

Privacy, Attention, and Political Community
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Note to readers:

This is still very much a draft! It started out as a little idea I wanted to explore, and has now graduated to medium-sized (maybe). I look forward to any conversations it may instigate.

Thanks,
--Wendy

PRIVACY, ATTENTION, AND POLITICAL COMMUNITY – DRAFT

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INTRODUCTION

In an era of information overload, some scholars (Lessig², Rosen³) have characterized a facet of privacy as a response to the problem of the short attention span: Because onlookers will not spend the time or attention to get the full context of a disclosure, disclosure of some information may produce a distorted view of the subject. (cf behavioral economics “bounded rationality”) Where others have spoken of privacy as deception (Posner) or a barrier to community governance (Etzioni), I explore privacy-through-limited-disclosure as a constituent of community and political organization.

To organize effectively in a modern liberal democracy, citizens must often aggregate into political groups larger than local or social communities. Their political organizing (and even common adherence to the political system) can be threatened if differences become more salient than points of common interest – even if those differences are

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²Lawrence Lessig, Privacy and Attention Span, 89 Georgetown Law Journal 2063-2072 (2001)

³JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 126 (2000).

irrelevant to common political goals and outside the political context. Privacy from disclosure may thus be necessary to avoid distraction.

Using John Rawls's idea of political liberalism as an overlapping consensus among groups with different underlying conceptions of the good, I suggest that privacy is an important component of political tolerance and accommodation. Privacy can support consensus and restore a respect for pluralism even when we lack the time or attention to understand its roots. As networked communications override some of the traditional architectural support for privacy, we must learn to avert our gaze from glancing disapproval, instead looking deeper or not at all.

Rawls describes the purposes of political philosophy, among them, reconciliation: "I believe that a democratic society is not and cannot be a community, where by a community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine. . The fact of reasonable pluralism which characterizes a society with free institutions makes this impossible.. This is the fact of profound and irreconcilable differences in citizens' reasonable comprehensive religious and philosophical conceptions of the world, and int their views of the moral and esthetic values to be sought in human life. But this fact is not always easy to accept, and political philosophy may try to reconcile us to it by showing us the reason and indeed the political good and benefits of it."⁴

When we have sufficient time and energy to engage with political philosophy, it can fill this role. When not, we need privacy.

⁴John Rawls, *Justice as Fairness, a Restatement* at 3-4 (2001).

Scholars have had difficulty placing privacy, and the numerous different things we [public] refers to by that label. The problem of “privacy in public” has proven particularly challenging, that is, the violation we feel when information that has been public to a degree, including that given voluntarily to some third parties, is made more public. Helen Nissenbaum has characterized the problem as one of “contextual integrity,” arguing for appropriate flow-control on information. Daniel Solove catalogues dozens of embarrassing situations as instances where we need something between secrecy and publicity. While the common law has been adaptable, it has not furnished complete theories against information intermediaries who facilitate out-of-context disclosure or fail to warn users of the publicity of their seemingly private activities.

PRIVACY IN PUBLIC AND TECHNOLOGY

When thefacebook.com first launched in 2004, the site was confined to Harvard College, bringing to a new medium the paper-backed “Facebook” circulated among the freshman class. Through it, students could browse the faces, and now, chat with classmates and find overlapping classes or interests, in the closed community of their peers.

Facebook founder Mark Zuckerberg's ambitions didn't stop there. As he saw the site's popularity and sensed its potential reach, he rebuilt and opened it to wider audiences, first to students at a few other colleges, then successively to any college, .edu email address, workplace, and finally to the world at large.

With each step, the network became more heterogeneous, but for a long time, its users had little reason to take notice of these changes. To each of them, the site looked like *their* collection of friends, the news, photos, and events from those with whom they chose to connect; invitations to connect from those who knew identifiers to search; and a few advertisements scattered around the edges. In many respects Facebook still looks like a transplanting of offline social relations.

When Facebook changes its privacy settings to “share” user information with more people, therefore, it is not only changing from the terms they contractually agreed to (albeit generally without reading), it is increasing the divergence between the site's visible practices and its underlying information flows. By this lack of transparency, it weakens the feedback mechanisms by which users might understand adjust their behavior to match its actual practices. Disclosures to the company are asymmetrical, not matched by any disclosure back to the end-user of what will be done with the data.⁵

Facebook's most recent “update” made users share more information publicly by default, and reduced their options to keep classes of information confined to networks and unsearchable. Like earlier changes, this prompted public outcry and the privacy skeptics' response, “If you wanted to keep it private, why did you put it online?” Yet Facebook is but one example of the new possibilities technology can offer and the challenges we face adapting them to our ends.

⁵Contrast Goffman's discussion of situated conduct, “what individuals can experience of each other while mutually present.” Erving Goffman, *Behavior in Public Places: Notes on the Social Organization of Gatherings*.

danah boyd, an ethnographer of online community, has studied especially young people's use of social networking tools. She notes that we communicate with publics, plural, deliberately crafting messages to the audiences we see.⁶ boyd finds that her subjects do not blindly transplant behaviors from offline to online, but learn what an online environment offers and use its constraints and possibilities in communication. Thus users of the early Friendster built "Fakesters" to serve as meeting nodes where the social network site offered none.⁷ Contrary to the complaint that "kids today are exposing too much because they don't know what they're doing," boyd finds that even teenagers shape their practices to the online environments and build complex systems around the simple signaling mechanisms they are given (updating "relationship" settings, reordering "top friends").

But we can only adapt to what we know is happening. When teens were told that college recruiters and admissions offices might look at Facebook profiles for evidence of suitability, many high school students changed their profile names so as not to be found by network outsiders.⁸ Their profiles were already connected to those of friends, so the identity switch did not disconnect them from the network.⁹

⁶ danah boyd. (2008). *Taken Out of Context: American Teen Sociality in Networked Publics*. PhD Dissertation. University of California-Berkeley, School of Information.

⁷ danah boyd, "Friends, Friendsters, and MySpace Top 8: Writing Community Into Being on Social Network Sites." *First Monday*, 11 (12) (2006, December).

⁸ Sarah Maslin Nir, *An Online Alias Keeps Colleges Off Their Trail*, *The New York Times*, April 23, 2010, <http://www.nytimes.com/2010/04/25/fashion/25Noticed.html>

⁹ Their identities would be easily discoverable from these networks, as anyone who's found Facebook or LinkedIn eerily accurate at predicting as-yet unconnected friends will recognize. It would be wrong for Facebook to "out" these students, however, or for admissions offices to attempt to pierce these veils.

Technology can give us cues to the public with which we are conversing, or it can hide those signals. Facebook shows a set of recently updated “friend” photos on each user's homepage when it wants to prompt us to write for that audience. “Send a note to __,” it urges, trying to use social ties to pull lapsed members back in.¹⁰ Yet Facebook rarely reminds us of the further nodes on the “friends of friends” network who will also have access to our posts. It cultivates the sense of intimacy and immediacy without often reminding us of the reach and duration of its networked posts.¹¹ Thus boyd tells of a teen who was dismayed to learn that her mother was among the “friends of friends” who could view her profile, connected through an aunt the girl had ‘friended.’ Her information sphere was decontextualized.

Helen Nissenbaum describes privacy as “contextual integrity,” saying we have established norms of “appropriate information flows” within contexts of activity, and sense a breach of privacy when information revealed in one context is disclosed or used in a manner inappropriate to that context.¹² Nissenbaum explains a concept of privacy that is not dichotomous, public or private, but varied according to the circumstances and contextual expectations of those sharing information.

[more]

¹⁰In a (possibly apocryphal) “quitting” page, a blogger showed the series of pictures Facebook showed a member trying to delete a profile, each a friend who would “miss you” if you left.

¹¹Imagine if before each posting, Facebook were to show you some strangers who could see the update, or to ask “Will you want this message to be visible next year?”

¹²Helen Nissenbaum, *Privacy as Contextual Integrity*; *Privacy in Context: Technology, Policy and the Integrity of Social Life* (2010);

Nissenbaum and boyd suggest that we are not being hypocritical when we demand privacy in public, rather we are reacting to unexpected and unwanted changes in our information environments.

Two linked problems of (particularly digital) information environments: they fail to show us their extent or their duration.¹³ Both persistence and accessibility can decontextualize information, allowing it to be taken out of the setting in which it was uttered and presented in unexpected ways.

In turn, this connects up with the “attention span” problem. Jeffrey Rosen and Lawrence Lessig both posit privacy as a solution to the short public attention span. When we learn a few embarrassing facts about a person out of context, we may base our judgment of him on those facts – which fail to capture all of the person and likely misrepresent him. Privacy serves to keep those facts out of casual view, until they can be seen in the context of the larger personal history and justification. Lessig thus describes how an email written in haste to an acquaintance at Netscape was drawn, from the public record of the Microsoft antitrust suit (in which Microsoft challenged Lessig's appointment as special master), into erroneous assumption of personal bias, mistaken reporting on the reasons for his disqualification (jurisdictional), and even misguided speculation about his sexual life.

Rosen writes at length about public figures drawn into allegations of sexual impropriety: Clarence Thomas, Bill Clinton, and Monica

¹³See danah boyd, "Making Sense of Privacy and Publicity." *SXSW*. Austin, Texas, March 13 2010, “Unfortunately, online environments are not nearly as stabilized as offline ones. While the walls in the streets may have ears, digital walls almost always do. More problematically, online architectures have affordances that are quite different than offline ones - persistence, searchability, replicability, scalability.”

Lewinsky among them. Each was turned for a time into a caricature, known primarily for these allegations. Rosen calls the effect “synecdoche,” from the literary figure in which a part stands for the whole.¹⁴ Prurient details in particular tend to capture public attention.¹⁵ Where the person has other claims to the public's attention, such as Clinton as the presidency continued post-impeachment, he may be able to rehabilitate himself. Yet Monica Lewinsky has almost no chance of escaping her label “intern in the blue dress” and Justice Thomas remains, to many, the joke of the pubic hair and the Coke can.

The cases of Clinton and Thomas illustrate an “aspect of the phenomenon of the synecdoche: those with unlimited access to the public's attention have a greater chance of being judged in context than those who do not,” Rosen says.¹⁶ Since most of us are not public figures on the scale even of Clarence Thomas, we face his risks.

Now, it may be true, as Lior Strahilevitz suggests, that most of us overestimate our centrality in social networks and believe too readily that our friends will grasp at our every embarrassment. He recognizes the danger to over-correcting our perceptions of the publicity of our actions.. “The danger, at least from a privacy perspective, is that people learn to stop being surprised by these encounters, and guard their personal information too much as a consequence.”¹⁷ But unless we find ways to recalibrate our inner censors, this suggests that if given accurate, transparent reporting of what technology knows about us, we will clam

¹⁴Jeffrey Rosen, *The Unwanted Gaze*, 138.

¹⁵See also Strahilevitz, *Privacy and Social Network Theory*.

¹⁶Rosen, *The Unwanted Gaze*, 157.

¹⁷Lior Strahilevitz, *A Social Network Theory of Privacy*. (2004).

up too much, and fail to share information in contexts of friendship and intimacy.¹⁸

PRIVACY AND PUBLIC REASON

Despite the sociological research, commentators in the media and academy persist in trivializing the demands for privacy in public. I argue that not only is such contextual privacy important to individuals' autonomy, self-actualization, and personal social relations, it supports our democratic self governance, tolerance and cooperation in a liberal democracy, and our collective action to solve the problems of a complex society. Here, I use a framework from the political philosophy of John Rawls, articulated in *Political Liberalism*. While Rawls does not directly address privacy,¹⁹ privacy in public seems uniquely connected with the public reason Rawls draws upon to support political liberalism.²⁰

After the publication of his highly influential *Theory of Justice*, Rawls turned to the “problem of stability”: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?”²¹

Theory had used the device of a hypothetical original position, veiling its participants with ignorance of their actual positions in society. Through deliberation to “reflective equilibrium,” the participants, on

¹⁸Fried.

¹⁹See James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 Chi.-Kent L. Rev. 767 (1994); Anita Allen, *Equal Citizenship: Race and Ethnicity: Race, Face, and Rawls*, 72 Fordham L. Rev. 1677 (2004), both commenting that Rawls does not address privacy.

²⁰To address: is privacy an end in itself or part of social ordering? Both, but this explanation fits the latter.

²¹*Political Liberalism* xvii-xviii

behalf of their represented citizens, reach two principles of justice.²² In *Political Liberalism*, Rawls seeks to describe how citizens in a democratic society can actually accept these principles and argue from them.

As an early step, Rawls distinguishes between a “political” and a “comprehensive” conception of the good. Citizens each subscribe to their own distinct comprehensive conceptions of “what is valuable in human life,” including “a more or less determinate scheme of final ends.”²³ Justice as fairness, by contrast, is a political conception, limited in scope to political, social, and economic institutions, the “basic structure” of society, a “unified system of social cooperation from one generation to the next.”²⁴ The political conception is not teleological – it does not presume a broader set of ends for persons or their society, but gives them the room to seek their own ends.

Individuals in a well-ordered society subscribe to the political conception and support its institutions in an “overlapping consensus” of comprehensive doctrines.²⁵ The political conception sits at the intersection of distinct comprehensive moral doctrines. “Citizens individually decide for themselves in what way the public political

²² His later restatement of the principles modifies them only slightly from their *Theory* statement::
(a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle). John Rawls, *Justice as Fairness, A Restatement* (2001, Erin Kelly, ed.).

²³Political Liberalism 19. They may back these conceptions in moral, religious, and ethical philosophy.

²⁴Political Liberalism 11.

²⁵Political Liberalism 11.

conception all affirm is related to their own more comprehensive views.”²⁶ The Rawlsian society is not a community; its consensus is of important but limited scope.²⁷

Rawls thus addresses the challenge of toleration. In a society characterized by deeply felt and genuine moral differences, citizens can recognize and share a common political project for mutual benefit through arguments based in “public reason.” In public political debate, they are to base their arguments on the shared political conception. This is not doublespeak or self-deception – the political conception is one that can reasonably be endorsed by the individual moral doctrines.²⁸ It does not require adherents to say one thing in public and another in private, rather it limits the grounds they can use to *persuade* in public.

To Rawls, the overlapping consensus is “not a mere *modus vivendi*,” not an unstable equilibrium to be captured and diverted whenever one party to the consensus gains a majority. Rather, it draws active support from the underlying conceptions. Though each may support it for differing reasons, all see the political consensus as reasonable.²⁹

The original position is still the basis for an hypothetical, not historical social contract. With the idea of “public reason,” Rawls

²⁶Political Liberalism 38.

²⁷Political Liberalism 42.

²⁸Political Liberalism 147-48 “All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides. The fact that people affirm the same political conception on those grounds does not make their affirming it any less religious, philosophical, or moral, as the case may be, since the grounds sincerely held determine the nature of their affirmation.”

²⁹Political Liberalism 154 “To apply the principles of toleration to philosophy itself is to leave to citizens themselves to settle the questions of religion, philosophy, and morals in accordance with views they freely affirm.”

proposes a deeper account of how real people can incorporate its reasoning into their political dialogue.

Political liberalism explicitly “abandon[s] the ideal of political community” or social unity around one doctrine.³⁰ Desirable or undesirable, it is not achievable without coercion that liberalism rejects. What sustains the liberal democracy is not deep agreement on a shared conception of the good, but mutual respect for fellow citizens as moral beings capable of forming and pursuing their own conceptions of the good, and of confining their arguments in the public sphere to public reason.

“A democratic society well-ordered by the two principles of justice can be for each citizen a far more comprehensive good than the determinate good of individuals when left to their own devices or limited to smaller associations.”³¹ A “social union of social unions.”³²

Justice as fairness “presents a way for [citizens in a constitutional regime] to conceive of their common and guaranteed status as equal citizens and attempts to connect a particular understanding of freedom and equality with a particular conception of the person thought to be congenial to the shared notions and essential convictions implicit in the public culture of a democratic society.”³³

³⁰Political Liberalism 201

³¹Political Liberalism 320.

³²Political Liberalism 320

³³Political Liberalism 369

Along the way, Rawls develops a deeper account of the citizen, a “moral psychology.”³⁴ Political citizens are reasonable and rational; they possess two moral powers, the capacities for a sense of justice and for a conception of the good. They are ready to cooperate, to propose or accept fair terms provided others can be relied upon to do likewise. They recognize “burdens of judgment as limiting what can be justified to others.” They are and want to be recognized as normal and fully cooperating members of society.

Rawls offers some sociological basis for acceptance of the liberal regime in his account of social self-respect. He places “the social bases of self-respect” among the primary goods which must be assured to each citizen prior to their deliberating on principles of justice or choosing conceptions of the good.³⁵ “Provided the basic liberties pay an important role in supporting self-respect, the parties have rounds founded on these liberties for adopting the two principles of justice.”³⁶ “By publicly affirming the basic liberties citizens in a well-ordered society express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life.”

Rawls calls his moral psychology a philosophical and political, rather than empirical account, designed to specify at a general level the

³⁴Political Liberalism 82. “Whether [the moral psychology] is correct for our purposes depends on whether we can learn and understand it, on whether we can apply and affirm its principles and ideals in political life, and on whether we find the political conception of justice to which it belongs acceptable on due reflection.” *Id.* at 87.

³⁵Political Liberalism 308; “[T]hese social bases [of self-respect] are among the most essential primary goods.” *Id.* 319.

³⁶Political Liberalism 318; see also Theory of Justice § 67;

characteristics of *homo politicus*.³⁷ Nonetheless, it matches with sociological accounts of human interaction in important ways. Nissenbaum, and the scholarship she cites, chronicle our capacity to comport ourselves in different contexts, some of greater scope than others; Goffman describes our ability to perform different roles, as compatible with the social context. In the political arena, we can perform the functions of public reason, while enacting other dialogues among other settings.

Privacy serves as a shield for our interactions in non-political space around nonpublic reasons. Just as it's exhausting to maintain a wholly public front, we don't always operate on or express ourselves in public reason. When dealing with people with whom we share more than the overlapping consensus, we may express ourselves in terms of these shared backgrounds, in terms of friendship or love, religious community or social exchange. Some will touch on politics, much will not. Rawls sees an important place for the “nonpublic reason of associations of all kinds: churches and universities, scientific societies and professional groups.... This way of reasoning is public with respect to their members but nonpublic with respect to political society and to citizens generally. Nonpublic reasons comprise the many reasons of civil society and belong to what I have called the ‘background culture,’ in contrast with the public political culture. These reasons are social, and certainly not private.”³⁸

³⁷Political Liberalism 87.

³⁸Political Liberalism 220.

Privacy in those reasons is necessary, however, for in reasoning, as in social interactions, we are plagued by the problems of the short attention span. We may be inclined to misjudge people's sincerity about public reason if we hear their strongly divergent nonpublic discussion. While it should be possible for people with differing conceptions to share their reasoning from the ground up, to explain not only their overlapping consensus, but also the particular doctrines and differing responses to non-constitutional questions, that requires time and effort on both sides. We operate under a “duty of civility,” Rawls says, “to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.”³⁹ When that time and effort are unavailable, it will be better to shield the differences than to expose them without their complementary explanations.

Nonpublic reasons are not illegitimate – as we have said, it is part of political liberalism that groups will have their unique and inconsistent comprehensive doctrines.⁴⁰ But as it's challenging to speak in public reason, it is also challenging to listen in that “civil” mode rather than rushing to judgment. Yet to judge others by our more everyday modes, when they're speaking in theirs, is unfair and potentially divisive.⁴¹

³⁹Political Liberalism 217

⁴⁰Political Liberalism 303 “A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good. In a modern democratic society the existence of such diverse ways of life is seen as a normal condition which can only be removed by the autocratic use of state power.”

⁴¹Compare Robert Post's “civility,” respecting the boundaries others set for themselves and their interactions. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957, 985 (1989).

Rawlsian public reason and the civil accommodation of nonpublic reason, like the problem of short attention spans, aligns with sociological and economic observations of our bounded rationality. In a world where information is costly, in both money and time, individuals reasonably act on imperfect information and heuristic shortcuts. We make snap judgments based on salient characteristics, and are biased toward the present in considerations of now versus long-term.

PRIVACY AND POLITICAL COOPERATION

In modern complex society, we often need to organize at large scales, as a body politic and within it to make our interests heard and to tackle complex problems. It is difficult enough to overcome the economic incentive barriers to collective action, without adding social conflict. Often, we will need the cooperation of those with whom we don't share ultimate goals or comprehensive conceptions. We benefit from diversity, yet may be challenged by it on a short-term consideration.

We can't assume uniformity, as proposals of radical transparency – that we should all just do everything in public – often do. Since we all will have different notions of what's embarrassing or politically harmful, we will still be inclined to think of others' indiscretions as categorically different from our own. *Ours* were excusable, for particular reasons we can justify to ourselves, *theirs* not. As a matter of time, attention, energy, we won't be able to fully engage with all. It is unhelpful to parade our differences in front of one another while trying to build cooperation.

Thus we need spaces, or contexts, that represent different publics, where we are free to let down our guard, engage in more intimate discussion.

Technologically mediated publics such as Facebook pose a two-pronged challenge: one of transparency of implementation, the other of adapting implementations to norms of communities

At the moment, our “reasonable expectations” of social technology are in a state of flux. We don't know what to expect, because the technology keeps changing what is possible, from both the user side and that of the facilitating companies and their paying customers (often advertisers, to whom the users' eyeballs and data are being sold).⁴² If we set interactions based upon what we perceive, we will be thrown off by the asymmetry. Over time, however, with accurate cues from the tools and sites we use (and stronger laws enforcing the accuracy and adequacy of notice), we can develop norms that account for the true publicity of our online activities. If we're building truly accurate mental models, however, most of the readjustment will be to treat everything as public

We don't want to be in the world where our “reasonable expectation” is that everything tech-mediated may be equivalent to publication on the front page of the New York Times. Abolishing contexts would eliminate the threat of contextual breaches, but would also deprive us of significant benefits from being able to interact on a scale smaller than the world-at-large. Privacy enhances association, so the context-free solution is no solution. Thus we will also want to build

⁴²See Monica Chew, Dirk Balfanz, Ben Laurie, *(Under)mining Privacy in Social Networks*.(2008); Ben Laurie, *Why Privacy Will Always Lose*, <http://www.links.org/?p=615>

more effective ways of looking away and forgetting – even if it's not in the tool-makers' interest to help us with that long-term problem.

Overall, we face a reverse Goldilocks problem: An in-between level of engagement with those from other communities is “just wrong,” at once too deep and too shallow. On a superficial encounter with others, we can recognize their common humanity and accord them respect on that basis. On deeper engagement and introspection, we can find common interests or probe a shared commitment to public reason despite deeply different philosophies of the good and interests along the way. In between, however, is the realm of snap judgments and mistrust, and a slipping of the roles, a forgetfulness that we don't need to share deep values in order to work together in the political sphere, and a drawing of erroneous conclusions from fragmentary evidence.

Thus Rawlsian political liberalism and its notion of overlapping consensus helps give meaning to the contextual view of privacy, and provides added framing for the concept. “Social cooperation is not merely coordinated social activity efficiently organised for some overall collective end. Rather, it presupposes a notion of fair terms of cooperation on which all participants may reasonably be expected to accept over the course of a complete life.”⁴³

Neither markets nor contracts yet provide us with sufficiently nuanced privacy in public. Insights from political philosophy can help those from sociology and computer science to shape the technology, law, and norms with which we support both privacy and publicity.

⁴³Rawls, “Social Unity and Primary Goods” in *Collected Papers*, Samuel Freeman, ed. 165.