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Roberts, A.J.

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Privacy in the Republic

Andrew Roberts

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ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College voor Promoties ingestelde commissie, in het
openbaar te verdedigen in de Agnietenkapel
op maandag 2nd december 2019, te 16:00 uur
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- Privacy in the Republic: An Introduction -

This thesis addresses two questions. The first is ‘why should republicans value privacy?’ or, put differently; ‘how does privacy serve republican aims?’ The second is ‘to the extent that republicans consider privacy to be valuable, how can it be secured in a manner that is consistent with republican ideals of participatory self-government and political equality?’

There is a substantial literature on privacy, and a growing body of contemporary writing on republican political theory. However, those who have contributed to the latter have paid little attention to the way in which privacy (or a right to privacy) might serve republican aims. Consequently, while the privacy literature encompasses various liberal perspectives, it lacks a well-developed republican account of the value of privacy. My aim in what follows, is to provide such an account. It seems to me that it might prove to be useful in various respects. First, it provides a coherent normative foundation for some of the ideas about power and privacy that can be found in the existing privacy literature. It will enable us to distinguish and make sense of the competing claims of those who say that our thinking about privacy and its value ought to be guided by the idea of autonomy, and those who argue that problems of social and political power ought to frame the way that we think about privacy. Second, in demonstrating how privacy might serve republican ends of freedom and self-government, it will take republican thinking in a new direction, and fill a significant void in the republican literature. Third, it brings a new (republican) perspective and conceptual framework to bear on privacy problems. Republican thinking provides us with concepts and a vocabulary that better capture the nature of the harm caused by certain losses of privacy than any found in the existing privacy literature.

I will show that an account of privacy grounded in the republican conception of freedom – an absence of domination - can provide us with an explanation as to why loss of privacy is harmful in circumstances that will prove to be problematic cases for liberals; problematic in the sense that liberals will agree that privacy is valuable, and that loss of privacy is harmful, but will find it difficult to explain why this is the case. But the aims of the republican account of privacy set out in this work are more extensive.

A satisfactory account of privacy should not limit itself to identifying why privacy might be valuable. It also needs to attend to the further question of how it can be secured. Drawing on broader republican ideas about the relationship between freedom and self-government, I will suggest that citizens can only be assured of a degree of privacy consistent with non-dominated status, through participation in the political processes in which the norms that have some bearing on their privacy will be determined. By virtue of the control that they are able to exercise through such participation, they can be viewed, and will come to see themselves, as the authors of these norms. In such circumstances, interference with privacy that is in accordance with those norms ought to be seen as an act that gives effect to their collective will, rather than an imposition. However, this claim only holds, if all citizens have been afforded these participatory opportunities, and the mode of participation is one through which it is possible for them to influence and exercise some degree of directional control over decisions that have implications for their privacy. These issues will be a central concern in subsequent chapters, and in view of this, what follows ought to be considered a democratic theory of privacy.

There are, of course, other accounts of privacy that are properly described as democratic accounts. These tend to focus on the value of privacy as a necessary condition of democratic participation. But they stop short of any claim that citizens can only be assured of privacy through such participation. I will argue that privacy is a condition that individuals can only secure for themselves as part of a co-operative enterprise involving their fellow citizens. The account of privacy offered here, recognizes that privacy is not only a pre-condition for participatory self-government, but also that this model of democracy constitutes the only means through which the citizens of a political community can secure conditions of privacy for themselves. Because citizens will have an awareness of this state of interdependence, and that broad participation requires a guarantee of privacy for all, each will have an interest in ensuring that it is secured not only for themselves, but also for their fellow citizens. Republican citizens will take privacy to be a common and a collective good, and this will give rise to a distinctive conception of the right to privacy – a right that is held in common, and collectively claimed and determined.

Before I set about the task of elaborating these ideas, I need to acknowledge that there will be some who will think that my approach is flawed from the outset, and that

any attempt to provide a republican account of privacy is misguided or redundant. Those who think it misguided might point to republicanism's historical association with militarism and with a narrow conception of citizenship that resulted in certain social groups – women and those who did not own property, for example – being excluded from political decision-making.¹ In light of this, they may claim that it cannot provide the basis of an attractive contemporary political programme.² We can assume that by extension, they would also say that it can neither provide the basis of an appealing account of the value of privacy, nor a blueprint for the design of institutions that will ensure proper account is taken of the interests of all citizens in determining the boundary between the public and private spheres.

This challenge can be met by pointing out that it is possible to understand the core ideas of classical republicanism in ways that are consistent with contemporary social values. In other words, bringing the central concepts embodied in the republican tradition to bear on current problems does not necessitate any commitment to the prejudices associated with this tradition in the distant past. As I have already suggested, what I will offer here, is an account of privacy that takes seriously, the equality of *all* members of a political community, and recognises that each ought to be able to participate and have a meaningful say in political decision-making that has a bearing on their privacy.

A second contention of critics, is that there is nothing distinctive about republicanism. The claim here is that republicanism is indistinguishable from liberalism, or at least strands of thinking found in some versions of liberalism. If this is correct, then I appear vulnerable to the claim that what is on offer in the chapters that follow, is not a republican account of privacy at all, merely another - perhaps refined - liberal account. It is perhaps worth pointing out that the ideas found in much contemporary republican writing do not stand in an antagonistic relationship with those that are central to liberal thinking. Indeed many of those who have contributed to the modern revival of republican ideas³ acknowledge that the two traditions occupy

¹ See generally, I. Honohan, 'Freedom as Citizenship: The Republican Tradition in Political Theory', (2001)

² The Republic 7, 14, who points out that Rousseau's republicanism explicitly excluded women from citizenship.

² See for example, R. Goodin, 'Folie Republicaine', (2003) Annual Review of Political Science 55.

³ Goodin, *ibid.*, suggests that the revival of interest in classical republican ideas can be traced back to the work of Quentin Skinner's in *The Foundations of Modern Political Thought* (1978: CUP) and JGA Pocock,

much common ground, some preferring the label 'liberal-republicanism'.⁴ Some point to a common ancestry, Maurizio Viroli claiming for example, that 'from a historical point of view liberalism owes to classical republicanism its most valid doctrinal principles', and that 'liberalism can be considered an impoverished or incoherent version of republicanism, but not an alternative to republicanism.'⁵ But two of the most influential modern republican thinkers, Quentin Skinner and Philip Pettit, claim that what distinguishes republican and liberal political traditions is the way in which liberty or freedom – the core value of both traditions of political thought - is conceptualised.

Pettit suggests that 'no matter which form liberalism takes, it contrasts with republicanism on how freedom is to be understood, a value to which each approach gives a prominent place.'⁶ The liberal conception of freedom is taken to be an absence of interference or threat of interference,⁷ and is contrasted by both Pettit and Skinner with the republican understanding of freedom as a condition of non-domination. Republicans claim that the idea of freedom as non-interference fails to recognize that a person can be constrained in her choices in the absence of any interference or threat of it. She will suffer some diminution in her freedom not only where there is interference, but also where another has uncontrolled power to interfere with her choices; dominating power. Any choice that she is in a position to make will be conditional – subject to the benevolence or approval of the other. She is free to choose, only to the extent that the other permits it. There is a loss of liberty in such circumstances, but one that is not accounted for by the idea of freedom as non-interference.

Pettit observes that for republicans, 'the real enemy of freedom is the power that some people may have over others, whereas on the liberal understanding, asymmetries in interpersonal power are not in themselves objectionable.'⁸ But his claim that

The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975: Princeton University Press).

⁴ Notably, C. Sunstein, 'Beyond the Republican Revival', (1988) 97 Yale Law Journal 1539; R. Dagger, Domination and the Republican Challenge to Liberalism, in J. Christman and J. Anderson (eds), *Autonomy and the Challenges to Liberalism*, (2005: CUP); R. Dagger, *Civic Virtues*, (1997: OUP). See also, W. Kymlicka, Liberal Egalitarianism and Civic Republicanism: Friends or Enemies?, in A. Allen and M. Regan (eds.), *Debating Democracy's Discontents: Essays on American Politics, Law, and Public Philosophy*, (1998: OUP).

⁵ M. Viroli, *Republicanism*, (1999, New York: Hill and Wang), p.61.

⁶ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (2012: CUP), p.11.

⁷ P. Pettit, *Republicanism: A Theory of Freedom and Government*, (1997: OUP), p.50, while acknowledging that liberalism is 'a broad church', suggests that freedom has been conceived as non-interference by many who occupy positions across the spectrum of liberal thought. See also, Q. Skinner, *Liberty Before Liberalism* (1998: CUP), p.84, who claims that the key assumption of classical liberalism is that 'force or the threat of it constitute the only forms of constraint that interfere with liberty.'

⁸ Pettit, above n.6, p.11.

republicanism can be distinguished from liberalism on the basis of the way in which each conceptualises freedom, has been challenged. A common criticism is that Pettit is strategically selective in the examples that he draws from liberal writing about freedom, ignoring some liberal thinkers who appear attentive to the problem of potential interference.⁹ Others argue that far from being a radical departure from the idea of freedom as non-interference, the concept of freedom as non-domination is a logical extension of it. Goodin, for example, claims that:

‘A liberal concern about one’s freedom from interference should logically extend, equally, to a concern with security of one’s freedom from interference. Historically, liberals may have been negligent (or worse) on this score. But logically, liberals can (and, by the internal logic of their own principles, should) be concerned with the resilience of the liberty that they champion as is any republican.’¹⁰

Of course, liberalism could be many things that it currently is not. David Dyzenhaus claims that, when challenged by those advancing alternative political ideologies as the solution to some perceived flaw in liberal thinking, liberals tend to point to some strand of liberal political thought that at some point in the evolution of liberal ideas has been attentive, however fleetingly, to those matters.¹¹ The problem is internalized, prompting a shift in liberal normative inquiry, and the development of the relevant strand of thinking is seen as a way of seeing off the challenge. When making this observation, Dyzenhaus had in mind the liberal response to the communitarian critique, but it is a pattern that can be found in liberal responses to republican ideas – republicanism does not offer anything that cannot be found in more or less developed form (or accommodated) in liberal thinking. As a counter to this, some – including Viroli, whose view, you will recall, is that liberalism is the underachieving and underdeveloped offspring of republicanism – will say that ideas liberals claim for themselves were, as a matter of history, derived from the doctrines of classical republicanism.¹²

⁹ See, for example, C. Lamore, ‘Liberal and Republican Conceptions of Freedom’, in D. Weinstock and C. Nadeau (eds.), *Republicanism: History, Theory and Practice*, (2004: London, Frank Cass) pp.107-8.

¹⁰ Goodin, above n.3, 61. See also I. Carter, ‘How are Power and Unfreedom Related?’, in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory*, (2008: Blackwell Publishing); M. Kramer, ‘Liberty and Domination’, in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory*, (2008: Blackwell Publishing).

¹¹ D. Dyzenhaus, ‘Rand’s Legal Republicanism’, (2010) 55 McGill Law Journal, 491,496. See, H. Pauerstuder, ‘Liberalism, Perfectionism and Civic Virtue’ (2001) 4(3) *Philosophical Explorations* 174 for an example of this tendency.

¹² See Honohan, above n.1, 15, noting that ‘significant republican ideas were subsumed in different forms into liberal, socialist or nationalist thought.’

I do not intend to enter the fray on the broad question of whether republicanism offers a distinctive set of political ideas. To engage with it would distract me from what I set out to do, which is to provide an account of privacy grounded in what I (and many others) take to be republican ideas.

This brings me to a matter about which it would be prudent to say something here. 'Republicanism' is a polysemantic term. As Iseult Honohan points out, there are 'almost as many hues of republican thought as there are of liberal.'¹³ I think that it will help the reader if I provide, at the outset, a broad outline of what seems to me to be the most appealing version of republicanism, the values of which will provide us with normative foundations for thinking about privacy and its value.

I. Privacy and What Version of Republicanism?

We have already seen that freedom is a core value for both republicans and liberals. But just as the way in which it is conceptualised is said to enable us to distinguish these two traditions of political thought, the circumstances in which it is said to be *realized* enables us to make an initial distinction between two strands of republican thought. The origins of one of these can be traced back to Athens and the ideas of Aristotle, and the other to the Roman republic. For our purposes, the significance of these two traditions lies in the view that each predominantly takes of participation in political life and its relationship with freedom. For Aristotle, political participation is a form of positive freedom. As Buttle puts it, 'the city is the centre of the citizen's moral life and it is by participating in the life of the city that citizens exercise their moral life.'¹⁴ Political participation is a form of positive freedom; an end in itself. This can be contrasted with the ideas about freedom and participation found in the Roman republic and the writing of Cicero. Cicero explains that individuals will be more successful in pursuit of their own ends if they work co-operatively. Their own well-being is dependent both on the well-being of others, and the health of the state. Here participation rather than being synonymous with the idea

¹³ *Ibid*, p.7. See also S. Besson and J. L. Marti, 'Law and Republicanism' in S. Besson and J. L. Marti (eds.) *Legal Republicanism: National and International Perspectives*, (2009: CUP), at p.5 who observe that there is no agreement on how many streams of republican thought exist, and observe that attempts have been made to distinguish number of versions: civic republicanism, Aristotelian republicanism, neo-Roman republicanism, neo-Athenian republicanism, socialist republicanism, communitarian republicanism and liberal republicanism.

¹⁴ N. Buttle, 'Republican Constitutionalism: A Roman Ideal', (2001) 9 *Journal of Political Philosophy* 331, 340. See also e.g. Pocock, above n.3; Cass Sunstein, above n.4; F. Michelman, 'Law's Republic', (1988) 97 *Yale Law Journal*, 1493. For an overview of this strand of republican thought, see A. Tomkins, *Our Republican Constitution*, (2005: Oxford, Hart).

of freedom, is considered to be instrumental to its realization. Participation in political life is the means through which individuals can be assured of their freedom.¹⁵ The common thread in both traditions of republican thought is an idea from which Honohan says all republican arguments spring – ‘a sense of the ineluctable interdependence of human beings, whose survival and flourishing depends on the kinds of social frameworks they inhabit, and who have common, as well as separate and conflicting, interests.’¹⁶

The form of republicanism that I will use as a normative framework for the account of privacy developed in the chapters that follow, is that which considers freedom to be something that is realized *through*, rather than *in*, political participation. I will take the view that only through participation in the political decision-making processes in which the norms that govern their shared life are determined, can citizens secure for themselves a resilient form of freedom – freedom as non-domination. Because among modern republican writers, Phillip Pettit is the most systematic thinker on the idea of freedom as non-domination, I will draw heavily on those parts of his work that explicate it. I will part company with him, however, on the issue of self-government and what is required by way of popular participation in political decision-making in order to secure conditions of freedom as defined by him.

Allusions to Athenian and Roman versions of republicanism are useful, for as Honohan points out, they foreshadow an important difference in emphasis in contemporary republican ideas. There were significant differences in the concept of citizenship and its relationship with political participation in the two republics. For Aristotle and the Athenian republic, citizenship was determined not by status, but rather by a person’s capacity to participate in political life – a capacity to rule, and be ruled.¹⁷ To have this capacity (and to be worthy of citizenship), one would have to possess ‘the intellectual virtue of rational deliberation... and the moral virtue of justice.’¹⁸ For Athenian republicans, freedom was secured through direct deliberative participation in political decision-making by citizens of equal status. It was through such deliberation that citizens realised the common good that they shared as members of a

¹⁵ See Honohan, above n.1; Q. Skinner, *Liberty Before Liberalism*, (1998: CUP).

¹⁶ Honohan, *ibid.*, 7.

¹⁷ Aristotle, *The Politics*, (1981: Penguin), p.181.

¹⁸ Buttle, above, n.14, 339.

political community. In the Roman republic, citizenship was a status acquired by those considered to be freemen, such persons being those who possessed legal rights, including, property rights.¹⁹

The Roman republic was less egalitarian, more aristocratic, less democratic and inclusive. As Wirszubski notes, 'self-government was not part of the ideal of Roman citizenship.'²⁰ This is not to say that Roman republicans saw no value in citizens' participation in the affairs of the republic. Cicero recognized the interdependence of citizens. Citizens could only advance their own interests by working co-operatively with others, and such co-operation was dependent both on the well-being of others, and of the institutions of the state. However, while participation in political life was considered virtuous, it was the existence of laws - to which all were subject - and a mixed constitution, in which competing institutions checked the political power of one another, that provided a guarantee of freedom. McCormick points out that Cicero believed the common good was best served by an assembly of the republic's wisest and most virtuous men, deliberating over and deciding the laws that ought to govern life in the republic.²¹ It was thought popular participation in politics should be confined to involvement in elections that determined which of the republic's 'best men' would constitute the assembly.²² Cicero's republicanism, claims McCormick, was an aristocratic republicanism. The Athenian form of government, in which freedom was thought to be secured by citizens' participation in political decision-making, was viewed with suspicion by Cicero. Direct democracy was thought to carry with it a risk of chaotic government and mob rule, which could in turn, threaten the stability and continuing existence of the republic.

II. A Progressive Form of Republicanism

These early republican ideas can be traced through the writing of Machiavelli, Harrington, Rousseau, Madison and others, to the work of contemporary republican thinkers. While acknowledging that modern republican writers owe a significant debt to those who have undertaken this work, I suggest that it is not necessary for our

¹⁹ Buttle, *ibid.*

²⁰ C. Wirszubski, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate*, (1960: CUP), p.14.

²¹ J. McCormick, *Machiavellian Democracy*, (2011: CUP), p.143.

²² *Ibid.*

purposes to undertake an extensive historical overview of the development of republican ideas. The ground we have covered so far enables me to explain that the version of republicanism that provides the normative framework for our thinking about privacy, combines elements of both Roman and Athenian republican thought. Pettit's neo-Roman model of republican government provides us with a conception of freedom that offers significant new insights on the value of privacy. However, his ideas about the extent and modes of political participation that will be sufficient to ensure popular control, and to realize conditions of freedom as non-domination, are unlikely to appeal to those who are concerned about the power some have to determine where the boundary between the public and private spheres is drawn, and how much privacy citizens will have.

In arguing that we should understand freedom in terms of non-domination, and that freedom is best secured by a mixed constitution of checks and balances, and the rule of law, Pettit aligns himself with Roman republican thinking. So too in his suggestion that citizens' ex ante participation in political decision-making be limited to participation in the election of representatives who will make decisions on behalf of its members regarding the arrangements that govern life in the community. Popular control of executive decision-making, he claims, can be exercised both through the ballot box and by individualized contestation of the decisions made by these political representatives. However, he argues that such contestation should occur beyond the mainstream political processes, in forums presided over by appointed (rather than elected) expert decision-makers. He arrives at this position by dismissing as unfeasible direct participation by citizens in any form of plenary assembly or 'committee of the whole', and expressing concerns about the tyranny of the majority in any form of representative government.²³ McCormick observes that Pettit appears to be (as was Cicero) more wary of the people, than of elites.²⁴

In Pettit's model of republican government, once citizens have elected political representatives, the role assigned to them is that of passive observer. They are expected to keep a vigilant watch over the elected decision-makers, and to step in if the decisions they make do not track their common interests. But as McCormick points out, the Roman

²³ Pettit, above n.6, pp.187-195.

²⁴ McCormick, above n. 21, p.158; J. McCormick, *Republicanism and Democracy*, in A. Niederberger and P. Schink (eds.), *Republican Democracy: Liberty, Law and Politics*, (2013: Edinburgh University Press).

institutional prescriptions that are reflected in Pettit's model of government 'risk increasing rather than decreasing the domination of ordinary citizens by economic and political elites'.²⁵ It is a form of republicanism, McCormick says, that 'has legitimized considerable arbitrary intervention by socioeconomic elites into the lives of ordinary citizens.'²⁶ Indeed he seems to doubt whether Pettit's institutional model, which excludes all directly participatory practices, can properly be described as 'democratic'.²⁷

It is an institutional model that I do not propose to adopt. The notion of the passive but vigilant citizen is at odds with what I understand to be required by the republican ideal of freedom realized in a self-governing community, the members of which, enjoy substantive political equality. As Robin Celikates points out, 'whether a (basic) norm is compatible with the freedom of those subject to it depends on whether the latter have had ... a say in the framing of the norm (and continue to have a say in its continuing application), not on whether they would or could – hypothetically or *ex post* – give their consent to it.'²⁸ To entrust others with this task, he suggests, is to 'outsource' self-determination.

When I claim that privacy serves the republican ideal of freedom and its realization through self-government, the version of republicanism that I have in mind is one that incorporates aspects of Roman and Athenian republican thought. For want of a better term, we might refer to it as a 'progressive' model of republican government.²⁹ It takes as its central value, Pettit's (neo-Roman) conception of freedom as non-domination. Relationships of domination occur where one party has power to interfere in the choices of the other, and that power is not itself controlled by the other. Pettit explains that power will be controlled by the other only if it is exercised as directed by

²⁵ McCormick, above n.21, p.167

²⁶ McCormick, *ibid.*, p.166

²⁷ Pettit's ideas about government have a certain resonance with Cicero's views on the ideal form of government, which he thought should have 'an executive with pre-eminent and royal qualities, but also grant certain powers both to the leading citizens and to the people according to their wishes and judgment'; Cicero, *How to Run a Country*, (2013: Princeton University Press), p.5.

²⁸ R. Celikates, 'Freedom as Non-Arbitrariness or as Democratic Self-Rule? A Critique of Contemporary Republicanism', in C. Dahl, T. Anderson Nexo, and C. Prendergast (eds.) (2013), *To Be Unfree: Republican Perspectives on Political Unfreedom in History, Literature and Philosophy*, Bielefeld: Transcript Publishing.

²⁹ The term is used by McCormick, above n.21, at p. 168; 'Should Pettit and *progressively* inclined republicans wish to elaborate a more substantive theory of democracy, they ought to qualify their relationship significantly to traditional republicanism, which successfully championed liberty as non-domination when challenging arbitrarily wielded monarchical power, but which exhibited a manifestly poor record in ameliorating domination exercised by socioeconomic and political elites within republics.'

her, or in a pattern that she has the influence to determine.³⁰ The power possessed and exercised by the state when it generates norms – laws, regulations and policies – and any intrusive and coercive power that those norms confer on its agents and agencies, will be non-dominating only if controlled by those who are subject to it. If we assume adherence to the rule of law, these norms and powers will be generally applicable. No citizen will be able to claim exemption or immunity. All will be subject to the power possessed and exercised by the state through its institutions, agencies and agents. It follows that this power will be non-dominating – that is to say, it will not constitute a diminution of freedom – only if subject to popular control by means of a process that provides citizens with an opportunity to exert influence.

This notion of substantive political equality requires the adoption of Athenian commitments to direct democracy. The progressive version of republicanism that provides the normative framework for our consideration of the value of privacy is one that holds to the idea that the members of a political community will only be able to realise conditions of freedom (non-domination) if opportunities for *ex ante* participation in a norm-generating process are open to all. Giving effect to this aim will, of course, present a significant challenge in a large-scale political community such as the modern nation state. But the commitment to it is of considerable normative significance. Progressive republicans will recognise that their own freedom depends on a guarantee of freedom for all. Unless all can play a meaningful role in shaping the generally applicable norms that regulate the life of the political community, the power that is exercised in generating them will lack an essential characteristic of non-domination. If conditions of non-domination are to be realized, there will have to be extensive and continuing efforts to facilitate broad *ex ante* participation in political decision-making. We can expect the commitment to substantive political equality that this entails, to be accompanied and reinforced by a sense of solidarity among citizens. As we will see, the idea that the freedom of citizens is dependent on a guarantee of freedom – and, I will say, of privacy – for all, will have significant implications, among other things, for the way in which rights are to be understood. The right to privacy will be politically determined, collectively held, and claimed on behalf of all citizens.

³⁰ Pettit above n.6, at p.50.

We will return to the characteristics of this version of republicanism at various points in the chapters that follow. Before we embark on that task, I want to provide an indication of how it will proceed.

III. Privacy in the Republic: An Outline

The aim of this work is to provide answers to the questions identified at the beginning of this introduction – ‘How does privacy serve republican aims?’ and ‘To the extent that republicans consider privacy to be valuable, how can it be secured in a manner that is consistent with republican ideals of participatory self-government and political equality?’ However, in the first chapter I want to engage with a methodological question – ‘What is the value of grounding an account of privacy in the core ideas of a comprehensive political theory?’ It seems to me that the answer is that, if we take privacy to be something that is instrumentally valuable, a condition that serves fundamental values such as autonomy and dignity, then the way those values are conceived will shape not only our views about the value of privacy - both generally, and across a broad range of circumstances - but also the way in which we conceptualize and define privacy itself. An account of privacy that takes it to be instrumentally valuable, can only be properly evaluated if its underlying philosophical foundations are exposed and adequately articulated.

Much has been written on the subject of privacy. But the literature contains very few examples of writing that explores in a systematic or sustained way, the relationship between privacy and the core ideas of comprehensive political doctrines. Those who write about privacy frequently explain the value of privacy in terms of freedom, dignity, and autonomy. Many of these writers appear to assume that the way in which these concepts are to be understood is self-evident. But of course, there is no consensus on the meaning of any of them. Iseult Honohan points out, for example, that although nearly all contemporary societies endorse the value of ‘freedom’, one is likely to encounter fundamental disagreement on what it means to be free – how freedom ought to be conceptualized.³¹ We can also expect to find divergent views on autonomy. Some will think that a person should be free to live by their own lights – to form and pursue their own conceptions of the good life, and can be considered autonomous to the extent that she has the capacity and opportunities that enable her to do so. There will be others who

³¹ Honohan, above n.1, 16.

take a narrower view of what constitutes a good life, believing that some ends have greater intrinsic value, and that a person's autonomy is related to the realization of those ends, not just any ends that she might happen to desire.

I will take up these issues in the first chapter, '**Privacy and Political Theory**'. Here a distinction will be drawn between 'top-down' or deductive reasoning about privacy on the one hand, and 'bottom-up' or inductive reasoning on the other, arguing that we are more likely to arrive at a coherent understanding of privacy by engaging in the former. Those who believe privacy to be so elusive a concept that it defies satisfactory definition will be inclined to believe that we should adopt a bottom-up or inductive approach in our attempts to make sense of it. On this approach, privacy is not a concept that derives coherence from any higher order or overarching set of values. Rather, it is a concept that is simply defined by those circumstances that we deal with under the rubric of privacy, and we can impose some sort of conceptual order by creating taxonomies of privacy interests.

But this approach is unsatisfactory. It makes sense only if we blind ourselves to the way in which privacy claims are determined. Where a claimant relies on her right to privacy in order to resist some form of privacy-invading measure or conduct, she is asserting that the interests served by privacy ought to be prioritized over those that are served by the privacy-interfering conduct. As soon as privacy becomes the subject of this form of disagreement it is located in the realm of politics. The question of priority can be resolved - at least in any rational way - only by recourse to more general moral-political values or beliefs that indicate what weight ought to be attached to the competing interests. Once this has been accepted, finding a consensus or even broad agreement on the value and definition of privacy might be seen as less of an imperative. The terms in which privacy are defined, and ideas about its value, will stand or fall with the moral-political theory that has shaped it.

The remaining chapters of the thesis are devoted to the development a republican account of privacy. As I have said, republican writers have paid little attention to the way in which privacy (or a right to privacy) might serve republican aims. At first sight an individual's desire for privacy might be thought by some republicans to be inconsistent with citizens' overriding civic duty - one of devotion to public life and the common good. As Buttle points out, Cicero considered retreat into private life to be

an abdication of the responsibility that one has for the well-being of others.³² A resilient state of freedom cannot be secured in private - only by working co-operatively with others. But any suggestion that privacy is inimical to attempts by the citizens of a republic to realise conditions of freedom, could only proceed from a crude understanding about the relationship between privacy and freedom.

The **second chapter – ‘Privacy and Non-Domination’** – presents the kernel of the thesis; that privacy should be considered by republicans to be a pervasive good, essential to protecting individuals from domination, and a pre-requisite for participation in the political process through which citizens can secure for themselves resilient conditions of freedom. It provides a preliminary response to both of the questions set out at the very beginning of this introduction; ‘why should republicans value privacy?’ and ‘insofar as it is considered valuable, how can it be secured by citizens in a way that is consistent with republican ideals of self-government and political equality?’ The chapters that follow this one, will strip away and examine in greater detail, ideas that are presented in holistic fashion here. The reason I take this approach rather than developing the account sequentially across a number of chapters, is that we will see that these questions are interrelated.

The first step in the argument will be the claim that privacy is valuable because it protects those who have it from domination. I will endorse the terms in which Philip Pettit has (most recently) defined domination; that is, a person will be dominated in his choices insofar as another has a power to interfere, which the person does not himself control. I will describe how loss of privacy might facilitate various modes of interference with a person’s choices. The second step involves the claim that citizens can only secure a degree of privacy that is consistent with equal non-dominated status through participation in the political processes in which norms that have a bearing on their privacy will be generated. But I will suggest that effective participation in those processes also depends on a guarantee of privacy for individuals and groups, both in their private and public (political) lives. For republicans, conditions of privacy will be both a product of, and a pre-condition for, the kind of well-functioning political process that will enable citizens to secure conditions of freedom as non-domination. There is, then, a certain circularity to the account that will be presented. In considering the value

³² Buttle, above n.14, p.336.

of privacy we are brought back to the idea that privacy is a necessary condition for efforts to secure it. This perspective is one that can be conveyed with greater clarity and cohesion if presented in one chapter rather than in fragmented fashion across several chapters.

Chapter 2 touches upon two aspects of the relationship between privacy and power. Interference with privacy might itself constitute an exercise of dominating power, and the loss of privacy may lead to the acquisition of dominating power by the interferer, and possibly, others. However, interference with an individual's privacy, and subsequent acquisition of personal information by the interferer and others, will expose the individual to domination, only where he or she exercises no control over those actions. But how can an appropriate degree of control be achieved? This question is addressed over the course of the next two chapters.

The first of these, **Chapter 3 – *Privacy and Social Justice*** – considers the state's duty to ensure that citizens do not suffer domination at the hands of one another. To the extent that a loss of privacy involves the exercise of dominating power, or leads to others acquiring such power, the state will be required to afford it protection, primarily through the promulgation of a range of privacy-protecting legal norms, and the recognition of a fundamental right to privacy. This obligation can be grounded in the republican conception of social justice. In common with most other theories of justice, we might expect freedom and equality to be the subjects of a republican theory of justice. But what will mark it as a distinctively republican theory is the way in which freedom and equality are to be understood – as characteristically republican concepts. Such a theory, Pettit suggests, ought to take freedom as non-domination as its subject – “the good with respect to which the state is required in justice to treat its citizens as equals.”³³ The principle of social justice requires the state to impose an order that will minimize the domination that citizens suffer at the hands of one another. To aid our understanding of how it might do so, this chapter will provide some elaboration of the concept of domination. We need to recognize that power resides in social structures, and that domination occurs where there is inequality of social power, so that one person or group is dependent on the good will or benevolence of another. A commitment to

³³ Pettit, above n.6, p.81

social justice requires the state to do something about these inequalities, to provide resources and some form of protection.

A republican theory of justice will, of course, bear on a range of issues, including many that are rather peripheral for our purposes. The principles of social justice will inform law and policies on the provision of education and welfare support, and a system of taxation, for example. But our interest is in privacy. The examples provided in Chapter 2 will demonstrate how loss of privacy can leave an individual vulnerable to domination by fellow citizens and corporate bodies. We might, therefore, expect a republican theory of justice concerned with freedom and equality, to have something to say about citizens' privacy.

Securing citizens' status as free persons – persons who have the freedom to make choices that are not conditioned by the preferences and desires of others – is likely to require the state to provide some citizens with a level of resources sufficient to free them from dependence on the good will of others. But in addition to this, the state will have to ensure that certain choices are subject to special protection, such choices constituting a set of 'basic liberties.' The relevant choices will be those in respect of which we would say that the existence of an uncontrolled power to interfere with them would leave those subject to the power at the mercy of those who possess it – unable to make choices without regard to the will of the other. I will claim both in light of this, and on the basis of the claims about the value of privacy made in chapter 2, that privacy should be regarded as one of the basic liberties recognized as part of a republican conception of social justice, and enshrined in a constitutional bill of rights.

Once privacy is recognized as one of the basic liberties implied by the idea of social justice, the question that follows is 'what are the obligations of the state?' Presumably, it will be required to ensure that citizens enjoy a degree of privacy that is consistent with the idea of citizens being free and equal persons, that is to say not subject to domination or living in a state of dependence. This will lead on to consideration of the forms of legal norms through which the necessary degree of privacy might be secured – principally, criminal law, private law, and regulation – and to whether, and on what grounds (consistent with republican ideals), we should prefer one or another form in particular contexts.

The idea of social justice provides a normative framework for discussion of the state's duty to take steps to protect the privacy of citizens in circumstances in which a loss of, or interference with, privacy involves the exercise or acquisition of dominating power. But in discharging those duties, there is a risk that the state itself will become a dominating agent; that citizens will come to be dominated by the state (or perhaps, more accurately, groups that wield *de facto* political power). It is here that we come up against the issue that is a source of particular concern for some of those who have written about privacy and power. The manifestation of power we are concerned with in this context is the political power to determine whether, in given circumstances, interests in privacy ought to be privileged over, or subordinated to, some other interest. The power to decide where the boundary between the public and private spheres will be drawn – to determine, in effect, whose privacy will be afforded protection by the state, and whose will not. These issues will be addressed in **Chapter 4 – Democratising Privacy**.

The aim in this chapter, will be to identify a set of institutional and procedural arrangements that will enable citizens to exercise a degree of control consistent with the idea of freedom as non-domination, in respect of the power the state exercises when it makes decisions that have a bearing on their privacy. It will be necessary for the state to provide and promote meaningful opportunities for citizens to participate directly in the processes in which those decisions are made. The foundation of the state's duties in this respect is the republican conception of political legitimacy. The power that is exercised when the institutions of government make decisions that affect citizens' privacy will be legitimate only to the extent that it is subject to popular control. Where there is a range of feasible institutional designs and procedural arrangements, the idea of political legitimacy requires the adoption of those that can be expected to minimise domination. In other words, in the context with which we are concerned, the idea of political legitimacy requires institutional and procedural arrangements that provide citizens with the greatest degree of control over decisions that affect their privacy. The argument will be that the legitimacy of such decisions depends on citizens *ex ante* participation in the decision-making process, and that decision-making needs to be deliberative. I will say that the aim of deliberation ought to be the construction of knowledge regarding the political community's shared interest in privacy, and that this knowledge ought to be the basis of decisions that affect citizens' privacy. I will suggest

that the construction of reliable knowledge requires a decision-making process that conforms to norms of communicative rationality. These norms require, among other things, a commitment to broad participation in the decision-making process, and to securing the participation of those who are most likely to be affected by the privacy issues that are under consideration.

The plausibility of the claim that these arrangements will enable citizens to exercise control over those with de facto power to determine the boundary between private and public spheres is likely to depend on the existence of some form of effective oversight of the process. This is one of the issues taken up in **Chapter 5 – A Republican Right to Privacy**. Having argued in the previous chapter that the content of a right to privacy, and the extent of privacy-related legal norms, ought to be determined by citizens through their participation in well-functioning deliberative processes, in this chapter I will consider two questions. The first is, ‘what is the function of a right to privacy?’, that is to say, ‘in what circumstances can it be claimed; to what does it entitle the right-holder?’ The second question follows on from the first – ‘what is the role of a constitutional court?’ On what grounds can a claim based on the right to privacy succeed?

A republican right to privacy needs to be conceived in a way that is consistent with, and supports the aims of, a republican conception of a just society. In broad terms, its function will be to secure conditions of non-domination. We have already seen that republicanism is not a monolithic body of political thought. There are a number of versions of it, and although almost all of these take as their core value, freedom as non-domination, ideas about the role that citizens ought to play in securing it, differ significantly. The way in which the right is conceived will be shaped by these ideas, and although there will be points of convergence, we should expect to find differing republican conceptions of the right to privacy. While I will touch on this matter, my aim in Chapter 5 will be to develop an account of the right to privacy that is consistent with the essential characteristics of a progressive form of republicanism; commitment to freedom as non-domination, substantive political equality, direct democracy, and civic solidarity.

In light of these values I will argue that the right to privacy ought to be viewed as an entitlement – or set of entitlements - held in common and claimed behalf of all citizens

on the basis of their collective interests. Where it is claimed, it is not on the basis that the claimant's individual interests should prevail over some common good. Rather, it is a claim that a particular interference with privacy constitutes an exercise of dominating power; power over which those who are, or might be, subject to it – citizens generally – do not exercise a degree of control that is consistent with the idea of freedom as non-domination. It serves the ideal of non-domination by securing for its holders' participation in, and influence over, decisions made by the institutions of the state that affect their privacy. But we will also see that it can be relied upon to compel the state to discharge the duties that are implied by the republican conception of social justice, requiring it to take steps to prevent citizens suffering domination at the hands of one another.

The **Conclusion – Privacy as a Republican Value** - will draw together the analysis in the preceding chapters, providing a birds-eye view of the ground that has been covered and offering some concluding thoughts on the value of thinking about the relationship between privacy, power, and domination.

- Chapter 1 -

Privacy and Political Theory

It might be thought that the first task of a thesis concerned with the concept of privacy, should be some attempt to define it. But Julie Inness cautions that anyone who sets out to do this will be faced by a conceptual quagmire.¹ Privacy is a familiar concept, one that we consider to be important, yet attempts to define it have been fraught. One need not venture too far into the substantial body of literature on the subject to discover that there seems to be fundamental disagreement over how privacy should be defined, why it is valuable, and consequently, about the meaning and scope of a right to privacy.² It has been claimed that just about the only point of broad agreement on privacy is that it is a 'messy and complex subject'.³ Indeed it has been said that the numerous attempts to define it have produced a debate that has often been 'sterile and is ultimately futile'.⁴ It has been lamented that privacy is a value 'so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings', that we might doubt whether there is any way of making sense of it.⁵ While few would reject the suggestion that privacy is an inherently valuable condition, most accounts of privacy focus on its instrumental value. Privacy is said to serve various ends. It has been claimed that privacy: is a pre-requisite for human flourishing and well-being;⁶ enables one to exercise dominion over a realm of intimate decisions;⁷ is a pre-condition of autonomous agency;⁸ is concerned primarily with the use and misuse of personal information;⁹ is integral to the proper functioning of a

¹ J. Inness, *Privacy, Intimacy and Isolation*, (1992, New York: OUP), 3.

² D. Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law', (2005) 29 Melbourne University Law Review 131, 134, suggests that while there is a 'daunting' body of literature, which comprises work that seems to have adopted every possible theoretical and political perspective on privacy, its most notable feature is the 'almost complete absence of agreement concerning both the definition of privacy and the values said to be promoted by the legal protection of it'.

³ H. Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life*, (2010: Stanford University Press), 67.

⁴ R. Wacks, *Law Morality and the Private Domain*, (2000: Hong Kong University Press), 214.

⁵ R. Post, 'Three Concepts of Privacy', (2001) 89 Georgetown Law Review 2087.

⁶ A. Moore, *Privacy Rights: Moral and Legal Foundations*, (2010: Pennsylvania State University Press).

⁷ Inness, *op. cit.* n.1, 140.

⁸ B. Roessler, *The Value of Privacy*, (2005: Cambridge, Polity Press); P. Roberts, Privacy, Autonomy and Criminal Justice Rights, in P. Alldridge and C. Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law*, (2001, Oxford, Hart).

⁹ R. Wacks, *Personal Information: Privacy and the Law* (1989, Oxford, Clarendon), 20.

democracy;¹⁰ enables subjects to develop and determine for themselves, the nature of their social relationships;¹¹ is essential for securing respect for human dignity,¹² and so on. I want to contribute to the existing literature on privacy by developing a republican account of the value of privacy and considering the way in which it might shape the way that we think about privacy issues. I hope that over the course of the chapters that follow, it will become evident that our anxieties about privacy are best explained by republican concerns about domination.

The array of ends that privacy has been said to serve appear to give some traction to claims concerning a lack of conceptual clarity and coherence. In light of this, some might reasonably ask why we need a republican account of privacy. Surely this will serve only to add to the problems that are said to beset this field of inquiry. It seems to me that such charges would be based on the false premise that the most compelling account of the value of privacy and the terms in which it ought to be defined can be found in the existing literature. If we were to accept such a view and embark on a quest to find it, it would soon become clear that many of the existing accounts are unsatisfactory and underdeveloped.

Beate Roessler has observed that in the most diverse accounts of privacy there is a focus on some manifestation of the ideas of freedom and autonomy.¹³ She also claims that it is not possible to develop a satisfactory theory of privacy unless it is embedded in a theory of democracy, for the latter establishes how the boundary between the private and public spheres ought to be negotiated.¹⁴ I want to suggest in this chapter, that if we take privacy to be an instrumental good, any attempt to define it will be inevitably influenced, to some greater or lesser extent, by a commitment to a comprehensive or basic set of fundamental moral and political values. However, while centuries of evolution in moral and political thought has resulted in some degree of conceptual clarity in various competing political and moral theories, it has not brought about consensus as to which interests and values should be included in any inventory of fundamental interests and values. Nor is there any consensus as to how the question of priority ought to be resolved where such values appear to pull in opposite directions.

¹⁰ A. Lever, 'Privacy Rights and Democracy: A Contradiction in Terms?' (2006) 5 *Comparative Political Theory* 142; P. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, (1995: University of North Carolina Press).

¹¹ J. Rachels, 'Why Privacy is Important', (1975) 4 *Philosophical Affairs* 328; R. Murphy, 'Social Distance and the Veil', in F. Schoeman (ed.), *Philosophical Dimensions of Privacy*, (1984: CUP); P. Regan, *Legislating Privacy* (1995: University of North Carolina Press).

¹² E. Bloustein, 'Privacy as an Aspect of Human Dignity' in Schoeman, *ibid*.

¹³ B. Roessler, 'New Ways of Thinking About Privacy', in J. Dryzek, B. Honig and A. Phillips (eds.), *Oxford Handbook of Political Theory*, (2006: OUP), 699.

¹⁴ *Ibid*, 709.

If we accept that the concept of privacy both serves and is shaped by the fundamental values of various moral and political doctrines, the conceptual disarray that is said to afflict privacy scholarship might be understood as a manifestation of disagreement at a more abstract level. This is not to say that those who have contributed to the literature on privacy have articulated the general moral or political values that form the bedrock of the accounts of privacy that they have offered, nor that they have always been conscious of any attachment to them. Relatively few attempts have been made to derive accounts of privacy in a top-down manner, from the central ideas of the various traditions of political thought. But any account will be shaped by an attachment to certain values. Though they may be lurking in the background, unidentified and unarticulated, these commitments are likely to be more or less consistent with, and can be explained by reference to, some form of comprehensive moral or political theory. This enterprise might not only reveal the source of much of the disagreement that exists over privacy, but provide us with a deeper understanding of some aspects of our intuition about privacy, and lead us to re-evaluate others. It is possible that some of these theories provide us with conceptual resources for a more compelling account of the value of privacy than those offered by others. My claim in this thesis is that the republican conception of freedom does just this. The explanation will unfold over the chapters that follow. But I want to begin, in this chapter, by illustrating how differing conceptions of privacy connect with the core ideas of various traditions of political thought, and how these ideas will shape the way in which we think about privacy and its value. Its role is to provide an outline of what the substantive inquiry undertaken in the chapters that follows entails. It both describes and justifies the methodology that will be used.

The first part of the chapter provides a broad and necessarily brief outline of the two dominant conceptions of privacy – one defining it in terms of inaccessibility per se, the other placing emphasis on control over access. In the second part of the chapter, I will suggest that we should think of privacy as a concept that is bounded on one side by abstract values and on the other, by decisions in concrete cases.¹⁵ We can develop an account of privacy by reasoning from

¹⁵ See M. Bayles, 'Moral Theory and Application', (1984) 10 *Social Theory and Practice* 97, and K. Henley, 'Abstract Principles, Mid-Level Principles, and the Rule of Law', (1993) 12 *Law and Philosophy* 121 who suggest that we might think of rights as mid-level principles that mediate the difficulty of applying more abstract values to particularised cases. Although this methodological approach is not one that has been utilised by privacy scholars it has been used as an analytical framework in other fields of inquiry, including medical ethics (see, for example, T. Hope, *Medical Ethics: A Very Short Introduction*, 2004: OUP; A. Krom, 'The Harm Principle as a Mid-Level Principle? Three Problems from the Context of Infectious Disease Control', (2011) 25 *Bioethics* 437), private law (see K. Mason, 'Do Top-down and Bottom-up Reasoning ever Meet?', in E. Bant and M. Harding (eds.), *Exploring Private Law*, 2013: OUP; M. Richardson, 'Towards Legal Pragmatism: Breach of Confidence and the Right to Privacy' in Bant and Harding (eds.),

the top-down, taking the abstract values as directives as to how privacy should be understood, or from the bottom-up, arriving at some sort of understanding of it, through a process of inductive reasoning from decisions about privacy across a range of circumstances. I will argue that bottom-up approaches are unlikely to provide us with the kind of coherent account of privacy produced by top-down approaches that proceed from, and are guided by, abstract values. An account of privacy derived from a set of coherent fundamental values embodied in a comprehensive political theory, ought to provide us with a coherent account of privacy. There are values that are common to many of these theories – freedom, autonomy, equality, for example – to which frequent reference is made in the privacy literature. But these references are seldom accompanied by any acknowledgement of the disagreement that exists as to how the concepts expressed in these values should be understood.

If there is conceptual disagreement about the ends that privacy are said to serve, we should not be surprised to find corresponding divergence in the way that privacy is conceptualized and its value understood. I will illustrate the point in the third section, taking the two conceptions of privacy identified in the first part of the chapter, and suggesting why libertarians, liberals and communitarians might be drawn, for quite different reasons, to one or the other. These differences arise because our view of privacy and its value will be shaped by our commitments to a more or less fundamental set of values that we believe to provide the foundation for the terms of social co-operation in a political community generally. This will lead us into consideration of a substantive republican account of the value of privacy over the next few chapters; an account that provides a more coherent and compelling account of the value of privacy than can be derived from the central ideas of these other traditions of political thought.

I. Privacy as Inaccessibility *per se*, or Control over Access?

Almost all attempts to define privacy might be described broadly as either access-based or control-based conceptualizations. As the descriptors suggest, those who advance control-based definitions, claim that privacy is a state of inaccessibility *per se*, so that we suffer a loss of privacy whenever others gain physical access to us, or to information about us.¹⁶ Those who offer

ibid, and professional ethics (see, M. van Wart, 'Code of Ethics as Living Documents: The Case of the American Society for Public Administration', (2003) 5 *Public Integrity* 331.)

M. Bayles, 'Mid-Level Principles and Justification', in J. R. Pennock and J. W. Chapman (eds), *Justification*, Nomos XXVIII, (1986, New York University Press), 48.

¹⁶ See, for example, J. Reiman, 'Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Information Technology of the Future', in B. Roessler (ed.), *Privacies: Philosophical Evaluations*, (2004: Stanford University Press), 197: 'the condition in which other people are deprived access to either some information about you or some experience of you.'

control-based conceptualizations of privacy define it by reference to the control that we have over others' access to us, and to information about us.¹⁷

(i) Privacy as a State of Inaccessibility

In an attempt to describe the nature and extent of the disagreement that exists in the literature on privacy, the distinction between access-based and control-based accounts constitutes only a starting point. Even among those who claim that privacy should be defined in terms of inaccessibility there is disagreement over the aspects of individual's life that ought to be encompassed by the concept of privacy. So, while we might distinguish accounts of privacy according to whether privacy is conceived as a state of inaccessibility per se, or as some form of control over such access, Inness suggests that we can further divide access-based accounts into two groups. The first comprises those who argue that privacy is a concept that relates only to information about an individual, and the second is a group that takes the view that privacy is concerned not only with informational access, but with other forms of access.¹⁸ It is possible to make further sub-divisions. Among those who believe that privacy concerns informational access there is disagreement over the quality of information that is encompassed by the concept of privacy. Inness herself believes that loss of privacy occurs only where another has access to *intimate* information about an individual.¹⁹ On this view, it would seem that there would be no loss of privacy where others take it upon themselves to disclose details of our salary, tax affairs, business strategies, or political affiliations to anyone willing to listen - nor would there be any interference with privacy in general, where employees were subject to covert surveillance in the workplace. According to Inness there would be a loss of privacy where an individual published intimate letters sent to him or her by a former lover.²⁰ But Parent, who claims that privacy is 'the condition of not having undocumented personal knowledge [information] about one possessed by others', would presumably say that publication of the letters does not involve any loss of privacy, as publication in this case merely disseminates personal information that has been

¹⁷ See for example, C. Fried, 'Privacy', (1967-1968) 77 Yale Law Journal 475, 482, who suggests that 'privacy is not simply the absence of information about us in the minds of others; rather it is the control we have over information about ourselves.' Also, also H. Gross, 'Privacy and Autonomy', in J. R. Pennock and J. W. Chapman (eds.), *Privacy*, Nomos XIII, (1971, New York: Atherton Press), 169; privacy is 'the condition under which there is control over acquaintance with one's personal affairs'.

¹⁸ Inness, above n.1, 19.

¹⁹ *Ibid.*

²⁰ C. Fried, 'Privacy', (1967-1968) 77 Yale Law Journal 475, 482. See also H. Gross, 'Privacy and Autonomy', in J. R. Pennock and J. W. Chapman (eds.), *Privacy*, Nomos XIII, (1971, New York: Atherton Press), 169; who suggests that privacy is 'the condition under which there is control over acquaintance with one's personal affairs'.

documented.²¹ But this conceptualization of privacy has been criticized on the grounds that it fails to capture circumstances in which many people would ordinarily think there has been an interference with an individual's privacy.²² We would be prevented from characterizing dissemination – even publication to the world at large - of any personal information contained in an obscure and relatively inaccessible public document, as an act that has any implications for the subject's privacy. But we might reasonably take the view that by voluntarily disclosing, or acceding to the dissemination or use of personal information, individuals should not be taken to have relinquished their interest how it might be used for purposes beyond those that they envisaged when they gave the relevant consent.²³ Furthermore, Parent's conceptualization of privacy would require us to conclude that privacy is not implicated in circumstances in which a person is subject to sustained surveillance that does not reveal anything about the agent that is not already a matter of public knowledge.

One response to these difficulties might be to say that we should define privacy as a broad state of inaccessibility. Ruth Gavison, for example, says that an individual enjoys perfect privacy when no one has any information about her, no one pays any attention to her, and no one has physical access to her.²⁴ Privacy is lost as soon as others obtain information, observe, or gain physical access to a subject.²⁵ But some suggest that this definition claims too much for the concept.²⁶ Privacy would lose its intuitive meaning if we were to be forced to accept that there is a loss of privacy whenever others acquire *any* information about us. In an attempt to overcome this problem it has been suggested that we should think of privacy not as a state of limited access *per se*, but a state of 'desired inaccessibility' or 'freedom from unwanted access'.²⁷ Nicole Moreham, for example, claims that a person will be in state of privacy to the extent that he or she cannot be seen, heard, touched or found out about, *and* does not want in the particular circumstances to be seen, heard, touched or found out about.²⁸

²¹ W. A. Parent, 'Privacy, Morality and the Law', (1983) 12 *Philosophy and Public Affairs* 269.

²² J. Wagner DeCew, *In Pursuit of Privacy: Law Ethics and the Rise of Technology*, (1997: Cornell University Press), 30.

²³ R. Wacks, *Privacy and Media Freedom*, (2013: OUP), 14.

²⁴ R. Gavison, 'Privacy and the Limits of the Law', (1989) 89 *Yale Law Journal* 421, 428.

²⁵ *Ibid.*

²⁶ See, R. Wacks, *Personal Information: Privacy and the Law*, (1989: Oxford, Clarendon), 20, who suggests that that it should be understood as a concept concerned primarily with the use and misuse of personal information.

²⁷ S. Bok, *Secrets: On the Ethics of Concealment and Revelation*, (1982, New York Pantheon), 10-11: 'Privacy is the condition of being protected from unwanted access by others – either physical access, personal information, or attention.'

²⁸ N. Moreham, 'The Protection of Privacy in the English Common Law: A Doctrinal and Theoretical Analysis', (2005) 121 *Law Quarterly Review* 628, 636.

But just as a broad conception of privacy as a condition of inaccessibility *per se* does not seem to be sufficiently well aligned with our intuitions about privacy, neither does the claim that privacy is a state of *desired* inaccessibility. The claim that a subject's preference for conditions of inaccessibility is an essential characteristic of privacy is often supported by asking us to think about the mariner who is marooned on a desert island, or the explorer who has fallen into a crevasse in some remote place, and both, for the time being, accessible to no-one. Those who say that the essence of privacy is an agent's desire for inaccessibility invite us to consider whether we would ordinarily say that either enjoys privacy. No doubt the response from some would be that the mariner and the explorer do indeed have privacy, though in the circumstances they may not give two figs for it. Those who advance the claim that desire is an essential dimension of privacy argue that we would ordinarily describe the condition in which the explorer and mariner unfortunately find themselves, as isolation, rather than privacy. The concept of privacy, so the argument goes, is inapposite here because neither the explorer, nor the mariner, wish to be inaccessible.

As Parent points out, '[d]efining privacy requires familiarity with its ordinary usage, but this is not enough since our common ways of talking and using language are riddled with inconsistencies, ambiguities and paradoxes.'²⁹ For example, we might be inclined to say to an exhibitionist couple who wish to engage in sexual activity in the park, that it is something that they ought to do 'in private.' But if the essence of privacy is an agent's desire to be inaccessible to others, this injunction makes no sense. The exhibitionists do not wish to be inaccessible, and so in directing them to withdraw from the gaze of others who do not wish to observe them, the concept of privacy is not one that is available to us. To suggest that they should withdraw to the solitude of their own home may appear to some to be just as counter-intuitive as the idea that the explorer who has fallen into the crevasse has privacy. Those who claim that privacy should be defined as a state of broad inaccessibility – encompassing conditions that others suggest ought to be described as solitude or isolation – might say that relying on linguistic use of the term privacy is unsatisfactory, because the way in which we speak about privacy in everyday language provides a partial and misleading picture. The reason for this might be that our interest in privacy tends to be stirred only when it is 'threatened', 'violated' or 'invaded'.³⁰ Ordinarily we are conscious of privacy only in circumstances in which its loss would be normatively significant; where the privacy-invading conduct has a detrimental effect on some aspect of an

²⁹ W. Parent, 'Privacy, Morality and the Law', (1983) 12 *Philosophy and Public Affairs* 269, 269.

³⁰ Nissenbaum, *op. cit.* n.3, 72.

agent's well-being, or we perceive it to be an affront to the dignity of the agent. In such circumstances, the question of control is salient but, as we will see shortly, those who think that privacy ought to be defined as a condition of limited access say that this does not mean that privacy should be defined by reference to the idea of control.

(ii) Privacy as Control over Access

It is not difficult to see why many find privacy defined as broad conditions of inaccessibility, unappealing. It seems at odds with some of our intuitions about privacy, and this disjunction has led many to argue that the idea of the *control* that an agent has over access to various aspects of his life, rather than a state of inaccessibility *per se*, should be regarded as an essential ingredient of any satisfactory attempt to define to privacy. However, there is significant variation in the degree to which emphasis is placed on control among those who believe that privacy ought to be defined in such terms. Some have defined privacy solely by reference to an agent's control over access. Fried, for example, suggests that 'privacy is not simply the absence of information about us in the minds of others; rather it is the control we have over information about ourselves.'³¹ But attempts to conceptualise privacy in this way has attracted criticism. If privacy is defined merely by reference to the control that an agent has over information about himself, then we would have to conclude that there is a loss of privacy whenever the agent loses the capacity to exercise control, irrespective of whether another makes any attempt to obtain information about him.³² If privacy is defined in these terms, it drives us to say that we suffer a loss of privacy not when there is some form of intrusion, but as soon as there is a risk of some intrusion that an agent would not be able to effectively resist.³³

It has also been claimed that defining privacy in terms of an agent's capacity to exercise control over access is also problematic if we think about the dissemination of information. An agent may exercise control over access to personal information by disclosing it to another. However, if following the initial disclosure, he is unable to prevent the other from disseminating the information more widely, it seems that the only way in which he can exercise control over it and maintain his privacy, is by choosing not to make the initial disclosure. Although, it might appear that the agent has some degree of control over the information, if he wants to prevent wider disclosure his options are so limited that he can be said, in practice, to have no power to

³¹*op cit.* n.19.

³² R. Wacks, *op. cit.* n.9, 14; N. Moreham, *op. cit.* n.27.

³³ Gavison, *op. cit.* n.23, 427.

choose at all, and cannot be said to exercise meaningful control.³⁴ One way in which this problem might be overcome is to claim that something counts as private not only when an agent can, in fact, control other's access to it, but also when he or she *should*, or *ought to*, be able to control access to it. Such a position is adopted by Beate Roessler, who argues that the concept of control should not be understood in a purely descriptive sense, rather it has an 'inherent normative moment', so that something counts as a private matter where an agent 'can and/or should and/or may' exercise control.³⁵ Even if an agent is unable to control access to information about herself, medical records for example, it would be reasonable to say that she should, *if she so wished*, be able to exercise such control and that consequently we should consider the information to be private information. Roessler shares in common with those who define privacy as a condition of desired inaccessibility, the view that privacy is concerned with an individual's preferences as to the circumstances in which others should have access to her or to information about her. I will suggest later that defining privacy in a way that renders privacy dependent on an agent's desire or preference for conditions of inaccessibility or control over access may represent an axis of disagreement grounded in the political principles to which those who disagree are committed.

II. 'Top-Down' and 'Bottom-Up' Thinking about Privacy

If nothing else, the ground covered in the preceding section lends some support to Adam Moore's observation that, 'neither intuitions nor natural language analysis offer much help... [n]ot doing violence to the language and cohering with our intuitions may be features of a good account of privacy; nevertheless, they do not provide adequate grounds for a definition – the language and intuitions may be hopelessly muddled.'³⁶ But if we are not to rely on our intuition about privacy, and the way in which we speak about it, what methodological approach should we adopt?

Privacy can be envisaged as a concept (and the right to privacy as a norm) bounded on one side by a unitary value or a coherent set of values, and on the other, by rules, discretionary

³⁴ Moreham, *op. cit.* n.27, 638. One response to this critique might be that it is based on a thin conception of control. The agent himself may not be in a position to intervene to prevent wider dissemination of the information, but this does not mean that he is unable to control dissemination of the information in some other way, perhaps through some form of coercion. See further, Lovett's account of residual power in social structures; F. Lovett, *A General Theory of Domination and Justice*, (2010: OUP).

³⁵ B. Rössler, *op. cit.* n.8, 8.

³⁶ *op. cit.* n.6, 11.

power, and decisions in particular cases.³⁷ In our attempts to understand it, we might take one of two broad approaches; 'top-down' or 'bottom-up'.³⁸ The former is a deductive and normative inquiry. An understanding of the concept of privacy, the meaning and scope of the right, and determination of the value of privacy in particular circumstances, all flow from an initial identification of, and commitment to, certain fundamental values.

A bottom-up approach, as the designation suggests, proceeds in the opposite direction, the initial focus of the inquiry being concrete decisions about privacy that have been made across a range of circumstances. For present purposes, it is possible to distinguish two forms of this inquiry, one more ambitious in its normative aims than the other. The more ambitious involves an attempt to identify, through a process of inductive reasoning from decisions in concrete cases, the kind of values that provide the starting point of a top-down approach. An example of the less ambitious form of bottom-up inquiry, is eclectic pragmatism – sometimes described as the 'antithesis of ideology'.³⁹ The primary concern of such pragmatists is the resolution of disputes in concrete situations, rather than fidelity to any general theory or set of fundamental values. Conflicts are resolved according to whatever considerations, aims, desires and objectives appear to be salient in the circumstances, and which the parties to the disagreement can accept as the basis for resolution – a decision with 'reasonable' consequences. General theories may be used as a guide to determining the outcome of a particular case where these have been invoked in some previous case, but no recourse to them need be made if a resolution can be reached on alternative grounds that are acceptable to those who are immediately affected by the decision in the particular case.

³⁷ See M. Bayles, 'Moral Theory and Application', (1984) 10 *Social Theory and Practice* 97, and K. Henley, 'Abstract Principles, Mid-Level Principles, and the Rule of Law', (1993) 12 *Law and Philosophy* 121 who suggest that we might think of rights as mid-level principles that mediate the difficulty of applying more abstract values to particularised cases. Although this methodological approach is not one that has been utilised by privacy scholars it has been used as an analytical framework in other fields of inquiry, including medical ethics (see, for example, T. Hope, *Medical Ethics: A Very Short Introduction*, 2004: OUP; A. Krom, 'The Harm Principle as a Mid-Level Principle? Three Problems from the Context of Infectious Disease Control', (2011) 25 *Bioethics* 437), private law (see K. Mason, 'Do Top-down and Bottom-up Reasoning ever Meet?', in E. Bant and M. Harding (eds.), *Exploring Private Law*, 2013: OUP; M. Richardson, 'Towards Legal Pragmatism: Breach of Confidence and the Right to Privacy' in Bant and Harding (eds.), *ibid*, and professional ethics (see, M. van Wart, 'Code of Ethics as Living Documents: The Case of the American Society for Public Administration', (2003) 5 *Public Integrity* 331.)

M. Bayles, 'Mid-Level Principles and Justification', in J. R. Pennock and J. W. Chapman (eds), *Justification*, *Nomos XXVIII*, (1986, New York University Press), 48.

³⁸ The dominant methodological debate in political philosophy concerns ideal and non-ideal approaches, but the top-down/bottom-up distinction does not map neatly onto any understanding of the former. For an overview of the debate in ideal/non-ideal theory, see L. Valenti, 'Ideal vs. Non-Ideal Theory: A Conceptual Map, (2012) 7 *Philosophy Compass* 654.

³⁹ Bayles, *ibid*. For example of this approach in legal reasoning see, R. Posner, *Law, Pragmatism and Democracy*, (2005: Harvard University Press).

This form of pragmatic approach occupies a prominent position in the literature on privacy. Daniel Solove, for example, has suggested that we ought to develop an understanding of privacy which proceeds from the examination of social practices, including the decisions of courts in cases involving privacy claims. The understanding of privacy that emerges, will be constantly revised and reformulated as more concrete cases that appear to implicate privacy arise and are decided, and as social practice evolves in light of new technologies, changing attitudes and expectations. A privacy interest exists, he suggests, 'whenever there is a problem from the related cluster of problems we view under the rubric of privacy.'⁴⁰ The concept of privacy is nothing more than a convenient label to describe those problems that we wish to deal with as 'privacy issues', beyond this the concept of privacy serves no purpose.⁴¹ This circularity is justified on the grounds that attempts to conceptualize privacy in the abstract have produced 'confusion and disarray' rather than 'clarity and direction'.⁴² Pragmatists deal with these problems by denying that privacy is a concept that serves any general theory or fundamental values.

One of the problems with which those who advocate such an approach are confronted, is that while a conception of privacy derived in this way might accommodate all of those situations that are commonly thought to implicate privacy interests, the concept will lack coherence. New privacy problems might not fit easily into the taxonomies of privacy interests that are produced. It might be necessary to shoe-horn them into existing categories in which they are an uneasy fit, or to create new categories.⁴³

Where a privacy claim is made, pragmatists suggest that it is necessary to 'balance' the practical consequences of what one party claims to be an interference with privacy, against competing interests served by the conduct that is said to occasion the interference. The position they adopt, is that privacy claims ought to prevail when they produce the best outcome for society.⁴⁴ A pragmatic approach to valuing privacy, Solove suggests, 'involves balancing it against opposing interests.'⁴⁵ But this begs the question. What is the basis of the balancing exercise? What determines how much weight is to be attached to whatever is being balanced?

⁴⁰ D. Solove, *Understanding Privacy*, (2008: Harvard University Press), 75.

⁴¹ *Ibid.*, 77.

⁴² *Ibid.*, 39.

⁴³ On this problem, see T. Bennett, 'Triangulating Intrusion in Privacy Law', (2019) *Oxford Journal of Legal Studies*, (forthcoming) doi: 10.1093/ojls/gqz0124, 21-24.

⁴⁴ *Ibid.*, 87

⁴⁵ *Ibid.*

As soon as answers to these questions are found, it will be seen that the task of resolving the dispute is located in the realm of politics. The question of priority can be resolved - at least in any rational way - only by recourse to more general moral-political values or beliefs that indicate how the weight to be attached to the competing interests ought to be determined.

However, beyond the circumstances of the case at hand, and the outcome of such 'balancing exercises' in previous cases, pragmatists have nothing to say in general terms about the value of privacy, or the weight that ought to be attached to privacy interests.⁴⁶ Pragmatists appear to accept that individuals have a right to privacy – at least a legal right – but will be able to say nothing coherent about the justificatory grounds of the right. The absence of any explanation as to the function of a right to privacy generally deprives it of any autonomous or moral force, and consequently, pragmatism does not provide any basis for a stable allocation of privacy rights.⁴⁷

Moving on from eclectic pragmatism, an example of the more ambitious form of bottom-up reasoning alluded to earlier, is described by James Griffin. Of concern to Griffin, is how a substantive account of rights might be expressed.⁴⁸ One approach, he suggested, would be to start with the idea of rights as it is used in social contexts by politicians, the judiciary, social campaigners, theorists and others, and ascend to whatever level of abstract values is necessary to explain the normative basis and force of particular rights.⁴⁹ Griffin accepts that a bottom-up attempt to determine the meaning and content of rights will have to ascend to a considerable degree of theoretical abstraction, and that those who adopt this methodological approach will at some point find that they occupy common ground with those engaged in an attempt to derive meaning and content from the fundamental values of general moral-political theories.⁵⁰

One of the virtues of this kind of bottom-up approach, Griffin suggests, is that it relieves the inquirer of the need to assume the correctness of any contentious abstract moral principles, or to consider any particular form of general moral or political theory.⁵¹ But it is not without its problems, and we have good reasons to doubt that it will provide a satisfactory basis for the development of a compelling theory of privacy. Ruth Gavison has pointed out that anyone who

⁴⁶ See Henley, *op. cit.*, n.37.

⁴⁷ See discussion of stable criminal justice rights in J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990: Oxford, Clarendon), 42-4.

⁴⁸ J. Griffin, *On Human Rights*, (2008: OUP).

⁴⁹ *Ibid.*, 29.

⁵⁰ *Ibid.*, 3-4.

⁵¹ *Ibid.*, 29.

sets out to answer the question ‘what is privacy?’ by examining judicial decisions (which Griffin suggests we take as one of the starting points of an inquiry to ascertain the meaning and scope of a right to privacy) might be seeking coherence where none exists.⁵² There may be references to concepts such as liberty, autonomy and dignity in the opinions found in the judgments handed down by constitutional courts in privacy cases, but we are likely to find few satisfactory attempts to clarify how such concepts are to be understood. To the extent that some explanation is offered, this might indicate that decision-makers subscribe to differing conceptions of the fundamental values that privacy is said to serve.

A bottom-up approach might be an adequate way of thinking about privacy if the decisions across a range of cases from which there is an attempt to derive its meaning, were the product of well thought-out positions – decisions that conform to an idea that John Rawls refers to as reflective equilibrium, wherein one’s views about privacy would be consistent with the general political convictions that one holds.⁵³ But many decisions about privacy seem to be intuitive, and poorly reasoned or articulated. This presents a serious problem for those attempting to identify the normative foundation of privacy through a process of inductive reasoning.

It is less of a problem, however, if we adopt a top-down approach. Social practice will, at some point, have been the starting point for thinking about abstract values, and will continue to inform and shape our understanding of those values. But whereas bottom-up approaches are essentially empirical and descriptive, top-down approaches are essentially normative. If our thinking about privacy is guided by a coherent set of general ideas and basic values found in a particular tradition of political thought, we can expect a correspondingly coherent theory of privacy. These ideas and values will shape our view of both the *function and scope of a right to privacy*, and terms in which the *concept of privacy* ought to be *defined*. In other words, we will be inclined to conceptualise privacy in a way that is consistent with our commitment to a more abstract set of values that we believe to provide the proper foundation for the terms of social co-operation in a political community.

Let me illustrate this by thinking about the reasons why those committed to differing versions of liberalism – egalitarian and perfectionist - might differ in their views as to how privacy should be conceived. I will suggest that egalitarian liberals and libertarians are likely to

⁵² Gavison, above n.24, 461

⁵³ J. Rawls, *A Theory of Justice*, revised edition, (1999: OUP), pp.40-46.

endorse control-based conceptions of privacy, and that we can suppose perfectionist liberals to be aligned with communitarians in thinking that privacy should be defined inaccessibility *per se*. But it will be apparent that despite these points of convergence, the fundamental values of these political doctrines are likely to produce accounts of privacy that conceive its value in fundamentally different ways.

In addition to this, and view of the fact that the aim in the chapters that follow will be to convince the reader that the republican conception of freedom – non-domination – provides the most coherent justification for an account of the value of privacy, the ground covered in the next section provides an early indication of what a republican account is up against. Although I will not be engaging in any sustained or systematic comparison, from time-to-time I will contrast republican thinking with that which we might expect from those committed to the central ideas of some of these competing traditions of political thought.

III. Political Values and the Concept of Privacy

So far, I have suggested that the way that we think about privacy will be shaped by our attachment to basic moral and political principles and values. To illustrate this idea, in this section I want to consider why commitment to particular political doctrines might lead an individual to prefer one conception of privacy over another. I will suggest that libertarians and egalitarian liberals – for quite different reasons - might be inclined to think of privacy as a *desire* for control over access or for conditions of inaccessibility,⁵⁴ and that perfectionist liberals and communitarians – again for different reasons – are likely to be attracted to a conception of privacy as a condition of limited access *per se*.⁵⁵

(i) The Appeal of Desire and Control for Egalitarian Liberals and Libertarians.

Libertarians subscribe to a very simple idea – that people ought to be free to live their own lives as they see fit. This basic tenet is subject to an equally straightforward proviso, which is that the right to do what one wants does not extend to acts of aggression (the use of physical coercive force) against the person or property of another, or to any threats of aggression – the ‘non-aggression principle’. Libertarian theory draws no distinction between state and individual in

⁵⁴ See for example Roessler, above n.8; Something counts as private where an agent has *de facto* control over access to it, or where we can say that he should, may, or ought to be able to control access to it. The protection of privacy, according to Roessler, means protection against *unwanted* access by other people.

⁵⁵ Such as that proposed by Gavison, above n.24, 428, for example; ‘an individual enjoys perfect privacy when he is completely inaccessible to others’, that is to say, where ‘no one has any information about him, no one pays any attention to him, and no one has any physical access to him’.

the application of the principle. The state may only interfere with the choices made by individuals, or the conduct in which they engage, if the individuals' choices or actions violate the equal rights of others to live their lives as they see fit. In other words, the state may legitimately resort to coercion only to prevent aggression, or to negate the threat of aggression. Coercive interference in the lives of citizens on any other basis will violate the non-aggression principle.

The claim that people have a right to do as they wish, and the non-aggression principle, are both grounded in the idea of self-ownership. For libertarians, the concept of ownership extends not only to the things that an individual acquires – she also enjoys ownership, in the form of proprietary rights, over her body, the talents and skills that she has, and whatever she is able to produce by deploying them. As Casey explains, if we are owners of our own bodies, 'only we can rightfully decide what is to be done by and to our bodies and our minds... what aggression is depends on what our (property) rights are. If you hit me, it is aggression because I have a property right in my body. If I take from you the apple you possess, this is trespass – aggression – only because you own the apple.'⁵⁶ The idea of self-ownership also provides the basis of the libertarian belief in the importance of free markets in which private property rights and the voluntary exchange of goods are afforded protection. If people are free to live their lives as they see fit, it follows that such freedom extends to participation in markets. Individuals should be free to enter into agreements to exchange those things over which they have proprietary rights where they believe the outcome of the exchange will make them, in some self-defined sense, better off.⁵⁷

How, if at all, might the concept of privacy serve libertarian ends of freedom and self-ownership? If libertarians believe that individuals should have a right to privacy, then they are likely to think of it as a quasi-property right. The right to privacy may be invoked to exclude others from land that we own. It might also be used to prevent others from acquiring personal information by coercive means, or through the threat of coercion. For libertarians, local or spatial privacy provides a degree of negative freedom that allows individuals to do as they wish. But privacy might also be valued because it facilitates free market exchanges. If I can rely on a right to privacy to prevent others seeing me unclothed or performing intimate sexual acts, it provides me with an opportunity to trade revelation – so long as the idea of seeing my naked form or my performing such acts is sufficiently appealing to others to induce them to part with

⁵⁶ G. Casey, *Libertarian Anarchy: Against the State*, (2012: London, Continuum), p.41.

⁵⁷ J. Heubert, *Libertarianism Today*, (2010: Praeger, Santa Barbara Ca.), p.6.

something that I might think valuable. Informational privacy might be considered important for similar reasons. The ability to choose when and to whom information is disclosed enables the individual to exploit information about themselves - to disclose it to others (who might want, in turn, to exploit it for their own ends) in order to acquire from them property, or proprietary interests, that the individual believes will leave him in a better position.⁵⁸ Although it is not an account of the value of privacy grounded explicitly in libertarian doctrine, we might expect libertarians to broadly endorse Richard Posner's economic theory of privacy. Posner suggests that the costs that people incur in ensuring that information about themselves is not disclosed, and the value of that information to others, justifies giving people property rights in it and permitting to trade those rights for other goods. This, he says, will ensure that information is put to its most valuable use, the value in question being the production of income, or other broad measure of welfare or utility.⁵⁹ The limits of this quasi-proprietary right to privacy will be determined, at least in part, by considerations of market efficiency.

In view of the libertarian principle that people should be able to live their lives as they see fit, and the limited range of circumstances in which this principle might be abrogated, we can presume that libertarians would think that an individual's desire for conditions of inaccessibility is an essential characteristic of the concept of privacy. One of the attractions of privacy defined as a condition of inaccessibility *per se*, is that it may be the subject of both a right and a duty. However, for libertarians, the imposition of a duty to separate oneself from others, assuming that it is accompanied by the threat of coercion in cases of non-compliance, will be legitimate only if it is imposed to prevent or bring an end to aggression. But the idea that we might deal aggressive acts or the threat of aggression, by imposing on the aggressor a duty to maintain his privacy seems odd. In such situations our thoughts would usually turn to the concepts of self-defence or recaption rather than privacy. Our response to physical force - or the threat of it (aggression) - is the reciprocal use of physical force, or a threat to respond with force. For libertarians, privacy will be valuable insofar as it promotes freedom and provides individuals with opportunities to live their lives as they see fit and to engage in free markets in a way that serves their self-determined interests and improves their position. Because libertarians are likely to take the view that privacy is something that individuals can choose to have but not have

⁵⁸ Libertarians might also take the view that non-consensual dissemination of private information that is likely to damage a person's reputation ought to be afforded protection under a libertarian privacy right on the grounds that rights of ownership extend to reputation.

⁵⁹ R. Posner, *An Economic Theory of Privacy*, in F. Schoeman (ed.), *Philosophical Dimensions of Privacy: An Anthology*, (1984: CUP), pp.334, 336.

imposed upon them, we would expect them to endorse a conception of privacy as control over access. It seems to better serve, and is more directly related to, libertarian ideas of self-ownership than privacy conceived as conditions of inaccessibility per se.

We might also expect egalitarian liberals to endorse this conception of privacy. But this endorsement will be motivated by different ideas about the function and value of privacy. Central to all versions of liberalism is the idea that what makes life valuable is autonomy. Egalitarian liberals believe that agents ought to be free to determine for themselves what constitutes a life worth living, subject to the proviso that whatever ends they choose to pursue must be compatible with the right that others have to pursue self-chosen ends. The overriding objective for the liberal state, therefore, ought to be to promote autonomy and provide liberal subjects with conditions in which they are able to develop autonomous ways of life. If an agent is to lead an authentic life – to determine for herself what kind of person she wants to be, what kind of life she wants to lead, and to pursue her chosen ends - she must be able to limit access to herself. The ability to withdraw from public gaze provides physical, cognitive, emotional and moral space in which he or she is able to engage in the reflective contemplation that authenticity requires - to experiment with new ideas, activities and experiences without the risk of being ridiculed, and to engage in conduct that might attract disapprobation.

For liberals the fact that privacy enables an individual to withdraw from the public sphere in this way does not exhaust its value. Privacy provides one with the ability to present oneself in a particular way – to choose what information about oneself to disclose, when to do so, to whom, and for what purposes. It is the ability of an individual to withhold and disclose personal information that defines the nature of the relationships that she has with others. Realisation of almost all conceptions of the good life will depend on the development and maintenance of a diverse range of social relationships. Some will be instrumentally valuable, a means to realizing the agent's self-authored ends, others might be constitutive of his or her conception of the good life. Some might decide that life is worthless without long-lasting and loyal friendship, and intimacy. What marks out such relationships from other forms of social relationships – the relationship we have with our bank manager, workplace supervisor, or child's teacher - is what we choose to disclose to the other. One of the hallmarks of close and intimate friendship is a reciprocal willingness to share intimate, sensitive and potentially shameful or embarrassing

information with the other, and the trust that we place in him or her not to disseminate it.⁶⁰ Others might take the view that accumulation of wealth, power and possessions are the ends of a worthwhile life, and that revelation of information about personal resources, tastes, proclivities and ambitions, might be a hindrance to their attempts to acquire these things. The privacy that enables one to control whether, and when, to withhold information, is as valuable to the agent for whom the development of intimate relationships is central to the good life as it is to the agent who believes that pursuit of wealth and power is what makes life worthwhile.

Egalitarian liberals believe that the state has a duty to provide conditions that make this kind of personal autonomy possible. But because they hold a commitment to freedom and equality of opportunity, there is an insistence that the state remains neutral among conceptions of the good in this provision. It must avoid privileging some conceptions of the good over others in its allocation of the right to privacy. Defining privacy in terms of an individual's desire for conditions of inaccessibility or for control over access to various aspects of her life sits well with this idea. A difficulty for liberals who subscribe to this conception of privacy, however, is what to make of those occasions in which there is an obligation or duty, backed by the threat of sanctions, to perform certain acts out of public view. If privacy is defined as a condition of unwanted accessibility, or for control over access, we cannot coerce people into maintaining privacy. But there are circumstances in which almost every society does, in fact, impose an obligation to engage in certain conduct, for example sexual activity, in places to which others do not have access. Some egalitarian liberals do suggest that privacy ought to be defined as a condition of limited accessibility.⁶¹ But generally, those who subscribe to egalitarian liberal values and the idea of the neutral state will be inclined to think that privacy is a condition of desired inaccessibility. Where we speak of an agent's obligation to separate him- or herself from others in certain circumstances, that obligation is rooted in *sui generis* historical and social

⁶⁰ Charles Fried has explained that "[l]ove and friendship... involve the voluntary and spontaneous relinquishment of *something* between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital that we spend in love and friendship"; C. Fried, 'Privacy [a moral analysis]' in F. D. Schoeman (ed.), *Philosophical Dimensions of Privacy: An Anthology*, (1984: CUP), at p.211.

⁶¹ See, for example, G. Reiman, 'Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Information Technology of the Future', in B. Roessler (ed.), *Privacies: Philosophical Evaluations*, (2004: Stanford University Press); also J. Reiman, *Critical Moral Liberalism: Theory and Practice*, (1997: London, Rowman and Littlefield) chapter 7, and; J Reiman, 'Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Information Technology of the Future', (1995) 11 *Santa Clara Computer and High Technology Law Journal* 27.

conventions that inform us how we ought to exercise self-restraint out of consideration for others and when we ought to withdraw from public view.⁶²

Before moving on to consider why perfectionist liberals and communitarians might endorse a conception of privacy as inaccessibility *per se* rather than a conception of privacy that focuses on the desires or preferences of the individual, it is important to keep sight of the limits of any convergence in the way that egalitarian liberals and libertarians are likely to think about privacy. While both are likely to be attracted to a concept of privacy defined in terms an individual's preference, they will have very different ideas about the value of privacy, and the justification and scope of a right to privacy. Liberals are likely to take the view that the libertarian idea of self-ownership does not capture the way in which the self is constituted. The liberal socially-embedded concept of self-realisation provides a much richer account of human endeavour and flourishing – the value of human life - than its libertarian counterpart. Liberals are likely to view the concept of self-ownership as a rather crude and unsatisfactory basis for a right to privacy, one that fails to provide an adequate justificatory account of privacy across all of the circumstances in which liberals are likely to think that privacy is a valuable.

(ii) The Appeal of Privacy as Inaccessibility per se for Perfectionist Liberals and Communitarians

While egalitarian liberals will say that privacy depends on an agent's desire for conditions of inaccessibility or control over accessibility, there are liberals who claim that individuals ought to be forced to experience privacy, even if their preference is for revelation or disclosure. Not all liberals subscribe to the idea of state neutrality between conceptions of the good. Some – perfectionist liberals – believe that the state has a duty to promote the well-being of its citizens and that it is, therefore, legitimate for the state to intervene in peoples life choices where that individuals' interests would be better served by the intervention than by leaving the individual to follow his or her self-determined course. Joseph Raz has argued that liberal resistance to coercion is grounded in concern for the autonomy of persons. But liberals should strive to provide individuals with the conditions that will enable them to develop an autonomous way of life, and this entails taking steps to 'control the physical environment and to regulate the non-coercive effects that one person's acts have over others in order to secure an environment suitable for autonomous life.'⁶³

⁶² Roessler, above n.8, at p.180.

⁶³ J. Raz, *The Morality of Freedom*, (1986: Oxford, Clarendon), 156.

How might this shape the way that such liberals think about privacy? Anita Allen suggests that some forms of privacy might be ‘promoted, protected and required by the law’ even it is ‘unwanted, disliked, not preferred and resented’, by those who are subject to the restriction.⁶⁴ The justification for this, she says, lies in the ‘foundational value’ of privacy. If liberals think that privacy has special value - that it is a pre-requisite for the development of autonomous agency - then it is not sufficient that individuals merely have an *opportunity to choose* the experience of privacy, it is vitally important that do, in fact, *experience* privacy.⁶⁵ Allen argues that while agents ought to be free to determine a conception of the good, and should be free to give up some of the privacy to which they are entitled, some degree of privacy will be needed if they are to develop an autonomous way of life. The premise of this claim is the idea that we all have a moral duty to respect others and take account of the way in which our decisions might affect others’ interests. But Allen says this moral duty extends to respect for oneself. An individual’s ‘personality and life enterprises’ might be affected by his or her decision to dispense with privacy – to ‘flaunt, expose, and share rather than to reserve, conceal, and keep’.⁶⁶ But what if the individual’s decision to give up privacy is autonomous, one that is consistent with her ideas about the kind of life that she wants to live? Well, the justification for imposing privacy is that this will make it possible for the agent to pursue ends that are more valuable than those that she has chosen for herself. This position is consistent with the broad claim made by perfectionists that the state has a duty to promote the well-being of its citizens and that it is legitimate for it to make judgments about the value of differing conceptions of the good life – to promote those that are valuable and suppress those that are not.⁶⁷ Just as Raz claims that the ideal or perfectionist liberal state may resort to coercion to regulate one person’s non-coercive acts in order to establish an environment suitable for autonomous life, so Allen suggests that it may be necessary for liberal governments to ‘proscribe and regulate disclosures and publications precisely in the interest of preventing cumulatively harmful diminutions of the taste for and expectation of privacy’.⁶⁸ It

⁶⁴ Allen claims to be an egalitarian liberal. However, this claim is difficult to reconcile with the argument that agents may be coerced into maintaining their privacy both for their own good and for the benefit of their fellow citizens, which she advances; see B. Roessler, ‘Autonomy, Paternalism and Privacy: Some Remarks on Anita Allen’, (2013) 13 APA Newsletter 13.

⁶⁵ A. Allen, *Unpopular Privacy: What Must We Hide?* (2011: OUP), 21.

⁶⁶ *Ibid.*, 171.

⁶⁷ See, Raz, above n.62, 417; ‘the autonomy principle is a perfectionist principle. Autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones.’

⁶⁸ A. Allen, ‘Coercing Privacy’, (1999) 40 *William and Mary Law Review* 723, 755. A further manifestation of the tendencies that Allen seems to have in mind is ‘media exhibitionism’. H. Nissenbaum, above n.3, 106, observes that ‘People are ready, even eager, to bear their souls to the world. These trends have been clearly evident for many

makes no sense from a perfectionist liberal point of view, for privacy to be defined as a subject's 'control of *unwanted* access,'⁶⁹ or to suggest that we take something to be private only 'if a person has a *desire* for privacy in relation to it' or '*wishes* to be free from outside access when attending or undertaking it'.⁷⁰ If the concept of privacy is to serve the ends envisaged by perfectionists it must be defined in terms that enable it to serve as both the subject of an enforceable right and of a similarly enforceable duty – as a state of limited access *per se*.

This conception of privacy is also likely to appeal to communitarians, who while recognizing the value of autonomy, think that the conditions that make autonomous life possible cannot be maintained on an individual basis. The ideal of self-realisation is only possible because the individual is socially situated. It is through the individual's membership of a political community that he or she is able to realise her self-determined ends. Where individual interests are in tension with the common good, communitarians are likely to attach greater weight to the latter than liberals. Where liberals prioritise individual freedom and ask whether some aspect of the common good is so important that it justifies some abrogation of individual freedom, communitarians point of reference will be the common good rather than individual interests. They will ask whether the individual freedom that is claimed is sufficiently valuable to justify the adverse effects it will have on the common good. Etzioni, for example, claims that for communitarians, privacy is a societal licence that exempts certain types of acts from public and communal scrutiny.⁷¹ While liberals value privacy because it establishes conditions that are a pre-requisite for personal autonomy, communitarians will value it where it enables individuals to engage in socially valuable practices. Licencing privacy provides a way of reinforcing the values that sustain the social framework that is a pre-requisite for the development of autonomous ways of life. But it might be also be necessary for the same reasons to impose a communitarian duty to maintain one's privacy. The requirement that defecation take place out of public view, and the laws in many societies that prohibit sunbathing nude on public beaches and consuming alcohol in public places, impose privacy in order to 'shore up the common good or certain social virtues', such as modesty.⁷² Communitarians are likely to share with perfectionist liberals a preference for a conception as a condition of inaccessibility *per se* on the

years in many mainstream television talk shows, whose guests – both celebrities and ordinary folks – share lurid details of their personal lives and intimate relationships.'

⁶⁹ Roessler, above n.8, 8.

⁷⁰ Moreham, above n.28, 636. Bok, above n.27, pp.10-11: 'Privacy is the condition of being protected from unwanted access by others – either physical access, personal information, or attention'.

⁷¹ A. Etzioni, *The Limits of Privacy*, (1999: New York, Basic Books), at p.196.

⁷² *Ibid.*

grounds that such a conception enables us to talk coherently about the imposition of a duty to maintain privacy, but part company with them on the justification for such a duty.

(iii) Is a Neutral Conception of Privacy Possible?

A significant objection may be raised to the claim that our attachment to basic moral and political principles will inevitably shape the way that we think about privacy. Some might say that it is possible to develop a 'neutral' conception of privacy. Ruth Gavison's definition of privacy is an attempt to provide just such a conception, the premise for which is that it is possible to embark on normative inquiry into the value of privacy only if we can say exactly what privacy is and when it is lost.⁷³ To this end she suggests that the adoption of any value-laden conceptions of privacy ought to be avoided, and claims that this can be achieved if privacy is defined as a condition of inaccessibility *per se* – 'an individual has perfect privacy when others have no physical access to him, are not able to observe him, and no information is known about him'. But is this conception of privacy neutral?

The task that Gavison sets herself is similar to that undertaken by legal theorists who have attempted to provide a purely descriptive, or normatively inert, theory of law. John Finnis has dismissed the possibility of such a theory. Any attempt that purports to provide a purely descriptive account of law, he says, cannot be normatively inert, because in proffering any particular theory, the theorist has acted on a preference for that theory over alternatives.⁷⁴ If this preference represents a rational choice, the reasons for conceiving law on the terms proposed by the theorist are normative reasons. They suggest why this particular conception ought to be preferred over all other available options.

Gavison's attempt to provide a neutral conception of privacy is vulnerable to the kind of criticism that Finnis directs at positivist accounts of law. She contrasts the definition that she proposes with the alternative conceptualisation of privacy as the control that an individual has over access. In the course of doing so, she provides us with various reasons why we should think about privacy as a condition of inaccessibility.⁷⁵ Significant for present purposes is her objection to a control-based conception on the grounds that 'control' suggests that the important aspect of privacy is the ability to choose it, and see that the choice is respected." She claims that the value of privacy is not exhausted by an individual's capacity to choose whether others have

⁷³ Gavison, above n.24, 425.

⁷⁴ J. Finnis, 'Law and What I Truly Should Decide', (2003) 48 American Journal of Jurisprudence 107, 119.

⁷⁵ e.g. Fried, above n.20.

physical or informational access. Privacy defined in terms of control, she argues, does not allow us to criticize an individual for ‘not choosing privacy and other times for choosing it’.⁷⁶ Access-based and control-based conceptions of privacy (at least those control-based conceptions that do not explicitly incorporate a normative dimension) are, in themselves, value-neutral; they merely describe extant conditions. But as soon as we make a rational choice to favour one conceptualisation over another, the preferred conceptualization can no longer be described as neutral or value-free. Although Gavison does not identify the circumstances in which an individual might be criticized for choosing or not choosing privacy, or the basis on which we might criticize him or her, the necessary implication of her acknowledgement of this as a possibility is that privacy is a concept that serves certain ends – that it has a particular value – and those ends are not served (or not as well-served) by an alternative conceptualization.

IV. Conclusion

In the introduction to this chapter, I stated that one of my aims was to set out, and justify, the way of thinking about privacy that is adopted in the chapters that follow. I have suggested that a satisfactory account of privacy must explain its relationship to the set of moral-political values that it serves, these being the values from which privacy norms, not least the right to privacy, are derived. What do we have to gain from thinking about the relationship between privacy and various conceptions of freedom, for example? It seems to me that it might lead to a change in our thinking about either or both of these concepts.⁷⁷ If we come to believe that there is a conception of freedom that is in some way preferable to that which we currently subscribe, we can expect a consequential shift in our understanding of privacy. Those adjustments will, in turn, result in a change in the way that we think about privacy problems and language that we use when we speak about them.⁷⁸ If a certain conception of freedom does not accommodate what seems to be an obvious and significant privacy harm, it ought to prompt us to consider whether our understanding of freedom needs to be revised.

Over the course of the chapters that follow, I hope to convince the reader that the republican conception of freedom offers the most coherent justification of the value of privacy. We will see in the next chapter, that this conception of freedom will enable us to explain its value in

⁷⁶ Gavison, above n.23, 428

⁷⁷ On the conceptualisation, cognitive development and the evolution of thought generally see, A. Gopnik and A. Meltzoff, *Words, Thoughts, and Theories*, (1997: MIT Press); D. Mareschal, P. Quinn and S. Lea (eds.), *The Making of Human Concepts*, (2010: OUP); S. Carey, *The Origin of Concepts*, (2009: OUP).

⁷⁸ A. Roberts, ‘Why Privacy and Domination?’, (2018) 4 *European Data Protection Law Review* 5.

circumstances in which those who perceive the value of privacy in terms of autonomy will have difficulty doing so. But my aims are broader than this might suggest. It is not enough to make a claim about the value of privacy. To the extent that it is considered valuable, a satisfactory account of privacy must give serious consideration to the means of securing it. It seems to me that, here too, the republican ideal of self-government, and recognition that individuals cannot secure conditions of freedom through their own efforts – that it must be a co-operative endeavor in which each has a duty to play a part – has more to offer than the doctrines canvassed in the previous section.

- Chapter 2 -*

Privacy and Non-Domination

In this chapter, my aim is, as stated in the introduction, to provide readers with the kernel of the thesis that will develop fully over the chapters that follow. It sets out a preliminary response to the two questions with which the thesis as a whole is concerned; 'Why should republicans value privacy?' and 'To the extent that it proves to be valuable, how can it be secured in a manner consistent with republican ideals of participatory self-government and political equality?'

I will suggest that the value of privacy for republicans lies in its capacity to shield individuals from domination. An act of interference with privacy might itself constitute an exercise of arbitrary power and be considered by republicans to be a form of domination. But an equal, and in some circumstances a greater concern, will be that the loss of privacy might leave the subject of it exposed to further domination. The acquisition of personal information following a loss of privacy, might provide any number of people who come into possession of it, with power to interfere in various ways with the decision-making of the person who has suffered the loss, and the range of choices that might be open to her.

There seems to be much anxiety about the extent to which governments and large corporations collect and retain information about us. We will be aware of some of this activity, but there will be much of which we are not. For most of us, the collection and retention of such information does not result in any obvious interference in our affairs. How then can we account for this anxiety, and do we have good reason to be anxious? If we suffer no interference as a result of loss of privacy, is our freedom really diminished by the loss? What if, in addition to suffering no interference following such loss, we are unaware that there has been some interference with our privacy? These are questions to which few satisfactory answers seem to have been provided. I will suggest that at the root of our anxieties about loss of privacy, is concern about what republicans will

* This is a more developed version of previously published work. See, A. Roberts, 'A Republican Account of the Value of Privacy', (2015) 14 *European Journal of Political Theory* 320.

recognize as domination. It seems to me that thinking about privacy problems in terms of domination will lead to a much more complete, compelling and coherent account of the value of privacy than any that has been offered to date.

I will show that a republican account can provide us with an explanation as to why loss of privacy is harmful in circumstances that will prove to be problematic cases for liberals – problematic in the sense that liberals will agree that privacy is valuable, and that loss of privacy is harmful, but will find it difficult to explain why this is the case. For liberals, privacy is valuable because it is a pre-requisite for autonomy. Where there has been a loss of privacy of which the subject is aware, liberals will be able to explain the harm (and concomitantly, the value of privacy) by pointing to the effect that this awareness will have on the decisions that she makes about the kind of person that she wants to be, and the kind of life she wants to lead. But this cannot stand as an explanation of the value of privacy (and conversely, the harm that is occasioned by its loss) where the subject is unaware that she has suffered a loss of it. However, this problem does not arise if we take privacy to be valuable because it protects those who have freedom from domination. We are able to say that although the subject may be unaware that she has suffered a loss of privacy, if others have acquired power to interfere in her affairs as a consequence of it, there is some diminution in her freedom.

If we accept that privacy is valuable because it protects those who have it from domination by others, it ought to prompt us to think about how it can be secured. According to the progressive form of republicanism, the values of which provide the foundation of the account of privacy developed in this thesis, the citizens of a political community can be assured of resilient conditions of freedom - and the privacy that will protect them from domination by others - only through some form of ex ante participation in the political decision-making processes in which the law will be collectively determined. I will suggest that privacy is a pre-requisite for such participation. It facilitates restricted forms of deliberation that are an essential prelude to the broad and inclusive public forms of deliberation through which the norms that shape both the nature of the relationship the citizens have with one another in a republican democracy, and the relationship they will have with the state, will be determined. I will also argue that effective participation in political decision-making will be dependent on citizens having a more general guarantee of privacy - a guarantee that secures the conditions of non-domination that are required for personal autonomy. The

individual who is unable to develop an autonomous way of life generally, is likely to be incapable of exercising the kind of political autonomy that is required if the republican ideal of self-government is to be realised. I will suggest that personal and political autonomy are mutually sustaining, and that privacy is a prerequisite for both. The account of privacy that is presented here might be described as reflexive. There is a certain circularity to it. In considering the value of privacy we are brought back to the idea of privacy as a necessary starting point in efforts to secure it. Citizens can only secure a degree of privacy that is consistent with equal non-dominated status, through participation in norm generating political processes. But effective participation in those processes, also depends on a guarantee of privacy.

The argument will be developed in the following way. The first part of the chapter describes the republican conception of freedom as non-domination and the various broad forms that dominating power might take. In the second part, I will argue that citizens can only be assured of conditions of freedom (non-domination) through some form of direct ex ante participation in the political process that generate the laws that regulate their lives. In the third part, I consider the role of privacy in securing conditions of freedom in the face of the threat of various forms of dominating control. In Part IV, I consider the way in which privacy facilitates effective participation in the political decision-making processes, such participation being essential to securing conditions of freedom and a guarantee of individual privacy.

I. Freedom as Non-Domination

As I noted in the introduction, republicanism aims to secure conditions of freedom for the citizens of a self-governing polity. In some versions of republicanism participation in political life is seen as an end in itself – the idea being that individuals are essentially social and political beings and realization of this can only be achieved through participation in political life.¹ Such participation is taken to be constitutive of freedom. In others, it is taken to be instrumentally valuable - that it is only through participation in political processes that individuals can be assured of their freedom.² The version of

¹ e.g. J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (1975: Princeton University Press); C. Sunstein, 'Beyond the Republican Revival', (1988) 97 Yale Law Journal 1539; F. Michelman, 'Law's Republic', (1988) 97 Yale Law Journal, 1493. For an overview of this strand of republican thought, see A. Tomkins, *Our Republican Constitution*, (2005: Hart).

² Q. Skinner, *Liberty Before Liberalism*, (1998: CUP).

republicanism that provides the normative foundation of the account of privacy developed in this work – progressive republicanism – belongs to the latter. In asking whether, and if so how, privacy might serve republican ends, we should have in mind the values of this form of republicanism, the core value being a conception of freedom as the absence of domination.

Republicans claim that the way in which they conceive freedom constitutes an important point of distinction between republican and liberal theories. Privacy is associated with the possibility of freedom, and so if the republican conception of freedom is distinct from its liberal counterpart, as republicans claim, it raises the possibility of an account of the value of privacy that is distinctive insofar as it can, in some respects, be distinguished from a liberal account.

Liberals say that conditions of negative freedom exist insofar as there is an absence of interference, so that a subject can be said to be free to the extent that her choices or preferences are not overridden by means of another's intentional obstruction, coercion, deception or manipulation.³ For republicans this conception of freedom fails to encompass the full range of circumstances in which it can properly be said that there is some diminution in individual freedom. As we will see, while republicans say that only some forms of interference constitute a loss of freedom, they also claim that an individual can suffer such a loss in the absence of any interference. If individuals are to enjoy conditions that are a pre-requisite for the successful pursuit of self-determined ends, we need a more expansive conception of freedom, one that is captured in the idea of non-domination. Perhaps the best-known definition of this concept is offered by Phillip Pettit, who suggests that someone dominates another to the extent that the person has the capacity to interfere, on an arbitrary basis, in choices that the other is in a position to make.⁴ Interference, he explains, will be arbitrary if it fails to track the ideas and interests of the subject.

In more recent writing, Pettit provides a refined definition of domination; 'Someone, A, will be dominated in a certain choice by another agent or agency, B, to the

³ Phillip Pettit, 'A Republican Law of Peoples', (2010) 9 *European Journal of Political Theory*, 70, 74.

⁴ P. Pettit, *Republicanism: A Theory of Freedom and Government*, (1997: OUP) at p.52. Others have subsequently observed that dominating power can also reside in social structures and have defined domination in a way that takes account of this. Lovett, for example, suggests that 'persons or groups are subject to domination to the extent that they are dependent on a social relationship in which the other person or group wields arbitrary power over them'; F. Lovett, *A General Theory of Domination and Justice*, (2009: OUP), at p.119.

extent that B has a power of interfering in the choice that is not itself controlled by A.⁵ The power to interfere will be 'controlled by A' only if it is exercised 'in a direction or according to a pattern that A has the influence to determine'.⁶ One can experience interference then, without being subject to dominating power. To take a simple example, Smith might think that it will help him in his attempt to give up smoking to issue an instruction to all of his friends, that if they see him with a cigarette in his mouth they should, without hesitation, remove and extinguish it. If Brown does just this, he interferes with Smith's choice to light up, but does so in accordance with directions that Smith has issued. The interference is, therefore, an exercise not of Brown's preferences as to whether Smith should smoke, but compliance with Smith's desire that his friends assist him in his attempt to give up smoking. In the absence of any retraction of the instruction that Brown has reason to take seriously, his repeated interventions to prevent Smith from lighting up does not constitute dominating control – the interference is in accordance with Smith's directions.

Pettit points out that interference in an agent's choices might take various forms. First, options that may have been open to the agent might simply be withdrawn by someone who has the power to remove an option from those available, so that it is no longer possible for the agent to choose it. Of course, it might not be possible to remove certain options. The interferer might not possess the power or control over forces that would be required to remove a particular option. The option may be of a kind that cannot be removed – it might be one that will always be open to the agent. But although removal of an option might be impossible, a second form of interference may still be feasible. It might be possible to interfere with an agent's choices by making the option considerably less attractive, for example, by attaching sanctions to it so that the agent would incur considerable costs were he to choose it. In such circumstances, the original unencumbered option is replaced with a far less attractive alternative.

The final mode of interference is manipulation of an agent's decision-making through the misrepresentation of options.⁷ Successful manipulation results in the agent being unable to make a choice on a proper understanding of the choices that are

⁵ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (2012: CUP), at p.50.

⁶ *ibid.*

⁷ For a justificatory account of the paternalistic manipulation of individuals' choices through the framing of options that are presented to them, see R. Thaler and C. Sunstein, *Nudge: Improving Decision about Health, Wealth and Happiness*, (2008: Penguin Books).

available. She may be 'nudged' towards certain options and away from others. An interferer might attempt to influence an agent's decision-making by overloading her with so much information that any strategic vision is clouded, blinding her as to the nature of certain options that are available. Rewards and incentives may be offered, and attempts may be made to induce feelings of guilt for not choosing an option that the manipulator would prefer the agent to choose.

It should be noted that each of these modes of interference – the removal, replacement or misrepresentation of options – can be pursued in the presence or the absence of awareness on the part of the victim of the interference. Its general effect as a form of dominating control, however, is likely to be amplified where the victim is aware.

This outline will do for the time being. I will provide some concrete examples of the forms of interference described above in the course of explaining in the next section how conditions of privacy might frustrate attempts to interfere in an agent's choices. For present purposes, we should note that republicans are concerned about interference, but not interference *per se*. Concern is reserved for *arbitrary* interference. The individual who suffers such interference is at the mercy of the agent or agency that has power to interfere. But while interference on an arbitrary basis will always constitute domination – to a greater or lesser extent, depending on the nature of the interference – a person need not interfere with another's choices in order to exercise dominating control. If an agent or agency has the power to interfere arbitrarily in an individual's choices, freedom is diminished even if the power is never exercised.

For republicans, the paradigmatic case of domination is servitude. A person who is enslaved might have the good fortune to fall into the hands of the most benevolent of owners, a master who gives him a free rein. However, republicans point out that even though such a person may find that he generally gets by without being subjected to arbitrary interference, this state of affairs is at all times contingent on the good will of his master. Although the slave is seemingly free to make his own decisions, those decisions will be taken in light of the knowledge that anything he chooses to do may be thwarted if it does not meet with his master's approval. Although there is no active interference in the slave's affairs, republicans would not say that he enjoys freedom in any meaningful sense of what it means to be free. The republican idea of freedom is perhaps best summed up by Duncan Ivison:

“I am not free simply because no one *actually* interferes with me... [T]he *bare potential* for interference threatens my liberty, not only the likelihood or probability of its exercise, and that means that as long as it is counterfactually the case that someone could arbitrarily interfere with me, I am unfree. So it is not merely the prospect or probability of arbitrary interference that matters but the bare potential.”⁸

To be exposed to dominating power is to live with the high degree of uncertainty that comes with not knowing whether or when one will be subject to interference. Republicans claim that not only is this state of affairs likely to engender considerable anxiety and a sense of dispiritedness, it makes planning much more difficult than it would be under corresponding conditions of non-domination.⁹ Where another has the power to interfere in an agent’s choices according to his whims, preferences or desires, the agent will be required to engage in strategic deference, or to anticipate interference and take evasive action in attempt to ensure that he provides the other with no reason to exercise the power he possesses.¹⁰ The development of successful strategies of deference and evasion, and the planning that this entails imposes significant costs, requiring the diversion of resources that could otherwise be deployed in determining and pursuing ends that the individual considers valuable.

II. Securing Freedom

The way in which freedom is conceived is said by republicans to mark a significant difference in republican and liberal thinking. A second ground on which it is claimed that the two can be distinguished, is the republican belief that an individual can only be assured of her freedom through participation in politics. Recall that, according to Pettit, a person will be dominated in a certain choice by another agent or agency, to the extent that the agent or agency possesses a power to interfere that is not itself controlled by the person. Control exists where the power is exercised in accordance with a direction issued by the person who is subject to it, or according to a pattern that he or she has the influence to determine. This idea was illustrated earlier using the rather trivial example of a smoker who issues a directive to his friends to extinguish any cigarette that they see him smoking. But suppose we think about interference not by well-meaning friends, but

⁸ D. Ivison, ‘Republican Human Rights?’, (2010) 12 *European Journal of Political Theory*, 31, 34-35.

⁹ Pettit, above n.4, p.85; M. Viroli, *Republicanism*, (1999: New York, Hill and Wang,) p.12.

¹⁰ Pettit, *ibid.*, at p. 81.

by a more remote and powerful entity. How is the individual to control the power that the state has to interfere in the decisions that he is in a position to make? Some say that he need do little, so long any measures that might be adopted, track common interests. The participatory duty of the citizen *ex-ante*, extends no further than the election of representatives who will be expected to ensure that the interests of those who elect them are given due consideration and weight in political decisions. If any measure is adopted that fails to track the interests that they share in common with others, citizens must be prepared to step in and contest it. Those who suggest that citizens' *ex ante* participatory duties are in this way relatively undemanding, claim that the need to secure electoral support and to minimize the likelihood of decisions being challenged mean that representatives will ensure that their decisions take proper account of the interests of those they represent.¹¹

The notion of the passive but vigilant citizen is, however, at odds with the classical republican idea of self-government. We noted in the introduction, Celikates' observation that from a republican perspective, circumstances in which citizens are willing to entrust others with the task of framing the norms to which they will be subject amounts to an 'outsourcing' of self-determination.¹² The idea of self-government requires citizens to understand the norms to which they are subject as an expression of their own political practice.¹³ The members of a republican democracy can only realize the ideal of self-government, and be sure that they will enjoy conditions of non-domination, through active participation in the decision-making processes that generate - determine the nature and extent of - the norms that will regulate their conduct.

The idea that citizens will only be able to secure conditions of freedom for themselves through some form of direct participation in the political processes that

¹¹ Pettit, for example, claims that in a well-functioning republican democracy, we might think of citizens exercising editorial rather than authorial control over norm-generating political processes. While citizens can step back and let others get on with the process of generating norms, they must have editorial control - the power to require that norms be reformulated so that they better track the interests that citizens hold in common. Editorial control, it is said, are likely to ensure that norms are generated in a way that will meet with editorial approval; see P. Pettit, *A Theory of Freedom*, (2001: OUP), at p.163. See also P. Pettit, 'Democracy, National and International', (2006) 89 *The Monist*, 301.

¹² R. Celikates, 'Freedom as Non-Arbitrariness or as Democratic Self-Rule? A Critique of Contemporary Republicanism', in C. Dahl, T. Anderson Nexø, and C. Prendergast (eds.), *To Be Unfree: Republican Perspectives on Political Unfreedom in History, Literature and Philosophy*, (2013: Bielefeld: Transcript Publishing).

¹³ *ibid.*

generate the norms to which they are subject, is one of the central commitments of the progressive form of republicanism that provides the foundation for the account of privacy developed in this thesis. Securing conditions of freedom in a political community is a necessarily co-operative endeavour. They are conditions that citizens can enjoy only if they exercise effective control over the power of the state. In other words, such power will be non-dominating insofar as it is acquired, exercised or conferred in accordance with terms collectively dictated by those who are subject to it.

Participation may take various forms, of course – from contributions to discussion on the development of political policies generally,¹⁴ to *ex-ante* contestation of concrete proposals and submission of counter proposals as part of a formal consultation process, and the empanelling of *ad hoc* citizens' assemblies to generate legislative proposals on issues of fundamental importance.¹⁵ But with membership of a self-governing polity comes the expectation that citizens will, when necessary, set aside private interests and pursue the public good of ensuring that the laws to which individuals are subjected, track their common interests.

The expectation that citizens will hold these pre-dispositions or commitments comprises a central idea of the republican concept of *civic virtue* and in this respect republican civic virtue is more demanding than its liberal counterpart. In the liberal state citizens involvement in political life, and support of liberal institutions, will be considered virtuous. However, the inculcation of a commitment to these institutions, the adoption of measures that are intended to instil in citizens a disposition to engage in political decision-making processes and to acquire the attributes required if their participation is to be effective, are likely to be considered by liberals to be a threat to state neutrality. Republicans have pointed out, however, that in abandoning the notion of state neutrality, they seek to isolate and promote only one strand in citizens'

¹⁴ See for example, the proposal by a member of parliament in the United Kingdom, that meeting rooms at Westminster be used 'to host discussion groups, presentations, lectures, meetings and debates... on as wide a range of topics as people want to discuss. Make the place a People's Parliament. If anyone knows a specialist in particular policy field with something useful to say, let me know and we'll book the room, invite MPs, activists, academics, students and anyone else who wants to come and kick off a discussion.'; John McDonnell MP, 'Join us to Create a People's Parliament'. Letter to the Editor, *The Guardian*, 12th November 2013. <http://www.theguardian.com/politics/2013/nov/12/join-us-create-peoples-parliament> (accessed 14th September 2018).

¹⁵ Perhaps the most notable example of this form of participation, is the empanelling by the government of British Columbia of a citizens' assembly. The assembly's task was to produce a recommendation for reform of the electoral process that could be submitted to the electorate in a referendum; see M. Warren and H. Pearce (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, (2008: CUP).

conceptions of the good; the good of not having to guard against arbitrary interference in one's affairs.¹⁶ Because conditions of non-domination enable citizens to identify and pursue their own conceptions of the good, the expectation that citizens will act in ways that promote and secure non-domination should not be considered inherently oppressive.

The civic duty that I have just described is grounded in the idea that the possibility of individual freedom requires collective control over the power of the state. But we need to acknowledge the various implications that flow from this proposition. If the power with which we are concerned is that involved in, and conferred by, the generation of norms that apply generally – to all members of a political community – the risk of domination will be minimised by ensuring broad participation in the process of generation. The idea of collective control, and the possibility of freedom, requires the input of all those who might, as a theoretical possibility, be on the receiving end of the power, and especially those from sections of the political community that common experience suggests are, in fact, most likely to be subject to it. The participation of those from these sections of the community ought to be of concern to those involved in the enterprise of generating norms, their absence raising the prospect the process will become one of domination.

The decision-making processes in which the citizens of a republican democracy have a civic duty to participate ought to be deliberative. Power conferred on officials must serve some interest that members of the polity share in common if it is not to constitute dominating power. Establishing just what these interests are, and that the conferral of power will, in fact, serve them, requires a form of deliberation that ensures that any decision is taken in light of a broad range of views. It is particularly important that the views of minority groups and sections of the community that may be disproportionately affected by the proposals are represented. The process should facilitate contestation. There must be adequate opportunities for opponents to challenge proposals and to present counterproposals. Interventions must be taken seriously and should be met by meaningful responses. Throughout the process all parties should reflect on alternative points of view, be willing to revise or abandon their positions in light of new information and insights, as well as being prepared to explain

¹⁶ J. Maynor, *Republicanism in the Modern World*, (2003: Polity Press), at p.69.

by reference to the grounds on which the position they advance is challenged, why it should stand. In sum, well-functioning deliberative processes will be those that provide citizens with an adequate opportunity to influence the content of legislative proposals that provide officials with power to interfere in the choices that they - the members of a self-governing polity - are in a position to make. Even if the views held by some who participate in these processes do not prevail, their active involvement might still enable them to exercise a form of control. The contestator may not get his way, but he can at least be assured that any measure that is adopted is supported by public reason - that it does, in fact serve common rather than sectional interests.

We will explore these issues at greater length in the chapters that follow, but this relatively brief outline of two important commitments of progressive republicanism - freedom as non-domination, and broad participation as an essential means of securing those conditions - provide us with enough of a framework to start thinking about why republicans might value privacy.

III. The Value of Privacy for Republicans

Let us, for present purposes, take privacy to be the condition in which the individual is (or a group of individuals are) separated from others. So that an agent has privacy where others do not have physical access to him, or access to information about him. Privacy is then, associated with the idea of negative freedom - those who have privacy do not suffer certain forms of intrusion. We have noted that republicans claim that the republican conception of freedom is distinctive, that it constitutes a necessary extension of the liberal conception of freedom as non-interference. I suggested earlier, that in light of this, a republican account of the value of privacy might be similarly distinctive, and it is to this possibility that we now turn. I want to approach it in the following way.

In part (i) of this section, I will consider how privacy might protect an individual from the various forms of arbitrary interference identified by Pettit: the replacement, removal and misrepresentation of options. This part of the republican account of privacy does not differ substantially from standard liberal accounts. However, what I consider in part (ii) *will* distinguish the account that is offered here from its liberal counterpart. I want to think about privacy and that aspect of freedom that republicans argue is a necessary extension of the liberal conception of freedom. This is the loss of freedom that republicans say can occur in the absence of interference - the subjugation

of a person to dominating power by virtue of another merely having the capacity to interfere on an arbitrary basis. It is here that a distinctive republican account of the value of privacy emerges. Where an agent is aware that he has suffered a loss of privacy, but has been subject to no subsequent interference, it is possible for liberals to construct an account of the value of privacy around a positive conception of freedom. This account cannot, however, accommodate circumstances in which the agent is unaware that he has suffered such a loss - that he has been the subject of covert surveillance, for example, or that others have acquired information about him without his knowledge. In contrast, a republican account of privacy grounded on the idea of freedom as non-domination, can explain a loss of privacy where there is no subsequent interference in terms of negative freedom. Further, this explanation covers both circumstances in which the subject is aware of the loss, and those in which he is not.

As we have already noted, exercise of the power to interfere will not be arbitrary if the person who is subject to it is able to exercise some control over it, and active participation in political decision-making processes provides citizens with an opportunity to control the use of power. In part (iii) I want to consider the role that privacy plays in facilitating such participation. I want to suggest that republicans will consider privacy to be a reflexive, common good; the right to privacy provides citizens with conditions of individual freedom that enable them to lead self-directed lives, but it is also a pre-requisite for the political autonomy that will be required for effective participation in processes through which a guarantee of privacy (and other basic liberties) can be secured.

(i) Privacy, Domination, and Interference

If a republican account of the value of privacy were to be restricted to consideration of the various circumstances in which the threat of domination came in the form of another's interference with an agent's choices, it would look rather like a standard liberal account. Liberals value privacy because they recognize it to be a pre-requisite for the development and exercise of autonomous ways of life. While personal autonomy is always in the foreground of liberal thinking, there are few references to it in republican writing. But this should not be taken as an indication that republicans are unconcerned about autonomy. Pettit explains that autonomy is a far richer ideal than that of freedom as non-domination, but claims that the republican focus on non-domination is warranted on the grounds that 'it is bound to be easier for people to achieve autonomy

once they are assured of not being dominated by others'¹⁷ The republican pre-occupation with domination is premised on the belief that if people are assured that they will not be exposed to dominating control, they can be 'trusted to look after their own autonomy.'¹⁸ But as Richard Dagger points out, when republicans attempt to explain the harm that results from subjugation to dominating power, they tend to do so by describing its adverse effects on an individual's capacity for autonomy. The person who suffers domination, he suggests, suffers 'the wrong of not being respected as someone with a right to live, think, and speak for himself'¹⁹ - an implicit appeal to autonomy. To be the subject of domination is to have questions as to what you can, may, or will do, taken out of one's hands; such issues are 'up to someone else'.²⁰ If we think about Pettit's account of domination in the form of arbitrary interference in a person's choices, the relationship between autonomy and domination is evident. Arbitrary interference in an agent's choices may seriously impede her attempts to determine for herself the kind of life that she ought to lead - to pursue self-determined ends. Some individuals might lack the capacity for autonomy in the absence of domination, but subjugation to dominating power will diminish *any* individual's capacity for autonomy. Republicans will value privacy for much the same reasons liberals insofar as it protects a person from arbitrary interference in her choices.

Let us start by considering how privacy - or a right to privacy - might ensure that others are unable to *replace* certain options - to substitute an option that you might be inclined to choose, with a less attractive alternative, so that you are more inclined to choose some other option that I would prefer you to choose. One broad way in I might achieve this (assuming I have the power to do so), is to attach a sanction to an option that I cannot remove from the range of options that are available to you. If the sanction is sufficiently onerous, you are likely to forego the option to which it is attached and choose an option I would prefer you to choose. Of course, my only preference might be that you do not choose the option to which I have now attached a sanction. But how

¹⁷ Pettit, above n.4, at p.82.

¹⁸ *ibid.*

¹⁹ R. Dagger, 'Autonomy, Domination, and the Republican Challenge to Liberalism', in J. Christman and J. Anderson (eds.), *Autonomy and the Challenges to Liberalism*, (2005: CUP), at p.190.

²⁰ J-W. Van der Rijt, 'Republican Dignity: The Importance of Taking Offence', (2009) 28 *Law and Philosophy*, 465. The fact that the dominated person is not his own master and does not enjoy equal standing with the dominator and other non-dominated citizens is humiliating in itself. It is on this basis that van der Rijt claims that republicans 'care about freedom as non-domination because they care about individual dignity'.

might privacy shield a person from this kind of interference? Well, decisional privacy provides individuals with freedom to make fundamental decisions about the way that they live their lives – to choose their affiliations, to choose those with whom they wish to form intimate relationships, and so on. It affords protection against attempts to ensure that those decisions conform to the preferences - moral or otherwise - of those who disapprove of the choices that the agent might make if given free rein. Take, for example, section 337A of the Singapore Penal Code. This provision makes it an offence for any male ‘to commit any act of gross indecency with another male person’, whether the act takes place in a public or a private place. If convicted a person may be imprisoned for up to 2 years. Now the state of Singapore cannot possibly remove the various opportunities that a man might have to engage in sexual activity with another man, so that it could be said that such a course of action is no longer *de facto* open to him. But it may be able to coerce him in a way that makes it less likely that he will take advantage of the opportunities that are available to him. It can do this by attaching a criminal sanction to such conduct. Criminalization replaces one option – the freedom to engage in sexual activity without any prospect of punishment by the state, with another – the option of engaging in such activity attended by the prospect of up to 2 years in prison if discovered. We might think the rational agent, if he perceives there to be a significant probability of being discovered, would be less inclined to engage in conduct that might be considered an act of ‘gross indecency’, than would be the case if that option was sanction-free. If this assumption is reliable, the failure to respect decisional privacy results in an interference in fundamental choices about the way in which the agent wishes to lead his life, and if this interference is arbitrary – that is to say, the agent has no opportunity to exercise control over the power – it constitutes a form of domination.

Moving on, examples of circumstances in which loss of privacy leads to the *removal* of options are not difficult to come by. It came to light in the United Kingdom, for instance, that a group of large construction companies had established a database of 3200 ‘blacklisted’ workers – those who were perceived to be ‘troublemakers’, an enterprise that seems to have benefitted from the collusion of the police who were said to have been supplying information on various workers.²¹ The effect of the disclosure of

²¹ See <http://www.theguardian.com/business/2013/oct/12/police-blacklist-construction-workers-watchdog> (accessed 14th September 2018), which reports that a file held on one of the workers ran to 36 pages of information. It was also confirmed by the Information Commissioner’s Office that the database contained notes from a meeting between the blacklisting organisation and police officers from a police

information held on the database to potential employers would, no doubt, have resulted in foreclosure of any employment prospects in the construction industry – the removal of options that would have been available but for the violation of the subjects’ informational privacy. Liberals might be expected to explain the harm caused by the disclosure by referring to its effects on the autonomy of the subject of the disclosure. The setback to employment prospects may frustrate career ambitions, or at a more base level, deprive the agent of an opportunity to use her skills and experience to generate the financial resources that would be required to realize the kind of life that she envisages for herself. Either way, the loss of privacy is likely to have a significant and adverse effect on the subject’s autonomy. Republicans, on the other hand, are likely to say that the disclosure of information, and its use by potential employers in recruitment decisions, are forms of domination. If the existence of a database is not common knowledge – a secret database - members of the polity will have had no say in whether or not commercial entities ought to be permitted to establish such databases, and if they were to be so permitted, the terms on which they ought to be operated. In the absence of an opportunity to exercise control in this way, those who administer the database, and those who have access to it, acquire dominating control - a power to remove the employment options of those who are chosen for inclusion on the database.

Finally, privacy might protect an agent from the possibility that others will interfere with his choices by *misrepresenting* options that are open to him. Pettit, it will be recalled, suggests that misrepresentation of options may enable an interferer to manipulate the decision-maker in a way that is likely to result in him choosing as the interferer wishes him to choose. He suggests that it might be possible to interfere with agents’ decision-making by ‘snowing them with so much information that they are putty in [the interferer’s] hands’.²² Successful manipulation, he explains, ‘will affect the exercise of your cognitive capacity to choose between certain options even if it leaves your objective capacity in place. By means of manipulation I may succeed in getting you to choose as I wish.’²³

national extremism tactical co-ordination unit’, which has itself established a database of those associated with what the police perceive to be ‘domestic extremism’. For academic commentary, see D. Whyte, ‘Policing for Whom?’, (2015) 54 *Howard Journal of Crime and Justice* 73.

²² Pettit, above n.5, at p.55.

²³ *ibid.*

Neil Richards provides an example that illustrates how loss of privacy facilitates this kind of manipulation.²⁴ Surveillance, he explains, provides corporations with a large amount of information about customers, and this can be used to persuade them to buy products or services more often, or to buy a wider range of goods or services. The supermarket chain, Target, for example, retains records of what its customers purchase. It uses that information as the basis for an inference as to which customers are likely to be pregnant – the purchase of unscented lotion and magnesium supplements, it seems, warrants such an inference. Once a customer is marked as someone who might be pregnant, they can be subjected to ‘targeted marketing’. This involves flooding them with information (targeted advertisements) relating to products that they offer, and which expectant mothers might purchase. This is done in the belief that if such customers are targeted in this way with sufficient frequency, they are likely to succumb to the suggestion that they ought to purchase the advertised items, and that they are likely to keep returning to the supermarket for this and other products for several more years.²⁵ Now some might consider this kind of marketing to be beneficial insofar as it saves those who are targeted the trouble of looking for products that they might need. Others might think it a distracting imposition.

However, it is not difficult to imagine circumstances in which the acquisition of information about a person enables whoever has that information to engage in a more insidious form of manipulation. If I learn of your fears and desires, it will be possible for me to use this information to manipulate your decision-making. If I want you to choose a certain option, I can emphasise possible consequences of the choice that are consistent with your desires. If I rather you did not make a particular choice, I can suggest to you that choosing this option might result in a state of affairs of which I know you are fearful, while playing down the likelihood of your preferences being satisfied by choosing this option. Our use of technology and activity online has increased the risk of others discovering information about us that could be used in this way. Suppose that I am forwarded an email without your knowledge, in which you state that you are fearful of Smith or have some other good reason to avoid him. My acquisition of this information enables me to manipulate your decision-making in quite subtle ways. If I would prefer you not to go to some event, I might suggest that Smith is likely to be there or that I have

²⁴ N. Richards, ‘The Dangers of Surveillance’, (2013) 126 Harvard Law Review 1934.

²⁵ *ibid.*, 1955.

heard that Smith's best friend will be there, knowing that this will make you less inclined to attend. I might come across information from I which can infer your preferences and anxieties in other – more innocuous - ways. If we share the same computer or device, for example, the internet browsing history might reveal that you visited websites that suggest you have certain anxieties and fears. I might not need to set out to find this information. The search engines that I use might, as soon as begin typing, make suggestions based on previous terms that you have used to search for information.

In relation to each of the examples provided above, republicans will say that loss of privacy could lead to interference, and that if the person who suffers the loss has no control or influence over the exercise of the power to interfere, it constitutes dominating control (and that consequently, the person suffers a diminution of freedom). Republicans will have no hesitation in claiming that privacy is valuable in these situations because it prevents others from acquiring dominating power. If pressed to explain why domination is harmful, they would no doubt offer an explanation that liberals would recognize as a claim that privacy is a pre-requisite for personal autonomy.

There is, then, nothing in the discussion of privacy so far, that suggests a republican account of the value of privacy is very different to its liberal counterpart. The grounds on which it can be distinguished come in the sections that follow, the first of which concerns the value of privacy in preventing domination in the absence of interference.

(ii) Privacy and Domination in the Absence of Interference

The discussion above concerned the way in which privacy might protect a person from the threat of arbitrary interference in her choices. Two of the examples that were provided involved the *use* of information collected and retained on databases. But what about the *mere possession* of information about an individual? Suppose someone were to access my internet browsing history without my knowledge or consent. Most people would agree that I suffer a loss of privacy. Those who believe privacy to be a condition of inaccessibility *per se* might say that my consent is irrelevant to the question of whether I suffer a loss of privacy – the mere fact that another acquires information about me means that I do, in fact, suffer such a loss.

Suppose that having seen that history, the reader is now in possession of information that I would find embarrassing or shameful were others to become aware of it. Let us further suppose that the reader discloses it to another person, and in the act of disclosing it, it is overheard by a third person. Each now has knowledge of the embarrassing/shameful facts revealed by the record of the internet sites that I have visited. Presumably we would all say that the person who accesses a record of the websites I have visited interferes with my privacy. We would probably be willing to say that the acquisition of this information both by the person to whom the original source of the information discloses it, and by the person who overhears the disclosure, are further losses of privacy. But how do we explain the harm that I suffer as a result of others learning what I rather they did not know about me? We can explain why their *use* of that information in a way that interferes with the choices that I might make is harmful - but what is the harm occasioned by *mere possession* of that information?

If we take freedom to be an absence of interference - or even if we say that that freedom is diminished where it is *probable* that another will interfere²⁶ - it is not at all obvious how the disclosure to the second person constitutes a loss of freedom. It is even less apparent how the acquisition of information by the person who simply overhears the disclosure constitutes any interference in my affairs or diminishes my freedom. That the person might use the information to interfere in my decision-making is no more than a bare possibility - a threat, or a risk, that I will suffer some interference. I know nothing of their intentions. They may never use the information, but I take no comfort in this possibility. It will not ease my anxiety about the loss of privacy. If I am aware of the loss of my privacy - I know or realize that someone has discovered information about my proclivities as a consequence of learning about the websites I have visited - then liberals can explain the harm that results from the loss in terms of positive freedom. An agent can be described as free not only to the extent that an adequate range of options are open to her, but also to the extent that she has the capacity to make self-determined (authentic) choices in relation to those options. She might suffer a diminution in

²⁶ On 'pure negative liberty' generally, see M. Kramer, *The Quality of Freedom*, (2001: OUP) ; I. Carter, *A Measure of Freedom*, (1999: OUP). For discussion in which republican freedom is contrasted with pure negative liberty see, M. Kramer, 'Liberty and Domination'; I. Carter, 'How are Power and Unfreedom Related?'; Q. Skinner, 'Freedom as the Absence of Arbitrary Power', and; P. Pettit, 'Republican Freedom: Three Axioms, Four Theorems', all in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory*, (2008: Oxford, Blackwell). For a liberal account of privacy and its relationship with the concept of 'pure negative freedom' see, B. de Bruin, 'The Liberal Value of Privacy', (2010) 29 *Law and Philosophy* 505.

(negative) freedom if others interfere to close off certain options. But the degree of (positive) freedom that she enjoys may be diminished if her capacity for authentic decision-making is undermined.

Beate Roessler suggests informational privacy is valuable to people because it is an 'intrinsic part of their self-understanding as autonomous individuals... to have control over their self-presentation... how they want to present or stage themselves, and how they want to be seen'.²⁷ If an individual is aware that others know what she would prefer them not to know, there will be involuntary shift in her perspective, from the first to the third person. This shift prevents her from acting in an authentic, self-determined way. Her conduct will be conditioned by her awareness of what other's know – it will prevent her from doing what she wishes without consideration for others' perspectives. Crucially, it may lead her to act in ways that are less likely to attract censorship and disapprobation; to adopt behavior that she does not want to adopt. In light of this, Roessler suggests that loss of privacy in such circumstances is closely connected with the possibility of individual freedom.²⁸ Here, the ideas of positive freedom and autonomy converge, so that we can say that even though there is no interference in his decision-making, the internet browser's awareness of other's knowledge of his browsing history and the inferences that might be drawn from it, adversely affects his autonomy, and diminishes his freedom to act in an authentic or self-regarding way. However, while the idea of positive freedom might provide the foundation for a plausible account of the value of privacy in cases in which the browser is aware that he has suffered a loss of privacy, its reliance on the effect of the loss of privacy on the autonomy of the subject means that it cannot explain the value of privacy in cases where the subject is unaware that he has suffered such a loss. Nor can the harmful effects of the loss be explained by reference to conception of negative freedom as an absence of interference. If we believe that privacy is valuable in such circumstances – that others should not be permitted to subject us to covert surveillance or to covertly acquire and retain information about us – we need to look elsewhere for the basis of an explanatory account.

It seems to me that the republican idea of domination provides a concept that enables us to speak coherently about the relationship between privacy and negative

²⁷ Beate Roessler, *The Value of Privacy*, (2005: Polity Press), at p.116.

²⁸ *ibid.*, at p.117.

freedom in circumstances in which a loss of privacy is not followed by any interference, and to do so whether or not the person who suffers the loss is aware of the loss. It was noted in Part I, that a person can assume dominating control over another, even if he or she makes no attempt to interfere directly in the choices made by the other. This kind of control, Pettit suggests, can be exercised through invigilation of a subject's choices.²⁹ Where I invigilate your choices, I may be happy to let you choose as you wish and not interfere, but I am poised to step in and block your choices if they do not accord with my preferences as to how you should choose. Pettit suggests that where an individual becomes aware of such invigilation, it can lead to intimidation. This will in turn enhance the effect of the invigilation by giving the individual a reason to be cautious and deferential, so as to avoid the likelihood that the invigilator will intervene to block or otherwise interfere with the individual's choices. Invigilation may involve the invigilator's physical presence. But it is quite possible - and perhaps a more effective way of ensuring compliance, to invigilate choices remotely with the aid of various forms of technology, as the person subject to invigilation can never be sure whether he is free of the other's attention.

Returning to the internet browsing example, whether I become subject to this form of dominating power will depend on the motivations of the person who discovers my browsing history and the others who become aware of the information. If they are inclined to use the knowledge that they have acquired to their advantage, they may be able to invigilate my choices by, say, making me aware of the fact that they know what I have been reading or viewing on the internet and suggesting to me that they are unable to give me an assurance that it will go no further. In such circumstances, I might put in train various strategies to prevent further disclosure. I might ask what I can do to ensure that no-one else finds out about the shameful revelations - in other words, submit myself to their will. Rather than tackle the issue head on, I might seek to ingratiate myself with them in the hope that they will not further-disseminate it. I may simply keep out of their sight and hope that by doing so any interest in me and the embarrassing/shameful information will eventually dissipate, and the risk of dissemination to others will diminish.

²⁹ Pettit, above n.5, at p.60.

But even if those who have acquired this information have no interest in using it for their own ends, they may nevertheless possess dominating power. The knowledge that they have, exposes me to the possibility of interference – they have a power to interfere in my choices, that I do not control.³⁰ Although they may have no immediate interest in using the information, the options that I have will vary according to any variation in their will. I will suffer no interference so long as they remain benevolent. But should that state of affairs change I might find that my options are changed for the worse. Republicans will say that the loss of privacy when my internet browsing history is discovered, and when it is disclosed to (or overheard by) others, means that those in possession of this information acquire dominating power, whatever their motivations or dispositions. This is so irrespective of whether or not I am aware that they have the information. As Celikates points out, awareness of one’s dependence on the arbitrary will of others is not a necessary condition for domination.³¹ The simple fact that we are dependent - that others have acquired the power to interfere arbitrarily - diminishes our freedom. If I am unaware that I am being watched or that others have acquired information about me, the loss of privacy that I suffer is harmful to the extent that those who watch or collect the information acquire such power. Liberals will be inclined to say that the loss of privacy that we suffer in such circumstances is harmful – that people and institutions should not covertly observe or collect information about us. However, as we have seen, they will find it difficult to explain why the loss of privacy that we suffer as a result of covert surveillance or data collection is harmful - why privacy is valuable in such circumstances. While liberals are generally concerned about the effect that a loss of privacy will have on the autonomy of the subject, the focus of republican concern will be any unchecked inequality in power that is created by such a loss. Republicans will say the loss of privacy we suffer when others watch or acquire information about us is harmful to the extent that it provides others with power to interfere arbitrarily in our decisions – the power to remove, replace or misrepresent options that would available to us had we not suffered a loss of privacy. This harm arises whether or not we are aware that others are watching and acquiring information about us.

³⁰ Pettit, above n.5, at p.62.

³¹ Celikates, above n.12.

Surveillance scholars and sociologists have recognized that surveillance provides the observer with power over the observed.³² Anthony Giddens, for example, has argued that in any form of social structure, whether it be the relationship between state and citizen, or employer and workforce, the collection and retention of personal information may be utilized as an instrument for ensuring the compliance of the subordinate class – the citizen, or the worker.³³ It gives rise, he says, to domination, and while he does not appear to think of domination as a *necessarily* ‘noxious’ phenomenon, it is obvious that when he speaks of domination in this context, it is taken to be a harmful state of affairs.³⁴ Privacy scholars have taken up this idea and suggested that we should think about the harm to which the loss of informational privacy gives rise, in terms of the power that others acquire over us as a consequence.³⁵ But those who have acknowledged the relationship between surveillance, loss of privacy, and the acquisition of power, appear to have recognised neither the importance of participation in political decision-making as means of controlling power, nor the role of privacy in facilitating such participation. I will explain the connection shortly, but before doing so, I want to say something about the effect of loss of privacy and consequent exposure to domination on the subject of the loss.

(iii) Are Republican Concerns about Loss of Privacy and Domination in the Absence of Interference Warranted?

The idea that concern over what use others might make of personal information that they possess, or the intentions of those who are able to subject us to close observation at will, should form the justificatory grounds of a right to privacy might be challenged. Some will, no doubt, claim that individuals ought to be more resilient in such circumstances, and that there is no warrant for extending recognition of a right to

³² See for example, D. Lyon, *Surveillance Studies: An Overview*, (2007: Polity Press).

³³ A. Giddens, *A Contemporary Critique of Historical Materialism*, vol. 1, Power Property and the State, (1981: University of California Press), p.174-181. Other writers have referred to workplace surveillance as a ‘panoptic power’, see, for example, S. Zuboff, *In the Age of the Smart Machine: The Future of Work and Power*, (1998: New York: Basic Books); B. Burris, *Technocracy at Work*, (1993: State University of New York Press).

³⁴ Giddens, *ibid.*, at p.50. Domination, he says, ‘refers to structured asymmetries of resources drawn upon and reconstituted in [the power relations that are sustained in the regularized practices constituting social systems]’. Domination, he suggests describes ‘the sway actors have over others, and over the material they inhabit.’ The idea of domination is not an ‘inherently noxious phenomenon’ and need not, he suggests, always be used in a negative fashion.

³⁵ Richards, above n.24.

privacy to them. David Archard, for example, believes that individuals ought to have a right to privacy in respect of others' direct perception of intimate conduct, but not in relation to others' knowledge of personal information:

It certainly gives one pause to realize that others know what one would wish kept restricted. But if such awareness inhibits action it surely does so only inasmuch as one fears the uses to which such knowledge might be put. Someone fearful of making her own decisions, or of acting on them, merely because others know what she would rather keep secret has a weak personality. She is the sort of person who cannot, in general take independent action. Her own nature, and not the loss of privacy, is what incapacitates her.³⁶

This seems to constitute a challenge not only to the extent to which I have suggested that republicans ought to be concerned about privacy, but to the reliability of republicans' assumptions about the effect of domination generally. Republicans can point, however, to empirical work that belies the suggestion that domination - whether it is manifested in others' capacity to interfere arbitrary in one's life by virtue of the personal information that they possess, or some other circumstance which leaves the individual vulnerable to arbitrary interference - will effect only those whose character is flawed, and are not, therefore, deserving of the protection that a right to privacy, or any other right, might afford. Numerous surveys of attitudes suggest that individuals want and value privacy. The Younger Committee, for example, found that respondents considered privacy to be the most important of seven 'social or civil rights issues' that they were asked to rank.³⁷ Protection of privacy was thought to be more important than protecting freedom of expression and ensuring a free press.³⁸ There also seems to be some degree of convergence in thinking about what kind of activity constitutes serious interference with privacy.³⁹

³⁶ D. Archard, 'The Value of Privacy', in E. Claes, A. Duff and S. Gutwirth, *Privacy and the Criminal Law*, (2006: Antwerp, Intersentia), 28.

³⁷ Report of the Committee on Privacy (Younger Committee), Home Office/Lord Chancellor's Office/Scottish Office, 1972, Cmnd. 5012.

³⁸ *ibid.*, 31, para. 230.

³⁹ C. Slobogin and J. Schumacher, 'Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"', (1993) 42 *Duke Law Journal* 727. Respondents to the survey of attitudes concerning perceived intrusiveness of activity that might fall within the scope of the unreasonable search and seizure guarantee set out in the Fourth Amendment to the US Constitution administered by the authors, considered the kind of activity likely to result in the acquisition of intimate personal information - search of a bedroom, reading a

It seems that people, in fact, value privacy for the very reasons philosophers suggest that is valuable. It provides them with space in which they can experiment and engage in creative activity unconstrained by social norms, set aside inhibitions, confide in others, and engage in reflective practices.⁴⁰ In view of this, we might think it both understandable and reasonable for people to become anxious about loss of privacy or the threat of such loss. The Younger Committee found that the issue of greatest concern to respondents was the future collection and retention of personal information by the government. It concluded that the survey revealed a 'general feeling of anxiety about the extent to which a general deterioration in privacy might affect the individual in the future'.⁴¹

But more may be needed to convince privacy sceptics of the importance of privacy and the harmful effects that interference with it or the threat of such interference might have. Social anthropological studies that explore the experiential impact of privacy violations suggest that they have 'practical' and 'symbolic' consequences.⁴² Fraudulent use of an individual's identity, for example, is likely to have serious practical consequences, the person whose identity has been used being required to devote significant time and other resources to limiting the harmful effects of the violation. However, participants in Christena Nippert-Eng's study considered symbolic consequences of privacy violation to be far more significant than the practical consequences. Here, the seriousness of a violation was measured according to the extent to which it threatened an individual's 'core sense of self'. This kind of violation required an individual to 're-envision the self, relative to others and the relationships that one has with them'.⁴³ It is, she suggests:

"... perfect for fostering [strong, almost uncontrollable emotional responses]. First, and if nothing else, a violation of our privacy hammers home the fact that we possess privacy only when others gift it to us.

personal diary, monitoring of telephone calls, a body cavity search - to be the most intrusive forms of interference.

⁴⁰ See, for example, D. M. Pedersen, 'Psychological Functions of Privacy, (1997) 17 *Journal of Environmental Psychology* 147.

⁴¹ Younger Committee, above n.37, 34. More recently, the House of Commons Home Affairs Committee, cited the 'deeply-felt unease and concern' at the extent to which the individual and society is subject to surveillance generally, as the reason for undertaking an inquiry into the growth of public and private databases in the United Kingdom; House of Commons Home Affairs Committee, *A Surveillance Society?*, Fifth Report of Session 2007-08, vol.1, HC581.

⁴² C. Nippert-Eng, *Islands of Privacy*, (2010: Chicago, Chicago University Press), 293.

⁴³ *Ibid.*

Violations make it clear that our desires depend on and are subordinated to those of the potential privacy givers and withholders around us... [A] sudden violation of one's privacy demonstrates in no uncertain terms that one clearly is not at all-powerful being. We are subject to others' agendas and abilities to carry them out as well."⁴⁴

If this is right – that it reflects what people, in fact, experience when they suffer a loss of privacy - it supports the republican account of privacy set out above. With loss of privacy comes uncertainty, the anxiety of not knowing what use might be made of the power that others acquire by virtue of their gain in knowledge about us. But where interference with our privacy runs counter to our preferences – where it has been violated in circumstances in which we wanted or expected it to be respected - feelings of anxiety and apprehension are likely to be accompanied by a sense of betrayal, anger or a combination of both. This might, in turn, engender bitterness or resentment at the position in which we now find ourselves. But what of this? What of the realization that one is vulnerable to such interference, one's 'outrage' over a violation of privacy⁴⁵ and the feelings of enmity that are likely to accompany it? Why should we take such emotional reactions to interference, or anxiety over the threat of interference with privacy seriously, even if it is a common experience?

Something seems to hang on this for republicans. The harm of domination has been explained, in part, on the basis of the psychological effect of subjugation to dominating power. Republican theorists claim that the dispiritedness, uncertainty, and vulnerability that comes with the realisation that one's freedom is contingent – that it depends on the benevolence or continued good will of another - are inimical to an individual's pursuit of self-determined ends. This seems plausible. But it also has some empirical foundation. Psychologists whose interests lie in social motivation and interaction have discovered that *affect* – a generic term used to describe both emotions and moods – appears to influence our capacity to engage in strategic social planning. Positive *affect* seems to promote 'assimilative and schema-based' cognitive functioning, while negative affect tends to lead individuals to adopt 'accommodative, externally-

⁴⁴ *Ibid*, 294.

⁴⁵ *Ibid*.

focused thinking strateg[ies]'.⁴⁶ In other words, it would appear that positive moods and emotions – the kind that we are likely to harbour when we believe that we stand on an equal footing with other citizens and are free to pursue self-determined ends– facilitate the kind of planning that is required for the development of an autonomous way of life. Negative moods and emotions, on the other hand – the kind that are a likely to flow from a realization that one is vulnerable to arbitrary interference and does not enjoy equal standing in relation to other citizens –will foster an outlook which is other-regarding. It may induce conformity to others' expectations and preferences. We may continue to follow through with our plans as far as we can, modifying them where necessary so as to minimize the risk of intervention. However, where we do not know what might motivate the other to interfere, that is to say, we do not know what their expectations or preferences might be, the only way in which we can be sure that they will not interfere is through abstinence from the conduct in respect of which the other possesses a power to interfere.

IV. Securing Freedom: Domination, Privacy, and Political Autonomy

In the discussion so far, it has been suggested that privacy can, in various ways, protect individuals from exposure to dominating power, and in doing so provides citizens with conditions that will enable them to develop autonomous ways of life. In the final part of this section, I want to shift the focus of discussion on to the issue set out in Part II above - the means through which the citizens of a republican democracy can realize the ideal of self-government and secure conditions of freedom (and privacy) for themselves. The ground covered in this section will be revisited and mapped in much greater detail over the course of the next three chapters, but I raise them here to provide an outline of what I described as the reflexive nature of the account of privacy that will be developed across those chapters. It is an account that turns in on itself. We recognise that privacy is valuable because it shields us from domination by others, and that the most effective way of securing it is through participation in the generation of norms that will have a bearing on our privacy, but when we consider the pre-requisites of effective participation we will conclude that privacy is among them. Let me explain.

⁴⁶ J. Forgas and S. Laham, 'The Interaction Between Affect and Motivation in Social Judgments and Behavior', in J. Forgas, K. Williams and S. Laham (eds), *Social Motivation: Conscious and Unconscious Processes*, (2005: Cambridge, CUP). See also, in the same volume, M. Kernis and B. Goldman, 'Authenticity, Social Motivation and Psychological Adjustment'.

It was suggested earlier that self-government requires *ex ante* participation in the political processes in which norms that regulate the conduct of republican citizens – the nature and scope of laws, rights, and entitlements, are generated. Privacy serves republican ends in a direct way by ensuring that others do not have the kind of access to citizens that enables them to exercise or acquire dominating power. But it also serves the interest in broad and effective political participation that all citizens hold in common. A republican right to privacy will have, to borrow a term used by Jurgen Habermas, a ‘dual character’. In serving individual interests it furthers a common good.⁴⁷ A right to privacy serves individual interests by securing conditions of freedom that are required if citizens are to develop autonomous ways of life. Personal autonomy is, in turn, a prerequisite for political autonomy – engagement in public life and, in particular, effective participation in norm-generating political decision-making processes.

Republican rights are not to be understood as pre-political norms - rights that establish the framework within which political decision-making takes place. Rather, they are the product of political decision-making processes - processes in which citizens are expected to actively participate.⁴⁸ There is in this sense, as Philip Pettit points out, no ‘temporal or causal gulf between civic institutions and the freedom of citizens.’⁴⁹ It is only through active participation in the practice of politically autonomous law-making, that citizens can develop a proper understanding of the legal order (the law, its actors and institutions), and determine both the content of the laws, and the nature and scope of the fundamental rights that they hold.⁵⁰

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,⁵¹ be a political settlement – an agreement that is the outcome of a well-functioning and inclusive deliberative process. It is through participation in such processes that citizens can be said to exercise control over privacy-interfering conduct and themselves define

⁴⁷ J. Habermas, *Between Facts and Norms*, (1998: MIT Press), at p.98-104.

⁴⁸ See R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (2007: CUP); R. Bellamy, ‘Democracy as Public Law: The Case of Constitutional Rights’, (2013) 14 *German Law Journal* 1017.

⁴⁹ Pettit, above n.4, at p.81.

⁵⁰ Habermas, above n.47, at p.121.

⁵¹ The qualification here, is an acknowledgement that the courts and other tribunals will necessarily be called upon to determine the scope of the right to privacy where a privacy claim is made in particular circumstances. It will not be practicable to have every privacy claim determined in democratic political process.

the boundary between the public and private spheres. In other words, to secure for themselves an appropriate degree of individual privacy. Iseult Honohan suggests that in a republican democracy, rights ought to be considered fundamental if they are “necessary to sustain citizens’ as active participators in determining the social conditions of their lives, and to enjoy equally the common goods made through collective self-determination, as well as to give them access to the individual goods necessary to be self-determining citizens.”⁵² Republicans, will regard privacy as a fundamental right not only because conditions of privacy may protect an individual from exposure to dominating power, but because such protection is also a pre-requisite for effective participation in deliberative processes that will determine the scope of a right to privacy.

It has been said that republicanism draws too sharp a distinction between public and private. Annabelle Lever, who criticises republican thinking on just such grounds, claims that in republican thinking, freedom is associated with the idea of self-government, and is ‘threatened... by any needs, desires and beliefs that interfere with people’s capacity for active citizenship and identification with the common good.’⁵³ It is not clear what strand of republican thinking Lever has in mind here. But the distinction between the public and the private in the version that we have endorsed is not a sharp one. As Honohan points out, a life cannot be led entirely in public, and an agent’s capacity to engage effectively in political life (or, perhaps, to engage in it at all) will depend on them having developed an autonomous way of life generally.⁵⁴ The person who has fulfilling intimate relationships, a stable home life, and is satisfied with the progress that she has made in the projects that she has set herself, is likely to be far better placed to engage in political life, than the frustrated and dispirited individual who is labouring over the question of what kind of person they want to be and what kind of (private) life they want to lead, or who is unable to realize important personal (non-political) goals that he has identified as objects of a worthy and worthwhile life. Personal and political autonomy should be thought of as mutually supportive and sustaining conditions. Without the guarantee of privacy that protects an individual from dominating control,

⁵² I. Honohan, *Civic Republicanism*, (2002: Routledge), at p.208.

⁵³ A. Lever, ‘Feminism, Democracy and the Right to Privacy’, (2005) 9 *Minerva* 1, 3.

⁵⁴ Honohan, above n.52, at p.212. See also I. Honohan, ‘Dealing with Difference: The Republican Public-Private Distinction’, in M. Bagrahamian and A. Ingram (eds.), *Pluralism: The Philosophy and Politics of Diversity* (2000: Routledge).

her ability to develop an autonomous way of life will be diminished, and in turn, her capacity for political autonomy will suffer.

If a republican democracy is to realize the goal of non-domination then it will require a certain proportion of the polity to be autonomous political actors – to be suitably motivated and be capable of effective participation in political decision-making.⁵⁵ If what I have suggested above is accepted – that political autonomy is dependent on citizens having developed autonomous ways of life generally (personal autonomy) – and privacy is a pre-requisite for personal autonomy – then republicans will consider individual privacy to be fundamental to the republican project of securing freedom generally. To invert the idea – if all citizens are guaranteed the privacy that they require to develop an autonomous way of life, they will be better equipped (though not necessarily more motivated) to exercise political autonomy. The interests that all citizens of a republican democracy have in shaping a common future and realising conditions of freedom, and recognition of the role that privacy plays in this enterprise, will lead to individual privacy being considered a pervasive and common good. Its value in promoting political autonomy cannot be considered independently of its value in providing conditions of non-domination that are a pre-requisite for personal autonomy, and *vice versa*.

In addition to promoting political autonomy indirectly in the manner I have just described, privacy also supports in a more direct way, the kind of political participation that is required to secure conditions of non-domination – one that is not grounded in the idea of personal autonomy. It was observed earlier that republicans will consider deliberative decision-making processes to be well functioning to the extent that they provide citizens with opportunities to present their points of view. The effectiveness of such processes in establishing conditions of non-domination will depend upon a sufficiently broad range of views being canvassed, particularly the views of those whose practices and beliefs do not attract majority support, and those from sections of the community that have suffered disproportionate and entrenched disadvantage. It will be necessary in order to secure the effective participation of those whose interests might

⁵⁵ See, M. V. Costa, 'Neo-republicanism, Freedom as Non-domination, and Civic Virtue', (2009) 8 Politics, Philosophy & Economics 401.

be shared by a minority, lack popular sympathy or approval, or attract condemnation, to provide them with a guarantee of privacy.

Democracy requires that individuals be free, subject to certain narrowly defined exceptions, to express their political views and to present political arguments in public – to seek to persuade, and to criticise prevailing political practices and institutions. Effective political deliberation is constituted in various spheres of communication. Although active participation in political decision-making requires individuals to engage at some point in public dialogue, deliberation among a more restricted group may be an essential preliminary to this, and a right to privacy provides the boundaries that make such deliberation possible. As Annabelle Lever points out ‘individuals may be uncertain about the political worth of their views, the best way to present them, or their likely effects.’⁵⁶ Privacy is valuable in this context because it affords individuals an opportunity to ‘develop and test their powers of persuasion and self-expression’.⁵⁷ It provides those whose interests and views might be met with widespread disapproval, enmity, or outright hostility, space to reflect on the importance of those interests, seek the advice and reassurance of allies, to take informal soundings from those who might be expected to take up opposition, and consequently summon the confidence and fortitude to advance and have them subjected to critical public scrutiny. Here, the right to privacy serves the political process (and the aim of securing conditions of non-domination) by providing conditions that enable minority groups to determine how best to articulate their position and explore strategies for advancing it. Revelation of formative plans that are later abandoned or radically transformed may expose a political association to ridicule, or otherwise undermine its credibility, and the risk of exposure may have a debilitating effect on motivation to participate in public deliberation.

V. Conclusion

My aim in this chapter has been to identify the value of privacy in securing the republican ideal of freedom as non-domination, and in so doing, to articulate the justificatory grounds of a republican right to privacy. The issue of privacy has received little attention in the republican literature, but its value in protecting us from interference - for securing

⁵⁶ A. Lever, ‘Privacy Rights and Democracy: A Contradiction in Terms?’, (2006) 5 Contemporary Political Theory 142.

⁵⁷ *ibid.*

freedom as it is conceived by liberals – is obvious. In this respect, there is little that separates liberal and republican accounts of the value of privacy. Clear ground appears between the two where an agent's loss of privacy cannot be satisfactorily explained in terms of the effect of a loss of privacy on the autonomy of the subject. If the subject is aware of the loss, it is possible for liberals to explain the value of privacy by reference to the effect that losing it will have on the subject's capacity for authentic decision-making. But this reasoning does not explain why we should consider privacy to be valuable where a subject is unaware that others have acquired information about him or are keeping him under observation. Although liberals can be expected to say that the subject suffers a loss of privacy as a consequence of such activity, they will have difficulty explaining why privacy is important in such circumstances, and why we might think that the subject of the loss has suffered some diminution of freedom. The republican concept of domination, however, provides us with the foundation of a broad and coherent account of the value of privacy, that encompasses (i) circumstances in which the subject suffers interference as a result of the loss, (ii) is aware that he has suffered a loss of privacy, but suffers no subsequent interference, and (iii) is unaware that he has suffered any loss of privacy, and suffers no subsequent interference.

The account of privacy provided here also reflects the republican belief that to be self-governing and to secure conditions of freedom for themselves, citizens must participate in the political processes that generate the norms to which they will subject. Liberals acknowledge that privacy is a pre-requisite for participation in democratic decision-making - that it 'helps to secure our legitimate interests in political choice and participation'.⁵⁸ However, an idea that does not find clear expression in liberal writing is that relationship between privacy, personal autonomy, political participation, and the possibility of individual freedom. Effective participation in political decision-making by individuals and groups requires a guarantee of privacy, and the only means through which citizens can be assured of privacy and other fundamental liberties is through political participation.

⁵⁸ *ibid.*, at p.156.

-Chapter 3 -

Privacy and the Demands of Republican Social Justice.

In the previous chapter, I suggested that republicans ought to consider privacy to be a pervasive good. Loss or interference with it might expose a person who suffers it, to domination. To be guaranteed of a certain degree of privacy is to enjoy conditions of freedom. I observed that the most effective way for members of a political community to secure those conditions, will be participation in the political processes that generate norms that affect their privacy. Such participation needs to be meaningful. Those whose privacy is at a stake must be able to exert influence and exercise control over how far, and in what ways, privacy is afforded protection.

Examples were provided to illustrate how loss of privacy can result in others acquiring power to interfere with choices that the person who experiences the loss is in a position to make. We saw that interference might take various forms, namely, the removal, replacement, or misrepresentation of options. Among the examples we considered was the creation by a consortium of construction companies of a database containing details of workers deemed to be troublesome, which the companies were able to access before making employment decisions. In this case, the interference with informational privacy that occurred when personal information regarding workers was included on the database and shared with others, almost certainly foreclosed opportunities for employment in the construction industry. We also saw how loss of informational privacy might lead to manipulation. Our example was the person who, is erroneously copied into an email and learns that the sender is fearful of a third person, or who as a result of discovering her internet browsing history is able to infer that she has certain anxieties. Possession of this information, we observed, would enable the person who has acquired it to misrepresent her options and manipulate her decision-making. Finally, criminalisation of consensual homosexual activity illustrated the connection between interference with privacy - in this case decisional privacy - and diminution of freedom through the replacement of options. The option of engaging freely

in such sexual activity, is replaced by one in which it might lead to moral condemnation and punishment.

It is possible to distinguish these examples on the basis of the relationship that exists between the parties involved. In the first two – the misdirected email/internet browsing history, and the database of construction workers – those who suffer interference with privacy and domination, do so at the hands of fellow citizens. In the case of criminalisation of consensual homosexual activity, it is the state that interferes with citizens' decisional privacy. Over the course of this chapter and that which follows, I will argue that in these situations, the state is under certain duties. One of these requires it to do whatever it can to ensure that the power it exercises when it takes decisions that will affect citizens' privacy, is non-dominating. This duty, which is essentially negative, is grounded in the republican conception of political legitimacy, and will be examined in the chapter that follows. In this chapter, I want to consider the existence of a positive duty that requires the state to take action to ensure that citizens do not dominate one another. Insofar as privacy prevents or facilitates domination, this broad positive duty implies a more specific duty to establish privacy norms that will tend to minimise the risk of domination. Its source is the republican conception of social justice.

In the first section, I consider the way in which domination is manifested in certain relationships that individuals (and groups) have with one another, and within these relationships, how privacy and domination are related. The second part of the chapter provides an outline of the republican conception of social justice. A theory of justice ought to provide us with a set of principles for the equitable distribution of fundamental goods among the members of a society. The good with which a republican conception of social justice is concerned, is non-domination. Because those who suffer interference with privacy might be exposed to domination, I will suggest that the ends of social justice require privacy to be afforded special protection. It should be regarded as a basic liberty, and it is from recognition of privacy's status as a basic liberty that the state's duty to afford it a degree of protection consistent with the aim of social justice is derived. In the final part of the chapter, I consider in broad terms, the part that various forms of law might play in providing the protection for privacy required by the idea of social justice.

I. Social Power, Domination, and Privacy

Ruth Gavison has observed that 'privacy is not equally distributed and some people have more power and security as a result.'¹ It might be that we can add to Gavison's observation, by saying that the reason some have more privacy and others less, is a consequence of the uneven distribution of social power.

There are various definitions of social power, but all embody the same basic idea.² A person possesses social power if she is in a position to impose her will on another; to influence or change what the other would, or might, prefer to do. I possess such power if I am able to interfere with your privacy whenever I choose to do so, and there is nothing that you can do to prevent me doing this. If I am also able to resist any attempt by you to interfere with my privacy, power is distributed unevenly, and as a consequence, it is likely that privacy will also be unevenly distributed. Even if I choose not to exercise the power that I have, your privacy will not be secure. I am able to interfere with it whenever I desire, for any reason. Power is the determinant of the distribution of privacy here. But it might also be the case that, as a consequence of my interference with your privacy in circumstances such as these, I acquire still more power to interfere with your choices. As we have seen, if I have power to access information about the websites you visit and the terms that you enter into internet search engines, I can start to draw reliable inferences about your propensities, fears and anxieties. Armed with this information I could, if I so chose, set about manipulating your decision-making, or forward the information to people who are in a position to grant or deny you opportunities that you might want to pursue.

These observations require elaboration. We need to consider more closely, the kind of social relationships in which domination is possible, the nature of social power

¹ R. Gavison, 'Privacy and the Limits of the Law', (1989) 89 Yale Law Journal 421, 444.

² Perhaps the best known is that provided by Max Weber: 'the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance,'; M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, (1968: Berkeley, University of California Press), p.53. There are various formulations of this definition, but all capture the same idea – a person possesses social power if she is able to impose her will on another; to influence or change what the other would prefer to do. See, for example, T. Wartenberg, *The Forms of Power: From Domination to Transformation*, (1990: Temple University Press); R. Dahl, 'The Concept of Power,' (1957) 2 *Behavioral Science* 201; S. Lukes, *Power: A Radical View*, (1974: London, Macmillan); P. Morriss, *Power: A Philosophical Analysis*, 2nd edition, (2002: Manchester University Press); K. Dowding, *Rational Choice and Political Power* (1991: Edward Elgar); F. Lovett, *A General Theory of Domination and Justice*, (2010: OUP), p.75. For a synopsis of various of theoretical and empirical studies on the nature of social power, see M. Brauer and R. Bourhis, 'Social Power', (2006) 36 *European Journal of Social Psychology* 601.

in those relationships, and the way in which power privacy and domination are related in this context. Domination resides in relationships that are strategic, in which power is unevenly distributed, and in which there is a degree of dependency, that is to say, a relationship from which the party with less power cannot extract him- or herself.

(i) Social Relationships, Social Power, and Dependency

We need to begin by recognising that domination occurs in certain kinds of relationships. We are related to others in many ways. Republicans will say that there is a sense in which all members of a political community are related. The destiny of each is bound up with that of others. The relationship is one of interdependence, founded on the recognition that securing conditions of freedom is a necessarily co-operative endeavour, a joint enterprise. In Chapter 5, I will suggest that the republican right to privacy should be conceived as something that is held in common by all members of the political community, rather than something held by individuals and claimed on the basis of their own particular interests. Conceived in this way, we might consider republican citizens to be related by virtue of their status as holders of the right in common, each having an equal interest in decisions that affect its scope and the way in which it is understood. Neither of these is the kind of relationship with which we are concerned in this chapter. They are examples of relationships we have with others by virtue of the civic bonds that exist between us. We are concerned in this chapter with the possibility of domination occurring in the relationships that we form as individuals, rather than those in which we happen to stand with others by virtue of our shared status as citizens. Nor are we concerned with the relationship in which individuals stand to the state, its institutions, agencies and agents. The kinds of relationship that are of interest to us here, are those that we form in the course of our private lives, as individuals (and groups of individuals), rather than citizens. They are the relationships that exist in the workplace, that we form as users and suppliers of commercial services and consumers of goods, that exist in the home, our intimate relationships, and so on. Such relationships I will describe here as *social relationships*.³

According to Frank Lovett, what makes this form of relationship – a social relationship - distinctive, is its strategic nature. He suggests that people will be in this kind of relationship ‘if they must anticipate the purposeful action of the other in deciding

³ F. Lovett, *A General Theory of Domination and Justice*, (2010: OUP).

what to do'.⁴ Such a relationship, he explains, can be fully or partially strategic. It will be *fully strategic* if each party is required to anticipate what the other will do before deciding, and *partially strategic* if only one party must do this.⁵ If we accept that domination only occurs in such relationships, we can say the mere fact that some person has power to interfere with my privacy is, without more, a sufficient ground for saying that I am dominated by her. It might be objectively the case that many members of a society have considerable power to interfere with my privacy. Some will have acquired skills that would enable them to hack into my computer and access personal data, others might be able to uncover information about people and create new forms of knowledge about them because they possess extraordinary tenacity and the ability to analyse and synthesise personal information. The financial resources of the very wealthy will mean that even if they do not possess the skills, knowledge and attributes required to interfere with privacy in this way, it is likely that they will be able to acquire the services of those who do. But this form of power can only be a source of domination where there those who possess it, and those who might be subject to it, are strategically related to one another.

In contrast to the relationship in which I stand with every other member of the political community by virtue of our shared status as citizens, the number of social relationships that I have will be relatively few. Let us take the power to interfere with privacy that the very wealthy possess, their wealth enabling them to access services and technology that make interference with privacy easier than it would be for those who have fewer resources. In a large-scale political community, I might simply be unaware of the existence of such persons, and they of me. In this case, they have power that I do not possess, but neither of us will have regard to what the other might do when we make our decisions. Suppose that because these things tend to be a matter of common knowledge, I do in fact know the identities of those who have considerable wealth and power to interfere with my privacy. If these people are still not aware of my existence, I have no reason to think that the power that they have will be used to interfere with my privacy, I do not have to consider how they might use it when making decisions regarding my own affairs. We are not strategically related to one another, and despite the fact that these people possess power, there is no subjugation.

⁴ *ibid.*, p.34.

⁵ *ibid.*

The republican concern is with the power that a person has to interfere with another's choices – there is a necessary relational dimension to domination. The capacity to interfere should not be confused with the power to do so. If I am marooned on a desert island, I retain the capacity to interfere in various people's choices, but unless and until my circumstances change, I do not have the power to do so. But where someone who possesses power to interfere with my privacy is aware of my existence and perceives how that power might be exercised in ways that will influence my decision-making, the conditions in which domination might occur exist. They occur even if I am unaware of the other person's existence, or of the power she has to interfere in my choices. Of course, they will also exist – and will be a more pressing issue - if I am aware that the other possesses this power, and I have some rational justification for thinking that it might be used to interfere with my privacy. If only one party has this awareness, the situation will be partly strategic, i.e. only one party will take decisions on the basis of what the other might do.

If they are both aware, and make decisions on this basis, it will be fully strategic. If we take our example of the database of construction workers, we can see that those included on it are parties to partially strategic social relationships with those who created and maintained the database. Because the database was secret, its existence would not have influenced the decision-making of the construction-workers. However, those who administered the database would have taken into account workers' decision-making and conduct when deciding who should be included on it. Had the existence of the database been common knowledge among construction workers, the social relationship would have been fully strategic. Not only would the conduct of workers have influenced the administrator's decisions, we can suppose that construction workers' awareness that they might be included on the database would affect the way in which they conducted themselves at work, and possibly, in other aspects of their lives.

(ii) *Imbalances in Social Power, and Dependency*

Instances of individuals dominating one another will only be found where the dominator and dominated are in a social relationship.⁶ But not all social relationships will constitute relationships of domination. Lovett suggests that domination will be found in the

⁶ *ibid.* p.36

structure of social relationships in which two conditions are present. One is an imbalance of social power, the second is dependency. Let us consider these in that order, first imbalances in social power, followed by dependency.

We have already made a number of observations about the nature of social power. Domination is found in certain forms of social relationships, and what defines a social relationship is its strategic character. If one of the parties to a relationship must take into account what the other might do, the relationship is one in which we might find domination. Of course, domination will not be present in all relationships in which one or both parties take into account what the other will do. If I want a relationship with someone to develop into an intimate one, I will have to give up some of my privacy by revealing my own feelings towards the other, and I will do so in the hope that the other might reciprocate. If I decide to do this only after weighing up the situation and coming to the view that she is likely respond in kind, the relationship is a partially strategic one. We take into account what others might do in most of our social interactions. We are often careful what we say because we are mindful of others' feelings, for example. It is only once our words or actions become conditioned by consideration of what others might do to us, the relationship might be one of domination. Furthermore, as McCammon points out, we might think that domination exists in social relationships only where a certain form of power exists – the power of one party to impose her will on the other.⁷ In the example I have just given, I might be besotted by the person to whom I reveal my feelings. The relationship that I have with her might be a strategic one, her rejection of my advances is an exercise of power, but we would not think of it as dominating power. Her actions are not motivated any desire that I bend to her will – to act in a way that she has determined that I should act.

In the previous chapter, we endorsed a definition of domination offered by Phillip Pettit: 'Someone, A, will be dominated in a certain choice by another agent or agency, B, to the extent that B has a power to interfere in the choice that is not itself controlled by A.'⁸ Domination will be present only where the power to interfere is strategically relevant and impositional. This is why there is no question of domination in the strategic decision over whether to disclose one's feelings to another described in the previous paragraph. We can also see that the question of whether a relationship is

⁷ C. McCammon, 'Domination: A Rethinking', (2015) 125 Ethics 1028.

⁸ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (2012: CUP), at p.50.

structured in a way that gives rise to domination, turns on whether one of the parties possesses power that the other would be unable to resist; there must be an imbalance in power. Imbalances of power are not inevitable. It is not difficult to envisage a social relationship in which power and privacy will be more or less evenly distributed. This will tend to occur where the parties are able to call on significant resources, so that the power that each has to interfere with privacy is negated by measures that they are able to put in place to shield themselves from intrusion.

In the course of perhaps the most sophisticated and sustained descriptive account of the social structures in which domination occurs, Lovett points out that imbalance of power is a necessary, but not a sufficient, condition for concluding that a relationship is one in which there is domination. There must also be some degree of dependency on the part of the person who is subject to the power. We will not be able to say that a person is subjugated if she has a cost-free option of removing herself from the situation. There must be some 'exit cost' - a constraint that prevents the person from removing herself, and the degree of dependency is something that can be measured by considering extent of that cost. Where the cost of removing oneself is considerable, the level of dependency will be high. Where they are prohibitive, dependency will be absolute.

(iii) The Structural Environment

We have established that domination is found in relationships that are structured in a certain way. The relationship must be one in which the parties are strategically related, so that in deciding what course of action to take, one or both of them must take into account what the other is likely to do. There must be an imbalance of power, and some degree of dependency. But we also need to understand the background conditions that make(s) domination possible. Lovett points out that in most circumstances the distribution of power among those who are parties to the form of social relationships in which domination might occur, will be affected by the structural environment in which it is set.⁹ This is important for our purposes, because the framework of legal norms established by the state, and the coercive power of the state, are part of that environment.

⁹ Lovett, above n.3, p.72.

The idea can be illustrated using an example of interference with privacy that has been considered by Adam Moore - a practice in which employers require employees, as a condition of continuing employment, to provide samples of urine, that are tested to establish whether the employee has been using drugs.¹⁰ This is clearly an interference with the informational privacy of the employees, but can we also say that the relationship between employer and employee is one of domination?

To advance our thinking about how background conditions might affect power and dependency, let us suppose that the reason for implementing the workplace drug-testing regime has nothing to do with safety concerns, nor are they conducted on the basis of other concerns that we might consider non-arbitrary. Rather, it is established by the employer because drug use is antithetical to the values by which he lives his life, and which he believes should guide the lives of others, including his employees. This seems to be the kind of strategic relationship in which domination might be found; a fully strategic situation in which the employer's demand that the employee surrenders his privacy, and the employee's decision about whether to do this, will take account of what the other might do. But what each is likely to do will depend on the range of options that are open to them, and this will, in part, be determined by the broader context - that is to say, matters that lie beyond the dyadic employer-employee relationship, in which these strategic decisions about interference with privacy arise.

Moore suggests that the broad context in which the employer demands compliance with his workplace drug testing programme, bears upon the question of whether or not the verbal act of consent constitutes true consent. He observes that when jobs are scarce and unemployment high, employees will be 'virtually forced to relinquish privacy because of the severe consequences if they don't'.¹¹ Where jobs are abundant and labour relatively scarce, they are giving what many would consider true consent. For republicans, the primary question will be whether the employer-employee relationship is one of domination. In republican thinking, there will be an epistemological relationship between consent to interference with privacy and the nature of the relationship in which the agreement to a course of action that is said to constitute consent, occurs. Lovett suggests that domination can be measured in degrees,

¹⁰ A. Moore, *Privacy Right: Moral and Legal Foundations*, (2010: Pennsylvania State University Press), chapter 8.

¹¹ *ibid.*, at p.166

according to the extent of the imbalance of power in the relationship, and the degree of dependency that exists. The greater the degree of domination, the stronger the inference that submission to interference with privacy is just that - submission rather than consent. In the case of the workplace drug-testing programme, the question that republicans will ask is whether the relationship between the parties is one of domination. If it is, then the inference should be that in allowing the employer to interfere with her privacy, the employee is submitting to dominating power.

Certain background conditions identified by Moore will have a significant bearing on the republican view of these circumstances. If we assume the parties to be aware of the unemployment rate, number of job vacancies, and availability of workers with the requisite skills, we can expect this awareness to affect (i) each party's level of dependency on the employment relationship and (ii) the distribution of power between them. If the employee is likely to have difficulty finding another job, and will suffer financial hardship, her situation will be one of high dependency. If there is an abundance of suitably skilled labour in the market, the employer's dependency will be relatively low. The degree of dependency that each party experiences will have some bearing on the extent of power that they have. If the employee has no viable alternative, she will not be in a position to resist the employer's demand that she submits to interference with her privacy. The employer will have power to interfere in the employee's choices about her privacy, and given what the interference with privacy is capable of revealing, the power to interfere indirectly in her lifestyle choices. If, on the other hand, the background to the relationship is one of high levels of unemployment, few job opportunities, but a shortage of workers with the necessary skills, power might be more or less evenly distributed, and as a consequence, the employees' privacy more secure, at least from the kind of privacy threat that we have been considering. It is difficult to see how such circumstances might constrain an employer's use of covert surveillance of her workers, for example, at least if she perceives the chances of the surveillance being discovered to be low.

The structural environment in which issues of domination and privacy are set, consists of a complex web of social facts and norms. Lovett explains that predictable and purposeful action and inaction on the part of those who are not, strictly speaking, parties to the kind of relationships in which domination is possible, can affect the balance of

power between those who are parties to it.¹² One of the examples of how interference with privacy might facilitate manipulation that we considered in the previous chapter, was the supermarket that collected information about its customers purchases. From this the supermarket was able to infer that some might be pregnant. Those customers were then flooded with advertisements for products usually purchased by expectant mothers. This was done in the belief that if such customers are targeted in this way with sufficient frequency, they are likely to succumb to the suggestion that they ought to purchase the advertised items, and that they are likely to keep returning to the supermarket for this and other products for several more years.¹³ This example is one in which one party to a strategic relationship uses information that it has acquired about the other, in an attempt to manipulate the decision-making of the other. But Susser, Roessler and Nissenbaum provide us with an example of how this kind of manipulation might be facilitated by a third party.¹⁴ They refer to a leaked internal strategy document produced by Facebook, which considered the possibility of monitoring teenagers' posts in order to draw inferences about their moods – whether they are feeling stressed, overwhelmed, or anxious, for example – and then allowing advertisers to use its platform to target those users. There are a number of strategic relationships here. One involving Facebook and its users. Another between Facebook and its advertisers, and a third involving the advertisers and those that they target. Unlike the supermarket example, in this situation, the advertiser has not collected the data that will enable it to manipulate those it will target. That data is collected by a third party – Facebook - which passes personal information to the advertiser, and allows the advertiser to use its platform to communicate with the targets of the advertising campaign. In this example, the relationship between the advertiser and the target is one of domination, but the domination is facilitated by a third party – Facebook. Of course, we might also conclude that the power that Facebook exercises when it collects and disseminates users' data, places it in a dominating relationship vis-à-vis its users, in addition to its facilitation of domination of those users by others.

¹² Lovett, above n.3, at p.71.

¹³ N. Richards, 'The Dangers of Surveillance', (2013) 126 Harvard Law Review 1934, 1955.

¹⁴ D. Susser, B. Roessler, and H. Nissenbaum, 'Online Manipulation: Hidden Influences in a Digital World', (December 23, 2018). Available at SSRN: <https://ssrn.com/abstract=3306006>

We now need to turn our attention to the role of the state. Its reach, and the extent of the power that it possesses, make it a significant and pervasive presence in the structural environment in which relationships of domination will be found. That power enables it to determine when and how citizens privacy will be privileged and protected, and the way in which in which it is exercised ought to be guided by the republican conception of social justice

II. Privacy and Republican Social Justice

A theory of social justice provides us with an answer to the question ‘what sort of order or basic structure should the state impose in a society, to ensure that justice is established in its citizens’ social relations with one another?’ Such a theory ought of provide us, John Rawls explains, with a set of principles for determining which, among a range of possible social arrangements, will result in an appropriate distribution of some good (or goods) among the members of a society.¹⁵ A theory of social justice, he suggests, might be thought of ‘as constituting a fundamental charter of a well-ordered human association’.¹⁶ It provides us with moral principles that shape the structure of a society.

Central to theories of justice, are ideas of freedom and equality. The way in which a theory is developed so as to secure these goods, will depend on the terms in which they are conceptualised as ideals of some broader political theory. In Rawls’ theory of justice, for example, freedom and equality are conceived in egalitarian liberal terms. Rawls employs the idea of a hypothetical social contract, in which those who are asked to determine how goods should be distributed do not know their endowments, commitments, values, desires and interests; or the position they occupy in that society. These decisions are to be made behind a hypothetical ‘veil of ignorance’. This is intended to ensure that particular conceptions of the good are not privileged in the social order that is established. Freedom is something that is achieved by individuals, and the basic liberties to which they are entitled, provide the basis of claims against social institutions that enable citizens to advance their own interests. What marks out a theory of social justice as a distinctively republican theory, is the way in which freedom and equality are to be understood – as characteristically republican concepts. Such a theory, Pettit

¹⁵ J. Rawls, *A Theory of Justice*, (1971: OUP), p.4.

¹⁶ *ibid.*, p.5

suggests, ought to take freedom as non-domination as its subject – ‘the good with respect to which the state is required in justice to treat its citizens as equals.’¹⁷

The ideals of freedom and equality are inextricably linked in republican thinking. Pettit explains that the republican citizen, if she is to enjoy freedom, must have a ‘publicly established and acknowledged status in relation to others.’¹⁸ She must be able to ‘walk tall and look others in the eye’. To be secure in this status means that citizens do not have to ‘bow or scrape, toady or kowtow, fawn or flatter, they do not have to placate any others with beguiling smiles or mincing steps... they do not have to live on their wits, whether out of fear or deference.’¹⁹ But if citizens are to acquire and retain this status, the state will have to ensure that certain of their choices are subject to special protection, such choices constituting a set of ‘basic liberties’ that are likely to be expressed as constitutional rights. While uncontrolled interference with those liberties will amount to domination, in almost all cases, such conduct will also demonstrate a lack of respect for the equal status, as a member of the political community, of the person who suffers the interference. Although freedom and equality are related in this way, a person’s equal status can be called into question in ways that do not involve any obvious and direct interference with their choices. Social justice requires the state to foster attitudes that demonstrate respect for citizens’ equal status, and in so doing, reinforce that status; to encourage a sense of solidarity among citizens. At the same time, it should take steps to suppress attitudes that tend to alienate and subordinate citizens by casting doubt on the legitimacy of their membership of the political community.

The relevant choices protected as basic liberties will be those in respect of which we would say that the existence of an uncontrolled power to interfere with them, would leave those who are subject to the power, at the mercy of those who possess it – unable to make choices without regard to the will of the other. Pettit suggests that candidates for inclusion in any set of basic liberties, will be: freedom to think what one likes; to express what one thinks; to practise one’s choice of religion; to associate with those willing to associate with you; to own and exchange certain goods; to change occupation and employment; and to travel and settle where one wishes.²⁰ As we will see in chapter

¹⁷ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (2012: CUP, p.81.

¹⁸ *ibid.*, p.82

¹⁹ *ibid.*

²⁰ *ibid.*, p.103.

5, these liberties ground a set of republican rights, the nature and function of which will be conceived very differently to those that liberals will say are needed to secure a liberal conception of justice.

We established in Chapter 2, that if an individual does not have freedom to choose who should have access to her and information about her, and the freedom to determine when and by whom she should be observed, she will be exposed to the risk of domination.²¹ This seems reason enough to say that privacy should be added to Pettit's inventory of basic liberties. But there are other reasons that support its inclusion. These reasons would carry similar weight in an argument that privacy is a primary good, and ought to be included in a Rawlsian scheme of basic rights and liberties.

The freedom that privacy provides, is likely to be a pre-requisite for full enjoyment of other basic liberties. Inherent in the idea that we should be free to think what we like, is an assumption that we will have the physical and psychological space to engage in the process of reflection and experimentation that the formation of ideas entails. Privacy is also crucial to enjoyment of another basic liberty - the freedom to express what one thinks. Ruiz points out that freedom of expression covers 'not only the freedom to choose when, how and about what we want to speak in public; it also covers the freedom whether to speak in public at all.'²² Freedom of expression is a principle that encompasses the freedom to express one's ideas and thoughts to a private audience. The advent of autonomous vehicles, which use technology capable of tracking and recording journeys, suggests that we might come to depend on the right to privacy to guarantee our freedom of movement.²³ As the example of the workplace drug-testing programme that we considered in the previous section illustrates, what we take to be labour rights might also be grounded in the right to privacy.²⁴

²¹ Frank Lovett, supposes that any satisfactory account of social justice would entail some right to personal privacy, but says little about the justification for including it in a scheme of rights or basic liberties. Lovett, above n.3, at p.219.

²² Blanca R. Ruiz (1997), *Privacy in Telecommunications: A European and an American Approach*, The Hague: Kluwer, at p.68.

²³ M. Gillespie, 'Shifting Automotive Landscapes: Privacy and the Right to Travel in the Era of Autonomous Motor Vehicles'. 50 *Washington University Journal of Law & Policy*, 147; R. Sobel, 'The Right to Travel and Privacy: Intersecting Fundamental Freedoms' (2014) 30 *Journal of Information Technology & Privacy Law*, 639; R. Sobal and R. L. Torres, 'The Right to Travel: A Fundamental Right of Citizenship', (2013) 80 *Journal of Transportation Law, Logistics & Policy*, 13.

²⁴ See, V. Mantivolou, 'Are Labour Rights Human Rights?', (2012) 3 *European Labour Law Journal* 151, 165, linking of right to privacy to employment rights.

All of this demonstrates that there are substantial grounds for the claim that privacy should be considered one of the basic liberties. In light of this, we need to think now, about how privacy ought to be protected. We should begin by noting that public acknowledgement that privacy has this status is important. Designation has an expressive function. It spreads awareness among citizens that the basic liberties concern particularly important domains of choice - choices that are central to the ideal of freedom and equality among citizens. Identifying the value of privacy and declaring it to be one of the basic liberties, signifies to the members of the relevant political community that choices as to what information about them should be disclosed, and who should have access to them, are pre-requisites of citizens' non-dominated equal status.

One way in which the state might work towards the entrenchment of privacy as a basic liberty, is to make efforts to ensure that appropriate respect for privacy is embedded in the social conventions that are regularly observed by citizens. In an ideal republican democracy, one in which resources are distributed evenly among a polity, the members of which share high levels of commitment to republican ideals of freedom and equality, this might be all that would be required of the state. But the inequalities that will inevitably exist, and tendencies to put self-interest before commitment to securing broad conditions of non-domination, mean that more will be needed if a degree of privacy consistent with a commitment to social justice is to be secured. We can expect the right to privacy to play a part in this. The function of the right is something that I will consider in Chapter 5. For the time being, I want to focus on the role of what Phillip Pettit²⁵ refers to as infrastructural programmes, in securing basic liberties generally, before moving on to consider the way in which they might secure privacy.

Pettit suggests that three kinds of infrastructural programmes will be required if the aims of a republican conception of social justice are to be achieved – *educational*, *insurance* and *insulation* programmes. The first of these – *educational* - must not only develop in the polity, the skills that will be required to enable them to make the most of their talents, it must also provide them with an understanding of the rights and responsibilities that go with the status of citizenship in a republican democracy. I do not propose to discuss in this chapter, the role that education might play in securing

²⁵ Pettit, above n.17, at p.110

conditions privacy for citizens, but will make some brief observations about it in the conclusion to the thesis.

Educational programmes aside, Pettit explains that there are two broad ways in which the state can protect citizens from interference in their choices. It can intervene directly, to effectively remove from the person who is in a position to interfere, the option of doing so. This form of intervention involves shielding the citizen from any attempt to interfere, and is effected through what he refers to as *insulation programmes*.²⁶ He goes on to point out that in circumstances in which a citizen is dependent in the exercise of a range of choices, on resources or protection provided by another, so that she becomes reliant on that provision, the negative action of refusing (or threatening to refuse) to provide the required resources or protection, would become indistinguishable from interference with those choices.²⁷ Routine reliance on such provision leaves the recipient in a state of dependence, and places the provider in a position of domination. Where necessary, the state ought to relieve this condition of dependency by stepping in and providing the required resources or protection, and in so doing, restoring the individual's freedom to choose. This form of support is provided through a range of *insurance programmes*.

(i) *Insurance Programmes*

Our concern is the state's duty to secure for citizens the degree of privacy that is required to ensure they are not dominated by others. Loss of privacy will often be a consequence of some form of interference. The appropriate response, therefore, will usually be to shield those who might suffer loss of privacy, rather than to step in and provide resources. Privacy as a basic liberty will be secured primarily, though not exclusively, through insulation programmes. But insurance programmes will also have a significant, though less direct, part in guaranteeing citizens' privacy.

To ensure that citizens do not find themselves forced to enter into, and remain in, dependent relationships with those who can provide basic necessities, the state must be capable of meeting these needs. This provision might include, among other things, access to housing, healthcare, legal aid, welfare schemes, and a basic income.²⁸ Some aspects of

²⁶ *ibid.*, p.73.

²⁷ *ibid.*

²⁸ See generally, P. van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (1997: OUP); P. van Parijs, 'A Basic Income for All', in J. Cohen and J. Rogers (eds.), *What's Wrong with a Free Lunch?*

these programmes might provide citizens with privacy that they would not otherwise have. With the provision of housing to those who would otherwise be homeless, comes a degree of spatial privacy, meaning that they are no longer accessible to others and thereby exposed to the violence and abuse that is often suffered by those who necessarily live their lives in public spaces. But a comprehensive welfare system will not eliminate disparity in wealth, and as Khiara Bridges points out, the poor will generally enjoy less privacy than the wealthy.²⁹ They will be more reliant on public transport, and so more visible than the wealthy. The wealthy will be able to distance themselves from public spaces, to put up fences, soundproof the buildings that they inhabit, and so on. They are less likely to work in spaces that are under surveillance. The idea of republican social justice does not imply a duty to protect privacy *per se*. Rather, it requires the state to ensure that citizens do not suffer domination as a consequence of interference with privacy. In other words, privacy is to be protected insofar as interference would constitute an exercise of dominating power, or domination would be a consequence of its loss. As we have noted, domination occurs in strategic relationships in which power is unevenly distributed and there is a degree of dependency. It is possible to protect privacy through welfare provision such as a basic income. In our example of the workplace drug-testing programme, it would provide employees with the option of maintaining their privacy by leaving the employment relationship. Awareness on the part of the employer, that this option is available to his employees, might also have an inhibiting effect on his willingness to press them into giving up their privacy. The provision of social housing will provide some citizens with privacy by providing them with an alternative to living their lives entirely in public spaces.

These programmes address the problem of arbitrary interference by alleviating conditions of dependency, enabling those who face it, to remove themselves from the situation. Ensuring, through a system of taxation and measures such as minimum wage legislation, that the income gap between the highest and lowest earners is not too great will tend to limit power of the relatively wealthy. We have already noted that the

(2003: Beacon Press); P. Pettit, 'A Republican Right to a Basic Income', (2007) 2 Basic Income Studies 1; R. Jubb, 'Basic Income, Republican Freedom, and Effective Market Power', (2008) 3 Basic Income Studies 1.

²⁹ K. Bridges, *The Poverty of Privacy Rights*, (2017: Stanford Law Books), p.92-3. Reliance on welfare provision might also require the poor to provide a significant amount of personal information to the institutions of the state; see generally J. Gilliom, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy*, (2001: University of Chicago Press).

distribution of wealth will affect the distribution of power and, in turn, the distribution of power will affect the distribution of privacy among the members of a political community. We can expect insurance programmes to provide diffuse protection for privacy. But we need to recognise their limitations. They will not shield citizens from interference with privacy that is effected by brute force or threats; menacing demands for information, for example. Nor will they eliminate all forms of dependency that lead to interference with privacy. The provision of a basic income enables the employee facing a drug-testing programme to protect her privacy by leaving the employment relationship. But what of circumstances in which dependency is not financial. Suppose Jones knows something about me that I would rather others not know, and he is aware of my preference. I am dependent on him keeping this information to himself – to continue treating it as private information. Insurance programmes will not relieve this dependency. I will need to maintain my relationship with Jones, to curry favour and avoid giving him any reason to disclose what he knows to others. These examples suggest that the positive duty to protect privacy implied by the idea of social justice, requires more of the state. In many circumstances, the state will only be able to discharge its obligations in social justice by shielding citizens from the threat of interference with privacy. This is where insulation programmes enter the picture.

(ii) Insulation Programmes

Rather than the provision of the material support that characterises insurance programmes, insulation programmes provide citizens with direct protection from the risk of interference and domination by others. Pettit suggests that this protection might take various forms, but that the standard approach will be to legislate – setting standards, establishing prohibitions, imposing duties on those who might be in a position to dominate, and conferring rights on those who are vulnerable to those in such positions. By establishing a framework of privacy-related legal norms the state can establish itself as a powerful and influential presence in the structural environment in which domination might occur.

While insurance programmes will address threats to citizens' privacy by *reducing dependency*, an insulation programme that consists of a framework of legal norms constitutes a means of *controlling power* to interfere with privacy. As we saw in the previous section, the power that a person is able to exercise is not only a function of her

means. It will also depend on what those who are not parties to the strategic relationship in which domination occurs decide to do. We observed that those who are part of the structural environment – third parties - might, through their action or inaction, facilitate domination. But these parties can also play a part in preventing it. Lovett illustrates the point using the example of the school bully who beats up other students and demands their lunch money.³⁰ The bully is clearly an agent of domination. But the dynamic of the relationship between bully and those he bullies is changed by the introduction of a third person; the headteacher who is committed to punishing instances of bullying. Lovett explains that if the bully dislikes punishment more than he likes getting the lunch money, and acts rationally, he will not threaten those from whom he might otherwise be inclined to extract money. From this, it is no great leap to see how the state – as a third-party actor with the authority to issue prohibitions and impose punishment for any breach – might control a citizen’s power to interfere with the privacy of another in the ways described in the previous section. The most obvious way in which it might do this, is to afford protection through the criminal law – to impose a cost on those who choose to exercise the power. But as we will see, it is not the only way that it might discharge the duty implied by social justice.

III. A Framework of Legal Norms.

We have considered how power and dependency that exist in certain forms of social relationships might enable citizens to interfere in one another’s privacy in ways that manifest domination. In the previous section, I suggested that the republican idea of social justice imposes on the state, a duty to ensure that its citizens do not dominate one another. To the extent that privacy shields citizens from domination, this broad obligation grounds further duties to protect it. In this part of the chapter, I want to consider the part that various forms of law might play in controlling interference with privacy and preventing domination.

The broad question of the reliance that we should place on different forms of law as a means of protecting privacy – rather the narrower question of how a particular form of law can be used to this effect - is one that has received little attention in legal or

³⁰ Lovett, above n.3, at p.71.

philosophical writing.³¹ Should privacy be protected primarily by private law or criminal law? Why criminal and private law, rather than constitutional or regulatory law?³² The answer to these broad questions, and questions regarding the function of particular forms of law, will depend on the overriding aim of a system of law. For republicans, the aim will be to secure conditions of non-domination. The chapters that follow deal with the process through which privacy-related norms are generated, and with the function of a right to privacy. They can be read as the normative foundation for a body of constitutional law that will protect privacy. In what remains of this chapter, I want to consider in necessarily broad terms how criminal, regulatory, and tort law might provide the protection of privacy required by the idea of social justice.

(i) Criminal Law

Jose Luis Marti has observed that ‘as a doctrine committed to liberty, republicanism gives criminal laws a central role in its institutional design, as an absolute prerequisite for the protection of citizens’, since criminal offences are the most serious threats to that liberty.³³ Our concern is privacy. An interference with privacy might itself be an exercise of dominating power, overriding the subject’s preferences as to who should have access to her. Loss of privacy might also result in the interferer (and others) acquiring power to interfere in subsequent choices of the person who has suffered the loss. But some of our examples, supermarkets collecting data on customers purchasing habits so that they engage in targeted marketing, for example, seem relatively trivial. It is doubtful that anyone would consider these to be the kind of serious threats to liberty that Marti suggests ought to be addressed by republican criminal law. So, under what circumstances should interference with privacy be considered a crime?

Liberal ideas about criminal liability are grounded in an individualistic conception of freedom. Liberal criminal law, in the words of Ekow Yankah, is ‘based on

³¹ See however, G. Fletcher, ‘Domination in Wrongdoing’, (1996) 76 Boston University Law Review 347, who develops a theory of domination as wrongdoing that traverses the boundary between criminal and tort (private) law.

³² For a rights-based account which suggests that a body of private law that has a statutory basis might provide a means of addressing the problem of domination, see F. Du Bois, *Social Purposes, Fundamental Rights and the Judicial Development of Private Law*, in D. Nolan and A. Robertson (eds), *Rights and Private Law* (2011: Oxford, Hart). On the possibility of protecting a right to privacy through private law, see C. Hunt, ‘From Right to Wrong: Grounding a “right” to Privacy in the “Wrongs” of Tort’, (2015) 52 *Alberta Law Review* 635.

³³ J. L. Marti, *The Republican Democratization of Criminal Law and Justice*, in S. Besson and J. L. Marti (eds), *Legal Republicanism: National and International Perspectives*, (2009: OUP), p.123-24.

a view of isolated individuals crashing into one another'³⁴, and a view of the relationship between the individual and state, as one of separation. The remote state's coercive intervention is justified on the grounds that it is necessary to protect the pre-political moral rights of the individual against whom the offence is committed. Republican criminal law is premised on a view of society that differs fundamentally from that taken by liberals. It proceeds from recognition that the members of a political community can only be assured of their own freedom by working co-operatively with others to establish the conditions that regulate their interactions with one another, the rights that they will have, and the duties that they will owe one another.³⁵ Anthony Duff points out that 'if the law is to address us as citizens (not as subjects), it must address us in terms of the values that supposedly structure our polity. We can expect the justification for the protection of privacy in republican criminal law to be grounded in the values that were identified in the introduction to this thesis as the core values of a progressive form of republicanism. The criminal sanction will extend to interference with privacy that denies citizens status as political equals, and that undermines the civic bonds that provide the foundation of co-operative efforts to secure conditions of freedom. We might expect interference with privacy that prevents or hinders participation in that endeavor to be considered a serious wrong against the political community, with the imposition of sanctions that reflect that view of its seriousness. The broad aim of a body of republican criminal law, Yankah explains, will be to ensure that citizens get the equal respect that is their due as members of the political community, and to enable them to continue sharing, and playing an active part in sustaining, the project of living together as part of such a community.³⁶

In the first section of the chapter, we focused on the idea of domination and considered the nature of the social relationships in which it might occur. But we could have just as easily spoken there about conditions that manifest a denial of political equality, because as we saw in the previous section, the republican values of freedom

³⁴ Ekow Yankah, 'Republican Responsibility in Criminal Law', (2015) 9 *Criminal Law and Philosophy* 457, 461.

³⁵ For a republican account of criminal law as a co-operative practice, see R. Dagger, *Republicanism and the Foundations of Criminal Law*, in R.A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law*, (2011: OUP). Also, S. Marshall and R. A. Duff, 'Criminalization and Sharing Wrongs', (1998) 11 *Canadian Journal of Law & Jurisprudence* 7; R. A. Duff, 'Responsibility, Citizenship, and Criminal Law', in R.A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law*, (2011: OUP).

³⁶ Yankah, above n.34, 465.

and equality are interrelated. It cannot be claimed that a person enjoys standing as a member of political community equal to that of others, if he or she is subject to the arbitrary whims and desires of any of those others – domination and the denial of equal status go hand-in-hand. Much of the conduct involving interference with privacy and facilitation of it that are proscribed by a body of liberal criminal law will have a counterpart in the calendar of republican criminal offences. But their justificatory grounds will be explained in terms of dominating control rather than denial of autonomy. The offence of blackmail for example, often involves a threat to reveal information about a person unless he does something that is demanded of him by the blackmailer. Various accounts of the offence have been offered.³⁷ Republicans will consider it a prime example of dominating control. Yet this is a concept that is largely absent from writing that seeks to explain the harm involved in this form of conduct.³⁸

With respect to the protection afforded to privacy it is likely that a body of republican criminal law will extend criminal liability for interference with it, beyond its traditional boundaries.³⁹ Phillip Pettit has observed that corporate organisations are significant agents of a domination whose power ought to be constrained by criminal law to a greater extent than is currently the case, particularly those that possess considerable power by virtue of their control over vast flows of personal data. The internet has become central to our social and civic lives. It has connected us social beings, political actors and activists, and has become an essential portal for communication with the institutions of government. Yet it poses a particularly grave threat to citizens' privacy and exposes large numbers to domination by fellow citizens and corporate entities. For example, republicans are likely to think of the harm occasioned by the online publication of sexually explicit images without the consent of the subject – so called 'revenge pornography' – in terms of domination and subjugation.⁴⁰ The justification for extension of criminal sanctions to those who knowingly permit publication of such images on

³⁷ See P. H. Robinson, M. T. Cahill and D. M. Bartels, 'Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory', (2010) 89 *Texas Law Review* 291.

³⁸ Fletcher provides an account of blackmail in which criminalisation is justified as a means of ending 'continuing dominance'. This refers to the power that the blackmailer has over the blackmailed but does not describe the position of the latter as one of dependency; G. P. Fletcher, 'Blackmail: The Paradigmatic Crime', (1993) 141 *University of Pennsylvania Law Review* 1617.

³⁹ Pettit, above n.17, at p.116.

⁴⁰ For a comparative legal analysis of the criminalization of this and similar forms of conduct, see B-J. Koops, B. Newell, A. Roberts, I. Skorvanek and M. Galic, 'The Reasonableness of Remaining Unobserved: A Comparative Analysis of Visual Surveillance and Voyeurism in Criminal Law', (2018) 43 *Law and Social Inquiry* 1210.

websites they control will be facilitation of this form of domination - the provision of that opportunity constituting part of the structural environment that makes it possible. The more deep-rooted justification will be that acts such as this - the website administrator's disregard for the subject's privacy - will tend to weaken civic bonds and undermine the sense of solidarity that is required if a political community is to flourish.

The internet's significance as a site of social interaction and political discourse might be thought to justify, from a republican standpoint, extending the scope of the criminal law to cover various forms of activity that currently is often dealt with using regulatory law. An obvious candidate is the unauthorised use and disclosure of citizens' personal data to manipulate political decision-making. It seems to be increasingly prevalent for information about the websites that citizens visit, the material that they view, and the interests that they seem to have, to be used to infer what their political views might be. With this information, it will be possible for those seeking to influence the outcome of popular elections and referendums, to target citizens who the data suggest could be persuaded one way or another - 'swing voters.' It seems that during campaigning prior to the referendum on the United Kingdom's continuing membership of the European Union in 2016, advertisers working for the organisers of the campaign to leave, created over 1400 advertisements that focused on particular issues, such as immigration and animal rights. These were sent selectively to individuals who it was believed, on the basis of their age, where they lived, and on data harvested from social media sites and other sources,⁴¹ would be receptive to the messages.⁴² Significantly, some of the messages provided no indication as to who had sent them. But why is the interference with privacy that enabled these practices problematic from a republican perspective, and why should it be thought so significant a problem as to warrant criminalisation?

We have noted that conditions of social justice are essential to the republican ideal of a community of political equals working together to secure conditions of

⁴¹ One way in which personal data was obtained, was by means of an online football prediction competition that required entrants to provide information about their name, address, email and telephone number, and voting intentions in the referendum; 'Vote Leave Faces Scrutiny Over £50m Football Contest', The Guardian, 20 May 2018; <https://www.theguardian.com/politics/2018/may/20/vote-leave-scrutiny-facebook-data-football-contest-brexit>

⁴² 'Vote Leave's Targeted Brexit Ads Released by Facebook', BBC News, 26 July 2018; <https://www.bbc.com/news/uk-politics-44966969>

freedom. The criminal law ought, among other things, to ensure citizens receive the equal respect that is due to them as members of the political community, and that they are able to play an active part in this co-operative project. If citizens are denied an opportunity to do so, or are hindered in their attempts to participate, then the foundations of the republican project will be seriously undermined.

Why then, does acquisition of data concerning voters' online activity, and the resulting power to target individual voters with specific messaging that appeals to their fears, anxieties, convictions, and so on, represent such a threat? How does it hinder effective participation? The answer is that the form of participation that is necessarily implied by the republican ideal of self-government, requires participants to be politically autonomous. The ideal will be undermined if sufficient numbers of citizens simply defer to the views of a particular individual or group – that is to say, if sufficient numbers are willing to accept or adopt what is asserted or proposed without engaging in critical reflection and evaluation. Autonomy is a condition that is achieved only by those who can be regarded as having taken decisions that can be understood in some way to be authentic; to be their own.

It seems to me, that a person's adoption or acceptance of a position or claim that is presented to her, can be regarded as an exercise of full autonomy if what Gerald Dworkin has referred to as 'the condition of procedural independence' is satisfied.⁴³ If I follow another's suggestion that I should vote in a particular way for the reasons that the other suggests, it can be regarded as an exercise of political autonomy so long as I have reached an independent judgment that the reasons or claims that have been offered in support of the suggested course of action are valid, legitimate, or in some other way, satisfactory reasons for voting in that way. Full autonomy imports a requirement of rationality - a condition that is concerned with the quality of decision-making. A rational process of belief formation will be one that is guided by 'a desire for the truth',⁴⁴ that seeks all relevant information and subjects it to critical evaluation. Such evaluation involves assessment of the reliability of the information, which in turn, requires appraisal of the credibility of its source.

⁴³ G. Dworkin, *The Theory and Practice of Autonomy*, (1988: CUP), p.18.

⁴⁴ On the idea of rational belief formation, see R. Nickerson, *Aspects of Rationality*, (2012: Taylor & Francis); J. Baron, *Rationality and Intelligence*, (1985: CUP).

It is the lack of awareness on the part of the targeted persons, that there has been an interference with privacy, and that those providing information, making claims, and offering reasons, possess information about the targeted persons' preferences, anxieties, etc, that undermines political autonomy. If I am aware that someone knows that I am fearful of certain things, I will be alerted the possibility that this is simply a ploy to get me to choose in the way that he or she suggests I should choose. I have reason to doubt the person's motivations and honesty, and whether I am being presented with all relevant information about the implications of voting the way in which the other suggests I should vote.⁴⁵ Having been put on notice, I can undertake my own inquiry to establish the validity and/or reliability of the claims and arguments that have been made, and the information that has been presented to me; seek corroboration from an independent source. Alternatively, if it is not possible to engage in this kind of inquiry, or I do not have the time or resources to do it, I can take account of the possibility that the other might be attempting to manipulate me, by attaching less weight to the claims, arguments, or information, in reaching a decision about what to believe. This form of manipulation undermines political autonomy, and it will tend to frustrate rational evaluation and critical reflection. Its deleterious effect is on the *conditions* required for full political autonomy, rather than the agent's *capacity* for it. Because it will make rational inquiry more difficult, the justification for criminalisation will be stronger still in cases involving deliberate or reckless false representations, and/or in which the true identity of those conveying the messaging is concealed. The impetus for criminalisation will be bolstered by the probability that, if the interference with privacy and the subsequent manipulation were to come to light, it would be likely to erode trust and weaken the civic bonds on which the republican project depends. Republican criminal law, Yankah suggests, encapsulates a reciprocal duty that flows between citizens and their civic community.⁴⁶

If the republican ideal of self-government is to be taken seriously, the demands of social justice, and the extent to which the criminal law should be relied upon as a means of achieving it, are matters that ought to be determined collectively, by the

⁴⁵ See, for example, R. Sagar, 'On Combating the Abuse of State Secrecy' (2007) 15 *Journal of Political Philosophy* 404, 405; who observes that elections cannot operate as an effective means of democratic control if citizens are denied information that enables them to evaluate a candidate's performance. The same point might be made a fortiori where the identity of the party making a claim is concealed.

⁴⁶ Yankah, above n.34, 463.

political community. The precise point at which interference with privacy constitutes a denial of civic equality, is likely to be a matter of reasonable disagreement. So too, whether criminal liability should be imposed on those who are not parties to the relationship of domination but facilitate it by assisting one of the parties to interfere with the other's privacy. These issues are significant. They point to the fact that a body of republican criminal law has an important expressive function. It constitutes a collective determination of the standards to which citizens must adhere if the republican project of human flourishing in a community whose members have equal civic standing is to be a success.⁴⁷ The existence of republican criminal law need not be taken as sign of a corrupt polity. This seems to be an unnecessarily pessimistic view of citizens' dispositions. Even in a civic community whose citizens are committed to social justice, it might not be clear to some, what this commitment requires in particular situations. The criminal law provides the members of the political community with a means of identifying circumstances in which interference with privacy exposes the person who suffers the interference to what that community considers to be a particularly serious form of domination.

(ii) *Regulatory Law: Data Protection Regimes*

If the criminal law acts on interferences with privacy that have particularly serious consequences for those on the receiving end, what of the state's obligations in social justice in other circumstances? We need to draw a distinction between circumstances in which no social good is served by the interference, and those in which interference is a necessary consequence of securing some such good – systems for electronically transferring funds, or the creation of medical records, for example. Interference of the first kind – that which serves no social good – will generally be dealt with under the criminal law. While interference of the second kind serves the common interests of the community, it will nevertheless expose citizens to a risk of domination.⁴⁸ One way of

⁴⁷ *ibid.*, p.465

⁴⁸ Data protection legislation seems to be an under-theorised body of law. There have been various suggestions as to the values that are served. See for example, P. De Hert and S. Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action', in S. Gutwirth, Y. Pouillet, P. De Hert and C. de Terwangne (eds.) *Reinventing Data Protection?*, (2009: Springer), who suggest (at p.5) that 'there are many possible 'readings' regarding the interests underlying data protection and their priority, ranging from autonomy, informational self-determination, balance of powers, informational division of powers, over integrity and dignity, to democracy and pluralism'. But none of these appear to provide the basis of sustained and detailed theoretical accounts of the normative foundations of data protection law. Bygrave makes a brief reference to nascent signs of republican thinking in data protection discourse, but republican ideas do not appear to have been taken up – at least in any obvious way – by

mitigating this risk is by establishing a regulatory framework. It is possible to think of all forms of law as 'regulation', but I understand it here to be a particular form of law, characterised by an informal and co-operative approach to compliance with prescribed standards. It proceeds on the assumption that compliance with these standards by those who possess citizens data is motivated by reputational concerns.⁴⁹

The power possessed by individuals and corporations who hold financial, health, and other forms of data needs little explication. If we take privacy to be a broad condition of inaccessibility, so that a person suffers a loss of privacy whenever someone gains access, observes or obtains information about her, any processing of data will amount to an interference with privacy. The act of processing personal data necessarily involves access to information about the data subject. It is, therefore, an interference with the privacy of the subject. Data protection law - or as some refer to it data privacy law - is, perhaps, one of the most well-known and pervasive forms of regulation, yet those working in this field have recognised that it is a body of law the development of which has been afflicted by a lack of clarity in its aims and conceptual foundation.⁵⁰ Bygrave suggests that although this form of law is concerned with the protection of privacy, its rationale is rooted in more fundamental values such as autonomy, dignity, civility, democracy and pluralism.⁵¹

For us, the fundamental values served by this form of law will be social justice and its constitutive ideals of freedom (non-domination) and (civic or political) equality. It has been suggested that data protection law serves the ends of deliberative democracy by ensuring that personal data is not used in ways that prevent or hinder individuals' political participation.⁵² For reasons that were set out in the previous section, it seems to me that this is a risk that ought generally to be regulated by a body of republican criminal law. But data protection law should also be seen as a means of addressing the problem of domination in social relationships, as defined in the first part of this chapter. Before developing this idea, I should point out, as those working in the field of data

those currently working in the field of data protection; L. Bygrave, *Data Protection Law: Approaching its Rationale, Logic, and Limits*, (2002: Kluwer), p.136.

⁴⁹ C. Parker and J. Braithwaite, 'Regulation', in M. Tushnet and P. Cane (eds), *The Oxford Handbook of Legal Studies*, (2005: OUP).

⁵⁰ L. Bygrave, *Data Privacy Law: An International Perspective*, (2014: OUP), at p.117.

⁵¹ *Ibid*, at p.121.

⁵² See, P. Schwartz, 'Privacy and Political Participation: Personal Information and Public Sector Regulation in the United States', (1994) 80 *Iowa Law Review* 553.

protection have done, that the concepts of ‘privacy’ and ‘data protection’ are not interchangeable.⁵³ Data protection principles address issues that do not appear in any obvious sense, to implicate the privacy interests of the data subject – at least those interests that are commonly taken to be the core interests protected by privacy, for example rectification of inaccuracies in data that is held by another. But for present purposes, we can take data protection law to be a body of norms that is, in large part, concerned with privacy.

Many of the principles that form the basis of contemporary data protection law lend themselves to a republican reading without too much straining. The starting point of a republican account of data protection law, will be an understanding that the exercise of power involved in the processing of data held by corporations, internet service providers, retailers, financial institutions etc., will not constitute domination insofar as it is controlled by the data subject. Broadly consistent with this, De Hert and Gutwirth note that data protection laws have been enacted ‘not to prohibit, but to channel power, viz., to promote meaningful public accountability, and provide data subjects with an opportunity to contest inaccurate or abusive record holding.’⁵⁴ Bygrave suggests that a set of core principles can be distilled from much of the existing data protection law.⁵⁵ It is possible to explain how these principles serve the ends of republican freedom, by thinking about the structural conditions that give rise to domination in the relationships that citizens have with one another.

In the absence of intervention by the state, the relationship between data controller and data subject will be one of domination. When the controller collects information about the subject, he or she acquires power to interfere with the choices that the subject is in a position to make. The extent of that power will depend on the nature and volume of information. In contrast, the subject is relatively powerless. She may not be able to determine whether information that she provides will be retained, where it has been retained, the duration of any retention, and what use might be made of it. One of the consequences of the imbalance of power between data controller/processor and the data subject, is a high degree of dependency. Unless the

⁵³ For example, De Hert and Gutwirth, above n48; O. Lynsky, *The Foundations of EU Data Protection Law*, (2015: OUP), ch.4.

⁵⁴ P. De Hert and S. Gutwirth, ‘Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power’, in E. Claes, A. Duff and S. Gutwirth (eds.), *Privacy and the Criminal Law*, 2 (2006: Intersentia), p. 77.

⁵⁵ Bygrave, above n.50, ch.5.

data subject has the power to secure destruction of the data, the relationship that she has with the data controller is one that she cannot bring to an end – only the data controller will be able to do this.⁵⁶

Having framed the issue in this way, we can now return to five basic principles of data protection law identified by Bygrave and consider the part they play in ensuring that citizens do not suffer domination. The first principle is that the processing of data should be ‘fair and lawful’. In respect of lawfulness, we noted earlier that where there are laws that determine if, when, and how interference with privacy is permissible, any interference that is consistent with the constraints they impose will be non-arbitrary. Of course, the corollary of this is that interference with privacy – such as the processing of personal data – that is inconsistent with any legal prohibition, will be arbitrary and dominating. The second component of the principle – fairness – is a more nebulous concept. The way in which Bygrave suggests fairness should be understood in this context, ought to appeal to republicans. The condition of fairness imposes on data controllers, a requirement to ‘take account of the interests and reasonable expectations of data subjects.’⁵⁷ This notion of fairness bears some similarity to terms in which non-domination is defined by Philip Pettit in *Republicanism*.⁵⁸ There Pettit suggested that a person’s capacity to interfere in another’s choices would be non-arbitrary and, therefore, non-dominating, to the extent that it is forced to track the interests and ideas of the person who is subject to it.⁵⁹ Fairness as a principle of data processing understood in the way described above, will be viewed by republicans as a principle of non-domination.

But we have endorsed Pettit’s later definition, in which non-arbitrariness is taken to be power to interfere that is controlled by the person subject to it; that is, power that is exercised ‘in a direction or according to a pattern that the person has the influence to determine’.⁶⁰ This is not problematic. Indeed, this conception of non-domination provides a more comprehensive grounding for the principles of data protection law. Bygrave explains that the idea of fairness also implies a duty of transparency. This duty

⁵⁶ On the dominating power of those who offer digital services, see P. Pettit, ‘Is Facebook Making Us Less Free?’, IAI News, 26th March 2018, available at <https://iainews.iai.tv/articles/the-big-brotherhood-of-digital-giants-is-taking-away-our-freedom-auid-884>

⁵⁷ Bygrave, above n.50, at p.164

⁵⁸ P. Pettit, *Republicanism: A Theory of Freedom and Government*, (1997: OUP), at pp.52-58

⁵⁹ *ibid.*, at p.55

⁶⁰ Pettit, above n.17, at p.50.

requires data processors to make data subjects aware of the nature and purposes of any data processing that is undertaken. It -the duty to inform – provides the foundation for a principle that corresponds with the idea of non-arbitrariness in our conception of non-domination – the principle of data subject influence. Bygrave explains that ‘a core principle of data protection laws is that persons should be able to participate in, and have a measure of influence over, the processing of data on them by others.’⁶¹ This principle implies a number of duties including a duty to inform data subjects of the data relating to the subject that the controller has in its possession, and the uses that will be made of it. Significantly with respect to non-domination, it is a principle that grounds rules that require consent for certain forms of data processing, that enable data subjects to have inaccuracies in data rectified, and that require data that has been unlawfully collected or is irrelevant to the purposes for which it is held, to be deleted. These rules address the problem of domination that is an inherent characteristic of the relationship between data controller and subject, by empowering data subjects. They provide subjects with rights that enable them to exercise greater control over the power that others acquire when they collect personal data.

Other principles alter the structure of the relationship by constraining the power of the data controller. The minimisation principle limits the power of the data controller, by restricting the extent of data collection to that which is necessary for achieving the purpose for which the data has been collected. Power is further constrained by the limitation principle, which grounds rules that prevent data from being used for purposes beyond those for which they have been collected. Of course, the effectiveness of data protection laws will depend on a range of measures such as auditing, the level of penalties, incentives for compliance, citizens awareness of data collection and the use that can be made of their data, and so on, that cannot be explored here. Some intervention might also be necessary where the organisations that have an effective monopoly on the provision of certain services, is such that we might view any agreement to the use of data to be submission rather than consent. But regulatory law, particularly data protection law, ought to be considered an important component of the framework of legal norms through which the state discharges its duty to establish a just society.

⁶¹ Bygrave, above n.50, at p.158.

(iii) Private Law: A Privacy Tort

For republicans, explaining the role that private law might play in securing the aims of social justice presents something of a challenge. There is little writing on the issue.⁶² This is perhaps because, as we have noted, republicans take the view that citizens are interdependent. Securing freedom is a necessarily co-operative endeavour involving popular control over the generation of legal norms, those norms being conceived as an expression of collective will. Where there is interference with privacy that diminishes freedom, the republican impulse will be that it should be met with a collective rather than an individual response. Some theories of tort law, take it to be a body of law that is bi-polar, concerned only with the relationship between the two individuals involved in the dispute. But there are others that conceive a public role for it. Dan Priel has suggested that much of modern tort law has begun to look 'public'. Liability is often decided on grounds that extend beyond the interests of the parties to the case.⁶³ As Steve Hedley points out, private law settles disputes between individuals. It determines how those disputes are going to be resolved, and 'keeps us to our own sides of the line'. But he observes that questions of 'who drew the line?', 'why was it drawn there?', and what are the legal consequences of crossing it?', are public questions.⁶⁴ Although private law is ostensibly about individuals, Hedley draws attention to the fact that '[c]ourts, whatever else they are, are public authorities, and private law, whatever else it is, is a technique or instrument used by those authorities.'⁶⁵ But to what end? We will say, 'to ensure that the state discharges the duty implied by the republican conception of social justice, namely, to ensure that its citizens do not dominate one another. But this is not an idea that is found in the mainstream of private law theory.

Despite a widespread view that tort law lacks any coherent normative foundation, those who have offered theories can be divided into broad camps. In one, are those who claim that it is a body of law concerned with corrective justice, its aim being to compensate individuals who stand in a certain relationship with one another, such that one is held liable for loss that she causes the other to suffer. On this view, a tort

⁶² Besson and Marti have observed that republicans have tended to focus on the role of criminal, constitutional and international law in securing goals; S. Besson and J. L. Marti, 'Law and Republicanism', in S. Besson and J. L. Marti, *Legal Republicanism*, (2009: OUP), at p.29.

⁶³ D. Priel, 'A Public Role for the Intentional Torts', (2011) 22 *King's Law Journal* 183.

⁶⁴ S. Hedley, 'Courts as Public Authorities, Private Law as an Instrument of Government', in K. Barker and D. Jensen (eds.), *Private Law – Key Encounters with Public Law*, (2013: CUP).

⁶⁵ *ibid.*, at p.90.

of privacy provides a means of restoring 'balance'. If it can be said that the person who suffers interference has suffered some loss because of the interference, and the person responsible has in some way benefited from it, then the law should operate to restore the parties to the original position. The benefit and loss need not be material, it can be conceived normatively; the benefit derived by the interferer is relief from the burden of having to comply with a duty to respect the other's privacy, while the other suffers a loss of privacy. There is a quantitative inequality that the law can remedy. For some, the question of whether it ought to provide a remedy in any given circumstances is to be determined on the basis of an understanding of rights and duties derived from pre-existing fundamental principles of morality.⁶⁶ The contrary view is that the scope of the rights and duties is determined as a matter of law on the basis of a shared social understanding of their meaning.⁶⁷

A second broad theory of tort law takes its primary function to be the vindication of rights - or more accurately to determine the secondary obligations that are owed by one person to another following the first person's failure to discharge a primary obligation to respect the rights of the other. On this view, a finding that one party is liable involves a determination that the other's rights have been violated. The leading proponent of this view, Robert Stevens, claims that once it has been determined that the person has wronged the other in this way, the role of tort law is to ensure that she discharges her duty to make amends.⁶⁸ He suggests, that where a person has violated the rights of another, we would expect that person to apologise and make good any harm. If the right in question is interference with privacy the harm caused by the interference will often be something that cannot be rectified or extinguished. The law of tort imposes a duty of 'next-best compliance', by compelling payment of damages.⁶⁹ The award of damages is compensation for the wrong that is committed rather than any subsequent loss that the right-holder has suffered, although the award of damages as compensation for the wrong suffered does not exclude the possibility of a further award

⁶⁶ See, for example, R. Wright, 'Substantive Corrective Justice', (1992) 77 Iowa Law Review 625.

⁶⁷ The leading proponent of this view of private law is Ernest Weinrib; see, E. Weinrib, *The Idea of Private Law*, revised edition, (2012: OUP). For an overview of tort theories and their implications for a privacy tort, see C. Hunt, 'From Right to Wrong: Grounding a "Right" to Privacy in the "Wrongs" of Tort', (2015) 52 Alberta Law Review 635.

⁶⁸ R. Stevens, *Torts and Rights*, (2007: OUP).

⁶⁹ R. Stevens, 'Damages for Wrongdoing in the Absence of Loss' in J. Varuhas and N. Moreham (eds.), *Remedies for Breach of Privacy*, (2018: Bloomsbury Publishing).

for consequential loss. On this understanding, violation of the right to privacy per se would be a ground for awarding damages, the quantum being determined according to the seriousness of the interference.

Although none of these theories considered alone provides us with an entirely satisfactory normative basis for a republican privacy tort, they can usefully shape our thinking about the role of such a tort in securing the aims of a republican conception of social justice. We can begin by observing that, for reasons that will be fully developed in chapter 5, a theory of tort that depends on a pre-political notion of rights – rights that are said to be grounded in, and derived from, an objective morality – will be incompatible with the version of republicanism that we have endorsed. The objection does not involve the denial of an objective morality. Rather, it is that we do not have a reliable means of evaluating claims to knowledge about what it requires, the nature and scope of the rights that can be derived from it, and the corresponding duties to which the rights give rise. In light of this, any one person or group's claims regarding these matters, can only be accepted on an arbitrary basis. Richard Bellamy points out that rights are held by all citizens, and any authoritative decision regarding the way in which they are to be understood – and the duties to which they give rise - affects not only the interests of the claimant, but those of every citizen *qua* holder of the right. Consequently, such decisions will be non-dominating only if determined in a process in which all of those affected have a say – a democratic process. I will return to this issue in the next chapter.

We are concerned with the role that a privacy tort – an action brought by an individual for interference with privacy - might play in securing the aims of a republican conception of social justice. It will be recalled, that in common with other theories of justice it is concerned with freedom and equality. But those concepts are to be understood in republican terms – as non-domination and civic or political or civic equality. It was suggested in the previous section that various forms of infrastructural programmes will be required if the aims of a republican conception of social justice are to be achieved. We noted that the state can protect its citizens from domination by others in various ways. The first is to intervene directly, to remove from the person who is in a position to interfere, the option of doing so. Such programmes we have referred to as insulation programmes. They shield the citizen from any attempt to interfere.⁷⁰

⁷⁰ Pettit, above n.17, at p.73

Insurance programmes on the other hand, address threats of domination that are the result of dependency, through the provision of resources that enable citizens to achieve independence. The theories of tort law that have just been outlined – those that take its purpose to be corrective justice and vindication of rights, respectively – indicate how it might be possible to fashion a republican privacy tort that both insulates citizens from domination and constitutes a form of insurance against the risk of subjugation.

We have noted that domination arises in social relationships in which there is an imbalance in social power, and one of the parties is dependent on the relationship. We also observed, that to ensure citizens do not find themselves forced to enter into, and remain in, dependent relationships with those who can provide basic necessities, the state must be capable of meeting those needs. It might do this by providing housing, healthcare, legal aid, and a basic income.⁷¹ We could add to this list, the provision of a legal right to recover any economic loss that it is caused by those who possess power that can be exercised on an arbitrary basis. This right can be provided through the recognition of various causes of action in tort law.

Suppose I provide details of my bank account to an online retailer who fails to store them securely, thus enabling a third party to transfer funds out of my account without my permission. We would no doubt think that the actions of the person who dishonestly appropriated my money should give rise to criminal liability. In this case, the criminal law failed to protect me from the initial exercise of dominating power, but tort law can reduce my exposure to further domination. As we have already noted, the fewer one's financial resources, the more dependent one will be on the good will, patronage, and benevolence of others. The loss that I suffer as a consequence of the of the transfer of funds from my account, leaves me more vulnerable in this respect. This situation can be remedied by a suitably oriented privacy tort, requiring those responsible for the interference – in this case the retailer and the third party – to make good the loss. An award of damages equivalent to the financial loss that I have suffered will restore me to the position of independence that I enjoyed prior to interference with my privacy. Of course, a cause of action cannot be limited to cases of *substantial* financial loss. If I have

⁷¹ See generally, P. van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (1997: OUP); P. van Parijs, 'A Basic Income for All', in J. Cohen and J. Rogers (eds.), *What's Wrong with a Free Lunch?* (2003: Beacon Press); P. Pettit, 'A Republican Right to a Basic Income', (2007) 2 *Basic Income Studies* 1.

no redress for relatively insignificant financial losses, a succession of such losses would lead over time, to a gradual increase in the extent of my dependence.

A second, and equally important, function of a republican privacy tort, will be to provide citizens with a means of establishing that the right to privacy extends to circumstances in which they have experienced interference, and of recognising the harm that the individual has suffered by instituting what Stevens has referred to as 'next-best compliance'; an award of damages by way of compensation. I suggested earlier that the right to privacy is something that is held by all citizens and that because of this, authoritative decisions that fix its meaning and scope ought to be made in a process that enables all of them to have a say - a democratic process. However, it is implausible to think that it will be possible to determine in advance, and through such processes, the extent of the right in the full range of circumstances in which interference with privacy might occur. The state can discharge the positive duty to ensure that citizens do not dominate one another that is implied by the republican conception of social justice, by providing an action in private law. Where the scope of the right has been unambiguously determined in a democratic norm-generating process, a privacy tort enables citizens to seek redress for violation of the right. But where the question of whether the right arises in circumstances that have not been contemplated in such a process, an actionable tort enables the state to address the question of whether there is a right to privacy in such circumstances.⁷² This is an issue to which we will return in chapter 5.

IV. Conclusion

The aim of this chapter has been to consider the state's duty to ensure that citizens do not dominate one another. To the extent that interference with a citizen's privacy constitutes an exercise of dominating power, or leads to others acquiring the power to interfere in his or her choices, the state has a duty to protect it. The source of that duty is the republican conception of social justice. We saw that domination occurs in social relationships that possess certain characteristics. They will be relationships in which there is an imbalance in social power, so that one is able to impose his will on the other, and a degree of dependency on the part of the party with less power, so that he or she is unable to exit the relationship. We saw that power imbalances and dependency has

⁷² See M. Richardson, 'The Battle for Rights: Getting Data Protection Cases to Court', (2015) 1 Oslo Law Review 23, who argues that law is 'the product of a constant struggle by individuals for the recognition of their legal rights.'

implications for privacy. Those with relatively little power and a high degree of dependency will be less able to resist attempts to interfere with their privacy. Those with little privacy will be vulnerable to domination by others. Those who start out with little privacy – the homeless, for example – are more likely to find themselves subjected to domination by others. We have seen that the state might discharge its duty to ensure that citizens do not suffer domination at the hands of others, through the institution of insurance and insulation programmes.

We have also noted that the state might, by meeting citizens' basic needs through a variety of insurance programmes – the provision of social housing and welfare payments, for example – secure for them, a greater degree of privacy than they might otherwise enjoy. But it is in a position to address the threat to privacy and accompanying risk of domination by acting to affect the balance of power in social relationships. It can do this by increasing the cost of exercising power, by criminalising interference with privacy and imposing sanctions on those who transgress. In addition to constraining the power of those parties to the kind of relationships in which domination is possible, the state might also discharge its obligations in social justice by empowering the relatively powerless. We saw how this might be achieved through regulatory law and the availability of actions for interference with privacy in private law. We noted that the principles of data protection law provide data subjects with various rights that enable them to monitor and challenge the power that data controllers have by virtue of their possession of data relating to the subject. It was suggested that, as well as enabling citizens to recover any losses that they suffer as a consequence of interference with privacy, the availability of an action in private law provides citizens with an opportunity to shape the scope of the right to privacy and claim the protection that it affords.

We need to recognise that while the state can, by establishing a framework of legal norms that secure conditions of privacy, discharge its duty to prevent citizens suffering domination at the hands of fellow citizens, the process of establishing it involves the exercise of power by the state. This leaves open the possibility that in seeking to discharge the obligations implied by the idea of social justice, the state will itself assume a position of domination. It is to this issue that we now turn.

- Chapter 4 -

Democratising Privacy

At the beginning of the previous chapter, I said that I wanted to provide an account of two broad duties that the state owes its citizens in respect of privacy. We began by considering the first of these duties, the source of which is the republican conception of social justice. In common with most - if not all - theories of social justice, the concepts of freedom and equality are central to the republican version. What marked it out as a distinctively republican conception was the way in which freedom and equality were to be understood. The idea of social justice entails a commitment, on the part of the state, to secure for its citizens, conditions in which they enjoy non-dominated choices. It requires the state to provide resources and a level of protection that will ensure citizens do not suffer domination at the hands of one another. The relationship with which we were concerned was that between social power and privacy.

In this chapter, our concern is privacy and political power. We will consider a second duty that the state owes to its citizens in respect of their privacy. This duty requires the state to ensure that the power it exercises in making decisions that affect citizens' privacy is non-dominating, so that it conforms to the republican conception of political legitimacy. In contrast to liberal conceptions of legitimacy, which depend on the conditions that must be met before those who are subject to political power can be assumed to have *consented* to it, the republican conception is concerned with the extent to which the power of the state is *controlled* by those who are subject to it. Whereas liberal legitimacy tends to focus on the kind of reasons that are offered as justification for a decision, republican legitimacy is concerned with the influence that citizens have over those decisions. In what follows, I will consider what arrangements might need to be put in place to ensure that any exercise of political power that has a bearing on individuals' privacy, is consistent with a commitment to the republican ideals of self-government, freedom, and political equality.

The freedom that one enjoys, - just like privacy - is something that can be measured in degrees. One can have more, or less, of it. The greater the degree of control one exercises over others' power to interfere in one's choices, the greater one's freedom. Conversely, the more extensive the other's power, the more dominating their position is

in relation to those subject to it. The republican conception of political legitimacy addresses the variable nature of political power and popular control. Where there are range of feasible alternatives, it requires the adoption of institutional designs and procedural arrangements that provide citizens with the greatest possible degree of control over power exercised by the state. In this chapter, I will suggest that decisions made by the institutions of government that have a bearing on citizens' privacy, will be legitimate only where they are the outcome of a deliberative decision-making process in which there is *ex ante* direct participation by citizens. The claim in outline, is that in making decisions that affect citizens' privacy, the state exercises political power. Insofar as such decisions proceed from reliable knowledge regarding the community's shared interest in privacy – that is, an understanding which is informed and shaped by a broad range of views, especially those most affected – it will be subject to maximal popular control. I will say that such knowledge can only be produced through the use of inclusive deliberative decision-making guided by certain norms of rationality.

In the course of this chapter I will refer, at various points, to the 'public/private distinction', the 'public and private spheres', and the 'public or shared interest' in privacy. It might be useful to say a little about the way in which these concepts are understood by republicans before we embark on the task in hand.

The idea of the community's shared interest is central to understanding the republican conception of the public/private distinction. For liberals, the distinction rests on who should control the activity in question. The public sphere comprises those matters that are a legitimate concern for the state and can, or ought to be, regulated by it. The private sphere comprises aspects of persons' lives that are no business of the state. Something is public if it is controlled or ought to be controlled by the state, and private if it ought to be controlled by individuals or social groups.¹ Because the state exists only to secure conditions in which each individual can pursue his or her own conception of the good, the private is logically prior to and privileged over the public. The boundary between the two will be determined by a set of rights, the scope of which will be established by recourse to pre-political objective morality.² Iseult Honohan³

¹ I. Honohan, 'Dealing with Difference: The Republican Public-Private Distinction', in M. Bagrahamian and A. Ingram (eds.), *Pluralism: The Philosophy and Politics of Diversity* (2000: Routledge).

² On the roots of this conception of the private sphere see M. J. Horowitz, 'The History of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1423.

³ Honohan, above n.1. See also B. Tholen, 'Drawing the Line: On the Public/Private Distinction in Debates on New Modes of Governance', (2016) 18 *Public Integrity* 237.

explains that the republican conception of the distinction differs fundamentally from the liberal version, in that it rests on the question of *interest* rather than *control*. If a matter is understood to be one that concerns all citizens – a matter of public interest – it belongs to the public sphere. If it is something of relevance only to those involved, then it is a private matter, and no business of the state.⁴ Both conceptions will raise questions in respect of which there is likely to be reasonable disagreement. In the liberal version, it is likely to concern the scope of the right to privacy and consequently the extent of the private sphere. In the republican, the issue will probably be the proper extent of the public interest. That is to say, whether in the circumstances under consideration, the issue of privacy *ought* to be of concern not just to the person whose privacy is at stake, but to all members of the political community.

As we have noted in previous chapters, republicans will consider privacy to be a reflexive common good. Citizens can only be assured of the privacy that will enable them to lead the life that they choose for themselves, through political participation. But the privacy that enables individuals to develop an autonomous way of life is a pre-requisite for effective participation. As Honohan points out, individual privacy is a pre-requisite for the development of intimate relations, family life, personal success and economic security. These things are, in turn, a necessary basis for effective participation in public life. Individual privacy both serves, and is secured by, political participation.⁵ Because of this, republicans will consider privacy – insofar as it provides a necessary foundation for political participation - to be a matter of public interest.⁶ But the view that individual privacy is a matter of common concern requiring a collective response - in the form of a decision made in one of the institutions of government - gives rise to a risk of domination by the state. The question we need to address in this chapter is ‘what arrangements will be required to mitigate this risk?’ How do we ensure that the state does not come to dominate its citizens in making decisions that affect their privacy?

The first part of the chapter sets out the republican conception of political legitimacy. As I have said, this imposes on the state, a duty to establish arrangements that provide citizens with greatest possible degree of control over the state’s power to

⁴ Honohan, *ibid.*, at p.157.

⁵ I. Honohan (2002), *Civic Republicanism*, London: Routledge, p.212; Honohan, *ibid.*, at p.165.

⁶ Consistent with this idea, we will see in the next chapter that the right to privacy that serves the progressive version of republicanism that we have endorsed will be conceived as something that is held in common by all citizens and serves their collective interest in individual privacy.

interfere in their choices.⁷ The second and third parts of the chapter make the argument that such control must involve some form of direct participation in the political decision-making processes that generate privacy-related norms. I will argue in the second part of the chapter that participation in popular elections and opportunities for *ex post* contestation constitute a relatively weak and attenuated form of control. While elections facilitate broad participation, this form of participation does not provide citizens with much control over subsequent political decisions that affect their privacy. Contestatory proceedings and hearings, on the other hand, enable those decisions to be challenged, but offer very limited opportunities for participation. The risk that attends these limitations, is that the conclusion as to where the community's interests in privacy lies, will be a subjective rather than a collective one, so that from the political community's perspective the determination is an exercise of alien power rather than collective will. In the third part of the chapter, I will argue that citizens can exert a greater degree of control over the power the state exercises when it makes decisions that affect their privacy through *ex ante* direct participation in decision-making, and identify the procedural conditions that will make this possible. In the final section of the chapter, I briefly consider the feasibility of this form of *ex ante* participation.

I. Republican Political Legitimacy

The republican conception of political legitimacy bears upon the question of the conditions that must be met before the state can subject its citizens to coercive and intrusive power, and for the exercise of that power to be non-dominating. I have already indicated that legitimacy will depend on the extent to which it can be said that this imposition is an exercise of collective will; that such power is controlled by the polity. It is the close relationship between a participatory form of control (and ultimately, freedom as non-domination) and legitimacy, that sets this conception of political legitimacy apart from contractarian ideas and gives it a distinctly republican character and set of demands.

Perhaps the most significant and well-known contemporary contractarian account of legitimacy, is that provided by John Rawls. According to Rawls, the exercise

⁷ This is derived from the broader idea expressed by Frank Lovett that "we should regard a state as legitimate to the extent that its configuration of political and legal institutions, as compared with feasible alternative configurations, will tend to minimise the domination that it inflicts on those persons subject to its authority."; F. Lovett, *A General Theory of Domination and Justice*, (2010: OUP), at p.211.

of political power is legitimate only if exercised in accordance with a set of constitutional essentials that 'all citizens as free and equals *may reasonably be expected to endorse* in light of the principles and ideals acceptable to their common human reason.'⁸ The legitimacy of the terms of political association and the exercise of political power, does not depend on whether citizens have, in fact, endorsed those terms. Rather it rests on a judgment as to whether it can reasonably be supposed that, as reasonable and rational agents guided by ideals of toleration and mutual respect, they *ought* to endorse them. On this account, the exercise of political power will be considered legitimate insofar as those who are, *de facto*, wielding it, provide those who are subject to it, with adequate justification for the way in which it is used. Where such justification is offered there is an assumption of collective consent to the state's exercise of coercive and intrusive power.

There is a marked conceptual difference in the republican conception of political legitimacy and Rawls' liberal account. The touchstone of legitimacy for Rawls is *justification* – the provision of the right kind of reasons. In republican thinking, the legitimacy of any conferral, assumption, and use of political power, depends not on the nature of reasons that are offered in support of it, but on whether citizens exercise adequate collective *control* over it.⁹ Political legitimacy, for republicans is tied to the idea of freedom as non-domination.

We have observed in previous chapters, that interference with privacy might be a manifestation of the exercise of dominating power, and that loss of privacy could result in others acquiring such power. We have taken domination to be the state of affairs defined by Pettit – 'Someone, A, will be dominated in a certain choice by another agent or agency, B, to the extent that B has a power of interfering in the choice that is not itself controlled by A.'¹⁰ To illustrate the point, we took as an example, the smoker who in his attempts to kick his habit, had co-opted his friends to the cause, by instructing them that if they saw him with a cigarette, they were to take it off him and extinguish it. We noted that the smoker's friends have power to interfere in his choices, but because that power is exercised on terms determined by the smoker, it does not constitute dominating

⁸ J. Rawls, *Political Liberalism*, (1993: Columbia University Press), at p.137.

⁹ The idea that political legitimacy is concerned with the collective control that citizens are able to exercise over the power of the state can also found beyond the republican literature; see, for example, J. Cohen, *Philosophy, Politics, Democracy*, (2009: Harvard University Press), at p.154.

¹⁰ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (2012: CUP), at p.50.

power. But we are now concerned with a risk of domination on an altogether different scale.

In the previous chapter, we saw that to discharge its obligation to establish a just society, one in which citizens do not suffer domination in their social relationships with one another, the state will have to establish a privacy-protecting legal order, comprised of various forms of law - criminal law, private law, regulatory law, and so on. In determining the scope of these norms, the state defines the boundary between the public and private spheres. We need to think of this as an exercise of power that affects the choices of those whose are subject to these norms. The extent of this power might be significant. Criminalisation of some activities - the provision of abortion services, or the sale of contraception, for example - will have profound effects, forcing some citizens to lead lives that they would not have chosen for themselves.¹¹ But of course the state's power is not exhausted once the scope of the criminal law is fixed. We saw that one of the functions of a privacy tort, will be to provide citizens with a means of establishing that the right to privacy extends to circumstances in which they have suffered interference. Here too, any constraints that the state might place on the circumstances in which there is a cause of action for interference, is an exercise of political power that will have a significant bearing on the extent to which citizens are able to secure conditions of privacy for themselves.

In addition to the power that it exercises through the substantive criminal law, the state will confer on its agents, agencies, and institutions, various investigatory powers - to engage in surveillance; search persons, possessions, premises, and vehicles; require the disclosure of encryption keys; monitor and capture data from computers and smart devices; seize documents and records, etc. - the exercise of which will entail some form of interference with citizens' privacy.¹² In private law actions, it will confer on the courts power to make orders that compel parties to disclose documents and other records. Power that effects citizens' privacy will also be exercised in decisions as to whether the details of legal proceedings and the identity of those involved should be

¹¹ See P. Alldrige and C. Brants, Introduction, in P. Allrdrige and C. Brants (eds.), *Personal Autonomy, The Private Sphere and Criminal Law: A Comparative Study*, (2001: Hart); P. Allrdrige, *Relocating Criminal Law*, (2000: Ashgate), chapter 4.

¹² See J. Purshouse, 'The Reasonable Expectation of Privacy and the Criminal Suspect', (2016) 79 *Modern Law Review* 871.

reported by the media, and in determining the circumstances in which those who have been convicted of criminal offences have to disclose that fact.¹³

For republicans, the power exercised by the state in such circumstances will lack political legitimacy if it is not controlled by those who are subject to it.¹⁴ The kind of privacy-related legal norms that we have identified above, will be generally applicable. In republican democracy committed to equality and the rule of law, no one will enjoy a general immunity from prosecution. Actions in private law will be available to all who can make out the relevant grounds. If these generally applicable legal norms are to be non-dominating, they must be generated in a process that provides all citizens with a say in determining the value that is placed on privacy. In private law, for example, that value will be expressed both in the range of circumstances in which interference gives rise to a cause of action – for trespass, breach of confidence, etc. – and in the defences that are available to those who engage in interference. In the criminal law, it is expressed in the scope of criminalisation for interference with privacy, in the circumstances in which a defence will be available, and in the sanctions that are imposed on those who are convicted.

The question I will address in the remaining sections of the chapter, is ‘what form of process will provide citizens with the degree of control over this exercise of power required by the republican conception of political legitimacy?’ To put matters differently, ‘what form of political participation will minimise the possibility of the state dominating its citizens when making decisions that affect their privacy?’ In chapter 2, I endorsed the view that the republican ideal of a self-governing polity requires *ex ante* participation, and suggested that it provides citizens with the most effective means of securing conditions of privacy for themselves. Citizens should, in some meaningful sense, have an authorial role in the development of the normative order that is imposed on them. At the same time, I rejected an alternative view of participatory democracy that represents the status quo in most Western democracies. It is one in which citizens are said to exercise popular control over norm-generating processes through participation in popular elections, and *ex post* contestation of representatives’ decisions. On this view, citizens are cast in a passive but vigilant role. They are able to step back and let elected

¹³ See J. Grace, ‘Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the UK’, (2014) 78 *Journal of Criminal Law* 121.

¹⁴ On which, see L. Beckman and J. Rosenberg, ‘Freedom as Non-Domination and Democratic Inclusion’, (2018) 24 *Res Publica* 181.

representatives get on with the process of generating norms, but must exercise editorial control; that is to say, they must have the power to require that norms be reformulated so they better track the interests that they hold in common with fellow citizens. Proponents of this approach claim that the need to secure electoral support, and to minimize the likelihood of decisions being successfully challenged, means elected representatives will ensure their decisions take due account of the interests of those they represent.¹⁵ However, we noted Robin Celikates' criticism that this amounts to an 'out-sourcing' of self-determination and lacks fidelity to the republican ideal of self-government.¹⁶

Over the next two parts of the chapter, I want to provide a more substantive foundation for the claim that the political legitimacy of those decisions taken by the institutions of the state that affect citizen's privacy, depends on citizens' direct *ex ante* participation in the norm-generating process. It will be necessary to explain why this form of participation provides citizens with a greater degree of control over the power that the state exercises when it makes such decisions, than a combination of participation in popular elections and *ex post* contestation. I suggest that we can use two measures to evaluate the degree of collective control that each provides. The first is the extent to which institutional and procedural arrangements provide those who are subject to the power – those whose privacy will be affected – an opportunity to participate in the processes that will generate relevant norms. The second is the effectiveness of those participatory opportunities – effectiveness being measured by the extent of any directional influence on the exercise of political power that can be achieved through the particular form of participation.

We will begin by considering how electoral participation and *ex-post* contestation fare when measured against these criteria.

¹⁵ P. Pettit, *A Theory of Freedom*, (2001: OUP), at p.163. Also P. Pettit (2006), 'Democracy, National and International', (2006) 89 *The Monist*, 301.

¹⁶ R. Celikates, 'Freedom as Non-Arbitrariness or as Democratic Self-Rule? A Critique of Contemporary Republicanism', in C. Dahl, T. Anderson Nexø, and C. Prendergast (eds.), *To Be Unfree: Republican Perspectives on Political Unfreedom in History, Literature and Philosophy*, (2013: Bielefeld, Transcript Publishing).

II. Securing Conditions of Privacy Through Elections and Ex-Post Contestation.

We have observed that establishing a framework of legal norms that bear upon citizens' privacy involves an exercise of political power, the legitimacy of which will depend on whether those norms are the product of a process that, compared to other feasible arrangements, will tend to minimise the risk of the state becoming an agent of domination. According to the conception of domination we have endorsed, domination will exist where there is power that is not controlled by those on the receiving end of it. Decisions made by the institutions of state that affect citizens' privacy, will be legitimate if they are generated in a political process that, taking into account what is feasible, provides citizens with the greatest possible degree of collective control. We have identified two criteria that we can use as a yardstick for evaluating the extent to which various institutional and political arrangements do this.

(i) Control through Popular Elections?

We need not pause for very long to consider how popular elections measure-up against the first of our criteria - the extent to which they provide those whose privacy will be affected by power exercised by the state, an opportunity to participate in the political processes in which the boundary between the public and private spheres will be determined. Elections make mass political participation possible. They give citizens an equal say by ensuring that votes are evenly distributed and equally weighted. However, voters will have little influence over decisions regarding their privacy that are subsequently made by elected representatives. If some aspect of law or policy that affects citizens' privacy causes sufficient public concern and dissatisfaction, it may become an electoral issue. Broad proposals for reform might be set out in the manifestos of political parties seeking election.¹⁷ Such was the position in the years preceding the General Election held in the United Kingdom in 2010. Over the previous 13 years, successive governments had introduced legislation that provided the police with increasingly intrusive powers. These included powers to take and DNA from those arrested on suspicion of committing criminal offences, and to retain it indefinitely, irrespective of whether the person was subsequently convicted of – or even charged with – a criminal offence.¹⁸ The police were also provided with a power to search

¹⁷ See 'Invitation to Join the Government of Britain', The Conservative Manifesto 2010, p.79.

¹⁸ s.64 Police and Criminal Evidence Act 1984 (England and Wales).

‘articles of a kind that could be used in connection with terrorism’, the exercise of which was not predicated on the usual requirement of reasonable grounds to suspect the person of having such items.¹⁹

Included in the main opposition party’s manifesto for the 2010 General Election, was a commitment to scale back the ‘database state’ and ‘protect the privacy of the public’s information’. But unlike a referendum in which citizens are asked to vote on a single issue, a necessary characteristic of popular elections is the aggregation of issues. Proposals to protect privacy, or to legislate in ways that will threaten it, will be presented as part of broad legislative programme, which the voter will be required to either endorse or reject in toto. Perhaps with this in mind, Richard Bellamy has claimed that voting should be seen as an expression of a set of value commitments, rather than an attempt to achieve a particular outcome.²⁰ Indeed it seems that the most reliable predictor of voting behaviour are the pre-existing basic and political values of the voter.²¹ In the General Election just referred to, for example, the proposals to protect citizens privacy were made by a party traditionally associated with fiscally libertarian policies of low taxation and public spending, privatisation of public services, and limited welfare support. Even if a vote was, in fact, cast only on the basis proposals to regulate the intrusiveness of the state, those with political power are able to take it to be an endorsement of the full legislative programme and underlying view of the role of government and the relationship between individual and state. The power that the vote provides those who prefer a less intrusive state is conditional. It involves endorsement of a programme of law-making that might, in many respects, be antithetical to the fundamental commitments of a voter. There may well be a significant number of voters for whom control over the intrusive power of the state will require those commitments to be abandoned, and it might be considered by many to be too great a price for the protection for privacy that is being offered.

The aggregation of issues is not the only reason for thinking that popular elections provide citizens with a relatively ineffective means of exercising directional

¹⁹ s.44 Terrorism Act 2000 (UK).

²⁰ R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (2007: CUP), at p.225.

²¹ See M. Vecchione, G. Caprara, F. Dentale, S. Schwartz, Voting and Values: Reciprocal Effects Over Time, (2013) 34 *Political Psychology* 465; A. Bardi and S. Schwartz, ‘Values and Behavior: Strength and Structure of Relations’ (2003) 29 *Personality and Social Psychology Bulletin* 1207; M. Barnea and S. Schwartz, ‘Values and voting’ (1998) 19 *Political Psychology* 17.

control over privacy-related decisions made by the state. If the only problem was aggregation, liberal use of referendums might be a solution. But it is not. The commitments that are made in the manifestos of parties contesting elections, and the questions posed in referendums, will usually be stated in broad terms. An explicit pledge to protect informational privacy might turn out to be rather hollow once the details of what is proposed become known. Conversely, the implementation of manifesto pledges that seem to have little to do with privacy might, when the detail is worked up, result in significant interference with citizens' privacy. A commitment to 'help' people back into work, and reduce dependency on disability benefits, for example, may well involve the collection of a significant amount of citizens' health data, and require claimants to submit to repeated medical assessments and intrusive interviews.

The power to unseat a government or a representative in an election cannot be dismissed as insignificant. But as Phillip Pettit explains, the concept of control embodied in the republican idea of political legitimacy demands more. It requires arrangements that enable citizens to impose a relevant direction on political decision-making. These must give rise to a recognisable pattern that reflects citizens' preferences on a particular issue or proposal that has implications for their privacy; they must make a 'designed difference'.²² Popular elections do not provide citizens with such influence. But is the position redeemed by the second aspect of what Pettit has described as the 'two-dimensional ideal of democratic control' – ex-post opportunities for citizens to contest decisions made by elected representatives that affect their privacy?

(ii) Control Through ex post Contestation.

Pettit's position is that a combination of participation in popular elections and ex-post contestation will provide citizens with a degree of control that enables us to say that they are not subject to domination by the state. On our understanding of political legitimacy this claim – if it were to be made in respect of privacy-related legal norms – would be valid only in the absence of feasible alternative arrangements that facilitate greater directional control to be exercised by those who are subject to the norms. We have seen that while elections enable large scale political participation, to the extent that the proposals they present relate to citizens privacy explicitly, they will be framed in rather general terms and must be accepted as part of a broader set of proposals and

²² Pettit, above n. 10, at pp.153-156.

policies, some of which will have implications for privacy that will not be apparent when voters are invited to endorse them. The progressive form of republican government that provides the political framework for the account of privacy developed in this thesis, will be one in which privacy norms are generated by a representative assembly. It too will utilise popular elections as an appropriate means of populating that assembly. The limitations of popular elections as a means through which citizens are able to exercise control over decisions about their privacy need to be recognised, but they are not decisive when it comes to thinking about the political legitimacy of the two models of participation under consideration in this chapter. The question of legitimacy will turn on the second dimension of the efficacy of ex-post contestation compared with ex-ante participation.

According to the two-dimensional ideal of democratic control, once the privacy implications of election pledges become clear, ex post opportunities to challenge the laws, regulations, rules and policies through which they are given effect, enable citizens to exercise a form of 'editorial control'.²³ It is said that the possibility of challenge will have a prophylactic effect, forcing legislators and policy-makers to act in ways they believe will meet with editorial approval. But there appears to be little, if any, support for this claim. Indeed, there is evidence of its ineffectiveness as a pre-emptive constraint on the legislature. The United Kingdom is a democracy in which a version of the two-dimensional model of democratic control exists in the form of popular elections and judicial review. But as we have already noted, in the decade leading up to the General Election of 2010, progressively intrusive powers were conferred on investigative agencies.

There are, however, more substantial grounds for thinking that ex-post contestation constitutes a relatively weak form of popular control over the power that the state exercises when it generates privacy-related norms. Ex-post challenges to privacy laws and policies might be heard by various bodies and institutions - administrative tribunals, ombudsmen, commissioners and so on. A characteristic shared by most of these, is that they will be formally de-politicised; they sit outside the mainstream democratic political system, and will be staffed by professional and expert decision-makers who follow procedures designed to deal with challenges to official

²³ Pettit (2006), above n. 15, 305.

decisions generated by the application of those decisions to particular sets of circumstances. When we considered the extent to which citizens are able through participation in popular elections to exercise control over the power of the state to determine how far individual privacy will be protected, we dealt with issues of participatory opportunity, and the effectiveness of that opportunity in terms of popular control, separately. However, we will see in our consideration of the exercise of control through *ex post* contestation that this distinction cannot be maintained.

A weakness of *ex post* contestation, at least in its conventional forms, is that it tends to afford rather limited opportunities for participation. The significance of this lies in the way that we have understood the concept of domination. The boundary between the public and the private is defined by generally applicable norms - laws, regulations, rules and policies - that affect all citizens' privacy interests. The power that is exercised when these norms are generated and subsequently enforced, will be non-arbitrary (and non-dominating) insofar as it is under the control of those who are subject to it. As generally applicable norms are addressed to all citizens, the political legitimacy of those norms will turn on the degree of *collective* control over the process that determines their content and scope. We have noted that the legitimacy of those norms depends on the use of decision-making procedures that provide the *greatest* degree of control. We therefore need to consider the extent to which citizens are able to exercise collective control by means of *ex post* contestation.

I will proceed on the assumption that most forms of *ex-post* contestation will have certain common features. First, that they will have some procedural mechanism for restricting access. As a way of managing the number of claims most will require challengers to demonstrate that they have 'standing'. That is to say, only those who can demonstrate that a decision has materially affected their privacy, or be able to show that they will be imminently affected, will be eligible to contest a decision made by an institution of the state, or by one of its agents.²⁴ I will also assume that the bodies that

²⁴ Such a doctrine has been developed by the US Supreme Court, *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.* (1982) 454 U.S. 464. In *Clapper v Amnesty International USA*, 133 S. Ct. 1138 (2013), a coalition of media, legal, labour and human rights organisations, lawyers and journalists, sought to challenge legislation that permitted intelligence agencies to engage in mass surveillance of the electronic communications of non-U.S. citizens outside the United States on the grounds that the lack of as a requirement of individualised suspicion rendered it unconstitutional; see further S. Vladeck, 'Standing and Secret Surveillance', (2014) 10 I/S: A Journal of Law and Policy for the Information Society, 551. The Court has also held that the Fourth Amendment, which offers protection

hear these claims will be committed to the idea of justice, so that their decisions are guided by ideas of fairness and equality. This will be manifested in a commitment to treat like cases in like ways, and this will usually be given effect by doctrines that require tribunals to follow previous decisions in similar cases. While such doctrines ensure consistency, and equality for those who have standing to challenge official decisions affecting their privacy, we need to recognise that any determination that binds tribunals hearing subsequent cases, also fixes the scope of the rights, entitlements, and duties, held by - or imposed on - all citizens.

The problem with this state of affairs, is that the only person whose participation is guaranteed is the claimant. Now provision for intervention in proceedings by third parties, typically non-governmental organisations and pressure groups, might enable wider participation. But such intervention will usually be in the gift of the body hearing the claim. Where permission is given for third party intervention, the numbers able to participate will remain relatively small. These restrictions violate a right that republicans might consider the most fundamental basic liberties – the right to equal participation in political decision-making.²⁵ But we can say more about this restriction, and whether arrangements in which ex post contestation constitutes the primary means of controlling the state's power, meet the demands of political legitimacy.

The claim that we can expect to be offered in support of ex post contestation, is that it enables citizens to exercise a form of editorial control over privacy norms generated by the state's legislative and policy-making institutions. If those norms do not meet with popular approval they can be challenged. But the limited participation means that many voices will not be heard. The sense in which ex post contestation enables a truly collective exercise of control – rather than some notional form of it - is difficult to make out. Contestation will rarely be preceded by any form of deliberative process to establish a collective position on the value of privacy generally, or in the particular circumstances that provide the context for the challenge. The decision will be contested on the basis of the claimant's own view of the issues. Her claims will be grounded in her own perspective. Even though the outcome of the process will affect the interests that all

against unreasonable search is a 'personal right', may not be asserted by anyone other than the person subject to the search; *Alderman v United States*, 394 U.S. 165.

²⁵ R. Bellamy, above n.20, at p.31; M. Goldoni, 'Two Internal Critiques of Political Constitutionalism', (2012) 10 *International Journal of Constitutional Law* 926, 932, who makes the observation in relation to political constitutionalism, but could also have been made in respect of republicans.

citizens have in privacy, the position and the arguments that are advanced will be hers, rather than those of the political community, or even a section of the political community that her views might be taken to represent. But the same can be said of the other participants.

In the absence of an inclusive deliberative process that provides broad participatory opportunities, the positions taken by the few involved in a hearing can only be an approximation of the public interest, based on the participants' views of what that interest ought to be. Take for example, the 'reasonable expectation of privacy' test that has been adopted by the US Supreme Court as a means of determining whether a search of an individual's person or property meets the Fourth Amendment's requirement of 'reasonableness'. A search will fall foul of the constitutional guarantee if carried out in circumstances in which the claimant has a 'reasonable expectation of privacy'. The reasonableness of that expectation turns on a what purports to be a collective view of the appropriate limits of respect for privacy. It was explained in *Katz v United States*,²⁶ that 'the expectation [is] one that society is prepared to recognise as reasonable'.²⁷ But how is the Court to ascertain whether the community would, in fact, consider it to be reasonable? In the absence of any reliable indication,²⁸ the public interest can only be determined on the basis of the judge's own limited perspective and experience. So much is acknowledged in Justice Scalia's observation in *Minnesota v Carter*,²⁹ that 'the only thing that the past three decades have established about the *Katz* test... is that, unsurprisingly, [reasonable expectations of privacy] bear an uncanny resemblance to those expectations of privacy that this Court considers to be reasonable.'³⁰

There are good reasons to doubt whether a tribunal's view of the community's interests in privacy would reflect the conclusion that might be reached in a deliberative process involving a large cross-section of the community. The possibility of disparity seems greater where the pool from which the membership of tribunals is drawn is socially homogenous. In a seminal study of the judiciary in England, published in the 1980s, J.A.G. Griffith suggested that the relatively small group of decision-makers sitting

²⁶ *Katz v United States*, 389 U.S. 347 (1967).

²⁷ *Katz v United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁸ Daniel Solove points out that the Supreme Court has never engaged with any empirical research in applying the 'reasonable expectation of privacy' test; D. Solove, *Understanding Privacy*, (2008: Harvard University Press), p.72.

²⁹ 119 S. Ct. 469, 477(1998).

³⁰ 119 S. Ct. 469, 477(1998) (Scalia J., concurring).

in the higher courts have by virtue of 'their education and training and pursuit of their profession as barristers, acquired a strikingly homogenous collection of attitudes, beliefs and principles, which to them represent the public interest.'³¹ Noting that judges presiding over appellate court hearings are not 'neutral', that they are making political choices - Griffith claimed that 'they are, like the rest of us, to a considerable extent conditioned by their social background [and] experiences'.³² Their interpretation of what is in the 'public interest and therefore politically desirable', he suggested, 'is determined by the kind of people they are and the position that they hold in our society; that is, part of established authority and so is necessarily conservative and illiberal.'³³ The social composition of the senior judiciary, he suggested, manifested a conception of the public interest in which law and order needs to be preserved by providing the police with broad intrusive powers of search and seizure and telephone tapping; a conception of the public interest that promotes conservative political values.³⁴ All of this led Griffith to dismiss the idea that courts are vigilant in protecting the individual against the power of the state as a 'political myth'.³⁵

The problem with *ex post* contestation as a means of controlling the power that the state exercises when it defines the boundary of the public and private spheres, is one of limited participation rather than the extent to which the judiciary is representative of the population at large. As Richard Bellamy points out, even if some attempt were to be made to produce a more socially diverse judiciary - a microcosm of society - there is no guarantee its decisions would reflect those that would be reached in a decision-making process in which every citizen had an equal opportunity to have his or her voice heard.³⁶ As we have seen, the republican conception of the public/private distinction is one in which the boundary is determined by the concept of interest. The public sphere encompasses matters of public interest - issues that are a shared or common concern - and by necessary implication, the private by matters that are of concern only to the

³¹ J.A.G. Griffith, *The Politics of the Judiciary*, 3rd edn. (1985: Fontana), at p.198. It appears that this homogeneity still persists. See M. Blackwell, "Old Boy's Networks, Family Connections and the English Legal Profession", [2012] Public Law 426, 442, using data from a range of sources concluded that "the English judiciary is still predominantly composed of men from a narrow range of educational backgrounds often with family connections to the legal profession."

³² Griffith, *ibid.*, at p.207.

³³ *Ibid.*, at 225.

³⁴ *ibid.*, at p.203

³⁵ *Ibid.*, at p.201.

³⁶ Bellamy, above n.20, at p.167. See also R. Bellamy, 'Public Law as Democracy', in C. MacAmhlaigh, C. Michelon, and N. Walker (eds.), *After Public Law*, (2013: OUP), p.146.

limited number of persons directly involved in them. Honohan explains that because the public is rather diffuse - encompassing the entire citizenry - the process of determining what is in the public interest 'requires the input of many in expression, discussion and action.'³⁷ We have seen that popular elections facilitate broad participation in the political process, but it is a form of participation that gives citizens little continuing directional influence over the power that the state exercises when it generates norms that have a bearing on citizens' privacy. Limited participation, and the narrow range of views that are represented, will tend to undermine any claim that ex post contestation constitutes an efficacious means of collective control. What then of citizens' participation in the processes in which these norms are generated?

III. Privacy, Control, and *ex ante* Participation

It is perhaps useful at this point, to remind ourselves of some of the observations that were made in Chapter 2. We noted there, that the notion of the passive but vigilant citizen is at odds with the republican idea of self-government. Whether a norm that affects the privacy - and more broadly, the freedom - of those who are subject to it, can be considered legitimate, will depend on whether they have had a meaningful say in the framing of the norm, and have a continuing say in the way that it is applied, rather than whether it is something to which they would or could consent, either hypothetically or ex post.³⁸ Robin Celikates has observed that to entrust others with the task of framing those norms, is to 'outsource' self-determination.³⁹ In a similar vein, John McCormick claims that 'in any democracy worthy of the name, the people should be institutionally empowered, wherever it is remotely efficacious logistically, to deliberate and decide public policy themselves'.⁴⁰ The position adopted in previous chapters is broadly consistent with these views. I have suggested that citizens can only be assured of a degree of privacy consistent with non-dominated status through some form of direct participation in the political decision-making process in which the boundary of the public and private spheres is determined. The present chapter develops this idea by introducing the concept of political legitimacy as the source of substantive and

³⁷ Honohan, above n.1, at p.164.

³⁸ Celikates, above n.16.

³⁹ *ibid.*

⁴⁰ J. McCormick, *Machiavellian Democracy*, (2011: CUP), p.164.

procedural duties owed by the state to its citizens. The substantive duty requires the state to ensure the power it exercises when making decisions that define the boundary between the two spheres, is non-dominating. The procedural duty requires it to adopt arrangements that will minimise the risk of domination in the exercise of that power. In chapter 2, I suggested that such control required ex ante participation in the decision-making processes that generate the norms that mark the boundary, and that the procedures themselves need to be deliberative and inclusive.⁴¹ Some elaboration is required.

(i) *Why Deliberate?*

Why should the decision-making process that produces decisions that have a bearing on citizens' privacy be deliberative? Why should such decision-making not be directed by the aggregation of individual preferences? At first sight, it seemed possible that majority voting on proposals might satisfy the demands of political legitimacy, as we have understood those demands. But more careful consideration, gave us reasons to doubt that this alone would provide a sufficient degree of collective control. Our concern was that pre-election proposals are often expressed in general terms and presented compendiously with other proposals that will either have to be endorsed or rejected *in toto*. But these are not an essential or unavoidable feature of an aggregative approach to democratic decision-making.

If we proceed on the assumption that institutional arrangements will retain their current recognisable form, accepting that privacy norms will be generated by an assembly of elected representatives, it is possible to envisage an aggregative approach that does not suffer from the problems we identified with popular elections. A specific and detailed legislative proposal on a single issue might be drafted, put to a popular vote as a single issue - in a referendum - and a course of action determined according to the preference expressed by a majority. It would also be possible to establish eligibility conditions that enable large scale participation in such a vote. Clearly, this would provide citizens with some sort of control over the power that political institutions exercise when making decisions that affect their privacy. But the absence of practices that are essential characteristics of a deliberative process - the public justification of

⁴¹ On the consistency of deliberative democracy with republican thinking see P. Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, in J. Fishkin and P. Laslett (eds.), *Debating Deliberative Democracy*, (2003: Oxford, Blackwell).

one's own position, engagement with those holding differing views, and reflection on one's own views in light of that engagement – ought to lead us to conclude that decisions about privacy that are made in this way, might also lack political legitimacy.

Progressive republicans will consider individual privacy to be a common good. Citizens can only be assured of their privacy through participation in the decision-making processes in which the norms - laws, regulations, policies - are framed. It must be a form of participation that enables collective control to be exercised over decisions regarding the extent to which the state protects (or respects) citizens' privacy, the scope of intrusive powers that it confers on its agents, the amount of information it demands from its citizens in return for access to the services and facilities it provides, the use that is made of such information, and so on. But, as we noted in chapter 2, effective participation will depend on citizens having developed autonomous ways of life, privacy being a pre-requisite for this. In this way, each citizen will view their own privacy as something that is bound up in a guarantee of privacy for all. For republicans, securing a certain degree of individual privacy will be a shared concern; a matter of public interest.

It should be clear enough, that the notion of the public interest we have just identified, cannot be derived from an aggregation of individual preferences expressed by individuals only on the basis of their own circumstances and immediate interests. But in the absence of a deliberative process, we will have no way of knowing what those interests are, and what the majority's decision represents. On an aggregative approach, the public interest is a thin concept, understood only in terms of the preference expressed by the majority. For progressive republicans, however, arriving at an understanding of the public interest requires consideration of the affect that a privacy-related decision will have on the lives of all citizens, and especially on those who are most likely to be affected by the decision. Conceiving the public interest as a shared or common interest, rather than an aggregation of individual preferences, reinforces the idea of citizens' equal standing as members of the political community by requiring those involved in the generation of privacy-related norms to consider the effect of their decisions on their fellow citizens.

I have suggested that some form of direct *ex ante* participation by citizens constitutes the most effective means of securing a measure of privacy that is consistent with the idea of non-domination. But we can safely assume that in a pluralistic society, deliberative processes will often not produce a consensus on what that measure should

be. How much privacy will citizens need if they are to be effective participants in a political process in which such issues will be resolved? There will, of course, have to be some determinative mechanism, typically a majority vote. Such a vote will affect the interests of all citizens,⁴² but as McBride points out, it 'might simply reflect the efforts of an unreasonable majority to impose its will on their fellow citizens.'⁴³ If privacy norms are to be seen as the product of collective will, those in a minority must be able to see them as something they have had a part in forging, even if the outcome is not that which they had desired. If they are able to exert some influence on the way in which the decision was reached, to see that their input was consequential, if not determinative, then those in the minority might be able to see it not as something that has been imposed upon them, but as the product of a Socratic exercise in which they have played a full part. Their participation will impose a certain discipline on the process – influence that constitutes a form of control. Let me explain.

Deliberative democracy requires those involved in making decisions about citizens' privacy to provide supporting reasons for the propositions they advance, and the objections that they raise. They should reflect on, and be willing to revise, their beliefs about what ought to be done on the basis of reasoned positions adopted by others. The opinions that participants hold, Rawls explains, 'are not simply a fixed outcome of their existing private or non-political interests.'⁴⁴ Some elucidation of the connection between deliberation and the idea of political legitimacy that we have endorsed is required here.

There are various conceptions of deliberative democracy. That which seems most helpful for our purposes is an approach commonly referred to as *epistemic proceduralism*.⁴⁵ On this view, the value of deliberation lies in its capacity to lead us to the right answer about how much privacy citizens should have in any given circumstances. But, as David Estlund observes, this claim is problematic. We need to

⁴² J. Elster, 'The Market and the Forum: Three Varieties of Political Theory', in D. Matravers and J. Pike (eds.), *Debates in Contemporary Political Philosophy* (2003: Routledge).

⁴³ C. McBride, 'Democratic Participation, Engagement and Freedom', (2013) 15 *British Journal of Politics and International Relations* 493, 497.

⁴⁴ J. Rawls, *The Law of Peoples*, (1999: Harvard University Press), p.138-139.

⁴⁵ There are differing versions of this account of decision-making process; compare, for example, D. Estlund, *Democratic Authority: A Philosophical Framework*, (2008: Princeton University Press) and F. Peter, 'Pure Epistemic Proceduralism', (2008) 5 *Episteme* 3.

clarify what we mean when we say that a political decision is right or accurate.⁴⁶ The 'right' answer here is not the correlative of some objective truth that has an existence independent of the deliberative procedure.⁴⁷ Even if we were to suppose that there is a pre-political objective moral truth from which it would be possible to derive the right answer on questions of privacy, our endorsement of deliberation does not rest on it.⁴⁸ For us, the right outcome is one that members of the political community can accept as the most accurate and reliable determination of where its shared interest in privacy lies. We should view deliberation as a knowledge-producing practice, what Fabienne Peter describes as 'a social practice that shapes the evaluation of propositions in the relevant community.'⁴⁹ It is a process in which political knowledge is constructed. As Barber explains this form of knowledge is autonomous and independent of abstract grounds.⁵⁰ It is severed from formal philosophy. The process through which it is produced becomes its own epistemology.⁵¹ For our purposes, the legitimising effect of deliberation lies in the claim that it will lead to a belief about the public interest in privacy that has the strongest possible justificatory grounds; a belief that is informed by the views of those whose interest it concerns - all members of the political community.

If deliberation will produce the best understanding of the political community's common interest in privacy, it constitutes the most effective means of ensuring that the boundary of the private sphere is not drawn in ways that serve sectional interests and the preferences of the privileged and the powerful. But to do so, it will need to conform to certain procedural conditions.

⁴⁶ Estlund, *ibid.*, at pp.112-113; D. Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in J. Bohman and W. Rehg (eds.), *Deliberative Democracy: Essays on Public Reason and Politics*, (1997: MIT Press).

⁴⁷ Such a view - that the aim of democracy ought to be to track some external 'truth' - is held by epistemic democrats; see C. List and R. Goodin, 'Epistemic Democracy: Generalizing the Condorcet Theorem', (2001) 9 *Journal of Political Philosophy* 277. This can be contrasted with 'pure proceduralism' which holds that democratic legitimacy does not depend on the quality of the outcome, but on the use of procedures that ensure political fairness or political equality.

⁴⁸ This view does not preclude the idea that participants might offer reasons in support of a position that they believe represents the objective truth; see M. Lynch, *Democracy as a Space of Reasons*, in J. Elkins and A. Norris (eds.), *Truth in Politics*, (2012: University of Pennsylvania Press).

⁴⁹ Peter, above n.45, drawing on the work of Helen Longino; H. Longino, *The Fate of Knowledge*, (2002: Princeton University Press).

⁵⁰ B. Barber, *Strong Democracy: Participatory Rights for a New Age*, (1984: University of California Press), p.167.

⁵¹ *ibid.*

(ii) Rationality

We need to give more detailed consideration to the form that a deliberative process will have to take if it is to produce decisions that are based on the most accurate understanding of citizens shared interests in privacy. If deliberation is to fulfil this epistemological function, we need to consider the role of rationality. Rationality is a quality of decision-making. It is concerned with the way in which we acquire and use knowledge.⁵² Our current focus is on the kind of deliberative process that will construct knowledge in the form of a generally accepted understanding of where the public interest in privacy lies in any particular circumstances, and the conception of rationality that we need to consider is what Habermas refers to as communicative rationality.

The requirements of communicative rationality are directed towards ensuring the knowledge constructed through communicative practice - the knowledge in our case being what constitutes citizens' common interests in privacy - is reliable. Claims that are made need to be grounded. That is to say, the empirical and normative assumptions that underlie the claim need to be identified and must be open to criticism. Communicative action, Habermas claims, is rational only when the person making an assertion is able, when challenged, to point to some evidence, or established norm, as the grounds for his or her view.⁵³ The strength of an assertion, argument, or position can be measured by the soundness of the supporting reasons, and the nature of the evidence that is relied upon.⁵⁴

This form of rationality also requires participants to adopt a certain attitude to the exchange of views. They must be open to counter-claims. Some of these might be knockdown arguments, others will undermine their original position. Where this happens, the force of those counterclaims needs to be acknowledged. Irrationality will be marked by 'deafness to argument', where contrary positions are met with dogmatic

⁵² J. Habermas, *The Theory of Communicative Action, Volume 1, Reason and the Rationalization of Society* (1981: London, Heinemann), p.9.

⁵³ *ibid*, at 15.

⁵⁴ The importance of the evidential support for proposals for intrusive legislation is evident in the observation by David Anderson, the UK government's reviewer of terrorism legislation, that "[w]hen so many people have a vested interest (whether they acknowledge it or not) in the seriousness of the threat [of terrorism], one must remain constantly open to the possibility that the threat is being exaggerated ... If perception becomes detached from reality, the consequence will be unnecessary fears, unnecessary powers and the allocation of excessive resources to the counter terrorism machine'; D. Anderson QC, *The Terrorism Acts in 2012*, Independent Reviewer of Terrorism Legislation, July 2013, at 2.84.

responses and failure to respond to criticism in ways that make communicative action rational.⁵⁵

The norms of communicative rationality enable those engaged in deliberative decision-making to exercise a degree of control over the process. I take these norms to be: the duty to give reasons, which expose the normative and empirical assumptions that have been made and the existence or absence of evidential support; the opportunity to challenge and contest positions that are taken; to advance competing views; to support objections to propositions with reasons, which can also be criticised; the requirement of open-mindedness, reflectiveness and a readiness to change one's position in light of new evidence and arguments – meaning that the position adopted at the end of the process will be the product of the contributions of all participants, having been shaped and tested in the various exchanges along the way.

There is empirical evidence that suggests engagement of the kind that occurs in deliberation helps participants to see the connection between their own interests and that of the group,⁵⁶ and increases the likelihood of co-operation.⁵⁷ Those who have challenged the views of others, demanded justification of positions that have been advanced and the rejection of alternatives, will have exerted non-trivial influence on the decision-making process. Through their engagement in the process they exert a form of control over the power that is exercised when state institutions make decisions about privacy. There are, however, two aspects of the concept of rationality we have considered, that connect with ideas that are central in republican thinking.

(iii) Equality and Inclusivity

The idea presented here is that citizens ex ante participation in deliberative decision-making processes, shaped by the norms of communicative rationality, constitutes the most effective means of control over power exercised by the state that has some bearing on their privacy. This claim rests on the view that deliberation provides a political community with the most reliable means of determining where their shared interests

⁵⁵ Habermas, above n.52, at p.18, citing S. Toulmin, R. Ricke and A. Janik, *An Introduction to Reasoning*, (1979: New York, MacMillan).

⁵⁶ R. M. Dawes, A. J. C. van de Kragt and J. M. Orbell, 'Co-operation for the Benefit of Us: Not Me or My Conscience', in J. Mansbridge (ed.), *Beyond Self-Interest*, (1990: University of Chicago Press); E. Ostrom, 'A Behavioral Approach to the Rational Choice Theory of Collective Action', (1998) 92 *American Political Science Review* 1;

⁵⁷ J. M. Orbell, A.J.C. van de Kragt, and R. M. Dawes, 'Explaining Discussion-Induced Co-operation', (1988) 54 *Journal of Personality and Social Psychology* 811; Dawes at al, *ibid.*

lie. On this view, deliberation has an epistemological function. It constitutes the means through which collective knowledge – the basis for an accepted common position – is constructed. But the reliability of the knowledge that is produced depends on adherence to certain procedural and participatory norms. We have already identified some of these – a requirement to give reasons, an openness to challenge, a willingness to reflect and revise one’s position. But there are two that might, from a republican perspective, be considered essential to realising what we have taken to be the aim of deliberation – reliable determination of the community’s shared interest in privacy, and with it, popular control over the power that the institutions of the state exercise when making decisions that affect citizens’ privacy.

The first concerns the equal status of participants. Joshua Cohen claims that an ideal form of deliberation will be one in which participants are considered both formally and substantively equal.⁵⁸ Formal equality is established through recognition that parties to deliberation have equal standing in the process, so that all participants possess the same procedural entitlements and are subject to the same constraints. What Cohen refers to as substantive equality, is the idea that existing distribution of power and resources should not affect citizens chances of participating and contributing to deliberation. Of concern to us should be any constraint on participation that will undermine the aim of producing reliable knowledge regarding shared interests in privacy. Estlund observes, that ‘epistemic proceduralism needs to hold that unlike any supposed expert elite, a proper democratic process taken as a whole can be agreed by all qualified points of view to have epistemic value with respect to political questions.’⁵⁹

But the idea that all qualified points of view have epistemic value does not imply that they have equal epistemic value when it comes to determining what the public interest in privacy requires. Greater weight ought to be given to the views of those on whom the burden of interference with privacy will fall most heavily. Let us take a proposal to place restrictions on the availability of abortion. Such restrictions implicate decisional privacy. This aspect of privacy provides an individual with the space to develop her personality, self-image, and sense of identity, free from interference by others, and from pressure to conform to others’ expectations and values. Jean Cohen explains that if a person does not have control over her body, her ‘self-image and self-

⁵⁸ Cohen, above n.9, at p.24.

⁵⁹ Estlund, above n.45, at p.102.

confidence are crippled.’⁶⁰ She treats as self-evident, that forcing a woman to endure an unwanted pregnancy imposes on her an unwanted identity – that of pregnant woman, mother, and carer:

“An unwanted pregnancy imposes a very powerful form of embodiment on a woman, in which she risks losing control over her bodily functions and her sense of self. It also imposes a new and undesired identity and a new and intimate relationship onto the woman, requiring heavy investments of herself with implications that go well beyond the physical discomfort of pregnancy or mere lifestyle issues that anti-choice thinkers believe sum-up the problem of an unwanted pregnancy and unwanted motherhood for women.”⁶¹

Joshua Cohen suggests that the views of those who will bear the heaviest burden of what is proposed, ought to carry greater weight than those for whom the proposal will be less onerous.⁶² He points out that prohibition or restriction on the availability of abortion would place a substantial burden on women, and Jean Cohen observes that:

“The significance of motherhood and the normative understanding of what constitutes a good mother is, in our society, profoundly different from fatherhood. It entails enormous (gendered) expectations regarding care and identity that cannot be reduced to the physical fact of pregnancy, but which attach to it.”⁶³

There is an issue of equality, in that no comparable restriction is imposed on men. The restriction would be a serious limitation on women’s autonomy. Cohen points to the US Supreme Court’s observation that ‘[t]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.’⁶⁴ For republicans, of equal concern, would be the effect that it might have on women’s ability to participate in the political life of the community, and the risk of their domination in the absence of such participation.⁶⁵ As Annabelle Lever observes, restrictions or prohibition on abortion are likely to threaten women’s opportunity to

⁶⁰ J. Cohen, *Regulating Intimacy: A New Legal Paradigm*, (2002: Princeton University Press), at p.61. See also J. Inness, *Privacy, Intimacy, and Isolation*, (1992: OUP), pp.84-86.

⁶¹ *ibid.*

⁶² Cohen, above n.9, at p.316.

⁶³ Cohen, above n.60, at pp.61-62.

⁶⁴ *Planned Parenthood of Southeastern PA v Casey*, 505 U.S. 833 (1992).

⁶⁵ Cohen makes similar claims in respect of the criminalization of consensual sexual activity and end of life decisions; Cohen, above n.9, at p.313-317.

participate as equals in the political process, and this leaves them vulnerable to having their interest overlooked, undervalued, or disregarded.⁶⁶

The second condition that progressive republicans are likely to consider essential to realising the (republican) aims of a deliberative process, is the requirement that it be an inclusive process. There needs to be broad participation. According to the definition of domination that we have endorsed, the power to interfere will be non-dominating insofar as it is controlled by those who are subject to it.⁶⁷ We have said that because the laws, regulations, etc., that define the public and private spheres will be generally applicable, the power that is exercised in their generation will only be non-dominating if subject to effective collective control. The idea of collective control expressed here, is not one in which the collective aspect of control is notional, in the sense that control is in fact exercised by a few on the basis of what they - the few - believe to be in the interest of all members of the community when it comes to decisions that affect privacy. There were two aspects to our criticism of *ex post* contestation as a means of controlling the power of the state. The first was a broad democratic objection. Decisions made in contestatory forums will affect every citizens' entitlement to privacy and the obligations that they owe with respect to others' privacy. But contestatory proceedings typically provide for very limited participation. Only a very small number of those who will be affected by the decision made in the hearing will have a say in it. The second ground on which we criticised *ex post* contestation, was that any decision made in such proceedings will usually be based on a narrow range of views about the respective value of privacy, and whatever interest or good it is pitted against in the particular case. Insofar as any claim is made about the public interest in such proceedings, it can only ever be a rough estimation of the position that would be the outcome of a process in which every citizen had an equal opportunity to have his or her voice heard.⁶⁸ We are now in a position to frame limited opportunities to participate in political decision-making that affects privacy as an epistemological problem.

We noted earlier that the expectation that those participating in deliberation will give reasons in support of the views they advance and objections they raise, serves an epistemic function. In stating the reasons for adopting a particular position, the person

⁶⁶ A. Lever, *A Democratic Conception of Privacy*, (2013: Authorhouse), p.148-154

⁶⁷ See further, Beckman and Rosenberg, above n.14; A. Sager, 'Political Rights, Republican Freedom, and Temporary Workers', (2014) 17 *Critical Review of International Social and Political Philosophy* 189.

⁶⁸ Bellamy, above n.20, p.167. See also R. Bellamy, above n.36, at p.146.

proposing it will reveal, explicitly or implicitly, the assumptions – normative and empirical – that ground it. We have said that the aim of deliberation will be to make a reliable determination of where citizens' shared interests in privacy lie. The matter of common concern will be that citizens are assured of a degree of privacy that will ultimately enable them – through the development of fulfilling personal lives - to become effective participants in the political decision-making processes through which they can secure on-going freedom (and privacy) for themselves.

But in what circumstances should privacy be protected and prioritised over other interests and goods? The answer to this question, will depend, at least in part, on the effect that interference with privacy would have on those who were to suffer it. We need to know what perceptions, attitudes, and emotions, a loss or interference with privacy (or the threat of it) will engender in individuals and groups, and the effect that these feelings will have on their personal lives, attachment to the political community, and motivation to engage in public life. The most cogent evidence of this will come from those who are most likely to suffer interference in the circumstances in question. The greater the number of persons in this position that we hear from, the more reliable our generalisations about the likely effect of interference on certain sections of the community will be. A particular weakness of *ex post* contestation as means of exercising collective control, is that the opportunity to participate is open to very few. A consequence of this limitation is that any attempt to determine the public interest in privacy proceeds from a weak evidential foundation, and there will be good reason to doubt the reliability of the conclusions that are drawn. Effective popular control over the power that the state exercises in making decisions that affect citizens' privacy requires significant input from those sections of the community whose lives are most likely to be adversely affected by those decisions. These will often be the vulnerable and disempowered, those in positions of dependency, those in insecure employment, asylum seekers, the homeless, the imprisoned; those who Iris Marion Young describes as 'the marginals' – people who are excluded from useful participation in social life and subject to material deprivation.⁶⁹ If the political legitimacy of decisions about privacy rest on the participation of those from marginal groups, and there are significant barriers to participation for those who are members of them, legitimacy cannot be

⁶⁹ I. M. Young, *Justice and the Politics of Difference*, (1990: Princeton University Press), p.63.

satisfied by mere provision of opportunities to participate. There must also be a positive duty on the state to promote participation and to facilitate it through the provision of various means of support.⁷⁰

Now it might be contended that the doctrine of standing that will operate in most contestatory processes ensures that those directly affected by the exercise of intrusive power will have their voices heard. This may be so, but there remains a problem of underrepresentation, and the epistemic implications of this are problematic. Take, for example, a development in US Supreme Court Fourth Amendment jurisprudence that Christopher Slobogin refers to as a non-egalitarian ‘poverty exception’ to the guarantee against unreasonable searches.⁷¹ He suggests that if one surveys the Fourth Amendment jurisprudence, it is possible to identify cases that significantly undermine the protection that it affords the poor. In those circumstances in which citizens have a reasonable expectation of privacy, any police interference with it will constitute a ‘search’, the constitutionality of which will require it to be conducted on probable cause and, in most cases, to be authorised by a warrant. However, that protection has been diminished by the Court’s suggestion that the protection afforded by the Fourth Amendment extends only to those circumstances in which the person seeking it has taken steps to protect his privacy that would be taken by a reasonable person.⁷²

⁷⁰ Studies of political participation indicate that rates of participation are strongly correlated to levels of income, wealth and education; see, C. Pattie, P. Seyd and P. Whitely, *Citizenship in Britain: Values, Participation and Democracy*, (2005: CUP); S. Verba, N. Nie and J-O. Kim, *Participation and Political Equality*, (1978: CUP). Those who have access to money and other resources are more likely to participate than those who do not.

⁷¹ C. Slobogin, ‘The Poverty Exception to the Fourth Amendment’, (2003) 55 Florida Law Review 391. See also W. Stuntz, ‘The Distribution of Fourth Amendment Privacy’, (1999) 67 George Washington Law Review 1265; K. C. Simmons, ‘The Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing’, (2014) 14 University of Maryland Law Journal of Race, Religion, Gender and Class 240.

⁷² See e.g. *United States v Dunn* (1987) 476 U.S. 207; *California v Ciraolo* 476 U.S. 207; *Rawlings v Kentucky*. Further erosion has been caused by a number of cases that establish that the guarantee does not extend to things and places that are visible with the naked eye to persons located in a public place: *Florida v Riley*, 488 U.S. 445 (1989). Constitutional protection against unreasonable searches does not extend to cardboard boxes in which the homeless live: *People v Thomas* 45 Cal. Rptr. 2d 610 (1995); a makeshift home established under a bridge: *State v Mooney* 588 A.2d 145 (1991); or a tent that has been pitched on public land without permission and, in certain circumstances, the homes of those receiving welfare benefits: *State v Cleator*, 857 P.2d 306 (1993). See also, *Wyman v James*, 400 U.S. 309 (1971), in which the US Supreme Court held that the homes of those receiving welfare benefits could be searched in the absence of probable cause, and without the need to obtain a warrant, for the purposes of detecting welfare fraud. However, while the homes of those suspected of welfare fraud are not protected by the Fourth Amendment, the business premises of those suspected of tax fraud – generally, those with high incomes, and corporations – do attract its protection; *GM Leasing Corp. v United States*, 429 U.S. 338. See further, J. C. Budd, ‘A Fourth Amendment for the Poor Alone: Sub-constitutional Status and the Myth of the Inviolable Home’, (2010) 85 Indiana Law Journal 355, who describes the development following the decision in

Slobogin points out that the extent to which the Fourth Amendment protects one against intrusion by agents of the state depends on existence of effective barriers to such intrusion.⁷³ It provides relatively little protection for citizens who have difficulty in distancing themselves from observation by observers who are in public spaces. Groups who find themselves in this position will include those in public housing; the unemployed whose recreational and social spaces will tend also to be public places; those on the frontline of the service industry – generally, the poor and disadvantaged; those who lack social power. But where the exercise of intrusive power by the agents of the state has been subject to ex post contestation in this way, the poor have represented only by the person appearing in the proceeding. The broad experience of members of communities that are disproportionately subjected to police searches, and the effect on their lives, is not represented in the process of determining the legitimate extent of intrusive police powers. Deprived of the views of such persons, we have reason to doubt that the decision about the scope of the constitutional guarantee was based on reliable knowledge as to the public interest in protecting privacy in such circumstances.

So far, I have made the following claims. If the power exercised by the institutions of the state when it makes decisions that affect citizens' privacy is to be non-dominating, it must be subject to effective collective control. The idea of political legitimacy imposes on the state a duty to establish arrangements that provide citizens with greatest possible degree of control over its power to interfere in their choices. I have suggested that the requisite degree of control can only be achieved through ex ante participation by citizens in decision-making that affects their privacy; decision-making needs to be deliberative; the purpose of deliberation is the social construction of reliable knowledge about the political community's shared interest in privacy, and; knowledge produced in this way is more likely to be reliable if the deliberative process is guided by the norms of communicative rationality. Among those norms is the requirement that positions and arguments need to be supported by reasons. These reasons will be grounded on normative and empirical claims, the validity of which will affect the reliability of the knowledge regarding the community's shared interests in privacy that is generated by

Wyman v James, of 'verification programmes' that require any person applying for welfare benefits to submit to a search of their residence by law enforcement officials.

⁷³ Slobogin, above n.71, 402.

the process. Our view of the validity of any empirical claim will depend on the strength of its evidential foundation.

The broader the participation by those who are directly affected by some measure or conduct that interferes with privacy, the more reliable a determination of the community's shared interest in privacy is likely to be. I have suggested that a primary concern for republicans will be the effect of the interference on those citizens' perceptions of their standing in the political community, how others perceive them, and their motivation and capacity to engage in public life. The most cogent evidence of this will be the various experiences of the members of social groups who have suffered or face the greatest risk of interference. In some cases, identifying those groups might be relatively straightforward. If the issue is the volume of personal information that the government ought to require welfare applicants to disclose about themselves in order to access services,⁷⁴ the relevant group will be those who are eligible to access those services. But there is a need for considerable caution in taking the views of a few to be representative of a group as a whole. It is possible to aggregate persons according to various attributes, their skin colour or sex, for example. But as Young points out, a social group is defined primarily by *identity* rather than *attributes*.⁷⁵

The feminist critique of the concept of privacy is that private and public spheres have been defined in ways that allocate the activities in which women tend to engage to the private, and those that are predominantly performed by men to the public.⁷⁶ This has been a significant obstacle to women's participation in public and political life, and the consequence has been for privacy to be conceptualised in ways that sustain relationships that are, for women, relationships of dependency. Feminist scholars have been particularly critical of the designation of the home as a private space upon which the state should not intrude.⁷⁷ Jean Cohen points out that the designation of 'the home'

⁷⁴ See, for example, J. Gilliom, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy*, (2001: University of Chicago Press), at p.34, who describes a government information system in Ohio, that prompts case-workers to ask welfare applicants for information on their military service, living arrangements, household income and expenditure, the age names and Social Security numbers of their children, work history, marital status, race, criminal history, divorce history, medical insurance, bank accounts, burial contracts, cemetery plots, life insurance, Christmas clubs and retirement plans, and how much they are charged for various utilities. See also, K. Bridges, *The Poverty of Privacy Rights*, (2017: Stanford University Press), ch.4.

⁷⁵ Young, above n.69, at p.58.

⁷⁶ A. Phillips, *Feminism and Republicanism: Is this a Plausible Alliance*, (2000) 8 *Journal of Political Philosophy* 279, 291.

⁷⁷ Catherine McKinnon, for example, has claimed that 'the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor'; C. McKinnon, *Feminism Unmodified*,

and 'the family' as entities to which privacy or the right to privacy attaches, shields internal intimate relations from public intervention and scrutiny.⁷⁸ But often those are relationships in which women hold subordinate status, 'positioned like children, as dependents'.⁷⁹ Anne Phillips has observed that challenging false unities - the view of the family as a harmonious unit, for example - has been a central concern of feminism.⁸⁰ The members of a family do not necessarily share the same interests. It cannot be assumed that the two sexes would never disagree, and the interests of 'woman and man', she says, cannot be substituted for the interests of 'man'. Phillips goes on to make a further observation that the issue false unities poses a problem for feminists. Just as the interests of 'man' cannot stand in for 'man and woman', there will be differences among between women - of class, age, sexuality, ethnicity, etc - and as Phillips points out, those with one set of experiences cannot stand in for those with others.⁸¹ We are each constrained by our own experiences. So, while women's interests in privacy ought to be a concern for men, men cannot be relied upon to recognise and mount the strongest defence of those interests. Similarly, not all women can be relied upon to recognise and effectively defend the privacy interests of women who find themselves in various states of dependency. The attraction of republicanism for feminists, Phillips suggests, is that - through deliberative democracy - it offers a dialogic understanding of social justice and the public good.⁸² Securing the political participation of women (and others) who are in positions of dependency, is essential to the construction of reliable knowledge about where our shared interest in privacy lies, and this, in turn is pre-requisite of effective collective control over the power of the state.

IV. Direct Participation

I want to finish by saying something briefly, about the form that direct participation by citizens in the kind of ex ante decision-making process that I have described above, might take. Graham Smith has observed that democratic theories tend to be incomplete and

(1988: Harvard University Press), at p.101. See also, C. MacKinnon, *Toward a Feminist Theory of the State*, (1998: CUP); J. Wagner DeCew, *In Pursuit of Privacy*, (1997 Cornell University Press), ch.5; B . Roessler, *The Value of Privacy* (2005: Polity), pp.23-27; A Lever, 'Feminism, Democracy and the Right to Privacy', (2005) 9 *Minerva: An Online Journal of Philosophy* 1; A. Lever, *A Democratic Conception of Privacy*, (2013: Author House), especially chapter 4.

⁷⁸ Cohen, above n.9, at p.51

⁷⁹ Cohen, *ibid.*

⁸⁰ Phillips, above n.76, 287.

⁸¹ *ibid.*

⁸² *ibid.*

often overlook the complexity of democratic practice.⁸³ In keeping with this tendency, I do not propose to develop any detailed institutional design for securing citizens' direct participation in decision-making by the institutions of government that will have a bearing on their privacy. But it seems to me that, in the face of the formidable challenge presented by the large-scale modern democratic state, I need to be able to establish that it is at least possible.

We can begin by dismissing that the idea that decisions about privacy should be made in some modern-day form of plenary assembly in which all citizens are able to participate. But rejection of this idea does not imply that it is not possible to establish a decision-making process to which all citizens have access and an opportunity to have their views heard, or for there to be the kind of responsive engagement of the kind described in the previous section. In most modern democracies, participation is facilitated by consultation processes in which proposals are published, and responses invited. Where proposals are reasoned and consultees provided with sufficient information to evaluate what is proposed, and responses also meet these conditions, and are in turn met with a reasoned rejoinder, the process might appear to be something like that proposed in the previous section. But there is a risk that with a consultation process open to the population at large, responses will be offered on the basis of self-interest. Citizens will not be required to consider the views of others before making their contributions, communication will tend to be radial - between individual citizens and the institutions of government - rather than between one another. This might naturally lead to a position in which the public interest is determined not according to a determination of shared interests in privacy, but by the aggregation of preferences expressed on the basis of self-interest.

The kind of deliberative process described earlier, that leads to the construction of reliable knowledge about the community's shared interest in privacy, requires a deeper and synchronous form of engagement between citizens. One way in which this might be achieved, is through a network of regional citizens' inquiries or mini-publics. These would differ from the mainstream political representative assembly in that they would operate on *ad hoc* basis, being constituted in order to consider a single privacy-related issue or self-contained set of proposals. Their membership would be determined

⁸³ G. Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, (2009: CUP), p.10.

in a way that ensured inclusive participation, and that those who could be expected to bear the brunt of the proposals would be strongly represented. It might run along the lines of the *Citizens' Inquiry into the National DNA Database* – the database maintained by police in the United Kingdom for investigative purposes - which was established by the Human Genetics Commission at a time of growing concern regarding the scope of the database.⁸⁴ The inquiry was undertaken by 2 panels, each drawn from different cities in the United Kingdom. These consisted of 25-30 citizens of different ethnicities, age and socio-economic backgrounds, and with varying degrees of knowledge about the subject-matter. The panels heard evidence from experts and undertook field visits to examine the impact of the database on various communities. The process was said to have led to an appreciation among those who participated of the social, political, and scientific implications of the scope of the database, and had 'challenged, altered and in some instances reinforced the panelists' initial views and opinions, transforming and enlivening the dynamics of the dialogue.'⁸⁵

The design of a framework for this kind of civic forum will have to incorporate an interface with the decision-making process of the institutions of government that generate privacy-related laws and policies. There must be some deliberative process involving representatives from both the civic forums, and legislative institutions. Although few in number, it is possible to find attempts to give the public a direct role in the legislative process. The United Kingdom parliament, for example, piloted a 'Public Reading' stage. Citizens were provided with an opportunity to comment online on proposed legislation, the comments being subsequently discussed in a 'public reading day' during the Committee stage of the draft legislation's passage through parliament. The motivation behind its introduction was to secure a greater degree of public participation in the process of legislating and to provide citizens 'with a real opportunity... to influence the content of draft laws.'⁸⁶ Citizens were provided with an opportunity to comment on a piece of draft legislation on a web forum. The responses were summarised and made available to members of a parliamentary committee responsible for scrutinising the legislation. But those members were not required to engage with the views of the public represented in the summary, and subsequent

⁸⁴ A Citizens' Inquiry into the Forensic Use of DNA and the National DNA Database, Citizens' Report, (2008: Human Genetics Commission).

⁸⁵ *ibid*, p.4.

⁸⁶ Public Reading Stage, SN/PC/06406, 19 March 2014, paragraphs 41-42.

evaluation of the process revealed no evidence of engagement, or any discernible influence on the legislation concerned.⁸⁷ Although useful insofar as it establishes the plausibility of some form of direct participation in the legislative process of a large-scale democracy, this initiative is far from the kind of deliberative process described earlier. For direct *ex ante* participation to perform the role envisaged in the previous section, there would have to be an opportunity for representatives of citizen bodies to engage in deliberation with those whose votes will be determinative, and in the forum in which that vote will take place. Participation and deliberative engagement need to be part of the ultimate decision-making procedure, rather than incidental to it. There also needs to be some means of enforcement. I will suggest in the next chapter, that this might be one of the functions of a republican right to privacy.

V. Conclusion

Over the course of the previous two chapters we have considered two distinct duties that the state owes citizens' in respect of their privacy. In the previous chapter, we considered the existence of a positive duty embodied in the republican conception of social justice, which requires the state to take action to ensure that citizens do not dominate one another, and insofar as privacy prevents or facilitates domination, the implied duty to establish privacy norms that will tend to minimise domination. We noted that the generation of these norms involves an exercise of power by the state, and this gives rise to a risk that the state might itself become an agent of domination. This risk is addressed by a second duty, the nature of which has been considered in this chapter; a duty that is implied by the republican idea of political legitimacy. The power that the state exercises when it makes decisions that affect citizens' privacy will be legitimate insofar as it is the product of a decision-making process that provided citizens with the greatest degree of control. I now want to consider the function of a republican right to privacy. We will see that it reinforces both of these duties.

⁸⁷ See, C. Leston-Bandeira and L. Thompson, 'Integrating the View of the Public into the Formal Legislative Process: Public Reading Stage in the Stage in the UK House of Commons', (2017) 23 *Journal of Legislative Studies* 508.

- Chapter 5 -

A Republican Right to Privacy

Over the course of the preceding chapters, I have developed an account of privacy grounded in republican ideas about democracy, freedom and self-government. At various points in those chapters, I have referred to the 'right to privacy.' In chapter 3, for example, I suggested that privacy should be considered one of the basic liberties, and that we could expect those liberties to be expressed as a set of constitutional rights. But despite these references and claims, I have left unanswered several fundamental questions. In the context of progressive republican ideas about freedom and collective self-determination, what does it mean to have a right to privacy? In what circumstances, and for what purposes, can it be claimed? My aim in this chapter, is to set out a conception of the right that addresses these questions and is consistent with the ideas that have been developed in previous chapters.

Although it has been said that republicanism is not a rights-based political theory,¹ there is a widespread commitment among contemporary republican thinkers, to the idea that citizens have rights. The modern idea of rights, it has been suggested, 'is perfectly consistent with republican ideals of political liberty and civil life.'² Indeed, those who have led the contemporary revival of interest in republican ideas envisage a plural society, the members of which enjoy political equality and possess certain fundamental rights.³ But once one moves beyond broad assertions that the concept of rights has a part to play in ensuring that citizens are not subject to domination, the republican literature offers little explanation as to how they do this. The question of what rights republican citizens should possess has received relatively little attention, and that of what they can do with the rights they might have, even less. In thinking about a republican right to privacy, we are

¹ See, for example, I. Honohan, 'Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government', in S. Besson and J. L. Martí, *Legal Republicanism: National and International Perspectives*, (2009: OUP); I. Honohan, *Civic Republicanism*, (2002: Routledge), p.207.

² M. Viroli, *Republicanism*, (2002: Hill and Wang), p.63.

³ C. Laborde and J. Maynor, 'The Republican Contribution to Contemporary Political Theory', in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory*, (2008: Blackwell), p.16. Unlike the concept of citizenship in the Roman republic - a status derived from the proprietary rights that defined a freeman - Maynor suggests that citizenship is conceived by modern republicans to be a status that bestows such rights; J. Maynor, *Republicanism in the Modern World*, (2003: Polity) p.182.

venturing into terrain that few have attempted to navigate. We need to proceed in the manner advocated in the first chapter.

Any account of the right to privacy that forms part of a political theory needs to be understood in terms of the aims of that theory.⁴ In what follows, I will set out a conception of the right to privacy that is consistent with, and best serves, the aims and commitments of a progressive form of republicanism. This, you will recall, is a version of republicanism that takes as its core normative commitment, the ideal of freedom as non-domination, a commitment that it shares with neo-Roman theories of republican government. Common to each of these theories is the idea that securing freedom, so conceived, requires a participatory form of self-government, participation constituting the means through which citizens are able to secure conditions of non-domination.

While neo-Roman republican accounts make no provision for direct participation by citizens in the legislative process, a commitment to do so is distinctive feature of progressive republicanism. As we have noted in previous chapters, a pressing concern for progressive republicans will be to ensure that there are broad participatory opportunities. We have endorsed the terms in which Phillip Pettit has defined domination; Someone (A) will be dominated in a certain choice by another insofar as another (B) has power to interfere in that choice that is not itself controlled by A.⁵ In the case of *generally applicable* norms, the power that is exercised in the process of generating those norms, and any power that they confer, will be non-dominating insofar as it can be said that it is controlled by those subject to it, that is to say, *all* members of the political community. This position does not imply - as some opponents of direct democracy seem to envisage it doing - the need for a plenary assembly in which all citizens have a right to participate. The infeasibility of this in a large-scale modern democracy hardly needs to be pointed out. The argument in the previous chapter was that the republican conception of political legitimacy places more modest demands on the state. It requires the state to do all that it can to secure some form of direct participation in the process of law-making. In the absence of such opportunities - particularly for those most likely to feel the effect of any decisions that are taken - there is a significant risk that the legislative process will itself

⁴ R. Dworkin, *Taking Rights Seriously* (2013: London, Bloomsbury Academic), p.118.

⁵ P. Pettit, *On the People's Terms: A Republican Theory and Model of Government*, (2012: CUP), at p.50.

become an instrument of domination; a means through which the powerful and privileged are able to impose their preferences on others.

In the previous chapter, I identified a set of conditions that would need to be met to ensure norms that have a bearing on citizens' privacy are non-dominating. The aim of these conditions is to ensure that any claim that such norms reflect the public interest, rests on the strongest possible justificatory grounds. If such grounds are to be established, it will have to be shown that those norms are the product of a decision-making process that is likely to produce reliable knowledge as to where, in the circumstances under consideration, the community's shared interests in privacy lie. We argued that the decision-making procedure most likely to generate such knowledge will be a deliberative process that conforms to the norms of communicative rationality. That is, a procedure in which participants are under an obligation to give reasons for the positions that they adopt and views they advance; are given the opportunity to challenge and to offer competing views, which will also be subject to the requirement to give supporting reasons; must be open-minded, reflective, and willing to change their position in the light of new evidence and arguments. We observed that reliable determination of the community's shared interests in privacy requires the input of many, especially those who are likely to bear the heaviest burden of any interference with privacy. But, as we have noted, privacy for individuals and for groups is also essential for effective participation in this process.

We can now begin work on a conception of the right to privacy that is consistent with these ideas. The first part of the chapter will describe a particularly distinctive feature of the right. Reflecting the interdependence of citizens, and the idea that securing conditions of freedom is a necessarily co-operative endeavour, I will explain that the right to privacy should be conceived as a right to a collective good that citizens hold in common. When it is claimed, the claim is made on behalf of all citizens as rights-holders. Having set out the basis on which citizens will hold the right, in the second and third parts of the chapter I will consider the basis on which it might be claimed. In the second part, I will say that it ought to be considered a quasi-participatory right. It provides a means of ensuring - through the use of procedures described in outline above, and set out in more detail in the previous chapter - that citizens exercise the greatest possible degree of control over the power that the state exercises, reserves for itself, and confers on others, when it makes privacy-related decisions. This aspect of the right is grounded in the idea of political

legitimacy. The right should be available as a means of challenging the legitimacy of decisions that will have an effect on citizens' privacy. In the final part of the chapter, Part III, I will identify a further basis on which the right might be claimed – one that is connected to duties imposed on the state by the idea of social justice. It should be open to citizens to claim the right where they suffer interference with privacy at the hands of a fellow citizen in circumstances that have not been attended to in any political decision-making process. The claim of the right in such circumstances, constitutes a demand that the state discharge the duties it owes to citizens as a matter of social justice.

I. A Right to a Collective Good, Held in Common

Laborde and Maynor have observed that no dominant contemporary version of republicanism denies the existence and importance of individual rights.⁶ We can say of a republican right to privacy, that it ought to secure for its holders, conditions of non-domination. The republican view that those conditions cannot be achieved through individual endeavour – that citizens are interdependent - has important implications for the way in which the right to privacy ought to be understood.

I have argued that republicans ought to consider privacy to be a *common*, and a *collective*, good.⁷ Individual privacy is something from which all citizens derive benefit. They can only be assured of the privacy that will enable them to live self-determined ways of life through co-operative participation in the political processes that generate laws that afford it protection. Citizens will not be in a position to engage in effective political participation if they have not been able to develop autonomous personal lives. To the extent that it can be assumed each of us desires such a life, and we accept privacy to be a prerequisite for this, we should consider privacy to be a *common* good. But we also have a *collective* interest in individual privacy.⁸ This is because, as we have previously noted, personal autonomy is an essential foundation for political autonomy. Political autonomy

⁶ C. Laborde and J. Maynor, 'The Republican Contribution to Contemporary Political Theory', in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory*, (2008: Blackwell), at p.16.

⁷ See chapter 2.

⁸ Priscilla Regan has also claimed that we ought to think of privacy as a collective good. The argument advanced in support of this position is narrower than that developed here. It proceeds from the view that technology and market forces make it more difficult for any one person to have privacy without all persons having a similar level of privacy. Regan argues that the development and pervasive use of social network platforms and 'Big Data' technology mean that it is more difficult for any one person to set her own privacy without some collective agreement about the level of privacy that all should have; P. Regan, *Privacy and the Common Good: Revisited*, in B. Roessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy: Interdisciplinary Perspectives*, (2015: CUP).

makes possible the collective self-determination through which freedom as non-domination is realised. Even if I happen to enjoy a degree of privacy at any given time, unless others have the privacy that enables them to contribute to the co-operative effort that is required to secure conditions of non-domination for all, the privacy that I have will be contingent. I might find at any moment that I face a threat of interference that can only be effectively nullified by a collective response. As Iseult Honohan points out, for republicans, membership of a political community is grounded ‘in the interdependence and mutual vulnerability of people who share a common fate and common concerns.’⁹

These ideas ought to be reflected in the way that a republican right to privacy is understood. Richard Bellamy has suggested that ‘many rights are better seen as defending public goods than as individual entitlements *per se*.’¹⁰ The interest that the citizens of a republican democracy have in ensuring that each has the privacy required for effective political participation, will lead them to think of the right to privacy as one that serves collective interests.¹¹ Because each citizen can only be assured of privacy for themselves if others have a guarantee of privacy, when a republican citizen claims the right, the basis of her claim will be the collective interest that she and other citizens have in privacy as a prerequisite for the necessarily co-operative endeavour of realizing freedom.¹² It is a right that protects interests that are held in common with, and claimed on behalf of, all citizens. This leaves open the possibility of the right being claimed not only by a person who has suffered interference, but also by someone who has herself suffered no loss of privacy, but can show that others have.

⁹ I. Honohan, ‘Freedom as Citizenship: The Republican Tradition in Political Theory’, (2001) 2 *The Republic* 7, p.21.

¹⁰ R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (2007: CUP), p.31; see also Joseph Raz who makes the more modest claim that ‘rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them’; J. Raz, *The Morality of Freedom*, (1986: Oxford, Clarendon), p.255.

¹¹ See further, R. Bellamy, ‘Democracy as Public Law: The Case of Constitutional Rights’, (2013) 14 *German Law Journal* 1017, 1022. Megan Richardson has also suggested that the right to privacy ought to be conceived as something that protects groups as well as individuals; M. Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea*, (2017: CUP), ch.5.

¹² Bellamy, *ibid.*, at 1026, makes a similar point in respect of free speech; ‘we do not necessarily have a personal interest in exercising this right ourselves. Rather, we all have an equal interest in the benefits of free debate and criticism of public policy by the comparatively small group of people with the time and expertise to do so.... and in the possibility of join that group being equally open to all, including ourselves should we feel motivated to so. An equal right to free speech is thus instrumental to securing a public good – that of a free society in the sense.... of being free from domination.’

Although the dominant view in rights discourse is that rights are individualistic and concerned with the personal interests of the claimant, there is a widespread view that rights can attach to groups.¹³ If it is accepted that the right can attach to a group, the logic that leads to this position must support the proposition that it is possible for a group comprising all members of a political community to hold the right to privacy in common. Backing for this view of the right is not only found in academic writing. It has been suggested that it is possible to read some judgments of the European Court of Human Rights in applications dealing with alleged violations of Article 8 of the European Convention on Human Rights – the right to respect for private and family life – in a way that lends some support to the idea. Bart van der Sloot, for example, has traced a line of decisions in cases involving large-scale surveillance by the state.¹⁴ In those cases, the Court adopted an approach that appears consistent with a republican view of the right to privacy as something that is held in common and claimed to further collective rather than personal interests in privacy. The Court’s traditional position in respect of alleged violation of Article 8 has been that the applicant must demonstrate that she has suffered some personal harm as a consequence of an interference with her privacy. However, van der Sloot explains that in respect of mass collection and processing of data:

“It is often difficult for individuals to demonstrate personal injury or an individual interest in a case; individuals are often unaware that their rights are being violated or even that their data has been gathered. In the Big Data era, data collection will presumably be so widespread that it is impossible for individuals to assess each data process to determine whether it includes their personal data, if so whether the processing is lawful, and if that is not the case, to go to court or file a complaint.”¹⁵

¹³ On the idea of group rights to privacy see, E. Bloustein, *Individual and Group Privacy*, (1978: Transaction); L. Taylor, L. Floridi and B. van der Sloot (eds), *Group Privacy: New Challenges of Data Technology*, (2017: Springer); P. Helm, ‘Group Privacy in Times of Big Data’, (2016) 2 *Digital Culture and Society* 137. On group rights more generally: C. Bisaz, *The Concept of Group Rights in International Law: Group Rights as Contested Rights-Holders, Subjects and Legal Persons*, (2012: Martinus Nijhoff); J. Mitnick, *Rights, Groups and Self-Invention: Group-Differentiated Rights in Liberal Theory*, (2006: Ashgate).

¹⁴ B. van der Sloot, *Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data*, School of Human Rights Research Series, vol. 81, (2017: Intersentia). See also B. van der Sloot, ‘A New Approach to the Right to Privacy, or How the European Court of Human Rights Embraced the Non-Domination Principle’, (2018) 34 *Computer Law and Security Review* 539, in which the author suggests that the approach adopted by the ECtHR is consistent with republican ideas about non-domination and the collective nature of rights.

¹⁵ *Ibid.*, at p.77.

The Court's response to this problem has been to permit individuals to challenge mass surveillance practices even where the person relying on the right has not demonstrated that her own interests have been affected. In these cases, the mere existence of the intrusive measures, and the possibility of the applicant being affected by them at some point in the future, is considered sufficient foundation for claiming the right. It might be suggested that this approach is a pragmatic response to a particularly problematic set of circumstances – Big Data – and that it does not offer much support for the idea that the right to privacy is something that citizens hold in common and claim on behalf of one another. However, van der Sloot points out that the Court has adopted a similar approach – one in which claimants have been permitted to claim that certain measures violate the right to privacy, without having to demonstrate that they have affected personally – in a broader range of circumstances. In *Brüggemann and Scheuten v Federal Republic of Germany*,¹⁶ legislation had been enacted that criminalized the termination of a pregnancy in certain circumstances. The Commission found that applicants were entitled to claim that the legislation was incompatible with the right to respect for private life, even though they had not been directly affected by it. Neither applicant had been pregnant while the legislation was in force, nor had they sought or been refused a termination, or been prosecuted for carrying one out.¹⁷

In more recent decisions, there has been explicit recognition that applicants' standing to challenge intrusive or coercive measures rests, not on demonstration of some setback to personal interests, but on membership of a community that is subject to the power that is said to violate the right. The notion of persons being subject to power referred to here, encompasses not only the *exercise* of power that results in interference, but to circumstances in which others simply *possess* the power to interfere. In either case, if such power is not controlled by those who are, or might be, on the receiving end of it, republicans would say that it constitutes dominating power.¹⁸ In cases in which powers to

¹⁶ *Brüggemann and Scheuten v Federal Republic of Germany*, (1977) Application No, 6959/75.

¹⁷ *Brüggemann and Scheuten v Germany*, (1977) Application No, 6959/75, p.53, para. 4. On the need to adopt this approach to the determination of claims made in respect of surveillance more broadly under Article 8, see B. van der Sloot, 'Is the Human Rights Framework Still Fit for the Big Data Era? A discussion of the ECtHR's Case Law on Privacy Violations Arising from Surveillance Activities', in S. Gutwirth, R. Leenes and P. De Hert (eds.), *Data Protection on the Move: Current Developments in ICT and Privacy/Data Protection Law*, (2016: Springer).

¹⁸ See A. Roberts, 'Privacy, Domination, and Data Retention: *Digital Rights Ireland v Minister for Communications*, (2015) 78 *Modern Law Review* 535 for a republican interpretation of the right to privacy provide by the European Charter of Fundamental Rights.

covertly monitor telecommunications have been challenged, the Court has suggested that the rights of all of those who use, or might use, such services will be affected. In practice, any citizen – as a potential user of telecommunications – would be entitled to challenge the powers.¹⁹ If the reasoning employed in these decisions is followed to its logical conclusion, where intrusive powers are generally applicable, any and all citizens will have the standing required to claim a violation of the right. Because the claim is one that could be made by any citizen, it takes no great conceptual leap to view the claimant as someone who claims the right on behalf of all of those who are similarly placed - all citizens. Indeed, it is not uncommon for those who have had their claim to particular rights vindicated, to suggest that their actions were taken on behalf of everyone who had been denied their rights. It should be pointed out that none of this denies that we ought to acknowledge the suffering, and reserve particular concern for the circumstances, of a claimant who has been on the receiving end of the exercise of dominating power.

The idea that the right to privacy is a right to a collective good - essential to collective self-determination - is a particularly significant distinguishing feature of a republican conception of the right, setting it apart from conceptions that are likely to be held by those committed to other traditions of political thought. The root of these differences lies in contrasting ideas about the relationship between citizen and state. For republicans, there is no separation between the two. Citizens are the constituents of a self-governing political community whose freedom depends on co-operative participation in the political processes that generate the laws to which they will be subject.

This is not a view shared by liberals and libertarians. The perception of the relationship in both traditions, is one of separation. Law that results in some interference

¹⁹ See for example, *Liberty and others v United Kingdom* (2008) Application No. 58243/00: "... the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied"; also *Zakharov v Russia*, (2015) Application No. 47143/06, both cases discussed by van der Sloot (2018), above n.14 at pp.88-93. For a similar reading of *Zakharov*, see M. Cole and A. Vandendriessch, 'From *Digital Rights Ireland* and *Schrems* in Luxembourg to *Zakharov* and *Szabb/Vissy* in Strasbourg: What the ECtHR Made of the Deep Pass by the CJEU in the Recent Cases on Mass Surveillance' (2016) 2 *European Data Protection Law Review* 121.

with privacy is seen as something that is done *to* citizens rather than *by* them. Rights are relied upon by individuals to keep the state at arm's length, preventing it from interfering in their affairs. For liberals and libertarians, rights are claimed by the individual *qua* individual, rather than something that is claimed on behalf of all citizens as holders in common. They will be claimed on the basis of personal rather than collective interests, although liberals and libertarians will frame those interests, and citizens' social interactions with one another, in different ways.

A libertarian scheme of rights will give concrete expression to the image of the citizen as a self-owner, exercising personal sovereignty over the resources in which she has an exclusive proprietary interest. It is the duty of the state to protect this interest by recognising certain rights. Among these will be the right to private property - including the property that one has in one's own body, capacities and powers - contractual freedom to transfer and trade the proprietary interests that one possesses, and a right against being compelled to do so.²⁰ For libertarians the right to privacy is a quasi-property right that enables the citizen further her interests through effective participation in a market. Moore suggests, for example, that the right to bodily privacy ought to be conceived as a right that permits the holder to possess or use his body in any way he chooses, provided that his or her use or possession does not worsen another's position. Its negative dimension prohibits others from using or possessing the right-holder's body, powers and capacities if that use would worsen the holder's position.²¹

The libertarian concepts of self-ownership and personal sovereignty are grounded in a fragmented vision of society and an atomistic concept of political freedom that is at odds with the republican belief in citizens' interdependence. For libertarians, the individual has primary responsibility for making his or her life flourish and 'no other has

²⁰ See R. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, (1998: Oxford, Clarendon); R. Barnett, 'Is the Constitution Libertarian?' (2009) *Cato Supreme Court Review* 9. See also O. Raban, 'Capitalism, Liberalism, and the Right to Privacy', (2012) 86 *Tulane Law Review* 1243, who in developing a liberal account of the right to privacy identifies a connection between capitalism's pursuit of economic well-being and liberalism's pursuit of personal well-being. It is suggested that privacy creates 'a free personal sphere within which actors are free to maximize personal prosperity in the same way as an economic sphere maximizes economic prosperity'.

²¹ A. Moore, *Privacy Rights: Moral and Legal Foundations*, (2010: Pennsylvania State University Press); A. Moore, 'Intangible Property: Privacy, Power, and Informational Control', (1998) 35 *American Philosophical Quarterly* 365; A. Moore, 'Toward Informational Privacy Rights', (2007) 44 *San Diego Law Review* 809; L. Scholz, 'Privacy as Quasi-Property', (2016) 101 *Iowa Law Review* 1113. On the idea of proprietary rights in one's body see S. Wheeler, 'Natural Property Rights as Body Rights', (1980) 14 *Noûs* 171.

any rightful authority concerning it.’²² The conceptualisation of the right to privacy as a proprietary right makes clear that it is an individual rather than a collective right. As Barnett explains, the rights that people have in property, and consequently in the (proprietary) right to privacy are several; the term ‘several’ being taken to mean ‘distinct, particular or separate’.²³ Any person who wishes to rely on the right to privacy must be able to show that he or she has a proprietary interest in the thing in respect of which the right is claimed – location, body, personal information etc. The right cannot be claimed if the claimant has no such interest. From a libertarian point of view, I would not be able to use the right to claim that some collection or use of *your* data is a violation of the right to privacy, even if I am also vulnerable to the same intrusive practices but have not yet been subjected to them.

The right to privacy will also be conceived by liberals as something that is held by individuals and claimed in the pursuit of personal, rather than collective, interests. Both liberals and libertarians will say that the right to privacy secures conditions that enable autonomy. Libertarians take the view that full autonomy will be realised where conditions are such that persons are able to make use of the full range of proprietary rights that they possess, and to prevent others from usurping or obstructing the exercise of those rights. Liberals are likely to consider this an impoverished view of autonomy and can be expected to reject it as a basis of liberal rights generally, and of a right to privacy in particular.

In response to communitarian critiques, liberals have emphasised that successful pursuit of reflectively self-chosen ends will depend on an individual’s ability to cultivate and sustain various forms of social relationships. The nature of these will be defined by the personal information that those involved choose to reveal to, and conceal from, the other. Robert Gerstein points out that intimate relationships, for example, ‘have as an important part of their content the exclusive sharing among intimates of things about themselves that no one else knows’.²⁴ He explains that if outsiders could acquire detailed knowledge of the intimacy, then what he refers to as the ‘moral capital’ that provides the fabric of the relationship – trust, confidence, revelation, exclusivity – would be impoverished.²⁵ The libertarian suggestion that we develop and sustain intimate

²² T. Machan, *The Promise of Liberty: A Non-Utopian Vision*, (2009: Lexington Books), p.79.

²³ Barnett (1998), above n.20, at p.65.

²⁴ R. Gerstein, Intimacy and Privacy in F. Schoeman (ed.), *Philosophical Dimensions of Privacy*, (1984: CUP).

²⁵ *ibid.*

relationships by relying on *proprietary* interests in our bodies, and in information about ourselves, sits awkwardly with richer liberal ideas about what is at stake.²⁶ Liberals also argue that thinking about personal information in proprietary terms – as a commodity – undermines agency by encouraging us to adopt a third person perspective on our own identity and behaviour.²⁷

The way that libertarians think about the right to privacy - as a quasi-proprietary right - will differ from the way in which liberals and republicans conceive it. But there is also clear ground between republican and liberal conceptions of the right. The liberal right to privacy cannot properly be described as atomistic, a term that we might use to describe the way in which the citizen is conceived by libertarians; as discrete actors navigating their own courses through life by engaging in a series of market transactions. Liberals recognise that autonomy has a social dimension, and that a right to privacy enables individuals to develop a range of relationships. But this does not align liberal thinking about the right to privacy with the republican conception of the right as something that is collectively determined, held in common with other citizens, and claimed on behalf of all.

Although the liberal right might be claimed in order to secure privacy where this is required in order to develop certain social relationships (or for other socially valuable reasons), it is still claimed on an individual basis.²⁸ The foundation of the claim is the claimant's personal interest in the development of those relationships. Those who have attempted to develop a liberal theory of group rights, recognise that the idea of collectively held rights is at odds with 'the premium that liberals place on individual freedom and

²⁶ See for example, Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology*, (1997: Cornell University Press), at p.54; "I am concerned that our intuitive sense of property rights breaks down in privacy contexts. Do we "own" behaviour we do not want observed, or all the information we want to have a right to suppress?" Also, J. Inness, *Privacy, Intimacy and Isolation* (1992: OUP), ch.3, who argues that 'mere ownership of possessions or the person does not adequately explain all privacy rights because there are cases in which privacy rights with respect to objects in the external world and the self do not correspond with ownership.' Jeffrey Reiman argues that the right to privacy in relation to one's body should be seen not only as a form of property right, but also a person's right to control over whether or not, and in what ways, her physical existence becomes part of someone else's experience; J. Reiman, 'Privacy, Intimacy and Personhood', in F. Schoeman (ed.), *Philosophical Dimensions of Privacy*, (1984: CUP).

²⁷ B. Roessler, Should Personal Data be a Tradable Good, in B. Roessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy: Interdisciplinary Perspectives*, (2015: CUP).

²⁸ See K. Hughes, 'The Social Value of Privacy, The Value of Privacy to Society and Human Rights Discourse', in B. Roessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy: Interdisciplinary Perspectives*, (2015: CUP), who argues for an interpretation of Article 8 of the European Convention on Human Rights in which the right is essentially individualistic but in which greater emphasis is placed on its societal value.

control'.²⁹ The liberal emphasis on independence (a contrast with interdependence) will lead to scepticism about the idea of such rights, which are likely to be viewed as undermining the freedom of the individual.

The focus of the discussion so far, has been on the nature of the right rather than the way in which it ought to be used. The idea that the right to privacy ought to be considered a right to a collective good, and that it is held in common by all citizens, so that where claimed, it is claimed on behalf of all, is rooted in the belief that securing resilient conditions of freedom generally, and privacy in particular, is something that an individual cannot achieve through his or her efforts alone. It requires broad and inclusive participation in the political processes in which the laws that regulate the lives of the members of a political community are formed. We observed in the previous chapter that those laws will be non-dominating insofar as they are grounded in a reliable determination of the community's shared interest in privacy. It was suggested that this requires the use of deliberative decision-making procedures that conform to the norms of communicative rationality, and the input of as broad a range of views as possible. We also noted that the ideal of non-domination, and the demands implied by the concept of political legitimacy, require the participation of those whose privacy is most likely to be affected by the laws that are generated by such processes. The question I turn to now, is 'how might the right to privacy serve these aims?'

II. The Right to Privacy, Popular Control, and Political Participation

A distinctive feature of the progressive form of republicanism, the values of which provide the normative foundation of our account of privacy, is its commitment to citizens' direct participation in the legislative process. This commitment is grounded in the belief that the direct involvement of citizens – those who are not elected members of the representative assembly that provides the institutional setting for the generation of law - constitutes the most effective and resilient form of popular control. Rather than keeping the state at arms-length, a republican right to privacy will protect citizens' privacy by carving out for them, a constitutive role in the government of the political community in which they live. Its primary purpose will be to secure effective participation in the processes that determine

²⁹ See C. Wellman, 'Liberalism, Communitarianism, and Group Rights', (1999) 18 *Law and Philosophy* 13, 27.

the extent to which the state will be permitted to interfere with their privacy (an issue of political legitimacy) and to which it will permit others to do so (a matter of social justice).³⁰

A serious commitment to direct participation must be accompanied by some enforcement mechanism – a means of overcoming attempts to block or frustrate effective participation. This, I suggest, can be achieved by adopting a procedural form of judicial review, which citizens will be able to initiate by relying on the right to privacy. It is an aspect of the right that connects with the idea of political legitimacy by ensuring that citizens are able to exercise popular control over decisions that have a bearing on their privacy.

But first I want to say something about the limits of the right to privacy in respect of two areas of political activity that are common to all contemporary models of republican government – voting and public deliberation.

(i) Voting.

Surprisingly little attention has been devoted to the question of whether we should consider voting to be a public or a private matter. It has been suggested that many believe the secret vote to be ‘the jewel in the democratic crown’.³¹ The generally unchallenged view is that ensuring that citizens’ voting choices remain secret is essential to the proper functioning of democracy. The claim is that if one’s voting record or intentions are regarded as public rather than private matters – information to which we all can (and ought to) have access – there will be attempts to bribe or coerce individuals to produce the outcome preferred by those who engage in these practices.

The secrecy of the ballot has also been defended on the grounds that disclosure of voting choices revealing carelessness, ignorance or selfishness might lead to public shaming and humiliation out of all proportion to the ‘wrong’ that was committed.³² The secret ballot, Annabelle Lever suggests, is consistent with an important democratic idea – ‘that citizens’ rights to vote does not depend on the approval of others or on the demonstration of special virtues, attributes or possessions.’³³ Republicans will no doubt agree that one’s vote should not depend on the approval of another. If this were the case,

³⁰ Iseult Honohan, one of the few republican writers to have considered whether republican citizens should have a right to privacy, suggests that the right can be justified on the basis of republican political autonomy; I. Honohan, *Civic Republicanism*, (2002: Routledge), p.212.

³¹ G. Brennan and P. Pettit, ‘Unveiling the Vote’, (1990) 20 *British Journal of Political Science* 311.

³² A. Lever, *On Privacy*, (2012: Routledge), at p.27.

³³ *ibid.*, at p.26.

they would have no hesitation in saying that the voter is dominated in her choices. Inherent to the concept of political autonomy, is the idea that citizens should reach their own judgment regarding the matters on which they are asked to vote.

Whether we think that the right to privacy ought to extend to voting, will depend on our view as to the basis on which such decisions ought to be made. Brennan and Pettit identify two ideals of voting – the *preference* and the *judgement* ideals.³⁴ According to the former, each voter is expected to register his or her private preference among the voting options. In a majoritarian electoral process, the outcome of the vote will represent an appropriate compromise between competing expressions of self-interest. Because they are expected to vote for the option that best serves their own position and interests, there is no obligation to justify the decision to others. In contrast, the normative expectation under the judgement ideal is that voters will reach decisions on the basis of their own evaluation of what option best promotes the public good.

Brennan and Pettit suggest that the judgement ideal best fits republican thinking.³⁵ Membership of a self-governing political community comes with certain civic obligations. Citizens are expected to work co-operatively to secure conditions in which none is subject to domination, and each can pursue his or her own (non-dominating) conception of a worthwhile life. Daniel Sturgis makes the point that although a vote is an individual decision, it has consequences for all members of the community.³⁶ The outcome of an election provides popular authority for the implementation of policies and the enactment of laws that affect and compel obedience from all citizens. Sturgis argues that unlike our political thoughts, our votes have public consequences. Because the decisions that we make in popular elections affect the lives of our fellow-citizens, we should expect to have them subjected to public scrutiny. Those who voted for some measure can be expected to offer to those who opposed it, but have nevertheless had it imposed upon them, the reasons for voting as they did. It has been suggested that the prospect of having others discover how we vote, and of having to explain the reasons for voting as we did, will prompt citizens to familiarise themselves with the issues, to give due consideration to what is at stake, and to engage in deliberation with others.³⁷ If public voting does in fact have this effect – encouraging citizens to prioritise the public good of securing conditions

³⁴ Brennan and Pettit, above n.31.

³⁵ *ibid.*, at p.317.

³⁶ D. Sturgis, "Is Voting a Private Matter?", (2005) 36 *Journal of Social Philosophy* 19.

³⁷ *ibid.*, at 25

of non-domination over narrow self-interest - all republicans, including those committed to a progressive form of republicanism, might be expected to take the view that citizens' votes should be considered a public rather than a private matter, and not something that falls within the scope of a republican privacy right. This seems to me to be right as a matter of principle. But if it is possible for citizens to exercise control over legislative and policy-generating processes through *ex ante* participation, the public consequences of private voting might not be as significant as in a model of democracy in which voting initiates a legislative process over which there are only weak forms of continuing popular control.

(ii) Public Deliberation

Perhaps the single-most distinctive feature of a progressive form of republican government when compared to other models of republican democracy, is its insistence on direct participation in the legislative process as an important aspect of popular control and an essential dimension of collective self-determination. But this participatory moment – the point at which citizens become involved in the deliberation that occurs as part of the formal legislative process - will be the culmination of a series of *ex ante* processes. The range of positions and views presented will have been developed, tested, challenged, refined, and distilled from deliberation that occurs at multiple sites of civic political engagement that lie outside the legislative process. The value of privacy in facilitating such deliberation is widely acknowledged.³⁸ It provides space – both physical and psychological – that enables individuals and groups to reflect, develop ideas, and test their powers of persuasion and self-expression.³⁹ It will be particularly important for enabling vulnerable, marginalised, and minority groups - whose views might not be well-received initially - to develop strategies and ways of framing arguments that will increase support for them. If the state fails to provide conditions of privacy that facilitate participation by such groups, so that they are hampered in their attempts to influence collective decision-making (or are entirely excluded from this process), it risks becoming an agent of domination.

Direct participation in the legislative process will be supported by multiple spheres of broader (non-legislative) public political deliberation. In respect of this, Titus Stahl

³⁸ See, for example, A. Lever, 'Privacy Rights and Democracy: A Contradiction in Terms?', (2006) 5 *Contemporary Political Theory*, 142; P. Voice, 'Privacy and Democracy', (2016) *South African Journal of Philosophy*; C. Brettsneider, *Democratic Rights: The Substance of Self-Government*, (2007: Princeton University Press), ch.4.

³⁹ Lever, *ibid.*

makes the important point that privacy should be considered an integral aspect of the political domains in which such deliberation occurs.⁴⁰ External intervention or surveillance will tend to have a distorting effect on the character and course of these deliberative processes.⁴¹ If it becomes common knowledge that the state is monitoring - or merely that it has unrestrained power to monitor - political activity, we can expect it to have an inhibiting effect on both political association and speech. This view is supported by empirical studies which suggest that where individuals are aware that their government is engaged in monitoring online discussion, they will readily offer views that are perceived to be held by the majority, and suppress what they take to be a minority view.⁴² In light of the observation just made regarding limited participation of minority groups and domination by the state, these matters ought to be a serious concern for republicans. As Stahl points out, 'the interest that is violated by surveillance is... not only an individual interest in liberty but also a collective interest in self-determination that can only be effectively safe-guarded by exempting political public spheres from surveillance.'⁴³

No doubt indiscriminate mass surveillance is a threat to the political autonomy on which the possibility of collective self-determination depends, but it is not the only threat. Mass surveillance, Big Data and insights provided by behavioural scientists can, and have been, utilised to manipulate citizens' political decision-making. The information that a digitized society requires citizens to offer up, might be used in ways that undermine and frustrate public deliberation. Cass Sunstein has argued that a well-functioning democracy depends on citizens being exposed to a broad range of views, including those that they find unsettling, irritating and distasteful.⁴⁴ This kind of exposure, and the subsequent engagement with those who hold these views, is essential to the realisation of conditions of non-domination – that is, essential to establishing state institutions that do not exercise dominating power over minorities. William Gorton has outlined ways in which Big Data can be used to turn citizens into the objects of manipulation by steering them away from information that might lead to a change in their beliefs and values, and towards sources

⁴⁰ T. Stahl, 'Indiscriminate Mass Surveillance and the Public Sphere', (2016) 18 *Ethics and Information Technology* 33.

⁴¹ *ibid.*

⁴² T. Dinev, P. Hart and M. Mullen, 'Internet Privacy Concerns and Beliefs About Government Surveillance: An Empirical Investigation', (2008) 17 *Journal of Strategic Information Systems* 214; E. Stoycheff, 'Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring', (2016) 93 *Journalism & Mass Surveillance Quarterly* 296.

⁴³ Stahl, above n.40.

⁴⁴ C. Sunstein, *Republic.com 2.0*, (2007: Princeton University Press), pp.5-6.

that reinforce their existing viewpoints.⁴⁵ Intervention can take even more pernicious forms, for example, the dissemination of misinformation and the use of ‘social bots’ – software programmes that generate automated messages and responses that appear to have been generated by a human user⁴⁶ – to deceive those using social media and propagate enmity towards certain groups and the values they hold.

In light of this, we might expect the right to privacy to support deliberation in various ways⁴⁷ – imposing on the state both negative and positive duties. Negative duties to refrain both from intervening in public deliberation, and from keeping under surveillance those who are engaged in (non-dominating) political activity. Positive duties to prevent private actors and organisations using citizens’ personal information to manipulate the formation of opinions and political choices.

At the same time, we can suppose that there will be limitations on the extent to which the right to privacy can be relied upon by those who participate in public deliberation. The aim of the right is to protect its holders from domination, and to provide them with a measure of control over the use and acquisition of power to interfere in their decision-making and the choices that are available to them. It follows that it should not be possible for it to be relied upon by those who seek to distort public deliberation and to manipulate citizens so that they are more likely to make political choices that serve the interests of those engaged in the manipulation. It might be necessary in order to deal with the risk of this form of domination, to require those who engage in public deliberation to disclose certain information about themselves. Just how much ought to be disclosed will be the subject of reasonable disagreement, and the question of how this ought to be resolved brings us to the core feature of the conception of the right that is implied by (and supports) the aims of a progressive form of republicanism.

(iii) Political Legitimacy, Direct Participation, and Popular Control.

I have said that the overarching aim of a republican right to privacy will be to enable citizens to exercise control over the power the state has to make decisions affecting their

⁴⁵ W. Gorton, ‘Manipulating Citizens’ How Political Campaigns’ Use of Behavioral Social Science Harms Democracy’, (2016) 38 *New Political Science* 61, 69-70.

⁴⁶ See E. Ferrara, O. Varol, C. Davis, F. Menczer and A. Flammini, ‘The Rise of Social Bots’, (2016) 59 *Communications of the ACM* 96; C. F. Naff, ‘Call in the Robocops’, (2018) 78 *The Humanist* 18.

⁴⁷ On the role of rights in facilitating activist citizenship, see G. Aitcheson, ‘Rights Citizenship and Political Struggle’, (2018) 17 *European Journal of Political Theory* 23.

privacy. Republicans hold differing ideas about how citizens might exercise that control.⁴⁸ What distinguishes the progressive from other forms of republicanism that take securing conditions of non-domination to be the aim of republican self-government, is the belief that citizens will only be able to secure those conditions through direct participation in the legislative process. A serious commitment to this idea requires us to find some way of securing such participation, so that citizens' can be seen as the authors of the generally applicable and enforceable privacy-norms to which they will be subject. I want to suggest that we can understand the right to privacy in a way that makes this possible.

The conception of the right that seems to offer the best support for the aims of a progressive form of republicanism will bear a fundamental similarity with the idea of rights that emerge from Richard Bellamy's ideas about a strict form of political constitutionalism. The position set out in the previous chapter was that political legitimacy requires broad, inclusive, and direct popular participation in deliberative legislative decision-making procedures. Those procedures need to possess certain characteristics that are likely to lead to decisions that accurately reflect the interests of the community when it comes to privacy. Bellamy's arguments against judicial determination of rights can serve as part of the justificatory grounds of a conception of the right to privacy that promotes direct participation. However, our understanding of the purpose of the right to privacy, the basis on which it can be claimed, and the judicial role in respect of its development role, will mark significant points of departure from his thinking on rights.

Consistent with the view that we have taken, Bellamy points out that constitutional rights are held by all citizens, and any authoritative decision regarding the way in which they are to be understood, affects not only the interests of the claimant, but those of every citizen *qua* holder of the right. This being so, the process for settling the content and scope of rights ought to be one in which all of those affected by the decision are able to have a say. But a process of rights-based judicial review does not afford this opportunity. Typically, such proceedings will involve a claimant, a respondent, and will be presided over by a small number of judges. The basis of the claim will be the claimant's view of the collective interest in privacy. It will be resisted by a representative of the institution of the state responsible for the intrusive measure, whose counterclaim will be based on a claim

⁴⁸ For a comparative analysis of the models of republican democracy offered by Richard Bellamy, Phillip Pettit, and John McCormick, see R. Silva, 'Non-Domination and Political Institutions: The Contested Concept of Republican Democracy', (2015) 9 *Brazilian Political Science Review* 3.

that the public interest requires prioritisation of the aims that the interference is said to serve. The issue will be determined according to the view among a majority of the judges on the basis of their own assessment of the public interest. We can presume that the basis of this would be the individual judge's intuitive sense of the likely outcome of a deliberative process involving all of those affected by the decision.

Bellamy suggests that judges are unable to engage in the kind of reasoning that we would expect of an elected representative assembly – that is, ‘open, public-spirited, concerned with public issues, but also publicly accessible and responsive to - and in some sense undertaken by - the public.’⁴⁹ It is doubtful whether any of the parties to judicial review proceedings will be able to reliably and consistently predict the outcome that such a decision-making process would produce. If judges are not able to engage in the kind of decision-making process that a legislative assembly would use to determine the content and scope of the right to privacy, the decision that they reach will be arbitrary. Bellamy would say that judges are imposing their own views as to how much privacy we should have.⁵⁰ The judiciary does not have access the rich body of material - the range of ideas, experiences and knowledge – upon which those involved in an inclusive political process are able to draw. Even if it could be established that judges' views are those that would often be reached in a deliberative political process, we might be inclined to think this more a matter of luck than a consequence of the application of some form of privileged knowledge regarding citizens' collective interest in privacy. In light of this, the argument that judicial review provides citizens with directional control over the generation of privacy-related norms seems unconvincing.

We can suppose that Bellamy would say that the best way of determining the content and scope of a right to privacy is in a real political process guided by norms of non-domination and political equality. The advantage that real democratic systems hold over courts is that a legislative embodiment of rights is likely to better track the collective

⁴⁹ Bellamy, above n.10, at p.187.

⁵⁰ Ibid, at p.166. So much has been acknowledged in US Supreme Court, Justice Antonin Scalia observing in *Minnesota v Carter*, 119 S. Ct. 469, 477(1998) that ‘the only thing that the past three decades have established about the *Katz* test... is that, unsurprisingly, [reasonable expectations of privacy] bear an uncanny resemblance to those expectations of privacy that this Court considers to be reasonable.’ Expressed more pithily the point is that in such cases ‘private attitudes... become public law’; C. Herman Pritchett, ‘Division of Opinion Among Justices of the U.S. Supreme Court 1939-41’, (1941) 25 American Political Science Review 890. See also, D. Solove, *Understanding Privacy*, (2008: Harvard University Press), p.72.

interests of citizens.⁵¹ Judicial review proceedings, he suggests, 'lack the fundamental democratic quality of allowing an equal input from all affected citizens – their "right" to author rights.'⁵² But for Bellamy, this authorial role does not take the form of direct participation by citizens in the legislative process.⁵³ The form of republican government he envisages, is one that is capable of policing itself.

The ideals of political equality and non-domination are said by Bellamy, to be served by a system of equal votes and majority rule on the one hand, and 'the balance of power' on the other. The 'balance of power' refers to arrangements that ensure that the notion of the common good is derived from representation of interests held by a range of different social classes. Briefly, the idea is that competition among political parties - the need to compete for votes - will mean that they must secure and hold together broad coalitions. To secure and retain power, parties will need to frame proposals and policies in ways that will attract the support of the majority of the electorate. Where this is achieved, the proposals can be said to best reflect the collective position of citizens on the particular issue.

The right to privacy implied by this model of government, will be a construct of all those parts of the legislation on the statute book that have some bearing on privacy - a legislative mosaic. We should think of the substantive content of the conception of the right that supports the aims of progressive republicanism as being determined in much the same way. This begs an important question. If the content of a right to privacy crystallises at this point – when legislation comes into force - in what circumstances, or on what basis, can it be claimed? Bellamy's answer, it seems, is that citizens will claim the right simply through their (rather minimal) and remote role in the promulgation of laws that apply equally to all, and which are enacted by means of a democratic process that treats them with the equal concern and respect that is due to them as autonomous individuals.⁵⁴

The content of the right is articulated in the body of law enacted by the elected assembly. The right imposes no constraints on the legislative process, the system of equal votes and the balance of power constituting a sufficient check, making elected assemblies responsive to views about the common good, and inclined towards moderate policies.

⁵¹ R. Bellamy, 'Rights as Democracy', (2012) 15 *Critical Review of International Social and Political Philosophy*, 444, 462.

⁵² *Ibid.*

⁵³ Bellamy, above n.10, at p.210.

⁵⁴ Bellamy, above n.51, 462.

Bellamy would say that if we think of rights as trumps, citizens play their trumps in the opportunities that there are to influence political parties' policies on privacy, and to endorse or reject such policies in regular popular elections. Allowing the right to privacy to be used to challenge legislation, the argument goes, would allow some citizens to play their trumps twice.⁵⁵ In the ordinary course of events, the judicial role in the determination of rights would be limited to circumstances in which the state or its agents have failed to comply with the privacy-norms generated by the legislature.

How does the right to privacy in progressive republicanism differ from the conception of the right implied by these ideas? In a progressive version of republican government, citizens will be able to rely on the right to privacy to challenge the decision-making of the state on a broader range of grounds. It will, of course, protect the holders of the right from domination in the way that has just been described - by ensuring that the rule of law is observed. Citizens will be able to rely on it when the state or its agents have not adhered to privacy-norms generated by the legislature; for example, where the exercise of intrusive power goes beyond any that has been conferred. But it will do more than this.

We have seen that libertarians view the right to privacy as a quasi-property right. Progressive republicans will take the view that one of the right's dimensions will be quasi-participatory. Lars Vinx makes the point that "[t]he idea that decisions about rights will be legitimate and deserving of respect if they are taken democratically would appear to presuppose that the democratic process functions adequately..."⁵⁶ As I have said, the boundaries of the right to privacy will be determined by the extent to which privacy is afforded protection in law enacted by the legislative assembly. That legislation will have the imprimatur of political legitimacy, and at the same time be non-dominating, if it is the product of a deliberative decision-making process that conforms to the procedural norms described in the final part of the previous chapter.

I suggested there, that these norms include an obligation to seek from others, information that is relevant to the decision (which implies a further duty to take positive action to secure the participation of as wide a cross-section of the community as possible, - especially those most likely to be affected). They require participants to justify the

⁵⁵ R. Bellamy, 'Rights, Republicanism and Democracy', in A Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Laws and Politics* (2013: Edinburgh University Press), at p.263.

⁵⁶ L. Vinx, 'Republicanism and Judicial Review', (2009) 59 *Toronto Law Review* 591, 592.

positions they take and the views that they hold. This requirement will expose the normative and empirical assumptions that have been made, and the existence or absence of evidential support. Those who engage in the process must have an opportunity to: challenge and contest the positions that are taken by others and the reasoning that supports these; and to advance competing views. Objections and counterclaims must also be justified and open to similar scrutiny. Participants must be open-minded, reflective and willing to change their positions in light of new evidence and arguments. The result of a process that conforms to these norms, will be a one shaped in various ways by the contributions of all participants. Each can be considered a co-producer, or co-author, of its output.

The right to privacy needs to be conceived in a way that supports and reinforces these aims. Accordingly, deviation from these norms in a process that generates laws affecting citizens' privacy, ought to provide the foundation for a claim that there has been a violation of the right to privacy. The claim calls into question the political legitimacy of the decision. Compliance with the norms minimises the risk of domination by providing citizens with the greatest possible degree of control over decisions that have a bearing on their privacy. Where the right is claimed there ought to follow, a judicial review of the process through which the impugned decision was made, the procedural norms set out in the previous chapter constituting the relevant evaluative criteria.⁵⁷ An obvious example, of a circumstance in which the right might be claimed will be failure to give any thought to privacy during the deliberation that precedes adoption of some intrusive measure. Such a course of action would be inconsistent with the recognition of privacy as both a basic liberty and a constitutional right. To the extent that this would impose a constraint on a legislative assembly, it is a rather loose constraint. It merely establishes privacy as a standing item on the legislative agenda, so that where it is implicated by some legislative proposal it *must* be the subject of deliberation.⁵⁸

⁵⁷ There is a rich literature on this form of procedural review, notably: J. Habermas, *Between Facts and Norms*, (1996: MIT Press), ch.6; J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (1981: Harvard University Press); C. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, (2007: CUP).

⁵⁸ Some republicans have argued that the power of the legislature ought to be subject to this kind of constraint. See, for example, Honohan (2009), above n.1, at p.89, "Legislation may not always track the interest in non-domination or autonomy. Certain fundamental interests may be identified which must be taken into account. These may be established as legal rights, though, in the republican view they will not be formulated in absolute terms."

The idea that a claim should lead to a procedural review is not unproblematic. There are two significant issues that need to be acknowledged. The first is that if we accept that the content and scope of the right (or more specifically, disagreement about these things) ought to be determined in a democratic process – one that we have claimed has particularly strong republican democratic credentials, then as Vinx points out, we would have to accept the result.⁵⁹ It would mean that discriminatory laws – those that would have a disproportionate or exclusive impact on the privacy of some minority – would, if decided in a democratic process that conformed to the norms of political rationality referred to in chapter 4, be legitimate. This seems to be a reasonable concern. But if those norms are faithfully applied – so that, for example, considerable efforts are made to secure the participation who are likely to disproportionately affected; evidence is sought on the likely benefit of what is proposed, and on the effect of the measures on those people; significant weight is attached to their views – we might think the risk of discriminatory and dominating legislation to be somewhat remote.

The second issue is that while allowing courts to engage in a procedural review of decisions about citizens privacy that are made by a political institution seems to respect popular sovereignty, the appearance might be an illusion. The objection is that procedural review necessarily collapses into a form of substantive review.⁶⁰ The argument will be that the procedural norms against which courts are to assess the legitimacy of legislative decisions about privacy, become proxies for substantive review. In considering whether dissenting and minority views were given sufficiently careful consideration, or were met with a meaningful response, for example, a court will be required to form a view on the merits or weight of those views and contributions. If what the courts are in fact undertaking is a substantive review of the decision dressed up as a procedural review, power to determine the extent to which privacy is protected will be concentrated in the hands of those conducting the review.

This is a problem, but in practice, it might not be a significant one. There will of course be hard cases – deviations that to many seem slight or inconsequential. In these cases, it might appear that a court is doing little more than asserting that the legislative assembly reached a decision that it – the court – would not have done. But there will also

⁵⁹ Vinx, above n.56, 594.

⁶⁰ The criticism is made by R. Dworkin, *A Matter of Principle* (1985), p58; Bellamy, above n.10, at p.110-11.

be cases in which the failings give rise to a clear risk of domination, for example, where there has been no attempt to facilitate the participation of those who are likely to be most affected by a proposed measure, or circumstances in which there is an obvious and deliberate failure to engage with the positions advanced by such groups. Insofar as procedural review necessarily leads to engagement with the substance of a decision, some power to determine the boundaries between public and private will be ceded to the courts. But it will be possible, by discharging their procedural obligations, for democratic political institutions to limit the extent to which this happens. The procedural norms that have been identified demand only what is possible, and it will be possible for those institutions to limit the number of hard cases by taking every practicable measure to ensure conformity with those norms.

In practice, instances of procedural review may be relatively few. Whether or not the grounds for review are made out will be a matter within the control of the political institutions whose decisions might be challenged. If I am correct in this view, we might conclude the risk of domination at the hands a judiciary that have powers of procedural review will pale in comparison to the risk posed by citizens being frustrated in their attempts to participate in the process of determining the law to which they will be subject, or indeed being excluded from that process altogether.

A successful challenge using the right to privacy ought to lead to invalidation of the decision to adopt the impugned intrusive measure. But this does not rule out a subsequent attempt at re-adoption. It will be open to the political institution to revisit the proposal and it is, of course, quite possible that a second deliberative process that conforms to the relevant procedural norms would result in the same outcome as the original process. But critically, the first would lack what the second possesses – political legitimacy.

Before moving on, I want to point to an unlikely source of support for some of the ideas presented in this section. In a liberal account of rights, one of the functions of the right to privacy will be to serve the interests of the holder by protecting her from unjustified interference by the state. Richard Bellamy suggests that rights to non-interference tend to be understood as pre-political or anti-political. Because they effect interference in the affairs of individuals, all laws are *prima facie* inimical to rights.⁶¹ If rights are to provide the holder with effective protection, their meaning and scope cannot

⁶¹ R. Bellamy, above n.11, 1024.

be determined by the norm-generating political institutions whose power they are supposed to constrain. Accordingly, the meaning and scope of rights are determined by recourse to pre-political objective morality, the principles of which ought to yield a definitive answer to question of whether the right extends to the circumstances in which it is claimed. Ronald Dworkin suggests that the rights set out in the US Constitution should be understood in this way. He argues that the language of the rights set out in the Constitution appeals to abstract moral principles, and in doing so, adopts them as limits on the government's power.⁶² The moral reading of the Constitution, he says, requires judges to '*find* the best conception of constitutional moral principles'.⁶³

But not all liberals consider rights to be pre-political constraints whose scope is to be determined in this way. Acknowledging that in a plural society there will be disagreement over rights, Attracta Ingram has suggested that the moral basis of liberal rights ought to lie in some form of collective agreement about how they are to be determined.⁶⁴ This agreement, intended to give political substance to the concept of autonomy, also provides the justification for the coercion that is involved in enforcement of those rights. Where there is disagreement about the scope of a right to privacy – as we might expect there often to be – Ingram would suggest the issue be determined by means of a political decision-making process that conforms to certain norms – the norms of 'rational social discourse'. Those norms require all conceptions of the good be accorded equal respect. Incorporating the Rawlsian principle of public reason, proposals that have a bearing on individual privacy, and which define the boundary between the public and private spheres, should be advanced on the basis of reasons that all could accept. There is much in this account that would appeal to republicans. Ingram suggests that discussion should focus on considerations in respect of which there is common rather than sectional interest, and that those participating in discussion should do so on an equal footing – there should be an absence of any 'external domination, internal hierarchy, or patriarchy'.⁶⁵

⁶² R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (1996: OUP), p.7.

⁶³ *Ibid*, p.11.

⁶⁴ A. Ingram, *A Political Theory of Rights*, (1993: OUP); see also H. T. Engelhardt Jr, 'Privacy and Limited Democracy: The Moral Centrality of Persons', (2000) 17 *Social Philosophy and Policy* 120, who suggests that where no-one can claim to have authoritative knowledge of the good, the right and the just, the moral authority of decisions about the right to privacy from the consent of those who collaborate in the enterprise of living in a society guided by certain principles of justice.

⁶⁵ Ingram, *ibid.*, at p.148.

The right to privacy envisaged by this account would constrain governments and majorities by ensuring decisions affecting individual privacy are the product of a decision-making process that citizens could be expected to agree should be used. Such agreement will be secured because the process comprises a set of ground rules that ensure that decision-making adheres to liberal values of autonomy, equal concern and respect, and state neutrality. It acknowledges that the content and scope of the right will be politically constructed, - the product of a deliberative political decision-making process - and that the legitimacy of decisions about rights will depend on compliance with certain procedural norms. By necessary implication, it would be possible to claim a violation of the right without having to resort to some pre-political notion of freedom. The right would be violated where a claimant has suffered interference at the hands of someone who has exercised power, the conferral of which was the result of a process that did not conform to the prescribed norms of political rationality prescribed.

There are broad similarities in Ingram's approach and that set out here. The idea that rights are politically constructed, that their legitimacy depends on decisions about them having been made in procedures that conform to certain procedural norms, and the implication that when challenged, (political) decisions that determine the content and scope of rights will presumably be subject to some form of procedural review. But despite these similarities, fundamental differences remain. Ingram's political account of rights is contractarian. The background assumption is one of separation between citizens and state. The liberal right-holder is detached from the political institutions which make decisions that will affect her privacy. She exercises control by keeping the state at arms-length. The aim of the republican right to privacy envisaged in this chapter is to enable citizens to exercise control through participation in decisions that will affect their privacy. The attention it pays to the process in which decisions about privacy are made, is driven by a concern that citizens participation needs to be effective - that non-domination depends on their ability to influence the decision-making process. For Ingram, the significance of the procedural norms is that they will produce a decision about privacy that it can be presumed those who are subject to it will accept.

I have suggested so far, that the right to privacy ought to be thought of as a quasi-participatory right to a common and collective good - one that supports and reinforces direct participation by citizens in the legislative process, so that they are able to conceive themselves as co-authors of norms that affect their privacy. This aspect of the right

connects with the idea of political legitimacy, as does the availability of the right as a basis for challenging any action taken by the state or its agents that does not conform to the privacy-norms embedded in laws passed by the legislature. But there is a further aspect of the right that is concerned with social justice.

III. Social Justice and Gaps in Privacy Protection.

The purpose of the right to privacy is to ensure that citizens are able to control over the power that the state exercises when it generates laws that affect their privacy. It does so by securing inclusive and effective participation in the political processes in which this occurs. I have suggested that this process needs to be policed and that this should be done by giving courts power to engage in a form of procedural review. However, it seems to me that the courts will inevitably have a more direct role in determining the content and scope of the right. Even if it is well-resourced, the political process in which the substantive content of the right to privacy is determined will be one of limited capacity and foresight. Those who participate in it, however diligent and well-intentioned, cannot be expected to anticipate, let alone address, the full range of circumstances in which citizens might suffer some form of intrusion. When such circumstances arise, the courts will have a duty - grounded in the idea of social justice - to step in and determine whether the claimant and those similarly placed should be protected by the right to privacy.

We saw in the previous chapter, that in addition to the duties implied by the idea of political legitimacy, the republican ideal of social justice imposes on the state a positive obligation to prevent citizens from dominating one another. It was suggested that it might discharge this duty by protecting privacy through some combination of criminal, private, and regulatory or administrative law. Not all circumstances in which citizens interfere with one another's privacy will be instances of domination. Interference with privacy will be non-dominating where it has been expressly permitted or endorsed in a decision of a norm-generating political institution - provided, of course, that the condition of political legitimacy is satisfied. But what of interference in circumstances that are not within the range of circumstances which have been considered by such institutions? How can citizens hold the state to its obligations in social justice? One way is to conceptualise the right to privacy in a way that enables them to do this.

Where a citizen has suffered interference with privacy at the hands of another, in circumstances that have not been contemplated by the legislature, the right ought to

provide the grounds of a claim that there has been a *prima facie* failure on the part of the state, to discharge the duty that it owes its citizens in social justice. Now a strict political constitutionalist, such as Bellamy, might say that the courts should have no part in determining privacy claims in such circumstances. Were they to provide some form of legal redress, the reasons for doing so would necessarily say something about the nature and scope of the right to privacy. But if we suppose that courts will be able respond more swiftly to citizens' claims that they are suffering domination at the hands of others, than would a legislature, judicial determination of privacy claims will not only be required as a matter of social justice, they will also enjoy political legitimacy – at least temporarily.

If citizens bring to the attention of the state, circumstances in which it is claimed that some are suffering interference with privacy at the hands of others, and are thereby subject to domination, there seems to be little justification for the delay that would result from deferral of any decision (by the courts) to an institution that has better democratic credentials (a legislature). Something like the maxim '(social) justice delayed is (social) justice denied', should apply. The necessity of a judicial intervention in these circumstances invests the court's determination of the question regarding the weight of collective interests in privacy, vis-à-vis the interests served by the interference, with political legitimacy. The state's decisions will be legitimate insofar as they emanate from institutions that are subject to maximal popular control in the prevailing circumstances. If the choice is between judicial determination of a privacy claim - that is, determination of the question of whether there is a right to privacy in the circumstances - and the extant inability of political institutions to offer any determination, the judicial determination will be legitimate. We should note however, that judicial decisions regarding the scope of the right to privacy can only ever be regarded as provisional. The courts' determination of privacy claims ought to rest on an approximation of the weight that would have been attached to privacy and the competing interest or good, had the matter been considered in a democratic political process conforming to relevant norms of communicative rationality. Judicial determination of the content and scope of the right to privacy will remain legitimate only in the absence of any contrary, and presumptively more reliable,

determination of the community's shared interests by a norm-generating political institution.⁶⁶

IV. Conclusion

I have suggested that viewing the right to privacy as an entitlement – or set of entitlements – held in common and claimed behalf of all citizens on the basis of their collective interests, is a distinctively republican way of thinking about the right. At the beginning of the chapter, I posed the following questions. In the context of progressive republican ideas about freedom and collective self-determination, what does it mean to have a right to privacy? In what circumstances, and for what purposes, can it be claimed? The answers that have been provided are derived from the central ideas, aims, and commitments, of a progressive version of republicanism. We have a conception of the right to privacy that serves the ideal of non-domination, and is consistent with, and reinforces, the two ideas explored in Chapters 3 and 4 – political legitimacy and social justice. It serves the ideal of non-domination by securing the holders' – that is all citizens', as holders in common – participation in, and influence over, decisions that affect their privacy. But we have seen that it can also be relied upon to compel the state to discharge the duties that are implied by the republican conception of social justice, requiring it to take steps to prevent citizens suffering domination at the hands of one another.

⁶⁶ The ideas offered here overlap with relatively recent ideas in constitutional theory that position the role of the courts in the middle ground between judicial and political constitutionalism; see T. Hickey, 'The Republican Virtues of the "New Commonwealth Model of Constitutionalism"', (2016) 14 *Icon* 794.

- Conclusion: Privacy as a Republican Value -

We set out with the intention of finding answers to two questions. The first of these was, 'why should republicans value privacy?', or reframed, 'how does privacy serve republican aims?' The second question follows on from the first - 'to the extent that republicans consider privacy to be valuable, how can it be secured in a manner that is consistent with republican ideals of participatory self-government and political equality? In the first chapter, I suggested that we should think of privacy as a concept derived from a set of fundamental values. These values provide us with the foundation of an account of the value of privacy. This thesis comprises an attempt to ground such an account in the core value of republicanism – freedom conceived as the absence of domination.

A simple answer to the first question – why should republicans value privacy? - is that privacy can protect those who have it, from domination. Privacy is valuable because it prevents others from exercising and acquiring power to interfere with our choices on an arbitrary basis, that is to say, according to their preferences rather than ours. Framing privacy harms in terms of alien power, rather than autonomy and dignity, has an intuitive appeal. When we suffer a loss of privacy, the immediate focus of our concern will often be how others might take advantage of the situation. We do not tend to embark on an introspective re-evaluation of the plans that we have made for ourselves, the effect of the loss on the way that we are able to portray ourselves, and changes in the way that others view us. This is not to deny that our thoughts might turn to these issues in due course, or that they are matters that do not demand our attention. But to think about harm in terms of autonomy misses what ought to be a more immediate concern – the power that others acquire when we suffer a loss of privacy. The account that has been provided over the previous chapters is not phenomenological, the aim has not been to explain how we experience loss of privacy. The point is, that our intuitive sense of the harm when we become aware of a loss, directs us towards a relationship that has not previously been fully explored - that between privacy, power, and the threat of domination. Republicanism provide us with a well-developed set of ideas for thinking about the way in which these concepts are connected.

The claim that republicans should value privacy because it shields those who have it from domination, is a rather simplistic expression of what is in fact a complex relationship. The republican account set out in this work began with an illustration of the ways in which loss of privacy might lead to domination of the person who has suffered it. The information that others acquire as a consequence of an interference with our privacy can be used by them, in ways that lead to us being denied opportunities, coerced, or manipulated in our choices. We have seen that the republican conception of freedom, or rather the antithesis of it – domination – enables us to explain why interference with privacy is harmful where the subject of it is unaware of the interference. That harm cannot be adequately explained in terms of the effect of the loss on the autonomy of the subject. It would be possible to explain why privacy is important in terms of the autonomy where leads to some subsequent interference in the subject's affairs. It cannot, however, account for the harm that a person suffers in the absence of such awareness and any subsequent interference. But we would surely want to say that loss of privacy in these circumstances, is problematic. We need not look past the flow of unsolicited emails that arrive in our email accounts from organisations with whom we have no dealings to realise that our personal information is being disseminated without our knowledge. The advertisements that appear on social media sites that we use is further evidence of this practice. But, as media investigations into the use of personal data to influence voter behaviour indicate, it is likely that our privacy is being interfered with to a much greater extent than we realise.¹

Most of us are likely to think that our data should not be used in this way. But I suspect we would want to go further and say that dissemination of it is problematic, and that it remains so even if we are unaware that it is being shared. We are unlikely to be moved from this view by the fact that those who have come into possession of it have – so far – declined to use it to manipulate us or otherwise interfere in our affairs. The mere fact that someone acquires the capacity to do this as a consequence of interference with

¹ For example, in the wake of the US Presidential Election and the UK Referendum on Leaving the European Union it was revealed that Cambridge Analytica had harvested the personal data of 50 million Facebook users without their consent. These were used to develop software to predict and influence voting choices. Those programmes were utilised to target voters, in both elections, with opaque political advertising, designed to appeal to their prejudices and exploit their anxieties. Although Facebook was aware of the data breach, it seems it took no steps to inform users of what had occurred: 'Revealed: 50 million Facebook harvested for Cambridge Analytica in major data breach, The Guardian, 8 March 2018, <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

our privacy, leaves us worse off than we were prior to the interference. Accounts of privacy that ground its value on the idea that it is a pre-requisite for autonomy offer no explanation as to why privacy is valuable in such circumstances. The same cannot be said of an account grounded on the republican conception of freedom. This enables us to say that we are worse off in this situation – one in which we are not aware that we have suffered a loss of privacy – because the person who has possession of the data has also acquired power to interfere with our choices. Even if he does not want to use it for such purposes, our freedom to choose is contingent on him not having a change of heart. The loss of privacy results in him acquiring arbitrary power, and though we may not realise it, leaves us subject to domination.

We have seen that there is more to the relationship between privacy and domination. Closer examination of the way in which privacy, power and domination are related revealed that the relationship was not as one-dimensional as might have been suggested by these initial observations. The drawing of the boundary between the public and private spheres - decisions made in political institutions about the circumstances in which privacy will be protected or respected, and those in which it will be sacrificed in pursuit of some other interest or good - constitutes an exercise of power. In more concrete terms, power is exercised when those institutions establish a system of laws that have a bearing on citizens' privacy. Those laws might, among other things, confer intrusive powers on the police, require government departments to collect information from citizens with whom they come into contact, facilitate the sharing of data across various arms of government, and criminalise certain forms of consensual activity, the provision of abortion services, the sale of contraception, and so. Each of these laws confers power to interfere with citizens' privacy. In the case of criminalisation of consensual activity and the prohibition of abortion, the law itself constitutes an interference with decisional privacy. In each case, the law is an embodiment of power that if not under the control of those who are subject to it – the community at large – will be dominating.

But we noted that the problem of domination that arises where there is interference with privacy is not one found exclusively in the relationship between citizens and the institutions, agencies and agents of the state. Citizens might interfere with one another's privacy in ways that manifest dominating power, and such

interference may well result in others acquiring this form of power. Domination is an inherent feature of social relationships that possess certain characteristics – an imbalance of social power, and dependence on the part of those who possess less of it. Those who have more power are likely to have the capacity to interfere with privacy at will. The privacy of those who are relatively powerless is correspondingly vulnerable. But these relationships do not exist in circumstances of isolation. They form part of a broader social environment, the circumstances of which will affect the balance of power in the relationship, and the risk that is posed to the privacy of the more vulnerable. We noted that the state is an omnipotent presence in this landscape, possessing greater power than any party to a relationship of domination. It is able to reduce both the risk of interference and the threat of domination. It can do this by imposing psychological constraints on the more powerful, threatening to impose sanctions for interference with privacy - that threat being issued through the criminal law. But providing the weaker party with resources – the provision of social housing, a basic income, and so on – will also secure greater privacy for recipients, the provision of social housing making them less accessible to others, for example.

Our thinking about privacy and domination has then, encompassed two broad forms of relationship. The relationships that we form with other individuals in our private lives, and the relationship that we have with the state *qua* citizen. We have said that the state has duties in respect of both of these relationships. One is to prevent citizens from dominating one another. The other, to ensure that in exercising power that has a bearing on its citizens' privacy, it does not itself become an agent of domination. These duties are derived, respectively, from republican conceptions of social justice and political legitimacy.

The short answer to the first question – why should republicans value privacy? – we have said, is that it protects those who have it from domination. This led us to the second question - 'to the extent that republicans consider privacy to be valuable, how can it be secured in a manner that is consistent with republican ideals of participatory self-government and political equality?' We endorsed the conception of domination provided by Pettit: A person 'A' will be dominated in her choices, insofar as another person 'B' has power to interfere in A's choices on an arbitrary basis. Critically, the power that B has, will be non-arbitrary and non-dominating, to the extent that it is

controlled by A, and/or is exercised in a pattern that has been determined by A. Various implications flow from this. First, if the interference with privacy has been sanctioned by A, it will not constitute an exercise of dominating power. But if we think about the problem of citizens dominating one another, we noted that domination occurs in social relationships in which there is an imbalance in social power, and some degree of dependency. We said that in such circumstances, the state has a duty to intervene to prevent domination and protect the privacy of the vulnerable party. But as others have pointed out, this seems to be inconsistent with some conceptions of republican freedom.² According to the conception that we have endorsed, the power to interfere in a person's choices will be non-dominating only insofar as it is controlled by that person. If the privacy (and freedom) of the weaker party to a social relationship is dependent on the intervention of the state, the power possessed by the other party is not under her control. The claim is that she is dependent on the state – 'on others' – for her privacy. If she does not exercise control over the power of the state, its intervention – despite its benevolent intentions – also constitutes an exercise of dominating power.

This claim might present more or less of a challenge for differing versions of republicanism, depending on the role that they envisage citizens will play in the process of generating the laws through which the state will discharge its duty to ensure that citizens do not suffer domination as a consequence of loss of privacy. It is less of a challenge for a progressive form of republicanism. The reason lies in what we have said about the duty imposed by the republican conception of political legitimacy, and what will be required to discharge that duty. We observed that the idea of political legitimacy is concerned with the possibility that, in the exercise of its power, the state might come to dominate its citizens. The power it exercises when it generates norms that affect citizens' privacy, and any intrusive powers it confers on its agents, will be legitimate if they are the products of a political process that offers citizens the greatest degree of control over the content and scope of those norms.

Progressive republicanism's commitment to citizen's direct participation is premised on the belief that it is the only means through which citizens can secure a degree of privacy that is consistent with the idea of non-domination. Citizens need to be seen, as to see themselves, as co-authors of the laws that will determine the

² See, T. Simpson, 'The Impossibility of Republican Freedom', (2017) 45 *Philosophy and Public Affairs* 27.

circumstances in which privacy will be afforded protection and those in which it will be subordinated to competing interests and goods. This requires broad participation in the political processes in which the content and scope of those laws are enacted, and that the participation of those most likely to be affected is essential to their legitimacy. In respect of the decision-making process that is used, I argued that this needs to conform to a certain conception of rationality – communicative rationality. The collective control that citizens exercise over decisions that affect their privacy, is effected through participation in a decision-making process that is designed to produce reliable knowledge about where their collective interest in privacy lies in any given circumstances, and to generate norms that reflect that understanding. If it can plausibly be said that citizens are co-producers of this knowledge and co-authors of generally applicable privacy-related norms, then it can also be said that any intervention by the state to protect privacy and prevent domination that might occur in social relationships, is an intervention on terms collectively determined by the parties to those relationships.

Progressive republicanism will place more demands on citizens than would be placed on liberal citizens. Securing conditions of freedom – and privacy – requires broad participation in political life. But the aim of these demands is to secure conditions that will enable them to conceive and pursue their own conceptions of the good life. In this respect, privacy will be considered a common good. But, as we have noted, personal and political autonomy are related. Development of a fulfilling personal life is a necessary foundation for effective political participation. The person who has fulfilling intimate relationships, a stable home life, and is satisfied with the progress that she has made in the projects that she has set herself, is likely to be far better placed to engage in political life than the frustrated and dispirited individual who is labouring over the question of what kind of person they want to be and what kind of (private) life they want to lead.

I have described privacy at various points of these thesis, to be a pervasive, collective and reflexive good, for the following reasons. Personal and political autonomy ought to be thought of as mutually supportive and sustaining conditions, and privacy is a necessary condition for the cultivation of both. Its value in promoting political autonomy cannot be considered independently of its value in providing conditions of non-domination that are a pre-requisite for personal autonomy, and *vice versa*. Privacy is a necessary condition for the democratic participation through which republican

citizens are able to secure the conditions of freedom that enable them to lead non-dominated (and non-dominating) self-determined lives. But privacy will also be an aspect of that freedom. Citizens who cannot be assured of any privacy cannot lead non-dominated lives. Privacy ought to be considered a collective good, in that the possibility of securing conditions of freedom rest on the broadest possible participation in the generation of norms. Put differently, a guarantee of privacy for any citizen depends on a guarantee of privacy for all, individual privacy being a necessary condition of effective participation in the process of norm generation. The idea of privacy as a reflexive good is an allusion to the circularity in this account of the value of privacy.

I should make one final observation in passing. I have described a set of institutional and procedural arrangements that will enable us, as members of a self-governing polity, to determine the circumstances in which our privacy should be protected or sacrificed in pursuit of other goods. But more will be needed. As I suggested in Chapter 2, their effectiveness will depend on the cultivation of certain dispositions and attributes in citizens. It will not be enough to provide broad opportunities for participation if citizens do not understand or recognise that their freedom depends on such participation. The value of privacy ought to be something that is addressed in the curriculum of a republican civic education. Citizens need to be aware of the role that privacy plays in deliberative democracy, through which a resilient form of freedom is secured. They will need to appreciate their interdependence, that conditions of freedom and privacy can only be secured through broad participation in the norm-generating processes of government, and that such participation requires everyone to have a certain degree of privacy. The aim of this programme of education ought to be inculcation of certain civic virtues. Beyond participation in political life, these virtues include a sense of solidarity with others, manifested among other ways, in concern and respect for others' privacy, such concern being shared equally by citizens and corporations. Much more could be said about these matters. My hope is that they will be explored as part of an enlarged account of privacy and republican aims, one that develops the work undertaken in the previous chapters, and considers the implications of the broad ideas that have been advanced in a wide range of circumstances.

It seems to me that the ideas presented in this thesis provide us with a new way of thinking about the value of privacy and how, together, we might be able to secure it.

It requires us to shift our perspective, and to think more seriously about the relationship between privacy and power – the threat to our privacy posed by those who have power, and what form our collective response to that threat should take. It seems to me that we need institutions and arrangements that provide us with more effective control over laws, policies and decisions that affect our privacy. The prospects of this will be greatest in a political community shaped by the values of progressive republicanism.

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Summary

This thesis develops a republican theory of privacy. It does so by addressing two questions. The first is ‘why should republicans value privacy?’ or, put differently; ‘how does privacy serve republican aims?’ The second is ‘to the extent that republicans consider privacy to be valuable, how can it be secured in a manner that is consistent with republican ideals of participatory self-government and political equality.’

As a prelude to engagement with these questions, the first chapter, ‘**Privacy and Political Theory**’, is concerned with methodology. Here a distinction is drawn between ‘top-down’ or deductive reasoning about privacy on the one hand, and ‘bottom-up’ or inductive reasoning on the other, arguing that we are more likely to arrive at a coherent understanding of privacy by engaging in the former. Those who believe privacy to be so elusive a concept that it defies satisfactory definition will be inclined to believe that we should adopt a bottom-up or inductive approach in our attempts to make sense of it. On this approach, privacy is not a concept that derives coherence from any higher order or overarching set of values. Rather, it is a concept that is simply defined by those circumstances that we deal with under the rubric of privacy, and we can impose some sort of conceptual order by creating taxonomies of privacy interests.

But this approach is unsatisfactory. It makes sense only if we blind ourselves to the way in which privacy claims are determined. Where a claimant relies on her right to privacy in order to resist some form of privacy-invading measure or conduct, she is asserting that the interests served by privacy ought to be prioritized over those that are served by the privacy-interfering conduct. As soon as privacy becomes the subject of this form of disagreement it is located in the realm of politics. The question of priority can be resolved - at least in any rational way - only by recourse to more general moral-political values or beliefs that indicate what weight ought to be attached to the competing interests. Once this has been accepted, finding a consensus or even broad agreement on the value and definition of privacy might be seen as less of an imperative. The terms in which privacy are defined, and ideas about its value, will stand or fall with the moral-political theory that has shaped it.

The remaining chapters of the thesis are devoted to the development a republican account of privacy. The **second chapter – ‘Privacy and Non-Domination’** – presents the kernel of the thesis; that privacy should be considered by republicans to be a pervasive good, essential to protecting individuals from domination, and a prerequisite for participation in the political process through which citizens can secure for themselves resilient conditions of freedom. It provides a preliminary response to both of the questions set out at the beginning of this summary; ‘why should republicans value privacy?’ and ‘insofar as it is considered valuable, how can it be secured by citizens in a way that is consistent with republican ideals of self-government and political equality?’ The chapters that follow this one, strip away and examine in greater detail, ideas that are presented in holistic fashion here. The reason I take this approach rather than developing the account sequentially across a number of chapters, is that that these questions are interrelated.

The first step in the argument is the claim that privacy is valuable because it protects those who have it from domination. I endorse the terms in which Philip Pettit has (most recently) defined domination; that is, a person will be dominated in his choices insofar as another has a power to interfere, which the person does not himself control. I describe how loss of privacy might facilitate various modes of interference with a person’s choices. The second step involves the claim that citizens can only secure a degree of privacy that is consistent with equal non-dominated status through participation in the political processes in which norms that have a bearing on their privacy will be generated. But I suggest that effective participation in those processes also depends on a guarantee of privacy for individuals and groups, both in their private and public (political) lives. For republicans, conditions of privacy will be both a product of, and a pre-condition for, the kind of well-functioning political process that will enable citizens to secure conditions of freedom as non-domination. There is, then, a certain circularity to the account that is presented. In considering the value of privacy we are brought back to the idea that privacy is a necessary condition for efforts to secure it. This perspective is one that that can be conveyed with greater clarity and cohesion if presented in one chapter rather than in fragmented fashion across several chapters.

Chapter 2 touches upon two aspects of the relationship between privacy and power. Interference with privacy might itself constitute an exercise of dominating power, and the loss of privacy may lead to the acquisition of dominating power by the

interferer, and possibly, others. But interference with an individual's privacy, and subsequent acquisition of personal information by the interferer and others, will expose the individual to domination, only where he or she exercises no control over those actions. But how can an appropriate degree of control be achieved? This question is addressed over the course of the next two chapters.

The first of these, **Chapter 3 – *Privacy and Social Justice*** – considers the state's duty to ensure that citizens do not suffer domination at the hands of one another. To the extent that a loss of privacy involves the exercise of dominating power, or leads to others acquiring such power, the state will be required to afford it protection, primarily through the promulgation of a range of privacy-protecting legal norms, and the recognition of a fundamental right to privacy. This obligation can be grounded in the republican conception of social justice. In common with most other theories of justice, we might expect freedom and equality to be the subjects of a republican theory of justice. But what will mark it as a distinctively republican theory is the way in which freedom and equality are to be understood – as characteristically republican concepts. Such a theory, Pettit suggests, ought to take freedom as non-domination as its subject – “the good with respect to which the state is required in justice to treat its citizens as equals.” The principle of social justice requires the state to impose an order that will minimize the domination that citizens suffer at the hands of one another. To aid our understanding of how it might do so, this chapter provides some elaboration of the concept of domination. We need to recognize that power resides in social structures, and that domination occurs where there is inequality of social power, so that one person or group is dependent on the good will or benevolence of another. A commitment to social justice requires the state to do something about these inequalities, to provide resources and some form of protection.

A republican theory of justice will, of course, bear on a range of issues, including many that are rather peripheral for our purposes. The principles of social justice will inform law and policies on the provision of education and welfare support, and a system of taxation, for example. But our interest is in privacy. The examples provided in Chapter 2 demonstrate how loss of privacy can leave an individual vulnerable to domination by fellow citizens and corporate bodies. We might, therefore, expect a republican theory of

justice concerned with freedom and equality, to have something to say about citizens' privacy.

Securing citizens' status as free persons – persons who have the freedom to make choices that are not conditioned by the preferences and desires of others – is likely to require the state to provide some citizens with a level of resources sufficient to free them from dependence on the good will of others. But in addition to this, the state will have to ensure that certain choices are subject to special protection, such choices constituting a set of 'basic liberties.' The relevant choices will be those in respect of which we would say that the existence of an uncontrolled power to interfere with them would leave those subject to the power, at the mercy of those who possess it – unable to make choices without regard to the will of the other. I claim both in light of this, and on the basis of the claims about the value of privacy made in chapter 2, that privacy should be regarded as one of the basic liberties recognized as part of a republican conception of social justice, and enshrined in a constitutional bill of rights.

Once privacy is recognized as one of the basic liberties implied by the idea of social justice, the question that follows is 'what are the obligations of the state?' Presumably, it will be required to ensure that citizens enjoy a degree of privacy that is consistent with the idea of citizens being free and equal persons, that is to say not subject to domination or living in a state of dependence. This leads on to consideration of the forms of legal norms through which the necessary degree of privacy might be secured – principally, criminal law, private law, and regulation.

The idea of social justice provides a normative framework for discussion of the state's duty to take steps to protect the privacy of citizens in circumstances in which a loss of, or interference with, privacy involves the exercise or acquisition of dominating power. But in discharging those duties, there is a risk that the state itself will become a dominating agent; that citizens will come to be dominated by the state (or perhaps, more accurately, groups that wield *de facto* political power). It is here that we come up against the issue that is a source of particular concern for some of those who have written about privacy and power. The manifestation of power we are concerned with in this context is the political power to determine whether, in given circumstances, interests in privacy ought to be privileged over, or subordinated to, some other interest? The power to decide where the boundary between the public and private spheres will

be drawn – to determine, in effect, whose privacy will be afforded protection by the state, and whose will not. These issues are addressed in **Chapter 4 – Democratising Privacy**.

The aim in this chapter, is to identify a set of institutional and procedural arrangements that will enable citizens to exercise a degree of control consistent with the idea of freedom as non-domination, in respect of the power the state exercises when it makes decisions that have a bearing on their privacy. It will be necessary for the state to provide and promote meaningful opportunities for citizens to participate directly in the processes in which those decisions are made. The foundation of the state's duties in this respect is the republican conception of political legitimacy. The power that is exercised when the institutions of government make decisions that affect citizens' privacy will be legitimate only to the extent that it is subject to popular control. Where there is a range of feasible institutional designs and procedural arrangements, the idea of political legitimacy requires the adoption of those that can be expected to minimise domination. In other words, in the context with which we are concerned, the idea of political legitimacy requires institutional and procedural arrangements that provide citizens with the greatest degree of control over decisions that affect their privacy. The argument is that the legitimacy of such decisions depends on citizens ex ante participation in the decision-making process, and that decision-making needs to be deliberative. I argue that the aim of deliberation ought to be the construction of knowledge regarding the political community's shared interest in privacy, and that this knowledge ought to be the basis of decisions that affect citizens' privacy. I suggest that the construction of reliable knowledge requires a decision-making process that conforms to norms of communicative rationality. These norms require, among other things, a commitment to broad participation in the decision-making process, and to securing the participation of those who are most likely to be affected by the privacy issues that are under consideration.

The plausibility of the claim that these arrangements will enable citizens to exercise control over those with de facto power to determine the boundary between private and public spheres is likely to depend on the existence of some form of effective oversight of the process. This is one of the issues taken up in **Chapter 5 – A Republican Right to Privacy**. Having argued in the previous chapter that the content of a right to privacy, and the extent of privacy-related legal norms, ought to be determined by

citizens by means of participation in well-functioning deliberative processes, in this chapter I consider two questions. The first is, 'what is the function of a right to privacy?', that is to say, 'in what circumstances can it be claimed; to what does it entitle the right-holder?' The second question follows on from the first – 'what is the role of a constitutional court?' On what grounds can a claim based on the right to privacy succeed?

A republican right to privacy needs to be conceived in a way that is consistent with, and supports the aims of, a republican conception of a just society. In broad terms, its function will be to secure conditions of non-domination. We have already seen that republicanism is not a monolithic body of political thought. There are a number of versions of it, and although almost all of these take as their core value, freedom as non-domination, ideas about the role that citizens ought to play in securing it differ significantly. The way in which the right is conceived will be shaped by these ideas, and although there will be points of convergence, we should expect to find differing republican conceptions of the right to privacy. While I touch on this matter, my aim in Chapter 5 is to develop an account of the right to privacy that is consistent with the essential characteristics of a progressive form of republicanism; commitment to freedom as non-domination, substantive political equality, direct democracy, and civic solidarity.

In light of these values, I argue that the right to privacy ought to be viewed as an entitlement – or set of entitlements - held in common and claimed behalf of all citizens on the basis of their collective interests. Where it is claimed, it is not on the basis that the claimant's individual interests should prevail over some common good. Rather, it is a claim that a particular interference with privacy constitutes an exercise of dominating power; power over which those who are, or might be, subject to it – citizens generally – do not exercise a degree of control that is not consistent with the idea of freedom as non-domination. It serves the ideal of non-domination by securing for its holders' participation in, and influence over, decisions made by the institutions of the state that affect their privacy. But we will also see that it can be relied upon to compel the state to discharge the duties that are implied by the republican conception of social justice, requiring it to take steps to prevent citizens suffering domination at the hands of one another.

The **Conclusion – Privacy as a Republican Value** - draws together the analysis in the preceding chapters, providing a birds-eye view of the ground that has been covered and offering some concluding thoughts on the value of thinking about the relationship between privacy, power, and domination

Privacy in de Republiek

Samenvatting

Dit proefschrift ontwikkelt een republikeinse privacytheorie. Dit gebeurt door twee vragen te beantwoorden. De eerste is 'waarom zouden republikeinen privacy moeten waarderen?' of anders gezegd; 'hoe dient privacy republikeinse doelen?' De tweede is 'voor zover republikeinen privacy als waardevol beschouwen, hoe kan deze worden gewaarborgd op een manier die consistent is met republikeinse idealen van participierend zelfbestuur en politieke gelijkheid.

Als inleiding op de betrokkenheid bij deze vragen gaat het eerste hoofdstuk, '**Privacy en politieke theorie**', in op methodologie. Hier wordt een onderscheid gemaakt tussen 'top-down' of deductieve redenering aan de ene kant en 'bottom-up' of inductieve redenering aan de andere kant, argumenterend dat we eerder tot een coherent begrip van privacy komen door het toepassen van de 'top-down'-redenering. Degenen die geloven dat privacy zo'n ongrijpbaar concept is dat het een bevredigende definitie tart, zullen geneigd zijn te geloven dat we een bottom-up of inductieve benadering moeten gebruiken in onze pogingen om er iets van te kunnen begrijpen. In deze benadering is privacy geen concept dat coherentie ontleent aan een hogere orde of overkoepelende reeks waarden. Het is eerder een concept dat eenvoudig wordt bepaald door de omstandigheden waarmee we te maken hebben onder de noemer privacy, en we kunnen een soort conceptuele volgorde opleggen door taxonomieën van privacybelangen te creëren.

Maar deze benadering is onbevredigend. Het is alleen zinvol als we ons blind maken voor de manier waarop privacyclaims worden bepaald. Wanneer een eiser een beroep doet op haar recht op privacy om zich te verzetten tegen een of andere vorm van inbreuk op de privacy, beweert zij dat de belangen die door privacy worden gediend, prioriteit moeten hebben boven die welke worden gediend door het privacy-inbreukmakende gedrag. Zodra privacy het onderwerp van deze vorm van onenigheid wordt, bevindt het zich in de politiek. De kwestie van prioriteit kan worden opgelost - althans op elke rationele manier - alleen door gebruik te maken van meer algemene

moreel-politieke waarden of overtuigingen die aangeven welk gewicht aan de concurrerende belangen moet worden gehecht. Als dit eenmaal is geaccepteerd, kan het vinden van een consensus of zelfs brede overeenstemming over de waarde en definitie van privacy als minder noodzakelijk worden beschouwd. De termen waarin privacy wordt gedefinieerd en ideeën over de waarde ervan, staan of vallen met de moreel-politieke theorie die haar heeft gevormd.

De resterende hoofdstukken van het proefschrift zijn gewijd aan de ontwikkeling van een republikeins verslag van privacy. Het **tweede hoofdstuk - 'Privacy en niet-overheersing'** - presenteert de kern van het proefschrift; dat republikeinen privacy moeten beschouwen als een doordringend goed, essentieel voor het beschermen van individuen tegen overheersing, en een voorwaarde voor deelname aan het politieke proces waardoor burgers voor zichzelf veerkrachtige voorwaarden voor vrijheid kunnen waarborgen. Het geeft een voorlopig antwoord op beide vragen die aan het begin van deze samenvatting zijn gesteld; 'waarom zouden republikeinen privacy waarderen?' en 'voor zover het als waardevol wordt beschouwd, hoe kan het door burgers worden gewaarborgd op een manier die consistent is met republikeinse idealen van zelfbestuur en politieke gelijkheid?' De hoofdstukken die hier op volgen, ontbloten en onderzoeken de ideeën die hier holistisch worden gepresenteerd met meer detail. De reden dat ik deze benadering gebruik in plaats van de uiteenzetting opeenvolgend in een aantal hoofdstukken te ontwikkelen, is dat deze vragen met elkaar samenhangen.

De eerste stap in het argument is de claim dat privacy waardevol is omdat het degenen die het hebben beschermt tegen overheersing. Ik onderschrijf de termen waarin Philip Pettit (meest recent) overheersing heeft gedefinieerd; dat wil zeggen, een persoon zal worden gedomineerd in zijn keuzes voor zover een ander de macht heeft om in te grijpen, die de persoon zelf niet beheerst. Ik beschrijf hoe het verlies van privacy verschillende manieren van interferentie met de keuzes van een persoon zou kunnen voortbrengen. De tweede stap betreft de bewering dat burgers alleen een mate van privacy kunnen waarborgen die consistent is met een gelijke niet-gedomineerde status door deelname aan de politieke processen waarin normen worden gegenereerd die van invloed zijn op hun privacy. Maar ik stel voor dat effectieve deelname aan die processen ook afhankelijk is van een garantie van privacy voor individuen en groepen, zowel in hun privé- als openbare (politieke) leven. Voor republikeinen zullen privacyvoorwaarden zowel een product zijn als een voorwaarde voor het soort goed

functionerende politiek proces dat burgers in staat zal stellen om voorwaarden voor vrijheid als niet-overheersing te waarborgen. Er is dan een zekere circulariteit in de gepresenteerde uiteenzetting. Bij het overwegen van de waarde van privacy worden we teruggebracht naar het idee dat privacy een noodzakelijke voorwaarde is voor inspanningen om deze te beveiligen. Dit perspectief is er een dat met meer duidelijkheid en samenhang kan worden overgebracht als het in één hoofdstuk wordt gepresenteerd in plaats van op een gefragmenteerde manier in verschillende hoofdstukken.

Hoofdstuk 2 gaat in op twee aspecten van de relatie tussen privacy en macht. Inbreuk op privacy kan zelf een oefening van dominante macht vormen, en het verlies van privacy kan leiden tot het verkrijgen van dominante macht door de interferant, en mogelijk anderen. Maar inmenging in de privacy van een individu en de daaropvolgende verwerving van persoonlijke informatie door de interferant en anderen, zal de persoon aan dominantie blootstellen, alleen wanneer hij of zij geen controle over die acties uitoefent. Maar hoe kan een passende mate van controle worden bereikt? Deze vraag wordt behandeld in de loop van de volgende twee hoofdstukken.

De eerste daarvan, **hoofdstuk 3 - Privacy en sociale rechtvaardigheid** - gaat in op de plicht van de staat om ervoor te zorgen dat burgers geen overheersing ondervinden door toedoen van elkaar. In de mate dat een verlies van privacy de uitoefening van dominante macht inhoudt, of ertoe leidt dat anderen die macht verwerven, zal de staat deze moeten beschermen, voornamelijk door de verspreiding van een reeks privacybeschermende wettelijke normen en de erkenning van een fundamenteel recht op privacy. Deze verplichting kan worden gebaseerd op de republikeinse opvatting van sociale rechtvaardigheid. Net als de meeste andere rechtstheorieën, kunnen we verwachten dat vrijheid en gelijkheid het onderwerp zijn van een republikeinse rechtstheorie. Maar wat het zal markeren als een onderscheidende republikeinse theorie, is de manier waarop vrijheid en gelijkheid moeten worden begrepen - als karakteristieke republikeinse concepten. Een dergelijke theorie, suggereert Pettit, zou vrijheid als niet-overheersing als onderwerp moeten beschouwen - "het goede met betrekking waartoe de staat in gerechtigheid verplicht is zijn burgers als gelijken te behandelen". Het principe van sociale rechtvaardigheid vereist dat de staat een bevel oplegt dat de overheersing die burgers door toedoen van anderen ondervinden zal minimaliseren. Om ons te helpen begrijpen hoe het dit zou kunnen doen, biedt dit hoofdstuk enige uitwerking van het concept van overheersing.

We moeten erkennen dat macht in sociale structuren zit, en dat overheersing optreedt waar er ongelijkheid is in sociale macht, zodat de ene persoon of groep afhankelijk is van de goede wil of welwillendheid van de ander. Een verplichting voor sociale rechtvaardigheid vereist dat de staat iets doet aan deze ongelijkheden, door middelen en een vorm van bescherming te verschaffen.

Een republikeinse rechtvaardigheidstheorie zal natuurlijk van invloed zijn op een aantal kwesties, waaronder vele die voor onze doeleinden nogal perifeer zijn. De principes van sociale rechtvaardigheid zullen de wet en het beleid informeren over bijvoorbeeld het verstrekken van onderwijs en welzijnssteun, en een belastingstelsel. Maar onze interesse ligt bij privacy. De voorbeelden in hoofdstuk 2 laten zien hoe verlies van privacy een individu kwetsbaar kan maken voor overheersing door medeburgers en bedrijfsorganen. We kunnen daarom verwachten dat een republikeinse rechtstheorie die zich bezighoudt met vrijheid en gelijkheid iets te zeggen heeft over de privacy van burgers.

Het veiligstellen van de status van burgers als vrije personen - personen die de vrijheid hebben om keuzes te maken die niet afhankelijk zijn van de voorkeuren en verlangens van anderen - zal waarschijnlijk van de staat vereisen dat sommige burgers voldoende middelen ter beschikking worden gesteld om hen te vrijwaren van afhankelijkheid van de goede wil van anderen. Maar daarnaast moet de staat ervoor zorgen dat bepaalde keuzes speciale bescherming genieten, welke keuzes een reeks 'fundamentele vrijheden' vormen. De relevante keuzes zijn die waarover we zouden zeggen dat het bestaan van een ongecontroleerde macht om zich ermee te bemoeien, degenen die onderworpen zijn aan de macht zou overlaten aan de genade van degenen die het bezitten - niet in staat zijn om keuzes te maken zonder rekening te houden met de wil van het andere. Mijn bewering is zowel hierop gebaseerd, als op de beweringen over de waarde van privacy in hoofdstuk 2, dat privacy moet worden beschouwd als een van de fundamentele vrijheden die worden erkend als onderdeel van een republikeins concept van sociale rechtvaardigheid, en verankerd moet zijn in een grondwettelijke statuut van rechten en vrijheden.

Als privacy eenmaal is erkend als een van de fundamentele vrijheden die het idee van sociale rechtvaardigheid impliceert, is de vraag die volgt: 'wat zijn de verplichtingen van de staat?' Vermoedelijk zal het nodig zijn om ervoor te zorgen dat burgers een mate

van privacy genieten die consistent is met het idee dat burgers vrije en gelijke personen zijn, dat wil zeggen niet onderworpen aan overheersing of het leven in een staat van afhankelijkheid. Dit leidt tot het overwegen van de vormen van wettelijke normen waardoor de noodzakelijke mate van privacy kan worden gewaarborgd - principieel, strafrechtelijk, privaatrechtelijk en in de regulatie.

Het idee van sociale rechtvaardigheid biedt een normatief kader voor de bespreking van de plicht van de staat om stappen te ondernemen om de privacy van burgers te beschermen in omstandigheden waarin verlies van, of inmenging in privacy de uitoefening of verkrijging van dominante macht inhoudt. Maar bij het vervullen van die plichten bestaat het risico dat de staat zelf een dominante partij wordt; dat burgers gedomineerd zullen worden door de staat (of misschien, beter gezegd, groepen die *de facto* politieke macht hebben). Hier stuiten we op de kwestie die zorgen voortbrengt voor sommige mensen die over privacy en macht hebben geschreven. De manifestatie van macht waar we ons in dit verband mee bezighouden, is de politieke macht om te bepalen of, onder bepaalde omstandigheden, belangen in privacy moeten worden geprivilegieerd over, of ondergeschikt aan, een ander belang? De bevoegdheid om te beslissen waar de grens tussen het publieke en het private domein wordt getrokken - om in feite te bepalen wiens privacy door de staat wordt beschermd en wiens wil niet. Deze kwesties worden behandeld in **hoofdstuk 4 - Democratisering van privacy**.

Het doel in dit hoofdstuk is om een reeks institutionele en procedurele regelingen te identificeren die burgers in staat zullen stellen een mate van controle uit te oefenen die consistent is met het idee van vrijheid als niet-overheersing, met betrekking tot de macht die de staat uitoefent wanneer het beslissingen neemt die invloed hebben op hun privacy. Het zal noodzakelijk zijn dat de staat burgers zinvolle kansen biedt en bevordert om rechtstreeks deel te nemen aan de processen waarin die beslissingen worden genomen. Het fundament van de plichten van de staat in dit opzicht is de republikeinse opvatting van politieke legitimiteit. De macht die wordt uitgeoefend wanneer de overheidsinstanties beslissingen nemen die de privacy van burgers aantasten, is alleen legitiem voor zover deze onderworpen is aan controle door het volk. Waar er een reeks haalbare institutionele ontwerpen en procedurele regelingen is, vereist het idee van politieke legitimiteit dat diegene worden aangenomen waarvan verwacht wordt dat deze de dominantie minimaliseren. Met andere woorden, in de context waar wij ons zorgen over maken, vereist het idee van politieke legitimiteit

institutionele en procedurele regelingen die burgers de meeste controle bieden over beslissingen die van invloed zijn op hun privacy. Het argument is dat de legitimiteit van dergelijke beslissingen afhangt van de voorafgaande deelname van burgers aan het besluitvormingsproces en dat besluitvorming weloverwogen moet zijn. Ik beargumenteer dat het doel van beraadslaging de opbouw moet zijn van kennis over het gedeelde belang van de politieke gemeenschap in privacy, en dat deze kennis de basis moet zijn voor beslissingen die de privacy van burgers beïnvloeden. Ik stel voor dat de constructie van betrouwbare kennis een besluitvormingsproces vereist dat voldoet aan normen voor communicatieve rationaliteit. Deze normen vereisen onder andere een verbintenis tot brede participatie in het besluitvormingsproces en om de participatie te verzekeren van degenen die het meest waarschijnlijk worden getroffen door de privacykwesties die worden overwogen.

De aannemelijkheid van de bewering dat deze regelingen burgers in staat zullen stellen controle uit te oefenen over degenen die de feitelijke macht hebben om de grens tussen privé- en publieke sferen te bepalen, is waarschijnlijk afhankelijk van het bestaan van een vorm van effectief toezicht op het proces. Dit is een van de kwesties die zijn behandeld in **hoofdstuk 5 - Een republikeins recht op privacy**. Na in het vorige hoofdstuk te hebben betoogd dat de inhoud van een recht op privacy en de omvang van privacygerelateerde wettelijke normen door burgers moeten worden bepaald door middel van deelname aan goed functionerende deliberatieve processen, overweeg ik in dit hoofdstuk twee vragen. De eerste is, 'wat is de functie van een recht op privacy?', Dat wil zeggen 'in welke omstandigheden kan dit worden geclaimd; waarop geeft het de rechthebbende recht?' De tweede vraag volgt op de eerste: 'wat is de rol van een hoog Gerechtshof?' Op welke gronden kan een claim op basis van privacy slagen?

Een republikeins recht op privacy moet worden opgevat op een manier die consistent is met, en de doelstellingen ondersteunt van een republikeins concept van een rechtvaardige samenleving. In grote lijnen zal haar functie zijn om voorwaarden voor niet-overheersing te waarborgen. We hebben al gezien dat het republikeinisme geen monolithisch geheel van politiek denken is. Er zijn hier een aantal versies van, en hoewel deze bijna allemaal een kernwaarde van vrijheid als niet-overheersing hebben, verschillen de ideeën over de rol die burgers zouden moeten spelen bij het veiligstellen ervan aanzienlijk. De manier waarop het recht wordt opgevat zal worden gevormd door deze ideeën, en hoewel er punten van convergentie zullen zijn, zouden we verschillende

republikeinse opvattingen over het recht op privacy kunnen verwachten. Hoewel ik deze kwestie aansnijdt, is mijn doel in hoofdstuk 5 om een beschrijving van het recht op privacy te ontwikkelen die consistent is met de essentiële kenmerken van een progressieve vorm van republikeinisme; inzet voor vrijheid als niet-overheersing, inhoudelijke politieke gelijkheid, directe democratie en maatschappelijke solidariteit.

In het licht van deze waarden, betoog ik dat het recht op privacy moet worden beschouwd als een recht - of een reeks rechten - dat gemeenschappelijk en opgeëist is voor alle burgers op basis van hun collectieve belangen. Waar het wordt geëist, is het niet op basis van het feit dat de individuele belangen van de eiser prevaleren boven een gemeenschappelijk belang. Het is eerder een bewering dat een bepaalde inmenging in privacy een uitoefening van overheersende macht vormt; macht waarover degenen die eraan onderworpen zijn of zouden kunnen zijn - burgers in het algemeen - geen mate van controle uitoefenen die niet consistent is met het idee van vrijheid als niet-overheersing. Het dient het ideaal van niet-overheersing door te zorgen voor deelname en invloed van de houders op beslissingen van de instellingen van de staat die hun privacy beïnvloeden. Maar we zullen ook zien dat het kan worden ingeroepen om de staat te dwingen de plichten te vervullen die worden geïmpliceerd door de republikeinse opvatting van sociale rechtvaardigheid, waarbij het stappen moet ondernemen om te voorkomen dat burgers lijden aan overheersing door toedoen van elkaar.

De **conclusie - Privacy als een republikeinse waarde** - brengt de analyse in de voorgaande hoofdstukken samen en biedt een vogelperspectief van de behandelde onderwerpen en enkele concluderende gedachten over de waarde van het denken over de relatie tussen privacy, macht en overheersing