy protections. It is particularly promising in its focus on the active participation of citizens in shaping the laws that secure their privacy.[97] The political account of privacy I develop in the next chapter takes the participatory institutions of democracies as a starting point in articulating the value of privacy. Yet the republican notion of non-domination ultimately raises similar issues to autonomy accounts previously discussed, as it asks the question: non-domination to what end? As Richard Dagger suggests, the republican ideal of non-domination, like the liberal ideal of non-interference, is ultimately an ideal about autonomy.[98] We seek non-domination because we seek to be self-governing. To ground our privacy interests in a notion of non-domination is thus to provoke the same issues that the autonomy accounts did—in particular those concerns about

95 The roots of a republican conception of freedom, as Quentin Skinner notes, are in Rome, where to be unfree was to be a slave, and to be a slave was to "remain at all times *in potestate domini*, within the power of [one's] masters" (Skinner, *Liberty Before Liberalism*, at 41). What republicans reject, according to Skinner, is "the key assumption of classical liberalism to the effect that force or the coercive threat of it constitute the only forms of constraint that interfere with individual liberty" (84). *Cf.* Philip Pettit, *Just Freedom* (New York: W. W. Norton and Company, 2014): 4-5.

96 Andrew Roberts, "A republican account of the value of privacy," *European Journal of Political Theory* 14.3 (2015), 320-344. *Cf.* Hoye, J. M., and Monaghan, Jeffrey. "Surveillance, freedom and the republic," *European Journal of Political Theory* 17.3 (2015), 343-363.

97 Roberts (*supra*) notes, for instance, that under Pettit's account non-domination can be achieved by giving individuals "control" over the exercise of power in their lives: "The meaning and content of a republican right to privacy (in common with all other fundamental or constitutional republican rights) should, as far as possible, be a political settlement—an agreement that is the outcome of a well-functioning deliberative process" (337).

98 Richard Dagger, "Autonomy, Domination, and the Republican Challenge to Liberalism," in *Autonomy and the Challenges to Liberalism*, eds. John Christman and Joel Anderson (New York: Cambridge University Press, 2005), 177-203: 184-187. *Cf.* Pettit, *supra* note 93, at 82.

whether choice and consent should be the primary ingredients in a modern privacy regulation regime.

More basically, however, the republican liberty interest simply swaps one normative framework for another. This is inevitable, of course: the normative dependence of privacy demands it. But to substitute a republican conception of liberty for a liberal conception of liberty—or autonomy, for that matter—is to appeal primarily to those who support republicanism; just as liberal accounts of privacy (which predominate) presuppose support for the tenets of liberalism. If we want to give an account of privacy that appeals to those who do not share our particular philosophical convictions, we will want to avoid basing our argument in a philosophical tradition to which not all will readily assent. As I will argue in the next chapter, a political conception of privacy avoids the schoolyard kickball game phenomenon of picking your favored privacy conception according to which (philosophical) player you like best.

2.2.3 Intimacy and relationships

Leaving behind justifications that stem from a liberal approach to privacy, we can examine a third justification, which draws on the romantic approach. Many theorists argue that privacy's value originates in our desire and need for intimate relationships of varying kinds. The basic intuition is that we cannot have certain relationships without some measure of privacy, and we can therefore justify protections of privacy on the basis of our interest in these relationships. Though intimacy-based justifications largely avoid the problems of choice and consent that plague autonomy and liberty-based justifications, however, their narrow focus limits their appeal.

Charles Fried first made the connection between our interest in intimacy and our interest in privacy, arguing that without privacy relations of "respect, love, friendship, and trust are… inconceivable."[99] Though Fried admits that there additional reasons to protect privacy, he argues that recognition of privacy's role in fostering intimate relationships will lead to fuller protections.[100]

[99] Fried, *supra* note 26, at 477.
[100] *Id.* at 484.

Privacy allows us to modulate levels of intimacy, allowing space for friends, lovers, acquaintances, and other relationships of varying depth.[101] James Rachels takes up this argument in full, writing that "there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people."[102] Privacy, Rachels argues, is the sluice gate of information about ourselves for which we alone have responsibility, providing more information in certain relationships than we would in others, making possible the diversity of human relations in our lives.[103]

Other writers have resisted such conceptions of intimacy, though underscoring its centrality in privacy concerns. Jeffrey Reiman, for instance, has written that the Fried-Rachels argument "overlooks the fact that what constitutes intimacy is not merely the sharing of otherwise withheld information, but the context of caring which makes the sharing of personal information significant."[104] Reiman writes evocatively that we often share deeply personal information with psychiatrists, but that same information in the context of a marriage is revealed for a different reason: "a reciprocal desire to share present and future intense and important experiences together, not merely to swap information."[105] This context of love and care is inseparable, Reiman contends, from our desire for privacy in which to share intimate parts of ourselves.[106] In this argument, Reiman uses similar language to Inness, who argues that privacy consists in control over information, access, and decisions (similar to Gavison's definition), where in each case what is at stake is the intimacy of the content.[107] Defining intimate matters as those matters which "[draw]

101 *Id.* at 485.
102 Rachels, *supra* note 25, at 326.
103 In a similar vein, Robert Gerstein has argued that intimacy of the most meaningful kind would be impossible without privacy. See Gerstein, *supra* note 30, at 76-81.
104 Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6 (1976): 33.
105 *Ibid.*
106 Reiman links his rebuttal of the Fried-Rachels view to a larger argument about the extent to which privacy enables "personhood," or the ability to see one's body and actions as one's *own*, and not another's. There are parallels in this argument to Kupfer's argument about self-conception (both, for instance, make use of Erving Goffman's work on total institutions like prisons and labor camps), though Reiman emphasizes the role privacy plays in separating our experiences from others, rather than in allowing an internal process of self-actualization.
107 Inness, *supra* note 29, at 56.

their value and meaning from the agent's love, care, or liking,"[108] Inness adopts Benn's principle of respect for persons to argue that we must respect people's capacities for emotional engagement.[109]

Intimacy arguments have the significant strength of identifying strongly with our intuitions. For many of us, the quintessential privacy concern is safeguarding the sanctity of precious moments with our loved ones—whether this is manifested in the things we say, the information we reveal, the actions we take, the behavior we exhibit, or just the ineffable feeling of being "alone" with the one we love the most. It may not be, as Inness wants to argue, that we *cannot* have intimate relations without privacy; but certainly they would be more difficult and possibly impoverished if prevailing norms allowed indiscriminate intrusions into intimate matters. Intimacy justifications of privacy protections also acknowledge the social nature of privacy. As Reiman writes, privacy is "a very complicated social ritual."[110] Though writers like Inness link their arguments to arguments about respect for persons and autonomous choosing, they at least acknowledge the role privacy plays in our *social* environment, not just how it safeguards some individualistic concern.

The difficulty with such arguments is that intimacy is not our *only* concern with privacy. Though we have inherited the romantics' concern with the inner emotional life, we recognize other interests. Personal financial information, medical records, and demographic profiles are all species of information that we may wish to keep from others out of a sense of privacy, yet not due to our sense of "love, liking, or care." We also seek privacy precisely to *withdraw* from relationships—consider the hermit in the woods—as well as to foster goods like peace, serenity, and reflectiveness.[111] A justification of privacy that trades solely on intimacy will fail to capture these

[108] *Id.* at 78.
[109] "If personhood makes claims on the agent as both an emotional and a rational being, it follows that an adequate principle of respect for persons must incorporate respect for each aspect: to respect another as a person is to respect her as both a rational chooser and an emotional chooser, a being with the capacity to make decisions with respect to her love, care and liking" (*id.* at 106).
[110] Reiman, *supra* note 104, at 39.
[111] Lever, for instance, argues that Inness's conception of privacy as intimacy "appears to undercut, for no good reason, support for privacy by eccentrics, non-conformists, the solitary, shy, creative, and artistic for whom the

other intuitions about the importance of privacy, as much as can be said for its acuity in recognizing our interest in fostering meaningful relationships. Indeed, it is difficult to understand how covert government surveillance can be resisted on the grounds of intimacy: intimate relationships can and do flourish even when government workers are watching from some undisclosed location. As long as those involved are unaware of the surveillance, they cannot—on the terms Inness and others provide—resist such actions. To justify the range of privacy protections on offer in modern society, we will thus need a justification broader than those offered by the above theorists.[112]

2.2.4 Eudaemonic justifications

Before addressing what I consider to be the most promising justifications of privacy protections—those based on political and social considerations—I will briefly examine the rarer argument that privacy protections are warranted on the grounds of human flourishing, or *eudaemonia*. To be sure, many of the arguments above implicitly utilize a notion of human flourishing, insofar as liberty, autonomy, and intimacy are ingredients of a fulfilling life. However, defenders of such approaches rarely make the argument from the ground up, linking such goods empirically to human happiness. Adam Moore, in *Privacy Rights: Moral and Legal Foundations*, makes such an argument. Building on an Aristotelian account of value as objective (independent of our affective states) and relational (tied to our particular qualities as a species),[113] Moore argues that privacy is simply *good* for human beings. To this end, he draws together a range of evidence, including studies in the natural world purportedly demonstrating the physical benefits from separation,[114] wide-ranging cultural studies indicating that privacy "in some form" is a cultural

protection of intimacy may be a relatively minor privacy good." See Annabelle Lever, *A Democratic Conception of Privacy* (AuthorHouse, 2013).

[112] Consider examples of extreme state monitoring, such as those that the People's Republic of China uses in its western province, Xinjiang: facial recognition scanners at malls, police devices that scan cellphones to decrypt messages, ubiquitous use of IDs to access basic services. Mounting criticism of such tactics from the point of view of *intimacy* clearly misses the point. See Josh Chin and Clément Bürge, "Twelve Days in Xinjiang: How China's Surveillance State Overwhelms Daily Life," *The Wall Street Journal*, 19 December 2017. https://www.wsj.com/articles/twelve-days-in-xinjiang-how-chinas-surveillance-state-overwhelms-daily-life-1513700355.

[113] Moore, *supra* note 27, at 40.

[114] *Id.* at 47-49.

universal,[115] psychological evidence underscoring privacy's benefits for group formation and status differentiation,[116] and work in prisons on the negative health effects of overcrowding.[117] For Moore, this evidence indicates that privacy is important to enable human flourishing, a classical Greek notion that utilizes the idea that humans have a distinct nature, and that we simply require certain goods in order to flourish.[118]

Moore's argument runs into trouble in a few spots. The first is that he plays fast and loose with the definition of privacy. While he defines privacy as an access-control right over bodies, places, and information, his account of the eudaemonic value of privacy relies almost exclusively on accounts of physical separation and psychological seclusion—and even these are based on a few, largely dated studies. Showing that "privacy" of some kind is expected in every culture, that physical separation is important for human social psychology, and that overcrowding has negative health effects is a far cry from demonstrating the universal, univalent value of privacy (particularly informational privacy, Moore's primary concern) in all contexts—and certainly not a robust enough foundation on which to rest the argument that we have a moral *right* to privacy. His further argument for the right to privacy—which utilizes what Moore calls a "Pareto-based principle" that, parallel to the Lockean proviso, grants rights to individuals when such rights do not infringe on the rights of others—trades on a particular orientation to rights that is contestable,[119] and further contains premises that seem highly suspect: for example, that "it is typically the case that others are not worsened by some individual's use and possession of their own personal information."[120]

115 *Id.* at 49-52.
116 *Id.* at 53. See, also, Barry Schwartz, "The Social Psychology of Privacy," *American Journal of Sociology* 73.6 (May 1968), 741-752.
117 Moore, *supra* note 27, at 56.
118 This teleological argument for the value of privacy is transformed in Moore's hands into an argument for privacy rights in control over access to bodies, places, and information via a "do-no-harm" justification: we have a presumptive claim to privacy based on its value to us in promoting human flourishing, and if our exclusive use of our own bodies, spaces, and information does not worsen anyone else, we can be said to possess a right to privacy (*id.* at 77, 85).
119 Those who adhere to a different philosophy can simply reject Moore's orientation and, in that simple move, dissolve the theoretical foundation he has built to protect privacy. No argument will be entirely incontestable, of course; but the degree to which the internal architecture of an argument contains contestable assumptions and presuppositions is the degree to which we should be nervous about its ability to sustain a robust regime of privacy protections.
120 *Id.* at 85.

For Moore to make the air-tight rights argument he wishes to make, it cannot be "typically" the case—it must simply be the case; and it is far from clear that such conditions typically obtain.[121] We should thus resist following Moore down the path of eudaemonic justification for privacy, as it offers us few attractive resources for designing privacy protections.

2.2.5 Toward a political justification

To close this chapter, I will now turn to a species of privacy justification that shows the most promise in avoiding some of the issues outlined above. Before doing so, it is worth commenting briefly on the broader similarities emergent in the justifications for privacy based on autonomy, liberty, intimacy, and well-being. What these justifications have in common is their commitment to an individualistic and philosophical approach to privacy. Their query is straightforward: "What values or interests does the individual have, and how does privacy embody or protect these values and interests?" And because there are several plausible candidates for such values, we see an irreducible plurality of answers to these questions. The first lesson we should take from this exercise is therefore that our privacy interests are varied, and privacy can bend and flex to accommodate different interests. Or, put another way: the internal content of privacy is indeterminate, as indicated by its normative dependence, and multiple normative frameworks and priorities can be used to fill in this content.

But the second lesson is that we have asked the wrong question. As I have written before, privacy is a socially-constructed and socially-contingent phenomenon. It is only meaningful to ask about public and private matters when one is living in community with others. Moreover, I have argued that we ought to think of privacy as a normatively dependent concept in that it is both instantiated in our social mores and dependent on overarching normative frameworks for

[121] Depending on how "personal information" is defined (Moore is not helpful here), it is quite easy to imagine scenarios in which withholding personal information can harm others: consider the spread of sexually-transmitted infections, the deception involved in withholding information about one's personal finances in a business transaction, and the interest an individual might have in knowing your criminal history before hiring you to look after their children. It is not clear why Moore believes he can slip this statement into his argument as a premise, rather than as a carefully argued contention.

coherence. These observations suggest that the proper starting point for inquiry into privacy is, therefore, the community—and, by extension, to ask what is fundamentally a political question, and not a philosophical one. The proposal is that we start our analysis of privacy by asking how it might be understood as a community-based practice, justified by the interests of the community and by political concerns. A number of theorists have explored this avenue to understanding privacy and formulating a coherent defense of its value in our lives.[122] I will briefly outline the views of a few in order to introduce this shift in thinking about privacy justifications.

In *Privacy and Social Freedom*, Ferdinand Schoeman argues that privacy should be understood from the perspective of social relations, not individual interests. Writing against autonomy-based justifications of privacy, Shoeman highlights the necessity of social pressures and conformity to free association, which he considers to be one of the bedrocks of a liberated life: "Most of our protections from a monolithic social and political tyranny depend on participation in associations," he writes. "The survival and effectiveness of these associations presuppose the availability of forces to bring about conformity with group norms—forces such as loyalty to group participants, methods, and ends."[123] Denouncing the notion of the "uninfluenced will" as a fiction, Shoeman insists that humans are "social beings whose stake lies in life with others."[124] Privacy, on this understanding, is a modulating social force: it dictates which social pressures are appropriate and which are not—granting that some are proper, or indeed necessary, for moral formation—and thereby enables what Shoeman calls "social freedom," or the ability to form and maintain associative ties. This conception of privacy admits of a number of features: it is contextual, historically located (not all societies at all times have need of privacy as Shoeman understands it), and agnostic to philosophical justification.[125]

122 For a compilation of different perspectives, see *Social Dimensions of Privacy: Interdisciplinary Perspectives,* Beate Rössler and Dorota Mokrosinska, eds. (Cambridge, U.K.: Cambridge University Press, 2015).
123 Ferdinand David Shoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992): 3.
124 *Id.* at 89.
125 That is to say: privacy could indeed further intimacy, liberty, autonomy, etc.; what matters, to Shoeman, is that it provides texture to the social relations that shape and define our moral culture, and thus our formation as moral beings (*id.* at 92, 107, 115, 153).

Where Shoeman turns to culture and morality, later writers have, in a parallel fashion, turned to politics. As we saw, Cohen has advanced the notion that privacy is necessary to protect the possibility of "difference" in a democratic society.[126] Much like Shoeman, Cohen sees privacy as necessary for shielding the individual from certain social and political pressures; her emphasis, however, is on "the processes of self-development and self-realization that go into identity formation."[127] Cohen writes that "in highly differentiated societies, the new privacy rights—precisely because they include both informational and decisional-autonomy aspects—play an important role in protecting the capacities of individuals to form, maintain, and present to others a coherent and distinct self-conception."[128] Utilizing an expansive definition of privacy, which includes decisional autonomy as well as informational control and lack of physical access, Cohen argues for privacy as an integral ingredient in a democratic society that embraces, rather than suppresses, difference.[129] The debate over privacy, to Cohen, is about how to govern a diverse society.

Annabelle Lever builds explicitly off of Cohen—and, I'd argue, implicitly off of Shoeman—to make a case for privacy rights as political rights.[130] Lever observes that implicit in Cohen's argument is the notion that "individuals' privacy interests, insofar as they are legitimate, will be different in key respects from those they would have under other forms of government, and different from those they would have in a state of nature."[131] In other words, politics shape our interests, including our interests in privacy; consequently, "we might tie individuals' interests in privacy to their interests in democracy."[132] Lever goes on to suggest a conception of privacy

126 Cohen, *supra* note 18, at 189.
127 *Id.* at 202.
128 *Id.* at 200.
129 "A privacy right entitles one to choose with whom one will attempt to justify one's existential decisions, with whom one will communicatively rethink conceptions of the good, and indeed, whether one will discuss certain matters with anyone at all…Thus the reciprocal recognition of privacy is the condition of the possibility of successful social interaction based on mutual recognition of the integrity of participants" (*id.* at 203).
130 For the most complete version of this argument from Lever, see Annabelle Lever, *A Democratic Conception of Privacy*, *supra* note 111.
131 Annabelle Lever, "Privacy Rights and Democracy: A Contradiction in Terms?" *Contemporary Political Theory* 5.2 (2006), 142-162: 146.
132 *Ibid.*

rights justified by our interests in democratic participation, including rights to personal choice, association, and expression.[133] For example, Lever writes, privacy rights allow individuals the freedom to prioritize their time and personal commitments in ways that allow for political expression: "If rights of political association are to be democratic, it is clearly important that individuals be capable of exploring competing conceptions of politics, different ways of associating together, and different reasons for doing so."[134]

Boone echoes Lever's recognition that privacy serves a vital democratic function, particularly in protecting the right of political association. In "Privacy and Community," Boone writes that political associations "are integral to the development of non-political centers of value that serve a number of vital democratic functions…Thus privacy fortifies modern democracy's prophylactic intention of preventing the total politicization of a person's life—a prospect that is characteristic of political religions and totalitarian ideologies, but repugnant to the democratic ideal."[135] The marriage of private and public concerns in this manner—i.e., basing the justification for a private right on our interest in a certain political/public life—helps to address the concern, oft-noted by feminist writers, that defense of privacy rights trades on a problematic public-private dichotomy. Indeed, as Lever notes, this justification of privacy rights is explicit in its reliance on political participation, on preserving the ability to individuals to form associations, express their grievances in solidarity, and organize to address common concerns.[136]

Writers who emphasize the social or political value of privacy are also more likely to recognize its context sensitivity. Helen Nissenbaum, for instance, has argued that privacy serves to protect "contextual integrity," or the integrity of norms that govern the "flow (distribution,

133 For more, see Annabelle Lever, "Privacy and Democracy: What the Secret Ballot Reveals." *Law, Culture and Humanities* 11.2. (June 2015); "Privacy, Democracy, and Freedom of Expression," in *The Social Dimensions of Privacy*, Beate Rössler and Dorota Mokrosinska, eds. (Cambridge, U.K.: Cambridge University Press, 2014); and "Privacy, Democracy, and Surveillance." *The Philosopher's Magazine* (Autumn 2013).
134 Lever, "Privacy Rights and Democracy: A Contradiction in Terms?" at 150.
135 Boone, *supra* note 54, at 8.
136 Lever, *supra* note 111, at 156.

dissemination, transmission) of information from party to party in a context."[137] Such norms, Nissenbaum notes, are highly contingent, responsive to "disparities across societies, cultures, and historical periods."[138] Nissenbaum's focus is explicitly informational privacy;[139] but other authors have applied the notion of contextual integrity to spatial or domestic privacy as well.[140] Building on the work of social theorist Pierre Bourdieu, Nissenbaum locates the value of privacy—and therefore the harms from privacy violations—explicitly in the social world: "The central thesis of the framework of contextual integrity is that what bothers people… is not that [contemporary systems of information gathering] diminish our control and pierce our secrecy, but that they transgress context-relative informational norms. These norms preserve the integrity of the social contexts in which we live our lives, and they support and promote the ends, purposes, and values around which these contexts are oriented."[141]

Finally, in perhaps the most persuasive account of the social value of privacy, Priscilla Regan has argued that the formulation of effective privacy policies requires abandoning an individualistic conception and embracing a conception of privacy as a common, public, and collective value. Regan's animating concern is the weak regime of privacy protections in the United States compared to the level of public anxiety over the issue, and she locates the source of legislative inaction in an overly liberal-individualist conception of privacy, which consistently under-emphasizes the harms from privacy violations because it fails to account for social harms.[142] Instead, Regan suggests conceiving of privacy as a *common value* ("all individuals value some degree of privacy and have some common perceptions about privacy"), a *public value* ("it has value not just to the individual as an individual or to all individuals in common but also to the democratic political

137 Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford: Stanford University Press, 2010): 145.
138 *Id.* at 134-135.
139 "The starting place of this book is the myriad socio-technical systems, devices, and associated practices that control, manage, and steer the flow of personal information, particularly those that have precipitated radical changes, aroused suspicion, caused anxiety, and drawn protect and resistance" (*id.* at 6).
140 See, *e.g.*, Judith Wagner Decew, "The feminist critique of privacy: past arguments and new social understandings," in *The Social Dimensions of Privacy* (*supra* note 122), 85-103: 98-99.
141 Nissenbaum, *supra* note 137, at 186.
142 Priscilla Regan, *Legislating Privacy* (Chapel Hill: University of North Carolina Press, 1995): 178.

system"), and a *collective value* ("technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy").[143] Regan maintains that conceiving of privacy in these terms—as a public good—would "require more attention to customary standards that organizations should follow in handling personal information and would compel more active social monitoring of compliance with the code," rather than placing the onus for privacy protection on the individual.[144]

Though these theorists make diverse arguments, their justifications for privacy protections share the intuition that privacy is best understood by examining its role in our social and political institutions, rather than its function for individuals. All reject (or heavily modify) the liberal-individualist paradigm that has so deeply penetrated privacy discourse. All recognize the difficulty in building a theory of privacy from the individual-up, rather than from the community-down, and they understand that privacy is fundamentally about the relationship between individuals and their wider contexts. In short, they recognize that to protect privacy is to protect a certain vision of how our communities ought to function. These writers recognize that social pressure, political coercion, and community norms are powerful and ambivalent forces in our lives, capable of providing both the structure for meaningful inter-personal interactions and the artifice for oppression. Privacy in this context is a necessary tool for guiding and channeling such forces.

To focus on this aspect of privacy is not, importantly, to neglect the important contributions of prior writers. Indeed, refocusing the debate on privacy in this way allows us to include the diverse interests we have in privacy. All of these are important facets of how privacy is implicated in our social norms and political commitments. But the focus on community allows for the introduction of a new framework in which to ground all of these facets of privacy—a new understanding of privacy and justification for protections that avoids the pitfalls of those that have

143 *Id.* at 213.
144 *Id.* at 232.

been surveyed in this chapter. In the next chapter, I will introduce and defend such a conception: the *political conception*.

Chapter Three: The political conception

The history of privacy indicates something fundamental about the concept of privacy: it is normatively dependent, reliant on other normative frameworks for an articulation of its value. This dependency also entails a "norm-dependence," in that privacy is constituted by the social norms and customs that form the backdrop of everyday life. Ignorance of these aspects of privacy has pervaded privacy discourse, resulting in the persistent and fruitless effort to locate some single human interest that explains our attachment to privacy. It has also led to definitional squabbles that define away aspects of our private lives that do not fit neat conceptual frameworks. In this chapter, I will introduce a new approach, one that draws on and extends work by other theorists who write on privacy's role in supporting democratic freedoms. The allure of a liberal-individualist understanding of privacy is strong and continues to shape policy, necessitating a robust defense of alternative approaches to privacy protection.

My approach—a political justification, rooted in democracy—contains several improvements on the current state of discourse. I link a democratic justification of privacy rights to the conceptualization of privacy I developed in chapter one. Theorists who have noted the interplay between privacy rights and democracy tend to view this relationship as supplemental evidence for privacy's value; I argue, rather, that a political justification in fact *follows from* a recognition of privacy's normative dependence. Only a political approach adequately contends with the specific implications of normative dependence, such as a heightened concern for public justification and the need to pay attention to the institutional or cultural specificities of any given polity. These observations go beyond current discourse by marrying a coherent conceptual scheme to several distinct arguments that link privacy with democratic values. I investigate how privacy can be constitutive of the formation of political identity, the exercise of free speech, and the associative freedoms that underpin modern democracy. Further, I explore privacy's role in the epistemic make-up of democracy, demonstrating that the central democratic mechanisms of "talk" and "votes" rely on epistemic inaccessibility. These innovations—amongst others—are syncretic

improvements on the social and political accounts of privacy discussed at the end of the previous chapter.

I will start by offering a new definition of privacy, designed to incorporate normative dependence while avoiding the pitfalls of other definitions. I will then introduce the political justification to privacy, and subsequently defend it by demonstrating a particular (and attractive) version of it: a democratic justification of privacy rights. I conclude by noting an implication of the foregoing argument: that there is no pre-political right to privacy.

3.1 The Legitimate Access Definition

If privacy lacks a central normative core, as I argue, how can it be defined? Can we get any more specific than "not public"? In the previous chapter I documented the extensive disagreement over how to define privacy, as well as the inadequacy in the existing contenders. The most promising are the access definitions, which define privacy as a form of personal inaccessibility (of various kinds). These definitions come closest to capturing the inherently oppositional and normatively dependent character of privacy, while remaining broad enough to capture a range of privacy concerns; but they provide few tools for adjudicating between competing versions, leaving them open to the charge of arbitrariness.

We can see a way forward through an approach similar to Judith Wagner Decew's in *In Pursuit of Privacy*. DeCew defines privacy as "whatever is not generally—that is, according to a reasonable person under normal circumstances, or according to certain social conventions—a legitimate concern of others."[1] The standard of legitimacy Decew uses is informed by whether or not an alleged privacy intrusion "jeopardizes or prohibits protection of a realm free from scrutiny, judgment, and the pressure, distress, or losses they can cause."[2] Her definition of privacy is thus a "cluster concept", incorporating "claims concerning information about oneself, physical access to

[1] Judith Wagner DeCew, *In Pursuit of Privacy* (Cornell University Press, 1997): 58.
[2] *Id.* at 64.

oneself, and decision-making and activity that provide one with the independence needed to carve out one's self-identity through self-expression and interpersonal relationships."[3]

DeCew's definition is attractive: it is pluralistic, sensitive to privacy's embeddedness in a social context, and inherently normative. She relies on the notion of "legitimacy," recognizing that what is considered private and not private is wrapped up in values about what makes privacy worthwhile, because it is wrapped up in pre-existing expectations we have of one another. The definition thus provides answers to many of the objections we raised against previous definitions. But it is still insufficient. The concept of the "reasonable person"—a legal term, crafted for legal reasoning— is too controversial to serve as the basis for a philosophical formulation of a definition of privacy.[4] DeCrew also adopts the very strategy she seems to reject. Though her language is broad, potentially admitting of a wide variety of privacy concerns, she clarifies that private matters are those that are beyond the legitimate concern of others "for a certain set of reasons," primarily freedom from scrutiny and judgment. This unnecessarily excludes privacy concerns that have little to do with social coercion. She uses the flexible language of "generally" and "legitimate" but then cuts against this generous impulse by centering her definition on freedom from intrusive actions.

If we combine the best parts of DeCew's definition with those of the access-theorists, we have a solution. I propose the following definition of privacy:

> The Legitimate Access Definition: To experience privacy is to be in a state in which one's self cannot be legitimately accessed or acted upon by others, either epistemically or physically.

The benefits of this definition should be clear from the foregoing discussions. In utilizing the language of "access," it incorporates the insights of the theorists who argue that privacy is fundamentally about existing in a state of limited accessibility. I have chosen the phrasing of

[3] *Id.* at 78.

[4] For a good discussion of the difficulties in "reasonable person" standards, see: Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of an Objective Standard* (Oxford: Oxford University Press, 2003). Ultimately, I remain agnostic as to whether the "reasonable person" standards solves more problems than it introduces, but I see no need to introduce these complex issues into the privacy debate.

"access to the self" that theorists such as Gavison and Allen have adopted, as it is the broadest access-based definition and avoids the unnecessarily restricting information-only accounts. Yet here I have clarified that "access" should be understood both epistemically and physically. By this I aim to cover the complete range of possibilities for accessing another human. *Epistemic access* would count as any access to another individual that provides information of any kind, including sensory information (seeing or hearing the individual) and data or personal information of any kind.[5] *Physical access* covers all situations in which one is physically in the presence of the other individual, whether noticed or not. The intent in including physical access is to acknowledge that one could be physically in the presence of another without receiving any sort of epistemic access, and this would still qualify as a privacy intrusion. The use of access in privacy definitions, I have also argued, incorporates the notion of control—for one can exist in a state of limited accessibility by choosing to exist in that state—without making privacy problematically dependent on the notion of control.

There are two innovations here worth explaining. My definition adds to the notion of access the notion of being "acted upon." In other words, privacy consists also in not being legitimately acted upon, either epistemically or physically, just as it consists in not being accessed epistemically or physically. To be *epistemically acted upon* means to receive informational inputs from an outside source—the opinions, judgments, or desires of other people. To be *physically acted upon*, rather obviously, means to be physically coerced or intruded upon by direct contact.[6] The intent of including the notion of being "acted upon" is to acknowledge that some of our privacy concerns

5 George Panichas, advancing an "intrusion" theory of privacy, has defined epistemic access as follows: "Innocuously, one person gains epistemic access to another when she becomes positioned so that she can, either directly or by use of various technological aids, gather information, form beliefs, or have knowledge of or with respect to someone else" (George Panichas, "An Intrusion Theory of Privacy," *Res Publica* 20 (2014): 145-161: 154). Panichas notes that it is only *intrusive* epistemic access that is at issue in privacy concerns; I would argue, contrariwise, that it is *illegitimate* epistemic access that typifies a privacy violation.

6 It will likely be noted that this definition necessarily includes actions that may not seem to be (primarily) privacy violations, such as physical assault or unwanted touching. The rejoinder is simply that we ought to view such actions as privacy violations, but not *only* privacy violations. It is entirely consistent with this definition to maintain that physical assault, unwanted touching, physical harassment, etc. are privacy violations, but they are more appropriately captured—or their wrongness is more fully explained—by separate concepts, such as bodily integrity.

center on our ability to choose the conditions under which we will make decisions—i.e., whose opinions, judgments, and desires we will allow to influence on our decision making. Such concerns exceed simple "access" and extend into the actions others can legitimately take toward us; yet they also are not captured by already-existing concepts such as liberty or autonomy, as we can be "free" to act in any way we please even if we have been forced to consider information or opinions we did not wish to consider. Privacy, defined in this way, means not having to expose oneself to the opinions, approval, censure, well-intended advice, or corrective intrusions of others, all of which fall under the category of epistemically acting upon another.

The definition also incorporates DeCew's use of the word "legitimate," but in a different fashion. The use of legitimate in this definition serves two purposes. The first is to qualify, like the words epistemically and physically, the central tenets of access and action. There are many ways of epistemically and physically accessing or acting upon others; the realm of the "private" is that realm in which such access or such actions are *illegitimate*. The second purpose of legitimate is to incorporate the fact that privacy is implicated in the morals and norms that govern our behavior, and thus implicates arguments about the morality or propriety of certain actions. In this definition "legitimate" should therefore be understood to mean "legitimate according to the shared understandings" of the community in question, or "legitimate according to the norms and laws" that govern appropriate intrusions in a given community. What counts as legitimate epistemic access in one community, therefore, will differ from what is legitimate epistemic access in other communities; this definition allows both to set the terms of their privacy debates.

To put this another way: I will not be appealing to some standard outside this definition to settle what counts as "legitimate" access, and therefore to further specify what counts as privacy, because the metes and bounds of legitimate access or action with regard to another person—i.e., the metes and bounds of privacy itself—rely on societally and historically contingent inputs.[7] This

[7] I do not mean here to utilize the concept of political legitimacy, about which there is already a rich literature. See, *e.g.*, A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); *Political Philosophy* (Oxford University Press USA, 2007), esp. chapters 1 and 2; "Justification and Legitimacy," *Ethics* 109.4

is what it means to hold that privacy is both normatively dependent and norm-dependent: the definition cannot set the normative content of privacy. It can only refer to the source of this content, which is the social and political context in which the conception is deployed.

The pre-theoretical conceptions of privacy inherent in the community—the mass of mores, intuitive understandings, social constructions, codes, and laws that inform how people conceive of themselves in relation to others—count as "exogenous inputs" in this definition. That is, the community in question comes to view certain forms of access and certain ways of acting on others as illegitimate, based on their understanding of privacy, which can itself be informed by any number of normative intuitions or social understandings. The Legitimate Access Definition then takes these shared social understandings and these specific legal contexts as givens in the use of "legitimate," which makes specific reference to them. The definition is therefore a *labelling exercise*, gathering all of these intuitions and understandings under one banner and calling them "private." In other words, it doesn't *cause* them to be private because they are beyond legitimate access; it *recognizes* them as such. When a community decides that certain spaces, actions, modes of being, and so forth are "private" because they are beyond the legitimate access or actions of others, then this simply *is* what privacy is—this collection of judgments. Though one might accuse this definition of being boring, it is not tautological.[8]

The blandness of the definition is a virtue. My broader intent is to combat the over-emphasis in the privacy literature on quibbling over the precise definition of privacy. As I have

(1999), 739-771. "Legitimate access" refers not to access that passes some threshold of moral argument, but merely a type of "acceptable" or "appropriate" access, where the standards used are those which are widely held by the community in question. Illegitimacy in this case could mean moral illegitimacy, but it could also be socially illegitimate—access that is considered illegitimate because it violates social propriety. The central intuition is that there is nothing universally illegitimate about any given privacy violation; but, rather, it can be illegitimate only insofar as it is held to be so by individuals sharing certain normative frameworks.

[8] To challenge a privacy norm therefore, under the Legitimate Access Definition, properly registers as a challenge to an entire normative regime. To claim "this is private," is not, at heart, a question of minutely defining the perimeter of a fixed concept, but rather it is a claim about what is legitimate or illegitimate access; thus, conflicts over the definition of privacy do and should implicate the normative stance of the entire society. For example, in the antebellum U.S., enslaved persons had no "legitimate" claims to inaccessibility, as the prevailing privacy norms did not extend to them. When they thus asserted their privacy or engaged in tactics to subvert surveillance, they were not merely seeking to redefine privacy, but were also necessarily challenging the normative framework that made regular privacy violations a unique feature of their lives. For further discussion, see Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015).

written, this tendency stems from the belief that privacy can be narrowly defined and thus better understood. Yet if we consider privacy a normatively-dependent concept, then the definition of privacy will be the least important part. The definition is simply naming what we know to be true, which is that privacy is the state of being able to legitimately deny people access to yourself, whatever that means in a given society. If the content and scope of privacy cannot be decided in advance by some comprehensive definition, but must be understood from within a certain community and according to a certain normative commitments, then the definition is merely a formal exercise. What is important is in the content: the values we implicate in privacy, and the reasons we have to protecting these values.

3.2 The political justification for privacy rights

Providing a new definition for privacy, therefore, does not resolve the question. Although the Legitimate Access Definition gives us a way to define privacy that avoids the pitfalls of other definitions, it also reveals that the central mistake most theorists make is to believe that a definition alone is necessary for understanding privacy. If the best definition of privacy is a broad one that makes explicit reference to a standard of community legitimacy, as I have offered here, then the natural question is, on what basis can a community make these judgments? Or rather: where does the value of privacy properly lie? Answering this question is the proper focus of the privacy debate.

The standards of legitimacy that a society develops could be based on any number of incomplete or imperfect ideologies, norms, and judgments. We explored some of those in the previous chapter and learned that any single one, on its own, proves inadequate. One pluralist approach might therefore be to adopt a several different justifications for privacy rights, which cannot themselves be subsumed under a single understanding, but collectively might provide an umbrella of protections: we care about autonomy, intimacy, and self-development for independent reasons, and this might give us independent reasons for valuing privacy. However, we would then lose a common basis for privacy protections. Indeed, one of the main aims of privacy theorists

who emphasize its social importance is precisely to avoid situations in which privacy is reduced to one of its constituent values. Writers like Regan know the costs of this strategy: when collective issues like national security or public health are on the line, any individual privacy concern is overshadowed by the social costs of protecting it. Privacy consequently suffers.[9] We therefore will want to chart a course between essentializing privacy, on the one hand, and dissipating its strength amongst several different justifications that can be picked apart one-by-one, on the other.

Recognition of normative dependence shifts attention from definitional squabbling over privacy to the commitments we choose to use to understand privacy and justify privacy rights. If we are serious about creating a sound basis for the protection of privacy, we should think seriously about which normative framework can withstand the stress tests of the modern age. To ignore the baseline condition of normative dependence in favor of adopting simply one normative framework over another is to ignore an essential feature of privacy. Liberal-individualist conceptions of privacy—which prioritize control, prize individual autonomy, and reify a strict public-private divide in law and moral reasoning—emerged from a particular historical moment, but they are by no means the only or even the best conceptions available to us of privacy.

The goal, then, is to articulate a basis for privacy laws that does not reduce to one of the many incomplete and imperfectly shared normative frameworks that exist in any given community. We are looking for what is common, what is basic to the entire community. From this, we will find the superstructure of the normative framework necessary for understanding the role of privacy in that community, because it will be a framework endorsable by all members of the community. If privacy emerges from a particular political context, then we ought to start with just this context. We ought to start with the political organization of the community in question.

In the remainder of this chapter, I will make the case for adopting a *political justification* for privacy protections. In short, this is a normative framework that articulates the value of privacy by

[9] Priscilla Regan, *Legislating Privacy* (Chapel Hill: University of North Carolina Press, 1995): 182.

demonstrating how it supports the political system and institutions that are in place. To answer the question, "why should we protect our privacy," we must first answer the question, "how does privacy make possible our politics?" This type of justification takes the conceptualization of privacy as normatively dependent to its logical conclusion. If privacy is inherently oppositional and dependent on given social and political contexts, then we ought to be able to illustrate the role it plays in those contexts and justify its value on the basis of that role. If we can show how privacy protects or upholds our political institutions and values, then we do not have to make the case for privacy's value. It will be inherent in the justification itself.

The justification is therefore political in two senses: one thick, one thin. (Or, to reprise terms from my introduction, one Waldronian, one Rawlsian.)[10] It is political, first, in that the normative framework used to express the value of privacy is the set of political institutions governing a society. This is the thick sense of the political justification: it draws on the basic political organization of society to give structure to the concept of privacy, and it directs our attention to the relationship between privacy and these institutions. These constitute the public, in the broadest sense, against which privacy is defined; and the value of privacy will thus be political—that is, of the *polis*—rather than individual. But the justification is also political in a thin sense: it aims to be acceptable to the broadest range of interlocutors. This thin sense of the political justification is a conception of privacy abstracted from particular philosophical commitments, agnostic to theories of liberalism or republicanism or socialism or whatever else, and theoretically capable of endorsement from all members who live under the same set of governing institutions. This is a conception of privacy that can serve as a basis for privacy protections regardless of individual convictions and regardless of the relationship between privacy and other values such as autonomy, intimacy, and liberty.

[10] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) and Jeremy Waldron, "*Political* Political Theory," *The Journal of Political Philosophy* 21.1 (2013), 1-23.

Of course, a political conception requires a specification of the system in question. I will focus on the democratic justification for privacy rights.[11] I will show how a community that characterizes itself as a "democracy" can use the institutions and values of democracy itself to fill out a conceptualization of privacy, and therefore to provide a justification for privacy protections. What counts as a democracy, of course, is hotly contested. I will not attempt to adjudicate between competing modern theories of democracy, whether "agonistic" or "deliberative" or "liberal,"[12] nor will I justify privacy protections on the basis of one of these conceptions. Indeed, as David Miller points out, much of the disagreement in the literature on democracy concerns the regulative ideals underpinning democratic institutions, rather than the institutions themselves: almost all contemporary democracies will have certain features in common, such as free expression, regular elections, freedom of association, and so on, even if these features are justified differently.[13]

I take these common features as my starting point for the relevant definition of "democracy." That is—for now—I do not mean to distinguish between different types of democracy, nor to stake out a claim in the debates over democratic legitimacy.[14] Rather, I aim to stipulate features of democracy I take to be common today, and to show how adequate privacy protections support these features.[15] In doing this, I hope to sidestep the debates over what

11 The democratic justification justifies privacy rights on the basis of how they uphold or support democracy, thus setting up a conditional claim: if you value democracy, then you should value privacy rights. Some do not assume the value of democracy, however, and would therefore not finding this argument convincing. See, *e.g.*, Jason Brennan, *Against Democracy* (Princeton: Princeton University Press, 2016).

12 See, generally, Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000); Jean-Jacques Rousseau, *On the Social Contract*, in *The Basic Political Writings*, trans. and ed. Donald A. Cress (Hackett Publishing Company, 2011); Joshua Cohen, "Deliberation and Democratic Legitimacy," in *The Good Polity: Normative Analysis of the State*, eds. Alan Hamlin and Philip Pettit (Oxford: Basil Blackwell, 1989); *Deliberative Democracy*, eds. James Bohman and William Rehg (Cambridge, M.A.: MIT Press, 1997); Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment," *Philosophy and Public Affairs* 29.4 (Autumn 2000), 371-418; John Rawls, *A Theory of Justice* (Cambridge, M.A.: Harvard University Press, 1999 [1971]); Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, M.A.: Belknap Press of Harvard University Press, 2011): esp. chapter 18; Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1998): esp. chapter 13.

13 David Miller, "Deliberative Democracy and Social Choice," *Political Studies* XL, Special Issue (1991), 54-67. *Cf.* Michael Goodhart, *Injustice: Political Theory for the Real World* (Oxford: Oxford University Press, 2018), esp. Ch. 5. Goodhart holds that the core ideals of any democracy are freedom and equality, and that this means democracy is principally about power relations and not about the institutions and procedures that govern democracies.

14 I emphatically do believe that variations on the democratic theme matter to discussions of privacy, but I will discuss the implications of institutional differences in the conclusion of this thesis. For now, I intend to propose a more general model for the political justification for privacy rights, relevant across various forms of democracy.

15 The institutions that constitute democracy today might be said to be those of "liberal democracy," rather than democracy *tout court*. I will be using the term democracy to connote the set of institutions that collectively comprise

democracy is "really about," and further to avoid having to stake a claim in the argument over the values or virtues implicated in democracy, though I will occasionally reference such arguments to show why partisans of one view or another might have additional reasons to support my thesis.

The discussion will be organized according to two sets of institutions that are integral to modern democratic governance: *participation*-oriented institutions and *epistemic* institutions. The former have to do with the conditions that must obtain for full participation in democratic self-governance. I focus on three: (1) the ability to develop political identities, (2) the existence of a system of free expression, and (3) the ability to freely organize and join voluntary associations. These are, in short, common features that we take to be the stuff of democracies. Whatever else democracy is about, it is at the very least concerned with ensuring some form of participatory parity, or the commitment that citizens be able to participate equally in the process of governance—at least in theory, and to the extent possible in practice—without unreasonable restraints. The genesis of this commitment is, for present purposes, not relevant. I propose instead to start with the traditional safeguards of participatory parity, i.e. the practices and institutions that typify democratic attempts to secure the participation of all citizens in lawmaking. If we can show how privacy plays an important role in ensuring these participation-oriented mechanisms, then we will have come a long way toward providing a democratic justification for privacy protections. I will argue that each of these features is supported by—even made by possible by—robust privacy protections.

The second set of institutions deal with what I will call the "epistemic balance" in a democracy. One way to think about democracy is that it is an information-gathering exercise, where the government seeks certain information from citizens and citizens seek certain

modern democratic governance and will avoid using the term "liberal democracy"—even if it may seem more familiar or precise—in order to distinguish my view from a liberal-individualist view. For an articulation of the differences between what we might call classical democracy and liberal democracy, see Benjamin Constant, "The Liberty of the Ancients Compared With That of the Moderns," in *Benjamin Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge, U.K.: Cambridge University Press, 2007 [1819]), 307-328. *Cf.* Josiah Ober, "Quasi-Rights: Participatory Citizenship and Negative Liberties in Democratic Athens," *Social Philosophy and Policy* 17.1 (2000), 27-61. Ober argues that the evidence from Athens suggests that participatory democracy (of the ancients) can provide a propitious environment for the development of liberal freedoms (of the moderns).

information from each other. I will argue this situation of epistemic inaccessibility (i.e., privacy) is a central feature of democracies, and that democracy therefore presupposes an "epistemic veil" between both the government and its citizens and between citizens themselves, constituted by the democratic instruments of "talk" and "votes." Insofar as voting and deliberation are central to democratic governance, yet also rely crucially on epistemic inaccessibility, we can show that privacy is constitutive of democracy.

3.2.1 Privacy and identity

The ability to develop and politicize one's identity has become a key feature of democratic participation today and a staple of political organizing. Consider, for instance, that some of the most important political movements in the U.S. over the past half-century have drawn on distinct identities (racial, sexual, economic) to formulate their demands: the 1960s Civil Rights Movement, the gay rights movement of the 1960s-80s, women's liberation, Occupy Wall Street, Black Lives Matter, trans liberation—the list goes on. The translating of particular identities into political demands is a complex and multi-step process (and privacy plays a role at every stage), but here I wish to focus on the first step: the individual's formation of a distinct identity, one that may be different from the identities of those around them. Here, important work has been done by sociologists, anthropologists, and privacy theorists investigating the socialization of the subject and the role of privacy in facilitating that process. What this work reveals is that privacy plays an important role in the delicate process of identity formation and thus supports a core element of democratic participation.

As Julie Cohen has observed, privacy theory—especially in the U.S.—has long remained enthralled to the liberal conception of the self, just as it has remained enthralled to liberalism more generally.[16] The result has been a curious resistance to the insights of social theory, a resistance which seems to stem from the conviction that any concession to the power of social shaping

[16] Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven: Yale University Press, 2012).

precipitates an equal and opposite step away from the liberal ideals of self-determination and critical reflection. But, Cohen notes, the two need not be exclusive: "One can choose to understand the autonomous liberal self and the dominated postmodernist subject as irreconcilable opposites," Cohen writes, "or one can understand them as two (equally implausible) endpoints on a continuum along which social shaping and individual liberty combine in varying proportions."[17] Identities are not formed outside social contexts, but through them; and the self that sits at the center of privacy theory should not be the imagined island of autonomous self-direction that we so often see, but rather the more realistic—and interesting—one that emerges gradually from social practices of both withdrawal and presentation.

To see how privacy inheres in self-making, it is first necessary to turn to Erving Goffman, whose investigations into the social construction of the self and the psycho-social impact of "total" institutions (like asylums and prisons) have been illuminating for understanding social ritual and subjectivity. In *The Presentation of the Self in Everyday Life*, Goffman famously compares the construction of the self to a performance:

> There will be a back region with its tools for shaping the body, and a front region with its fixed props. There will be a team of persons whose activity on stage in conjunction with available props will constitute the scene from which the performed character's self will emerge, and another team, the audience, whose interpretive activity will be necessary for this emergence. The self is a product of all these arrangements, and in all of its parts bears the marks of this genesis.[18]

Though Goffman's account could be critiqued for over-emphasizing the performative aspects of identity construction, all that interests us here is that such performance is an essential (if not sufficient) aspect of how individuals conceive of the roles they play in society—and thus of the identities they take on. Importantly, crucial elements of self-construction take place both "backstage" and "front-stage." The "back region," Goffman argues, is where individuals are more relaxed, and it is thus where the props for the performance of the self can be constructed; but it is

17 *Id.* at 115.
18 Erving Goffman, *The Presentation of the Self in Everyday Life* (New York: Doubleday, 1959), 253.

the audience in front of which one performs (the "front-stage") that interprets the performance, thus giving rise to the role one plays.[19]

The notion that we perform for others in everyday life is intuitive. But Goffman resists the conclusion that there is any deep distinction between these performances—which, he is quick to point out, are deeply informed by societal expectations[20]—and the "real" or "authentic" self: "While we could maintain the common-sense notion that fostered appearances can be discredited by a discrepant reality, there is often no reason for claiming that facts discrepant with the fostered impression are any more the real reality than is the fostered reality they have the power of embarrassing."[21] The focus on performance as central to identity runs through all of Goffman's work. In his work on stigmas, for instance, Goffman writes: "The consequence of a presentation [of a visible stigma] that is perforce made to the public at large may be small in particular contacts, but in every contact there will be some consequences which, taken together, can be immense… Thus any change in the way the individual must always and everywhere present himself will for these reasons be fateful."[22] That is, our *performed identity*—who we are before others, in the various roles we play—powerfully directs the course of our lives, rather than some noumenal self that sits beneath the surface of our social interactions.

The role of privacy in this process can be seen in two aspects, though Goffman is not explicit about either. The first is what he calls "audience segregation." Being able to separate audiences—to perform different roles for different audiences—is, according to Goffman, a crucial aspect of being able to play a role at all: "Incapacity to maintain this control leaves the performer in a position of not knowing what character he will have to project from one moment to the next,

19 Erving Goffman, *The Presentation of the Self in Everyday Life* (Edinburgh: University of Edinburgh, Social Sciences Division, 1958) at 2-3, 69. The notion of "back-stage" appears also in Goffman's work on total institutions, like mental hospitals and prisons, in which inmates have no privacy and thus no opportunity to stop performing in front of an audience. In such situations, Goffman argues, the very tools for understanding one's self as "self," as a person with a distinct identity, are stripped away. See Erving Goffman, *Asylums* (New York: Doubleday, 1961).
20 *Id.* at 2-3, 23: "When the individual presents himself before others, his performance will tend to incorporate and exemplify the officially accredited values of the society, more so, in fact, than does his behavior as a whole."
21 *Id.* at 43.
22 Erving Goffman, *Stigma* (Englewood Cliffs, N.J.: Prentice-Hall, 1963): 48.

making it difficult for him to effect a dramaturgical success in any one of the them."[23] And a crucial aspect of audience segregation, in turn, is privacy: being able to keep information from one audience that one reveals to another, remaining inaccessible to some and accessible to others.[24] The ability to do this is a common-place exemplar of private prerogatives. Consider injunctions against employers inquiring into their employees' personal lives, or, a more ancient practice, the screen between the priest and the confessant. The goal of such practices is often cast, as we have seen, in terms of fostering the conditions for intimacy or autonomy. Goffman's analysis encourages us to see audience segregation rather as a condition for the development of self-hood.[25]

The second role of privacy in the process is in what Goffman calls "back-stage control." This is Goffman's phrase for the ability to not be on stage at all, to close the curtains on the audience. "Here," he writes, "the performer can relax; he can drop his front, forgo speaking his lines, and step out of character."[26] Privacy provides this ability to rest back-stage, to be able to separate oneself, however incompletely, from the roles one is playing and reflect on them. In *Privacy and Freedom* Alan Westin draws heavily on Goffman and other sociologists to formulate his conception of privacy in its four states: solitude, anonymity, reserve, and intimacy, writing of the need for a back-stage that individuals require the ability to "lay their masks aside to rest," as "[t]o be always 'on' would destroy the human organism."[27] Westin's central privacy conceptions of anonymity and reserve also drew on the work of sociologist Georg Simmel, who wrote of the "surprising openness"[28] of strangers to each other (indicating to Westin the expressive value of

[23] *Id.* at 83.
[24] See, also, Robert K. Merton, *Social Theory and Social Structure* (New York: The Free Press, 1957): 374-376.
[25] This argument is crucially different from that offered by Joseph Kupfer in chapter two (see section 2.2.1), who argued for the role of privacy not merely in the construction of an identity, but in an *autonomous* self-concept. The argument here is that seeing oneself as a "self" requires trying out and performing different roles, which in turn requires some degree of audience segregation, which in turn requires some degree of privacy. Kupfer, on the other hand, wishes to enlarge this argument into a stronger claim that this process produces properly autonomous individuals, and further than we can ground privacy protections on the strong linkage between autonomous self-hood and privacy.
[26] Goffman, *supra* note 18, at 70.
[27] Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1968), 35. For a discussion of the sociological basis for Westin's seminal text, see Valerie Steeves, "Reclaiming the Social Value of Privacy" in *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society,* eds. I.R. Kerr, Valerie Steeves, and Carol Lucock (Oxford: Oxford University Press, 2009), 191-208: 197.
[28] Georg Simmel, *The Sociology of Georg Simmel*, trans. and ed. Kurt H. Wolff (New York: The Free Press, 1950), 404.)

anonymity) and the importance of "social distance" in preserving the "honor" of individuals.[29] This distance allows for differentiated performances even in public, as individuals use a host of behavioral and material devices—both etiquette and veils—to manage their backstage.[30]

Enacting this performance of the self thus assumes the ability to withdraw from certain eyes and reveal to others. Irwin Altman has termed the negotiation between front-stage and back-stage the "inter-personal boundary" process; privacy, then, is control over this boundary.[31] According to Altman, this dialectic process occurs constantly in all social interactions, conceptually transforming privacy from merely withdrawal from the world into a "whole range of openness-closedness of the person or group."[32] Here Altman, like Goffman, makes clear that the question of privacy spans the tired public/private divide, as the inter-personal boundary process can occur in public space, private spaces, or any space in between.[33] Altman's centering of control in his definition remains problematic, and his definition at points obscures more than it reveals. To define privacy as a type of withdrawal—or inaccessibility—is not to claim that privacy is *about* or principally *for the purpose of* withdrawal, so much as to define one pole in the range of "openness-closedness." Nonetheless, his identification of privacy with this dialectic of front-stage and back-stage is important for the present discussion because it links privacy directly with the process of identity formation.[34] By analogizing privacy to a cell membrane, Altman highlights privacy's similar centrality to the constitution of the self.[35]

[29] *Id.* at 321.
[30] Robert F. Murphy, "Social Distance and the Veil," *American Anthropologist* 66.6, New Series, Part 1 (Dec., 1964), 1257- 1274.
[31] Irwin Altman, *Environment and Social Behavior* (Monterey, California: Brooks/Cole Publishing, 1975): 6.
[32] *Id.* at 11. He writes later that "privacy is not solely a 'keep out' or a 'let in' process" but "involves a synthesis with others and being out of contact with others" (23).
[33] See Erving Goffman, *Relations in Public* (London: Allen Lane The Penguin Press, 1971): 28-61. Goffman here speaks of the "territories of the self," which he defines as "a field of things… [for which] the boundaries of the field are ordinarily patrolled and defended by the claimant" (29). Goffman mentions "personal space" and "information preserve" as two of these territories, with clear linkages to notions of privacy as inaccessibility.
[34] Altman writes that the three goals of privacy are: "1. the regulation of interpersonal boundaries; 2. the development and management of interpersonal roles and dealing with others; and 3. self-observation and self-identity" (*id.* at 47-48). See, also, Irwin Altman, "Privacy—A Conceptual Analysis," *Environment and Behavior* 8 (1976), 7-29: 27.
[35] Altman, *supra* note 31, 27.

Altman is not alone in this insight. Valerie Steeves brings Goffman, Simmel, and Altman into conversation with social theorist George Herbert Mead, for whom the very process by which individuals "become aware of themselves as individuals" is "only through our social interaction with others."[36] This is necessarily a reflexive process, according to Mead, requiring that individuals mentally bifurcate themselves to see themselves from an outside perspective. In other words, if role-playing allows for the self to flesh itself out in various ways, it exists also in a dialectical relationship with stepping back from those roles and evaluating them "from the outside."[37] Privacy provides the opportunity for this reflexivity: "If the individual's understanding of himself as a subject emerges through the recognition of the other and the self, privacy, as the boundary between the two, is placed at the center of identity, because privacy is what allows the self to become reflexive."[38] The reflexivity allowed by privacy enriches the role-playing that Goffman and others have argued is the essence of self-construction by enabling us to critically assess the roles that we play. Steeves writes that "[b]y trying on these roles and seeing them reflected back at us through our social interactions with others, we come to know who we are."[39] Thus, Mead's insights allow us to say, as Steeves does, that privacy "sits at the core of self-reflection and intersubjectivity."[40] This recognition makes privacy central to socialization:

> Privacy is no longer confined to solitude or procedural control over personal information; instead, it is intersubjectively constituted through social interaction. From this perspective, privacy is the boundary between self and other that is negotiated through discursive interaction between two or more social actors. It is, accordingly, a dynamic process that is exhibited by the individual in social interaction with others, as the individual withdraws from others into solitude or moves from solitude to intimacy and general social interaction.[41]

What this sociological discussion is intended to illustrate is that privacy functions to preserve the substrate of democratic governance in a very basic way: by providing a mechanism through which

36 Steeves, *supra* note 27, at 204. See, also, George H. Mead, *Mind, Self, and Society* (Chicago: University of Chicago Press, 1934).
37 Barry Schwartz, "The Social Psychology of Privacy," *American Journal of Sociology* 73.6 (May 1968), 741-752.
38 Steeves, *supra* note 27, at 204.
39 *Id.* at 205.
40 *Id.* at 206.
41 *Ibid.*

individuals construct the identities that are the basis of political demands. Of course, not all political demands stem from identarian impulses, and not all identities translate neatly into political demands. But if identities matter *at all* to democratic politics—as I believe they do—then we have good reason to be interested in how privacy enables self-construction.

Cohen has defined privacy as "an interest in breathing room to engage in socially-situated practices of boundary management."[42] This breathing room, in turn, "enables situated subjects to navigate within preexisting cultural and social matrices, creating spaces for the play and the work of self-making."[43] Cohen links privacy therefore to the ability for citizens to practice self-government in the face of an increasingly "modulated" democracy: it allows for the unpredictability that is intrinsic to innovation, both technological and personal.[44] This is surely true. But the value of privacy to democracy, I argue, kicks in even earlier than at the stage of practicing citizenship: it enables identities to exist in the first place. By facilitating the formation of subjectivity, privacy thereby enables the articulation of that subjectivity, the "self-understandings" that we tell ourselves and others and that become the basis for our identities.[45]

Identity is a slippery concept, made even more so by the diversity of uses to which it is put. Here I mean to use it as a stand-in for the articulation of the self that emerges gradually as one performs in a variety of contexts, under various constraints and in relation to various social norms. So understood, the link between identities and democratic practice becomes more clear. "Who one is" in a community generates both privileges and demands, depending on the varied ways that power and respect are apportioned; and understanding oneself as an individual who belongs to empowered or disempowered groups requires taking on a relevant identity:

[42] Cohen, *supra* note 16, at 149. Cohen writes: "Privacy law does not exist to protect fixed, exogenously constituted selves from the effects of technological and social dynamism; it exists to shelter dynamic, emergent subjectivity from informational and spatial constraint."
[43] Julie Cohen, "What Privacy is For," *Harvard Law Rev*iew 126.7 (2013), 1904-1933: 1911.
[44] *Id.* at 1912, 1917-1918.
[45] Dorothy Holland, William Lachicotte Jr., Debra Skinner, and Carole Cain, *Identity and Agency in Cultural Worlds* (Cambridge, M.A.: Harvard University Press, 1998): 3.

> The person acquires the ability to take the standpoint of others as she learns to objectify herself by the qualities of her performance in and commitment to various social positions (for example, in the United States, mother, activist, black woman, Marxist anthropologist, student, environmentalist, public servant, good person). Such objectifications, especially those to which one is strongly emotionally attached, become cores of one's proactive identities.[46]

Frantz Fanon and Chimamanda Ngozi Adichie have written movingly of moments when they "discover" they are black, and therefore that they belong to a group of politically disempowered individuals in their respective societies.[47] What they are describing is a process of *social identification*, of combining the process of subject-formation described above with prevailing social categories (based on skin color, sexual identity, gender, etc.) to generate identities.

Richard Jenkins has described this process of aligning the internal identity with the external classification as "the dialectic of identification."[48] This dialectic plays out along both internal and external dimensions: the role-performing and interaction-management that Goffman and others adumbrate as central to identity, as well as the process of social categorization that is imposed from the outside. Neither is, itself, sufficient to explaining identity; rather, they combine in "looping" feedback mechanisms, in which individuals form a sense of themselves partly by adopting or reacting against external classifications, which in turn evolve in response to these individual reactions.[49] The struggles over these identities—sometimes conceived of as the struggle between self-identity and social identity—become one of the ways in which citizens of a democratic body can express their demands, organize for change, or generate new political rights. Thus, if identities are one of the languages of democratic politics, then privacy forms (some of) the words in which this language is written. By playing a constitutive role in the processes by which

46 *Id.* at 4.

47 Frantz Fanon, *Black Skin, White Masks*, trans. Charles Lam Markman (London: Pluto Press, 1986 [1952]): 82-108. Fanon writes: "I was responsible at the same time for my body, for my race, for my ancestors. I subjected myself to an objective examination, I discovered my blackness, my ethnic characteristics; and I was battered down by tom-toms, cannibalism, intellectual deficiency, fetichism [*sic*], racial defects, slave-ships, and above all else, above all: 'Sho' good eatin'"" (84-85); Charina Nadura, "Nigerian Author Chimamanda Ngozi Adichie: 'I Became Black in America,'" *BillMoyers.com*, 16 December 2014: https://billmoyers.com/2014/12/16/nigerian-author-chimananda-ngozi-adichie-identity/.

48 Richard Jenkins, "Categorization: Identity, Social Process, and Epistemology," *Current Sociology* 48.3 (July 2000), 7-25: 7.

49 On "looping," see Ian Hacking, "Between Michel Foucault and Erving Goffman: Between discourse in the abstract and face-to-face interaction," *Economy and Society* 33.3 (2004), 277-302.

individuals in a modern society form and understand their own selves, privacy helps to create the conditions for political identities to emerge and for democratic contestation to proceed.[50]

This recognition takes an insight that has been developed in theoretical work on the social value of privacy and gives it a political valence. To be sure, one could argue that privacy's value inheres just in these vital processes of subject-formation. But we can link this social value of privacy to a broader set of concerns if we recognize that the construction of the self has political repercussions, especially in democratic polities. In a world in which interest groups, political parties, advocacy organizations, and social justice movements form the currency of political expression, the process by which individuals form identities is critically important. The question is not just whether any given individual has the capacity to fully develop his or her own sense of self; it is, rather, whether the democratic process can sustain itself. To recognize the role of privacy in the formation of the self is thus to link privacy more comprehensively to the basic process by which democracies function.

The relationship between privacy and identity has received some attention in privacy scholarship, but largely in relation to a second, more immediate effect: the role of privacy in sheltering identities, once formed, from the coercive influence of outside norms.[51] The extent to which norms about privacy will enable atypical or norm-defying social identities to flourish uninhibited will, of course, depend on the context of any given society; but, importantly, it is precisely the various manifestations of privacy—carving out spaces, discourses, and relationships

[50] See Lisa Austin, "Privacy and Private Law: The Dilemma of Justification," *McGill Law Journal* 55 (2010), 165-209; also "Privacy, Shame, and the Anxieties of Identity," (unpublished manuscript) (Jan. 1, 2012), available at: http://ssrn.com/abstract=2061748. This process is, of course, not always straightforward, and individuals can and do resist the classifications foisted on them by their ascriptive characteristics. But the broader point stands: for a resistance to social identification to occur, the individual must have a sense of who she is and how that deviates from her ascribed identity. Thus the process of forming a political identity relies on the development of one's identity through the process outlined above regardless of how one handles the process of social identification.

[51] Jonathan Kahn, "Privacy as a Legal Principle of Identity Maintenance," *Seton Hall Law Review* 33 (2003), 371-410. *Cf.* Luciano Floridi, "The Ontological Interpretation of Informational Privacy," *Ethics and Informational Society* 7 (2000): 185-200. Under what he calls the "re-ontologization" of the "infosphere," Floridi argues that new information and communication technologies have changed the ontology of individuals such that our identities are now constituted, at least in part, by the information about us. This recognition, Floridi maintains, leads to the conclusion that privacy—which is centrally about information—deals directly with our identities. What Floridi means by "identity" is different from how I am using it here, however; he uses it as a general term for the "self," rather than for the "self-concept" or "performance" that one practices.

that are protected from legitimate access from others—that will determine the extent to which such deviancy can be accommodated. In other words, after enabling the process by which identities are formed, privacy also plays a role in sheltering those identities from outside influence.[52] A society with lower expectations of privacy, in which more of our physical and emotional lives are legitimately open to access and influence by others, will make it correspondingly more difficult for divergent social identities to survive. The need for privacy to protect deviancy has also become increasingly urgent in the modern age, in which many communities have become hotbeds of plural identities.

Privacy's role in facilitating role performance, audience segregation, and boundary management for the purpose of developing personal identity coincides marvelously with its role in sheltering deviancy in Laud Humphreys' controversial study of male sex in public restrooms ("tearooms"). In *Tearoom Trade*, which draws heavily on Goffman's work, Humphreys underscores repeatedly the importance of privacy in allowing men in the community—the majority of whom were married to women—to engage in homosexual sex. The anonymity of the sex enables men to keep their various social identities inoculated from contamination with their activities in the restrooms,[53] which in turn allows them play out various roles that are otherwise unavailable to them.[54] Such roles are forbidden either because of wide social sanction against the behavior or because of the men's (public) heterosexual relationships.[55] In the restroom, the men become different people. However, once they leave, they don the "breastplate of righteousness" (a

[52] Seth Kreimer writes that "the compulsory exposure of choices of intimate self-definition to public scrutiny results in their corruption, not purification," and thus that "the conformity-inducing effects of disclosure are to be avoided" (Seth F. Kreimer, "Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law," *University of Pennsylvania Law Review* 140.1 (Nov. 1991), 1-147: 97). This is particularly true for "fragile and unorthodox identities."

[53] Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (New York: Aldine de Gruyter, 1975 [1970]): 11

[54] *Id.* at 48: "Another aspect of the normative structure of tearoom games is found in the roles that participants play. I refer to parts taken not only by participants in the sexual acts as such but by all who enter public facilities during an encounter… For those who are aware of and willing to play the game, however, the exigencies of these encounters demand a great deal of flexibility."

[55] *Id.* at 55. See, also, Lee Edelman's commentary on the use of stalls in men's rooms: "[T]he urinary function in the institutional men's room customarily takes place within view of others—as if to indicate its status as an act of definitional display; but the private enclosure of the toilet stall signifies the potential anxiety at issue in the West when the men's room becomes the locus… of intestinal relief" (Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural Theory* (New York, London: Routledge, 1994): 161).

reference to Ephesians 6:14) to mask any indication of their secret desires, becoming men who "will work with Boy Scouts in the evening and spend much of [the] weekend at church."[56] Yet both performances are equally part of the men's identities, insofar as both are roles that they take on.[57] In addition to the anonymity—which allows for role experimentation, and thus for the transformation of identity—the sex itself is performed in private, despite the ostensibly public setting. Humphreys describes the "privacy of the silent interaction," which, he underscores, serves both to guard against the hostility of the outside world and to ensure non-identifiability.[58] Silence, the protection of the bathroom walls, the use of a look-out: all these devices serve to detect and avoid intrusions. And suffused throughout the interaction is the homosexual subculture of the 1970s, which relied on "secrecy about [one's] true identity, symbolic gestures and the use of eyes for communication, unwillingness to expose the whereabouts of [one's] meeting places, extraordinary caution with strangers" and other strategies to protect against outside assault.[59] Though most of the men who Humphreys interviewed did not identify as homosexual, public restrooms—along with cinemas and bathhouses—served as important incubators for a burgeoning political movement. In the tearooms, the various functions of privacy in promoting the development of identity are on full display.[60]

Several scholars have noted the use of privacy to allow space for deviation from social norms. Observing that the social tolerance that enabled pluralism has sparked a corresponding uptick in "prurient and censorious attention" to the details of others' lives,[61] Thomas Nagel has

56 *Id.* at 135, 105.

57 Humphreys emphasizes this point: "However much the covert participant may be reacting to guilt in erecting this defensive barrier, he is also engaging in a performance that is part and parcel of his being… The secret offender may well believe he is more righteous than the next man—hence his shock and outrage, his disbelieving indignation, when he is discovered and discredited" (*id.* at 135).

58 *Id.* at 13.

59 *Id.* at 24.

60 It's worth noting that the controversy over Humphreys work stems largely from his violation of the privacy of these men, as he did not always reveal that he was a researcher planning to publish his findings, and he occasionally used disguises. For a good discussion, see Michael Lenza, "Controversies Surrounding Laud Humphreys' Tearoom Trade: An Unsettling Example of Politics and Power in Methodological Critiques," *The International Journal of Sociology and Social Policy* 24.3-5 (2004), 20-31. But the irony should not be lost: a researcher used a deceptive use of his own privacy in order to uncover rich material about the private lives of others.

61 Thomas Nagel, "Concealment and Exposure," *Philosophy & Public Affairs* 27.1 (1998): 1.

argued that privacy plays an essential role in preserving "the element of restraint" in a society.[62] This element of restraint is important not to enshrine deceit, but rather "to manage the distinction between foreground and background, between what invites attention and a collective response and what remains individual and may be ignored."[63] Nagel's observations here point to an additional role that privacy plays in the social world: a practical one of providing the breathing room for social interaction between different people. Restricting the legitimate access we may have to others allows people to choose which aspects of their identity they will bring into the "foreground" of social interaction, which in turn allows for the civility and mutual-restraint that enable social interaction in the first place.

Robert Post has similarly identified the impetus behind the four privacy torts of U.S. law as "safeguard[ing] the rules of civility that in some significant measure constitute both individuals and the community."[64] The role here, again, is sequentially after the role privacy might play in the formation of identity discussed above.[65] Nagel, for instance, focuses on how privacy also shelters and nurtures identities, enabling them to survive in a pluralistic environment, and by so doing allows for the "going along and getting along" that are practically necessary in any society. Privacy creates space for the construction of divergent social identities by enshrining rules of civility and restraint that reconcile social pluralism with the requirements of community.

Reconciling pluralism with majority rule has been framed by some as one of the central challenges for democratic governance: a question of protecting "difference" while ensuring

[62] *Id.* at 2. Nagel frames the issue as a corollary to the familiar political problem of reconciling pluralism with democratic will: "There is an analogy between the familiar problem that liberalism addresses in political theory, of how to join together individuals with conflicting interests and a plurality of values, under a common system of law that preserves their collective interests equitably without destroying their autonomy—and the plural social problem of defining conventions of reticence and privacy that allow people to interact peacefully in public without exposing themselves in ways that would be emotionally traumatic or would inhibit the free operation of personal feeling, fantasy, imagination, and thought."

[63] *Id.* at 3.

[64] Robert C. Post, "The Social Foundations of Privacy: Community and Self in Common Tort Law," *California Law Review* 77.5 (1989), 957-1010: 959.

[65] Post does, however, pay tribute to the way privacy is constitutive of identity making, insofar as we internalize social norms as part of our personalities: "According to Goffman, then, we must understanding individual personality as *constituted* in significant aspects by the observance of rules of deference and demeanor; or, to return to the more prosaic language of *Eastman*, by the rules of decency recognized by the reasonable man. Violation of these rules can thus damage a person by discrediting his identity and injuring his personality" (*id.* at 963).

"democracy."[66] Privacy facilitates this balancing process by creating space away from the public where differences can be nurtured.[67] Divergent social identities inevitably have political repercussions; they complicate the process of democratic consolidation, and they often give rise to new political claims and discourses that struggle for recognition. By fostering the creation of these discourses, privacy functions not just to give structure to our social world, but also to allow for the bubbling up of new political visions. Nagel and Post frame this as a necessary lubricant to avoid too much political or social friction in a pluralistic political body; but such divergences are a necessary part of the health of democratic politics. Sheltering identities from corrosive outside influence promotes individual freedom, yes, but it also battles the ossification that threatens any democratic body by virtue of its majoritarian decision-making.[68] Privacy helps to thwart, in Jed Rubenfeld's words, the danger of "a society standardized and normalized, in which lives are too substantially or too rigidly directed."[69] Privacy therefore protects not (necessarily) individual freedom—which would imply that the ultimate aim is to safeguard autonomy—but the ability to resist the "productive, normalizing power" that states are capable of exercising over individual lives.[70] This "totalitarian" power forces individuals to "live out a script of someone else's authorship."[71]

[66] See, generally, *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996).

[67] "The project of reconciling universality and particularity, autonomy and identity, cannot be solved entirely at the level of the public sphere… At the very least, some of the fundamental preconditions of genuine participation in public citizenship *and* of building and defending unique identities will depend on maintaining the necessary political and legal protections of privacy" (Jean L. Cohen, "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press ,1997): 136). See, also, Jean L. Cohen, "Democracy, Difference and the Right to Privacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, *supra* note 66, 187-217. Here Cohen links privacy rights explicitly to their role in sheltering identities: "Let me formulate the standard that underlies this aspect of privacy as *the right not to have an identity imposed upon one by the state or third parties that one cannot freely affirm and embrace*" (202, emphasis in original).

[68] Some may object that not all identities are worth protecting, particularly racist or anti-democratic ones. But a broad respect for the process of identity formation does not translate into a willful blindness to actively harmful ideologies, just as a broad respect for the privacy of family life does not preclude laws against child abuse or domestic battery. Though not all identities are "valuable" to democracy in the same way, it *is* democratically useful for the overall legal and social environment to be broadly tolerant of unorthodox social identities.

[69] Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102.4 (1989), 737-807: 784. Rubenfeld argues subsequently that privacy is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state" (*ibid.*).

[70] Jed Rubenfeld, *Freedom and Time* (New Haven: Yale University Press, 2001), 235.

[71] *Id.* at 241.

Though Rubenfeld does not link his argument explicitly to identity, the connection is clear: privacy serves not merely to give a wide latitude of *action*, but to prevent individuals from becoming people they don't wish to become. In so doing, it enables the vital ("anti-totalitarian") task of preserving distinct identities. The claim here, again, is not that privacy is valuable because we value the ability of individuals to define their lives for themselves, though this may be true. Rather, it is that privacy protects the very health of our democracy, especially if we are committed to resolving the paradox of "difference" in a democratic body that Cohen and others have discussed. Privacy simply *is*—through its various manifestations—a mechanism by which we can preserve the plurality of political identities that exist in a democracy, and in this way it provides for itself a justification for its protection.

3.2.2 Privacy and freedom of expression

A commitment to defending freedom of expression is a feature of almost all modern democracies. In the United States, this commitment achieves its most unqualified support in the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[72] Of course, a written commitment to freedom of speech does not enact it in reality. Article 35 of the Constitution of the People's Republic of China guarantees freedom of speech and of assembly, despite widespread internet censorship and the persecution of journalists, and western democracies are not immune to enacting restrictive anti-speech laws in contravention of their own commitments.[73] But democracies are nonetheless uniform in their expressed

[72] U.S. Const. amend. 1

[73] Constitution of the People's Republic of China (中华人民共和国宪法), accessed on 22 January 2018: http://en.people.cn/constitution/constitution.html. See, also, "China: still world's biggest prison for journalists and citizen-journalists," *Reporters Without Borders*, 2 June 2017, accessed on 22 January 2018: https://rsf.org/en/news/china-still-worlds-biggest-prison-journalists-and-citizen-journalists; Schenck v. United States, 249 U.S. 47 (1919) [affirming the constitutionality of the Espionage Act of 1917, and upholding the criminal convictions of men who had distributed flyers to draft-age men encouraging them to resist induction].

commitment to ensuring freedom of expression both in theory and in practice, to the extent that the exceptions to such a blanket commitment—e.g. hate speech laws, laws against defamation and libel, and so forth—have become areas of significant scholarly research and debate.

Free expression can be justified on numerous grounds, including the liberal notion of autonomy or the romantic ideal of authenticity. But regardless of independent philosophical or moral bases for supporting a right to free expression, there is a clear link between free expression and democratic governance. Indeed, in his oft-cited commentary on the First Amendment, Alexander Meiklejohn tied freedom of expression explicitly to democracy and self-government, rather than to first principles: "The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[74] This basic logic, Meiklejohn argued, is what allows us to discern which speech is ultimately to be protected by the First Amendment. Rejecting legal arguments for the protection of "private intellectual curiosities," Meiklejohn argued that the core of the First Amendment was to preserve "participation in public discussion and public decision of matters of public policy," and that the freedom to do this was "the basic postulate of a society which is governed by the votes of its citizens."[75] For people to participate equally, they must have access to a wide variety of views. Otherwise, entire segments of the population can be kept ignorant, misinformed, or censored. Though a democratic form of government is not strictly incompatible with censorship,[76] few today would accept that a government that dramatically restricted political expression would be worthy of the label of democracy.

[74] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Clark, New Jersey: The Law Book Exchange, Ltd., 2012 [1948]): 26-27. *Cf.* Robert C. Post, "Participatory Democracy and Free Speech," *Virginia Law Review* 97.3 (May 2011), 477-490.
[75] *Id.* at 45-46.
[76] Jean-Jacques Rousseau, *On the Social Contract*, in *The Basic Political Writings*, trans. and ed. Donald A. Cress (Hackett Publishing Company, 2011): book IV, chapter seven, 41-42. Rousseau also had cool views on political parties or "special interests." But since no modern democracies embody Rousseau's prescriptions (not least because all rely on representation of some form), and, further, since few advocate for them, I will not take up Rousseau's democratic challenge here.

If, then, we accept that free expression is essential to democracy, what remains is to show the importance of privacy to free expression. There is, no doubt, a tension between protections of privacy and protections of speech, especially in the publication of sensitive but publicly-relevant material.[77] But the antagonism between the two cherished values of privacy and freedom of expression is not the whole picture, as legal scholars such as Paul Gewirtz have acknowledged. Writing about Title III of the Omnibus Crime Control and Safe Streets Act[78]—which sought to protect the privacy of wire, oral, and electronic communications—Gewirtz notes: "Title III not only protects privacy but also promotes free speech itself by encouraging uninhibited expression and reducing the fear that uninhibited discussions might be intercepted, used, and disseminated."[79] Privacy allows for the private exploration necessary for divergent political views, which can then be aired in the public sphere once matured. Neil Richards has argued in favor of significant protections for what he has termed "intellectual privacy," or "a zone of protection that guards our ability to make up our minds freely."[80] These protections are, according to Richards, overlooked in a society habituated to intrusions on the delicate processes of reading, thinking, and communicating with others. But such activities, conducted in private, are essential to free expression:

> "When we're trying to make up our minds about whether we like government policy, a war, a movie, or even our appearance, we often test novelty with our intimates. We share with our small groups before we are ready to share with the world. We trust them to keep our half-formed notions and beliefs confidential and not to share them with others. At the same time, we also expect that when we are talking to our confidants, third parties are not listening or recording what we say. These activities and expectations allow us to discuss, test, and reevaluate our ideas before they are ready for public exposure.[81]

[77] For a good discussion of the tension between freedom of the press and freedom of (individual) expression as this relates to privacy, see Annabelle Lever, "Privacy, Democracy, and Freedom of Expression," in *The Social Dimensions of Privacy*, eds. Beate Rössler and Dorota Mokrosinska (Cambridge, U.K.: Cambridge University Press, 2014).
[78] *Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, U.S. Code 18 (1968), § 2511(1)(c). The law provides sanctions against anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."
[79] Paul Gewirtz, "Privacy and Speech," *The Supreme Court Review* (2001): 143.
[80] Neil Richards, *Intellectual Privacy* (Oxford: Oxford University Press, 2015): 95.
[81] *Id.* at 98.

The formation of opinions relevant to political life requires private cultivation; it requires space protected from public examination and criticism, room for mistakes, and the strengthening and refinement that occur through back-and-forth with trusted friends and family members. By practicing and rehearsing arguments with those within our inner circle, we gain the confidence and tools to bring these views to a wider audience. Conversely, the intimacy and trust that typify private relations allow people to explore controversial viewpoints in a productive fashion, rather than to suppress them out of fear of public condemnation. Such protections are even more vital for minority groups or political radicals, who frequently find themselves on the defense in the public sphere. Carving out spaces where such groups can mature and strengthen their political convictions without fear of public reprisal is essential to ensuring they have a voice in the political process.[82] Privacy safeguards these spaces. Indeed, the importance of privacy in protecting the formation of sensitive opinions is institutionally recognized in jury trials, in which the deliberations are closed-door. What we recognize to be true in criminal justice procedures can be applied more broadly to a democratic society: privacy is constitutive of a commitment to freedom of expression, and not just an opposing value that must be counter-balanced.[83]

Protecting one's identity may mitigate the harm of what Timur Kuran has called "preference falsification," or "the act of misrepresenting one's genuine wants under perceived social pressures."[84] Preference falsification is, of course, widespread and intuitive. We routinely lie in order to fit in with our environment, in ways both serious and benign. But Kuran draws our

[82] See, *e.g.*, Gewirtz, *supra* note 79, at 155: "In our daily narrative transactions, we are always negotiating our relationship to an audience. Privacy is ultimately about our power to choose our audience. When privacy is invaded, we are compelled to have an audience we do not want."
[83] See, *e.g.*, *Bartnicki v. Vopper* 532 U.S. 514 (2001), J. Breyer *concurring*: The "assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place." *Cf.* Volokh, Eugene. "Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You," *Stanford Law Review* 52.5 (2000), 1049-1124. Volokh argues that restrictions on speech on the basis of privacy concerns is unconstitutional under the First Amendment, but does not directly address whether such restrictions might be beneficial to free expression (their constitutionality notwithstanding).
[84] Timur Kuran, *Private Truths, Public Lies* (Cambridge, M.A.: Harvard University Press, 1995), 3. Kuran specifies this definition using language evoking the public and the private: preference falsification is "the selection of a public preference that differs from one's private preference."

attention to the pernicious consequences of widespread preference falsification, to which he attributes the sudden collapse of communism in Eastern Europe. On the social level, preference falsification leads to (apparent) widespread support for policies that don't actually command such assent.[85] On the individual level, the retention of such policies over time impoverishes public discourse by concealing the inefficiencies of the status quo, which in turn weakens private preferences that are in opposition.[86] In less technical terms, Alexis de Tocqueville made a similar observation about this tendency in democracies, writing that majority rule induces citizens to substitute public opinion for their own reasoned judgments.[87] The point is similar: preference falsification both produces bad public outcomes and attenuates the critical faculties of individual citizens. Both of these are failures of the democratic process—the former because individuals' preferences are not actually reflected in policy, and the latter because it reduces the ability of citizens to participate meaningfully in policymaking. Minority views are silenced or conformed to the majority, and democratic judgment consequently suffers.[88]

Policymaking itself benefits from private spaces. The importance of transparency in government notwithstanding, research suggests non-public deliberative contexts—such as closed-door legislative committee meetings—experience a higher quality of debate than public ones. Such private spaces "allow legislators to deliberate without external influence, lower the pressures to follow the wishes of constituents, and make it easier for politicians to reflect, to show respect for

85 *Id.* at 18.

86 *Id.* at 157: "In practice preference falsification does affect private preferences. It distorts *public discourse*—the corpus of assertions, arguments, and opinions in the public domain. In turn, the distortion of public discourse transforms *private knowledge*—the understandings that individuals carry in their own heads. The transformation of private knowledge ends up reshaping private preferences."

87 Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J.P. Mayer (New York: HarperCollins, 2000 [1835-1840]): 433-436.

88 There is recent evidence that the knowledge that one is being surveilled online—even if one finds such surveillance justified—contributes to a chilling of speech and an expressed conformity of opinion, especially if one's opinions deviate from the norm. See, *e.g.*, Elizabeth Stoycheff, "Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring," *Journalism and Mass Communication Quarterly* 93.2 (2016), 296-311. Though the so-called "chilling effect" of surveillance has been widely noted (and disputed), some legal scholars have pointed to an equally powerful "conforming effect," in which surveillance causes individuals to conform to majority views. See, *e.g.*, Margot E. Kaminski and Shane Witnov, "The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech," *University of Richmond Law Review* 49 (2015), 465-518.

the claims of others, or even to change their opinions."[89] Writing on deliberative negotiation in Congress, Mark Warren and Jane Mansbridge call the empirical evidence linking privacy to improved deliberation "incontrovertible," writing that "relatively private interactions behind closed doors provide the moments, sheltered from publicity… in which opposing parties can share their perspectives freely and come to understand the perspectives of others."[90] Legislators experience in specific form what is broadly applicable across the political body: privacy enables a franker, more deliberative discussion by decoupling statements from identities. We explore, compromise, experiment, and play when we have the privacy to do so.

Preference falsification can be alleviated by instruments that allow for the expression of views without personal identification. For legislators, such an instrument is the use of private committee meetings, where the "Chatham House Rule" might prevail.[91] For citizens engaging with each other on more open forums, the vehicles of anonymity or pseudonymity serve a similar function.[92] The ability to hide one's identity completely or assume a fictitious one may free individuals from constraints that would otherwise stifle expression, such as personal biases, social ostracism, threats, or legal sanction.[93] The U.S. Supreme Court has long recognized the benefits of

[89] Jürg Steiner, André Bächtinger, Markus Spörndli, and Marco R. Steenbergen, *Deliberative Politics in Action: Analyzing Parliamentary Discourse* (Cambridge, U.K.: Cambridge University Press, 2004): 88, 128-131.
[90] Mark E. Warren and Jane Mansbridge, André Bächtinger, Maxwell A. Cameron, Simone Chambers, John Ferejohn, Alan Jacobs, Jack Knight, Daniel Naurin, Melissa Schwartzberg, Yael Tamir, Dennis Thompson, and Melissa Williams. "Deliberative Negotiation," in *Political Negotiation: A Handbook*, ed. Jane Mansbridge and C.J. Martin (Washington, D.C.: Brookings Institution Press, 2016), 141-196: 178, 174. See, also, Daniel Naurin and Christine Reh, "Deliberative Negotiation," in *The Oxford Handbook of Deliberative Democracy*, eds. Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (Oxford: Oxford University Press, 2018), 728-742.
[91] Originating with the British think-tank Chatham House, the Chatham House Rule reads: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." See "Chatham House Rule," Chatham House, at: https://www.chathamhouse.org/chatham-house-rule#.
[92] The distinction between the two is slight but important. An anonymous person is someone who has no identity, or who has assumed a random identity that is uncorrelated with any previous identity they have assumed. A pseudonymous person creates a persistent, fictitious identity that they use for specific purposes or over time. The archetypical example of a pseudonymous identity is an author's "pen name," such as Mark Twain or George Eliot.
[93] Eric Barendt, *Anonymous Speech: Literature, Law, and Politics* (Portland, Oregon: Hart Publishing, 2016): "Many people may hesitate to speak, if they are required to disclose their identity as a condition for communicating their views. Among these people are immigrants and asylum-seekers; gays and lesbians; members of minority racial and ethnic groups; the victims of harassment or bullying on a housing estate or their place of work; and whistle-blowers bringing to public attention dangerous or illegal practices by their employer. They may fear social ostracism from their neighbors, loss of their job, or detention if their identity is revealed, particularly when their views are highly critical of established authority" (68).

anonymity to free expression. In *Talley v. California*, the Court ruled that the First Amendment protected the distribution of anonymous handbills, noting that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[94] Later, in *McIntyre v. Ohio Election Commission*, the Court invalidated an Ohio law prohibiting the distribution of anonymous campaign literature. In the majority opinion, Justice Stevens wrote that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[95] Anonymous pamphleteering was, in Steven's words, an "honorable tradition of advocacy and dissent" and "a shield from the tyranny of the majority."[96] Indeed, some legal scholars have read *McIntyre* as ultimately about the need for privacy. Lee Tien, for instance, has written that anonymity allows "persons to resist socially imposed identities."[97] Resisting these social impositions is not merely a mechanism for encouraging or releasing productive political dialogue; it is also, in Tien's view, an integral part of identity construction in a discursive interaction.[98]

But anonymity is no panacea. The Court qualified (or even contradicted) its *McIntyre* opinion in *McConnell v. Federal Elections Commission*, which upheld various disclosure requirements in Bipartisan Campaign Reform Act of 2002 that had the effect of limiting certain forms of anonymous speech.[99] In the opinion, the Court accepted the argument that requiring disclosure of the sponsors of campaign ads is a boon to public debate. There are many traditional arguments against anonymity: that it acts as a way to avoid accountability for one's actions, disseminate

94 362 U.S. 60 (1960), at 64.
95 514 U.S. 334 (1995), at 342.
96 *Id.* at 357.
97 Lee Tien, "Who's Afraid of Anonymous Speech? McIntyre and the Internet," *Oregon Law Review* 75 (1996): 167. See, also, Tien at 173: "The choices we make about how we reveal ourselves to others are constitutive of identity. I therefore read *McIntyre* also as a case about personal privacy…"
98 *Id.* at 168: "At the heart of this argument are the ideas that speech is interaction, and that interaction and identity are reciprocally entwined. Put differently, revealing identity information is an act whose meaning depends on the relationship between the persons involved."
99 540 U.S. 93 (2003); see, also, Pub. L. No. 107-155, 116 Stat. 81.

falsehoods, dupe one's intended audience, or abuse and harass others.[100] J.S. Mill famously argued against the secret ballot—the most widespread form of institutionalized anonymity in a democracy—on the grounds that it would allow individuals to avoid scrutiny for their votes, and would therefore encourage voting selfishly or ignorantly.[101] Anonymous communication can cause an individual "[to] be the victim of soapbox invectives, crude thoughts recorded on a bathroom wall, malignant lines printed in a letter to the editor of a newspaper, hurtful statements or footage broadcast on television, or the same nasty words written in a comment on a blog site."[102] Racism thrives on anonymous forums.[103] And anonymous abuse frequently has a gendered dynamic: women are the targets far more often than men. The social costs men typically face for abusing and objectifying women are obviated when the abuse cannot be traced back to individuals.[104]

These costs do not show, however, that anonymity does not contribute to free expression. What they illustrate is that the enlargement of free expression magnifies its attendant risks. In an extensive examination of anonymous culture ("A-culture") on the website 4chan, David Auerbach writes that "A-culture is hardly a utopia of free speech, but neither is it a fulcrum of hate speech."[105] The anonymity of online chatrooms allows for the re-emergence of "an immensely large playground": "With those elements of individual identity that might be divisive and might reference the positions and responsibilities of 'real' life obscured, freedom is reestablished. What looks like anarchy from the outside is rarely actually anarchic; it is play, carefully regimented and

100 Lidsky, Lyrissa B. and Thomas F. Cotter. "Authorship, Audiences, and Anonymous Speech," *Notre Dame Law Review* 82 (2013): esp. 1559-1568. The "positive analysis," according to Lidsky and Cotter, "leads to few if any clear normative conclusions concerning the appropriate legal response to anonymous speech" (*id.* at 1577). They thus rely on the normative weight of the First Amendment, which privileges more speech over less and assumes a rational audience capable of resisting the harms of anonymity, to tip the balance in favor of anonymity.
101 J.S. Mill, *Considerations on Representative Government*. 1861. (London: Park, Son, and Bourn, 1897): chapter X, "Of the Mode of Voting," pp. 197-218.
102 Saul Levmore, "The Internet's Anonymity Problem," in *The Offensive Internet: Speech, Privacy, and Reputation*, eds. Saul Levmore and Martha Nussbaum (Cambridge, M.A.: Harvard University Press, 2012), 50-67: 50.
103 Avery Stone and Tyler Kingkade, "Racist Posts on Yik Yak Prompt Student Protest at Colgate University," *Huffington Post*, 24 September 2014. http://www.huffingtonpost.com/2014/09/24/colgate-university-protest-racist-yik-yak_n_5875106.html.
104 Martha Nussbaum, "Objectification and Internet Misogyny," in *The Offensive Internet: Speech, Privacy, and Reputation*, *supra* note 102, 68-87.
105 Auerbach, David. "Anonymity as culture: a treatise," *Triple Canopy*. Accessed 23 January 2018: https://www.canopycanopycanopy.com/contents/anonymity_as_culture__treatise. (unpaginated)

circumscribed."[106] Unsurprisingly, to Auerbach, such forums are particularly attractive to those who consider themselves to be socially or culturally sidelined—the "shut-ins, the unemployed, and, generally, losers." Such "losers" find the cloak of anonymity useful for engaging in the sorts of community-building and debate that others may do more publicly.

Gabriella Coleman argues that the hacker group Anonymous, which grew from members of 4chan, might therefore represent an enactment of philosopher Ernst Bloch's "principle of hope." The disruptive activities of the collective—which "encompass free-speech causes from Tunisia to Zucotti Park"—hold "latent possibilities that in certain conditions can be activated and perhaps lead to new political realities."[107] The use of anonymity as a cloak for their activities is related, in Coleman's view, to the central identity of the group, which sees itself as an undifferentiated collective of individuals, defined as much by the heterogeneity of its internal personalities as by the homogeneity of its outward presentation. Anyone can join Anonymous; but once one joins, one is subsumed by the collective. The use of anonymity even comes full circle—the hackers weaponize breaches of personal data to illustrate the impossibility of achieving the liberating privacy that Anonymous members themselves enjoy:

> Anonymous has worked to expose the collection and mining of personal information by governments and corporations—and in doing so deflated the notion that such a thing as 'private information' exists, as opposed to information in the public sphere. This distinction is one of the foundations of the neoliberal state, the very means by which individuality is constituted—and tracked. Anonymous has made it clear that there's no difference between what we imagine to be our private and public selves… or, at least, Anonymous has revealed that the protection of information (which helps guarantee that difference) by a benevolent security apparatus is a myth. At the same time, Anonymous has put forward its own model—the practice of anonymity—for maintaining that very distinction, suggesting that citizens must be the guardians of their own individuality, or determine for themselves how and when it is reduced into data packets.[108]

However, anonymity is not the only form of privacy that contributes to free expression, and it may not even be the best. In a useful exploration of the benefits of anonymous speech, Alfred Moore

[106] *Ibid.*
[107] Coleman, Gabriella. "Our Weirdness is Free," *Triple Canopy*. Accessed 24 January 2018: https://www.canopycanopycanopy.com/issues/15/contents/our_weirdness_is_free. (unpaginated)
[108] *Ibid.*

has written of two dimensions to identity disclosure: *traceability*—the ability for one's online identity to be traced back to one's "actual" or social identity—and *durability*: the ease or difficulty of changing one's identity.[109] Both of these are commonly subsumed under the notion of "communicative accountability," which critics of anonymity allege is lacking in anonymous speech but remains necessary for true deliberation. Moore argues we can separate the two dimensions. Pseudonymity allows users to construct durable and lasting identities that are not linked back to their real identities—i.e., durability without traceability. And while traceability tends to have negative effects on discourse for all the reasons enumerated above (fear of repercussions, social ostracism, and so on), durability contributes to discourse by "holding commentators accountable for claims they make, enabling challenges in terms of consistency, and exposing uncivil or abusive commenters to sanctions."[110] Moore's analysis suggests that one can minimize the potential harm from anonymous speech by encouraging its less dangerous cousin: pseudonymous speech.

Pseudonymity allows users to "engage in selective disclosures to other people who are also pseudonymous and thus playing particular versions of themselves."[111] The sense of safety provided by the veil of privacy in turn then "has a generative effect, enabling self-expression and the development of new perspectives and experiences."[112] The company Disqus, which provides a platform for online commenting, notes that pseudonymous commenters contribute at 6.5 times the rate of anonymous ones and 4.7 times more than those who were identified, accounting for 61% of total comments on their platform. "Pseudonyms drive communities," they conclude.[113] And examples abound of authors adopting pseudonyms to publish critically acclaimed works that

[109] Alfred Moore, "Anonymity, Pseudonymity, and Deliberation: Why Not Everything Should be Connected," *The Journal of Political Philosophy* 26.2 (2018), 169-192: 170.
[110] *Id.* at 176. See, also, Carissa Véliz, "Online Masquerade: Redesigning the Internet for Free Speech Through the Use of Pseudonyms," *Journal of Applied Philosophy* (2018).
[111] Rebecca Tushnet, "The Yes Man and *The Women Men Don't See*," in *A World Without Privacy*: *What Law Can and Should Do*, ed. Austin Sarat (Cambridge, U.K.: Cambridge University Press, 2015), 83-130: 117.
[112] *Ibid.*
[113] Disqus, "Pseudonyms drive communities," accessed 22 January 2018: https://disqus.com/research/pseudonyms/.

otherwise, were the author's true identity known, would have never seen the light of day.[114] Consider that some of the most important works in American political thought, *The Federalist Papers*, were published under the pseudonym "Publius."[115]

The democratic potential of online forums characterized by pseudonymous or anonymous speech has only grown in recent years. Yochai Benkler wrote over a decade ago of the rise of the "networked information economy" characterized by "new and important cooperative and coordinate action carried out through radically distributed, nonmarket mechanisms that do not depend on proprietary strategies."[116] This transformation has affected the public sphere also. Benkler observes that the new networked public sphere "enables many more individuals to communicate their observations and their viewpoints to many others, and to do so in a way that cannot be controlled by media owners and is not as easily corruptible by money as were the mass media."[117] Habermas's public sphere dominated by mass communications has given way to one in which citizens comment on news articles online and engage in virtual debates, thus transforming from "passive readers and listeners to potential speakers and participants in a conversation… [and] as potential subjects for public communication."[118] Some authors have termed this the "Public Sphere 2.0," building on Habermas's principles for democratic debate.[119] As more and more of the deliberative action in democracies takes place online—in comment threads, chatrooms, social

114 For a useful discussion of this phenomenon—and its relative fall from grace in modern times—see Louis Menand, "Literary Hoaxes and the Ethics of Authorship," *The New Yorker*, 10 December 2018. https://www.newyorker.com/magazine/2018/12/10/literary-hoaxes-and-the-ethics-of-authorship.
115 *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003 [1788]).
116 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006): 3.
117 *Id.* at 11.
118 *Id.* at 213. *Cf.* Jurgen Habermas, "Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research," *Communication Theory* 16 (2006), 411-426: "Moreover, the dynamics of mass communication are driven by the power of the media to select, and shape the presentation of, messages and by the strategic use of political and social power to influence the agendas as well as the triggering and framing of public issues" (415).
119 Carlos Ruiz, David Domingo, Josep Lluís Micó, Javier Díaz-Noci, Koldo Meso, and Pere Masip, "Public Sphere 2.0? The Democratic Qualities of Citizen Debates in Online Newspapers," *The International Journal of Press/Politics* 16.4 (2011), 463-487.

media posts, and so on—the tools of anonymity and pseudonymity will become increasingly important to carrying out a central function of democratic governance.[120]

Free expression cannot survive in a world without masks. Protections of privacy in the form of protections for anonymous/pseudonymous speech, the prosecution of those who mine and publish personal information, and respect for areas (homes, schools, think tanks) where politically-relevant opinions are formed and strengthened can therefore be justified on the basis of their contribution to the integrity of democratic governance.

3.2.3 Privacy and freedom of association

Political action in modern democracies does not, however, rely on single individuals proclaiming from rooftops so much as on the coordinated efforts of groups of like-minded citizens—or, political associations. The freedom to voluntarily join together for a common purpose—whether religious, political, social, or otherwise—is a bedrock institution of political organizing in democracies around the world and the basis for political parties.[121] Indeed, for Tocqueville, the importance of associations to democratic governance exceeded even that of free expression: "When a political association is allowed to form centers of action at certain important places in the country, its activity becomes greater and its influence more widespread. There men meet, active measures are planned, and opinions are expressed with that strength and warmth which the written word can never attain."[122] Amy Guttman has likewise written that "[s]horn of associational activities, the United States would not only be unlivable for most of us as individuals,

120 See, *e.g.*, Jisuk Woo, "The right not to be identified: privacy and anonymity in the interactive media environment," *New Media and Society* 8.6 (2006), 949-967. Woo argues that privacy in a networked environment ought to be conceived of primarily as the right not to be identified, i.e., to be anonymous. *Cf.* Christopher Parsons, "Beyond Privacy: Articulating the Broader Harms of Pervasive Mass Surveillance," *Media and Communication* 3.3 (2015), 1-11. Parsons argues that privacy cannot fully capture the deliberative harms of mass surveillance.

121 See, generally, *Democracy and the Role of Associations*, ed. Sigrid Roßteutscher (London, New York: Routledge Group, 2004).

122 Tocqueville, *supra* note 87, at 189.

it would also be unviable as a liberal democracy."[123] As we shall see, privacy forms an integral part of associative freedoms in modern democracies.

The types of "associational activities" that citizens of a democracy participate in, and the reasons for this participation, are varied. Some of the most common are so-called "expressive associations," which exist to promote a message or advocate a political viewpoint. The U.S. Supreme Court has defined the individual's right to participate in such associations as the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[124] These are the political interest groups, advocacy organizations, non-profits, and social clubs that many individuals participate in, and which are often the environments in which concerns over free expression are most heightened. Contrast these with "intimate associations," based on the relationships we form with others—sexual, social, and familial, the blood ties and romantic liaisons that fill out the texture of our social world. U.S. jurisprudence draws a division between these two, basing the former on First Amendment protections for free expression and the latter on a concept of "personal liberty."[125] John Inazu—who resists the language of "association" in favor of "assembly"—notes three distinct types of assembly: political, expressive, and dissenting.[126] Inazu emphasizes that so-called expressive assemblies (oriented to speech) are just one of the many ways that citizens assemble, though all have democratic implications.

Regardless of the taxonomy, associations are believed to promote democracy in several distinct ways: by cultivating democratic values, magnifying political expression, and enabling resistance to the tyranny of the majority. Robert Putnam, in his seminal *Bowling Alone: The Collapse and Revival of American Community,* documented the centrality of civic associations to U.S. social life,

123 Amy Guttman, "Freedom of Association: An Introductory Essay," in *Freedom of Association*, ed. Amy Guttman (Princeton: Princeton University Press 1998), 3-31: 18.
124 Roberts v. United States Jaycees, 468 U.S. 609 (1984): 622.
125 *Id.* at 620.
126 John Inazu, *Liberty's Refuge* (New Haven: Yale University Press, 2012): 156-160. Inazu quite rightly points out that the language of "association" isn't present in the U.S. Constitution, but the language guaranteeing freedom of "assembly" is.

arguing that "ethnic fraternal organizations, church-based women's reading groups, and fashionable country clubs" as well as "civil rights movement[s], youth service groups, and ecumenical religious organizations" are essential constitutive elements of our social world, without which we lose our sense of being a community.[127] More importantly, even "social" activities—like bowling—have profound political repercussions. The social capital generated through casual and frequent associations in civic life forms the foundation for the mutual trust that enables the democratic project. Other theorists have likewise noted that the rich sociality enabled by civic associations can be translated into political resources, helping citizens to practice the sorts of attitudes and mindsets that are necessary for democratic self-governance, such as "respect, equality, deliberation, discussion, compromise, and self-sacrifice."[128] Indeed, even when associations are not explicitly political in nature, or would seem to be only tenuously connected to the practice of democracy, their role in assisting in the formation of personal identity underscores arguments made earlier about the relationship between identity and democracy.[129] By cementing relationships with one another and practicing our roles in various groups, we learn who we are and how to express our demands. These are political virtues.

The importance of associative freedom in a democracy does not collapse, therefore, merely into the arguments for free expression. It is of course true that political associations serve to coordinate and magnify individual voices. But associations are democratically valuable outside of their expressive capacities. Critics of "Twitter activism"—a form of expression without

127 Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000): 22. See, also, Gabriel Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press, 1963). *Cf.* Jean Cohen, "Trust, voluntary association and workable democracy: the contemporary American discourse of civil society," in *Democracy and Trust*, ed. Mark E. Warren (Cambridge, U.K.: Cambridge University Press, 1999), 208-248.

128 Kent Greenawald, "Freedom of Association and Religious Association," in *Freedom of Association*, *supra* note 123, 109-144, at 110.

129 See, *e.g.*, theologian Stanley Hauerwas' description of the Christian church: "In developing such skills [of interpretation], the church and Christians must be uninvolved in the politics of our society and involved in the polity that is the church. For the Christian, therefore, the church is always the primary polity through which we gain the experience to negotiate and make positive contributions to whatever society in which we may find ourselves" (Stanley Hauerwas, *A Community of Character: Toward a Constructive Christian Social Ethic* (Notre Dame: University of Notre Dame Press, 1981): 74).

association—point out that the most successful social movements rely on the "strong ties" of individual relationships forged in community with one another.[130] Feminist writers have noted that the ability to organize and form political associations was critical for the women's movement, in that it provided the training grounds for political action, concentrated the otherwise diffuse power of the participants, and helped to amplify the voices of the women organizing for change.[131] In one study of the East-German Revolution of 1989, it was shown that social networks—defined as "social groups or organizations"—were the most important factor in predicting the mobilization of citizens, greater even than the expectation of repression or the presence of opposition groups.[132] And in ethnically divided societies, voluntary associations can contribute to the working of democracy by integrating ethnic communities and creating horizonal linkages with the broader political community.[133]

In short, associations are not merely megaphones for distinct viewpoints, but rather constitute a distinct form of political engagement. In his critique of arguments that "yoke" association to speech rights, George Kateb argues that "association is central to [our] lives" for an "indefinitely large range of ends," and not merely to serve as conduits for opinions.[134] Associations are the context in which citizens learn and practice politics; they facilitate organizing; and they even help to fulfill certain government functions. Brian Balogh has documented the extensive role of associations in American politics during the twentieth century, arguing that in many instances public authority was "delegated" to "universities, the professions, interest groups, trade

130 Malcolm Gladwell, "Small Change," *The New Yorker*, 4 October 2010. Accessed at: https://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell.
131 Carmen Sirianni, "Learning Pluralism; Democracy and Diversity in Feminist Organisations," in *Democratic Community: Nomos XXXV,* eds. J.W. Chapman, and Ian Shapiro (New York: New York University Press, 1993), 283-312: esp. 285, 304-309.
132 Karl-Dieter Opp and Christiane Gern, "Dissident Groups, Personal Networks, and Spontaneous Cooperation: The East German Revolution of 1989," *American Sociological Review* 58 (1993), 659-680.
133 Meindert Fennema and Jean Tillie, "Civic communities and multicultural democracy," in *Democracy and the Role of Associations*, *supra* note 121, 219-236.
134 George Kateb, "Freedom of Association and Religious Association," in *Freedom of Association*, *supra* note 123, 35-63: 37.

associations, and private corporations."[135] This analysis implies a book-ended role for associations in democracy: on one end, via the provision and enlargement of a diversity of viewpoints for policy, and on the other, via the execution of those policies in conjunction with the government.

The role of privacy in enabling citizens to form and maintain associations in many ways mimics its role in protecting expression. Tien notes that "the other half" of the Supreme Court's anonymity jurisprudence has to do with the anonymity of associations.[136] Interest groups, political action groups, parties, and advocacy organizations all rely on privacy to retain the anonymity of membership lists, hold meetings, discuss views, and plan protests. In *NAACP v. Alabama*, the Court ruled that the National Association for the Advancement of Colored People was not required to disclose the identities of its Alabama membership, as doing so would compromise the ability of the organization to pursue its political aims. Writing for the Court, Justice Harlan made the link with privacy clear: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective a restraint on freedom of association… This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."[137] In much the same way that privacy enables freedom of expression, the ability of political associations to organize is safeguarded by both laws and norms that restrict the ability of outsiders to access the identities of the members, the content of the discussions, or the physical spaces of the meetings.

The insight of the Court in *NAACP v. Alabama* is echoed by more recent commentators. Surveys show that the knowledge or suspicion of surveillance has a chilling effect on speech in online communities.[138] Sociologists have documented the disruptive effect of surveillance on social movements. In a study of the surveillance of social movement organizations in the U.S., several

[135] Brian Balogh, *The Associational State: American Governance in the Twentieth Century* (Philadelphia: University of Pennsylvania Press, 2015): 220.
[136] Tien, *supra* note 97, at 176.
[137] 357 U.S. 449 (1958): 462.
[138] Gillian York, "Communications surveillance in the digital age," *Global Information Society Watch 2014*. Association for Progressive Communication and Humanist Institute for Cooperation with Developing Countries. GISWatch.org

scholars noted that "knowledge (or fear) of surveillance and infiltration forces organizations to direct their energies toward defensive maintenance and away from the pursuit of broader goals."[139] Participants in the study—members or leaders of social movement organizations—reported paranoia, depression, and attrition as a result of actual or perceived surveillance. This in turn had manifold effects on their ability to organize, affecting "fundraising, relations with members, reputation and connections with allies, redirection of agendas, displacement of strategic framing, and foreclosure of space for civil disobedience."[140]

The corrosive power of surveillance on political association has long been recognized by law enforcement bodies, such as the Federal Bureau of Investigation. The FBI undertook extensive surveillance against political organizations on both the left and right from 1956-1971, under a program of counter-intelligence termed COINTELPRO. By infiltrating various groups (from the KKK to the black power movement), exposing members, and fostering an environment of mistrust, the FBI facilitated "the creation of tensions—frustration, mistrust, paranoia—that have longer-term disruptive effects on protest organizations."[141] The FBI's targeting of dissident groups is proof positive of their radical democratic potential, and its use of surveillance and infiltration further evidence of the importance of privacy to preserving the integrity of such groups. By ensuring the social cohesion of these groups, blocking the access of outsiders, and giving freer rein to political expression, privacy plays a vital role in fostering the turbulence of healthy democracies—the bubbling up of dissident voices, which find strength in numbers and incubatory safety in private spaces. Without privacy acting in its various forms (blocking off meeting spaces, safeguarding communications, ensuring anonymity), the vital functions that these groups play in our political order would be compromised.

139 Amory Starr, Luis A. Fernandez, Randall Amster, Lesley J. Wood, and Manuel J. Caro, "The Impacts of State Surveillance on Political Assembly and Association. A Socio-Legal Analysis," *Qualitive Sociology* 31 (2008): 251-270: 255.
140 *Id.* at 267.
141 David Cunningham, *There's Something Happening Here: The New Left, the Klan, and FBI Counterintelligence* (Berkeley: University of California Press, 2004): 153.

The role of privacy in ensuring associational freedom, and thus in strengthening the political position of dissident groups, is related to privacy's capacity to enable subversion in repressive political contexts. In *Domination and the Arts of Resistance*, James C. Scott examines the "hidden transcript" of resistance that hides in plain sight in environments of domination. The ability of an oppressed group—slaves, serfs, indigenous peoples—to encode and express resistance depends on a host of norms enabled by privacy. Scott describes the heavily ritualized social performance of civility, deference, and respect as the "public transcript" of power which, by its very rigidity, helps to maintain the façade of hegemony while resistance foments underneath.[142] The argument that privacy helps us to differentiate our relationships takes on a distinctly more political hue: privacy enables subordinate peoples to play the part required of them without arousing the suspicion of the dominant group.[143] All the while, Scott writes, a hidden transcript that consists of "those offstage speeches, gestures, and practices that confirm, contradict, or inflect what appears in the public transcript" is lurking beneath the performance.[144] Privacy is crucial to the formation of this hidden transcript. Scott documents, for instance, the off-stage behavior of slaves in the antebellum American south:

> Outside that surveillance and in the 'hush arbors,' where a whole series of devices were used to prevent the sound from carrying (for example, shouting into overturned pots), an entirely different atmosphere reigned—one of release from the constant guardedness of domination, permitting dancing, shouts, clapping, and participation… In contrast to [preaching delivered by or for the slave-masters], the offstage Christianity, as we know, stressed the themes of deliverance and redemption, Moses and the Promised Land, the Egyptian captivity, and emancipation.[145]

Scott's examination of the hidden transcript of resistance demonstrates that privacy is integral, perhaps indispensable, to the formation of social spaces, practices, gestures, codes, songs, and

142 James C. Scott, *Domination and the Arts of Resistance* (New Haven: Yale University Press, 1990): 2.
143 "The theatrical imperatives that normally prevail in situations of domination produce a public transcript in close conformity with how the dominant group would wish to have things appear" (*id.* at 4).
144 *Id.* at 4-5. *Cf.* Kuran, *supra* note 84, who disputes Scott's claim that a private transcript can survive the repeated and mendacious public performance required in such contexts. This disagreement is not fatal, however. Kuran's observation that the "offstage" can start to mirror the "on-stage"—thus limiting dissent—can co-exist with Scott's claim that there is a time in which the two diverge, and that private conversations therefore often remain the only avenue for dissent in oppressive climates.
145 *Id.* at 116.

speech patterns that embody resistance to domination. That such domination can occur in democracies should not surprise any student of history. Privacy is an important part of ensuring that resistance to oppression can flourish in a variety of political contexts, including ostensibly "democratic" ones. For theorists who emphasize democracy's role in critiquing or overturning hierarchies of power, this aspect of privacy is particularly democratic: in the absence of institutional or formal arrangements that equitably distribute power in society, privacy enables the existence of rival *discourses*, communicated quietly and furtively, that challenge dominant power arrangements.[146] The existence of such discourses depends on spaces in which to air them (privately) and groups of sympathetic listeners—i.e., they require association, and not merely free expression.

Even in ostensibly free environments, privacy preserves the capacity for self-governance. As previously mentioned, the focus of Shoeman's *Privacy and Social Freedom* is to recover the role of privacy in facilitating the ability to engage in associational activities, what he calls "social freedom." Shoeman links the value of associations directly to our ability to pursue diverse life paths free from conforming pressures: "We are free from the power of *the* state or *the* society… when we have available diverse social groups to which we can adhere and contribute, and from which we can garner support."[147] The structure of the argument is similar to those made about expression: citizens rely on the protection of privacy to engage in the play—deliberative or associational—that produces political expression and activity.

Alan Wolfe likewise argues that semi-public, semi-private associations that enjoy privacy protections "can protect individual members against intrusive state intervention from outside, express particularistic rather than universalistic needs, and allow the individual members within the group to develop their personal identities (and self-confidence) more fully."[148] Shoeman's

146 See, *e.g.*, Goodhart, *Injustice: Political Theory for the Real World*, *supra* note 13, at 139: "Democracy is quintessentially concerned with the legitimate uses of power and the necessary and appropriate constraints on its operation and effects."
147 Ferdinand David Shoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992): 153.
148 Alan Wolfe, "Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, *supra* note 67, 182-203: 197.

"social freedom" and Wolfe's protection against "state intervention" can be seen as different terms for the same phenomenon: practicing democracy, or self-governing. Indeed, for some theorists, citizens' capacity to organize on their own accord is the lifeblood of democracy, counteracting the stultifying tendencies of bureaucracies, constitutions, and elected leaders to limit or constrain democratic outcomes.[149] Safeguarding this capacity—for which privacy is one of many tools—is therefore safeguarding the "political mode of existence" itself.[150]

But the freedom to associate would involve also the freedom *not* to associate. For political participation to have any meaning, the capacity to choose *not* to participate must also be protected. For some, joining together in a political association is a version of political engagement; for others, such associations represent the refusal to engage in politics (or, more accurately, the refusal to engage in politics on the terms offered to them). Such rejection is an essential component of healthy democracies, differentiating willing and enthusiastic support from coerced assent. It distinguishes democratic outcomes from dictatorial ones. Privacy facilitates this right of refusal, or right to choose. Annabelle Lever highlights privacy's role in ensuring freedom of choice by "facilitat[ing] forms of protest and non-compliance that, while relatively non-confrontational and costless, can be politically effective, by depriving meetings of their members, or would-be leaders of their followers."[151] All citizens are de facto members of political bodies. But not all citizens are equally members of the panoply of civic organizations and political associations that populate a democracy. To join or not join organizations without being tracked or documented in this activity is the essence of political choice. Indeed, Raia Prokhovnik has argued that forms of private, "ethically-grounded" obligations, which are not traditionally seen as political, should be recognized

149 Sheldon Wolin, "Fugitive Democracy," *Constellations* 1.1 (1994), 11-25. Wolin, of course, rejects that democracy can be defined by the institutions—including those of elections or political rights—that are commonly associated with it, rather than with the episodic moments of concerted political action themselves. I cite him here to show that both institutionalists and "agonist" democratic theorists agree on the importance of associations to the democratic project, even if they disagree on how to define the democratic project.

150 *Id.* at 23: "The experience of which democracy is the witness is the realization that the political mode of existence is such that it can be, and is, periodically lost… Democracy is a political moment, perhaps the political moment, when the political is remembered and recreated."

151 Annabelle Lever, "Privacy Rights and Democracy: A Contradiction in Terms?" *Contemporary Political Theory* 5.2 (2006), 142-162: 150.

as forms of active citizenship.[152] Thus even the traditional privacy of the home can be seen as a form of democratic engagement.

As several theorists have noted, however, the freedom not to associate implicates a worry about ensuring the privacy of associations. Not all associations inculcate pro-democratic values. Yael Tamir reminds us that "[s]ome associations have the contradictory effect; they threaten social cohesion, erode social capital, frustrate social equality and equal opportunity, and violate individual rights." [153] To protect the privacy of the NAACP is also to protect the privacy—and effectiveness—of the KKK. And what about anti-discrimination statutes? These concerns have led the U.S. Supreme Court to qualify association rights, as in *Roberts v. United States Jaycees*, in which the Court held that requiring an all-male social club to allow woman as full voting members would not violate their First and Fourteenth Amendment rights.[154] The overriding state objective of preventing discrimination against women was seen as more critical than the associational freedoms of the group. Some political scientists, recognizing the central role associations have in cultivating democratic attitudes, have argued in favor of gentle intervention to encourage pro-democratic associations and discourage "particularistic" ones.[155] The worry is that privacy might be used as a shield to prevent legitimate governmental scrutiny into the behaviors of organizations that would subvert the democratic order or harm individuals.

These are not minor concerns. But they overstate the democratic dangers of privacy, while understating its boons. First, it is important to distinguish between respecting the privacy of associations and refusing to regulate them at all. While private associations may enjoy the shield of privacy in their internal affairs, they must engage with the larger political community to affect non-members. The terms of this engagement are subject to (democratic) laws. Moreover,

152 Raia Prokhovnik, "Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness," *Feminist Review* 60, Feminist Ethics and the Politics of Love (Autumn, 1998), 84-104.
153 Yael Tamir, "Revisiting the Civic Sphere," in *Freedom of Association*, *supra* note 123, 214-238: 215.
154 468 U.S. 609 (1984).
155 Stephen Macedo, "Community, Diversity, and Civic Education: Toward a New Liberal Political Science of Group Life," *Social Philosophy and Policy* 13.1 (Winter 1996), 240-268. Macedo writes that parochial or particularistic associations need to be "constituted and shaped to be of use to the liberal regime" (241).

protecting the privacy of associations does not mean refusing to investigate them entirely. Just as we permit infringements on privacy in other settings for a host of health and safety reasons—child or domestic abuse, for instance—so we can permit infringements when associations prove actively dangerous to either their individual members or to the wider democratic community. Where this line is drawn is, of course, subjective and liable to abuse. But it is important to understand the trade-offs: widespread infringements on the privacy of groups have anti-democratic implications. Though it is easy to claim that racist hate groups ought to be surveilled, it is harder to make this case when such surveillance justifies similar measures against groups to which one is more sympathetic—recall the wide-ranging targets of the FBI's COINTELPRO operation. Privacy infringements on associations may be justified in certain instances, but the costs should be understood.

Framing the value of privacy in terms of its importance to democratic institutions makes this debate more clear than it would be otherwise. Instead of weighing the democratic harms of anti-democratic groups against the individual or social harms of surveilling these groups, the plane of engagement is the same: how does a given association bolster (or corrode) democracy? The extent to which a given group actively debases democratic values or institutions is the extent to which its privacy claims weaken; and, correspondingly, the extent to which a group is pro-democratic is the extent to which these claims strengthen. Of course, judging where on the spectrum a group falls is exceedingly difficult. This judgment is easier to make in theory than in practice, and the obvious limitations—in addition to the dangers of personal bias—call for a broad respect for the privacy of association and a presumption of innocence. The weight of the evidence shows that democracies rely on various personal and political affiliations for carrying out the project of self-governance, and that such affiliations in turn rely on privacy for effective functioning. Privacy enables democracy.

3.2.4. Privacy and the epistemic balance

Identity, free expression, and association I take to be central elements of modern democracies. We form identities as socio-political beings in community with one another, and these identities become the basis for various political demands; we then use the institutions of free expression and free association to develop these demands, coordinate action with those who share our demands, and effect political change. I have shown how privacy plays an integral role in each of these elements, allowing for the development of distinct political identities and upholding the institutions of free speech and association.

In this section, I will look at the project of democracy itself, taken as a whole, through a particular lens: the epistemology of democracy. My claim is that democracy, understood as a particular way of generating outputs (policy choices, electoral results) from inputs (the views of individuals), presupposes privacy, an "epistemic veil" between both the government and citizens and between citizens themselves, without which we lose the justification for the central democratic devices of voting and deliberation—or, to use Elizabeth Anderson's terms, "talk" and "votes."[156] Before detailing the argument, it will be useful to introduce the intuition up-front: in the potential world in which the government and its representatives know more about voters than voters do about the government and in which voters increasingly know extensive information about each other, we will find it both theoretically suspect and practically impossible to continue the democratic practices of deliberating with each other on political questions and periodically revealing our preferences to elected officials through voting. In short, data will replace democracy.[157]

156 Elizabeth Anderson, "The Epistemology of Democracy," *Episteme, A Journal of Social Epistemology* 3 (2006), 8-22: "Talk is needed to articulate proposals to make certain concerns a matter of public interest; votes are needed to ratify such proposals" (9-10).

157 For some countries, it may be more accurate to say that data *has* replaced democracy. See, *e.g.*, Christina Larson, "Who needs democracy when you have data?" *MIT Technology Review*, 20 August 2018. https://www.technologyreview.com/s/611815/who-needs-democracy-when-you-have-data/

Epistemology is concerned with the basis for beliefs. One branch of epistemology, called social epistemology, replaces a focus on the individual with a focus on "the distribution of knowledge or error within the larger social cluster," where a social cluster can be a group of friends, a corporation, or a democratic polity.[158] That is, if individuals can be wrong or right, then collections of individuals can be wrong or right also; and if an individual has ways of generating true or false beliefs, then collections of individuals also have ways of generating true or false beliefs. To ask epistemological questions of social bodies is to ask, what information do they need to form their beliefs? And, given this information, how often do they generate epistemologically sound beliefs?

Friedrich Hayek famously addressed this question in relation to states as economies. To Hayek, the central epistemological problem facing states was how to use the dispersed knowledge in a society to generate true beliefs about their productive allocation.[159] The epistemology of democracy, then, is a form of this social epistemology. It sees democracy as one way—amongst many available alternatives—of coordinating the action of individuals to respond to certain problems and generate solutions. The relevant questions are thus: What information do democracies need in order to work? And how often do democracies generate epistemologically sound (i.e., true) beliefs?[160]

To speak of the epistemology of democracy is to wade into a long and inconclusive debate in democratic theory over how democracies are to be appraised. One view holds that democracies are to be judged according to how often they "get things right," assuming there is some external standard of rightness (or wrongness) against which to judge democracies. David Estlund has

158 Alvin Goldman, *Knowledge in a Social World* (New York: Oxford University Press, 1999): 4.
159 Friedrich Hayek, "The Use of Knowledge in Society," *The American Economic Review* 35.4 (1945), 519-30. Of course, Hayek believed that this task was impossible for a single mind, and thus famously advocated for market prices to govern the allocation of resources.
160 I follow Goldman in adopting a "veritistic" social epistemology, i.e., one that is oriented to discovering an objective, external truth, and defines failures as false beliefs or the lack of a true belief (Goldman, *supra* note 158, at 5, 69-76). Democracies must, of course, decide a gamut of questions, including ones without ostensibly "true" answers—such as how to distribute resources or whether to go to war. Epistemic democrats are thus concerned with whether democracies make *wise* decisions, where wisdom can mean either the capacity to see some objective truth or the capacity to make good use of distributed knowledge and insight to make a (correct) decision.

referred to this as the "correctness theory" of democracy.[161] Others have labeled it merely "instrumentalist."[162] The basic intuition is that if we can ask epistemic questions of democracy, then democracy can be seen as a tool to access the truth, and it should be judged according to how often its claims are true. What ultimately matters is to make the correct decisions; democracy is simply the best means we know of to make correct decisions. If there is a better tool, then we ought to use it. Some who adopt this instrumentalist view have therefore advocated for replacing democracy with an "epistocracy," or rule by the most knowledgeable.[163]

Say, however, that you are committed to democracy, even if there were some arrangement that were ostensibly more truth-tracking. You might hold this view as an article of faith. You might also hold this view because you believe the justification for democracy consists in how it is run—the principles it embodies—rather than in its epistemic capacities. Such so-called "proceduralists" come in many stripes. Social choice theorists, for instance, deny that there is any independent truth other than the preferences of individuals and therefore argue that the only epistemic question for democracy is the internal one of how to aggregate everyone's preferences fairly. They thus judge democracy according to the fairness of its aggregation procedures, where such procedures are merely instrumental to the ultimate goal of achieving a ranked ordering of social preferences.[164] Rawls' procedural justification for democracy was a principle of fairness.[165] Habermas's was an ideal deliberative procedure.[166] Regardless of the reasoning, proceduralists are united in identifying the way in which decisions are reached—rather than the correctness of the decisions themselves—as the reason to prefer democracy to other forms of government. The right procedure might just so happen felicitously to produce good judgments, but that would be, at best, a happy side-effect.

161 David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008): 122.
162 Fabienne Peter, "The Epistemic Circumstances of Democracy," in *The Epistemic Life of Groups*, eds. Miranda Fricker and Michael Brady (Oxford: Oxford University Press, 2016).
163 See, *e.g.*, Jason Brennan, *Against Democracy* (Princeton: Princeton University Press, 2016). For a rebuttal, see Piero Moraro, "Against Epistocracy," *Social Theory and Practice* 44.2 (2018), 199-216.
164 Christian List, "Democratic Deliberation and Social Choice: A Review," in *The Oxford Handbook of Deliberative Democracy*, *supra* note 90, 463-489.
165 Rawls, *A Theory of Justice* (Cambridge, M.A.: Belknap Press of Harvard University Press, 1999 [1971]).
166 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, M.A.: MIT Press, 1996 [1992]).

I will not here undertake an argument for the justification for democracy. The purpose in introducing these two views—instrumentalism and proceduralism—is to indicate that while for some the epistemic dimension of democracy is paramount, for others it is meaningless or, at best, a distraction. Both views are unattractive in their extremes. Instrumentalists are faced with the haunting specter of epistocracy or—perhaps worse—interminable debates over attempts to prove the "wisdom" of democracy,[167] while proceduralists are forced to deny that sound judgments have anything to do with the justification of democracy. We ought to deny pure instrumentalism if we take as a premise, as I do here, that we will prefer a democratic form of government to all others, regardless of the results of the epistemic test. This implies an intrinsic value to democracy that instrumentalists deny.[168] But we ought also to deny pure proceduralism if we believe that it matters whether laws get things right or wrong. As Estlund points out, if this didn't matter at all, why wouldn't we merely flip a coin to decide elections or make major policy decisions?[169] That modern democracies have not chosen this method—or other fair, arbitrary methods—implies that we believe that asking epistemic questions of democracies is sound, and it matters to try to get things right.[170]

Those who take the middle ground are thus left in the following position. It makes sense to view democracies as mechanisms of gathering dispersed knowledge in order to make collective decisions, where those decisions can be viewed—partially and imperfectly—as attempts at tracking the truth. What the "standards of correctness" are, or what the truths are, does not matter for our

167 Consider the continued relevance of the Condorcet Jury Theorem, which was first espoused in 1795. See M.J.A.N de Caritat, marquis de Condorcet, "An Essay on the Application of Analysis to the Probability of Decisions Rendered by a Plurality of Votes," in *Classics of Social Choice*, ed. and trans. Iain McLean and Arnold Urken (Ann Arbor: University of Michigan Press, 1995 [1795]), 91-112. See also Peter, "The Epistemic Circumstances of Democracy," *supra* note 162, on the incoherence of epistemic instrumentalist defenses of democracy.

168 I do not mean here to undertake an argument to *prove* the value of democracy. I take the preference for democracy as a premise in my argument, insofar as I am constructing a *democratic* justification for privacy. The argument cannot proceed unless we first assume that we value democracy.

169 Estlund, *supra* note 161, at 6.

170 Estlund carves a middle ground, claiming that democracy is justified as "epistemically the best among those that are generally acceptable in the way that political legitimacy requires" (*id.* at 8). See, also, David Estlund, "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority," in *Deliberative Democracy*, eds. James Bohman and William Rehg (Cambridge, M.A.: MIT Press, 1997), 173-204: 174. Anderson, *supra* note 156, also adopts an approach of "partial" or "impure" proceduralism.

purposes.[171] What is important is that democratic governments are justified in wanting certain information, and that this information is possessed, somehow, by the members of the society who are capable of withholding this information. For our purposes, this information can be seen as views or judgments about policy, potential candidates, or the "common good."[172] We do not need to adopt a stance on what the informational content of voting really is, because what is dispositive is that *citizens possess information that the government justifiably wants*, in some epistemically important (but not wholly instrumental) way.

What I want to suggest is that this epistemic set-up is quintessentially a question of privacy. Citizens are in a state of epistemic inaccessibility with regard to the government and each other; or, approached from the opposite direction, democratic governments rely on the private information that citizens uniquely possess (their own views about how things should be run) in order to make decisions.[173] In short, privacy is a precondition of democracy.

Of course, all citizens—not just democratic ones—exist in a state of privacy vis-à-vis their governments with regard to information about how things should be decided. But democratic governments are unique in that they make this information the very basis of decision-making. They *need* this information in order to act democratically, according to the will or wishes of the "demos." Regardless of one's particular theoretical sympathies, from Rousseau to Rawls democratic theorists have insisted that the information that democracies need to function is dispersed throughout the broader body politic, and not, say, contained in the head of one man, or written in some immutable text. Thus the inaccessibility of this information is of particular concern for democracies, and

171 For instrumentalist epistemic democrats, the standard of correctness is some independent truth to which claims should adhere. For those that deny that there is some truth "out there" about the decisions democracies must make, the standard of correctness might be something like the aggregation of private wills, or the decision of the overlapping consensus.

172 Melissa Schwartzberg adopts a "deflationary" account of epistemic democracy in which citizens are bearers of "judgments" rather than knowledge or preferences, which then form the basis of democratic legitimacy. I see Schwartzberg's critical account of epistemic democracy as consistent with the claims I make here. See Melissa Schwartzberg, "Epistemic Democracy and Its Challenges," *Annual Review of Political Science* 18 (2015), 187-203.

173 In a theoretical sense, the government just *is* the people in a democracy. But the epistemic conditions I have described here obtain whether we conceive of the government as a collection of one's peers (à la Rousseau) or as a bureaucratic state that takes direction from a voting public (à la Weber). In either instance, the government's "wanting" information amounts to a general epistemic need facing any democratic arrangement.

retrieving it has been a vexing riddle for centuries. For those who view the question as intelligible,[174] the answer to "what do the people want?" has traditionally been: "Well, let's ask."

Consequently, the two mechanisms that democracies typically rely on to get at this information are political discussion and casting ballots—or, talk and votes. But talk and votes are not the only methods of collecting such information theoretically available. There are a host of ways to get information from someone, especially if you wield power over them: forced interrogation, torture, spying, deceiving, and polling, to name just a few. Governments have in the past used all these methods and likely will continue to do so in the future. In democracies, however, the two methods that have become institutionalized—that have become nearly synonymous with the meaning of democracy itself—have been the institutions of political debate and periodic elections. An examination of the roles each of these play in democracy reveals that a respect for epistemic inaccessibility (i.e., privacy) lies at the heart of each practice thus at the heart of democracy.

Let's start with voting. Theories of voting abound, from those who believe voting is a statement of opinion about some issue, to those who believe voting is merely an opportunity to "throw the bums out."[175] Again, we need not adopt a theoretical stance here; all that is necessary is to recognize that voting minimally constitutes the revealing to government (or its representatives) of private information that citizens uniquely possess—whether that information is an element of the "general will," a private preference, an expressive opinion, or whatever. If the government's purpose is to access this information, which is distributed throughout the population, the obvious question is: why ask? Why not predict it, or mine it, or coerce it out of citizens?

174 For a skeptical view see, *e.g.*, Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Routledge, 1994 [1942]): chapter XXI, 250-268; William Riker, *Liberalism Against Populism* (Prospect Heights: Waveland Press, 1988); Kenneth J. Arrow, *Social Choice and Individual Values* (New Haven: Yale University Press, 2012 [1951]). Both Riker and Arrow are social choice theorists who argue that the idea of a "common good" or a "single will" for a collectivity is incoherent or impossible. *Cf.* Joshua Cohen, "An Epistemic Conception of Democracy," *Ethics* 97.1 (Oct., 1986), 26-38; and Gerald Gaus, "Does democracy reveal the voice of the people? Four takes on Rousseau," *Australasian Journal of Philosophy* 75.2 (1997), 141-162.

175 Goldman, *supra* note 158, at 315; Schumpeter, *supra*, at 269-283.

Some of the available options we can eliminate for reasons that clearly have nothing to do with privacy. We cannot apply the methods of the Spanish Inquisition to modern voters because it is wrong to torture people, not because in so doing we would be violating their privacy. But as one moves from more coercive measures to more subtle ones, such objections lose their weight. If the government could devise a technique for perfectly tracking citizens' beliefs, and it thereby eliminated voting because it "already knew" what citizens believed, would we consider this a democratic government? If not, why? What has been lost?

Estlund foregrounds this worry, but he writes only that "it seems clear that rule by the people is something different from rule in accordance with the people's views. Even if some mechanism forces or guarantees that people's views are tracked, putting their view 'in control' in a certain way, that is not the same as *people* being in control."[176] The hypothetical as posed is not fantastical. The term "neuro-surveillance" is already employed to describe the use of neurological information (e.g. brain scans) to predict crime or determine guilt.[177] In much the same way, it is not inconceivable that health information might be used in the future to predict someone's partisan affiliation or voting patterns. And if such methods were accurate, they would seemingly obviate the need for voting. If the purpose of voting is to reveal information that the government justifiably wants, and we have found a better way to reveal this information, why keep the institution of voting? To be sure, voting might serve other purposes—increasing civic engagement, involving people tangibly in the political process, and so forth—but if we managed to find other ways to generate these goods, thus reducing voting merely to its information-revealing function, would we still preserve it?[178]

I think the answer is yes. I want to suggest that voting, by enshrining a notion of epistemic inaccessibility, maintains the necessary balance of power in a democracy by making the

176 Estlund, *supra* note 161, at 76.
177 Adam Moore, "Privacy and Neuro-Surveillance," *Res Publica* 23 (2017), 159-177.
178 Assume here, also, that the government tracking the preferences of citizens would also strive to enact those preferences, including removing officials who have lost the trust or confidence of the voting public. In other words, assume a benevolent government that has access to the private wills of all citizens.

government reliant on citizens' decisions to disclose their views. That is, if all other related concerns about the elimination of voting were somehow assuaged, democrats would *still* have reason to maintain the vote over some method of more perfectly tracking voters' preferences, and this reason is that the privacy of voters' knowledge (of their own preferences) is part of what makes democracies *demo*cratic. A genuine democratic government—that is, one that aspires to be democratic—relies entirely on the views of individual citizens for the legitimacy of its existence and the content of its laws. Rule *by* the people is what justifies rule *for* the people. These views or preferences are the fuel on which democracy runs. When citizens are in a position of being capable of withholding their views, they are in a position of withholding the very basis for legitimate rule from their representatives or authorities.

This relationship run deeper than what is at play when a representative or political party is voted out of office, in which case voters can be seen as withholding their approval for a given policy or politician. Rather, what is at stake is the state *itself*. Through the mechanism of voting, the epistemic veil between citizens and their government can be breached only at the behest of—and with the consent of—voters themselves.[179] Without this mechanism, the balance of power shifts. The government transforms from one entirely *reliant* on the will of the people to survive to one merely *responsive* to the wills of citizens, who are in no position to either give or withdraw their consent. This latter position—what we might call a "doxocracy," or rule by opinion polling—might have merits, but it certainly wouldn't be democratic.

This is perhaps what Estlund was hinting at when he wrote that putting people's "views" in charge was different from putting people in charge themselves. The pivotal moment of the vote, where the citizen chooses to draw back the epistemic veil and reveal her will (or preferences) to the government, is democratically valuable *not only*—or even—because it makes the content of her will the object of government policy, but because it makes the existence of any legitimate

[179] I borrow the notion of a democratic "epistemic veil" from Radhika Rao. See Radhika Rao, "A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality," *Villanova Law Review* 51 (2006), 827-840. See also Rawls, *supra* note 165, for the original articulation of the "veil of ignorance."

government at all subservient to the will of the citizen. In other words, there is something communicated in the decision to disclose, and not just in the content of the disclosure.[180] The exercise of the vote affirms the basic structure of democratic legitimacy. The epistemic veil between voters and their government thus seems to be theoretically inseparable from the basis of democracy itself. It is what separates democracy—rule by the people—from doxocracy, rule by their views. And it indicates that privacy plays a pivotal role in the justification for democracy. Without privacy, citizens lose the power to withhold their views from government, voting is rendered unnecessary, and democracy dissolves.

The above assumes, however, a (highly theoretical) situation of government benevolence, in which those responsible for government policy are perfectly—and merely—responsive to the mined preferences of the electorate. The point can also be demonstrated more pragmatically. Though we have assumed that it would be possible for a democratic government to have access to the inner thoughts and motivations of its citizens while resisting the temptation to exercise power over them, we have good reason to doubt this situation could ever be the case in practice. Already, the democratic process is subject to intense surveillance, the aims of which seem to be both to predict and to mold voter behavior. Colin Bennett, for instance, writes: "In our capacities as participants, non-participants or potential participants in the democratic electoral process, personal data is increasingly captured and processed about us for the purposes of regulating the fair and efficient conduct of elections and also to influence our behaviors and decisions."[181] Such surveillance measures include integrated voter management platforms, the use of data to segment the voting population and target individual voters ("microtargeting"), capturing data from social media, and the development of mobile applications for political messaging.[182] The combined effect

[180] This arguments complicates, but does not invalidate, mandatory voting systems in countries like Australia and Brazil. Even there, it is possible *not* to vote, if one pays a (minor) penalty. Such laws are thus more accurately viewed as incentive regimes, aiming to encourage voting, rather than as truly *compulsory* voting systems.
[181] Colin Bennett, "Trends in Voter Surveillance in Western Societies: Privacy Intrusions and Democratic Implications," *Surveillance & Society* 13.3/4 (2015), 370-384: 371.
[182] *Id.* at 372.

of these various practices—some of which may have individually justifiable purposes—is that voters are increasingly treated as consumers, subject to similar strategies of identification and manipulation that occur in the commercial realm.

Cohen has, as we saw earlier, warned of a "modulated democracy" and of the dangers that stem from pervasive surveillance—conducted by both private actors and the government—designed to predict and therefore shape the actions of "citizen-consumers."[183] Watching and recording necessarily entail having the power to influence or control. And governments, when offered this power, take it. The result is that citizens lose the capacity for self-government, which "requires habits of mind, of discourse, and of self-restraint that must be learned." Cohen concludes:

> Those are the very same habits that support a mature, critical subjectivity, and they require privacy to form. The institutions of modulated democracy, which systematically eradicate breathing space for dynamic privacy, deny both critical subjectivity and critical citizenship the opportunity to flourish. The liberal democratic society will cease to be a realistic aspiration unless serious attention is given to the conditions that produce (aspiring) liberal selves.[184]

It is therefore quite possible to deny my theoretical argument and yet still believe that, in practice, privacy is necessary to protect democracy. That is, even *if* it were theoretically acceptable to replace the vote with some more efficient method based on abolishing the epistemic veil between citizens and their government, the practical application of this scheme would likely entail the destruction of democratic citizenship, as the state would deepen and extend the surveillant practices it already undertakes in order to influence voter behavior. Since it is practically impossible for the state merely to vacuum up voter preferences without attempting to shape them, voting emerges as the only safe method of transferring the information from citizens to state. Institutionalizing a condition of epistemic inaccessibility thus proves vital for carrying out democratic governance. Without it, the state would ultimately replace the wills of citizens with its own will, shaping their

183 Cohen, *supra* note 43, at 1917: "Modulation is a mode of privacy invasion, but it is also a mode of knowledge production designed to produce a particular way of knowing and a mode of governance designed to produce a particular kind of subject. Its purpose is to produce tractable, predictable citizen-consumers whose preferred modes of self-determination play out along predictable and profit-generating trajectories."
184 *Id.* at 1918.

preferences and desires so as to democratically "legitimate" its pre-determined interests. It would exercise such power largely unnoticed.[185]

Indeed, worries about the coercive effects of "getting behind the vote" lie at the root of one of the most institutionalized aspects of privacy in the democratic process: the secret ballot. If people are required to reveal how they vote, or to disclose the reasons for their vote, this information might be used against them; citizens in such a position would therefore be liable to coercion, and the electoral process would be polluted. Lever suggests that the reasons for the secret ballot may even be more than prudential. The purpose isn't just to ward off intimidation and corruption; it instead reflects the inherent right of voters to vote as they please, "whether they are rich or poor, well-educated or not."[186] Regardless of the justification, the secret ballot reaffirms the epistemic veil. Voting both presupposes a state of privacy and mandates a private exercise.

Hence, what democracy assumes is something like what Ian Carter has termed "evaluative abstinence," or "a refusal to evaluate persons' varying capacities."[187] We might call it, for our purposes, "epistemic abstinence."[188] This type of perspective requires "abstaining from looking behind the exteriors that people present to us as moral agents," therefore treating them as "opaque."[189] Though Carter directs his argument at the basis for equality, it can be usefully applied to the argument for voting. Democracies must adopt the perspective of treating the vote as sufficient for gleaning the will of the people or aggregating preferences, abstaining from looking beneath the vote to access the viewpoints, motivations, or beliefs that citizens have not chosen to

185 In the same special issue of *The Harvard Law Review* in which Cohen writes, Neil Richards observes: "The bottom line about surveillance and persuasion is that surveillance gives the watcher information about the watched. The information gives the watcher increased power over that watched that can be used to persuade, influence, or otherwise control them, even if they do not know they are being watched or persuaded" (Neil Richards, "The Dangers of Surveillance," *Harvard Law Review* 126.7 (May 2013), 1934-1965: 1956).
186 Annabelle Lever, "Privacy and Democracy: What the Secret Ballot Reveals," *Law, Culture and Humanities* 11.2. (June 2015), 164-183: 175.
187 Ian Carter, "Respect and the Basis for Equality" *Ethics* 121.3 (April 2011), 538-571: 550.
188 Others have called acknowledging of the limits of one's knowledge "epistemic modesty." See Burynseels Koen and Jeroen van den Hoven, "How to do things with personal big biodata," in *The Social Dimensions of Privacy*, *supra* note 77, 122-140: 122.
189 *Id.* at 551-552.

reveal. This "blindness" must be, as Carter writes, a "conscious theoretical stance."[190] Privacy thus emerges, slowly but unmistakably, from the center of the democratic project. The practice of voting presupposes the epistemic inaccessibility of voters vis-à-vis their government, and preserving this inaccessibility preserves democracy.

But what of "talk"? If democracy requires the vote, and the vote requires privacy between citizens and their government, can something similar be said for the deliberations that take place both before and after the aggregative procedure of voting? There are some, of course, who would deny that "talk" plays any important role in a democracy. The social choice theorists mentioned earlier are doubtful that anything more than fair aggregative procedures are necessary for legitimate democratic governance. Conversely, those who advance a conception of "deliberative democracy" believe that "legitimate lawmaking issues from the public deliberation of citizens."[191] For deliberative democrats, the *only* legitimate government is that which is governed by a certain ideal of public deliberation—i.e., of "talk."[192] Joshua Cohen, for instance, writes that outcomes are democratically legitimate "if and only if they could be the object of a free and reasoned agreement among equals," and that ideal deliberative procedures are "meant to provide a model for institutions to mirror."[193] Deliberative democrats thus contend that "it is the process by which everyone's will is formed that confers its legitimacy on the outcome, rather than the sum of already formed wills."[194]

190 *Id.* at 559.
191 "Introduction," in *Deliberative Democracy*, *supra* note 170, ix-xxx: ix. Strictly speaking, however, deliberative democrats can also believe that deliberation need only take place by the people's *representatives*. See, *e.g.*, Stephen Elstub, "Deliberative and Participatory Democracy," in *The Oxford Handbook of Deliberative Democracy*, *supra* note 90, 187-202.
192 "Deliberative democracy is an ideal of political legitimacy. It claims that political decisions are ideally legitimate when they are made through a deliberative procedure, which implies publicly exchanging arguments 'offered by and to participants who are committed to the values of rationality and impartiality,' and in which all those affected by the decision can take part directly or through their representatives." Samantha Besson and José Luis Martí, "Introduction," in *Deliberative Democracy and its Discontents*, eds. Samantha Besson and José Luis Martí (Ashgate, 2006), xiii-xxxi: xv.
193 Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy*, *supra* note 170, 67-91: 73.
194 Bernard Manin, Elly Stein, and Jane Mansbridge, "On Legitimacy and Political Deliberation," *Political Theory* 15.3 (1987), 338-368: 353.

The critiques of deliberative democracy—that it is paternalistic, impossible, idealistic, or pre-supposes consensus—are well known and not worth rehashing here.[195] But we do not need to claim, as deliberative democrats do, that the legitimacy of democracy reduces to its deliberative procedures in order to acknowledge that deliberation is a central democratic ingredient.[196] The purely aggregative vision of democracy bears little resemblance to modern democracies, and it contains few attractive features. As mentioned, freedom of speech and of association are two hallmarks of liberal democracy. Both aim—at least in part—to facilitate and encourage some form of democratic deliberation. Talking is an important part of a democracy, whether because it combats political ignorance, helps to refine or transform pre-deliberative preferences into something more conducive to the "common good," or because it simply allows those in the minority to officially register their dissent from the prevailing consensus.[197]

Talking, like voting, is also a way of conveying information that is distributed across an electorate in discrete individuals. We talk to one another because we don't already know the ideas, opinions, judgments, or information that our fellow citizens possess. Discussion is a mechanism for eliciting this information from each other, much as voting is a mechanism for the government to elicit information from citizens. The very notion of democratic deliberation is therefore premised, like voting, on an epistemic veil between citizens, one that must be breached for discussion to take place. "Talk" asks a similar question of us that "votes" did: if we knew already what other citizens thought, especially citizens who held views opposed to ours, what would

195 See, *e.g.*, Jon Elster, "The Market and the Forum: Three Varieties of Political Theory," in *Deliberative Democracy*, *supra* note 163, 3-33: esp. 13-18; Ilya Somin, "Deliberative Democracy and Political Ignorance," *Critical Review* 22.2-3 (2010), 253-279; Chantal Mouffe, *The Democratic Paradox*, *supra* note 12; and Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment," *Philosophy and Public Affairs* 29.4 (Autumn 2000). Deliberative theorists themselves admit that the ideal speech situation envisioned by Habermas is a regulative ideal, and not a realistic aspiration, and recent work suggests a relaxation of this ideal. See, *e.g.*, Jane Mansbridge, "Conflict and Self Interest in Deliberation," in *Deliberative Democracy and its Discontents*, *supra* note 192, 107-132; and Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin, and José Luis Martí, "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy* 18.1 (2010), 64-100.

196 Simone Chambers, "Deliberation and mass democracy," in *Deliberative Systems: Deliberative Democracy at the Large Scale*, eds. Jon Parkinson and Jane Mansbridge (Cambridge, U.K.: Cambridge University Press, 2012), 52-71: "Deliberation is part of any democratic order. The question is really about what weight and significance, both theoretical and practical, one gives to deliberation" (53).

197 Anderson, *supra* note 156; Manin, Stein, and Mansbridge, *supra* note 194, at 354.

happen to deliberation? What would be the consequences for democracy? The hypothetical is not difficult to consider, as it bears a resemblance to modern politics. As people gain more and more information that seems to reveal the viewpoints of others, they become less and less likely to engage in deliberation with one another. Instead, they resort to pigeon-holing their opponents and reducing them to simplistic categorizations. "Don't talk to him. I already know what he thinks."

Consider the case of partisanship. Knowing the party affiliation of someone is analogous to knowing the content of their political beliefs. Recent research has indicated that strong partisans are poor deliberators, especially when dealing with opposing views: they are less likely to adopt an attitude of reciprocity toward the opposing side and more likely to do so with those who agree with them already.[198] Many factors drive partisanship, and it is still poorly understood. But insofar as knowing someone's partisan affiliation is a species of opening (or, perhaps more pertinently, feeling oneself to have opened) the epistemic veil between citizens, it is a useful harbinger for what widespread epistemic accessibility (i.e., non-privacy) would mean for deliberation.

The results aren't promising.[199] This is not surprising: when people feel they know already what others think, the motivation to engage in genuine deliberation—with the aim of persuading others of your side, or at least giving everyone a fair hearing—is considerably lessened. Instead, as party affiliation increasingly becomes a marker of social identity, we see the refusal to engage at all with other citizens who may disagree. One commentator on American politics has termed this "epistemic closure."[200] The path is perverse: from conditions of epistemic inaccessibility, we

198 Ryan Strickler, "Deliberate with the Enemy? Polarization, Social Identity, and Attitudes toward Disagreement," *Political Research Quarterly* 71.1 (2018), 3-18.

199 *Cf.* Jonathan White and Lea Ypi, *The Meaning of Partisanship* (Oxford: Oxford University Press, 2016): esp. chapter three, "Partisan Justification." Ypi and White's notion of partisanship, however (which they distinguish from "factionalism" in that it requires generalizable claims), concerns the *reasons* for which people hold certain views and the capacity of partisanship to provide a model of political justification in the mold of public reason. They do not address the likelihood of deliberation occurring between partisan groups. See, also, Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F. Thompson, and Mark Warren, "A systemic approach to deliberative democracy," in *Deliberative Systems*, *supra* note 196, 1-27: esp. 6-7 (for how partisanship might benefit deliberation) and 24 (for the harms of partisanship).

200 Julian Sanchez, "Frum, Cocktail Parties, and the Threat of Doubt," *JulianSanchez.com*, 26 March 2010: http://www.juliansanchez.com/2010/03/26/frum-cocktail-parties-and-the-threat-of-doubt/.

encourage deliberation; once we feel we know in advance what others think, we accept "epistemic closure."

The point can also be illustrated by considering two extremes. Under conditions of extreme privacy, in which citizens lack any mechanisms for pre-knowing the views of their peers, the only way to hear the views of others is by talking to them. Otherwise, citizens would leave in complete ignorance about the views of others in the community. An extreme level of privacy, therefore, practically necessitates some form of deliberation—even a bare form. Under conditions of complete transparency, conversely, in which citizens' views are exhaustively chronicled or exposed to others, the need for deliberation is lessened. Why talk to someone if you already know what she will say? Of course, deliberation may still take place. The desire to justify one's own views or to attack the views of one's adversaries may ignite democratic "talk" even when no new information can be learned. But, whatever form of deliberation it may be, it likely won't be one motivated in part by the desire to learn from or about other perspectives.

Deliberation thus proceeds from a position of privacy between citizens, and it suffers as this privacy is abrogated. Yet, though the epistemic veil between citizens provides the *impetus* for engaging in deliberation, the *purposes* of deliberation have to do with much more than the exchange of information. In other words, citizens must initially engage in deliberation because they otherwise live in the dark about what their peers think, but they get from the process much more than just this new information. The give-and-take of political discussion aims to transform the citizens themselves. It broadens perspectives, encourages compromise, and provides an outlet for political participation and the expression of dissent.[201] The act of deliberating is, political psychologists admit, an "unnatural state of affairs for most citizens."[202] But it is precisely because it is unnatural that it is important to force citizens to do it. Research shows, for instance, that deliberation

201 Amy Guttman and Dennis Thompson. *Democracy and Disagreement* (Cambridge, M.A.: Belknap Press, 1996): 41-43; Gerry Mackie, "Deliberation and voting entwined," *Oxford Handbook of Deliberative Democracy*, supra note 90.
202 Christopher Karpotwitz and Tali Mendelberg, "The Political Psychology of Deliberation," in *The Oxford Handbook of Deliberative Democracy*, *supra* note 90, 535-555: 538.

increases the likelihood that partisans will view issues through the same ideological lens, creating a condition that public choice economists call "single-peaked preferences." The results are more fruitful discussions and more legitimate compromises.[203]

Privacy also improves the quality of the deliberative discourse.[204] Recall the importance of private spaces for the fostering of unorthodox views and ways of life, which in turn can become durable identities. Iris Marion Young has written that the "social perspectives" that different social groups can bring to a discussion are "a resource for enlarging the understanding of everyone and moving them beyond their own parochial interests."[205] To make possible this "deliberative resource" of group difference, it is first necessary to foster social conditions in which this difference can mature and develop. Such conditions require privacy, which shelters nascent identities from public scrutiny and provides outlets for expression. Recall, also, the role privacy plays in ensuring freedom of expression. Insofar as expressive freedom forms part of a broader deliberative practice—which may include practices of debate, persuasion, and bargaining[206]—privacy safeguards the diversity and integrity of the viewpoints that themselves constitute the fuel of deliberative encounters.

The nature of information disclosure also matters for deliberative practices. Whether the information about an individual's views is mined or disclosed—presumed or volunteered—impacts the quality of deliberation. Deliberation involves "reason giving."[207] In addition to their viewpoints, deliberators share their reasons for holding such views. Maintaining an epistemic veil between citizens helps to ensure that the types of information that individuals reveal in the course of deliberation and the reasons they give for their viewpoints are decisions made by the participants

203 Christian List, Robert Luskin, James Fishkin, and Iain McLean, "Deliberation, single-peakedness, and the possibility of meaningful democracy: evidence from deliberative polls," *The Journal of Politics* 75.1 (2012), 80-95.
204 Christopher Parsons, Colin J. Bennett, and Adam Molnar, "Privacy, surveillance, and the democratic potential of the social web," in *Social Dimensions of Privacy*, *supra* note 77, 202-222: 216. *Cf.* Brennan, *Against Democracy*, esp. 58-73, for a critique of the claim that deliberation produces democratic benefits.
205 Iris Marion Young, "Difference as Resource for Democratic Communication," in *Deliberative Democracy*, *supra* note 170, 383-406: 398-399.
206 See Mansbridge, *supra* note 195; Mansbridge et al., *supra* note 195.
207 See Cohen, *supra* note 193; Cristine Lafont, "Is the Ideal of Deliberative Democracy Coherent?" in *Deliberative Democracy and its Discontents*, *supra* note 192, 3-25; Chambers, *supra* note 196, at 58-59.

themselves. The existence of multiple potential reasons behind a single conviction necessitates clarification and articulation to avoid misattribution; but, as individuals lose control over the circumstances in which their views are presented, they concurrently lose the ability to present their reasons. Pervasive surveillance alters the communicative environment of citizens in discussion with one another, removing the ability to determine for themselves the audience of the deliberative body and thus undermining communicative rationality.[208] A situation of relative epistemic inaccessibility helps to ensure that the deliberative moment—whether it takes place in a town hall, an online forum, or a coffeeshop—is not undermined by pre-judgments or assumptions.

Where does this leave a concerned democrat? Much as was the case with voting, privacy emerges as an important element in maintaining the democratic practice of deliberation. The very structure of discussion and debate in a democracy is premised on the exchange of views, which exchange is itself premised on individuals' not already knowing what other citizens believe. Discussion proceeds off the basis of an initial state of epistemic inaccessibility, which provides the impetus for gathering together—in person or, increasingly, online—to speak to one another. When citizens believe there is no epistemic veil to be lifted, as is the case when people are "categorized" according to their partisan affiliation, deliberation suffers. But though the need to "draw back the veil" may provide the initial justification for deliberation, in practice it proves to be about much more than the dry exchange of information. There are democratic benefits from deliberation that cannot be achieved from learning about or guessing what another believes. By preserving a sense of uncertainty—even mystery—about how others think, privacy preserves the conditions under which we come together to debate, compromise, and make progress.

An examination of the roles of voting and deliberation in democracy therefore underscores the centrality of privacy to each practice. Though often taken for granted, the ability of citizens to

[208] Titus Stahl, "Indiscriminate mass surveillance and the public sphere," *Ethics and Information Technology* 18.1 (2016), 33-39: "…indiscriminate surveillance of political, public activities removes the option for participants of the public sphere to collectively determine what social relations are appropriate for this sphere and it thereby limits their ability to exercise collective communicative freedom" (37).

remain epistemically inaccessible—and the unique political power of lifting the epistemic veil—is vitally important to democratic governance. To understand the value of privacy requires looking no further than the democratic practices already in place around us.

3.3 The moral right to privacy

A political conception of privacy, as applied to democracy, thus presents us with a strong alternative to prevailing articulations of the content and meaning of privacy. I will close this chapter by discussing an implication of the political approach, which the reader has likely surmised by now: it undercuts the notion of a universal moral right to privacy.

I do not intend to engage here in a lengthy discussion of rights, nor will I attempt to defend a certain conception of "human rights." Certainly there is enough scholarly disagreement on this subject that it would be unproductive to mount a robust argument here. For the purposes of my argument, however, I will posit three features of moral rights as traditionally understood in philosophy—features that I believe most proponents of a universal right to privacy have in mind.[209] The first is that rights attach to us as individuals, that they are rooted in our humanity rather than in our status as citizens or members of a certain polity. Locke, for instance, argued that rights are pre-theoretic and natural; we have them before we enter into political obligations or social contracts, and they shape those obligations and contracts as outside considerations.[210] The second, related to this intuition, is that rights are properly universal. If we possess certain rights simply by virtue of our humanity, the logic goes, then nothing about our cultural, social, or political context

209 What I have in mind, again, is a pre-political concept of rights as privileges or dignities possessed by humans solely because of our humanity, and not political or civil rights that come into being because of one's membership in a political body.

210 John Locke, *The Second Treatise of Government* (New York: Dover Publications, 2002 [1689]): esp. sections VI-VII, 221-222. To be sure, many have challenged the notion of "natural rights," especially given Locke's reliance on divine source of human rights. Hannah Arendt, for instance, noting the dissolution of the traditional religious basis for natural rights, criticized the secular reconstruction of the "rights of man." Arendt famously argued that stateless peoples do not possess human rights because they do not possess any national citizenship. See Hannah Arendt, "The Perplexities of the Rights of Man," in *The Origins of Totalitarianism* (Great Britain: André Deutsch, 1987), esp. 290-302. For a critical appraisal of this view, see Jacques Rancière, "Who is the Subject of the Rights of Man?" *South Atlantic Quarterly* 103.2/3 (Spring/Summer 2004).

should be able to influence or detract from this set of rights. All of us have the same rights. Finally, these universal rights are often conceived of as "side-constraints" on action.[211] That is to say, they limit or constrain what we may legitimately do to others in pursuit of common purposes.[212]

With this picture of rights in mind, we can now consider why privacy is a bad contender. The normative dependence of privacy seems fatal to any attempt to conceptualize it as a moral right. What privacy is, and what domains of life it covers, shifts considerably over time, even within the same cultural context. It has already been mentioned how classical notions of privacy diverge significantly from modern conceptions, both in the scope of what is covered by the "private sphere" and in the normative weight given to the private vis-à-vis the public realm of life.[213] Indeed, to even conceive of a "right to privacy" in the first place is to assume a liberal-individualist approach to privacy, despite this approach's relatively recent provenance. If rights are universal, how can we construct a right to something that has not universally manifested?

The rejoinder to this observation is, of course, that historical conceptions of privacy that differ significantly from our own were mistaken in some respect. In other words, the mere absence of privacy rights in previous epochs does not mean there *shouldn't* have been privacy rights, just as the absence of rights against unjust execution or imprisonment does not mean that there shouldn't have been such universal protections years ago. But this objection misses the fundamentally different nature of privacy as against these other rights. What privacy is and whether or not it's even a good thing are historically determined. This feature is part of privacy's normative dependence. With such seismic shifts over time, it is difficult to say what something like a right to privacy projected back into time would even protect in the first place. If what a right to privacy would protect is different in ancient Greece from what it is in dynastic China, different in early-

211 For the most forceful representation of this view of rights, see Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974): esp. 22-35.

212 There are many who argue that this conception of rights is too minimal, and that rights properly involve the capability to do something rather than a constraint against something being done. See, *e.g.*, Amartya Sen, *Inequality Re-examined* (Oxford: Clarendon Press, 1995). Yet these approaches are *more* demanding, rather than less, and make justifying a moral right to privacy even more difficult. I have chosen here the least demanding version of the "moral right" in order to show that even a minimalist approach fails to make the case.

213 See chapter one, section 1.2.1.

modern Italy from what it is in post-modern Britain, then what is it that is being claimed as an inheritance of the human condition?

Outside of social and historical contingency, however, we must confront the difficulty of constructing a right to privacy once we have accepted that privacy is justified in multiple different ways. This observation theoretically leaves open the possibility of a right with "multiple groundings": the view that the numerous potential justifications for a right to privacy are merely partial, that each on its own is insufficient to provide the basis for a right, but that taken together as an organic whole they pass some important rights-triggering threshold. However, the multiple-groundings approach invites an additional difficulty: namely, how to adjudicate the strength of different privacy protections. It may be the case, for instance, that we wish to enshrine privacy protections principally related to one's liberty—i.e., privacy protections against surveillance and interrogation—with stricter laws than we would privacy protections of the value of solitude or shame (for which we may rely more heavily on social norms). If these various justifications are bundled together to create an undifferentiated moral "right to privacy," we lose the ability to make such distinctions. Everything rises to the level of a rights violation, regardless of the central issue.[214]

Most importantly, on the broadest level, privacy as a universal moral right sits uncomfortably with its conceptual structure. I have written that privacy is conceptually oppositional, requiring a notion of publicness or publicity first. Barrington Moore has observed, likewise, that "the need for privacy is a socially created need. Without society there would be no need for privacy."[215] This feature of the concept of privacy makes it difficult to transform into an moral right that we possess prior to putting ourselves into community with one another and taking on social responsibilities. That is to say, privacy is not important to us *qua* individuals, but rather to us *qua* members of a socio-political community, as interlocutors and fellow-citizens, who must

214 Daniel J. Solove notes: "The value of privacy is not uniform across all contexts. We determine the value of privacy when we seek to reconcile privacy with opposing interests in particular situations." Daniel J. Solove, *Understanding Privacy* (Cambridge, M.A.: Harvard University Press, 2008).
215 Barrington Moore, *Privacy: Studies in Social and Cultural History* (New York: M. E. Sharpe, Inc., 1984): 73.

rely on a complex array of social norms, practices, and traditions to give texture to the forces we bring to bear on one another. This image of privacy is at odds with the traditional conception of rights as areas of human life which we sanctify as protected *when* we enter community, *because* we possess them pre-politically, rather than a need that arises precisely *on account of* the existence of a community of others.[216]

It might be thought that this conception of privacy leaves non-citizens out to dry. On one level, the charge just doesn't stick: non-citizen residents and immigrants are often afforded the basic protection of the law wherever they are located—even if they are denied certain privileges, like voting—and there is little reason to think that a democratic community wouldn't decide to extend privacy protections to all persons within its borders. But on another level, the accusation is factually honest. Non-citizens can be subjected to invasive privacy measures that citizens are not: consider extensive border security checks or the work of intelligence agencies in spying on foreign citizens. When governments feel they are not beholden to those who will suffer from privacy invasions, the so-called "right" to privacy mysteriously dissipates. Non-citizens are thus both theoretically and actually exposed in ways that citizens are not. This is not just an issue for political or civil rights, however. As Timothy Snyder has documented, statelessness tends to destroy all rights—moral or otherwise.[217]

The political conception of privacy takes off from the institutions of politics, and not from the pre-political qualities of individual human beings. Protections for privacy that stem from the political conception thus cannot be based on a moral right to privacy that exists prior to political commitments, because the value of privacy stems from those political commitments in the first place. This is not to say that it would be impossible to construct an account of the moral right to

216 "Privacy is not something that atomistic individuals possess in the state of nature and sacrifice in order to join the social compact. We establish privacy protections because of their profound effects on the structure of power and freedom within society as a whole" (Solove, *supra* note 214, at 93).

217 Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (New York: Tim Duggan Books, 2015). Snyder argues that one of the key mechanisms by which the Nazis justified their extrajudicial killings was by rendering millions of Europeans "stateless" and thereby outside the jurisdiction of any rights-preserving laws. *Cf.* Arendt, *supra* note 210.

privacy. But such an account would likely involve adopting some version of a liberal-individualist approach to privacy, the deficiencies of which we have already outlined. Moreover, the anemia of the case for a moral right to privacy should not concern us. Civil rights—like voting and equal protection—require no pre-political basis, yet they are some of the most important protections that modern democracies afford. A civil right to privacy can and will survive the death of a moral right to privacy.

In the next chapter, we will see how the political conception helps to address a number of problems facing privacy advocates, including how to get around consent, how to address the nature of modern surveillance, and how to rebut privacy critics. If we have reason to adopt the political conception of privacy by the end of the chapter—as I believe we do—then we have reason also to abandon the attempt to find some moral right to privacy. Whether or not it exists, it is not useful to us.

Chapter Four: The path forward

In the previous chapter, I argued for a particular conception of privacy—the political conception—and demonstrated how privacy might be seen as integral to various democratic institutions and to the epistemic presuppositions of a democratic form of government. The political conception of privacy is an appealing option for those frustrated by existing approaches to privacy. By demonstrating how privacy lies at the center of identity formation, the freedom of expression, the freedom of association, and the epistemic circumstances of democracy, I have demonstrated that we can think of privacy's value in democratic terms. Without a presumption of privacy, I contend, we would have anemic or attenuated political parties and interest groups, a chilling of political expression, a feeble associative environment, and few—if any—justifications for preserving the franchise and democratic debate. In short, we would not have democracy as we know it.

Other commentators have noted that privacy is important for free speech and self-development, and some have explored its democratic potential. But they have failed to link these arguments to a more comprehensive conceptualization of privacy itself. The political justification follows from the normative dependence of privacy. Recognition of this conceptual feature compels us to take seriously the political environment that influences our private world, and to show how privacy contributes to our governing institutions. This is the political approach to privacy.

This approach dovetails with the Legitimate Access Definition of privacy and my skepticism about the utility of conceiving of privacy as a moral or universal right, though ultimately the political conception of privacy does not rely on a single definition or strictly rule out the possibility of privacy's being a moral right that attaches to individuals regardless of their political context. Nevertheless, its independence from this moral argument is a virtue: we do not need to wade into the thorny debate over moral rights or try to harmonize the deeply social and contingent nature of privacy with the universalism of rights language in order to justify laws and regulations

that protect privacy. Indeed, as I have mentioned previously, a political conception even recommends conceiving of privacy as a political or civil right, much like voting and equal protection statutes. Rather than justifying such rights by arguing that they draw on some deeper moral truth, we can simply point to the integrity of democracy itself. This is our justification. Though this leaves the political conception of privacy vulnerable to those who would deny the value or utility of democracy, I consider this a minor vulnerability, and one worth bearing for the benefits.

4.1 The benefits of the political conception

What are these benefits, then? In addition to its conceptual coherence, its avoidance of the pitfalls of other approaches, and its sidestepping of the moral rights debate, the political conception offers several other advantages over its rivals. The first is that it carries a lower burden of justification. The lesson of normative dependence is that every conception of privacy—and thus every justification for privacy protections—draws on outside frameworks. As we have seen, modern conceptions draw on liberal and romantic notions of what is central to individuals' lives and what is the purpose of government power. The burden of justification that such conceptions carry is inherent in their normative frameworks themselves: a critic of liberalism, for instance, will find little to love in the (dominant) liberal conception of privacy rights. If the liberal vision for individual flourishing is unattractive, critics ask, why should we buy their arguments for the necessity of privacy? In his trenchant critique of American individualism, Phil Slater takes precisely this approach and ably demonstrates the limits of an individualistic approach to privacy.[1]

The political justification for privacy rights faces fewer hurdles precisely because the basis of its argument is a political system to which, in theory, all interlocutors have assented. Liberals, romantics, social-democrats, republicans: they differ in much, but they are variations on a

[1] Phil Slater, *The Pursuit of Loneliness: American Culture at the Breaking Point* (Beacon Press, 1990).

democratic theme. To borrow Rawlsian terminology, the political conception does not rely on a comprehensive worldview in order to justify privacy rights; instead, it uses something closer to an overlapping consensus.[2] Rather than pick a contested philosophical or moral framework and tackle the double hurdles of both justifying the worldview *and* demonstrating its relevance to privacy protections, proponents of the political conception start with something that should require little justification: our political institutions, common to all. What is left to demonstrate, therefore, is how privacy is an inextricable part of the democratic project, without needing to explain or defend the democratic project itself. In a debate typified by deep disagreement over the definition of privacy, the source of its value, and the justification for privacy rights, removing one hurdle to consensus is a virtue.

David Pozen's useful analysis of "privacy-privacy" tradeoffs is relevant here. Pozen starts with the observation that the tradeoffs associated with privacy typically entail balancing privacy against some other social interest (e.g., public health or national security), but rarely take account of tradeoffs between different privacy interests (e.g., informational privacy versus bodily privacy, as in the case of TSA Pre-Check).[3] Among Pozen's taxonomy of forms of privacy-privacy tradeoffs is what he terms a "domain tradeoff," in which "the privacy interests on either side of the ledger… seem to implicate different domains of value."[4] How do we weigh intimacy against control over data, if they conflict? Normative dependence locates this debate outside of privacy. To adjudicate between different privacy conceptions requires a debate over the normative commitments that are informing these conceptions. Though difficult, a debate on these terms at least clarifies the nature of the conflict. It demonstrates what ideologies are at play, and thus what must be confronted or overturned to rectify a tradeoff.[5] Moreover, if my analysis of the political conception proves

2 Rawls, *A Theory of Justice* (Cambridge, M.A.: Belknap Press of Harvard University Press, 1999 [1971]); Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), esp. 196-225. Here I intend to adapt the language and spirit of Rawls' contentions, and not to endorse his project of political liberalism.
3 David E. Pozen, "Privacy-Privacy Tradeoffs," *University of Chicago Law Review* 83 (2016), 221-247: 222.
4 *Id.* at 231.
5 For example, Danielle Citron's exploration of the concept of "sexual privacy" reveals that this form of privacy (relating to social norms around sexuality, nudity, and intimate behavior) has historically been devalued as against traditional forms of privacy. This trade-off, as Citron would be quick to agree, is a result of a set of sexist normative

convincing, then we have reason to adopt a hierarchy of privacy values in which democracy-eroding privacy violations are considered more severe than other types. Thus we have reason to be more protective of the privacy of expressive speech and political activities than we do of, say, health data (except insofar as breaches of health data have democratic implications).

The political conception also spans and subverts the traditional public/private divide. A common presumption in the literature of privacy is that we can understand the structure of privacy merely by examining the so-called "private sphere" itself, leaving everything else to a separately-theorized "public sphere."[6] But the "grand dichotomy" between public and private is not so easily identified, and private and public are not the only spheres of life we can theorize. In addition to what I have outlined in this thesis, Jeff Weintraub traces four different public/private dichotomies:[7] the liberal-economistic approach,[8] the republican-virtue approach,[9] the sociability approach,[10] and the feminist approach[11] to the public/private distinction. These are, in short, various privacy conceptions—overlapping with but not identical to the ones I have identified—that draw the line between private and public in different places for different reasons. To understand what privacy is doing, then, requires situating it within multiple different frameworks

commitments (historically informed by centuries of abuse) that have overlooked the routine sexual privacy violations that many women face, especially in marginalized communities. To properly understand the privacy implications, it is first necessary to get at what ideologies are informing the current conceptions. See Danielle Citron, "Sexual Privacy," *Yale Law Journal* 128 (2019), 1870-1960.

6 See, *e.g.*, Beate Rössler's approach: "When I talk of privacy in what follows, I am not simultaneously referring to the public sphere. I shall be treating the other side of this 'great dichotomy' as a 'residual category,' without any more precise structure, though where necessary I shall go into the interplay and interaction of the private and the public" (Beate Rössler, *The Value of Privacy* (Cambridge, U.K.: Polity Press, 2005): 1-2).

7 Jeff Weintraub, "The Theory and Politics of the Public/Private Distinction" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 1-42.

8 "The field of the nongovernmental is conceived essentially in terms of the market. It is therefore not surprising that the use of the public/private distinction within this framework has characteristically involved a preoccupation with questions of *jurisdiction*, and especially with demarcating the sphere of the 'public' authority of the state from the sphere of formally voluntary relations between 'private' individuals" (*id.* at 8).

9 "Here the 'public' realm is the realm of political community based on citizenship: at the heart of 'public' life is a process of active participation in collective decision-making, carried out within a framework of fundamental solidarity and equality. The key point is that this whole realm of activity, and the problematic it generates, are essentially invisible within the framework of the [liberal-economistic] perspective" (*id.* at 10).

10 "The notion of the 'public' realm, then, sees it as a realm of sociability, mediated by conventions that allow diversity and social distance to be maintained despite physical proximity" (*id.* at 19).

11 "Feminists have emphasized the ways that these public/private decisions are gender-linked in terms of both social structure and ideology" (*id.* at 28).

about what the private and public really are, drawing into question the common assumption that a simple line divides the private world from the public world. Alan Wolfe, similarly, has introduced the concept of part-social, part-political, and part-private "publics" such as "families and kinship networks, associations, ethnic and racial groups, linguistic communities, and other similar communities of interest, identity, and belief" which rely on both a public-facing component and a private interest component.[12]

The arguments I introduced in the previous chapter do not rely on some contrived normative dichotomy between one's private and public lives. There are, of course, prudential reasons to distinguish between "private" and "public" activities, spaces, authorities; and what is private is, by definition, what is not public. But under the political conception, no normative work is done by this distinction. Rather, at the heart of the political conception is the idea that much of what one does in private is critically important for one's public activities, and that these public activities are in turn the framework in which we understand the value of privacy. It might therefore be more accurate, adapting Altman, to speak of the public/private *dialectic*, rather than the public/private dichotomy.[13]

Deflating the significance of the public/private dichotomy allows us to incorporate and address various thorny issues for privacy scholars, such as the question of experiencing privacy in public or bringing public power to bear in private spaces. Though these issues remain complex, we do not need to muddy the waters by attributing some deeper significance to a divide in our conceptions of the private and public worlds. Rather, we are free to see the public world as interacting with, ceding to, and intruding into the private world along multiple planes—economic, political, moral—and with respect to a variety of issues, and always with an eye toward understanding how this dialectic shapes our politics.

12 Alan Wolfe, "Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary" in *The Public and Private in Thought and Practice: Perspectives on the Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 182-203: 197.
13 See Irwin Altman, *Environment and Social Behavior* (Monterey, California: Brooks/Cole Publishing, 1975).

4.1.1. Beyond consent

Denying the normative usefulness of the public/private divide brings us to a third benefit of the political approach: it sheds the liberal framework, and with it the overreliance on choice and consent in privacy regulation. I demonstrated in chapter one that the liberal approach to privacy is a particular historical development, and that there is nothing to privacy *per se* that recommends a liberal approach. Notions about the private and the public existed prior to the emergence of liberalism; and, with luck, privacy will survive the influence of liberalism. The liberal approach to privacy has many virtues, of course—chiefly its appreciation for shielding certain spheres of life from government influence and respecting the autonomy of individuals. But over-reliance on individual choice and consent in privacy management is deeply problematic, not least because individuals rarely read or understand consent notices before granting access to their data.[14] As a result, notes Kevin Haggerty, consent has become "the biggest charade in privacy law," functioning to "sanction" data collection rather than "restrain" it.[15] Fred Cate, using the healthcare field as a case study, has outlined several additional problems with the paradigm of individual choice in privacy management, including the frequent absence of any real choice, the illusion of choice when there is none, the stark theoretical difference between consensual privacy violations and actual privacy protection, the burdens on individuals, and the hampering of legitimate data uses by making all data collection subject to the whims of individuals.[16] "Maximizing choice," Cate concludes, "is not the same thing as protecting privacy."[17]

Privacy scholars have written on the theoretical problems with the consent model, though few have known what to do in response. Daniel Solove, for instance, takes aim at the entire paradigm of what he calls "privacy self-management"—a central feature of major privacy and data-

[14] See chapter two, section 2.1.3(d).
[15] Kevin D. Haggerty, "What's Wrong with Privacy Protections?" in *A World Without Privacy: What Law Can and Should Do*, ed. Kevin Sarat (Cambridge, U.K.: Cambridge University Press, 2015), 190-233: 224.
[16] Fred Cate, "Privacy in Health Research: The Limits of Individual Choice," *California Law Review* 98.6 (December 2010), 1765-1803: 1772-1778.
[17] *Id.* at 1802.

protection standards—which relies on the capacity of individuals to make intelligent and informed choices over managing their privacy and which "[takes] refuge in consent."[18] In addition to the normal cognitive problems that individuals face in privacy self-management, Solove notes several structural issues: the sheer scale of data requests (making individualized instances of consent practically impossible), the impossibility of adequately assessing future harms, and the neglect of social or collective consequences from individual privacy decisions.[19] In the face of this, however, Solove resists the paternalistic approach of compelling certain privacy choices and concludes rather meekly that "there is no silver bullet."[20] The fealty to consent and aversion to paternalistic solutions runs deep in most privacy scholars, so great is the pull of liberalism. Yet even the possibility, slim though it is, of truly informed and rational consent cannot rescue the fundamental difficulty: we can and will consent to trading privacy for convenience. As will be shortly discussed, individuals' willingness to sacrifice privacy in order to access discounts, services, and conveniences—indeed, to participate in the economy at all—is a central feature of modern surveillance. We participate in our surveillance. We consent.

Lisa Austin, more helpfully, suggests abandoning consent in favor of focusing on the power that surveilling entities have over those whose data they seek. The law in this instance would not paternalistically dictate the choices of individuals, but rather would serve to regulate the terms of the interaction between two unequal parties. The focus then shifts entirely: "If we start from the position that it is up to individuals to determine their own privacy preferences, then the obligation of someone seeking to collect information from that individual is to obtain consent," Austin writes. "If instead we start from the position that surveillance places the surveilling party in a position of power over another, then the obligations of the surveilling party might be quite

[18] Daniel J. Solove, "Privacy Self-Management and the Consent Dilemma," *Harvard Law Review* 126.7 (2013), 1880-1903: 1880.
[19] *Id.* at 1888-1893.
[20] *Id.* at 1900.

different."[21] Her recommendation is congenial to the political approach to privacy precisely because it does not privilege consent unnecessarily, but rather treats privacy as a question of the structural design of relationships which therefore demands structural remedies. However, Austin's welcome prescriptions notwithstanding, the ambivalence in the literature over the role of control and consent has resulted in a policy environment that continues to make so-called "notice-and-consent" laws a primary tool in the privacy arsenal.[22]

Embracing alternatives to the liberal-consent model is all the more important with the advent of so-called "big data." Big data can be defined as a method of inquiry characterized by a "capacity to search, aggregate, and cross-reference large data sets" and as a phenomenon that relies on a combination of advanced computational technology, pattern-based analysis of large-N datasets, and a "mythology" of believing that large data sets "offer a higher form of intelligence."[23] To be sure, big data offers real opportunities, especially in the fields of health, national security, and climate change; but it also presents new challenges, chief among them the inadequacy of consent in data protection. The "legal fiction" of consent, some scholars have noted, has become, in the age of big data, a "legal fantasy."[24] This is at least in part because the contextual inquiry and individualized evaluation that would be necessary for meaningful consent is made even more

21 Lisa Austin "Enough About Me: Why Privacy is About Power, not Consent (or Harm)," in *A World Without Privacy*: *What Law Can and Should Do*, *supra* note 15, 131-189: 164.

22 "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)" *Official Journal of the European Union* L119 (4 May 2016), 1-88: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN. The definition of consent (Article 4.11) is as follows: Consent is "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." This is an improvement. For further discussion, see Sally Annereau, "Understanding consent under GDPR," *Global Data Hub*. Taylor Wessing LLP, November 2016: https://globaldatahub.taylorwessing.com/article/understanding-consent-under-the-gdpr . For an overview of the approach of the Fair Information Practice Principles (FIPPs), see the U.S. Federal Trade Commission's report to Congress, which surveyed international standards regarding FIPPs and concluded that two of the five core principles were "Notice/Awareness" and "Choice/Consent." Federal Trade Commission, "Privacy Online: A Report to Congress" (1998): https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

23 danah boyd and Kate Crawford, "Critical Questions for Big Data," *Information, Communication & Society* 15.5 (2012), 662-679: 663.

24 Katherine Strandburg, "Monitoring, Datafication, and Consent: Legal Approaches to Privacy in the Big Data Context," in *Privacy, Big Data, and the Public Good: Frameworks for Engagement*, eds. Julia Lane, Victoria Stodden, Stefan Bender, and Helen Nissenbaum (Cambridge, U.K.: Cambridge University Press, 2014), 5-43: 8.

impossible by the sheer scale of big-data operations and their tendency to be automated, "drag-net" procedures.[25]

In a world dominated by big data, concepts like anonymity and consent can become compromised because of the unpredictable and interminable ways in which data flow between data collectors (making it difficult to specify what the consent is for) and because single, consenting individuals can unlock data for thousands of other non-consenting individuals (think of how much can be predicted about you once it is revealed you are Facebook "friends" with someone who has volunteered detailed information on their race, income, political opinions, and so forth).[26] A shifting technological landscape and the attendant epistemological evolutions it has sparked creative ways of thinking about privacy protection that do not rely on individualistic, notice-and-consent-based solutions. The political approach is just such a way.

4.2.2. Countering a surveillance society

The political approach to privacy also best captures the harms of surveillance, a task made all the more important in light of the inadequacy of current privacy conceptions to express the danger of surveillance and to propose effective remedies. To demonstrate this advantage, it is first necessary to apprehend the nature of surveillance today. Surveillance is "the focused, systematic, and routine attention to personal details for purposes of influence, management, protection, or direction."[27] It has roots in the French word *surveiller*, or to "watch over" or "oversee." Though traditionally a question of visibility—one watches with eyes—surveillance throughout the twentieth century became increasingly associated with identifying, categorizing, and tracking individuals through the use of personal data. As David Lyon notes, surveillance is therefore always about power, yet it is also a feature of modern bureaucratic states as such, which rely on "naming,

[25] *Id.* at 30-31; boyd and Crawford, *supra* note 23, at 664.
[26] Solon Barocas and Helen Nissenbaum, "Big Data's End Run around Anonymity and Consent," in *Privacy, Big Data, and the Public Good: Frameworks for Engagement*, *supra* note 24, 44-75.
[27] David Lyon, *Surveillance Studies: An Overview* (Cambridge, MA: Polity Press, 2007): 14.

identification, counting, classifying, record-keeping" and other such processes to carry out core state functions.[28]

Popular conceptions of surveillance often portray it as the sinister Big Brother of George Orwell's *1984*, but Foucault's articulation of Jeremy Bentham's "Panopticon" illustrates that surveillance is not merely a tool of control in totalitarian societies, but a productive force in all modern societies, compelling—almost spontaneously—the desired behaviors: "He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection."[29] That is, surveillance isn't exogenously applied to unwilling subjects, but actually produces subjects who do the work of surveillance—in Foucault's terminology, "disciplining them"—for it. In this way, the modern self is a product of surveillance. Given that the Panopticon was an imaginary guard tower in a prison, it is small wonder that surveillance is commonly viewed as evil. But surveillance is ambiguous, as Lyon writes: "The garnering of personal data by institutions frequently facilitates entitlement, efficiency, convenience, or security."[30] The task falls to scholars in the burgeoning field of surveillance studies to parse the good from the bad.

Though surveillance has existed in some form in all societies, modern technological advances have facilitated tremendous transformations in how surveillance permeates and affects modern states. A number of key conceptual advances have tracked technological change. Roger Clarke introduced in the 1980s the notion of *dataveillance*, or "the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons."[31] The rise of an information society, facilitated by computers and centralized databases, challenges the ocular-centrism of surveillance conceptions. The eye is no longer necessary to see

[28] *Id.* at 79.
[29] Michel Foucault, *Discipline and Punish* (New York: Vintage Books, 1977): 202-203.
[30] Lyon, *supra* note 27, at 167.
[31] Clark, Roger. "Information Technology and Dataveillance," *Communications of the ACM* 21.5 (May 1988), 498-512. Accessed at: http://www.anu.edu.au/people/Roger.Clarke/DV/CACM88.html.

others, as they become visible through their data. In the 1990s, Oscar Gandy built on Clarke's insight to introduce the model of the *panoptic sort*, a "totalizing system of social control that depends on the ability of state and corporate bureaucracies to collect, process, and share massive amounts of personal information to track, command, coordinate, and control each and every one of us to an extent we would not have considered possible."[32] With our data, Gandy wrote, we are categorized according to how economically productive or socially useful we are, with predictably lamentable results for levels of discrimination and inequality.

Kevin Haggerty and Richard Ericson followed with the concept of the *surveillant assemblage*: the interlocking, root-like matrix of different surveillance systems that "operates by abstracting human bodies from their territorial settings and separating them into a series of discrete flows."[33] Drawing on the work of Gilles Deleuze and Félix Guattari, Haggerty and Ericson describe how the human body is broken down ("de-corporealized") before being reassembled into data flows, in the process creating a "data double of pure virtuality" and thus "a new type of individual, one comprised of pure information."[34] The de-corporealized individual of pure information is even more susceptible to surveillance, as the limitless data that we produce—bio-data, behavioral data, thought data—are more easily collected and monitored. This is a feature of "liquid modernity," the result of which is *liquid surveillance*: a conception of surveillance not as a disciplining, Panoptic force, but as a seductive, oozing temptress, coaxing ever more information out of compliant individuals. The emphasis therefore "moves from enforcement to temptation and seduction, …[and] from policing to the arousal of desire."[35] Thus, whereas the Panopticon, to those who saw it for what it was, might have produced resistance, liquid surveillance "seems to seduce participants into a stunning conformity of which some seem scarcely conscious."[36] We

[32] Oscar H. Gandy, *The Panoptic Sort: A Political Economy of Personal Information* (Boulder: Westview Press, 1993): 1.
[33] Kevin D. Haggerty and Richard V. Ericson, "The Surveillant Assemblage," *British Journal of Sociology* 51.4 (2000): 605-622: 606.
[34] *Id.* at 611, 614.
[35] Zygmunt Bauman and David Lyon, *Liquid Surveillance: A Conversation* (Cambridge, U.K.: Polity Press, 2012): 57.
[36] *Id.* at 54.

need only to give in to the siren call of the services that ease our daily lives at the cost of data extraction.

Yet this liquidity of surveillance has rendered the panoptic vision of surveillance incomplete at best and obsolete at worst.[37] Surveillance is now ubiquitous, initiated by various actors, serving various interests, and taking place between peers as well as between corporate bodies (states, businesses) and individuals. Alice Marwick, for instance, has written of *social surveillance*, which takes place between individuals of "relatively equal power," often on social networking sites or in the form of "gossiping, eavesdropping, investigation, gossip, and inquiry."[38] Mass surveillance—termed *panvasive surveillance* by some scholars—can often go undetected by the hundreds of millions of citizens it affects, as the Snowden revelations demonstrated; surely a disturbing development, but difficult to square with the internalized process of self-discipline that the panoptic model offers.[39]

Indeed, the advent of big data has facilitated panvasive surveillance, which far surpasses traditional surveillance in its ability to track and manage large populations. Unlike the Panopticon, which relied on disciplining the souls of individuals because it lacked the resources to directly surveil all of them at the same time, big data surveillance *can* track millions of individuals simultaneously. These new capacities give surveillance a different flavor: instead of discipline, we have anticipation and control. "Actionable intelligence" is mined from the formerly inscrutable patterns of behavior that emerge from large populations, with the purpose of predicting behavior *before* it takes place rather than catching it once it has occurred.[40]

37 For a fuller discussion of the limits of the panoptic model of surveillance, see Kevin D. Haggerty, "Tear down the walls: on demolishing the panopticon," in *Theorizing Surveillance: The Panopticon and Beyond*, ed. David Lyon (Wilan Publishers, 2006), 23-45; Elia Zureik, "Theorizing surveillance: the case of the workplace" in *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination,* ed. David Lyon (London: Routledge, 2003), 31-56.

38 Alice Marwick, "The Public Domain: Social Surveillance in Everyday Life," *Surveillance & Society* 9.4 (2012), 378-393: 382.

39 Christopher Slobogin, "Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine," *Georgetown Law Journal* 102 (2014), 1721-1776

40 David Lyon, "Surveillance, Snowden, and Big Data: Capacities, consequences, critique," *Big Data and Society* (2014), 1-13; Sarah Brayne, "Big Data Surveillance: The Case of Policing," *American Sociological Review* 82.5 (2017), 977-1008.

Dataveillance; the panoptic sort; the surveillant assemblage; liquid, panvasive, and social surveillance; big data—all of these terms denote specific aspects of the modern surveillance environment. It is not merely that surveillance is a feature of our lives; it is that surveillance has defined our lives. Shoshana Zuboff writes in *The Age of Surveillance Capitalism* that modern capitalism runs off the data that we willingly provide it in exchange for its services:

> Surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioral data. Although some of these data are applied to product or service improvement, the rest are declared as proprietary *behavioral surplus*, fed into advanced manufacturing processes known as 'machine intelligence,' and fabricated into *prediction products* that anticipate what you do now, soon, and later. Finally, these prediction products are traded in a new kind of marketplace for behavior predictions that I call *behavioral futures markets*. Surveillance capitalists have grown immensely wealthy from these trading operations, for many companies are eager to lay bets on our future behavior.[41]

Our behaviors have become "surveillance assets," turned into "surveillance revenues," which are translated into "surveillance capital."[42] The very economic system itself relies upon surveillance, which feeds the "extraction imperative" of ever more supplies of raw material in the form of "behavioral surplus," or the data we provide by interacting with the services surveillance capitalism provides (Google search, social media, the products in the "Internet of Things").[43] The structure of surveillance relies on our participation to run smoothly.

But our participation, though given seemingly willingly, is also inevitable. In recent testimony before the U.S. Senate Committee on Banking, Housing, and Urban Development, Maciej Cegłowski, the founder of Pinboard, stated: "A characteristic of this new world of ambient surveillance is that we cannot opt out of it, any more than we might opt out of automobile culture by refusing to drive."[44] Surveillance capitalism affords "no exit, no voice, and no loyalty, only

41 Soshana Zuboff, *The Age of Surveillance Capitalism* (Cambridge, M.A.: Harvard University Press, 2019): 8.
42 *Id.* at 94.
43 *Id.* at 87. Haggerty and Ericson foreshadowed this argument twenty years ago, writing: "In a cybernetic world, surplus value increasingly refers to the profit that can be derived from the surplus information that different populations trail behind them in their daily lives" (Haggerty and Ericson, *supra* note 33, at 616).
44 "Privacy Rights and Data Collection in a Digital Economy: Hearing before U.S. Senate Committee on Banking, Housing, and Urban Development" 116 U.S. Cong. (May 2019)(testimony of Maciej Cegłowski).

helplessness, resignation, and psychic numbing."[45] Instead of Big Brother, we are faced with the indifferent "Big Other," the "sensate, computational, connected puppet that renders, monitors, computers, and modifies human behavior."[46] In this environment, we have given up what Zuboff calls our "right to a future tense"—the right to decide what we will do with our lives, or even with our next few hours, as we fall captive to "a panvasive digital architecture of behavior modification owned and operated by surveillance capital."[47]

What Zuboff and prior theorists comprehensively demonstrate is the profound inability of existing conceptions of privacy to cope with the issue of surveillance in the modern day. Against surveillance capitalism and the surveillant assemblage, the notion of the lone individual jealously guarding his private sphere seems woefully inadequate. Consent is meaningless in an environment in which individuals (a) cannot escape surveillance even if they wanted to, and, importantly, (b) do not *want* to escape surveillance, but rather actively participate in it. These facts make any conception of privacy focused on the individual and her powers of control utterly toothless against the powers of surveillance.

Surveillance scholars have noticed the vulnerability. David Lyon, accusing privacy of being "associated with possessive individualism, with property, and with a dubious notion of persons as autonomous agents,"[48] has written that privacy is "not the most significant casualty" of surveillance.[49] Another scholar has called it "chimerical" to believe that a "retreat into the private sphere" is a solution to ubiquitous surveillance.[50] And Zuboff herself is skeptical that current notions of privacy can do much to help us combat surveillance capitalism, writing: "If the past is

45 Zuboff, *supra* note 41, at 94.
46 *Id.* at 376
47 *Id.* at 332.
48 Lyon, *supra* note 27, at 7. He later bemoans the "loss of the social" in the privacy conception (174).
49 Bauman and Lyon, *supra* note 35, at 13.
50 Andre Mubi Brighenti, "Democracy and its visibilities," in *Surveillance and Democracy*, eds. Kevin D. Haggerty and Minas Samatas (London: Routledge, 2010), 51-68: 51. Intriguingly, Brighenti calls for abandoning the public/private divide in favor of conceptualizing the danger of surveillance in terms of its damage to the public, "visible" sphere, and hence to democracy (see esp. 59-64). This argument implies that a conception of privacy *in terms of* democracy—i.e., that which I offer here—helps to alleviate his concerns.

a prologue, then privacy, data protection, and antitrust laws will not be enough to interrupt surveillance capitalism."[51]

The diagnosis is too quick. Though such critiques hold water against a particular conception of privacy, we are not wed to this conception. And the political approach offers deep resources to meet the challenges of surveillance. As a preliminary note, it is important to clarify that locating privacy's value in the political realm does not imply that the only threats to privacy come from government or its agents. Indeed, corporate non-government surveillance, which is arguably more pervasive and threatening than government surveillance, has important antidemocratic implications.[52] In addition, the line between state and non-state surveillance is thinning, as governments increasingly make use of the data extracted by non-state actors, and government policy with regard to personal data sets the tone for corporations.[53] Sebastian Kubitschko notes, for example, that "government agencies are important secondary beneficiaries of surveillance capitalism as they routinely access and exploit flows of data for their own purpose" and often "directly offload the surveillance responsibility to private-sector operators" such as telephone and internet providers.[54] Thus, to articulate privacy harms as harms to democracy is not to ignore the diverse sources of privacy invasions, including "private" ones; rather, it is to attempt to register these diverse violations on the same political scale.

That "scale"—democracy—gives the political approach to privacy its initial foothold in addressing the behemoth of modern surveillance systems: it encourages thinking of privacy, itself,

[51] Zuboff, *supra* note 41, 486. In a lively earlier analogy, Zuboff writes: "Demanding privacy from surveillance capitalists or lobbying for an end to commercial surveillance on the internet is like asking Henry Ford to make each Model T by hand or asking a giraffe to shorten its neck" (192). Yet she leaves open the door for privacy to play a bigger role in the conversation if theorists undertake "a reframing of privacy discourse, law, and judicial reasoning."
[52] Julie Cohen notes, for instance, that the regulations covering government use of data are typically stronger than the regulations of private uses of similar data. See Julie Cohen, "The Inverse Relationship between Secrecy and Privacy," *Social Research* 77.3 (2010), 883-898.
[53] *Id.* at 113-114, discussing the impact of 9/11 on government privacy policy, and consequently on the regulatory clout of the FTC against private corporations. See, also, Julie Cohen, "What Privacy is For," *Harvard Law Rev*iew 126.7 (2013), 1904-1933: 1916.
[54] Sebastian Kubitschko, "The Role of Hackers in Countering Surveillance and Promoting Democracy," *Media and Communication* 3.2 (2015), 77-87: 80. In an acknowledgment that a political or social conception of privacy is useful for understanding surveillance harms, Kubitschko also writes that his understanding of privacy is "not… as a reinforcement of liberal individualism, but as a phenomenon critical for societal arrangements as a whole" (81).

as a *systemic* value, and not an individual one. What the foregoing review of surveillance literature reveals is that the effects of surveillance on modern democracies are structural. Yet the prevailing privacy conceptions locate the harm of degraded privacy primarily on the individual level, whether the individual's autonomy or capacity for intimacy or liberty of action or whatever. This "obsessive individualism" is what makes surveillance scholars skeptical that privacy is up to the task of addressing surveillance. David Philips and Michael Currey summarize the disjunction eloquently, writing that privacy discourse "has focused on the personal affronts associated with personal data collection—identity theft, high-tech 'peeping Tom'-ism, and annoying telemarketing calls" while "[at] the same time, it has ignored structural effects—the management of taste, increased inequity in market knowledge, and the creation of a society fractured into increasingly precise and exclusive market segments. The discourse has identified the victims as unrelated individuals, rather than as members of a social order."[55]

The political approach to privacy heartily embraces this critique. The harms from privacy invasions *are* structural harms, in that they are harms to the very political order itself. Though, of course, privacy violations are committed against individuals or groups of individuals, the argument of the previous chapter has shown that we should locate the danger of such violations in their capacity to undermine democracy, and not merely in how they impact individuals. In short, to the surveillance theorist who avers that the danger of surveillance is in its warping of entire social, political, and economic systems, the advocate of the political conception of privacy responds: the value of privacy can be located precisely in those systems. Protecting privacy means protecting what surveillance targets.[56] Under the political conception, to call for privacy in the face of surveillance is to challenge head-on the structural assault of the surveillant assemblage.

[55] David Phillips and Michael Curry, "Privacy and the phenetic urge: Geodemographics and the changing spatiality of local practice" in *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination*, *supra* note 37, 137-152: 147.
[56] In a 2014 report from the Human Rights Watch and the American Civil Liberties Union, the author wrote that the harms of surveillance affected a "cluster" of democratic rights, including "freedoms of expression and association, freedom of the press, the public's right to access information, and the right to counsel" (G. Alex Sinha, "With Liberty to Monitor All," *Human Rights Watch*, 28 July 2014: Accessed 17 May 2018 at: https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and)

Further, the articulation of the value of privacy in the political approach tracks the specific harms of modern surveillance. Consider identity. I have argued that privacy preserves the delicate processes by which individuals form their own identities, both by ensuring the integrity of the "role performance" that is important for the formation of subjectivity and by inhering in the dialectic between personal identity formation and external social categorization. Surveillance does violence to this process. Marwick writes, for instance, that the social surveillance of social networking sites leads to "context collapse," whereby individuals are expected to perform a variety of roles for a variety of audiences all at once, making any one role harder to fulfill.[57] This interrupts the playful, experimental process by which people develop an internal sense of who they are. But surveillance also interrupts the interplay between individual subjectivity and social identity by imposing categorization unilaterally from the outside, reducing the individual only to the relevant bits of external information necessary for the desired classification. As a result, "there is no dialogue between watcher and watched," but rather "categorization has become the dominant mode of identification."[58] This need to categorize is known as "social sorting," which "sorts people into categories, assigning worth or risk, in ways that have real effects on their life-chances."[59] Social sorting is a central goal of modern surveillance, and it is corrosive to normal identity-formation processes. By imposing identification from the outside, surveillance therefore contravenes the identities that individuals may wish to assert for themselves, poisoning a major organ the of democratic body.

Surveillance also threatens identity in a more subversive sense: by *creating* unauthorized new identities for individuals. One feature of modern surveillance is its capacity to separate the body from its information, and then to break this information into discrete data flows that are used to form "data doubles" of real individuals. This process is often used to assess the criminal or terrorist

57 Marwick, *supra* note 38, at 386-386.
58 Richard Jenkins, "Identity, surveillance, and modernity," in *Routledge Handbook of Surveillance*, eds. Kirstie Ball, Kevin D. Haggerty, and David Lyon (London: Routledge, 2012), 159-166: 164.
59 David Lyon, "Introduction" in *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination*, *supra* note 37, 1-12: 1.

risk of individuals. One author has compared the formation of data doubles to the formation of financial derivatives, calling such virtual identities "data derivatives": "Indifferent to the contingent biographies that actually make up the underlying data…, the data derivative is not centered on who we are, nor even on what our data says about us, but on what can be imagined and inferred about who we might be—on our very proclivities and potentialities."[60] Irma van der Ploeg argues that this informatization of the body requires a new "body ontology," such that violations of informational representations of us are equivalent to bodily violations.[61] Even if we do not follow van der Ploeg's logic—that our data *are* us in the same way our bodies are—it is clear that these data doubles *compete* with our actual identities, as they offer predictability and certainty instead of the uncertainty and instability of actual identity.

The effect of surveillance is thus that we lose control over our identity, as virtual versions of us are created without our knowledge, which then form the basis of decisions and categorizations that affect our actual selves. The data double claims to represents us, but only through the engineering of a third party and for the purpose of meeting the needs of that third party, whether a national security agency or a tech company. The separability and manipulability of identity that modern surveillance tactics have introduced require diverse resistance tactics. Toshimaru Ogura, for instance, calls for a "drastic transformation" of identity politics, praising modern developments such as "DJ culture, pirate culture in the Third World, or person-to-person (P2P) file exchange" which "form decentralized inter-subjectivity." These re-assertions of the slipperiness of identity have had the effect, Ogura writes, of "unconscious resistance against [the] certification politics of the surveillance-oriented society… [by remaining] as elusive as water running through one's fingers."[62]

[60] Louise Amoore, "Data Derivatives: On the Emergence of a Security Risk Calculus for Our Times," *Theory, Culture, and Society* 28.6 (2011), 24-43: 28. Amoore concludes eloquently: "The derivative risk form acts through us and the prosaic, intimate, banal traces of our lives, but yet it forgets us. As necessarily incomplete, complex, undecided people, it forgets us" (39).
[61] Irma van der Ploeg, "Biometrics and the body as information: Normative issues of the socio-technical coding of the body" in in *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination*, *supra* note 37, 57-76.
[62] Toshimaru Ogura, "Electronic government and surveillance-oriented society," in *Theorizing Surveillance: The Panopticon and Beyond*, *supra* note 37, 270-295: 292-293.

Surveillance thus has detrimental effects on the organic and social processes of identity formation that are at the heart of democratic politics. These effects hit at multiple levels: through its destruction of our ability to perform different roles for different contexts, its unilateral imposition of categorization—known as social sorting—and its wholesale creation of new, virtual identities disconnected to our actual stories and which become the locus of administrative and bureaucratic decision-making.[63] It is possible to try to articulate these harms merely at the level of the individual. But the political approach connects them to the health of the political system itself and thus confronts surveillance on equal terms.

Consider, also, the epistemic argument that lies at the heart of the political approach. I have proposed that privacy constitutes the epistemic veil that runs through democracy. This construction helps capture the unique danger of the predictive drive at the heart of surveillance: it seeks to know in advance what individuals will do or think or want, and thus to render the veil unnecessary.[64] Prediction supplants the responsiveness of democratic governance, instead becoming its own form of governance, a version of doxocracy that does not even need to poll the people because it claims to know in advance what they want. In the commercial realm, the predictive drive of surveillance is epitomized in the widespread use of the system of Customer Relationship Management (CRM), which "involves capturing and managing data generated by consumers as they select, purchase, and use products" in order to produce "statistical consumer profiles" that can be used to predict consumer behavior.[65] Uncertainty creates economic inefficiencies, as companies must plan for multiple contingencies; predictability, however, allows for a focused application of resources. As I've mentioned, the notion of the "modulated

[63] *Cf.* Ian Kerr and jennifer barrigar, "Privacy, identity, and anonymity," in *Routledge Handbook of Surveillance*, *supra* note 58, 386-394.

[64] "Automated control systems share a predictive orientation toward people; individual or group dispositions are rendered into statistical probabilities that can be acted on in advance or in real time, usually for the sake of institutional efficiency and commercial profit rather than social wellbeing. The systems seek to fix identities in advance for more effective control, regardless of the questionable ethics associated with acting on predictions, or actualizing such pre-dictions" (Torin Monahan, "Surveillance as governance: Social inequality and the pursuit of democratic surveillance," in *Surveillance and Democracy*, *supra* note 50, 91-110: 98-99).

[65] Kirstie Ball, Elizabeth Daniel, Sally Dibb, and Maureen Meadows, "Democracy, surveillance, and 'knowing what's good for you'," in *Surveillance and Democracy*, *supra* note 50, 111-126: 113.

democracy" that Julie Cohen has articulated trades precisely on this predictive drive of surveillance, which, by encouraging and incentivizing certain behaviors so as to better predict them, produces a "blunted" citizenry.[66]

But the danger is particularly acute when surveillance is utilized specifically in the political sphere. It does not take much adjustment to use the techniques of CRM to predict voter behavior instead of customer behavior; to segment the voting population as one segments a customer base; and to tailor partisan pitches the same way one would tailor advertisements. Indeed, many have documented that "the growing use of political consultants to conduct electoral campaigns has resulted in targeting votes through an expansive use of marketing techniques."[67] Priscilla Regan wrote presciently about how such segmentation of the voting population constitutes a "fragmentation of the body politic," making it impossible to treat citizens equally in their capacity as citizens alone.[68] Yet making predictions from surveillance data is *also* an attempt to circumvent the epistemic veil, and thus an attempt not only to know the contents of individuals' votes but to know whether they will vote at all. This epistemic veil upholds the integrity of democracy itself, providing the basis for the franchise and for deliberation. To evade it by predicting or influencing voter behavior is to attack the foundation of democracy.

Indeed, we have a ready example of the dangers of such tactics: the role of the data analytics group Cambridge Analytica in the 2016 U.S. Presidential Election. Martin Moore, in *Democracy Hacked*, recounts how Cambridge Analytica built a political campaign strategy on the basis of data pulled from individuals' Facebook accounts. With these data, the firm was able to tailor political messaging so as to encourage or discourage voting. It did so by

> building up detailed profiles of each individual, combining data on everything from basic demographic information, to browsing habits, to social life, to spend habits. It meshed this with primary data it collected through surveys and polling, and used all this to group people by their personality and by the issues they cared most about. Tailoring political communication for people

66 Cohen, *supra* note 53, at 1918.
67 Ball et al., *supra* note 65, at 114.
68 Priscilla Regan, *Legislating Privacy* (Chapel Hill: University of North Carolina Press, 1995): 227.

> based on their personality was, CA argued, much more likely to trigger a behavioral response than communication based on less intimate factors.[69]

This behavior is a deep perversion of the epistemic balance in a democracy. Made accessible to politicians and campaigners, voters are manipulated so as to achieve desired political outcomes. Moore writes that the purpose of such tactics is to appeal to the sub-rational behavioral impulses of individual voters, rather than to try to inform and persuade them. In other words, the goal is to circumvent deliberation and manipulate voting. Recognizing the role of privacy in upholding an epistemic veil between citizens and government—or those seeking political office—gives us a vocabulary for describing the anti-democratic harms of the forms of data-trawling that took place during the 2016 election.

To say that surveillance violates privacy, then, is not a trivial or insignificant claim, but rather one that, under the political approach, conveys the full gravity of the harms that the surveillant appendage can inflict. What is necessary is not to abandon privacy, but to re-imagine it. Indeed, privacy's continuing relevance is implied, though not explicitly acknowledged, in many scholars' work. Zuboff, for instance, while cool on the prospects of privacy for addressing surveillance, nonetheless writes that the first step in the creation of behavioral surplus is an "incursion" into private lives, thus implying that protections against such incursions can nip the process at the bud.[70] She concludes her argument with a plea for a "right to sanctuary" in the modern day—a solution similar to the need for privacy as "inaccessibility" that I have described. "The real psychological truth," she writes, "is: If you've got nothing to hide, you are nothing."[71]

Kubitschko likewise writes of anti-surveillance hacker groups like the Chaos Computer Club, founded in 1981, which see "media technologies and infrastructures as political phenomena relevant to society at large." Such groups counteract surveillance largely by "building, supporting, and maintaining alternative infrastructures that enable more secure and anonymous ways of

[69] Martin Moore, *Democracy Hacked* (Oneworld Publications, 2018): 60-61.
[70] Zuboff, *supra* note 41, at 139.
[71] *Id.* at 479.

communicating outside the realm of data-hungry, profit-oriented assemblages."[72] In short, such groups actively create private—that is, epistemically inaccessible—spaces. Simone Browne, writing on the racialized development of surveillance in the United States, introduces the concept of *dark sousveillance*, or "the tactics employed to render one's self out of sight." In response to antiblack surveillance, Browne writes, enslaved people and black Americans "co-opted, repurposed, and challenged" surveillance tactics like lantern laws, branding, and slave passes in order to make themselves less visible, and therefore less subject to control.[73] What these writers share is an approach to countering surveillance that employs the type of privacy I have described in this chapter: one that relies on physical and epistemic inaccessibility and that maintains that current surveillance practices are *illegitimate* attempts to access individuals. In so doing, they call into question the entire system that produces and legitimates such surveillance practices.

The political approach to privacy offers numerous advantages for theorists who are frustrated with the current state of privacy discourse. By drawing on our shared political commitments, it offers an easier justificatory path to passing legislation. It sidesteps the theoretical difficulties entailed in a reification of the public/private dichotomy and abandons the allegiance to consent and the obsessive individualism of liberal privacy conceptions. And it updates privacy to meet the challenges of the modern world: namely, the spread of big data and the pervasive, systemic effects of surveillance. Privacy is a democratic, and thus structural, value. To protect it is to protect the integrity of our political systems.

4.2 Defusing privacy critiques

For almost as long as there have been defenses of the right to privacy, there have been critiques of it. What remains to be seen from the political conception is how it rises to meet the

[72] Kubitschko, *supra* note 54, at 83.
[73] Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015). See, also, Simone Browne, "'Everybody's Got a Little Light Under the Sun'," *Cultural Studies* 26.4 (2012), 542-564.

challenges of those who believe we are better off without privacy—or without privacy as we currently understand it. Some believe that privacy doesn't cover any rights or interests that aren't already better captured by other concepts, such as liberty rights or rights over the body. I will call this the *reductionist* critique, as it maintains that privacy reduces down into other core human interests. Others have argued that concerns over privacy evince an obsessive individualism that fails to appreciate the social needs and community ties that form the foundation of human well-being. I will call this the *communitarian critique*. Finally, the most trenchant critiques of privacy have come from certain feminist authors, who have argued that the public/private distinction has served to mask oppression and deny women political agency. I will address this as the *feminist critique*. In the remaining sections, I aim to show how the reconceptualization of privacy as an important element of democratic governance helps to defuse these critiques, which predominantly rely on an outdated liberal conception of the private sphere.

4.2.1 The reductionist critique

In "The Right to Privacy," Judith Jarvis Thomson argues that the so-called "right to privacy" can really be explained by other, already existing rights. Thomson's argument has become the standard bearer of reductionist critiques of privacy, all of which are some form of the contention that there is nothing distinctive about privacy that merits protection, as every instance of a privacy violation is also an instance of some other rights violation. If this is true, Thomson and others contend, then we have little reason to extend protections on the basis of *privacy*, for privacy ultimately does nothing other than add an additional label to basic rights we already recognize as such.

Thomson focuses in her critique on two primary rights that she claims cover the vast majority of privacy violations: property rights and self-ownership rights. She takes as her prototypical examples of privacy violations the man who possesses something valuable in a safe (in her article, a very good piece of pornography) and a couple who is having an argument inside

their house. Thomson argues that we have the intuition that the man who does not want us looking at his picture in his safe has a *right* to keep us from looking at the picture—either by breaking into the safe or by training some x-ray machine on the safe from afar—and, further, that even if we were *able* to see the picture, we would be wrong for looking without his permission. Similarly, we have the intuition that listening in on the couple having an argument inside their home (perhaps with the aid of an amplifier) violates their rights.[74]

But Thomson notices that our intuitions in these cases are parallel to our intuitions about property rights and what she calls "rights over the person." That is, we are bothered by the picture-in-a-safe example because we recognize that the man has property rights in the picture, and these rights include controlling who looks at it; and we are bothered by the couple-having-an-argument example because we recognize that people have rights over their own bodies, and these rights include deciding who will listen in on our intimate conversations.[75] When it comes to informational privacy, she argues that "there is no such thing as violating a man's right to privacy by simply knowing something about him"; however, "we have a right that certain steps shall not be taken to find out facts, and we have a right that certain uses shall not be made of facts."[76] That is to say, simply *knowing* information about someone—even highly personal information—is not wrong; but it is wrong to take certain (coercive/penetrative) actions to acquire this information, and it is wrong to use this information in certain ways (e.g., to cause distress, to blackmail, etc.). But these are wrongs that we can articulate without resorting to a concept of privacy. Thomson concludes:

> The question arises, then, whether or not there are any rights in the right to privacy cluster which aren't also in some other right cluster. I suspect there aren't any, and that the right to privacy is everywhere overlapped by other rights… If I am right, the right to privacy is 'derivative' in this sense: it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy. Indeed, the wrongness of every violation of the right to privacy can be explained without ever once mentioning it.[77]

[74] Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs* 4.4 (1975), 295-314: 296, 298-301.
[75] *Id.* at 299-303.
[76] *Id.* at 307.
[77] *Id.* at 310, 313.

Thomson's critique is powerful, but we have reasons to resist her conclusion. First, though she applies a reductive analysis to the right of privacy itself, she is expansive when it comes to her conception of other rights. Property rights, she seems to argue, naturally include prohibitions on looking at other people's things, but this broad conception of property rights is neither obvious nor justified, especially as the traditional understanding of property rights concerns merely the formal possession or legal ownership of material objects, not the treatment they may receive at the hands of others. Even if she is right, she has certainly not provided an argument for it. A similar argument may be made for her supposed "rights over the person," a category so broad as to include my right to control my own body parts, my right to not be touched, and my right to not be listened to (but only if I don't want to be listened to). Thomson could *in theory* be entirely correct to argue that our intuitions in the couple-having-argument example can be explained by appeal to something like a right over the person, but she has not provided a reason for why we should prefer this justification over something like a right to privacy.

Second, we should question Thomson's analysis of our concerns over personal information. Thomson wants to argue that our intuitions against snooping and spying are really intuitions about the methods by which personal facts are learned and the potential consequences of learning this information, and that these intuitions further derive, respectively, from our recognition of rights over the person and from rights we possess in other areas (not to be caused mental or physical distress, not to be coerced, etc.). Simply *knowing* information, she argues, cannot be a violation of a right. This conclusion is similarly unjustified. Imagine, for instance, a scenario similar to those that Thomson uses: I overhear a man loudly having a conversation in a public space about sensitive personal information he learned about an acquaintance by training a listening device on the acquaintance's house. We can all agree that this man violated some right of our acquaintance's, whether the right to privacy or the right over the person or whatever. Thomson would argue, however, that *I* have violated no right, because I have not violated my acquaintance's right over her person, even though I now know the exact same sensitive information as the man

who spied. But this also seems intuitively wrong. The fact that I now know this information—which the acquaintance clearly did not want others to know—would strike many as a violation of *something*, a violation that imposes some sort of duty on me, maybe that I ought to confess to this acquaintance that I now know this information (even though I know it through no fault of my own), or, less stringently, a duty not to spread this information. The precise parameters of the wrong are not as important as the fact that we can isolate something wrong about the situation that does not overlap with property rights or rights over the body.[78]

Finally, we should resist the use of rights language at all when it comes to discussing privacy. At the heart of Thomson's critique is the idea that if every violation of a supposed right can be explained in terms of other rights violations, then the right in question is useless, ephemeral, or derivative. It is precisely because in every violation of privacy we can point to a violation of some other right that Thomson claims we have reason to do away with this notion of privacy rights altogether. I have already written of how the concept of privacy is ill-suited to the language of rights, and that if we are to use rights language it should be to frame privacy as a type of civil or political right that we possess because of our membership in a political body, and not a moral right akin to self-ownership rights. Thomson's casual assumption that privacy, if it is to be valuable, must be considered this type of right limits the reach of her critique. If we reject this (liberal, rights-based) framework for understanding privacy, then Thomson's arithmetic approach to tallying privacy violations appears warped and inappropriate.

This deficiency in Thomson's privacy conception is particularly concerning in a modern era typified by the types of surveillance I have discussed above and the difficulty of centering consent in privacy management. For, in Thomson's world, even if we were to find the elusive

[78] Julie Inness, in her critique of Thomson's argument, points out that the existence of a separate category of wrongs we call "privacy violations" indicates that, even if privacy violations happen to overlap with other types of violations, there is *something* distinctive about them that merits a separate label: "The very fact that certain property and self-ownership rights can be divided off and placed in the privacy cluster suggests that there is a common factor shared by these diverse rights (Julie Inness, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1996): 37). Inness also points out that property rights and rights over the body don't perfectly overlap with our privacy intuitions (33-34), a point which is echoed by Thomas Scanlon in his rebuttal to Thomson's argument. See Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975), 315-322: esp. 318-319.

"right to privacy" subsisting in the liminal space between various more established rights, we would still handle that right essentially as we do other rights, i.e., by waiving it in certain circumstances and asserting it in others. As we have seen, this approach to privacy protection fails to account for both the difficulty of achieving informed consent in a complex data environment and the inviting, co-operative nature of surveillance and data collection. Under a reductionist understanding such as Thomson's, a world in which millions of individuals daily waive their rights to privacy should cause us little concern, as the central normative burdens have all been met. We have good reason to resist this logic.

4.2.2 The communitarian critique

Given the theoretical debates between liberals and communitarians in the 1980s and 90s, it is not surprising that one of the main lines of attack against privacy advocates has been formulated by communitarian theorists and others alienated by the "atomistic" conception of the individual that seems to sit at the heart of liberalism. The conception of privacy that communitarians therefore have in mind is, it must be said, an avowedly liberal conception, with significant differences from the political conception that I have advanced in this thesis. Nonetheless, it is worth outlining the communitarian critique in order to demonstrate why it fails against the political reconceptualization of privacy that I have outlined.[79]

Communitarians argue that the protection or promotion of privacy amounts to a fetishization of the "private" aspects of life—intimacy, solitude, individuality—at the expense of public virtues and communal ties.[80] In a precursor to this type of argument, Phil Slater wrote in *The Pursuit of Loneliness: American Culture at the Breaking Point* that the human desires for community, engagement, and dependence have been frustrated by an American culture that prizes

[79] Some of the authors here may not identify as communitarian, but I consider their critiques and commentaries to be broadly consonant with the communitarian approach to political thinking, and in particular its aversion to excessive individualism.

[80] See, *e.g.*, Richard Hixson, *Privacy in a Public Society* (New York: Oxford University Press, 1987): "The right to privacy is more than a legal concept; it is also a religious tenet, a cult, a fetish" (xv). Hixson later writes that privacy has received "too much rhetorical attention" since Warren and Brandeis's 1890 article.

"individualism" above all else.[81] Americans "seek a private house, a private means of transportation, a private garden, a private laundry, self-service stores, and do-it-yourself skills of every kind," yet, after demanding such privacy, "feel more and more alienated and lonely when we get it."[82] The costs of over-valuing privacy spill over into the public realm: not only do we pursue autonomy to the detriment of our well-being, but we allow private values—like authentic emotional expression—to become the currency of all human interactions, ignoring the unique demands of public engagement.[83]

This latter argument is taken up more fully in *The Fall of Public Man*, where Richard Sennett frames the problem of contemporary society as two-fold: (1) the "impersonal" issues of the public realm fail to "arouse much passion" on their own, and (2) it is only by falsely treating public matters as "matters of personality" that we begin to take any interest in them.[84] This need to privatize public matters stems from a "tyranny of intimacy," in which the standards of intimate life (emotional authenticity, particularity, personality) become the standards of all realms of life.[85] As a result, both realms are corrupted—the expansion of the private attenuates its unique pleasures, and the "public man" ceases to exist.[86] Sennettt does not consider the argument that proper attention to and care of the private sphere can actually enable a healthier and more participative politics; rather, public and private are "correctives to each other."[87] The public man must leave the comfort of the private realm in order to confront the harsh and impersonal realm of public affairs.

Amitai Etzioni, the leading communitarian theorist of privacy, adopts a similar, if slightly more nuanced, position. Etzioni argues that the "basic tension" between a desire for privacy and the need for public safety and public health—what he calls the "common good"—has been

81 Phil Slater, *The Pursuit of Loneliness: American Culture at the Breaking Point* (Beacon Press, 1970): 5.
82 *Id.* at 7.
83 *Id.* at 148.
84 Richard Sennett, *The Fall of Public Man* (London: Penguin, 1978): 6.
85 *Id.* at 337-338.
86 *Id.* at 267: "As belief in the public domain has come to an end, the erosion of a sense of self-distance, and thus the difficulty of playing in adult life, has taken one more step," Sennett writes. "A person cannot imagine playing with his environment, playing with the facts of his position in society, playing with his appearances to others, because these conditions are now part and parcel of himself."
87 *Id.* at 98.

resolved too much in favor of privacy.[88] Examining in detail a host of different policies, from the HIV testing of pregnant women to the government's ability to read encrypted private messages, Etzioni argues that an excessive regard to privacy has led to sub-optimal policy outcomes.[89] Conceiving of privacy as a right capable of "trumping" other interests throws out of wack the "balance" that Etzioni believes any community must strike between community concerns and individual freedom.[90] As a result, Etzioni bases his legal justification for privacy protections on the Fourth Amendment of the U.S. Constitution, which explicitly authorizes breaches of privacy by allowing for "reasonable" searches and seizures.[91] Only the Fourth Amendment, in Etzioni's view, embodies the necessary balance between privacy protections and the promotion of the common good.[92] As a consequence of this approach, Etzioni can draw a distinction between protection from public *scrutiny* (the heart of Fourth Amendment protections) and protection from public *control* (the typical conception of decisional privacy, embodied in the reproductive rights cases such as *Roe v. Wade* and *Eisenstadt v. Baird*).[93] Etzioni calls for limiting privacy—understood as exemption from public scrutiny—in order to enable a less onerous regime of government control and coercion. Where the state steps back, the "third realm" of community mores and expectations steps in to shape individual action: "[P]ublicness reduces the need for public control, while excessive privacy often necessitates state-imposed limits of private choices."[94]

88 Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999): 3.
89 In the case of the privacy of medical records, Etzioni argues that an obsession with government snooping has blinded Americans to the dangers of profit-making "privacy merchants"—or "Big Bucks" instead of "Big Brother" (*id.* at 182).
90 *Id.* at 184, 199.
91 The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV: https://constitution.findlaw.com/amendment4.html.
92 Etzioni, *supra* note 88, at 206-207.
93 *Id.* at 209. To illustrate the difference, Etzioni points out that though the government can *control* what one cannot carry (drugs, contraband) and can carry (flares, spikes) in one's car, it nonetheless cannot search any car it pleases without good cause (210-211). Recall, also, the difference between publicness as visibility and publicness as representation that Arash Abizedah has discussed in the context of the seventeenth-century religious turmoil (see chapter one, note 85).
94 *Id.* at 214.

This explication of the communitarian criticism of privacy may hopefully reveal the resources of the political conception to meet them. First, it is clear from these writings that the real bogeyman is not privacy, but rather individualism, which these writers largely conflate. Slater, for instance, conceives of his task as centrally an indictment of the American individualist ethos, a product of which is our obsession with privacy. And Etzioni blames the rise of "radical individualism" for the current state of privacy policy, which he counter-balances constantly against the common good.[95] But the political conception of privacy is not accurately conceived of as an individualistic conception, whose purpose is to exalt individual autonomy and weaken political decision-making. Rather, the political conception treats privacy as an integral ingredient in the process by which fair and democratic decisions are made. What these writers are critiquing is, therefore, the specific liberal conception of the private, which I have gone to great lengths to criticize as well. Indeed, Etzioni's reliance on the liberal conception to make his case against more privacy protections is illustrated by his use of scholars like Stanley Benn, who represents the gold standard when it comes to liberal privacy argument.[96] If, then, privacy is not necessarily about shoring up the liberal notion of autonomous individuals freeing themselves from communal obligations, much of the communitarian critique loses its bite.

There is ample evidence, moreover, that many communitarians adopt a perspective on privacy that is congenial to the political conception. Etzioni offers his own version of the argument for privacy's normative dependence, writing:

> [P]rivacy is a contingent concept. Although some vague notion of privacy exists in most, if not all, societies, the specific way we treat privacy in our law and culture is a recent phenomenon, and one that has already been recast at various times. In other words, privacy is hardly a near-sacred concept that cannot be reformulated.[97]

[95] Etzioni, *supra* note 88, at 188.
[96] See chapter two, note 32.
[97] Etzioni, *supra* note 88, at 188. Etzioni also writes later of individualistic privacy conceptions that they can be "best understood in the historical context in which they arose," pointing to thinkers like Locke, Smith, and Mill as major influences on the development of the current conception of privacy (194).

Etzioni thus acknowledges what I would call the normative dependence of privacy and likewise blames liberalism for many of the current problems with modern privacy conceptions, though his solution is to shrink and limit privacy, rather than to reimagine it. His definition of privacy is, furthermore, much like the Legitimate Access Definition that I have offered: "I suggest that a sound communitarian treatment of privacy views it as the realm in which an actor… can *legitimately* act without disclosure and accountability to others."[98] His explicit inclusion of a standard of legitimacy is similarly tailored to take into account the way in which privacy is socially constructed.[99] These elements of Etzioni's argument suggest strong congruencies between his approach to privacy and the political approach.

Despite these congruencies, however, the communitarian critique goes wrong in several places. Even in acknowledging the importance of socio-historical context in understanding privacy, Etzioni falls into the trap of binarism that typifies his liberal foes: the choice he presents us with is either privacy or the common good, but not both. In portraying privacy and the collective good of the community as opposite poles on a linear spectrum, Etzioni extrapolates a trade-off that holds only in certain circumstances—such as the HIV testing of pregnant mothers—to hold for the fundamental relationship between privacy and common political life.[100] Yet if privacy's value lies not in its ability to promote individual autonomy, but in its role in maintaining healthy democratic processes, then the antipodal relationship between privacy and the common good cannot be so easily maintained; the former enables the latter. In denying the usefulness of a public/private dichotomy, Etzioni replaces it with another one, perhaps equally as obfuscatory. Even if we adopt Etzioni's limited definition of the common good as public health and public safety, the problem for his argument persists. For how does a democratic society properly allocate

98 *Id.* at 196 (emphasis in original).
99 "In contrast, the definition of privacy provided here has a normative element because it includes an exemption from scrutiny and, in some instances, the requirement to close to view or hearing those elements considered normatively appropriate or inappropriate by the relevant society" (*id.* at 197).
100 "Privacy cannot be extended to the point where it undermines the common good; conversely, duties set to maintain social order cannot be expanded to the point where they destroy privacy" (*id.* at 199).

resources for public health and safety other than through democratic procedures, which themselves are bolstered by proper privacy protections? On any cut, therefore, Etzioni's conviction that the common good and privacy are opposite values that must be "balanced" does not hold up.

The inability to countenance the ways in which privacy is crucial for a thriving public realm also burdens Sennett's account. Perversely, Sennett ends up reifying the public/private dichotomy by arguing that each sphere has its proper place and boundaries, even though most theorists who draw such stark lines do so for opposite objectives.[101] To argue that the public man is and must be different from the private man in order to engage in politics is to ignore that much of what is political takes place in private, or at least in private spaces. The impersonal, calculating public man of Sennett's conception is simply one type of political actor; the political dissident who organizes in discreet locations is also one; the young activist finding her voice by posting pseudonymously in online forums is another; and so is the young gay man hiding the fact that he is visiting his boyfriend from his conservative parents. All of these individuals are engaging in the hard work of cultivating their voices and identities to pursue political objectives, and all of them rely on the sanctuary of privacy to do so. Space away from the public is important for public action in modern democracies. Ignorance of—or inattention to—this feature of privacy blunts Sennett's critique that the "attributes" of the private realm are expanding into and therefore weakening the public realm. Insofar as the public sphere is indeed in crisis, the culprit cannot be said to be privacy *per se*, but only, at best, a very particular conception of it.

The communitarian critics of privacy have much to add to the conversation about the purpose of political life and the attenuation of public bodies. And their criticisms of liberal privacy conceptions are welcome contributions to the debate over privacy and its role in modern life. In this regard, they have something in common with the project I have pursued here. Nonetheless,

[101] Sennett, *supra* note 84, at 18, 91, 98.

in seeking to redress the harms of an individualistic privacy ethos, they have failed to account for the flexibility and adaptability of privacy, nor have they considered a reconceptualization of privacy that fashions it anew to meet the challenges of the current era. Privacy can enrich the public life that communitarians and their sympathizers so deeply prize. We don't need less of it; we need more.

4.2.3 The feminist critique

The stiffest challenges to the pro-privacy regime have come from feminist authors, most notably Catharine MacKinnon, Susan M. Okin, Carol Pateman, Patricia Boling, and Anne Phillips. Though these scholars write from diverse perspectives and do not agree in all aspects of their work, they collectively offer several distinct and mutually-reinforcing lines of argument questioning the value of privacy and challenging the public-private distinction. A faithful reconstruction of their work will reveal, however, the fundamental compatibility between the feminist approach to privacy concerns and the political conception of privacy. What emerges from the following analysis is that these feminist authors were writing against a liberal conception of the private sphere, and not any conception of privacy whatsoever. As such, a reconceptualization of privacy as a political value may alleviate feminist concerns about the role of privacy in future democratic regimes.

"The personal is political." This phrase—trotted out in virtually any discussion of second-wave feminism—is often used as a blunt instrument in discussions of feminist political objectives, serving either to praise or to vilify feminists and their allies, depending on one's perspective. Despite its overuse, it nonetheless serves as a useful organizing principle for the discussion of the feminist critiques of the public-private dichotomy. The sentence itself is a challenge to the liberal conception of the political order. If what is personal (i.e., intimate, private, domestic) is a political matter, then what can be said of the notion of private prerogative at the heart of the liberal project? What guarantees can be constructed against state interference? Is there any role for privacy at all,

or must it be "exploded," as MacKinnon memorably put it?[102] Beyond merely challenging the liberal division of human life into normatively distinct public and private spheres, however, the mantra "the personal is political" expresses several distinct convictions.

The first is that the conditions that obtain in the private sphere can and do constrain women's capacity to participate in the public sphere. As such, concern for equal political rights necessitates concern for private barriers to participation. Utilizing Walzer's conception of complex equality—that inequality in one sphere should not translate into inequality in another—Okin notes that "the division of labor within most families raises psychological as well as practical barriers against women in all other spheres."[103] The expectation that wives or mothers will take on the bulk of domestic work raises the costs of participation in other spheres of life, including public life. It is therefore an insufficient response to feminist concerns to argue that women enjoy equal legal rights; as Phillips argues, "democracy in the home is a precondition for democracy abroad."[104] The liberal public-private dichotomy thus presumes that individuals can come neutrally to the public sphere, and that disparities in public power cannot stem from private injustices. In questioning this presumption, feminist writers have sought to open the door to applying the same level of scrutiny to private inequalities that would normally be applied to public inequalities.

Second, feminists maintain that gender domination in private relations requires scrutiny not just because it constrains participation in the public sphere, but also because such domination is itself a worthy object of political attention. Domestic battery, marital rape, incest, the expectation of limitless unpaid domestic labor: these all present questions of justice and equality on par with concerns over redistribution, civil rights, and other more common public concerns. Yet they often escape theoretical attention because of their identification as "private" concerns, outside the

[102] Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, M.A.: Harvard University Press, 1989): 191.

[103] Susan M. Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989): 132. See also 116-117: "According to the separate spheres criterion, the family and personal life can be regarded as just *only if and insofar as* it contains no inequalities, at least among its adult members, that translate into inequalities in other spheres. But to hold the family to this standard is clearly a challenge to the public/domestic dichotomy, according to which marriage and the family are supposedly self-regulating, beyond the range of state intervention."

[104] Anne Phillips, *Engendering Democracy* (Pennsylvania State University Press, 1991): 96.

purview of traditional theories of justice. "Observe," MacKinnon writes, "that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of privacy doctrine's coverage."[105] In this sense, the personal is political in that it raises political questions, and not simply in that personal matters can have reverberating consequences outside the private sphere. The family is a site of power; it is therefore a site of politics.[106] To drape it in the shroud of the private is to render it impervious to the transformative and disruptive power of political action.

Third, feminists have sought to draw attention to the inter-connections between the public and private, and specifically to the ways in which the construction of the private is a result of specific political decisions. The determination of what counts as "private" and what counts as "public" is itself a contingent decision, and not a natural state of affairs. This realization, feminists contend, saps the normative power from the private sphere. Okin, for instance, argues that "to the extent that a more private, domestic sphere does exist, its very existence, the limits that define it, and the types of behavior that are acceptable and not acceptable within it all result from political decisions."[107] Others have been quick to note the role of liberalism in construing the two spheres as separate and hermetically sealed. Pateman observes that "the apparently universal criteria governing civil society are actually those associated with the liberal conception of the male individual, a conception which is presented as that of *the* individual," and, as such, "feminist criticism is primarily directed at the separation and opposition between the public and private spheres in liberal theory and practice."[108] MacKinnon describes the liberal vision of the private as "that which is inaccessible to, unaccountable to, unconstructed by, anything beyond itself" and therefore "defined by everything that feminism reveals women have never been allowed to be or

105 MacKinnon, *supra* note 102, at 194.
106 Okin, *supra* note 103, at 128; Phillips at 101-102.
107 Okin, *supra* note 103, at 129.
108 Carol Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford: Stanford University Press, 1989): 119, 118.

to have."[109] In contrast, feminists emphasize "the imbrication of public and private life":[110] what occurs in the realm of the private can generate political demands, and decisions in the public realm shape and delimit the private.[111]

Finally, the feminist claim that the personal is political advances a broader conception of the public sphere than is allowed under liberalism. In questioning the public-private dichotomy, feminists draw attention to the democratic potential of traditionally private activities like club meetings and women's associations. The delimiting of the public sphere to specific, institutionalized forms under liberalism is, according to feminists, a stoppering up of the democratic impulses latent in any polity. By encouraging the application of a democratic—and therefore, presumably, public—lens to a broader range of activity, feminists seek to refashion the political order:

> When the small collective that produces a feminist newsletter struggles to work in democratic fashion, its members are learning the kind of confidence, competence, and respect for the opinions of others that will help them change for the better any other organization to which they subsequently belong. In this sense, every democratized forum in civil society is a kind of building block out of which we get democracy as a whole; and the more there are, the better things will be.[112]

What can be seen, therefore, is that the common interpretation of "the personal is political" as a rallying cry for the abolition of privacy altogether is a straw man. Though some more radical feminists did indeed mean to abolish the concept of privacy, many second-wave feminists were careful to separate their critiques of the *ideology* of the private sphere from the much stronger claim that privacy *per se* is problematic.[113] Pateman, for instance, writes that the feminist critique is aimed

[109] MacKinnon, *supra* note 102, at 190.
[110] Joan B. Landes, "Introduction," in *Feminism, the Public and the Private*, ed. Joan B. Landes. Oxford Readings in Feminism (Oxford: Oxford University Press, 1998), 1-17: 3.
[111] Pateman, for instance, writes that "a proper understanding of liberal social life is possible only when it is accepted that the two spheres, the domestic (private) and civil society (public), held to be separate and opposed, are inextricably interrelated; they are two sides of the single coin of liberal-patriarchalism" (Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *The Public and Private in Social Life*, eds. Stanley I. Benn and Gerald F. Gaus (United Kingdom: Croom Helm Ltd., 1983), 281-303: 284-285).
[112] Phillips, *supra* note 104, at 118.
[113] *Id.* at 95. See, also, bell hooks and Tanya McKinnon, "Sisterhood: Beyond Public and Private," *Signs* 21.4, Feminist Theory and Practice (Summer 1996), 814-829: esp. 822-824.

at "two interrelated dimensions of the structure of liberal-patriarchalism," and should not be taken to suggest that "no distinction can or should be drawn between the personal and political aspects of social life."[114] Likewise, Okin admits that "both the concept of privacy and the existence of a personal sphere of life in which the state's authority are limited are essential."[115] And Boling goes even further, arguing that, often, "the personal is *not* political, is not public, and is not anyone else's business."[116] Instead, Boling takes aim at the "ideological function" of privacy, arguing that the liberal reification of the public-private dichotomy prevents us from translating personal concerns into political concerns in any meaningful or systematic way.[117]

It may also be clear at this point that these feminist challenges to the traditional conception of the private sphere largely dovetail—rather than conflict—with the political conception of privacy I have been developing thus far. The feminist authors discussed here have been acutely aware of the normative dependence of privacy, though they did not use this term. In portraying privacy as an aspect of liberal ideology, they recognize that the concept of privacy can be repurposed to suit different normative frameworks, and thus can absorb and amplify the weaknesses of these frameworks. The dominance of liberalism in shaping privacy norms concerns feminists; it also concerns me. Rescuing the private from the grip of liberalism was a primary goal of feminists; it is also a goal for me. De-emphasizing the public and private dichotomy and underscoring the interrelatedness of the public and private are major feminist aims; they have also animated this thesis. Recognizing that the line between the private and public is contingently drawn, and that its placement is less important than the reasons for drawing the line, are key feminist insights; they are also insights I have tried to emphasize. Indeed, the political approach to privacy can be seen as a feminist project in that it seeks to make good on the call to reimagine the

114 Pateman *supra* note 108, at 133.
115 Okin, *supra* note 103, at 128.
116 Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca: Cornell University Press, 1996): x.
117 *Id.* at 13, 58.

relationship between the public and private in a way that provides genuine opportunities for equal political participation.

In short, once the feminist critique of privacy is understood more properly as a critique of a particular *conception* of privacy (and not the concept itself), it becomes a boon to the political approach, rather than a challenge. A feminist reimagining of the private sphere would entail de-emphasizing the primacy of domestic privacy (at least insofar as it hinders the uncovering of domestic abuse), ensuring the privacy of solidarity and political-action groups, safeguarding feminist expression from both private and state oppression, and encouraging spaces where gender-atypical identities can develop and flourish.[118] It would seek to ensure that privacy really does entail protection from oppressive or totalizing influences, and that it doesn't constitute an arbitrary shield around the household or the individual that serves no purpose other than to reify an arbitrary divide. These are also the goals of the political approach to privacy.

Yet the political approach builds where the feminist critique tears down. Deconstructive critique is an important aspect of reconceptualizing a concept as immense as privacy, but the prescriptive and forward-looking resources of the political approach offer more to theorists and policymakers than the largely negative tactics of some feminist privacy critiques. Though many feminist authors carefully maintain that they would make space for a re-imagined public and private, their focus on tearing down the liberal ideology of privacy leaves little room for expanding on the potential benefits of privacy to democratic futures. This thesis has been an attempt to make that case. A careful accounting of the deficiencies of the liberal privacy regime is strengthened by an articulation of what could take its place. To re-appropriate MacKinnon's terminology, the political

[118] Whether a feminist approach to privacy would cover a woman's "right to choose" whether to have an abortion is something about which feminists disagree. See MacKinnon, *supra* note 102, for the argument that the privacy rubric is unsuited to ensuring reproductive rights; see Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, N.J.: Rowman and Littlefield, 1988) for the argument that decisional privacy rights are an important feminist objective. Allen's scholarship is part of a corpus of feminist work on privacy that seeks to preserve and transform it, rather than tear it down. See, also, Jean L. Cohen, "Democracy, Difference and the Right to Privacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (New Jersey: Princeton University Press, 1996), 187-217; Jean Bethke Elshtain, *Public Man, Private Woman* (Princeton: Princeton University Press, 1981); and Linda C. McClain, "Reconstructive Tasks for a Liberal Feminist Conception of Privacy," *William and Mary Law Review* 40.3 (1999), 759-794.

approach to privacy seeks to replace the ideology of liberalism with the ideology of democracy—to incorporate the private sphere into a future of widespread political participation. Re-imagining privacy is not just possible, as feminists admit, but critical for political change. Privacy is a tool to help ensure democratic rights for all in the twenty-first century.

Furthermore, the intersections of sex with race, class, and gender-identity help to draw attention to the limited resources of second-wave feminism to meet the task of re-constructing privacy. It is no doubt true that women of all races have experienced domination in the home. But a potential recourse to the public sphere is only available to some (mainly white, mainly well-off) women; and for many (mainly non-white, mainly poor) women, working "outside the home" often means working inside someone else's.[119] For those who face entrenched discrimination in the public sphere, a recourse to the "political" is not always an attractive option. Black feminist authors have observed the uncertain consequences of politicizing the private, as the public sphere has infrequently been sensitive to the needs of black women or men. Rather, they have emphasized the power of private places, like the home, to nurture and protect those who face dehumanization in public. bell hooks, for instance, has written of the "radical political dimension" of what she calls the "homeplace" for African-Americans:

> Throughout our history, African-Americans have recognized the subversive power of homeplace, of having access to private space where we do not directly encounter white racist aggression. Whatever the shape and direction of black liberation struggle (civil rights reform or black power movement), domestic space has been a crucial site for organizing, for forming political solidarity. Homeplace has been a site of resistance.[120]

Here, hooks cannot be accused of upholding a liberal vision of the home as the "man's castle" or of ignoring feminist critiques of gender domination in the home. Indeed, she laments that "black people daily perpetuate sexist norms that threaten our survival as a people."[121] Rather, her aim is

119 See, e.g., Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge, 2002): esp. 45-67, on the experience of black women in paid domestic labor and the differences between black and white women's approach to the home; see, also, Susan Boyd, "Introduction," in *Challenging the Public/Private Divide: Feminism, Law, and Public Policy*, ed. Susan Boyd (Toronto: University of Toronto Press, 1997), 3-33.
120 bell hooks, *Yearning: race, gender, and cultural politics* (Boston: South End Press, 1991): 47.
121 *Id.* at 48.

to signal the deficiency of any response to a liberal privacy conceptualization that emphasizes *solely* the liberatory potential of public scrutiny, without also acknowledging the subversive potential of privacy. Relying on or re-purposing the private to nurture resistance to domination has long been, in hooks' estimation, an important strategy in black survival. Iris Marion Young likewise writes about the "deeply ambivalent values" of the home, arguing that despite the power of feminist critiques of the home, "the idea of home also carries critical liberating potential because it expresses uniquely human values."[122] It might therefore be said, following Young and hooks, that for some women the personal is political precisely because it *remains* personal.

The feminist critique of privacy, therefore, must be understood not just as targeted at a single conception of privacy—rather than privacy as a whole—but also as a critique from a particular, and by no means comprehensive, feminist perspective. Feminist authors who have questioned the normative weight placed on the public-private dichotomy have greatly contributed to weakening the grip of liberalism on privacy conceptions. Their theoretical work is important for clearing the way for new normative frameworks. But I hope here to move beyond a purely critical perspective, offering new resources and insights for those who believe the private can and must be utilized to guarantee a democratic future for all.

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A common bogeyman emerges from these various critiques: a conception of privacy as a individualistic, possessive right, a tool in the liberal citizen's arsenal to block political and community engagement in equal measure. And, indeed, if this is what privacy is—if this were the essence of privacy *as such*—then such critiques would be far more damaging. As we have seen, however, this conception of privacy is neither universal nor attractive, despite its current theoretical hegemony. By abandoning it, we disperse the cloud of critiques that have developed

[122] Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997): 134.

around privacy, which mistake a particular articulation of privacy for the concept of privacy itself. We can grant the cogency of these critiques against the liberal conception of privacy without granting that they would undermine newer, more imaginative re-interpretations of the concept of privacy. Indeed, in unpacking the reductionist, communitarian, and feminist critiques, we become newly aware of the inadequacy of older privacy paradigms for capturing the value of privacy today. Such critiques only heighten the need to reimagine privacy.

I have attempted to offer just such an reimagination in the political approach to privacy. Privacy faces a coterie of challenges, most especially in modern forms of surveillance and in the inadequacy of the consent paradigm for privacy regulation. It should be a precondition for adopting any new conception of privacy that it provide resources for meeting these challenges. In this chapter I have demonstrated that the political approach to privacy provides such resources for democracies concerned with a basis for aggressive privacy regulation in the wake of extensive social and technological changes. If privacy is defined as space away from what is public or common, and the public or the common are defined in part by the democratic institutions which secure the conditions of our political participation, then articulating privacy's role in supporting these democratic institutions is a vital step in modernizing privacy. We are free to do this because of privacy's normative dependence—the normative flexibility that sits at the heart of privacy—which directs our attention precisely to these institutions and political commitments in order to fill out the normative content of the concept of privacy. The stakes are high. But the way forward is clearer than we might suppose.

Conclusion

We are now in a position to take a second look at van Eyck's *Arnolfini Portrait*, the painting with which this thesis began. The tensions I highlighted— is the private separate from the public, or reliant on it? Does it constrain (the wife), or enable (the man)?—can now be more specifically described. The private world requires a public one from which it can emerge. The window in the painting, which allows light from the outside world to illuminate the private interior of the bedroom, can be seen as symbolizing this oppositional relationship. Further, whether privacy represents a constraint on one's freedom or a precondition of it cannot be determined from within the bounds of the concept of privacy itself. Normative dependence orients privacy, like a compass along the lines of a magnetic field, in the direction of our other normative commitments. The wife's position by the bed and the man's position by the window indicate less about the nature of privacy than they do about the way it has been used in the service of other interests. We can—and should—reimagine privacy as we see fit.

This thesis has been organized into two parts. In the first part, "Conceptualizing privacy," I have sought to provide the linguistic and theoretical tools necessary for understanding what type of concept privacy is. I have argued that privacy lacks any internal normative structure because it is defined always in opposition to a pre-existing public world. Opposition to the public—and, varyingly, to what is in public view, to what is common, to what is representative, and so forth—makes privacy into a repository of our other commitments, and not an independent normative commitment itself. This feature of privacy I have called normative dependence. We see it at work in various historic reformulations of what "the private" is, in interpretations of history that seek to essentialize a certain relationship between private and public, and in the bewildering array of competing conceptions and definitions of privacy in the modern day. To reprise Raymond Carver, "what we talk about when we talk about" privacy is, I've argued, the mix of other, more foundational commitments that form the normative landscape of our lives.

In the second part, "Toward a new conception," I have argued that the normative dependence of privacy frees us to consider an explicitly political conception of privacy. This conception of privacy is political both in its choice of theoretical tools (the institutions of our shared political commitments) and in its abstraction from the comprehensive worldviews (like liberalism) that typically infuse privacy. I have argued for the use of a political conception specifically in relation to democracy, demonstrating privacy's capacity to enable core democratic functions like the creation of identity, the freedom of expression, and the freedom of association. I have also argued that privacy can be seen as an epistemic precondition of democracy, providing a justification for the franchise and for democratic deliberation. Finally, I've shown that a political conception is more broadly endorsable than conceptions based on particular philosophical commitments, that it does not reify the public/private dichotomy, that it moves beyond choice and consent, that it addresses the challenges of modern surveillance, and that it defuses prominent critiques of privacy.

Throughout this thesis—and particularly in the second part—I have sought to position the political approach to privacy as a pragmatic step forward in the privacy debate. It is a conception of privacy that is fit for purpose. Given the complex and internally contradictory array of commitments that could potentially inform an understanding of privacy, no single conception could capture all relevant intuitions. The political conception is no exception to this. Our interests in privacy cannot always be political ones. But if our goal is to provide a common basis for a broad array of privacy protections, I argue that the political conception of privacy meets this goal better than other approaches.

Two brief, additional comments are in order before concluding. First, the adumbration of the political conception I've given here remains incomplete. I've explicitly chosen to demonstrate how the core commitments of a (liberal) democracy can be used as a normative framework to understand the value of privacy. The benefit of this approach is that it can be applied across a broad spectrum of institutional variation. Privacy advocates in the U.S., Europe, Taiwan—

anywhere that shares these basic commitments—can sign on to the argument I have provided. But we do not need to limit ourselves merely to the most universal iteration of the political conception. If we are to use our shared political commitments to understand the value of privacy, specificity can only help the case. Democracies differ. Honoring and using that difference is an important component of the political approach.

In the context of the United States, for instance, a political approach to privacy can make use of the peculiar institutional structures of a federated republic.[1] Federalism, in particular, offers attractive resources for re-imagining privacy. First, it is a structural feature of the political environment. Unlike rights, which attend to individuals, federal guarantees are properly about the distribution of power and authority in a polity, balancing the efficiency of centralized command with a regard for localized authority.[2] To interpret privacy as a feature of federalism would thus highlight the ways in which privacy acts as a structuring force, much like federalism, rather than the ways privacy can be utilized by individuals to pursue particular ends. It directs attention to the environment in which privacy is deployed, rather than to the individuals who are affected by it. This could prove fruitful for future privacy protections. As Cohen has recently written, "detaching privacy from figures [i.e., individuals] and reorienting it toward environmental conditions opens up spaces of operational possibility that a narrower focus on subjects forecloses (or has enabled us to ignore), even as the benefits of such an approach redound to those subjects."[3]

Second, federalism foregrounds power. Broadly understood, federalism seeks to either agglomerate power from several distinct units, to decentralize power from one unitary government, or to balance power between each entity, depending on the initial conditions.[4] In the United States specifically, a federal system has classically been understood to be a compromise between

1 For a comparative guide to federalism, which looks outside the U.S., see Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: University of Toronto Press, 2015).
2 Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, D.C.: Brookings Institution Press, 2001), 9-31.
3 Julie Cohen, "Turning Privacy Inside Out," *Theoretical Inquiries in Law* 20.1 (2019), 1-31: 21.
4 Preston King, *Federalism and Federation* (London: Croom Helm, 1982): 28-56.

individual states and the federal government. Yet whether or not the classical understanding of federalism is still appropriate to modern realities, federalism still, in whatever iteration, focuses attention on power.[5] As Austin has remarked, a focus on power helps to address current issues with the notice-and-consent paradigm.[6] Gaining access to another confers power. Regulating the exercise of that power by, for example, mandating its responsible use or prohibiting certain exploitative uses (e.g., by implementing stringent rules on data handling that do not turn on an individual's giving consent), is a promising path forward in privacy regulation.

Finally, federalism helps to motivate the anti-totalizing impulse of privacy. In this thesis, I've shown how privacy can protect deviant identities and promote dissent—preserving the "difference" in democracies. Such capacities are analogues of federalism's structural commitment to institutionalizing diversity.[7] "The genius of federation," Michael Burgess has written, "lies in its infinite capacity to accommodate and reconcile the competing and sometimes conflicting array of diversities have political salience within a state."[8] Federalism has traditionally sought to realize this objective via the institutional separation of powers, granting authority to local units to pursue agendas at odds with the central government's. Yet institutional separation—if it even retains any purchase—may no longer suffice to achieve federalism's objectives. The immense capacity of the U.S. federal government and its private-sector partners to collect and use data on individual citizens has skewed the balance of power between localities and central authorities. Privacy, then, might be seen as a "new federalism": an opportunity to disperse power in much the same way as federalism used to, making use of data protection laws (instead of constitutional divisions) to stymie the ability of a central government to accrue power to itself and flatten local diversity.

5 See, *e.g.*, Heather Gerken, "Federalism 3.0," *California Law Review* 105 (2017), 1695-1723. Gerken critiques traditional accounts of federalism emphasizing co-sovereignty or co-autonomy, yet nonetheless re-describes the relationship of states to the federal government as the "*power* of the servant" (my emphasis)(1704).
6 See chapter four, note 21.
7 Gerken, *supra* note 5, at 1710-1714. Gerken argues that federalism, by providing "different platforms and different forms of advocacy for would-be dissenters," supplements the First Amendment's guarantees (1712).
8 Michael Burgess, "Federalism and Federation: A Reappraisal," in *Comparative Federalism and Federation: Competing Traditions and Future Directions*, ed. Michael Burgess and Alain Gagnon (Toronto: University of Toronto Press, 1993), 3-14: 4.

Such thoughts are preliminary, but they offer an example of the avenues for further theorizing that the political approach to privacy opens up. More work should be done on the interaction between different political traditions and privacy. Federalism is but one possible area for future work; the difference between parliamentary and presidential democracies might be another, and the role of privacy in non-democratic regimes yet a third possibility. Each of these avenues represents an opportunity to reflect on the interaction between privacy and politics and to articulate context-sensitive recommendations for privacy policy. Each of them represents an opportunity to practice, in Waldron's terms, "*political* political theory." And each of them is a quiet rebuke to the presumption that sound privacy policy requires finding some pre-political, universalistic foundation for protecting privacy. It is in the messy, changeable, and contingent world of our political arrangements that we find justification for withdrawal from the public eye.

The political approach thus also makes trans-national privacy critique more sensitive and targeted. Much has been made of the abrogation of privacy in China.[9] There is, perhaps, much to criticize. But the critique—if it is to be made—should take into account the deep differences in political organization between China and the West. If the stability of the regime is more important than freedom of expression, if individual identities are seen as dangerous to social cohesion, and if technocratic rule is preferred to representative democracy, the use for privacy diminishes significantly. It may be the case that we wish to denounce such an arrangement. But the message of this thesis is that this argument is properly about our fundamental normative commitments, and not about privacy. Those who wish to criticize China's approach to privacy have, therefore, two options. They can either critique it from the inside—demonstrating that China's privacy policies undermine its own political institutions—or they can criticize the political commitments that give rise to certain privacy decisions. What this thesis makes clear is that importing a universal privacy standard from outside and imposing it on a polity makes little theoretical or practical sense.

[9] See, for instance, Josh Chin and Clément Bürge, "Twelve Days in Xinjiang: How China's Surveillance State Overwhelms Daily Life," *The Wall Street Journal*, 19 December 2017. https://www.wsj.com/articles/twelve-days-in-xinjiang-how-chinas-surveillance-state-overwhelms-daily-life-1513700355.

My final comment is to indicate how a political approach might help shape policy. Unsurprisingly, a political approach to privacy does not make notice-and-consent the lodestar of good privacy policy. Though consent has a role to play, we should not be afraid of ostensibly "paternalistic" regulations that strip individuals of their ability to consent to certain privacy intrusions. To use Cohen's terms, we ought to be concerned about protecting "privacy-preserving boundaries and conditions," rather than enabling individual choice over privacy.[10] Adopting this perspective would de-emphasize regulating the terms of consent—as in the case of the GDPR—and instead focus attention on the design of digital technologies, ensuring that they do not require or incentivize privacy-invasive features.[11]

One example of design-focused privacy innovations is the use of so-called "differential privacy," which introduces mathematical noise in datasets to prevent the personal identification of data subjects.[12] Another example is "federated learning" (a further indication of the parallels between federalism and privacy), which enables machine learning to proceed without the need for centralized training data by keeping such data on individual devices rather than stored centrally on the cloud.[13] More broadly, wise privacy regulations would place the regulatory emphasis on the entities seeking to use data, rather than on the data subjects who are the traditional focus of privacy regulation. The political approach thus recommends legislation aimed at regulating business behavior rather than at increasing consumer choice.[14] These tools are, of course, specific to the data-protection aspect of a larger commitment to privacy, but they are increasingly important in a data-heavy world.

10 Cohen, *supra* note 3, at 24.
11 See, *e.g.*, Woodrow Hertzog, *Privacy's Blueprint: The Battle to Control the Design of New Technologies* (Cambridge, M.A.: Harvard University Press, 2018).
12 Kobbi Nissim, Thomas Steinke, Alexandra Wood, Mark Bun, Marco Gaboardi, David R. O'Brien, and Salil Vadhan, "Differential Privacy: A Primary for a Non-technical Audience," working paper in *Privacy Tools for Sharing Research Data* Project, Cambridge, M.A.: Harvard University, 3 March 2017.
13 Brendan McMahan and Daniel Ramage, "Federated Learning: Collaborative Machine Learning without Centralized Training Data," *Google AI Blog*, 6 April 2017. Accessed 23 July 2019: https://ai.googleblog.com/2017/04/federated-learning-collaborative.html.
14 For a recent example of such legislation, see the "Data Care Act of 2018": U.S. Congress, Senate, *Data Care Act of 2018*, S.3744, 115th Cong., 1st sess., introduced in Senate 12 December 2018, https://www.congress.gov/115/bills/s3744/BILLS-115s3744is.pdf.

On the legal side, the political approach would, for instance, encourage grounding constitutional arguments for privacy in First Amendment guarantees of freedom of speech and association, in the model of *NAACP v. Alabama*. Traditional Fourth and Fifth Amendment arguments should not be abandoned. But if my analysis here is correct—if rights to free political expression and free association require guarantees of privacy—then the First Amendment is fertile ground for arguments in favor of a constitutional right to privacy. Of course, there is no reason to throw out privacy laws currently on the books that do not neatly align with a political approach to privacy, such as the commonly accepted four privacy torts.[15] We pass and maintain laws for a variety of partial or particular reasons. But for legal advocates looking for a solid constitutional basis for the establishment of privacy rights in the United States, I suggest that constitutional provisions that concern participation in the political process might be a promising new path.

However, design, regulation, and legal reasoning cannot be the full picture. Just as the practice of democracy requires cultivating certain habits, the practice of privacy will require a commitment to educating a new generation in the importance of privacy. We teach young students about democracy, liberty, civil rights—why not also privacy? Not only would this commitment to education help to foster privacy-loving attitudes in the individuals who will eventually craft legislation, sit on review boards, and chair companies, but it would also ensure that we commit to articulating and re-articulating the value of privacy *for us*. And as the normative commitments and principles by which we live slowly change over time, we will be forced to demonstrate anew the role of privacy in those commitments.

Sun Microsystems CEO Scott McNealy's famous quip twenty years ago—"You have zero privacy anyway. Get over it."—may seem anathema to privacy advocates.[16] But McNealy was on

[15] See William L. Prosser, "Privacy," 48 *California Law Review* (1960), 383-423. *Cf.* Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," *New York University Law Review* 39 (1964), 962–1007; and Robert C. Post, "The Social Foundations of Privacy: Community and Self in Common Tort Law," *California Law Review* 77.5 (1989), 957-1010.

[16] Polly Sprenger, "Sun on Privacy: 'Get Over It,'" *Wired*, 26 January 1999. Accessed 23 July 2019: https://www.wired.com/1999/01/sun-on-privacy-get-over-it/.

to something. There has been, or must be, *a* death of some kind. It is the death of certain conceptions of privacy, forged and refined many years ago, annealed to endure long past their use, ill-suited to the demands of the present age. The expiration of these conceptions represents not the end of privacy itself, but of a former version of it. In its place we can imagine newer, stronger conceptions, ones that will equip us to attack the anxiety and malaise of the current moment. The death of one type of privacy can enable the birth of another. But this transition is neither automatic nor pre-ordained. It will take theoretical creativity, bold thinking, and historical perspective to make the shift. With luck, a political conception of privacy might chart the course forward—strengthening the public, respecting the private, and preserving the balance between the two.

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