# A Democratic Right to Privacy: Political or Perfectionist?

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The guiding thesis of Democratic Rights is that democracy is best understood in terms of three core values: equality of interests, political autonomy, and reciprocity. These values ground the democratic rights of citizens, most obviously rights associated with the rule of law, on the one hand, and familiar freedoms of conscience and expression, on the other. These rights, and the values they express, take seriously our status as free citizens who are, in equal measure, both the willing authors and subjects of the laws. Brettschneider calls this the value theory of democracy.

Given this understanding of democracy, democratic contractualism is a framework for justifying coercion consistent with the core democratic values of equality, autonomy, and reciprocity. This framework features an account of democracy's public reason, and a principle of inclusion. Together, public reason and inclusion help us distinguish the boundaries of privacy and reasonable state coercion.

A recurring theme in Democratic Rights is that when we understand democracy in terms of the value theory, and legitimacy in terms of democratic contractualism, some apparent conflicts between liberal rights and democratic procedures dissipate. What seemed at first to be a conflict between, say, the US Supreme Court imposing rights against the will of state majorities turns out to be an affirmation of rights that are essential to democracy, and which thus properly constrain majoritarian procedures.

I will focus here on the democratic right to privacy, and how Brettschneider treats a range of difficult conflicts in light of the value theory and democratic contractualism. Brettschneider argues that his favoured approach draws the line between public and private—and justifies some state forays into family life—in ways more appealing than

much of the extant work on privacy in contemporary legal and political thought. I am inclined to agree, with two related caveats.

Brettschneider's argument rests heavily on a largely unelaborated Rawlsian standard of reasonableness, the coherence and utility of which several philosophers find grounds to dispute. I think such disputes can, for the most part, be safely avoided, if not necessarily addressed to the full satisfaction of critics. To suggest how, I elaborate the standard in a way that highlights the strength of Brettschneider's approach.

The more serious issue, I think, is that the political liberal standard of reasonable rejection may not do as much work as Brettschneider suggests when justifying the line drawn between private and public in difficult cases. Instead, the justificatory division of labour in at least some such cases seems skewed toward standards of informed choice and feasible exit opportunities, neither of which seem to require the political liberal principle of reasonable rejection. This is not to say that Brettschneider's purportedly political liberal account collapses into a perfectionist approach. What I argue is that the distinction he draws between perfectionist and political values is less important to his approach than he suggests, and that the attractiveness of his political liberalism relies on more traditional, comprehensive liberal commitments.

**1.**

Privacy rights have often been defended for intimate affairs among consenting adults: what interest could the state possibly have in what goes on between consenting adults in the privacy of their bedroom? To see the distinctiveness of Brettschneider's approach, consider first how one might ground the claim that the state does have such interests. Some natural law theorists argue that merely pleasurable sexual activities do

not advance the goods of reproduction or marital unity intrinsic to human flourishing, and thus violate our integrity (e.g., George 1999). If you believe this, then the step to legislating against these violations—even if freely chosen—is an easy one to take.

Against this view, many liberals and libertarians insist that the state has no legitimate interest in regulating consensual intimate affairs among consenting adults. These activities cry out for an affirmation of our inherent dignity, and an attendant right to live our own lives, from within, by our own lights.

In contrast, many feminists argue that intimate affairs often have important public consequences: the personal is political. Privacy rights too often obscure the degree to which private inequalities within families can limit women's public standing as free and equal citizens[1]—and even if they didn't, those private inequalities are often unjust, as both liberal feminists and some egalitarians argue (Okin 1989, Cohen 2008). In such cases, the state may legitimately intervene.

The libertarian, then, is extraordinarily reticent about state interference in private consensual activities. Many feminists and egalitarians are less reticent, but differ among themselves on questions of emphasis and priority, while differing dramatically with natural law thinkers on the appropriate rationale for state interference within the private sphere.

Brettschneider takes a different approach—one that seems to occupy a middle ground between the libertarian and feminist positions just rehearsed, helping us to organise and justify contrasting intuitions about liberty and consent, on the one hand, and the public consequences of private actions, on the other. For democratic contractualism, and political liberalism more generally, the damning problem with the natural law position is not that it violates liberal precepts about autonomy and personal

flourishing, nor that it fails to recognise the moral parity of men and women and the inegalitarian consequences of gendered norms and practices. The problem is that the 'new natural law' approach fails to treat citizens as free and equal sovereigns and subjects, and is thus inconsistent with the core values of democracy.

State interference in matters of consensual sexual intimacy, then, is problematic for Brettschneider because the proffered reasons are either irrelevant to, or inconsistent with, the core values of democracy. The natural law theorist may or may not be wrong about the connections between sexual intimacy, human flourishing, and the natural order of the universe. They err in imposing any such conception of flourishing as politically authoritative, thus making unreasonable demands on those who do not agree. And to the egalitarians and feminists, democratic contractualism argues that some significant state interventions are indeed acceptable to address inequalities within the family, but only insofar as such interventions advance core values of democracy threatened by the offending inequalities.

I find the democratic contractualist approach to be very attractive. Yet Brettschneider's response to the natural law position—and indeed his entire value theory, especially reciprocity and the account of democracy's public reason—depends heavily on the reasonableness standard so prominent in political liberalism and related strands of deliberative democracy. What if there are good grounds to question reasonableness as the arbiter of justifiable authority claims? Such a critic is unlikely to be swayed by the relatively brief discussion of reasonableness in chapters two and three of Democratic Rights, and would propose a different standard of justifiable authority. For instance, she could dispute the 'reasonable rejection' interpretation of reciprocity that Brettschneider adopts, favouring instead an understanding of reciprocity as merely

a guarantee of a fair hearing.

Understanding the force of this criticism requires some elaboration of Brettschneider's reliance on the political liberal ideas (and ideals) of reasonableness and public reason. Public reason imposes constraints on the reasons that can be offered to justify exercises of political authority. The constraints imposed by public reason are grounded in an ideal of citizens as free moral equals who desire to pursue their ends in ways that others can accept as valid. For political liberals, the values of 'political reasonableness and the freedom and equality of citizens' determine 'not just the kinds of reasons political officials can appeal to in political justification but also independent standards of justification, objectivity, and validity that apply within the domain of the political' (Freeman 2007: 234). Thus the normativity of claims that are eventually decisive within public reason rests on their emerging from an appropriately constrained procedure, rather than on whether or not reasonable parties actually or hypothetically assent to specific claims made within public reason.[2]

The acceptability of these constraints is grounded in the burdens of judgement. We need not be sceptical about the truth of our deepest moral and philosophical convictions, but we ought to accept that evidence relating to social, political, and economic matters, and especially moral considerations, is typically complex, uncertain, and admits of contrasting interpretations and emphases, which are in turn shaped by our differing capabilities, experiences, attachments, and aspirations.[3]

If these burdens plausibly obtain, then agreement on matters of truth relating to questions of the good is an implausible hope; coercion exercised without such agreement is bound to seem unprincipled to those who reject the truths appealed to by those wielding authority. As Rawls puts the point, 'those who insist, when fundamental

political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so' (2005a: 61).

That semblance alone does not make it so, of course: the powerful may ultimately be correct (assuming we can give sense to that possibility). Public reason, however, provides alternative grounds for legitimacy, minimising the degree to which citizens are asked to submit to authority justified by appeal to comprehensive metaphysical, epistemic, moral, and spiritual doctrines that they reasonably reject.[4]

Debate continues over whether or not this distinctly political account of legitimacy needs more robust epistemic foundations than advocates typically allow, and what those foundations might be.[5] Others wonder what ought to be the appropriate scope of public reason.[6] Yet however these debates turn out, I think this is a workable model of legitimacy grounded in public justification. If we take seriously the ideal of citizens as free moral equals, and ask that citizens be, in some meaningful sense, the willing authors of the laws they obey, then legitimacy demands that public justification of political authority avoid, so far as possible, dependence on foundations that some citizens may reasonably reject. To be clear, we take this ideal seriously not because of the (to our view of things) deeply mistaken beliefs that some, perhaps many of our fellow citizens hold about what is true and good in life. Instead, we respect their moral powers to affirm a conception of justice and develop and pursue a conception of the good in ways consistent with respect for those same powers in others.

If these remarks on public reason persuade, then Democratic Rights offers a very appealing story about why state interference with consensual intimate affairs is unjustified. Laws against homosexual intimacy, for example, cannot find purchase

within the public reason of democracy. Such laws violate the principle of inclusion, in at least one of two ways. First, they demand adherence to comprehensive accounts of the good that some citizens reasonably reject (thus violating the core democratic value of reciprocity). Second, they affirm some aggregative conception of the good, such as utilitarianism or natural law, that fails to take our interests seriously as free and equal citizens who are both the authors and subjects of the laws we obey (thus violating either or both the core values of equal interests and political autonomy).

**2.**

So far, so good.[7] But even for political liberals, more is required. Democratic privacy rights promised not only to account for when privacy ought to be respected by the state, but also for when the state may legitimately interfere with our decisional autonomy. The rest of chapter four of Democratic Rights is thus devoted to the question of legitimate state interference.

Obviously the state may intervene in our intimate associations (most notably the family) to prevent physical violence or, in the case of children, unambiguous instances of neglect. But these are easy cases. Brettschneider wants to tackle the more difficult questions of intervention that feminist critics of privacy have identified.

Suppose some form of inequality within a family does not rise to the level of assault or neglect; indeed, it may even arise out of mutual consent. Perhaps a husband and wife—'Glenda' and 'Roger', in Brettschneider's example—live according to starkly inegalitarian beliefs about the subservient role of women, as dictated by the tenets of some religious sect. Further suppose that this inequality at home does nothing to encourage either the husband or the wife, as citizens, to challenge the values of

democracy in their public judgements and activities. Indeed, suppose that, as citizens, both routinely vote for candidates who strongly support equality of the sexes and gender equity throughout society. Does their relationship offend the democratic value of equality of interests?

Democratic contractualism, Brettschneider argues, distinguishes between political and other forms of inequality, and unless the latter offend the former, there is no case for coercive intervention by the state. Indeed, the presumptive right of decisional autonomy 'grants citizens the ability to make their own decisions even when this allows them to enter into relationships that seem inconsistent with psychological autonomy and equality.' The state must ensure 'rights to conditions that respect citizens' equal interests' but 'it is not attempting to promote equality in a psychological sense' (2007: 90). So long as there are feasible opportunities for exit from relationships (opportunities that the state may have to promote through divorce laws, education programmes, and financial guarantees), and protections against violence and intimidation, then the state has provided the conditions demanded by the core values of democracy and the framework of democratic contractualism.

Brettschneider offers an analogous case against Catherine MacKinnon's indictment of pornography as more than mere speech (MacKinnon 1993). MacKinnon's view is important for Brettschneider's purposes because it seems at first blush to be an argument grounded in concern for political equality as a core democratic value. Pornography, MacKinnon suggests, shapes men's attitudes and behaviours in deep and pernicious ways that undermine gender equality in a wide range of settings, but especially as citizens. Pornography should thus be regulated because it leads men to think and act in ways that systematically undermine equal citizenship for women.

According to Brettschneider, however, MacKinnon's account goes beyond political equality, by viewing pornography as 'a behavior rather than speech' (2007: 91). This leads easily, Brettschneider fears, to restrictions on autonomy based on perfectionist rather than political reasons. 'If it were to turn out, for instance, that some sexual practices reinforce the idea that women are unequal in a psychological sense, MacKinnon's logic could be used to argue that these practices should be discouraged or even criminalized' (ibid.), regardless of whether or not the attitudes in question do in fact lead to violations of political equality or autonomy. However odious inegalitarian attitudes associated with sex and sexuality may be to many of us, Brettschneider believes they are typically not violations of the core values of democracy.

To be sure, the line between political and psychological inequality is not always clear, as Brettschneider notes, and he allows that 'a widespread instance of inequality in the deep perfectionist sense could point to institutional problems' (ibid.). His case in point is polygamy, and he concludes that this practice might in principle satisfy the core values of democracy, if conditions obtained to ensure that women could enter such relationships as informed and willing participants (and were genuinely free to leave if and when they wish). Polygamy under those conditions might be legitimately protected as part of the space of decisional autonomy that free and equal citizens rightfully enjoy.

I readily acknowledge the appeal of this political liberal strategy for judging the legitimacy of state intervention in seemingly private affairs: it draws the line between state interference and freedoms of expression and association in ways that seem less controversial than alternative approaches, by avoiding expansive claims about equality and autonomy that go beyond the political realm. I believe, however, that much of this appeal trades on a subtle move that commits Brettschneider to a more comprehensive

liberalism than he avers. As an empirical point, there simply may not be very much psychological domination permitted by the decisional autonomy guaranteed under democratic contractualism. When Brettschneider argues conditionally for pornography and polygamy, a great deal of persuasive work is being done by those conditions, and they pull democratic contractualist justification beyond political liberalism.

To see how, suppose we have structured institutions to ensure that girls and young women are sufficiently educated and financially and emotionally secure, such that they can freely enter into (psychologically) inegalitarian relationships as willing informed participants, confident in the knowledge of their (state-guaranteed) ability to exit if and when they wish. The process of ensuring these background conditions will make it very difficult for parents and cultural leaders with inegalitarian beliefs to impose their values and traditions on young women during formative years in the home and community. Such authoritative imposition of values and practices during children's' formative years is the primary mechanism by which these (indeed, any) traditions persist over time with sufficient adherents to sustain themselves as a viable cultural tradition. By interfering with a core process of cultural transmission within these traditions, the institutional prerequisites of Brettschneider's democratic contractualism select against the sorts of traditions that would generate hard cases for his approach. Notice, however, that this selection pressure is generated not primarily through appeals to public reason and the standard of reasonable rejection, but rather by guaranteeing conditions of meaningful choice for those facing inegalitarian and nonliberal traditions, regardless of whether or not bearers of those traditions accept these conditions as reasonable public claims.

In this respect, then, the contrast between democratic and perfectionist equality in

Brettschneider's account is less pronounced, and less important, that it at times appears in Democratic Rights. Once we have ensured the conditions of informed entry and effective exit for women, it will be difficult for unchosen private inequality and domination to endure in personal relationships.

Now it is open to Brettschneider to rejoin that his political liberal approach is distinctive and persuasive when we imagine just those cases where, even if informed entry and exit were guaranteed, people would still freely choose relationships of inequality and domination; whether or not they actually tend to do so is immaterial to the justificatory point, the argument would go. Here, after all, is where more comprehensive perfectionist approaches would side unconditionally with psychological equality against personal autonomy. Yet even if the facts were ever to go against my suspicion, I think what makes personal autonomy worthy of respect under democratic contractualism is not only that it is consistent with the core values of democracy, but that autonomous relationship choices survive the tests of informed entry and feasible exit opportunities.

Furthermore, consider a deeper problem that illustrates the justificatory insufficiency of Brettschneider's political liberalism, and that is insensitive to my empirical claim about institutions selecting against certain forms of inequality and domination. Brettschneider discusses (along with 'Glenda' and 'Roger') a hypothetical case of a thirty-year old man who is inordinately deferential to the advice of his parents (2007: 88-9). Distinct from the 'privately inegalitarian couple' case, the 'deferential son' example is meant to illustrate further the distinction between psychological (perfectionist) and political (democratic) inequality, by drawing a parallel distinction between psychological and political autonomy. A perfectionist concern with

psychological autonomy is motivated by ideals of personal well-being and human flourishing that depend upon, or tend to favour, comprehensive moral, philosophical, or spiritual doctrines. In contrast, Brettschneider insists that democratic contractualism limits our concern—at least for the purposes of justifying state interference in personal relationships—to only those constraints on autonomy that undermine the capabilities and opportunities implicated in democratic citizenship.

Suppose, the example goes, that a thirty year old man—let's call him Morty—lives with his parents and follows their advice in every significant decision in his life, regardless of his own preferences. Indeed, referring to this subservient soul as having distinct preferences of his own is a bit odd: he votes as his parents instruct, acts as they counsel without fail, and so on; in what meaningful sense does he have preferences of his own? Brettschneider wants to argue that, so far as the value theory of democracy is concerned, Morty is politically free. We would, Brettschneider suggests, take it as a violation of his freedom of conscience if the state barred his parents from instructing him on how to vote.

I find it odd that democratic contractualism has no concerns whatsoever with this domestic situation. Morty is not politically free in any meaningful sense. After all, being the willing author and subject of the laws requires a degree of reflection—especially on our values, interests, and aspirations—that Morty clearly lacks. Even if (as I suspect) the real work being done in deciding such difficult cases is by a (not especially political) liberal concern for informed choice and feasible exit opportunities, then Morty's case is still troubling: he is unable to gain sufficient distance from his own circumstances of complete subservience to freely choose that condition.

Rather than clarifying the appeal of democratic contractualism, I think Morty's

case further illustrates the difficulty of distinguishing between psychological and political autonomy in just these sorts of hard cases. If Morty says 'I want this life,' I do not think we should believe him, because it isn't clear that he himself knows what he means. We should be similarly sceptical when he says 'I want this candidate elected' or 'this policy enacted'. Morty is not the author of the laws we together legislate and obey; at best, he is a faithful delegate on behalf of his parents, thus over-representing their positions on political matters. Certainly, I see the force of the illustration for less extreme variations, in which Morty has to some extent chosen his deferential position; but then, if Morty can gain the critical distance from his parents' influence to affirm their counsel meaningfully (and also to acknowledge available exit options), then the case is no longer especially difficult, and it seems not to need a distinctly political sort of liberalism to justify the state respecting Morty's private choices.

My suspicion, then, is that Brettschneider's appeal to informed choice and feasible exit pulls democratic contractualist justification in the direction of perfectionism. By structuring public institutions to ensure the conditions for meaningful choice in intimate relationships and religious associations, democratic contractualism makes certain problematic relationships of private inequality and domination less likely to prevail over time: the social conditions for their effective reproduction will be undermined by institutions that secure political equality. And even if we question my empirical claim about institutional pressures and incentives, Brettschneider's example of the deferential son illustrates the difficulty of distinguishing clearly between political and more expansive dimensions of autonomy.

As a political liberal with some perfectionist and Kantian sympathies, I find this a perfectly acceptable feature of the theory, but it does suggest that Brettschneider's own

contrast—between distinctly political and more demanding conceptions of equality, and their justificatory consequences with respect to privacy—is less dramatic than he avers. Brettschneider aims to be political in the Rawlsian sense, but his treatment of privacy stacks the justificatory deck in favour of perfectionism, and it is comprehensive liberal commitments that make his political liberalism attractive. I conclude that the political liberal features of democratic contractualism may be less important for addressing difficult privacy cases than the more traditional (comprehensive) liberal commitments upon which the theory's account of privacy ultimately depends.

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**NOTES**

[1] Some empirical research supports these claims, showing how private factors lead to political inequalities; see, for instance, Burns et al. (2001).

[2] On this distinction, compare McKinnon (2002: 30-5) and Peter (2007) on the relationship between public reason and democratic legitimacy.

[3] This is not a complete list of the burdens as Rawls presents them (2001: 35-6, 2005a: 56-7). For an instructive discussion, see McKinnon (2002: 39-41, 45-6).

[4] Critics may doubt that these burdens provide sufficient grounds for accepting the constraints on justification imposed by public reason, or that public reason can generate sufficient agreement or sufficient motivation toward agreement. Others have worried that the application of public reason is constrained without warrant, applying (for Rawls, at least) to fundamental moral and philosophical disputes, but not to comparably deep disputes over political values In response to charges of incompleteness and arbitrary application see, respectively, Schwartzman (2004) and Quong (2005). Still others have insisted that public reason must be grounded in something true; acceptability by reasonable parties is an insufficient foundation. Of course, some may simply deny the existence of moral reasons

altogether, public or otherwise.

[5] We could ground this account of legitimacy in a particular account of truth, an ideal of self-respect, distinctly democratic values, or an associated ideal of free and equal citizens; see, respectively, Estlund (2007: 43-64), Cohen (2009), McKinnon (2002: chaps. 2-3), and Rawls (2005b).

[6] For Rawls the appropriate scope of public reason is fundamental principles and constitutional essentials; others suggest a broader scope, for example, Quong (2004).

[7] For political liberals, at least; others may have lingering doubts—can emotivists accept an account of legitimacy grounded in public reason thus understood? Should we be troubled if they cannot?

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