Why Privacy and Domination?

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Why should we think about the value of privacy in terms of domination? Do we need to introduce a new conceptual framework for thinking about privacy issues? The response that I offer in what follows, is that thinking about privacy as something that serves an idea of freedom as the absence of domination might, in some circumstances, provide us with a more compelling account of the value of privacy than those that take autonomy to be value that is served by it.

There is a popular view that the literature on privacy – rather like the concept itself - lacks coherence. Julie Inness, for example, observes that:

[e]xploring the concept of privacy resembles exploring an unknown swamp. We start on firm ground, noting the common usage of “privacy” in everyday conversation and legal argument; it seems it will be a simple task to locate the conceptual and moral core of such an often-used term. But then the ground softens as we discover the confusion underlying our privacy intuitions... [If] we turn to the legal and philosophical literature on privacy in the hope of gaining a foothold... we find chaos; the literature lacks an accepted account of privacy’s definition and value. ¹

Some who hold this view might think that bringing a new concept to bear on privacy issues will just add another layer of confusion. Such scepticism would be misguided. We should not be surprised that there is disagreement about both how privacy ought to be defined and why it is valuable. Privacy is, of course, a concept, and one way of understanding concepts is as a means of organising and representing beliefs, that are themselves grounded in concepts through which we articulate more fundamental beliefs. If we were to set aside the question of whether privacy is an inherently valuable condition, and think only about its instrumental value, we might say that privacy should be valued because it secures, for those who enjoy it, a degree of freedom. I suspect that few would disagree with this proposition. But if privacy and freedom are connected in this way, we can expect our conceptualisation of freedom to affect both the way in which we conceptualise privacy, and our thinking about how and in what circumstances privacy should be protected. In other words, my commitment to a theory about freedom will shape my ideas about privacy, and I have suggested elsewhere that the appearance of disarray in the privacy literature might be explained, at least in part, by the differing theories of social and political freedom to

¹ Julie Inness, Privacy, Intimacy and Isolation (OUP 1992).
which those who write about privacy are committed, whether consciously or otherwise.\(^2\)

Returning to the questions posed above - why should we think about the value of privacy in terms of domination and, do we need to introduce a new conceptual framework for thinking about privacy issues? – it seems to me that the answer lies in the way that we might respond to a rather broader question. What do we have to gain from thinking about the relationship between privacy and various conceptions of freedom? Well, concepts are dynamic, and the way that we think about privacy and its value can be changed. So too, the way the we think about freedom. Given the conceptual relationship between freedom and privacy, re-examining the beliefs that we hold about the nature of freedom – its constituent conditions – might, if it causes a shift in those beliefs, lead us to think differently about privacy; cause a restructuring of the conceptual framework that guides our thinking.\(^3\) That restructuring might be more, or less, radical depending on the extent of any change in the beliefs that we hold about freedom. 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, and 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.

The conception of freedom that has exerted by far the greatest influence on those who have contributed to the literature on privacy, is that associated with the liberal tradition. Liberals believe that to be free is to lead an autonomous life. The negative dimension of this conception of freedom is the absence of interference. Its positive aspect is synonymous with capacity for autonomy – access to the cognitive and material resources required to determine and pursue one’s own conception of a life that is worth living. Privacy serves this vision of freedom in various ways. It provides the physical and psychological space that we need to reflect on what kind of person we want to be and what kind of life we want to lead. It enables us to experiment without being exposed to ridicule or disapprobation. The conception of privacy that serves the ideal of autonomy is fully socialised. For the many, the development of an autonomous way of life will not be a lone pursuit. Realisation of the kind of life that most will choose for themselves will depend on the cultivation of a diverse range of well-functioning social relationships. The development of these requires the ability to control what others know about one, which one cannot do without an assurance of privacy.\(^4\)

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3 On the conceptualisation, cognitive development and the evolution of thought generally see, Alison Gopnik and Andrew Meltzoff, Words, Thoughts, and Theories (MIT Press 1997); Denis Mareschal, Paul Quinn and Stephen Lea (eds), The Making of Human Concepts (OUP 2010); Susan Carey, The Origin of Concepts (OUP 2009).

It is possible to distil from the privacy literature a detailed and conceptually rich account of privacy grounded in the idea of autonomy. The connection that is made between that privacy and autonomy is so prevalent that in respect of the value of privacy it should be considered the orthodox view. However, the work of those who led a late-20th century revival of interest in classical republican political thought has provided us with an alternative conception of freedom - the absence of domination, or non-domination. The claim is that those who live non-dominated lives enjoy a more resilient form of freedom than those whose freedom consists of an absence of interference. For republicans, it is not enough that we happen not to suffer interference. Freedom conceived as non-interference does not cover the full range of circumstances in which we are constrained in our choices; we can suffer no interference, yet still find ourselves under the yoke of others. According to the conception of freedom as non-domination, we should consider ourselves to be free insofar as others do not have power to interfere on an arbitrary basis. We suffer a loss of freedom when others interfere on an arbitrary basis, but our freedom is diminished even in the absence of actual interference, if others have power to interfere that we are unable to resist.

The relationship between privacy and domination (and non-domination) has various dimensions. A positive act of interference with privacy – my reading your personal diary, for example – is an exercise of power. If my use of this power is unconstrained, so that despite your wish that I not read its contents, you are unable to prevent me from doing so, my act of interference with your privacy by reading your diary is an exercise of dominating power. In this circumstance, nothing seems to turn on whether we think about privacy as something that serves a conception of freedom that focuses on non-interference and autonomy, or non-domination. We will arrive at the same conclusion – the person who is on the receiving end of the interference suffers a loss of freedom. That is not all, it seems that we do not need to resort to the concept of domination to explain the harm that occurs – autonomy does the job perfectly well. The interference overrides the subject’s preferences, and in so doing fails to show the respect that is due to each of us as autonomous moral agents.

But this will not always be the case. Take the mass surveillance and data collection programmes established by state intelligence agencies - the NSA and GCHQ, for example. The activities in which these agencies engaged clearly interfered with the privacy of the those whose data was captured. When the existence of these programmes became public knowledge, this awareness would no doubt have affected the decision-making of some of those affected. It is not difficult to explain the harm that flows from

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5 For perhaps the most comprehensive account see Beate R ossler, The Value of Privacy (Polity 2005). See also, Inness (n 1).

interference with privacy in these circumstances by reference to the autonomy of the subjects. However, we would surely want to say that even before it became a matter of common knowledge, this activity caused harm – that it was in some way wrong. But if we view privacy to be valuable because it is a pre-requisite for autonomy, it is difficult to make the argument. Where a person has suffered a loss of privacy but is unaware that this has happened, it can have no bearing on the decisions that he makes. Furthermore, if the data that has been captured is merely retained and put to no further use, it does not limit his options. The concept of freedom as domination provides us with the basis of a far more compelling claim – the harm lies in the power that the intelligence agencies exercise and acquire by interfering with privacy. Even if I am unaware that these agencies have interfered with my privacy, I am left worse-off as a consequence of the interference. The data that is captured provides those who possess it with power to interfere in my affairs; to manipulate me, and to close off options that might otherwise be open to me. My choices are conditional on their willingness to continue to let me choose as I wish. I should take no comfort in the fact that they have no present intention to use the information, because if they are subject to no constraints, this state of affairs could change at any time and for any reason.

This, I hope, is just enough to suggest that thinking about privacy as a concept that serves the ideal of freedom as non-domination might be a productive enterprise. Adopting this perspective does not require us to turn away from the literature that expresses the value of privacy in terms of autonomy. Concern about domination encompasses a concern about the autonomy of those who are subject to domination. As Phillip Pettit points out, there cannot be any meaningful form of freedom in the positive sense of ‘self-mastery’ without non-domination. But there will be circumstances in which the idea of freedom as non-domination provides us with the conceptual foundation for a more compelling articulation of the harm that is occasioned by an interference with privacy (and its consequences) than any attempt that takes the autonomy of the subject as the end that is served.

An approach to privacy problems guided by concern about domination rather than autonomy, involves a non-trivial shift in perspective. If we assume that the vantage point from which we consider these matters is that which is occupied by the subject, the approach is one that requires us to attend to the external rather than the internal consequences of interference with privacy. The immediate appeal of thinking in this way, is that it seems to accord with our intuitive response to losses of privacy, which tend to be other-regarding – concern about what others might do with any sensitive personal information that they acquire, or the motives of those who appear to be watching too closely. Those advocating greater privacy protection might find it beneficial to adopt

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9 Pettit, Republicanism: A Theory of Freedom and Government (n 6) 81-82.
a way of speaking about privacy problems that that seems to align with this intuition. For most people the connection between privacy and the exercise and acquisition of power by others will be easier to grasp than that between privacy and autonomy. If this is correct, then the advantages of framing the issue in this way might extend beyond deliberation that occurs in policy-formation and lobbying, to that which forms part of the legislative process and the task of transposing legislative intent into law and regulations. We can speak about the purpose of privacy law in terms of constraining the power of those who might interfere with privacy rather than the more abstract purpose of providing conditions that are required for autonomy.

I want to conclude by offering a few thoughts on where those who take on the task of exploring ideas that connect privacy and non-domination (or conversely, interference with privacy and domination) might concentrate their efforts. There is an - as yet - small, but significant body of writing on privacy and domination. For obvious reasons, the focus of much of it has been state surveillance. But domination could be utilised as a conceptual foundation for thinking about privacy problems in a much wider range of social spheres – the main stream media, social media, employment relations, the family, the activities of corporations, the criminal justice system, political activity and so on – than it has, to date. Further still, questions about the form of law – if any – that ought to be utilised to protect privacy and shield individuals from domination have barely been touched. One will find few references to the concept of domination, for example, in the writing of those private law scholars who have considered actions for interference with privacy and breach of confidence.

An initial challenge for those who take-up this work, will be to settle upon a conception of domination as a starting point. Several can be found in the literature. The essence of each of these, is the idea that we suffer loss of freedom insofar as others have the power to interfere in our decision-making that they are able to exercise on an arbitrary basis. Power will not be arbitrary if it is externally constrained or controlled by generally applicable rules, regulations, and other norms. An important distinction is between

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11 See for example, Carolin Moeller, ‘Are We Prepared for the 4th Industrial Revolution? Data Protection and Data Security Challenges of Industry 4.0 in the EU Context’ in Ronald Leenes et al (eds), *Data Protection and Privacy* (Hart 2017) 156, who alerts us to the danger that increasing interaction between machines and humans in the workplace might lead to comprehensive surveillance and profiling of workers, and in turn lead to ‘an asymmetry of power between employers and employees’.

12 See Bryce Newell’s contribution to this issue of EDPL.

13 Some have suggested that freedom as non-domination can only be guaranteed by law; see for example, Charles Larmore, ‘Liberal and Republican Conceptions of Freedom’ in Daniel Weinstock and Christian Nadeau (eds), *Republicanism: History, Theory and Practice* (Cass 2004). Others believe that social conventions can be an effective means of controlling power alongside legal norms; see, Frank Lovett, *A General Theory of Domination and Justice* (CUP 2010) ch 4, 101-111; Frank Lovett, *A Republic of Law* (CUP 2016). It has also been suggested that we can live non-dominated lives in the absence of state-generated coercive norms; see Samuel Clark, *Living Without Domination: The Possibility of an Anarchist Utopia* (Ashgate 2007).

14 See Samantha Besson and Jose Luis Marti (eds), *Legal Republicanism: National and International Perspectives* (CUP 2009). The essays in this volume explore the interface between the republican conception of freedom as non-domination and law, but none considers the protection of privacy in any detail.
procedural and substantive conceptions of domination. The former provides us with a relatively thin conception of freedom. All that is needed to render power non-dominating is the existence of constraints—non-arbitrariness corresponds with the idea of the rule of law.\textsuperscript{15} The claim is that so long as there are rules and procedures that are known to all, a person knows where she stands and can plan her affairs accordingly. But this understanding of non-arbitrariness overlooks the possibility that in the process of establishing laws that regulate the activities of citizens, and to confer power on its agents and set the terms on which it can be used, the state might come to dominate its citizens.

This possibility has been a central concern of those who have developed substantive conceptions of domination. On the substantive view of non-domination, the mere existence of law and regulations is an insufficient guarantee of freedom. To be non-dominating the relevant norms must conform to certain values that establish their legitimacy.

In establishing a framework of privacy-related law and regulations that, among other things, confers intrusive power on agents of the state, determines the circumstances in which those interfering with privacy will be sanctioned, provides citizens with remedies for interference with privacy, prescribes what can be done with personal data - the state draws the boundary between the public and private spheres. This process itself involves the exercise of power; the power to determine which aspects of citizens’ privacy will be afforded public protection and which will not. For republicans, who believe that citizens can only secure conditions of freedom for themselves through a form of self-government in which they have some meaningful influence over the generation of the legal norms that regulate their lives, this exercise of power will be non-dominating (and legitimate)\textsuperscript{16} insofar as it is subject to popular control. There is, however, significant disagreement among republicans as to the manner in which such control should be exercised – disagreement that will lead to differing conclusions about whether it can be said that in exercising power to define any part of the boundary between public and private spheres the state dominates those who are subject to the power. In addition to questions regarding domination in substantive privacy-related law, is whether the existence of related discretionary power – the power to make regulations, determine when laws should be applied, decide when regulatory requirements are enforced, and when and what penalties should be imposed – might be a source of domination.

The top-down thinking about non-domination and privacy that I have outlined here, ought to be a reflexive process. If a certain conception of freedom does not accommodate what seems to be an obvious and significant privacy harm, it ought to prompt

\textsuperscript{15} The most notable proponent of this view is Lovett, A General Theory of Domination and Justice (n 13) ch 4.

\textsuperscript{16} Others values that establish the legitimacy and non-dominating status of privacy-related law will include that of political equality, manifested among other things, in that citizens have equal opportunities to influence the content and scope of legal norms, and the requirement of public justification of intrusive measures.
us to consider whether our understanding of freedom needs to be revised. Those who are engaged in this kind of inquiry will encounter privacy scholars who appear to be travelling in the opposite direction – working from certain privacy problems towards the identification of concepts that represent the nature of the problem - and whose work will also be valuable to the development of the broad project. They are the source of a significant seam of writing in the privacy literature that connects privacy and power.\textsuperscript{17} Rosa Ehrenreich, for example, suggests that ‘the realm of the “private” is shaped by the exercise of power’.\textsuperscript{18} She explains that those who possess social power have the ability to define what is private and what is not – ‘they have the luxury of controlling their own privacy while denying that of others.’\textsuperscript{19} In a similar vein, Daniel Solove has argued that we ought to understand the privacy problems that arise when personal information is included on databases in terms of power and vulnerability:

The problem with databases is not our being watched, controlled or inhibited. Nor is it our lack of ownership in our personal information. Rather, it is a problem that involves power and the effects of our relationship with the public and private bureaucracy – our inability to participate meaningfully in the collection and use of personal information. As a result we must focus on the structure of power in modern society and how to govern relationships with bureaucracies.\textsuperscript{20}

These writers, suggest that our concern when thinking about privacy issues ought to be the power that others possess. But none provides us with particularly compelling reasons as to why our consideration of privacy issues should be framed in this way. Having given serious thought to the relationship between privacy and power, they seem so far to have struggled to find a set of ideas that might provide both the basis of a coherent explanatory account of their concerns, and a model for dealing with the issues that are the cause of those concerns. One that encompasses different dimensions of power – the power that is exercised in interfering with privacy, the power that some possess to interfere with others’ privacy, the power that might be acquired as a consequence of interference with privacy, and the power to determine where the line that demarcates the private and public realms is drawn. It seems to me, that the obvious destination for those travelling in this direction, is the concept of domination.

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\textsuperscript{19} ibid 2060.

\textsuperscript{20} Solove (n 17) 1461.