A Democratic conception of privacy

Annabelle Lever

A DEMOCRATIC CONCEPTION OF PRIVACY

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Published by AuthorHouse 09/13/2013

ISBN: 978-1-4918-7838-5 (sc)
ISBN: 978-1-4918-7839-2 (e)

This book is printed on acid-free paper.

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Dedication

To my mother, and in memory of my father, with much love and many thanks.

Acknowledgements

This book is based on my doctoral thesis. Although it is usual to publish one's thesis first, it was only after publishing *On Privacy* for Routledge, that I also decided to publish my thesis. I have published many academic articles on privacy since 1997, but there are still aspects of my original research on privacy which strike me as novel and which I hope may be helpful to others interested in the philosophy of privacy, although I have left the original references and bibliography as they are. For example, the thesis contains an extended comparison of the personal and political aspects of our interests in privacy and their role in identifying privacy, as a distinctive value, and justifying it as a distinctive legal right. Although the comparison between our personal and political interests in privacy can be found in my later work, the thesis provides a more sustained discussion of these different aspects of privacy, and of their relationship and importance for a distinctively democratic interpretation of privacy. Likewise, my thesis contains a chapter dedicated to the relationship between women's claims to privacy and their interests in abortion as well as childbearing. It also contains a discussion of women's personal and political interests in abortion and of their importance for a democratic commitment to the equality of men and women. While my subsequent publications on privacy extend and deepen ideas which can be found here—relating them to debates over freedom of the press, private property or neuroscience, for instance—there are aspects of my original research which I have not had the opportunity to revisit but which, I hope, may still be of interest to others.

I am therefore grateful to the Ernst and Lucie Schmidheiny Foundation for a grant which enabled me to publish my thesis with AuthorHouse. My husband, Dan Grecu, helped to turn a thesis written on a 1990s Mac Plus into a document readable on 21st century computers, and then helped me to prepare this book for publication. Without his help and encouragement, I don't think I would have been brave enough (or technically capable) of doing so.

It is also a great pleasure publicly to acknowledge those who made it possible for me to write the doctoral thesis on which this book is based. In the first place, I would like to thank Colin Matthew, Susan Wood and, above all, John Robertson—all of St. Hugh's College, Oxford. Without their help I doubt that I would have completed my B. A., and am quite sure that I would never have embarked on an academic career. It was a privilege to study History with them. My thanks, as well, to those who supervised, read and helped me to revise my thesis. To Margaret Burnham and Martha Nussbaum I am grateful for their willingness to be on my Committee, and for their helpful comments and perceptive questions, which it would be nice to be able to answer properly someday. Elsa Bardalez and Melissa Williams read, talked through and helped me to rewrite much of this work, as they have with papers, job talks, presentations and proposals before and since.

In Joshua Cohen, I suspect, I got something like the Platonic ideal of an advisor. He supervised this project from beginning to end—and, in fact, provoked me into writing on the right to privacy. His work on democratic theory underpins this thesis and at every stage of the project he has helped me to clarify and to improve its arguments. He is a terrific philosopher, great teacher and a wonderful advisor.

Finally, I would like to thank the people at Social Studies, Harvard University, and the Department of Political Science at the University of Rochester, NY. Social Studies has been a haven for many graduate students struggling to finish their dissertations, a school where we learned social theory as well as taught it. I would particularly like to thank Judy Vichniac, Pratap Mehta, Glyn Morgan and David Peritz for making my last year there so enjoyable

and fulfilling, as well as for their help with my thesis. The Political Science Department at Rochester, NY provided me with genial and supportive colleagues, plenty of laughter and thought-provoking ideas and also, it must be said, the relief of a "proper" job. Their confidence in me made it easier to finish the dissertation, and their generous policy of providing a first term without teaching was invaluable. I am especially grateful to Jim Johnson, who was incredibly generous with his time, ideas, encouragement and jokes. One of the nicest things about finally publishing this book is the chance publicly to thank you all.

INTRODUCTION

Carol Pateman has said that the public/private distinction is what feminism is all about. I tend to be sceptical about categorical pronouncements of this sort, but this book is a work of feminist political philosophy and the public/private distinction *is* what it is all about. It is motivated by the belief that we lack a philosophical conception of privacy suitable for a democracy; that feminism has exposed this lack; and that by combining feminist analysis with recent developments in political philosophy, we can meet the philosophical and political need for a distinctively democratic conception of privacy.

This book then, is an effort to sketch and defend such a conception of privacy. It aims to show that while some conceptions of privacy are inconsistent with democracy, others are not. Indeed, the book asserts, the belief that privacy can be valuable and that it can justify basic legal rights, is implicit in a democratic conception of persons as free and equal beings, and a democratic conception of politics as the self-governing, or regulating, activity of such individuals. Just as we can and should reject undemocratic conceptions of the suffrage in favour of democratic ones, so the book maintains, we can and must reject undemocratic conceptions of privacy in favour of ones that reflect the moral equality of men and women, and a commitment to democratic forms of government.

Democracy is often described as government by and for the people. On such a view, democracy is a political regime which can be contrasted with monarchies or aristocracies on the one hand, or with theocracies and despotisms on the other. By contrast with the

former, it is a form of government that views individuals as citizens and as equal members of the agency which authorizes the use of political power. By contrast with the latter, it is a form of government whose purposes and aims are established by the common interests of individuals, conceived as free and equal citizens.

It is my contention that there is a plausible and attractive conception of privacy implicit in this view of democracy. Hence, I show that individuals have fundamental interests in privacy because privacy enables them to participate in politics freely and as the equal of others and, beyond that, to lead lives that they can each affirm to be reasonable, valuable and right. As I think that the ideal of democratic government is properly associated with this latter and broader goal, as well as with the former one, I call my account of privacy a democratic conception of privacy to signal its connection to a particular ideal of politics, and to the conception of persons that makes this ideal a convincing and inspiring one.

As this is a work of political philosophy, however, no effort is made to address the legal merits of competing accounts of the right to privacy, or to resolve legal dispute about the content and justification of particular constitutional rights in the United States. Thus, while I use Supreme Court decisions and works of legal theory to illustrate and support my arguments, my use of these materials is governed by philosophical concerns and my conclusions, therefore, are strictly of a philosophical, not a legal, nature.

The book is divided into four chapters, moving from feminist criticisms of privacy to an engagement with the philosophical literature on privacy and an account of the right to privacy in a democratic society. It proceeds as follows. In Chapter 1, I examine feminist concerns about privacy, through a close reading of the work of Catherine MacKinnon. I argue that MacKinnon persuasively shows that protection for privacy has frequently licensed the coercion and subjection of women, and that her arguments are supported both by feminist scholarship, key Supreme Court decisions, and by familiar conceptions of privacy and equality. However, I argue, these criticisms do not imply that privacy, like slavery, can never be democratic, because wholly inconsistent with the equality of individuals. Rather,

feminist criticisms of privacy suggest that privacy, like the suffrage, can be necessary to the equality of women and can have a legitimate and important place in a democratic society.

In Chapter 2, I examine the philosophical literature on privacy in light of the need to distinguish democratic from undemocratic accounts of its nature and value. This literature, I show, can help us to provide an account of privacy that is sensitive both to its inegalitarian aspects and to its importance for a democratic commitment to the freedom and equality of women. However, I argue, we cannot embrace current philosophical accounts of privacy uncritically, because to a striking extent they are, themselves, indifferent to the ways that privacy has licensed sexual inequality.

Thus, in Chapter 2, I set about interpreting privacy as a moral and political value, in light of the strengths and weaknesses of the philosophical literature on privacy. Their strength is that they show that there are many reasons for caring about privacy, or many ways in which we might define it as a democratic value. Their weakness is that they tend to assume that we must choose amongst these different conceptions of privacy, in order to provide a philosophically cogent account of privacy.

This, I show, is a mistake and one that can be remedied by remembering that a commitment to the equality of individuals requires us to acknowledge the reasonable differences in value and interest that may characterize their relations in a democracy. When we do so, I show, it is possible to define privacy in terms of its protection for self-definition, intimacy and confidentiality, without having to choose between the three of them. For individuals may legitimately disagree about the differences between privacy and other values, even while holding that privacy is a distinctive and important democratic good; and they may also disagree about the importance of privacy compared to other goods, such as equality, without denying that self-definition, intimacy and confidentiality can be morally and politically desirable in a democracy.

In Chapter 2, therefore, I show that we can provide a philosophically adequate account of what privacy is and why it is valuable without supposing that privacy is always sexually

egalitarian, or denying that it has a distinctive place in a democratic conception of value. Chapter 3 then extends this account of privacy, by considering the justification for a legal right to privacy. Just as we cannot provide a democratic conception of privacy without attending to the different, though equally valid, concerns that individuals may have so, I show, we cannot provide a democratic account of privacy rights if we forget that individuals can, quite reasonably, differ in the importance that they attach to privacy.

The result, I argue, is that we can distinguish two main reasons for protecting privacy by right in a democracy, the one personal and the other political. Whereas the former emphasizes the importance of self-definition, intimacy and confidentiality to the personal freedom and equality of individuals, the latter emphasizes their importance to their prospects for voluntary and equal participation in the processes of collective choice and deliberation that define a democratic government.

These two justifications of privacy rights reflect the fact that in a democracy the personal can be political, as feminists have insisted, but need not be in order to merit protection by right. Indeed, I argue, we can distinguish democratic from undemocratic accounts of the right to privacy in this way: for whilst the former acknowledge the variety of individuals' interests in personal and collective choice, the latter either collapse the political into the personal, or assume that the legitimate claims of individuals are merely a function of collective needs, interests and values. Neither of these is consistent with familiar assumptions about the nature and justification of democratic institutions and rights, nor can they be reconciled with a commitment to sexual equality. Thus, I conclude, though the fact that there are different justifications for privacy rights in a democracy means that individuals may legitimately disagree over the content and justification of basic rights, it is wrong to confuse democratic debate with moral or conceptual confusion and so, arbitrarily, to truncate our accounts of privacy, equality and democracy.

Finally, in Chapter 4, I test and develop these claims by examining the justification for abortion rights in a democracy. I argue that women have legitimate interests in abortion, as well as in bearing

children, because they have fundamental, and legitimate, interests in privacy and equality. Although safe and legal abortion is necessary to sexual equality, as feminists claim, I show that we can provide a convincing and democratic account of women's claims to abortion only if we recognize women's interests in self-definition, intimacy and confidentiality. This is because women have both personal and political interests in abortion and we will be unable adequately to identify these if we overlook their interests in privacy. Indeed, I show, the difference between democratic and undemocratic solutions to conflict over abortion lies precisely in this: that whereas the former acknowledge the importance of privacy to the personal and political equality of women, the latter overlook or deny this. As a result, the latter license both mandated abortions, although women have legitimate interests in bearing and raising children, and prohibitions on abortion that cannot be reconciled with the freedom and equality of women.

That is not to say that abortion is not a politically significant matter, or that we can resolve moral conflict over abortion simply by giving women a legal right to abortion. Neither is the case. However, the chapter shows, in a democracy individuals are entitled to make morally and politically controversial decisions for themselves not simply because this is expedient or useful, but because this is right. To overlook this feature of democracy, I argue, is to make moral and political conflict utterly intractable by democratic means. Thus, while controversy over abortion has been held to show that privacy is an incoherent and undemocratic right, this chapter argues that it shows the reverse: for controversy over abortion makes clear that privacy is essential to democracy, and why this should be so.

This overview of the book, I hope, makes clear that its concerns are methodological as well as substantive, and moral as well as political. Thus, its central methodological claim is that we cannot reconcile privacy with the equality of individuals unless we make a deliberate effort to do so. Its central moral and political claims are that privacy is compatible with the equality of individuals, and sufficiently important to the latter that, in a democracy, the privacy of individuals merits legal protection by right.

However, this summary of the book also exposes its limitations. Chief amongst these, I fear, is that it provides no sustained discussion of the place of property on a democratic conception of privacy, and that the latter, itself, is rather a broad preliminary sketch than a polished and detailed portrait. I regard these limits on the scope and arguments of the book as limitations, albeit ones that I hope to be able to remedy before too long.

However, limited though the book clearly is, I believe that it lays out the essential components of a democratic conception of privacy and that, by analysing and synthesizing several diverse bodies of literature, it may help those who are interested in the relations between privacy, equality and democracy.

CHAPTER 1

PRIVACY AND EQUALITY

A. INTRODUCTION

Roe and the Right to Privacy

In *Griswold v. Connecticut* the Supreme Court held that a right to privacy is implicit in the American Constitution's protection of individual rights.[1] This right, the Court argued, makes it unconstitutional for the State to prohibit contraceptive use in marital relations. In *Eisenstadt v. Baird* the Court extended its ruling to cover the use of contraceptives in non-marital relations.[2] Then, in *Roe v. Wade*, the Supreme Court held that a woman's right to privacy is sufficiently broad to cover her right to choose an abortion, rather than to continue her pregnancy.[3]

Roe held that state criminal abortion laws prohibiting all but life-saving abortions violate the Due Process Clause of the Fourteenth Amendment, "which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy". It claimed that

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1 381 U.S. (1965).

2 405 U.S. (1972).

3 410 U.S. (1973).

> *Though the state cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term.*

Thus, the Court concluded, for the stage of pregnancy prior to approximately the end of the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician". For the subsequent stage of pregnancy, through to approximately the end of the second trimester, "the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health". Finally it held that "For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life, or health of the mother". [4]

Roe has proved one of the most bitterly controversial of Supreme Court decisions, perhaps matched only by *Brown v. Board of Education* in the post-war period.[5] Both the morality and the constitutionality of *Roe* have been disputed. Some deny that we can distinguish abortion from infanticide and argue that all or most abortions are, therefore, unjust killing. Others, by contrast, deny that *Roe* is good constitutional law, even if they think that abortion can be morally justified. They believe that there is no constitutional warrant for a right to privacy, and deny *Roe*'s claim that its reasoning

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[4] The decision for the Court was written by Justice Blackmun, joined by Chief Justice Berger, and Justices Douglas, Brennan, Stewart, Marshall and Powell. Berger, Douglas and Stewart filed concurring opinions. Justice White filed a dissenting opinion in which Justice Rehnquist joined. Rehnquist also filed a separate dissenting opinion.

[5] 347 U. S. (1954).

and conclusions are in line with, and follow from, *Griswold* and *Eisenstadt*.[6]

Moreover, *Roe*'s trimester framework has been itself the object of heated moral and constitutional dispute. Some people deny *Roe*'s assumption that there is any moral or legal significance to viability—or the point at which in theory, if not necessarily in fact, the foetus could survive outside the womb. Thus, they deny that there is any moral justification for allowing most abortions before that point and permitting the prohibition of most abortions thereafter.[7] Alternatively, they believe that the constitution provides no basis for such differences, and claim that technology is pushing viability to increasingly early points in pregnancy so that, as Justice O'Connor has famously asserted, *Roe* is on "a collision course" with itself.[8]

Privacy and Equality

These controversies about the morality and constitutionality of abortion, however, have tended to obscure another objection to *Roe*, though one addressed less to its conclusion than to its reasoning. The objection is that *Roe* illustrates the fundamental incompatibility of the right to privacy and the equality of individuals.[9] It is this objection to *Roe* that I will investigate in this chapter. It raises, I think, important

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6 John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*", *Yale Law Journal*, vol.82, (1973).

7 See, for example, Deborah L. Rhode, *Justice and Gender*, (Harvard University Press, Cambridge, 1989), pp. 211-2.

8 Justice O'Connor, dissenting in *Akron v. Akron Center for Reproductive Health*, 462, U. S. (1983).

9 Catherine A. MacKinnon, "Privacy v. Equality: Beyond *Roe v. Wade*", in *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press, 1983), pp. 93 -102; Deborah Rhode, supra; Sylvia Law, "Rethinking Sex and the Constitution", *University of Pennsylvania Law Review*, vol. 132, (1984), pp. 955-1040; Cass R. Sunstein, "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy", *Columbia Law Review* vol. 2, (1992).

philosophical questions about both privacy and equality and addressing these can help to clarify the philosophical grounds of the right to abortion. Though many people would agree with Brandeis that privacy rights are necessary to protect "the inviolate personality" of individuals, privacy has often been associated with the shameful, the alienating, the oppressive.[10] A right to privacy has, therefore, been held to stunt and thwart the personality of individuals and thus to obstruct and threaten both individual self-development and social cooperation.

The claim that *Roe* illustrates the incompatibility of privacy and equality assumes that we must reject the right to privacy because it justifies a distinction between the personal and political aspects of social life which maintains the subordination of women to men. I will refer to this claim as "the conflict thesis", because it holds that rights to privacy must conflict with the equality of women and men.

The right to privacy is thought to be incompatible with equality because it gives individuals rights of personal choice in sexual and familial relations, and so carves out an area of social life—the private realm or sphere—into which the state may not enter. Thus, the right to privacy implies that we can distinguish the personal from the political, and that intimate and familial relations are private rather than political matters. But this feminists deny. They claim that relations of domination and subordination characterize the sexual and familial relations of individuals, and that the division of power within

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[10] S.D.Warren and L. D. Brandeis, ""The Right to Privacy [The Implicit Made Explicit]", in *The Philosophical Dimensions of Privacy*, ed. Ferdinand Schoeman, (Cambridge University Press, New York, 1984). For the association of privacy with shame see Richard A. Wasserstrom, "Privacy: Some Arguments and Assumptions" and Robert S. Gerstein. "Privacy and Self-Incrimination," in ed. F. Schoeman. See also Rhonda Copelon, "Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change", In J. Lobel, ed. *A Less Than Perfect Union*, (Monthly Review Press, New York, 1988).

families is a political matter.[11] They claim that the sexual division of labour and income within the family denies women social equality with men, and licenses the exploitation and coercion of women in all areas of social life. Egalitarian reform of the family, they argue, is necessary if women are to become the social equals of men. This, they believe, is incompatible with the assumption that familial and sexual relations are private.

For those who endorse the conflict thesis—and some feminists do not[12]—there is no way to revise the content and justification of the right to privacy that would make it compatible with sexual equality. For in societies marked by pervasive sexual inequality, such as our own, there is no way to distinguish the personal from the political. Nor is it possible to separate those features of our intimate and familial relations which disadvantage women from those which do not. Thus, some feminists believe, the right to privacy cannot be made compatible with sexual equality, because we lack the means to distinguish the personal from the political without justifying sexual inequality.

The conflict thesis, I believe, supports a distinctive objection to the Supreme Court's reasoning in *Roe*. It asserts that *Roe*'s justification

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11 Susan Okin, *Justice, Gender and the Family*, (Basic Books, New York 1989), pp. 124, 133; Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", *Harvard Law Review* vol. 96 no.7 (1983); Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy", in *The Disorder of Women*, ed. C. Pateman, (Stanford University Press, Stanford), 1989; N. Taub and E.M. Schneider, "Women's Subordination and the Role of Law", in *The Politics of Law: A Progressive Critique*, ed. D. Kairys. (Pantheon Books, New York, 1990).

12 See, for example, Virginia Woolf, *A Room of One's Own*, (Harcourt Brace Jovanovich, New York, 1989); Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, (Rowman and Littlefield, New Jersey, 1988); Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought*, (Princeton University Press, Princeton, 1981; Jean L. Cohen, "Redescribing Privacy: Identity, Difference and the Abortion Controversy ", *Columbia Journal of Gender and Law*, vol. 3, no. 1, (1992), pp. 43-117.

of abortion rights is incompatible with the equality of women and men. Though assuming that women have a right to abortion, and not denying the constitutionality of *Roe*, this objection implies that there should be no legal right to privacy and that *Roe*'s justification of abortion is philosophically inadequate. It implies that women have a right to abortion because they are the moral equals of men, and that this right is necessary to treat women as the equals of men. Finally, it suggests that the *Roe* Court could have, and should have, defended the constitutionality of abortion from the constitution's guarantees of equal protection for individuals, rather than by recourse to the right to privacy.[13] Thus, the claim that *Roe* shows the incompatibility of privacy and equality raises intriguing philosophical and constitutional questions, ones which differ from more familiar controversies about abortion rights, but which appear of considerable relevance to these.

The constitutional questions raised by the conflict thesis are important, but I will not address them here. Instead, I will be looking at the philosophical aspects of the thesis, attempting to clarify and assess the philosophical reasons for believing that the right to privacy must justify inequality. I believe this warranted both by the significance of the philosophical aspects of the conflict thesis and because these can be distinguished sufficiently from its constitutional

[13] That means, by reference to the other part of the 14th Amendment: its equal protection clause, rather than its due process clause.

aspects to enable us treat them separately. For legal and moral rights are not necessarily the same, even if they share the same name.[14]

I will be using a provocative and important article by noted feminist theorist and legal scholar, Catherine MacKinnon, to describe and illustrate the conflict thesis. In "Privacy v. Equality: Beyond *Roe v. Wade*", MacKinnon argues that the right to privacy perpetuates the subordination of women to men, and thus justifies sexual inequality.[15] MacKinnon is commonly thought to have argued that privacy rights are incompatible with sexual equality[16] and this strikes me as a reasonable interpretation of her article. She asserts throughout that privacy rights subordinate women to men but nowhere suggests that this is merely one aspect of the right to privacy, albeit a lamentable one. By asserting that *Roe*'s privacy justification of abortion subordinates women to men, MacKinnon takes aim at feminist hopes for the right to privacy at their strongest point. This is what makes the article of particular philosophical interest, and suggests that in it MacKinnon advances the claim that privacy rights are incompatible with sexual equality. I will, therefore, be supposing that MacKinnon

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[14] Apart from the obvious fact that iniquitous laws exist, it is a substantial philosophical question whether or not laws could, or should, prohibit everything which might be classed as immoral, or mandate everything which morality requires. Though otherwise holding different conceptions of law and morality, Aquinal and H. L. A. Hart, for example, appear to share the view that law and morality do not require us to forbid every immoral act by law, or legally to require individuals to cultivate and exhibit virtues such as generosity and heroism, however important and valuable these may be. See Thomas Aquinas, *On Law, Morality and Politics*, (Hackett Publishing Company, Cambridge, 1988), pp. 67-69; and H. L. A. Hart, *Law, Liberty and Morality*, (Stanford University Press, Stanford, 1963).

[15] Catherine A. MacKinnon. "Privacy v. Equality: Beyond *Roe v. Wade*". All page references to MacKinnon's work will be to this book, unless otherwise stated, and will appear in the text.

[16] See Jean Cohen, supra p. 50, and Anita Allen, supra, pp. 36, 55, 71.

endorses the conflict thesis, and will be using her article to present the thesis for philosophical assessment.

MacKinnon is, however, a controversial thinker and this article is no exception. In places she appears to assert that all heterosexual intercourse is rape, or that all heterosexual intercourse is coerced.[17] Such claims are considered outrageous and insulting, even by many feminists. But they are not, I believe, essential to her argument that the right to privacy and equality must conflict, nor to the feminist reasons for accepting her argument. MacKinnon has recently denied that she holds such views or that her work endorses such beliefs.[18] Though useful to know, such statements clearly do not resolve questions about the role of coercion in our society, nor are they likely to quell interpretive debate about the meaning and implications of her published words.

Nevertheless, in my exposition of MacKinnon's objections to the right to privacy, and in my analysis of her views, I will assume that we need not determine these specific questions one way or the other. Answering such questions, I believe, provides only additional evidence for our conclusions about the relationship of privacy and equality, evidence parasitic upon, and of relatively minor significance to, the feminist claim that privacy is incompatible with equality. For sexual violence and coercion can take any number of forms, of which rape is only an instance. The murder, intimidation, harassment and exploitation of women by men would all seem included, whether or not associated with any particular sexual acts. For that reason, then, the conflict thesis does not depend upon the view that heterosexual intercourse is rape. As a result, we can ignore controversy on this score when determining whether or not rights to privacy and equality conflict.

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17 For example, "…abortion policy has never been explicitly approached in the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality; that is, as an issue of forced sex". p.95.

18 MacKinnon said this during a talk on February 6 1993, "Pornography: Left and Right", that she gave to a conference on "Laws and Nature: Shaping Sex, Preference and the Family", held at Brown University

Summary

This chapter, then, will do two things. First, it sets out MacKinnon's reasons for thinking that privacy rights promote sexual inequality, rather than undermining it, as Woolf assumed. It then assesses these views through a philosophic analysis of the Supreme Court decisions in *Harris v. McRae* and *Bowers v. Hardwick*.[19] MacKinnon cites these cases as evidence that rights to privacy and equality are incompatible and they seem to support her position. In *Harris*, after all, the Supreme Court held that the State need not provide Medicaid coverage for non-life-threatening abortions, thus putting medically safe abortions beyond the reach of most poor women. In *Bowers*, the Court held that the right to privacy does not protect consensual adult homosexual intercourse and, as a result, upheld State laws prohibiting homosexual sodomy in Georgia and elsewhere. Thus, these cases appear to support MacKinnon's condemnation of the right to privacy and her conclusion that feminists should reject the right to privacy.

However, this book shows, rights to privacy and equality do not have to conflict, as *Harris* and *Bowers* deny our equal interests in privacy. Although *Harris* and *Bowers* justify sexual inequality, as MacKinnon claims, the reasons that they do so illustrate the importance of privacy to sexual equality. Hence, I believe, a commitment to sexual equality requires us to distinguish amongst different conceptions of the right to privacy, because some conceptions of privacy are compatible with equality, although others are not. Thus, I will contrast majority and minority opinions in the Supreme Court cases cited by MacKinnon, before concluding with some thoughts on the relationship of rights to privacy and equality, and on the possibilities for a democratic conception of privacy.

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[19] *Harris v. McRae*, 448 U. S.(1980), and *Bowers v. Hardwick*, 106 U.S. (1986).

B. MACKINNON'S CRITIQUE OF PRIVACY

MacKinnon's analysis of the right to privacy suggests three main ways in which it perpetuates and justifies sexual inequality. The first is that the right to privacy sets limits to legitimate state action, giving individuals a right to be let alone which they can claim against others and against the state. The second is that privacy rights support and justify the male-dominated family in the name of intimacy and love. Finally, she believes that the right to privacy justifies sexual inequality by justifying a distinction between the personal and the political, or between the public and the private. I will take these three objections to privacy rights one at a time, in order to clarify MacKinnon's concerns.

The First Objection

MacKinnon's first objection to the right to privacy is that privacy is the right to be let alone, or to be free from state action. Because privacy gives individuals rights to be let alone by the state, she argues, it leaves the powerful free to oppress the vulnerable without fear of state scrutiny and accountability. Though the right to privacy limits the concerted use of state power to crush any particular individual, she believes, it promotes individualized forms of oppression which are incompatible with the freedom and equality of individuals. Putting her thesis in succinct polemical form, she claims that the right to privacy enables men to oppress women one by one.

MacKinnon notes that liberals believe that the right to privacy is necessary to protect the freedom and equality of individuals. Liberals claim that privacy protects the legitimate differences between individuals because it gives them the right to be let alone by the state. In this way, liberals believe, the autonomy of individuals is secured, and individuals are, then, free to cooperate together as equals, despite their differences.

MacKinnon, however, believes that the case for a right to privacy rests on a basic error. It presupposes, she argues, that state action is the primary threat to the freedom and equality of individuals

and ignores the fact that state action may be necessary to secure these.[20] We only ensure the freedom and equality of individuals by leaving them alone, if they are already free and equal to begin with. So, the right to privacy only protects the freedom and equality of individuals if they are already free and equal. If not, state action might be necessary to secure these goods and so individuals would have no right to be let alone by the state. This possibility is wrongly precluded by liberal justifications of privacy, MacKinnon believes.[21] As a result, she argues, the right to privacy protects the coercion and subordination of some individuals to others, while claiming to protect the freedom and equality of all.

MacKinnon, then, believes that liberals are wrong to imagine that state action is the principal or only obstacle to individual rights. According to MacKinnon, poverty, different bodily powers and the legacy of past inequality can all provide more potent obstacles to individual autonomy than state action, and state action could remove or substantially alleviate these.[22] For example, women may be unable to prevent conception and pregnancy though the state does not prohibit contraceptive use, because they are ignorant of the relevant biological facts or of their right to use contraceptives. They may be prevented by poverty, youth, geographical location and the opposition of others, from using contraceptives even if they want to. They may be discouraged from using contraceptives though they want to prevent pregnancy, because contraceptive use has a social meaning which women "did not create"—namely, that one is "loose", has no moral standards, is willing to have sexual intercourse with any man. Because women cannot control these interpretations

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20 "…if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful", p.100.

21 "To complain in public of inequality within it contradicts the liberal definition of privacy. In this view, no act of the state contributes to—hence should properly participate in—shaping the internal alignments of the private or distributing its internal force", pp. 99-100.

22 Speaking of the *Harris* case, she says: "State intervention would have provided a choice women did not have in private"; p.101, emphasis in text.

of contraceptive use, and these make it more difficult for women successfully to refuse sex with men, MacKinnon notes that women may be unwilling to use contraceptives, though otherwise they would do so.

Hence, MacKinnon maintains that the right to privacy justifies inequality because it assumes that individuals are free and equal when they are not. She uses the Hyde Amendment and *Harris v. McRae* to illustrate and support these claims. The Hyde Amendment, which has passed Congress each year since 1976, limits the use of Federal Funds to reimburse the costs of abortions under the Medicaid program of health care for the poor. Initially, it allowed Federal funding for abortions following from incest and rape as well as for life-threatening pregnancies.[23] MacKinnon believes that the Hyde Amendment supposed that women could be held responsible for becoming pregnant, because they could refuse to have sex with men, and could use contraceptives to prevent pregnancy. Thus, it allowed state funding only in "exceptional" circumstances: in cases of rape, or in life-threatening emergencies.[24]

Similarly, *Harris*, in holding the Hyde Amendment constitutional, assumed that poor women can be held responsible for their poverty, that they could have chosen not to be poor. Both, in

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[23] "In 1976, the last year that the government paid for all 'medically necessary' abortions, the number of federally funded Medicaid abortions was almost 300,000. By 1992 the number had plummeted to fewer than 100, with the government paying only for abortions needed to save the life of the mother. A study by the Alan Guttmacher Institute—the research arm of Planned Parenthood—estimates that one-fifth of the Medicaid-eligible women who would otherwise have obtained abortions now carry their pregnancies to term because they cannot afford to pay for abortions". From "Clinton plan may spark new fight on abortion aid" by Michael Putzel, staff writer for the Boston Globe. *The Boston Globe*, March 31 (1993), p. 1.

[24] However, since *Harris* the Hyde Amendment has allowed funding only for life-saving abortions. In 1993, the Hyde Amendment was again passed by Congress.

short, ignored the structural causes of pregnancy and poverty which women face, through no fault of their own, and which they cannot avoid or change without state aid. "It is not inconsistent, then, that framed as a privacy right, a woman's decision to abort would have no claim on public support and would genuinely not be seen as burdened by that deprivation", MacKinnon concludes.

Recognizing that the state cannot wholly prevent pregnancy from rape or contraceptive failure, and that it cannot ensure that men as well as women can become pregnant, MacKinnon assumes that the state can, nonetheless, prevent a woman's sexual capacities from becoming the source of particular disadvantage and indignity. The state can shape the circumstances in which women conceive, bear children and have abortions, so that these do not, as they now do, disadvantage women because of their sex. But this, she believes, the right to privacy prevents, by wishing away sexual inequality and coercion. Because it sets the limits to legitimate state action, the right to privacy allows social differences which undermine the freedom and equality of individuals. Far from protecting the legitimate differences between individuals, as liberals claim, MacKinnon concludes, the right to privacy protects illegitimate differences between individuals and so justifies the exploitation and intimidation of women by men. As MacKinnon puts it, the right to privacy means that "women with privileges get rights".

The Second Objection

The association of privacy and intimacy provides the grounds for MacKinnon's second objection to the right to privacy. Whereas her first objection is that privacy rights associate freedom and equality with the absence of state regulation, her second objection is that they associate freedom and equality with the male-dominated family and with heterosexual intimacy. Thus, MacKinnon believes, "It is probably no coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; the very feelings, intimate—form the core of what is

covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labour; has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition . . ."

Liberals believe that privacy protects the autonomy and equality of individuals by enabling them to form personal associations whose terms are largely regulated by themselves.[25] In this way privacy rights allow individuals to pursue their personal good, and enable individuals to know together goods which they could not know alone (to paraphrase Sandel's happy phrase)[26]. This, liberals hope, will give individuals equal access to things which are valuable, but which would be devalued or unavailable were choice prohibited.[27] For example, mutual care, love, affection and friendship, trust and support seem to be fundamental human goods, and ones which depend on the voluntary participation of individuals for their being and sustenance. But because they are vulnerable to interference from others and, particularly, from the state, liberals think that the state can only ensure these goods for individuals indirectly. By protecting intimate, sexual and familial relationships by privacy rights, then, they hope that the state can protect indirectly what it cannot ensure directly, and can, thus, further the happiness as well as the freedom and equality of individuals.

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25 S.I Benn, "Privacy, Freedom and Respect for Persons" in *Philosophical Dimensions of Privacy*, (ed.) F. Schoeman, pp. 223-244.

26 Michael J. Sandel, *Liberalism and the Limits of Justice*, (Cambridge University Press, Cambridge, 1982), p.183, Sandel, here, is speaking of politics, but the phrase seems as appropriate for smaller communities.

27 See, for example, Julie C. Innes, *Privacy, Intimacy, and Isolation*, (Oxford University Press, Oxford, 1992); Ferdinand Schoeman, "Privacy and Intimate Information ", pp. 91 and 111-2; Charles Fried, "Privacy ", *Yale Law Journal*, vol.77, (1968), pp. 475-93.

However, MacKinnon claims, the degree of intimacy has been "the measure of the oppression" of women by men.[28] The liberal case for protecting intimate relationships, she believes, presumes that the state has no legitimate interest in setting the terms of personal associations, or regulating them, in order to exclude exploitative, damaging or unjust associations. It supposes that intimacy precludes exploitation and injustice and, thus, that the state has no legitimate interest in regulating the internal relations of intimate associations: " . . . intimacy is implicitly thought to guarantee symmetry of power. Injuries arise in violating the private sphere, not within and by and because of it".

These premises, MacKinnon believes, are mistaken. For sexual inequality forces women into disadvantageous and exploitative associations with men. As Okin and others have noted, women are expected to marry, to have children and to be the primary caretakers of these.[29] They are supposed to devote themselves to the care and fulfilment of others, rather than of themselves. Such social expectations shape the treatment and self-images of women from infancy, and shape, therefore, their opportunities for learning, work and for personal satisfaction and enjoyment in our society. The result is that women are encouraged to choose a course of life that makes them dependent on men for their well-being, and face a wide variety

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[28] p.100. MacKinnon, here, appears to echo a point made by Mill: " . . .every one who desires power, desires it most over those who are nearest to him, with whom his life is passed, with whom he has most concerns in common, and in whom any independence of his authority is oftenest likely to interfere with his individual preferences". John Stuart Mill, "The Subjection of Women", in *John Stuart Mill and Harriet Taylor Mill: Essays on Sex Equality*, ed. Alice C. Rossi, (University of Chicago Press, Chicago, 1970), p.136. See also Susan Okin, *Justice, Gender and the Family*, (Basic Books, New York, 1989), p. 136: Marriage and family "constitute the pivot of a societal system of gender that renders women vulnerable to dependency, exploitation and abuse".

[29] Susan Okin, ch. 7, "Vulnerability by Marriage" and particularly the section entitled "Vulnerability by Anticipation of Marriage", pp. 142-46.

of obstacles to doing otherwise.[30] In particular, they face the obstacle presented by men who endorse this perception of women, or resent, fear, or are indifferent to the pursuit of independence by women.[31]

Moreover, MacKinnon argues, it is a mistake to believe that intimacy secures the choice and well-being of individuals, and thus assures mutuality in relationships. Intimacy, in itself, need not counter-act the egoism, misperception of the worth of others and oneself, which leads to injustice. On the contrary, it may allow these free play and intensify

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30 Okin p.153 " . . . [T]he major reason that husbands and other heterosexual men living with wage-working women are not doing more housework is that they do not want to, and are able, to a very large extent, to enforce their wills"; p.82 on the problems of exit from a relationship that women face due to economic dependence and p.168 the differential power that women's economic dependency creates during a relationship.

31 "The National League of Cities estimates that as many as half of all women will experience violence at some time in their marriage. Between 22% and 35% of all visits by females to emergency rooms are for injuries from domestic assaults . . .. Especially grotesque is the brutality reserved for pregnant women: the March of Dimes has concluded that the battering of women during pregnancy causes more birth defects than all the diseases put together for which children are immunized. Anywhere from one-third to as many as half of all female murder victims are killed by their spouses or lovers [often when they try to leave], compared with 4% of male victims", Cathy Booth, Jeanne McDowell, and Janice C. Simpson, "'Til Death Do Us Part", *Time Magazine*, (Jan 18 1993), p.41.

injustice.[32] As both Mill and MacKinnon observe, intimacy may increase the pressures on women to behave in ways that please or flatter men, or which support their often unconscious sense of what is owed them by women, because they are men. Intimacy with men, in short, may increase the pressure on women to be subservient, passive and self-sacrificing, rather than alleviating this pressure as liberals expect. Thus, MacKinnon maintains, "When the law of privacy restricts intrusions into intimacy, it bars changes in control of that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect".

So, privacy perpetuates sexual inequality and unfreedom, according to MacKinnon, by hiding and justifying oppression because it is intimate and chosen. By protecting existing forms of intimate association, privacy rights suppress legitimate differences between individuals over sex-roles, the choice of sexual partner, the conduct of sexual and familial relations.

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[32] For example, recent work suggests that the majority of rapists know their victims well—being friends, neighbours, former lovers, rather than strangers. But, as MacKinnon notes, intimacy is taken to presume consent to intercourse, so that our conceptions of rape tend to preclude its possibility where a woman knows her assailant. Intimacy with men, therefore, can preclude consent by women—a fact made explicit by the exception of marital rape from the legal definition of rape in many states in America and in many countries. See MacKinnon p. 95. See also Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No*, (Harvard University Press, Cambridge, 1987), especially pp. 23-4 on privacy and chapters 3 and 4 on the common law approach to rape and on the legal situation in the 1970 and 1980s in America. "Until the first wave of legal reform in the 1970s, an aggravated assault against a stranger was a felony, but assaulting a spouse was considered a misdemeanour, which rarely landed the attacker in court, much less in jail. This distinction, which still exists in most states, does not reflect the danger involved. Michael Dowd, director of the Pace university Battered Women's Justice Center, has found that the average sentence for a woman who kills her mate is 15 to 20 years; for a man, 2 to 6"; pp. 41-42 "'Til death do us part", supra.

By perpetuating the subordination of women to men in the name of intimacy, privacy rights promote "the intimate degradation of women as the public order". By endorsing oppressive and exploitative relationships because individuals commonly accept these, privacy rights militate against alternatives. For they make sexually egalitarian relationships—whether heterosexual or homosexual—appear aberrant, unreasonable, perverse. Thus, privacy rights inhibit and undercut the quest for better ways of relating to others, of caring for, and loving them, as equals.

The Third Objection

MacKinnon's third reason for believing that privacy is incompatible with equality is that privacy rights endorse and maintain the public/private distinction, or the distinction between the political and personal. But this distinction, she claims, is precisely what feminists have had to "explode" in order to press their claims for sexual justice. The public/private distinction distinguishes the political from the personal in ways that privilege the interests, voices and persons of men, over those of women. Hence, feminists have insisted, the personal is political, in order to show the connection between individual acts of sexual violence and exploitation and the way that our society creates and distributes political power.[33]

In liberal thought the right to privacy is meant to ensure that the uses of state power are determined by impersonal or neutral means. This, it is thought, is necessary if state power is to be justified and

[33] For discussions of the slogan "the personal is political", and of different interpretations of this see: Linda J. Nicholson, *Gender and History: The Limits of Social Theory in the Age of the Family*, (Columbia University Press, New York, 1986), pp. 17 - 43; Anne Phillips, *Engendering Democracy*, (Pennsylvania State University Press, Pennsylvania, 1991), pp. 92-119; Carol Pateman, supra pp. 131-134. Pateman notes that "The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle, and comments "it is, ultimately, what the feminist movement is about", p.118.

compatible with the freedom and equality of individuals.[34] By requiring individuals to distinguish between the personal and the political, the right to privacy is supposed to ensure that the uses of state power are determined by the common interest of citizens rather than by the whims, caprice and prejudice of the powerful. By protecting the personal interests of citizens from political decision-making, the public/private distinction is supposed to encourage fearless participation in public life even by the relatively powerless or the socially unpopular.[35] Protection for the right to privacy and the public/private distinction, then, are meant to be evidence of a state's commitment to impartiality between the competing interests of citizens and to the freedom and equality of individuals in public and private life. In this way, liberals believe, the public/private distinction can secure the foundations of constitutional democracy and avert the evils of absolute government.

According to MacKinnon, there are two main difficulties with this picture of the public/private distinction. First, it presupposes that the private is not already political. Second, it presumes that the personal/political distinction is, itself, neutral and impersonal. Neither, she claims, is the case. So, far from promoting freedom and equality, she thinks, the public/private distinction perpetuates sexual inequality and places precisely those beliefs, practices and institutions which most contribute to sexual inequality, beyond democratic accountability and redress. The public/private distinction "is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is

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[34] S. I. Benn and G. F. Gauss, eds. *Public and Private in Social Life*, (Croon Helm, London, 1983); "The liberal Conception of the Public and Private" p 40; Nancy Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought*, (Harvard University Press, Cambridge, 1987), p. 60.

[35] Rosenblum stresses the connection between privacy and participation, pp. 61-2: "Far from inviting apathy, private liberty is supposed to encourage public discussion and the formation of groups that give individuals access to wider social contexts and to government."

a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it".

The private is political, MacKinnon argues, because its existence depends on support from government, without which there would be no legal protection of privacy.[36] Moreover, government's maintenance of privacy rights is no more politically neutral than its other acts—for example, raising and spending taxes, or regulating the press and communications media.[37] In each case, the state distributes political power—or the ability to determine how the state is governed—by its grant of rights. In each case, it does so for reasons that are at least as likely to be influenced by political calculation—or calculations of what will be advantageous to those with power—as by convictions about the justice or goodness of one course of action rather than another.[38] So, if open and accountable, governments are meant to protect citizens from the abuse of state power by those who have it, we should abandon privacy rights in the interests of democratic government. Absent the belief that the private is not political, MacKinnon argues, the rationale for privacy rights advanced by liberals collapses, and privacy can be seen for what it is: a threat to the freedom and equality of citizens.

Moreover, MacKinnon believes, it is untrue that the personal/political distinction is neutral between the interests of persons and provides, therefore, an impersonal guide to resolving conflicts between them. What is considered personal is, therefore, considered unsuitable for political discussion and for collective action.[39] But this means that sexual inequality and injustice can be dismissed as

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36 See Frances Olsen and Taub and Schneider supra.

37 See Stanley Fish, "There's No Such Thing as Free Speech—And It's a Good Thing, Too", *Boston Review*, vol. 17, (January-February 1992), pp. 3-4, 23-26.

38 See, for example, MacKinnon's account of why women got a right to abortion on p.101.

39 See Anne Phillips, pp. 93-4.

a personal matter, as not appropriately political.[40] Thus, the public/private distinction, according to MacKinnon, depoliticizes sexual injustice and inequality, leaving its victims without effective means for enlisting the help of others in defence of their rights.

According to MacKinnon, the public/private distinction licenses two different, but related, results. First, it implies that social inequality is a personal matter—that it is the nature of particular individuals or social groups, not their circumstances and the behaviour of others, which are responsible for their disadvantaged social position. Second, it implies that, though in the public realm the state must aggressively combat prejudice against individuals, in private individuals may join sexist or racist associations if they so want, or read pornography though this is illegal in public. In each case, by supposing that our personalities can be more or less unaffected by our circumstances, the state allows prejudice to flourish and, with it, the coercion and subordination of individuals.

Harris and *Bowers v. Hardwick*, MacKinnon believes, support these claims. In *Harris* the Supreme Court held that the government was not responsible for the poverty of poor women who wanted abortions—and took this to be so self-evident that it did not bother to cite any supporting evidence.[41] Yet this claim was essential to their reasons for denying poor women Medicaid funding for abortions. For, the Court held, were the government responsible for the poverty of poor women, it would have a duty to remove poverty-caused obstacles to the exercise of the right to abortion, a duty to fund abortions for poor women.

In *Bowers v. Hardwick* the Supreme Court held that the right to privacy does not cover consensual homosexual sodomy between

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[40] Hence, MacKinnon notes, the belief that *women*'s use or non-use of contraceptives is an important consideration in deciding whether or not she should have a right to abortion and the remarkably tenacious belief that women are, somehow, responsible for being raped or battered by men.

[41] "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category", pp. 298, 316-7.

adults, even though this occurs in the home, where others need not witness it. The Court cited in its support, the condemnation of homosexuality in the Old Testament, in medieval law and in the law of many States in the Union. It argued that, in the face of abiding and deep-seated prejudice against homosexuality, it was "facetious" to claim that there was a constitutional right to homosexual sodomy, found in the constitutional right to privacy and guarantees of procedural due process.[42] Yet, *Bowers* provided no evidence that consensual adult homosexual sodomy harms anyone, or interferes with the rights of individuals and should be banned. Rather, it supposed, the mere fact that people were prejudiced against such sex acts provided warrant for the state to prohibit them.[43]

In each case, MacKinnon argues, the right to privacy naturalized and justified social inequality, turning the biological and social differences between individuals into the basis for disadvantage and subordination. It enabled the Supreme Court to maintain that the state need not fund abortions for poor women because it was not responsible for their poverty or their pregnancy. Hence MacKinnon claims that " . . . the *Harris* result sustains the ultimate meaning of privacy in *Roe*: women are guaranteed by the public no more than what we can get in private".

The same could be said of *Bowers*. The Court decided to affirm only that part of the challenged Georgia statute condemning homosexual sodomy, refusing to rule on the statute's criminalization of heterosexual sodomy as well.[44] It held that homosexual sodomy had nothing to do with the familial and reproductive concerns underlying the constitutional right to privacy, because it was homosexual and, therefore, raised no issues of procreation or contraception.[45] It failed to consider how previous laws against

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42 pp. 186, 191-4.

43 pp. 186, 196.

44 See Blackmun's dissent, p. 200.

45 "None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case". pp. 186, 190-91.

homosexuals might have promoted or inflamed prejudice against them, or how its own ruling might threaten the public standing, dignity and freedom of individuals who are, or are thought to be, homosexual.[46] In this way, it promoted precisely those conditions which have done most to prevent homosexuals from seeking and exercising political power, or positions of public prominence and civic responsibility.

So, far from providing a neutral or impartial standard for resolving conflicts over the uses of state power, MacKinnon concludes, the public/private distinction undermines their principled and democratic resolution. It guarantees, she believes, that oppressed and disadvantaged social groups will lack impartial judges in those institutions which our society uses to hear, judge and redress the grievances of individuals, whether courts, parliaments or public opinion. "To fail to recognize the meaning of the private in the ideology and reality of women's subordination by seeking protection behind a right to that privacy is to cut women off from collective verification and state support in the same act", MacKinnon concludes.[47]

Summary

MacKinnon argues, then, that the right to privacy is fundamentally incompatible with the freedom and equality of women. Those things which it protects unaccountability, the male-dominated heterosexual family, the public/private distinction—are, precisely, those things which are responsible for their domination by men. Hence, she claims, it is not accidental that *Harris* justified sexual inequality, nor just bad luck that *Roe*'s privacy justification of

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[46] For discussion of violence against homosexuals and the failure of laws to punish this see Kendall Thomas, "Beyond the Privacy Principle ", *Columbia Law Review*, vol. 92, (1992), pp. 1462-7, p.1486, n.194. Thomas also discusses the circumstances surrounding the arrest of Hardwick, pp. 1437-39.

[47] pp. 101-2, emphasis in text.

abortion rights for women had such results. Rather, she thinks, this is exactly what one would expect. Thus, she concludes, *Harris* fulfils the logic of *Roe*'s privacy perspective on abortion and shows us that *Roe*'s claim that women have a right to privacy is, indeed, "an injury got up as a gift".

C. THE CRITIQUE OF MACKINNON

General Remarks

These, then, are MacKinnon's reasons for believing privacy rights a threat to sexual inequality, and they seem compelling. For it does look as though privacy rights have justified sexual inequality in the ways alleged. What is less clear, however, is that privacy rights are therefore intrinsically and uniquely incompatible with equality, as MacKinnon implies. From the fact that privacy right have justified inequality, for example, it does not follow that they must do so, anymore than the justification of undemocratic voting rights shows that equality is incompatible with the right to vote.

Thus, I believe, we need to distinguish *Roe* from *Harris*. For *Roe* gave women a legal right to abortion, a right that MacKinnon believes necessary to sexual equality and which, despite *Harris*, she believes to have improved the situation of women. So, instead of concluding from *Harris* that rights to privacy and equality are incompatible, we need to consider more carefully the grounds of the *Harris* decision, and their significance for the relationship of privacy and equality.[48] This is particularly important because *Harris* did not claim that state funding for abortion rights is inegalitarian or incompatible with the privacy rights of those who oppose abortion.

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[48] Rosalind Pollack Petchesky, for example, directly disagrees with MacKinnon's claim that Harris is a logical extension of I. See *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom*, (Northeastern University Press, Boston, 1984), p.299: "No matter how one reads it, and in spite of the loopholes in *Roe v. Wade*, it is impossible to reconcile the position the Court took in 1980 with its opinion in 1973."

Nor, in fact, does MacKinnon argue that *Roe*'s justification of abortion made state funding for abortion impossible.[49] As a result, there seems no compelling reason to assimilate *Harris* to *Roe*, although privacy rights have often justified sexual inequality.

Moreover, MacKinnon's critique of the right to privacy is ambiguous in several ways. She shows that our equal right to privacy has justified sexual inequality and concludes that rights to privacy must undermine the equality of individuals. However, her evidence suggests that rights to privacy and equality need not conflict, because rights to privacy which justify sexual inequality depend on dubious premises about the equality and rights of individuals. Get rid of these, *Roe* suggests, and there is as little reason to reject the right to privacy on egalitarian grounds as there is to abandon the right to vote. So without denying that *Harris* and *Bowers* justify inequality, there seems no reason to condemn the right to privacy out of hand, or to conclude, with MacKinnon, that privacy rights are the enemy of sexual equality.

In what follows, I will try to substantiate these ideas or hypotheses. Looking at MacKinnon's three objections to the right to privacy, I will show that sexist conceptions of equality and inadequate theories of rights both underlie undemocratic accounts of privacy. When we recognize the place of these in justifying sexual inequality, I believe, we can accommodate MacKinnon's claim that privacy has justified sexual inequality, whilst rejecting her conclusion that rights to privacy and equality must conflict. This is possible without

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[49] The majority in *Harris* argue that the state has no duty to fund abortion or childbirth. The implication, then, seems to be that the state can legitimately fund neither, either one, or both if it wants to.p.316, 318 especially footnote 20 quoting *Maher*. MacKinnon does not argue that the situation prior to *Harris* was in fact incompatible with a right to privacy. In fact, in footnote 20, p.249 MacKinnon notes that the right to privacy has been held to *include* funding for abortions under some *state* constitutions. But MacKinnon fails to explain why, if funding for abortion can be compatible with privacy rights, *Harris* fulfils the logic of *Roe* – a logic which, according to her, justifies sexual inequality.

assuming that moral and legal rights are identical, or that the state can legitimately enforce every moral claim by law. Nor, indeed, is it necessary to suppose that individuals' claims to privacy and equality must be obvious, or susceptible to only one interpretation. Because neither is the case, my analysis of the Supreme Court decisions in *Harris* and *Bowers* focuses on the interpretive principles and assumptions that guide the Majority and Minority conclusions about the right to privacy, rather than on those conclusions themselves. In this way I hope to show that on widely accepted assumptions about democratic rights we can reject the decisions in *Harris* and *Bowers* without rejecting the right to privacy itself.

The Right To Be Let Alone

Two arguments are critical to *Harris*' conclusion that *Roe*'s privacy right to abortion is compatible with denying poor women state funding for abortion.[50] The first is the claim that the government is not responsible for the poverty of poor women. The second, that the government has a duty to remove only those obstacles to the exercise of rights which it, itself, has created. Hence, the majority state: "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category".[51] The first claim is certainly contentious and, if rejected, it would seem that the state would have a duty to aid poor women, because their right to privacy gives them a right to be let alone by the state. However, I will concentrate on the second claim in *Harris*. I do not think that a woman's right to funding for abortion ought to turn on complex and inevitably contentious questions

[50] While I will be arguing that this is not compatible with the privacy rights of women, the majority's claim here does not imply that the right to privacy must prevent the state from redressing inequality. Hence, however inegalitarian, the majority position merely shows that privacy rights are compatible with inequality, not that they imply inequality or are incompatible with equality.

[51] *Harris*, p. 298.

about the role of the state in causing the poverty of poor women. But if we accept the second claim of the *Harris* majority, this is unavoidable.

Moreover, it is this second claim which illustrates MacKinnon's contention that the right to privacy justifies inequality because it rests on the mistaken premise that individuals would be free and equal if left alone by the state. This belief does inform the *Harris* decision and does justify inequality, as MacKinnon claims. However, the right to privacy need not have these results. The Supreme Court majority here advance a general claim about rights that they then use to interpret the content of the right to privacy. It is, I believe, this thesis about rights that we should reject as inegalitarian and not, as MacKinnon thinks, the right to privacy.

The majority believe that the constitution *requires* government to remove only government-caused obstacles to the exercise of rights, although it *permits* the government to remove other obstacles to individual action.[52] Whether or not this claim is correct as a matter of constitutional interpretation, this thesis about individual rights (and state duties) justifies inequality and seems incompatible with a democratic theory of rights. It supposes that poverty can be an absolute bar to the exercise of fundamental rights in cases where the government is not causally responsible for poverty. Thus, it assumes that the freedom and equality of individuals are adequately protected where natural catastrophe or the results of legitimate third part actions create poverty-based obstacles to the exercise of basic rights—or ones critical to freedom and

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[52] p. 298: "To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result"; p.316-7: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution."

equality. But such a conclusion makes no moral sense, and is hard to reconcile with basic principles of right. After all, if one can effectively be deprived of even fundamental rights through no fault of one's own, it is hard to see why we should care about rights, or suppose them necessary to protect our freedom and equality.

That is not to say that the government has a duty to remove poverty-based obstacles to the exercise of rights in every case. Though there are good reasons to believe that poverty threatens the freedom and equality of individuals,[53] particularly where it coexists alongside great wealth, it is not clear that a democratic society must ensure that the poor are capable of exercising all their rights, on pain of injustice. However, in circumstances where it is possible for government to remove poverty-caused obstacles to the exercise of *fundamental* rights, and of doing so without threatening the rights of others, it seems that government would have a duty to remove them—by subsidizing the exercise of those rights and/or by alleviating poverty. Thus, contrary to the Majority's assumption that the State is morally responsible for poverty only where it is causally responsible for its existence,[54] basic principles of right suggest that the state has a duty to remove poverty based constraints on the exercise of fundamental rights so long as it can do so without threatening the rights of others.

Thus, the premise on which *Harris* denied poor women state aid is not compelling, as it is not true that government has a duty to remove only those obstacles to the exercise of rights for which it is causally responsible. There is, therefore, no reason to believe, with MacKinnon,

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53 See Marshall's objections to the Court's interpretation of the Equal Protection Clause, in his Harris dissent, pp. 341-3. 54 For a similar critique of the majority's understanding of state duties, see Unger's objections to the "truncation" of the equal protection analysis in Roberto Mangabeira Unger, The Critical Legal Studies Movement, (Harvard University Press, Cambridge, 1983), pp. 44-52.

54 For a similar critique of the majority's understanding of state duties, see Unger's objections to the "truncation" of the equal protection analysis in Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, (Harvard University Press, Cambridge, 1983), pp. 44-52.

that the right to privacy must justify inequality because it is the right to be left alone by the state. For the *Harris* principle of state duties would justify inequality whatever right was in question.[55] It is hardly surprising then, and no mark against the right to privacy, that *Harris*' interpretation of *Roe*'s privacy right to abortion justified sexual inequality, as it does not seem reasonable to agree with the majority's theory of individual rights. In any case, whether or not one agrees with the Majority, their justification of inequality cannot be blamed on the right to privacy. So, while true that *Harris* justifies inequality and coercion, there is no reason to conclude from this that equality and the right to privacy must conflict.

In fact, the *Harris* decision illustrates quite well the reasons for thinking that privacy rights can be necessary to protect the legitimate differences between individuals. According to the minority[56], the Hyde Amendment is incompatible with the privacy and equality of poor women, because it illegitimately deprives them of personal choice and, thus, fails to protect their equality. By looking at the minority's objections to the Hyde Amendment, I will show that the right to privacy can protect the legitimate differences between individuals and need not, as MacKinnon claims, justify inequality amongst them. Attention to the reasoning of the minority—unjustifiably ignored by MacKinnon—shows that *Roe* is compatible with sexual equality, even though *Harris* is not.

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[55] Indeed, it seems to have done so most strikingly in *DeShaney v. Winnebago County Department of Social Services* 489 U.S. (1989).

[56] It is worth noting that Justice Stevens, who sided with the *Harris* majority in the cases on funding for non-medically necessary abortions, here joined the minority, but wrote his own opinion, although in many respects his views overlapped with those of Brennan, Blackmun and Marshall.

The minority argue that the Hyde Amendment is incompatible with the privacy of poor women.[57] The right to privacy, they claim, means that poor women have a right to abortion than rich women, or a lesser interest in privacy than terminate a pregnancy *rather than* to continue it. Because the choices a pregnant woman faces are dichotomous, if we prevent a woman from terminating a pregnancy, then we inevitably force her to continue it. This, the minority believes, we may not do without violating her right to privacy. But this is what the Hyde Amendment does. By denying poor women funding for abortions while funding childbirth, the state makes poor women an offer that they cannot well refuse.[58] Through selectively funding dichotomous options, the Hyde Amendment injects "coercive financial incentives favouring childbirth into a decision that is constitutionally guaranteed to be free of governmental intrusion."[59] As a result, the minority argue, the Hyde Amendment deprives indigent women of their freedom to choose abortion over maternity and so "impinge[s] on the due process liberty right recognized in *Roe v. Wade*".

The minority, then, assert that the state can violate the privacy of poor women by refusing to fund abortion. They take issue with the majority's contention that the Hyde Amendment creates no new

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57 I will here be referring to Brennan's opinion, which Marshall and Blackmun joined, although they, like Stevens, wrote their own opinions too (p. 329). Brennan says that he agrees with Stevens' dissenting opinion but "I write separately to express my continuing disagreement with the Court's mischaracterization of the nature of the fundamental right recognized in *Roe v. Wade*, and its misconception of the manner in which that right is infringed by federal and state legislation withdrawing all funding for medically necessary abortions".

58 p. 330, that state prohibition on Medicaid funding for therapeutic abortions "by design and in effect … serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have"; and pp. 333-4: "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse."

59 *Harris*, p.333.

obstacles to a poor women's reproductive choice, and so does not affect the privacy of poor women.[60] As the minority note, the majority assumes that the poverty of poor women is itself an absolute bar to reproductive choice, and so believe that the Hyde Amendment does not (and, indeed, cannot) deprive poor women of choice.

According to the minority, this assumption is false. Poverty only prevents women from having abortions if the state withholds funding for abortion. It is, therefore, the combination of poverty and the Hyde Amendment's selective funding of reproductive choice that forces poor women to continue unwanted pregnancies. Though "*Roe* and its progeny" do not mean that "the State is under an affirmative obligation to ensure access to abortions for all who may desire them", the minority hold that the state has a duty to fund abortions for poor women.[61] They believe that *Roe* prevents the State from "wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion". Because it violates this requirement, they conclude, the Hyde Amendment is incompatible with the privacy of poor women.

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[60] The majority maintain that " . . . the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all" See p.298 and p.314, where Stewart, for the majority quotes the decision in *Maher v. Roe*, that the unequal subsidization of childbirth and abortion is not an obstacle to a woman's reproductive choice because it "has imposed no restriction on access to abortion that was not already there".

[61] p. 330. This appears to be a reiteration of *Roe*'s tolerance for limitations on abortions in the third trimester of pregnancy, except for abortions necessary to the life and health of women. It is this feature of *Roe* that motivates Stevens' dissent in *Harris*. See p. 351 "If a woman has a constitutional right to place a higher value on avoiding either serious harm to her own health or perhaps an abnormal childbirth than on protecting potential life, the exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled."

Furthermore, the minority argue, the Hyde Amendment is incompatible with the equality of poor women. There is no reason to believe that poor women have a Lesser interest in privacy than men. But only on these assumptions would the Hyde Amendment be compatible with the equality of poor women. For the principal way in which the Hyde Amendment promotes or "encourages" childbirth is by preventing poor women who want abortions from exercising their right to abortion.[62]

This, the minority believe, is incompatible with the right of individuals to be treated equally by government. The means that the Hyde Amendment chooses to promote childbirth fall with disproportionate impact on one social group (and on one right), but there is nothing about promoting childbirth which justifies such a result.[63] Thus, the minority claims, the means that the Hyde Amendment uses to promote childbirth are discriminatory, although the goal of promoting childbirth might otherwise be a legitimate government objective.[64]

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62 Brennan argues that what is particularly obnoxious about the Hyde Amendment is that its weight falls "only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state—mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases" pp. 331-2.

63 See Marshall's opinion, p. 343.

64 All the members of the minority deny that the Hyde Amendment can be understood as a rational means of promoting childbirth, as the majority claim (p. 325). For example, Steven notes that the effects of the Hyde Amendment are irrational on fiscal as well as medical grounds, and so that the Hyde Amendment could not be rationally related to the object of promoting childbirth, because it harms the whole pool of Medicaid recipients in order to prevent abortions. Moreover, Petchesky has noted that while the government denied Medicaid funding for abortions, it continued Medicaid funding for sterilization—a policy hard to reconcile with the majority's interpretation of the Hyde Amendment. See Petchesky, p. 296.

So, instead of showing that privacy and equality must conflict, the Hyde Amendment and *Harris* illustrate the reasons for thinking that protection for privacy can be necessary to protect the equality of individuals. Individuals may reasonably differ on matters of fundamental importance. Without rights to differ in such matters—rights that we hold against each other and against the state—it is hard to see how we can ensure the freedom and equality of individuals. *Harris* and the Hyde Amendment both show that rights to privacy by themselves are insufficient to protect the equality of individuals. Yet that does not show that we have no right to be left alone by the state, anymore than it shows that we have no right to equal treatment by law. For in their different ways, both the Hyde Amendment and *Harris* display indifference and even hostility to the rights of individuals. This, I believe, is because of, not despite, their indifference to the legitimate differences between individuals, and their apparent contempt for what *Roe* called a fundamental right—the right to privacy.[65]

The Right to Personal Choice and Intimacy

MacKinnon's second objection to the right to privacy is that it protects the exploitation and coercion of women by men, in the name of choice and intimacy. Thus, she argues, privacy rights are incompatible with sexual equality because they protect coercion and exploitation if intimate or familial and, in this way, obscure and justify domination.

MacKinnon appears to believe that there is no way to protect the intimate relations of individuals by privacy rights without assuming that heterosexual intimacy is uniquely valuable and that the

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[65] Stevens, in fact, concludes that the Hyde Amendment "require[s] the expenditure of millions and millions of dollars in order to thwart the exercise of a constitutional right", and Brennan, Blackmun and Marshall also insist that the Hyde Amendment is a deliberate attempt to circumvent and to undermine *Roe*. See pp. 356n.4; 330-1; 348; 344 for the views of Stevens, Brennan, Blackmun and Marshall.

male-dominated heterosexual family is private. Hence, she supposes, privacy rights must protect heterosexual relations, however oppressive, and deny legal protection to homosexual associations, however egalitarian. She seems to assume that the male-dominated family must provide the model for defining those intimate relations which privacy rights protect, and so that the treatment of heterosexual intimate relations between unmarried individuals must perpetuate the familial subordination of women to men, if covered by privacy rights. Similarly, she supposes that the right to privacy cannot be compatible with rights of homosexual marriage, family formation and non-marital intercourse. However, I will argue, Blackmun's dissent in *Bowers* shows that we can distinguish the private from the familial through equal rights of intimate association.

The majority[66] in *Bowers* claim that the state may legitimately prohibit consensual adult homosexual associations, even if they occur where others need not see them.[67] They argue that this would be compatible with the privacy and equality of individuals, because the right to privacy is not some broad right to intimate association. Rather, they maintain, the right to privacy protects only certain types of personal decisions, namely, decisions about marriage, child-rearing and education, procreation and reproduction.[68] Homosexual associations have no clear connection to either of these matters, they

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66 Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Burger and Powell filed concurring opinions. Justice Blackmun filed a dissenting opinion in which Justices Brennan, Marshall and Stevens joined. Stevens also filed a dissenting opinion in which Brennan and Marshall joined.

67 "The fact that homosexual conduct occurs in the privacy of the home does not affect" the right of the state to prohibit such conduct, the majority claims. See pp. 195-6 for their argument that *Stanley v. Georgia* 984 U.S. is not applicable to the case, though *Stanley* protected the possession of pornographic materials in the home that would be illegal outside it. For Brennan's objections to the majority's interpretation of *Stanley* as, essentially a First Amendment ruling, see pp. 206-7.

68 *Bowers*, pp. 190-91.

claim. Hence, they conclude, laws prohibiting such associations are compatible with the right to privacy and with the equality of individuals.

The argument of the majority, here, depends on the premise that homosexual associations have no connection to matters of family formation or procreation. The majority do not defend this premise and it is a controversial one.[69] It is far from clear that homosexual association must lack a connection to interests in family formation and procreation, although our laws prevent homosexual marriage and child-raising. Hence, if we denied the majority's premise, there would be no need to accept its conclusion that homosexual associations are excluded from privacy protection, even on the majority's definition of the right to privacy.

But the majority's account of the right to privacy itself merits critical attention. The majority present a very narrow account of the right to privacy, one which largely identifies the private with the familial. They fail to explain what unites the diverse content of the right to privacy as they understand it, but appear to assume that rights of reproductive choice can be treated as natural extensions of our interests in family formation. In this way, they assimilate privacy protection for the use of contraceptives in non-marital heterosexual intercourse and for the right to abortion, into an existing model of the right to privacy based on the family. Hence, the majority's account of the right to privacy treats all legal forms of heterosexual intercourse as though they were directly connected to our interests in family formation, while excluding all forms of homosexual association, however committed, from protection by privacy rights. As a result, their account of the right to privacy appears to illustrate MacKinnon's objections to the right to privacy, because they divorce our interests in privacy from our interests in equality.

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[69] See p. 191. They say that "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated either by the Court of Appeals or by respondent."

Whereas the majority attempt narrowly to circumscribe the right to privacy, while incorporating a wide range of heterosexual associations within it, Blackmun's minority decision endorses a more expansive account of the right to privacy. His reasons for doing so, and his account of the connection between intimacy and the right to privacy, I believe, enable us to constrain the content of privacy rights in ways that protect the equality of individuals. For our interests in equality are central to Blackmun's account of the right to privacy, whereas they have no clear connection to the right to privacy as the majority present it.

Blackmun contends that we cannot define the right to privacy in the way that the majority propose. Instead we must try to establish what unites those things that the right to privacy protects and distinguishes them from the things that it excludes. This the majority do not do. They fail to explain what, in their opinion, makes homosexual associations like incestuous or adulterous associations, which privacy rights exclude, rather than like those heterosexual associations covered by the right to privacy.[70] As a result, Blackmun contends, the majority fail to identify the legitimate interests which privacy rights protect. Consequently, they arbitrarily deny that consensual adult homosexual associations fall within the realm of the right to privacy.

Central to the legitimate interests which privacy rights protect, Blackmun argues, are our interests in self-definition and self-determination through intimate and sexual association with others.[71] Individuals have, he supposes, a fundamental interest in defining who they are and what they cherish, through close personal ties to others. The choice of companions and conduct of our intimate relations are generally important expressions of our identities and values, and form an important ingredient of our happiness and well-being. "'[T]he ability independently to define one's identity that is central to any concept of liberty'", Blackmun states "cannot

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70 See *Bowers*, pp. 209- 210, n.4

71 *Bowers*, pp. 204-5.

truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others'".[72] Hence, he believes, rights of self-definition and self-determination in intimate relations form an essential aspect of the right to privacy: "The concept of privacy embodies the 'moral fact' that a person belongs to himself and not others nor to society as a whole".[73]

Unlike the majority's, Blackmun's interpretation of our interests in privacy makes room for our interests in equality. By associating our interests in intimacy with our interests in self-definition and self-determination, Blackmun is able to explain why individuals have an equal interest in privacy, and to constrain the right to privacy in ways that support our equality. Thus, Blackmun maintains that the state may prohibit coercive and exploitative relations because individuals have an equal interest in determining the nature of their intimate ties to others.[74] However, he claims, this means that the state cannot deny individuals privacy simply because some people find their behaviour offensive and immoral. He argues that "the fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting such relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose*

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[72] p. 205. Blackmun is here quoting from *Roberts v. United States* Jaycees, 468 U.S. (1984), p.619.

[73] See p. 204. Here Blackmun cites Stevens' concurring opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. (1985), p.777 footnote 5. There Stevens quoted from Charles Fried, Correspondence in *Philosophy and Public Affairs*, vol. 6, (1977) pp. 288-89. Charles Fried condemns the majority decision in *Bowers* in *Order and Law: Arguing the Reagan Revolution—A Firsthand Account*, (Simon and Schuster, New York, 1991), pp. 81-83.

[74] This is suggested by Blackmun's discussion of the limits of privacy rights, footnote 3 pp. 208-9, and by his objection to the majority's association of consensual adult homosexual intercourse with the possession of drugs, firearms or stolen goods, which are not "[v]ictimless", p.209.

the form and nature of these intensely personal bonds".[75] Thus, Blackmun concludes that equal rights to privacy are inconsistent with state-enforced conformity to one model of intimate or sexual association.

By connecting our legitimate interests in privacy to our interests in equality, then, Blackmun is able to define the right to privacy in a way that includes consenting adult homosexual relation, whilst excluding forms of intimacy which subjugate women. So, if the minority's account of the right to privacy justifies sexual inequality, Blackmun's account of the right to privacy show that privacy rights of intimate association can advance our interests in equality.

In short, a comparison of the majority and minority decisions in *Bowers*, shows that privacy rights need not justify sexual inequality. For if assumptions about the privacy of the family have often justified inequality, the right to privacy does not depend on such assumptions. Indeed, Blackmun's account of the right to privacy implies that our notions of the familial may need considerable revision because current conceptions of the familial have wrongly denied some people privacy and equality. Comparing majority and minority decisions, then, shows that we can distinguish accounts of privacy rights which justify inequality from those which do not. If the former sever the connection between our interests in privacy and our interests in equality, the latter reveal the connection between these. As a result, we can reject MacKinnon's second objection to the right to privacy, because rights of personal choice and intimate association can advance and enhance the equality of individual, rather than undermining it.

The Public/Private Distinction

MacKinnon's third objection to the right to privacy is that this right creates a distinction between public and private things, between the political and the personal. Such distinctions, she argues,

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[75] p. 205 Emphasis in text. Blackmun cites Kenneth Karst, "The Freedom of Intimate Association," *Yale Law Journal*, vol. 89, (1980), pp. 624 and 637.

justify sexual coercion and inequality because they assume that the personal is not already political, and that the personal ought not to be political. As a result, they prevent inequality in the private sphere, or in the personal relations of individuals, from being recognized as political issues, demanding public redress.

MacKinnon provides two main reasons why the public/private distinction justifies inequality. First, she believes, it leads us to presume that either existing privacy rights or existing political rights are just, and on that basis determines how the public/private line should be drawn. Second, the distinction leads us to ignore the interdependence of the personal and political and, therefore, to naturalize social inequality or to politicize biological differences. But the public/private distinction need not have these effects and it is, in fact, doubtful that it could consistently have both at once.

As we have seen, there is nothing about valuing privacy which requires us to treat existing privacy rights as just, anymore than valuing equality or democracy need commit us to overlooking inequality and undemocratic government. It does not seem that we must ignore the interdependence of private and public realms in order to justify inequality. Nor need we deny their distinctness in order to protect the privacy and equality of individuals. A look at the majority decisions in *Harris* and *Bowers* can illustrate these points and, therefore, the difficulties of MacKinnon's contentions.

The majorities in both *Harris* and *Bowers* relied heavily on claims about the rights of the majority of citizens to determine what the state should do. Hence, they stressed their duty, as unelected judges, not themselves to "legislate" by ruling legislation unconstitutional without good reason.[76] On these grounds, they claimed that the Hyde Amendment and Georgia statute are constitutional, because they could

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[76] "There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance". *Bowers*, pp. 186, 194-5.

not see any compelling reason to consider them incompatible with the privacy and equality of individuals. Far from claiming that the personal is not political, or ignoring the fact that the legislature and they themselves were determining the content of privacy rights, they explicitly recognized these facts in their reasoning, though reaching conclusions about justice at odds with those of MacKinnon or the minority.

Thus, the majority's decisions justified inequality because of the way that they thought that public and private realms should be distinguished, rather than because they ignored their interdependence. Though ignoring the role of past politics in causing poverty and hostility, the majority are aware that government action shapes the private opportunities of individuals, and believe that it may do so legitimately. Hence, the mere fact of distinguishing public and private realms, it seems, does not justify inequality although some ways of making the distinction will do so.

And this seems plausible: because we can still distinguish amongst our rights, even though they may be dependent on each other. For example, the respective content and justification of the right to vote and the right to freedom of expression are interdependent. The content and justification of the one, in other words, constrains the content and justification of the other. Yet, we suppose, individuals should have rights to both. Though we may find it hard to know how to distinguish the two or to establish where one ends and the other begins, we are not indifferent to the need to do so, or agnostic about the appropriate means of doing so. Thus, we recognize that we may need to distinguish between these rights in order to protect them both—as when we consider whether or not we can rightly make "hate speech" or pornography crimes.[77] And we recognize that the reasons for trying to distinguish between the right to vote and the right to freedom of expression tell against resolving disputes in such matters by tossing coins or rolling dice. Instead, we

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[77] For recent debate on this issue, see Catherine MacKinnon, "Pornography, Civil Rights, and Speech", *Harvard Civil Rights—Civil Liberties Law Review*, vol. 20, no. 1, (1985), pp. 1-70; Owen Fiss, "Freedom and Feminism", *Georgetown Law Review*, vol. 80, no.6, (August 1992), pp. 2041-62; Joshua Cohen, "Freedom of Expression", *Philosophy and Public Affairs*, (Summer 1993).

generally think, the appropriate way to resolve disputes about the respective content of our rights should involve the reasoned consideration of opposing positions, so as to minimize, as far as possible, arbitrariness in our protection of individual rights.

MacKinnon, however, assumes that if public and private realms are interdependent, we cannot distinguish between then without justifying inequality. But, clearly, this supposes that we can preserve equality without distinguishing the two, and that interdependence precludes reasonable distinctions. The latter seems mistaken, because rights to vote and to freedom of expression can be distinguished, even though they are interdependent, and we can, indeed, compare better and worse ways of doing so. The former seems mistaken as well. For the fact that we support homosexual rights need not commit us to finding our personal happiness in homosexual associations, nor imply that the state should mandate homosexual associations for everyone. Such things seem unreasonable and incompatible with equality, for the reasons proposed by Blackmun. So, if we are to protect the freedom and equality of individuals, we will have to distinguish the personal from the political, and the personal choices of individuals from the collective choices of citizens.

Hence, I do not think that we can interpret the feminist claim that the personal is political as an objection to all forms of public/private distinction, rather than to particular ways of distinguishing the two.[78] Otherwise, we will be unable to distinguish the feminist claims from a defence of absolute government, or government by whim, personal prejudice and self-interest. Feminists do not suppose that because pregnant women, rather than other people, should have the right to decide the abortion decision, that they should have greater voting rights than others. When they argue that the personal is political, feminists do not mean to imply that whatever women want should be the law of the land. Nor do they suppose that all decisions are just merely because they are either personal or political—otherwise they would have no grounds to reject absolute monarchy, restrictive abortion laws, racial and sexual discrimination.

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[78] Okin, pp. 127-8.

The feminist claim that the personal is political, then, presupposes some differences between the personal and political, and assumes that individuals ought to have rights of personal choice constraining what a democratically elected government can do. It implies that some rights of personal choice are necessary to establish a democratically elected government and so cannot be over-ruled by government. Just as a democratically elected government cannot legitimately deny women a right to vote—however much a majority of citizens might wish to do so, or however advantageous it might be for them if they could do so—so, feminists suppose, with the right to abortion. Though the personal is political in various senses, they believe that certain personal decisions need to be insulated from politics in the interests of democracy or equality.[79] Recognizing that the difference between the personal and political may not be sharp, and can certainly be contentious, they still believe that there are principles and reasons which can enable us to decide and revise our beliefs about the legitimate limits of state action. This, at least, seems the implications of feminist claims, understood as claims for equality and as a contribution to the understanding of equality and democratic government.

Though MacKinnon has shown, then, that some ways of drawing the public/private line justify inequality, this does not mean that rights to privacy and equality must conflict. What it shows is that undemocratic conceptions of politics and of persons are interdependent and can be mutually supporting. Some conceptions of persons justify inequality—racist and sexist ones, for example. But we cannot do without some distinct conception of persons in determining what justice requires nor without some conception of personal choice. In short, we need to be able to distinguish between individuals and amongst choices, because the interests and choices of one are not necessarily those of all.

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[79] A. Phillips, *Engendering Democracy*, pp. 92-119 and I. M. Young, *Justice and the Politics of Difference*, (Princeton University Press, Princeton, 1990), pp. 119-121.

Summary

A comparison of majority and minority decisions in *Harris* and *Bowers*, then, suggests that feminists need not reject the right to privacy. Although privacy rights have often justified sexual inequality, they have not invariably done so. Moreover, accounts of the right to privacy which are sexually inegalitarian clearly depend on unreasonable assumptions about the equality and rights of individuals. It is, therefore, unreasonable to maintain that rights to privacy and equality must conflict, as both of them can, but need not, justify sexual subordination.

Hence, we can reject MacKinnon's assumption that women have had privacy although lacking equality with men. Instead, the evidence suggests that women have lacked privacy because they have lacked equality with men. Though legal rights to privacy, by themselves, cannot guarantee women "a room of their own", Roe shows that they can affirm and protect the interests of women in self-definition and self-determination. There is, then, no need to reject the right to privacy because some interpretations of that right have justified inequality. As we have seen, privacy rights can be compatible with sexual equality, and respect for the equality of individuals can require us to affirm and to defend their claims to privacy.

D. CONCLUSIONS

Introduction

Three general conclusions, I believe, are supported by the evidence that we have examined. First, that rights to privacy and equality need not conflict. Second, that rights to privacy and equality are interdependent. Hence, the meaning and justification of the one must reflect that of the other. Third, that the interdependence of rights to privacy and equality explains why they need not conflict. In what follows, I will explain and clarify these conclusions.

Privacy and Equality

In this chapter I have argued that rights to privacy and equality need not conflict, although the right to privacy can justify inequality. Thus, I have tried to show, our beliefs about what privacy is depend on a variety of factors, more or less normative and empirical. For example, the majority decision in *Harris* depends on the claim that government has a duty to remove only those obstacles to personal choice which it has created. Similarly, its decision depended also on the assumption that government is not responsible for the poverty of poor women. If we reject these assumptions, there would be no need to conclude that the Hyde Amendment is compatible with the privacy rights of poor women. As a result, the majority decision in *Harris* does not support MacKinnon's belief that rights to privacy and equality must conflict.

There are, then, egalitarian conceptions of the right to privacy. In this, privacy can be distinguished from slavery. For it is difficult to reconcile slavery with the equality of individuals. Indeed, accounts of slavery which assume that it is compatible with equality seem to rest on unreasonable assumptions of fact and value. For example, they assume, with Aristotle, that there are natural slaves and natural masters, and that slavery is equally good for both.[80] Or they assume that slavery can be consistent with the liberty of individuals, as do Locke and Nozick, although supposing absolute government to be unjust and liberty to be valuable.[81] So without denying that some things which people have valued are fundamentally incompatible with equality, there seems no reason to count the right to privacy amongst these.

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[80] See Book 1, sections 3-7, in Aristotle, *Politics*, ed. Stephen Everson, (Cambridge University Press, Cambridge, 1988).

[81] John Locke, *Two Treatises of Government*, (Cambridge University Press, Cambridge, 1960), with Introduction by Peter Laslett, Second Treatise ch. 4; Robert Nozick, *Anarchy, State, and Utopia*, (Basil Blackwell, Oxford, 1974), p.331.

This conclusion finds support from MacKinnon's own assumptions about the freedom and equality of individuals. Though arguing that liberal beliefs about freedom and equality are inadequate, she treats them as recognizable, if imperfect, accounts of these values. Similarly, she seems to assume that personal choice, intimacy and limits on state action are all potentially valuable and compatible with the freedom and equality of individuals. However, given her account of privacy, if we revise our conceptions of personal choice, intimacy and the limits of state action so that they are compatible with the freedom and equality of individuals, this would be to revise our conceptions of the right to privacy. In short, given MacKinnon's account of the distinctive features of the right to privacy, her assumptions about the freedom and equality of individuals show that rights to privacy and equality need not conflict.

Of course, it is possible that MacKinnon has misidentified the right to privacy, and on some other account of privacy, rights to privacy and equality will prove incompatible. After all, one might think, there is nothing distinctive to the right to privacy in its protection of personal choice, intimacy or limits on state action. All our rights, it seems, must protect these if they are to be compatible with the freedom and equality of individuals. So, if one wants to isolate the distinctive features of the right to privacy which justify inequality—given that any of our rights might do so—we cannot identify the right to privacy in the way that MacKinnon proposes. To do so, we might think, will fail to isolate those factors which lead privacy, like slavery, inevitably to justify inequality.

But though there are difficulties with MacKinnon's account of the right to privacy this objection seems mistaken. Her account of the right to privacy is not particularly idiosyncratic and appears to reflect and to explain the reasons why people have thought privacy rights incompatible with equality. Moreover, it has support from established philosophical, legal and empirical accounts of privacy and from both the majority and minority decisions in *Harris* and *Bowers*. Thus it is not clear that there is a better description of the right to privacy which shows that privacy and equality must conflict.

As Marx noted, there is no mystery how slave and serf economic systems perpetuate inequality, because the coercion they justify is so manifest.[82] Because the coercive aspects of capitalism, which perpetuate inequality, are less manifest, he thought that we need to demystify capitalism in order to see why it is a morally unacceptable form of social cooperation. Similarly MacKinnon supposes that there would be no mystery about the way in which privacy rights justify inequality if individuals did not have equal rights to privacy. However, because individuals have equal rights to privacy and because privacy looks like a reasonable object of rights, she thinks that we must demystify the right to privacy in order to understand the causes of inequality in our societies. So, I suspect, there is no reasonable account of the right to privacy which shows that privacy and equality must conflict. Thus, it seems fair to conclude from MacKinnon's account of privacy, that the right to privacy need not justify inequality although, historically, it has often done so.

Interdependence

As we have seen, MacKinnon believes that our conception of the nature and value of equality depends upon our conception of the right to privacy. Hence, she argues, we can only have an adequate account of the equality of individuals if we reject the right to privacy. Citing *Harris* and *Bowers* as evidence that rights to privacy and equality must conflict, she implies that but for the right to privacy, these decisions would have had a different outcome. In other words, she assumes that the right to privacy stopped an otherwise acceptable account of equality in its tracks—and that this is why the majority reached the decisions it did in these two cases.

However, I have tried to show, there is no warrant for this interpretation of the majority decisions. *Harris* reflects an

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[82] See *Capital*, vol. 1, trans. Ben Fowkes, (Penguin, Harmondsworth, 1976), pp. 345-6.

unreasonable account of the rights of individuals, which would itself justify inequality whatever right was in question. In particular, it provides an unreasonable account of the equality of individuals, because it supposes that relations of force and fraud are compatible with equality.

Similarly, the majority's decision in *Bowers* includes an unreasonable account of equality. It supposes that the prejudices of some can justify the use of state power against others. But if it is wrong to deny individuals rights to interracial marriage, because doing so reflects unreasonable beliefs about the harm of miscegenation and, plausibly, the inferiority of blacks to whites, then it is similarly wrong to deny homosexuals intimacy based on prejudice against sodomy or against homosexuals. In each case, one aspect of the harm inflicted on individuals is the denial of equality, of equal concern for their well-being and equal respect for their moral capacities and agency.

Thus, the majority decisions reflect the dependence of the right to privacy on our conceptions of equality. They show that our conceptions of equality shape our accounts of the content and justification of privacy rights. Hence, a difficulty with MacKinnon's account of the relationship of privacy and equality rights is her assumption that equality depends on privacy, but that privacy is not similarly dependent on equality. For *Bowers* and *Harris* show that privacy and equality are interdependent rights, so that assumptions about the content and justification of the one reflect assumptions about the other. Moreover, it is hard to see why our beliefs about equality should depend upon our beliefs about privacy, but not vice-versa. If our values are to be reflectively held, our rights to be more than a haphazard conglomeration of particular privileges, we ought to be able to revise any one of these in light of the others. In short, if our values and rights are to have reasoned support, rights to privacy and equality must be interdependent.

In fact, though the conflict thesis appears to assume that our beliefs about the right to privacy are wholly independent of our beliefs about equality, this assumption makes it hard to understand how liberal beliefs about privacy can justify inequality. Unless

we believed equality valuable, there would be no reason to give individuals equal rights to privacy—however valuable we took privacy to be. Unless we believed that equality was compatible with privacy, there would be no justification for rights to privacy, if we assumed that individuals should have equal rights. But it is only because the right to privacy justifies inequality *despite* equal rights to privacy, that there is any reason to suspect that it must be intrinsically inegalitarian.

It seems mistaken, then, to attribute inegalitarian accounts of the right to privacy to the nature of privacy rights. To do so ignores the role of our theories of rights and our understanding of equality in determining the privacy rights of individuals. This leads to a misleading picture of the right to privacy, and a simplistic picture of how privacy rights justify inequality. It provides a misleading image of the right to privacy as some sort of free-floating entity, whose content and justification bears no relationship to our beliefs about the equality or rights of individuals. It provides a simplistic account of the ways in which inequality is justified, by obscuring the fact that inegalitarian assumptions about the rights and the equality of individuals can and have justified inequality.

I conclude, then, that empirical and normative considerations show that privacy and equality are interdependent notions. Our understanding of the content and justification of the one, in other words, will shape our understanding of the other. As MacKinnon claims, the majority decisions in *Bowers* and *Harris* justified sexual inequality. Instead of showing that rights to equality and to privacy have nothing in common, however, they support the conclusion that some conceptions of equality deprive women of privacy.

Interdependence and Conflict

Finally I conclude that the interdependence of rights to privacy and equality explains why privacy and equality need not conflict. If privacy and equality are interdependent rights, then we can revise our accounts of the content and justification of each in light of our best understanding of the other. Though this in itself provides no

guarantee that our rights to privacy and equality will be democratic, our ability reflectively to revise both provides us with the means to accommodate the distinctive value of each in a democratic scheme of individual rights.

For example, the fact that rights to privacy and equality are interdependent can enable us to reject the majority's account of the right to privacy in *Bowers*, without concluding that privacy rights must justify inequality. As I have shown, the majority's account of the right to privacy justifies inequality by identifying the private with the familial, while disconnecting our interests in familial associations from our interests in equality. By contrast, Blackmun's account of the right to privacy, for the *Bowers* minority, justified rights of familial and intimate association on the grounds that individuals have an equal and legitimate interest in personal choice and self-determination.

The *Bowers* majority, as we have seen, assumed that the state may legitimately prohibit personal associations on the grounds that they are offensive and immoral because different from traditional family arrangements. The minority denied that this is compatible with our equal right to privacy. Indeed, Blackmun's account of our equal right to privacy affirmed our legitimate interests in distinguishing ourselves from others through our intimate associations. So the majority's account of the right to privacy justifies the oppression of women and the denial of privacy to homosexual associations, although the minority's does not.

Nor is this "accidental", to use MacKinnon's vocabulary, as the minority's account of the right to privacy reflects our legitimate interests in equality, whereas the majority's does not. Hence, attention to the interdependence of rights to privacy and equality shows that the right to privacy need not justify inequality. We can, then, embrace the minority's account of the right to privacy without justifying sexual inequality and can reject the conception of privacy and equality implicit in the conflict thesis. For that thesis legitimizes inequality on the grounds that it is protected by a right to privacy, though our equal right to privacy is incompatible with sexual equality. In consequence, it justifies inequality as surely as the rights to privacy that it condemns.

So, I conclude that rights to privacy and equality need not conflict because they are interdependent as well as distinct. Because they share a common content and justification, we can formulate a democratic conception of the right to privacy and distinguish it from alternatives. We can revise our accounts of the right to privacy in light of a democratic theory of rights, because rights to privacy have a foundation in the equality of individuals. Similarly, we can revise our understanding of the equality of individuals to reflect a democratic account of the content and justification of rights to privacy. In this way, we can advance our understanding of the right to privacy and establish its place in a democratic scheme of rights. Thus, the interdependence of rights to privacy and equality enables us to reject the conflict thesis, and to formulate a democratic conception of privacy.

CHAPTER 2

THE VALUE OF PRIVACY

A. INTRODUCTION

This chapter aims to promote agreement on the morally and politically significant features of privacy. It examines the core values associated with privacy as a political value, and analyses their importance and relationship to each other. By highlighting the significance of familiar features of privacy the chapter shows that considerable agreement on its value is possible, despite controversy about the best justification of particular rights and disagreement over the relationship of privacy to other values. Attention to this agreement, the chapter shows, supports the view that privacy and equality need not conflict, and provides the foundation for an egalitarian justification of rights to privacy.

The previous chapter suggests, and ordinary experience confirms, that the term "privacy" and its cognates can refer to rather different things. Thus, the majority in *Bowers v. Hardwick* referred to both procreative and familial decisions as private matters, although the familial and the procreative are by no means identical.[83] Similarly the minority decision in *Bowers* associated privacy with intimacy, but

[83] *Bowers v. Hardwick*, 106 U. S. (1986), pp. 190-91.

also with self-definition and self-determination.[84] Yet, as MacKinnon notes, there is so little natural connection between these that the former can undermine the latter.[85]

The seemingly heterogeneous character of "private matters" raises two obvious questions about the place of privacy in normative political argument. First, do "private matters" have any identifiable characteristic that distinguishes them from other matters—whether religious, political, or artistic? Second, do these characteristics, if there are any, add anything important or useful to our understanding of moral and political values—or do appeals to privacy merely reiterate and obfuscate the reasons for caring about such values as life, liberty and the pursuit of happiness?[86]

These questions are the object of considerable political, philosophical and legal debate. Thus, lawyers have argued for some time about what harms, if any, are privacy offenses according to the common law.[87] More recently, constitutional lawyers have tried to explain which reasons for limiting state action distinguish the right to privacy in American law, from other constitutional rights.[88]

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84 *Bowers v. Hardwick* p.205.

85 C. A. MacKinnon, "Privacy v. Equality: Beyond *Roe v. Wade*" in Feminism *Unmodified: Discourses on Life and Law*, (Harvard University Press, Cambridge, Ma., 1983), pp. 93-102.

86 For the contention that the latter is the case see J. J. Thomson, "The Right to Privacy" in *Rights, Restitution, and Risk*, (Harvard University Press, Cambridge, Massachusetts, 1986), pp. 117-134.

87 See, for example, the contrasting analyses of William L. Prosser and Edward J. Bloustein in F. Schoeman ed. *Philosophical Dimensions of Privacy: An Anthology*, (Cambridge University Press, City, 1984).

88 Compare, for example, Ruth Gavison's "Privacy and the Limits of the Law", in ed. Schoeman, pp. 346-401 with Tom Gerety's "Redefining Privacy", *Harvard Civil Rights—Civil Liberties Law Review* 12 (1977).

Meanwhile, philosophers want to know if privacy is a coherent and distinctive moral and political value.[89]

I am interested in the philosophical problem of distinguishing privacy from other values, such as liberty, only as this illuminates the relationship of privacy and equality. I will, therefore, be examining only a small part of the literature which these controversies have provoked and so have a correspondingly modest contribution to make to it. However, the fact that there is quite sharp disagreement on the ingredients of privacy and its relationship to values other than equality, places obvious constraints on the quest for an egalitarian interpretation of privacy. For if the latter is to have any merit as an account of privacy, and to carry any conviction in resolving disputes about privacy rights, it needs to depart from reasonably uncontroversial premises about privacy, or ones to which people with widely differing views could reasonably assent.[90] Thus, a concern to clarify the relationship of privacy and equality means that we cannot ignore, even if we cannot resolve, controversy about the relationship of privacy to a variety of different values.

With such concerns in mind, therefore, this chapter aims to do two things. First, to establish some points of agreement about privacy as a political value, in light of current controversy about it. Second, the chapter aims to parlay this agreement into evidence for the compatibility of privacy and equality. In the course of doing this I will analyse and try to clarify the structure of privacy as a political value. My efforts, I hope, will show that privacy can be a coherent

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89 See, for example, the different responses of Scanlon, Rachels and Reiman to Thomson, in the journal *Philosophy and Public Affairs*. T. Scanlon, "Thomson on Privacy," in *Philosophy and Public Affairs*, vol. 4, 1975, pp. 315-22; J. Rachels, "Why Privacy is Important," in *Philosophy and Public Affairs*, vol. 4, 1975, pp. 323-333; J. Reiman, "Privacy, Intimacy and Personhood," in *Philosophy and Public Affairs*, vol. 6, 1976, pp. 26-44; also F. Schoeman "Privacy: Philosophical Dimensions of the Literature", in ed. Schoeman, pp. 1-33.

90 J. Cohen, "Freedom of Expression," in *Philosophy and Public Affairs*, vol. 22, 1993, pp. 223-4.

value despite its somewhat heterogeneous components. However, I do not aim to show that privacy is indispensable to normative political debate or to illuminate the boundaries between privacy and other values more that is necessary to distinguish privacy from equality. While I hope to establish important points of agreement on privacy, in other words, this can coexist with considerable controversy about privacy and its place in moral and political argument.

In the first part of the chapter, then, I will identify the main constituents of a privacy claim to personal choice, as generally understood by critics and advocates of privacy. These involve, I believe, one or more of the following: (1) a claim to solitude or to personal inaccessibility; (2) a claim to intimacy, or the regulation of familial, sexual and affectionate relationships; (3) a claim to control the dissemination of personal information; (4) a claim to be treated with dignity and respect for one's moral agency and capacities. I will examine the relationship between these different privacy claims or aspects of privacy, arguing that they are heterogeneous and mutually irreducible, even if there are also close connections and affinities between them.

In the second part of the chapter I will develop this claim and show its significance for equality. Thus, recognizing the diverse features of privacy, I will argue, can promote agreement on its value and importance to equality. For the internal heterogeneity of privacy means both that there may be a wide range of reasons for caring about privacy and that we can revise inegalitarian conceptions of privacy by reinterpreting and reordering its elements.

The second part of the chapter, then, develops the implications of the first, by showing that the morally fundamental features of privacy are closely, but not indissolubly, connected. While the lack of a fixed connection between the different parts or aspects of privacy means that privacy claims or arguments can conflict, it also helps to explain why we can care about privacy while caring also about equality and a whole range of other values. Hence, the relatively flexible relations between the different aspects of privacy can help us to clarify the distinctive contribution of privacy to normative political argument.

My thesis here contrasts with the assumption of some philosophers that as a political value privacy has a relatively clear and determinate internal structure. Thus, while recognizing that "privacy" refers to some more or less different things, they attempt to show that there is a determinate and hierarchical relationship between the different parts of privacy. These links, they believe, explain why appeals to privacy can advance unique and significant reasons for protecting personal choice.

For example, Anita Allen and Ruth Gavison treat inaccessibility as the conceptual and moral core of privacy, for political and legal purposes.[91] Hence, they are committed to explaining any personal control of information or intimate relations which privacy licenses, by reference to the nature and importance of inaccessibility. By contrast, Inness believes that relations of love and care form the conceptual and moral core of privacy.[92] She holds, therefore, that the different components of privacy as a political value can be explained in terms of the fundamental connection between privacy and intimacy.

In the final part of the chapter I examine such claims and show how they arise as a response to philosophical and political doubts about the coherence and importance of privacy. However, while sympathetic to the view that privacy can be distinguished from other political values such as liberty, equality and freedom of expression, and that moral and political argument may require us to make such distinctions, I believe that privacy is a less determinate political concept and value than these writers suggest. Because we can reinterpret and revise our values—even those with a long and august pedigree—this indeterminacy strikes me as neither peculiar to privacy nor an obvious defect. Indeed, in the case of privacy this indeterminacy enables us to democratize attractive aspects of privacy

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91 A. Allen *Uneasy Access: Privacy for Women in a Free Society*, (Rowman and Littlefield, New Jersey, 1988); R. Gavison, "Privacy and the Limits of the Law" in ed. Schoeman, pp. 346-402.

92 J. C. Inness, *Privacy, Intimacy, and Isolation*, (Oxford University Press, New York, 1992).

while rejecting features which, though historically and politically important, have no place in a democracy. Thus, in this chapter I aim to advance the claim that privacy is compatible with equality by examining widely recognized and agreed upon features of privacy in moral and political argument.

B. PERSONAL CHOICE AND PRIVATE MATTERS

There is considerable philosophical disagreement about the best way to characterize the political value of privacy and, as we have seen, some people contend that privacy is not valuable. Despite such disagreements, four main reasons are commonly associated with privacy claims to personal choice by both critics and advocates of privacy. These are that private matters involve (1) solitude and limits on personal accessibility; (2) intimacy and the chance to develop close personal relations with others; (3) control of personal information; and (4) personal dignity. I will examine these in turn, drawing on the philosophical, political and legal literature on privacy. However, to avoid confusion, I should note that my aim there is simply to systematize the literature on privacy. Thus, nothing of substance turns on the way that I group or characterize the main aspects of privacy, as this is done for purposes of clarity and simplicity, and not to advance any particular conception of privacy.

Privacy, Solitude and Inaccessibility

Privacy is frequently associated with solitude and the ability to exclude others, or to make oneself inaccessible.[93] Hence, privacy commonly figures in political argument in support of demands for personal inaccessibility and control over the ways in which others can approach, sense or monitor us. In political philosophy, protection for the solitude and inaccessibility of individuals is almost universally recognized to be an important feature or privacy, and this

[93] See in particular Allen p.15, Gavison p. 350, Scanlon p. 315.

inaccessibility is commonly recognized to be psychological as much as physical. Thus Scanlon, Allen and Westin believe that privacy appeals to personal choice can protect emotional reticence and reserve quite as much as physical distance, and emphasize privacy's protection for anonymity as well as for solitude.[94] In fact, Westin claims that "The manner in which individuals claim reserve and the extent to which it is respected or disregarded by others is at the heart of securing meaningful privacy in the crowded, organization-dominated settings of modern industrial society and urban life".[95]

Critics of privacy also prominently link privacy with inaccessibility. Thus, Thomson supports her argument that privacy is a redundant political value by arguing that limits on personal accessibility can be justified perfectly well without reference to privacy by appealing instead to our rights and interests in bodily integrity, liberty and the protection of private property.[96] Similarly moral critics have generally objected that privacy supports loneliness and isolation, fosters exclusivity and a failure to acknowledge a common humanity because privacy enables individuals to erect walls around themselves and so to deflect the concern, curiosity and interest of others.[97] For example, Edmund Leach maintains that "Privacy is the source of fear and violence . . . I am isolated, lonely and afraid because my neighbour is my enemy".[98] Thus, the ability to isolate oneself from others is widely acknowledged to be an important feature of privacy in normative political argument, by its critics and admirers.

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94 Scanlon p. 316; Allen pp. 17, 23-24; and A. F. Westin *Privacy and Freedom*, (Atheneum, New York, 1967) pp. 31-42

95 Westin p. 32.

96 Thomson pp. 124-8.

97 For a discussion of these views see M. A. Weinstein, "The Uses of Privacy in the Good Life" in J. R. Pennock and J. W. Chapman (Eds.) *Privacy: Nomos XIII*, (Atherton Press, New York, 1971), 88-104; and R. A. Wasserstrom, "Privacy: Some Arguments and Assumptions" in ed. Schoeman, pp. 317-332.

98 E. Leach, *A Runaway World? The Reith Lectures 1967*, (Oxford University Press, London, 1968), p.46.

Privacy and Intimacy

The second reason generally given for treating some matters as private is that they are intimate, sexual or familial.[99] Thus the choice of personal companion, lover and spouse is generally treated as a matter for individuals to decide for themselves, and appeals to privacy aim to enforce this norm against the government, parents and others who wish to intervene.[100]

The idea that intimacy or close and sustained relations of an affectionate, sexual or family nature are normatively important elements of privacy is widely acknowledged even if personal choice for such relationships is one of the most controversial and oft-criticized features of privacy. Although friendship, love, sexual desire and kinship are rather different bases for relationships, they are all commonly thought of as private by virtue of the highly personalized demands that they make on individuals, and of the pleasures to which they give rise.[101] The same applies also to friendships and to the other personal associations of a non-sexual nature which are thought to owe their existence to the personal qualities, interests and avocations of their participants.

Thus intimacy is commonly recognized to be a privacy reason for allowing personal choice, and for limiting the say that the state or other people can have in the conduct of our affairs. This is attested to also by critics of privacy. For example, MacKinnon argues that privacy sacrifices sexual equality to intimacy, and Okin makes a

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99 Inness chapters 5 and 7; Allen p. 19; and both C. Fried, "Privacy: [a moral analysis]", pp. 203-221 and F. Schoeman, "Privacy and Intimate Information", pp. 403-417 in ed. Shoeman.

100 Gavison is unusual amongst privacy theorists in defining privacy in such a way as to exclude intimacy. For Gavison "An individual always loses privacy when he becomes the subject of attention", and she characterizes privacy in terms of "three independent and irreducible elements: secrecy, anonymity and solitude". pp. 353-4.

101 S.I. Benn, "Privacy, Freedom and Respect for Persons" pp. 101, 104-5 in ed. Schoeman.

similar point when considering the inegalitarian distribution of income between men and women within families.[102] Indeed, privacy protection of current forms of intimacy forms an essential aspect of feminist concerns with privacy as a political value.

Privacy and the Control of Personal Information

The third reason typically taken to underlie claims to privacy, involves the control of personal information. Protection for privacy is meant to protect individuals from the unconsensual publication or dissemination of information about themselves.[103] Such protection is generally thought to cover information about a person's habits, beliefs, emotional and physical state and appearance in so far as they are not evident to all, or of legitimate political or judicial concern.[104] Privacy protection is also commonly thought to protect individuals from the involuntary publication of artistic or creative works, as well as of more mundane personal records and communications. While such works may not communicate information about their author or creator in any clear or unambiguous way, they are generally thought to be expressions of one's personality and to indicate one's feelings, beliefs and technical capacities. Hence, as Warren and Brandeis emphasize, privacy protection against the involuntary publication of creative endeavors does not depend on their artistic or creative merit,

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[102] MacKinnon p. 100 and S. Okin *Justice, Gender and the Family*, (Basic Books, New York, 1989) ch. 7.

[103] S. D. Warren and L. D. Brandeis, "The Right to Privacy [the Implicit Made Explicit]", pp. 75-103 in ed. Shoeman; and Westin's *Privacy and Freedom* are the classic examples of this view. Thus, Westin defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". p. 7.

[104] For these limits on privacy see Warren and Brandeis pp. 87-9 and Westin pp.370-376.

but on the fact that their creator does not want to expose his or her efforts to general view and evaluation.[105]

The importance of information control to privacy is suggested by its critics as well as its admirers. Thus Thomson attempts to show that privacy is redundant by explaining how appeals to liberty, personal security and the protection of property can sustain claims to control what is known about us and, thus, the enjoyment and use others can make of our capacities, misfortunes and possessions.[106] Similarly, feminist critics of privacy are commonly concerned that privacy protects the public standing and respectability of wife-batterers, rapists and child molesters and, in general, shrouds coercion and exploitation in silence, anonymity and ignorance. Thus, MacKinnon concludes that "the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labour", and argues that it has "cut women off from collective verification" of their rights and well-being.[107]

Privacy and Moral Personhood

Finally, a characteristic of private matters frequently thought to be important is its alleged protection of personal dignity and moral personhood. By this is generally meant respect for the moral agency and capacities of individuals, and acknowledgement and protection for their moral separateness and independence. Thus Reiman, Benn and Schoeman associate privacy reasons for protecting personal choice with the view that individuals are each the source of moral claims, so that no one should ever be used merely as a means for the

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105 Warren and Brandeis. pp 79-80.

106 Thomson pp. 128-134 although at p. 128 Thomson maintains that "none of us has a right over any fact to the effect that the fact shall not be known by others. You may violate a man's right to privacy by looking at him or listening to him: there is no such thing as violating a man's right to privacy by simply knowing something about him".

107 MacKinnon pp. 101-2.

well-being of others or for the achievement of some public policy.[108] Similarly Eichbaum claims that "[t]he human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a life-style which allows expression of their uniqueness and individuality".[109]

Privacy appeals to the protection of personal choice along these lines also commonly reflect the fact that individuals need to develop their capacities for reflective choice and agency—or their most distinctively human attributes. As a result, the humanity of individuals is vulnerable both to bad luck and other developmental misfortunes and to the malice, neglect and capriciousness of others. So dignitarian or moral-personhood accounts of privacy as a political value commonly assume with Reiman, that privacy protection for personal choice is not merely a tribute or recognition of an individual's humanity, but part of what constitutes and maintains it.[110]

Emphasis on the dignitarian aspects of privacy is commonly thought to explain the importance privacy attaches to preventing unwanted behaviour that does not create any noticeable harm or injury or even the risk of such harm. For example, Benn appeals to our dignitarian interests in privacy to explain what is wrong with treating people as entertaining objects to be sighted and studied without their knowledge or consent in ways analogous to bird-watching.[111] Conversely, critics of privacy acknowledge this

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[108] E.g. Reiman "privacy is a social ritual by means of which an individual's moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own. And this is a precondition of personhood", p. 39; Shoeman pp. 414-6; and Benn pp. 228-9.

[109] J. Eichbaum, "Towards and Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy," in *Harvard Civil Rights—Civil Liberties Law Review*, vol. 14, (1979), p. 365.

[110] "The right to privacy, then, protects the individual's interest in becoming, being and remaining a person", Reiman p. 44.

[111] Benn pp. 225-7.

feature of privacy when they argue that privacy misrepresents and threatens the dignity of individuals by holding hostage the conscious pursuit of common affairs and interests to individual whim, prejudice, self-interest and confusion.[112]

These, in bare outline, are the features of privacy as a political and moral value which are most widely cited and appealed to. It is by reference to one or the other that individuals commonly seek to substantiate the claim that something is a private matter, and so should be left to their discretion. It is also with reference to these features that critics or sceptics express and seek to substantiate their concerns and objections.

There is, clearly, considerable overlap between these different reasons for protecting personal choice or what we might also call different aspects of privacy. Thus, most obviously, the idea that privacy supports claims to inaccessibility overlaps with the belief that privacy gives individuals control of personal information. Indeed, the latter can sometimes seem to be merely a more specific version of the former, indicating more clearly in what ways a respect for privacy requires us to be left alone.[113] With Warren and Brandeis and with Westin and Benn the control of personal information is also explicitly linked to human dignity, as it is thought to be an essential dimension of such dignity or personhood. Thus, Warren and Brandeis contrast the concern for our spiritual needs and interests manifested by privacy protection against the unconsensual publication of personal information with the concern for our material needs and interests

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[112] Marx's critique of civil society, and of the distinction between the private man and the public citizen suggests this line of thought. See Karl Marx "On the Jewish Question" and "Contribution to the Critique of Hegel's *Philosophy of Right*: Introduction" in ed. Tucker *The Marx-Engels Reader*. (W.W. Norton & Co., New York, 1978). See also the republican depreciation of privacy in favour of the political life, of which Hannah Arendt's *The Human Condition* is an example. Hannah Arendt *The Human Condition* (University of Chicago Press, Chicago, 1958).

[113] W. A. Parent, "Privacy, Morality and the Law," in *Philosophy and Public Affairs*, vol. 12, 1983.

manifested by legal protections against theft and exploitation.[114] Similarly, Benn argues that resentment and not just fear is an appropriate response to the indignity threatened by a national data centre. He claims that, for similar reasons, it is wrong to treat even an entertainers' life as material for entertainment. In each case, he suggests, the dignity of individuals is threatened or violated if their lives can be subject to the scrutiny of others at will.[115]

Privacy concerns for intimacy and inaccessibility also frequently overlap. Thus Allen argues that intimacy is one of the goods which privacy protects by limiting others' access to us—a position whose force is suggested by the importance to many homosexuals of being able to hide, disguise and otherwise limit knowledge of their sexual and amatory preferences.[116] Similarly, Inness maintains that the importance we attach to relationships of affection, love and care underlies privacy claims to personal choice both because these emotions cannot generally be forced and out of respect for individuals as "emotional choosers".[117] Some such view, indeed, underpinned Blackmun's minority argument in *Bowers*, which linked privacy claims to intimacy to our interests in dignity. Thus Blackmun held that privacy, as a political value, has generally protected an individual's quest for sexual and emotional fulfilment through intimate association with others because such fulfilment is an important element in the happiness of most people and typically enables us to

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114 Warren and Brandeis p.79. They also contrast an interest in securing the just material reward for one's endeavours by controlling their publication, with the value of privacy to an individual, which lies "in the peace of mind or the relief afforded by the ability to prevent any publication at all".

115 Benn pp. 231 and 133.

116 Allen p. 19. See also V. J. Samar, *The Right to Privacy: Gays, Lesbians, and the Constitution*, Temple University Press, Philadelphia, 1991, especially pp. 142-51 and 157-171 and Fried's influential, if contentious, claim that control of personal information is essential to intimacy in ed. Shoeman pp. 205, 211-213.

117 Inness p. 91.

express our fundamental values and to develop and exercise our moral powers.[118]

There are, however, important differences between these main reasons for protecting personal choice. For, most obviously, not all forms of inaccessibility involve the control of personal information, nor is there any necessary connection between sexual choice and respect for human dignity. I wish briefly to clarify this remark before explaining why these discontinuities do not mandate the view that privacy is an incoherent value, or undermine the intuition that there are morally and politically significant affinities between the different aspects of privacy.

Privacy and Heterogeneity

As reasons for protecting personal choice there are important differences between solitude and personal inaccessibility, intimacy, control of personal information, and dignity. For example, some common reasons for valuing personal inaccessibility, such as the desire for peace and quiet, for personal security, the ability to concentrate, can tell against family life, romance and the fulfilment of sexual desire.[119] Similarly, some of the reasons for caring about intimacy or the control of personal information may have nothing much

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[118] *Bowers v. Hardwick* p102. Hence, Blackmun claimed, "the fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . .that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds". (emphasis in the text).

[119] Michael Weinstein in ed. Pennock and Chapman, p.102 focuses on the intellectual and creative activities which privacy can support. W. L. Weinstein explicitly rejects the view that privacy implies intimacy, when he claims, p. 33, and notes at p. 32, footnote 6 that intimate relations may conflict with the equality, autonomy and dignity of persons. W. L. Weinstein, "The Private and the Free: A Conceptual Inquiry" in *Privacy*, (Eds.) J. R. Pennock and J. W. Chapman, (1971), pp. 27-55.

to do with moral dignity: The pursuit of pleasure or happiness, self-expression and self-interest, while important to us, may be neither dignified nor particularly worthy. Devotion to family can make us hostile to the claims of others and love can inhibit moral judgement and action. Hence Leach's condemnation of "the family, with its narrow privacy and tawdry secrets", in *A Runaway World?*[120] The control of personal information, moreover, can foster secretiveness and distrust of others, even where one has nothing to hide and no reason to fear others.[121] In short, these different reasons for protecting personal choice may point in different directions and support conflicting personal and political choices.

Nonetheless, it seems possible to describe affinities or connections between these different reasons for protecting personal choice, even if there is no natural or inevitable connection between them. For cultural factors and historical contingency may have a role in maintaining the cohesion and legitimacy of a society's values (or those of a particular individual), just as these factors may also lead to "legitimation crises", and efforts at individual moral reform.[122] In the case of privacy, for example, it is often noted that the things which contemporary American and European societies consider private differ from those in other societies and, even, from those considered private in America and Europe a generation or so ago.[123] Thus it seems reasonable to imagine that at least some of the moral connections between different aspects of privacy need to be explained in light of individual and social needs provoked by historical change and development.

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120 E. Leach p. 44.

121 Hence the concerns of Bruno Bettelheim about privacy. See B. Bettelheim, "The Right to Privacy is a Myth," in *The Saturday Evening Post*, (July 27, 1968), p.9 and Leach op. cit.

122 J. Habermas, *Legitimation Crisis*, (Beacon Press, Boston, 1975).

123 Westin pp. 29-30, and pp. ch. 13, pp. 330-364; and also H. J. Spiro, "Privacy in Comparative Perspective" pp. 121-148 in ed. Pennock and Chapman.

For example, the work of Warren and Brandeis and of Westin suggests that the distinctive importance of information control to privacy is comparatively recent, reflecting the growth of modern journalism, of modern technologies for collecting and storing information without entering houses or taking some physically discrete object like a letter. Wire-tapping, telephone-tapping, a mass-entertainment industry and mass-communication, in short, clearly have a place in explaining the normative rationale connecting the control of personal information to other basic features of privacy. For not only is some security for personal communication desirable if people are to be able to communicate on important matters, but the fear that one may be spied upon, and not merely that one's letter or wire may go astray, can inhibit emotional declarations, the frank exchange of ideas, the playful gesture and, thus, the intimacy, inaccessibility and agency of persons. Thus Westin claims that "[t]he right to speak, to publish, to worship, and to associate cannot survive in the modern age of scientific penetration of house, auto, office, and meeting room unless the courts and public mores install a curtain of law and practice to replace the walls and doors that have been swept away by the new instruments of surveillance".[124]

But the fact that control of personal information emerged as a distinct ingredient of privacy, if it did, in response to technological development and urbanization, does not mean that it cannot come to have an independent place in our conceptions of privacy. For the pressures that can make control of personal information important to established conceptions of privacy may lead us, in time, to see control of personal information as an independent good, which privacy claims to personal choice should protect. In other words, we may be brought to revise or reinterpret our conceptions of solitude, intimacy or dignity in light of the importance we come, on reflection, to place on the control of personal information. Thus, for example, we might expand our ideas of intimacy to include telephone conversations, and may come to value this particular form of communication and

[124] Westin p. 398.

to care about the way in which its access is regulated. Or, perhaps, we come to distrust apparently innocuous requests for information about us once we realize how little say we have over the physical life and use of this information. In short, the fact that there is no natural or inevitable connection between different aspects of privacy does not suggest that their relationship is merely fortuitous, and that their connection is wholly lacking in moral or political significance.

Indeed, I would tentatively suggest that 3 basic interests or concerns unite the different characteristics of privacy, as commonly understood, and illuminate its value. These are: (1) interests in self-definition and self-determination; (2) interests in intimacy or companionship and (3) interests in confidentiality.

These are, I think, important personal and collective interests and ones which are compatible with respect for equality and a wide range of other values. Though there is no reason to suppose that they are unqualifiedly good, or that they cannot conflict with other interests, these can, fairly, be considered important even by those who otherwise disagree on the value of privacy. Thus, I will try to show, we can parlay agreement on some familiar aspects of privacy (its association with solitude, intimacy, control of personal information and human dignity) into agreement on some fairly uncontroversial reasons for valuing privacy.

C. PRIVACY INTERESTS

Three interests in privacy, I think, can illuminate the importance commonly attached to privacy by its proponents and its critics and, thus, reveal the common connection between different privacy reasons for protecting personal choice. These are not the only interests that privacy protects nor is this the only way to describe the features of privacy that interest me. However, these three interests are morally significant and provide an intuitively appealing way to analyse the normative concerns associated with privacy.

The first such interest is the interest in self-definition and self-determination. By this I mean the interest that individuals have in forming a personal identity and sense of themselves, of discovering

what they value and deem important in life, and in living their lives according to their beliefs and aspirations.[125] Without some sense of who we are, and of the ends that we ought to pursue, we will lack the means to develop and exercise our capacities for moral thought and action. Thus, it is reasonable to suppose that individuals have fundamental interests in self-determination, even though our identities, values and opportunities are not wholly the product of, or susceptible to, personal choice.[126]

This interest, I believe, helps to illuminate the connections between privacy protection for solitude, intimacy, the control of personal information and personal dignity. Not only are these important to our ability to constitute a sense of ourselves as distinct moral persons, but they are, as well, ways in which we express and seek to exercise, our powers of personal choice. Thus, our personal relations with others help to define who we are and what we care

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[125] See Jean Cohen, "Redescribing Privacy: Identity, Difference and the Abortion Controversy", in *Columbia Journal of Gender and Law*, vol. 3 no. 1, (1992), pp. 101 and 114-6; Rhonda Copelon, "Unpacking Patriarchy", in *A Less Than Perfect Union*, ed. J. Sobel, (Monthly Review Press, New York, 1988), pp. 316-9.

[126] Hence what Martha Nussbaum identifies as "the fragility of goodness" and the philosophical concern, which she shares with Bernard Williams, that one's moral standing, in one's own eyes and those of other people, depends so often on matters over which we have little or no control. As Nussbaum writes: " . . .that much that I did not make goes towards making me whatever I shall be praised or blamed for being; that I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me into a position in which I cannot help being false to something or doing some wrong; that an event that simply happens to me may, without my consent, alter my life; that it is equally problematic to entrust one's good to friends, lovers, or country and to try to have a good life without them—all these I take to be not just the material of tragedy, but everyday facts of lived practical reason". M. C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, Cambridge, 1986), p.5.

about, as Blackmun maintained in *Bowers v. Hardwick*.[127] Solitude and the ability to isolate, or seclude, themselves, gives individuals opportunities for self-reflection and self-knowledge, relaxation and experimentation that sustain their capacities for judgement and decision—making, and may, themselves, be sought as intrinsically desirable goods.[128]

Finally, because our ability to define and fulfil our obligations, and to act in ways that we believe worthwhile and right is so commonly necessary to our self-respect, to the sense that our lives are worth living, our interests in self-definition and self-determination help to explain the connections between privacy protection for personal choice and dignity. Without the possibility of ordering and acting upon our obligations, our moral capacities can come to seem like a cruel burden or a bad joke, a source of misery and self-blame, rather than a resource to be respected, cultivated and enjoyed. So the dignitarian aspects of privacy can be illuminated and connected to our interests in inaccessibility and intimacy, via our interests in self-definition and self-determination.

It is, perhaps, a truism to say that individuals need close and varied contact with others, even though they may differ both in the extent of that need, and in the degree to which they value personal relationships as ends in themselves. The love, care, support and concern of others is generally necessary for us to flourish and even to survive, and our ability to reciprocate and to develop such relations is generally valued and cultivated by individuals for its own sake, and for its contribution to one's self-respect, social standing, personal fulfilment and sense of belonging.

This interest in companionship helps to illuminate privacy protection for seclusion and solitude, as well as for dignity and

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[127] See p. 204, *Bowers v. Hardwick*. Also, *Thornburgh v. American College of Obstetricians and Gynaecologists*, 476 U. S. (1985), p. 772.

[128] This point is emphasised by Alan Westin, pp. 32 – 42 and by Michael A. Weinstein. in "The Uses of Privacy in the Good Life" in *Privacy*, eds J. Roland Pennock and John W. Chapman, (Nomos XIII, Atherton Press, New York, 1971), pp. 88-104.

freedom of personal communication. As Rachels, Fried and Schoeman have argued, our ability to distinguish and to maintain different personal associations importantly depends on our ability to control access to ourselves, and to vary the degree of intimacy and formality inherent in our relations with others.[129] Such control enables us to respond to the needs of others, and to personalize our relations to them. Hence an interest in intimacy and companionship helps to illuminate the connections between the heterogeneous aspects of privacy and to explain why privacy protection for a variety of personal associations is a central ingredient of privacy as a moral and political value.

Finally, our interests in confidentiality help to give substance and coherence to the different aspects of privacy. Individuals have interests in confidentiality because they have interests in expressing their faith and trust in others, and in being able to reciprocate these, as occasion demands.[130] Confidentiality enables individuals to express themselves freely, without fear of misunderstanding or manipulation, and so to take risks or explore possibilities that they would otherwise fear and avoid.[131] In these ways confidentiality can promote self-confidence, as well as trust in the integrity and ability of others. A concern for confidentiality, therefore, can illuminate privacy protection for the inaccessibility, intimacy and dignity of individuals, as these can be seen both as ways to protect our abilities to give and receive confidences, and as themselves expressions of trust and concern for others.

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129 Thus, Rachels claims that " . . .our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have… [This] is, I think, one of the most important reasons why we value privacy". Rachels, p. 329.

130 See, for example, Westin, p. 37, Schoeman.

131 See, for example, the discussion of Consciousness—Raising Groups, in Hester Eisenstein, Contemporary Feminist Thought, (G. K. Hall and Co., Boston, 1983), ch. 4 and Catherine MacKinnon, *Towards a Feminist Theory of the State*, ch. 3.

If this analysis is right, individuals have basic interests in privacy, and these can be used to illuminate the moral and political connections between the different aspects of privacy. However, before proceeding, it may be helpful to consider the relationship between these three privacy interests. For, off hand, an interest in self-definition seems a considerably broader interest than either the interest in intimacy or in confidentiality, and this raises natural concerns about the internal coherence and analytic purchase of the account of privacy offered here. In particular, it is natural to worry, as does Robert Bork, that appeals to self-definition in the interpretation of privacy are likely to prove endlessly expandable, and to make it impossible to distinguish privacy claims from a claim to get what one wants.[132]

This is, I believe, a legitimate concern, and one to which there is no easy answer. However, though I cannot allay this worry completely, the following points suggest that it is, in fact, less acute than it first appears, because the reasons for thinking self-definition a basic human interest point to ways in which we can delimit or constrain it for the purposes of moral and political analysis.

In the first place, the ability to form a personal identity, or sense of oneself as a distinct moral agent, though complex is not meaningless. In particular, the interest in self-definition is a moral and political one, motivated by the fact that individuals are typically capable of moral judgement and agency and have an interest in developing and exercising these capacities even though others may find it advantageous to stop them. Thus, the concern here is not with protecting all choices, whatever they may be, but with the ability of individuals to decide what ends they believe to be reasonable, worthwhile and right, as free and equal beings. Granted that it may not always be easy to distinguish the interest in self-definition from

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[132] See Robert H. Bork, *The Tempting of America: The Political Seduction of Law*, (Free Press, New York, 1990), especially p. 98 and pp. 110-126. For similar criticism, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. (The Free Press, New York, 1991), pp. 58-9.

the interest in getting one's way in all circumstances—particularly as we are likely to believe that those who hold ends of which we disapprove are unreasonable, immoral and selfish—we are not helpless to distinguish egoism from self-definition, or protection for all choices from self-determination. Indeed, the importance of recognizing that individuals have an interest in deciding how they should live derives partly from this: that once one grants such an interest one must make the effort to listen and attend to the moral views of others, rather than assuming that these can be simply dismissed as nonsense, immoral or self-serving whenever they conflict with our interests.

Secondly, a concern for the ability of individuals to form and develop a moral identity of their own cannot be separated from their interests in acting on that identity, or from revising it in light of new evidence. As a result, there is nothing arbitrary about connecting the interest in self-definition to the interest in self-determination, because individuals are unlikely to develop an independent sense of themselves if they have no prospects for independent moral action. Thus, while it may seem as though the link between self-determination and self-definition might be broken in the interests of analytic clarity and a more determinate conception of privacy, the moral and political reasons for believing self-definition to be a fundamental human interest are reasons also for believing that it cannot be separated from the interest in *living* a life that one can affirm to be reasonable, valuable and right.

Finally, though there is a close connection between our interests in self-definition, intimacy and confidentiality, as we saw, the former need not gobble up the latter. Our interests in intimacy and confidentiality are not simply interests in defining our identities and goals, and distinguishing these from those of other people. Important though these are, they are also interests in being loved, cared for, supported, understood, trusted whether or not there is anything distinctive about our needs in this respect, and whether or not these can sensibly be described as an outcome of our self-conceptions, or as a precondition for having a personal identity at all.

To that extent, then, it is possible to distinguish amongst our interests in privacy, because we can have good reason to care for other people, to trust and reciprocate such trust, whether or not our sense of self is at stake, or our ability to act on our fundamental values. But if that is so, there is no reason to believe that our interests in privacy are simply interests in getting what we want, or are infinitely expandable and indeterminate. Heterogeneous and difficult to define precisely they may be, but so long as one acknowledges that individuals can have interests in deciding how they should live, as well as interests in intimacy and confidentiality, there is no reason to deny that these underpin familiar conceptions of privacy, nor to deny their legitimacy. So, while it is true that we run the risk of arbitrariness and injustice in so far as we cannot pin down the value of privacy precisely, that is no reason to maintain that we lack identifiable interests in privacy, or that these are simply random or unconnected to each other. Instead, it seems grounds for concluding that our moral and political values do not come neatly packaged and, as a result, our moral and political judgements simply cannot be always as clear, distinct and certain as we would like them to be.

There are, then, three ways that we can describe the moral affinities between the different aspects of privacy. Though one might wish to focus on one rather than the others, each is an important interest and has a place in illuminating our particular judgements about privacy. For instance, privacy is often associated with the protection and toleration of diversity; with the allowance and encouragement of individuality; and with social stability and generational continuity.[133] My account of privacy interests accords with these aspects of privacy, which figure prominently in arguments

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[133] See, for example, Ruth Gavison, p. 367. However Gavison notes that by tolerating social deviancy, as long as it is quiet or hidden, "privacy reduces our incentive to deal with our problems". This concern about the limits of privacy can be seen also in R. Copelon, "Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change" in *A Less Than Perfect Union*, (Ed.) J. Lobel, (Monthly Review Press, New York, 1988).

for and against privacy rights. Thus, critics of privacy commonly charge that it leads us to overvalue personal choice and individuality; that it threatens accepted moral standards and dissolves common bonds and responsibilities; and left-wing critics, in particular, charge that privacy perpetuates the power of an irresponsible social elite.

I will examine these criticisms of privacy and their weight in the next chapter, when looking at the justification of privacy rights. What matters here is this: (1) that my account of privacy interests is compatible with familiar criticisms of privacy and can, indeed, illuminate them; and (2) that one might, without contradiction, agree that privacy interests are valuable or important, while still doubting the value of privacy. Thus, whilst agreeing that self-determination, intimacy and confidentiality are all important, one might believe that these interests are better protected by values other than privacy. Or, one might agree that these interests are important, but assert that they conflict with interests which are more important and fundamental. Either way, one might reasonably accept this account of the interests underlying privacy as a political value, though still doubtful about, or even hostile to, broad claims about privacy's value and importance.

Thus, it seems possible to characterize the interests underlying privacy protection for personal choice by appealing to, and developing, acknowledged and comparatively uncontroversial assumptions about privacy and its moral and political significance. The comparatively uncontroversial character of my account of privacy interests is important for several reasons. First, because it is directly related to the plausibility and usefulness of this interpretation of privacy. Secondly, because there is a fairly close connection between the uncontroversial and accessible nature of one's assumptions, for purposes of moral argument, and their compatibility with equality. Respect for equality can require us to respect and accommodate the

diverse values individuals may reasonably hold.[134] Hence, evidence that privacy is compatible with a wide range of moral perspectives itself provides a reason for thinking it compatible with equality.

And it is reasonable to believe that privacy is compatible with a wide range of values—religious, secular, individualist or communitarian. For concerns with self-determination and self-definition, with companionship and confidentiality are neither narrow nor sectarian, the preserve of some one social group, or some moral or religious sect. Different people may, reasonably, attach different importance to each of these, given their particular values, and there may well be competing interpretations of the particular content or meaning of each. However, it is difficult to think of a group, or a moral position for which these privacy interests have no value—even if, in some cases, the value accorded to personal choice, for example, is instrumental and seen as a necessary accommodation to a morally distasteful world.[135]

The connection between these three privacy interests and equality can also be described more directly. Thus, self-definition and self-determination are goods that commonly motivate quests for equality and democratic rights, just as our capacities to identify with others and to cooperate with them are essential to the achievement

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134 See, for example, J. Cohen, "Moral Pluralism and Political Consensus" in *The Idea of Democracy*, (Eds.) D. Copp, J. Hampton and J. E. Roemer, (Cambridge University Press, Cambridge, 1993), pp. 270-288., and "Freedom of Expression" pp. 223-4. Gavison rejects the attempt to provide an intrinsic -value account of privacy for similar reasons. Arguments that privacy is inherently valuable, she believes, "obscure the specific functions of privacy". Moreover, "They prevent any discussion with people who do not share the intuitive belief in the importance of privacy". Gavison p. 360.

135 Similarly, Gavison claims that "privacy may be linked to goals such as creativity, growth, autonomy, and mental health that are accepted as desirable by almost all such theories [of the good life], yet in ways that are not dictated by any single theory". Gavison pp. 361-2.

of equality.[136] Confidentiality can protect individuals from oppression and subordination, as well as enabling them to recognize and to discover common interests, hitherto unacknowledged or suppressed.[137] Similarly, love, friendship and companionship can motivate individuals emphatically to reject the subordination of one person to another (Mill) and, by providing examples or models of reciprocity, can help us better to see what it might mean to treat each other as equals. In these ways, then, privacy can enable individuals to affirm the importance of equality as a moral and political value, and to challenge the claims of those who believe that the subordination of some people to others is natural, inevitable or just.

For these reasons, then, it seems fair to treat privacy and equality as distinct but compatible values. That is not to say that they cannot conflict, or that privacy protection for particular personal choices is always egalitarian. It almost certainly is not. Our interests in generational equality, for instance, may tell against privacy protection for some personal choices associated with privacy—in the distribution of income and property, say.[138] However, such possibilities give us no reason to conclude that privacy and equality must be incompatible, or that respect for the equality of individuals requires us to forgo all personal choice in our beliefs, attachments and loyalties. Thus, our privacy interests, as described, support the view that (1) some important moral concerns unite the diverse features of privacy as a moral and political value; and (2) that these are compatible with, and can even promote, the equality of individuals.

Thus far I have argued that privacy can have a variety of controversial and even conflicting features without being an arbitrary

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136 See, for example, Sara Evans, *Personal Politics*, "Fraternity", in Anne Philips, *Democracy and Difference*, (Pennyslavania State University Press, Pennyslavania, 1993), ch. 1 and ch. 3 of *Engendering Democracy.*

137 See Westin, pp. 350-351, also Eisenstein and MacKinnon on consciousness raising, supra.

138 Rawls says, at section 46, p. 301 "Even in a well-ordered society that satisfies the two principles of justice, the family may be a barrier to equal chances between individuals". See also section 77 pp. 511-2.

and incoherent mish-mash of different values. I have also argued that the different normative concerns connecting paradigmatic features of privacy are compatible with equality. In this, the final part of the chapter, I will connect these two arguments, by examining some competing philosophical claims about the fundamental and unifying features of privacy. These claims, taken singly, conflict both with my own and with each other—although taken together, I believe, they support my emphasis on the diverse and mutually irreducible features of privacy. So, in what follows, I will argue that attention to the diverse and contradictory features of privacy is necessary if we are to reach general agreement on the value of privacy, and if this agreement is to prove compatible with the equality of individuals.

D. EQUALITY AND DIVERSITY

The failure to recognize the different and even conflicting privacy interests of individuals lies at the heart of inegalitarian conceptions of privacy. Thus, our conceptions of privacy are almost certain to lead to inequality, given familiar social divisions, if the privacy interests of men are held to represent those of women; the privacy interests of heterosexuals to represent those of homosexuals; the rich, those of the poor; whites, those of blacks; and the old those of the young. For the interests of these groups are not alike, and are mutually incompatible in some respects. To ignore these differences when deciding which interests privacy protects is to assume that the protection of privacy has no relevance to social conflict, or to be cruelly indifferent to the relevance it has. The results, in either case, are conceptions of privacy which, like those in *Bowers* and *Harris*, justify inequality in the name of an equal right to privacy.

Because a concern for equality requires us to recognize the diversity of our interests in privacy, it is important to see that this is perfectly compatible with the belief that privacy is a distinctive and important political value. For the philosophical literature on privacy suggests that a concern to distinguish privacy from other values leads to pressure to ignore or downplay the heterogeneous and contradictory aspects of privacy. For example, Allen, Inness, Reiman and Parent all reject

Thomson's contention that privacy is a confused and redundant value. They agree with Thomson that privacy is made up of rather different things, but dispute her claim that there is no common connection amongst these, giving privacy its *raison d'être*.[139] Moreover, each interprets Thomson's challenge in a similar way: as requiring them to find the one value connecting together the different ingredients of privacy. In short, each takes it that they must find that one paradigmatic feature of privacy which underlies all other commonly recognized aspects of privacy, and which gives these their moral importance. Though sharply disagreeing about which this foundational value is, therefore, these authors agree on what it would take to disprove Thomson's claim that privacy is a redundant hodge-podge of other values.

If I am right, however, this methodological assumption is both unnecessary and misguided. It is unnecessary because we can identify important privacy concerns by thinking of private matters as heterogeneous and loosely connected to each other. Far from needing to find one core value, organizing the rest, we can treat privacy as made up of equally important, mutually irreducible elements, without making it a moral and conceptual jumble. For there can be close affinities between the different aspect of privacy, even if there is no logical or necessary connection between them. Thus Scanlon agrees with Thomson "that the rights whose violation strikes us as [an] invasion of privacy are many and diverse, and that these rights do not derive from any single overarching right to privacy".[140] Yet he, like Rachels, believes that our interests in privacy, though diverse, may provide a common foundation for the disparate rights that make up "the right to privacy cluster".[141]

Nor is this so surprising. For Thomson's concern is not that privacy is made up of different parts, but that there is no logical or moral connection between these which illuminates their moral status. What

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139 Reiman pp. 27-28, and 43-44; Inness pp. 28-29 in particular; Allen p. 41; Parent pp. 269-271, 278-280.

140 Scanlon p. 315.

141 Scanlon p. 315, and Rachels p. 323, and Thomson's article for the idea of a "right to privacy cluster".

is chiefly responsible for Thomson's belief that the right to privacy is a redundant amalgam of different rights is the sense that "the fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster".[142] Thus, a successful response to Thomson—if there is one—does not consist in showing that privacy is *really* one thing—whether inaccessibility, intimacy, dignity, control of personal information or what have you—but in explaining what moral or other concerns tie various features of privacy together and make it a useful part of moral and political discourse. For that, if I am right, one must identify and elaborate the diverse features of privacy, in order to establish their connections. So, a belief that privacy is an important political value does not commit us to finding some one moral concern at its core, or to the belief that privacy provides only one main reason for protecting personal choice.

But the attempt to find such a single foundation for privacy seems misguided as well as unnecessary. While the quest is motivated by the desire to show that privacy is an important and useful political value, and so should not be consigned to Thomson's scrap-heap, the method undermines the quest. For this attempt to tidy up and bind together the diverse aspect of privacy results in conceptions of privacy which are either too abstract to show that privacy is valuable and important, or which reveal inegalitarian assumptions about the content and value of privacy in their particulars.

For example, Allen believes that privacy can be identified with inaccessibility, for moral and political purposes. Thus, she describes different aspects of privacy in terms of their connection to inaccessibility. This works relatively well when it comes to confidentiality, anonymity and reserve which, as Allen claims, are ways of limiting others' access to us.[143] But, as she acknowledges, things are not so straight-forward when

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142 Thomson pp. 132-3. I will be looking at the case for a right to privacy in the subsequent chapter. For now, I am concerned with the prior question whether or not the term "privacy" refers to anything useful or valuable to which it would make sense to claim a right.

143 For reserve, see p. 19 and pp. 23-24 for Allen's account of anonymity and confidentiality.

it comes to intimacy. Though we customarily treat intimacy as a form of privacy, and an important one, we are, as Allen recognizes, at least as likely to think of inaccessibility and intimacy as opposites, as to consider the latter a case of the former. Hence, Allen notes that "Intimacy would seem to fall outside the privacy concept as denoting a degree of openness to communication or contact with selected others, rather than a degree of inaccessibility".[144]

Allen's response to this problem is to note that inaccessibility is often a means to intimacy.[145] This is true, but insufficient. For intimacy is not just a form of inaccessibility,[146] or a way of making ourselves inaccessible to others. Indeed romantic conceptions of intimacy commonly treat personal reserve as an obstacle or barrier to intimacy, locating intimacy in the full and free communion of individuals. Moreover, the presence of others may, in fact, prove as necessary to the sustenance of intimate relationships as the ability of individuals temporarily to isolate themselves.[147] Hence, there seems nothing in the nature of intimacy to support Allen's claims about the importance of inaccessibility to privacy. Rather, a concern for intimacy might lead us, with Leach, to condemn privacy as a political value, or to question the importance of personal inaccessibility to a reasonable conception of value.

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144 Allen p. 19.

145 "In practice seclusion and intimacy are closely related… Intimacy is facilitated by and closely associated with the form of privacy known as seclusion". p. 19.

146 Allen seems to want to claim that it is, or can be treated as such, when she says "Yet, when viewed as a condition of selective disclosure, intimacy also denotes inaccessibility", although she does not expand on this point. p. 19.

147 Other people may be necessary to intimacy in the sense that they provide material support and aid, and because they help to fulfil the diverse psychological needs of individuals which cannot always, if ever, be met in dyadic or small-group relationships. Some such ideas, clearly, influence the beliefs of those, like Leach, who believe the nuclear family stultifying. "The family looks inward upon itself", Leach complains, and as a result "there is an intensification of emotional stress between husband and wife, and parents and children". Leach op. cit. p. 44

The relationship of personal inaccessibility and intimacy, and their relative importance to privacy, then, depends both on our circumstances and on our values. As it is reasonable to think that these may differ without showing that privacy is unattractive or redundant, Allen's account of privacy illustrates Tribe's complaint that, "by focusing on the inward-looking face of privacy" some accounts "slight those equally central outward-looking aspects of self that are expressed less through demanding secrecy, sanctuary or seclusion than through seeking to project one identity rather than another upon the world".[148] It appears also to illustrate some of the reasons why MacKinnon thought privacy a threat to equality. For by identifying privacy with inaccessibility, Allen downplays or ignores the way in which privacy depends on the support and help of others and on the active cooperation of the state.[149] As the outcome in *Harris* suggests, such conceptions of privacy are likely to perpetuate social inequality, though they need not invariably do so. Hence MacKinnon's complaint against *Harris*: that "State intervention [or state funding for abortion] would have provided a choice [poor] women did not have in private".[150]

Despite the importance of personal inaccessibility to most moral and political conceptions of privacy, then, there seems no reason to try to define privacy in terms of inaccessibility alone. In fact, rather than promoting agreement on the nature and importance of privacy, insistence on the importance of inaccessibility relative to other core features of privacy seems likely only to promote controversy and to justify inequality. For our conceptions of personal inaccessibility are not always coherent and egalitarian. Thus, if we are to modify these, without conceding that privacy is incoherent or a threat to fundamental values, our conceptions of privacy must include, and give independent weight to, values other

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148 L. H. Tribe, *American Constitutional Law*, (The Foundation Press, Inc., Mineola, New York, 1988), pp. 1303-4.

149 Thus MacKinnon believes that, for women, "a right to privacy looks like an injury got up as a gift. Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered", p. 100.

150 MacKinnon p. 101.

than inaccessibility. And this we cannot well do by insisting that the importance attached to personal inaccessibility is sufficient to distinguish privacy from other moral and political values.[151]

I have focused on the difficulties with Allen's claim that inaccessibility forms the essential and dominant element of privacy as a political value. But the difficulties with her conception of privacy give us no reason to adopt the alternatives proposed by Inness, Parent or Reiman. For we have no more reason to believe that intimacy, personal information, or personal dignity are inherently coherent and egalitarian political values than we have to believe this of personal inaccessibility. As a result, if we insist on the intrinsic importance of any one of these to privacy we are likely rather to uphold arbitrary and inegalitarian conceptions of value than to illustrate or illuminate the integrity and importance of privacy.[152]

Consideration of MacKinnon's concerns with privacy can illustrate this claim. As MacKinnon argues, the association of privacy with intimacy has made sexual inequality appear both inevitable and desirable.[153] Inevitable, because based on supposedly natural differences between individuals; desirable, because supportive of, and necessary to, some particular conceptions of the good life for individuals and for society. In fact, as MacKinnon argues—and as Inness agrees—there is nothing particularly natural or appealing about traditional forms of intimate and family arrangements; nor need intimacy preclude coercion

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[151] In fact, it would seem that a concern for personal inaccessibility, like a concern for personal dignity, is important to our interests in freedom of expression, and so cannot sharply differentiate privacy from other values, as Allen believes. See J. Cohen "Freedom of Expression", pp. 225-229.

[152] Similarly, it seems, Gavison thought that it would be counterproductive to insist that privacy is inherently valuable, when trying to explain why privacy is valuable. See Gavison, p. 360.

[153] MacKinnon pp. 99-101.

and inequality.[154] This being so, identifying privacy with intimacy is likely to perpetuate sexual inequality, and so to undermine rather than support the claim that privacy is an attractive political value.

According to Inness the content of privacy is determined by its connection to intimacy alone, so that decisions can properly be called private only so far as they are intimate.[155] But despite her own objections to the majority's reasoning and conclusions in *Bowers*, this contention is likely to deny privacy protection to forms of consensual adult association which do not fit traditional or established conceptions of intimacy.[156] Indeed, Inness herself would apparently deny privacy protection to consensual adult sexual relations which are based purely

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154 Inness p. 99 notes that though "it *may* be a psychological truth than the agent's love, care, and liking are difficult to compel, there is no reason to suppose that such compulsion is impossible. In fact, people often end up closely tied after such compulsion", as can happen in some cases of kidnapping or abduction, of arranged marriages, or in an unwanted pregnancy. (emphasis in text).

155 Inness p. 56, and ch. 5 on the content of privacy (pp. 56-73). By contrast, W. L. Weinstein insists that "There is a wide range of instances where to speak of something as private is not to imply intimacy". p. 33.

156 Inness believes that the majority should have granted privacy protection to homosexual associations because they are intimate. p. 125. The result in *Bowers*, then, she attributes to the "the Court's failure to locate intimacy as the conceptual and moral core of privacy". But this ignores the fact that, as both majority and minority agree, not all intimate relationships are legally private—incestuous and bigamous ones, for example. Moreover, it fails to address the prejudice of the majority and its role in denying homosexuals privacy. For the majority might well have connected homosexual relationships to the interests in procreation and family formation that they identified as private. Furthermore, an important part of their decision depended on the claim that a legislative majority may prohibit behaviour merely on the grounds that it is considered immoral, offensive and disgusting by some people. In short, it is hard to agree with Inness' diagnosis of the result in *Bowers*, or to see how her conception of privacy promotes sexual equality.

on lust[157], or, one might suppose, on curiosity, rather than on the "love, liking and care" which she takes to be the essence of intimacy.[158] In other words, by separating our interests in intimacy from our interests in self-expression, in equality or in self-discovery, Inness removes the possibility of finding, within a conception of privacy, the resources for correcting sexually inegalitarian conceptions of intimacy and morally arbitrary limits on privacy. Not only, then, is her conception of privacy likely to justify sexual inequality, but it appears to undercut, for no good reason, support for privacy by eccentrics, non-conformists, the solitary, shy, creative and artistic for whom the protection of intimacy may be a relatively minor privacy good.

In short, it seems unreasonable to equate privacy with intimacy if one values privacy, because the place of intimacy in a democratic society is so deeply controversial, and so closely associated with the unattractive features of privacy as a political value. Respect for equality and the reasonableness of others, in other words, requires us to temper and to revise, familiar claims about the moral and political importance of intimacy. That does not mean that we lack legitimate interests in intimacy, anymore than that we lack legitimate interests in privacy. Indeed, a less reductive view of privacy would enable us to reject sexist conceptions of both intimacy and privacy, on the grounds that they violate the self-definition and confidentiality of women. But this is inconsistent with the attempt to elevate intimacy over other moral and political reasons for caring about, and protecting, privacy.

Nor do we promote respect for privacy by insisting that privacy is distinguished from other political values by its protection for personal information or for personal dignity. After all, as feminists have long noted, privacy rights have too often prevented us from recognizing

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157 Inness p. 92.

158 See ch. 6 "Intimacy: the core of privacy", pp. 74-94. I am unsure how this highly moralised conception of intimacy fits with Inness' recognition that coercion does not preclude intimacy—unless she is assuming that coercion and subordination must cease before love and intimacy develop. But this proposition is hard to square with the putative case of the kidnap victim which she cites at p. 99.

the extent of sexual violence and coercion in our societies, thus protecting the reputations of men at the expense of the reputations and safety of women.[159] Instead of fostering dignity, protection for privacy has, as MacKinnon suggests, often cost women their self-respect, and the respect and sympathy of others.[160] Thus it seems undesirable to stake the value of privacy on its protection for personal information and the protection of personal dignity, for privacy protection of personal choice on these grounds has, clearly, been both arbitrary and sexually inegalitarian.

If we wish, then, to maintain that privacy is valuable despite the cover that it has so often given to injustice, we must be able to distinguish between different privacy goods and values and, therefore, between human dignity and personal information. For we can recognise and respond to the limits of familiar conceptions of personal information and dignity only be establishing what they have included, and what they have excluded. This is not possible if we ignore different conceptions of privacy, or the differences amongst privacy goods and values. Hence, it is no more compelling to answer Thomson by identifying privacy with personal dignity or the protection of personal information, than it is to insist, with Allen and Inness, on the paradigmatic privacy status of personal inaccessibility and of intimacy. For our conceptions of each have played their part in supporting unreasonable and unjust values and institutions. As a result, it is impossible to identify privacy with any one of these in a straightforward way so long as one wants to claim that privacy is valuable.

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159 Hence, traditionally the stringency and intrusive nature of the "corroboration" requirements placed on women who would charge a man with rape, for, as Susan Estrich shows, courts have traditionally been concerned that "errant young girls and women coming before the court" would "contriv[e] false charges of sexual offences by men". See Susan Estrich *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press, Cambridge, 1987), p. 43.

160 MacKinnon p. 100 on battered women, and p. 95 on rape trials.

Moreover, it is only at the cost of an improbably reductive account of our interests in privacy that these accounts are able to show that it is a coherent moral value. As such, their response to Thomson's worry that "privacy" merely refers to a laundry list of disparate and arbitrarily connected values, is simply to deny that "privacy" *does* refer to morally and conceptually different things. But, as we have seen, that claim is implausible, as it requires us to believe that intimacy, solitude and the rest are, at bottom, identical goods. Thus, the price of coherence, on these views of privacy, is a severely reductive account of our basic values and a willingness to ignore, or to accept uncritically, some of inconsistent, problematic, even repugnant, aspects of established values.

As a response to Thomson, then, such accounts of privacy are a failure and necessarily so: for they assume that our moral language, thought and experience are all far simpler, more transparent and consistent than they evidently are. But as I hope to have shown, it is unnecessary as well as undesirable to insist on the fundamental homogeneity of privacy, even if one thinks it a useful and desirable value. It is unnecessary, because we can make sense of privacy as a moral and political value whilst acknowledging the diversity of privacy goods, by showing the different reasons why privacy might be valuable and useful in moral and political debate. It is undesirable to insist on the homogeneity of privacy, if one values privacy, or agreement on what privacy is, because this is all too likely to promote controversy and to fuel reasonable concerns that appeals to privacy are morally meaningless, or just a cover for the sectional interests of the privileged and powerful.

Hence, acknowledging the importance of intimacy, inaccessibility, personal dignity and personal information to established conceptions of privacy does not require us to identify privacy with one rather than another of these, nor to treat these values as more quintessentially private than alternatives. Indeed, if the argument of this chapter is correct, it is unreasonable to suppose that we can describe the value of privacy without reflecting on the equality of individuals, and allowing for the diverse values which people can reasonably endorse. For what distinguishes privacy from other values, and what makes

it valuable, depends on our conceptions of equality and of other values. As a result, a reasonable and egalitarian conception of privacy cannot require us to identify privacy with only one value, because the interests, intuitions, beliefs and values of people can be both different and reasonable.

It is, therefore, unsurprising that the value of privacy can be described in a variety of ways and that these can be mutually incompatible. This does not mean that privacy is morally incoherent, nor that there is anything peculiar about privacy as compared to other values. After all, there are competing conceptions of equality, and these are not each unreasonable just because they are not fully harmonious.[161] Similarly, as Thomas Grey has shown, there is no natural or inevitable connection between different property rights, and thus between right to use, sell and bequeath property.[162] Yet Thomson is not unreasonable to group them into a bundle, and to treat protection for property as an important moral and political good.[163] In short, recognition of the diverse aspects of privacy seems essential to an egalitarian conception of privacy, and so, to a reasonable understanding of its importance and value.

That is not to say that there is anything intrinsically wrong with disaggregating privacy for the purposes of moral or political analysis, as Thomson suggests that we do. The point of my analysis, in other words, is not to show that there is something about privacy as a value over and above the value of its component parts. My point, rather,

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161 As J. Cohen remarks, "two inconsistent views may both be fully reasonable, though they cannot both be true". J. Cohen "Freedom of Expression", footnote 43, p. 223.

162 T. C. Grey, "The Disintegration of Property" in *Property*, (Eds.) J. R. Pennock and J. W. Chapman, (New York University Press, New York, 1980), pp. 69-85.

163 Thomson, pp. 120-121: "To own a picture is to have a cluster of rights in respect of it. The cluster includes, for example, the right to sell it…, the right to give it away, the right to tear it, the right to look at it . . .To own a picture is also to have certain 'negative rights' in respect of it, that is, rights that others shall not do certain things to it . . ."

is this: that there is nothing bizarre or especially problematic about privacy simply because it is made up of heterogeneous elements or any reason, therefore, to suppose that it is senseless or misleading to talk about privacy as a single (composite) entity or value.

For some purposes, perhaps, it may be simpler to disaggregate the different elements of privacy, or to discuss one of its elements in isolation from the others. In the case of some of the more narrowly technical issues raised by informational privacy, for example, this might be perfectly appropriate. However, as there clearly are important moral and political connections between our different privacy interests—connections that we are likely to overlook if we treat privacy simply as a jumble of unrelated interests—it seems perfectly sensible and legitimate to insist on the basic integrity of privacy as a moral and political value. Indeed, as with the concept of property so with the concept of privacy: it is likely that sustained analysis of the different elements involved, and their place in moral and political analysis, is most easily conducted by recognizing their connection to a broader whole of which they form a part, than by treating each in isolation from the other. But be that as it may, if the fact that privacy can be thought of as a single, though composite, value does not mean that we have to think of it in this way, it is still worth noting that such a possibility is open to us, and that it may prove helpful in analysing and critically evaluating our values.

E. CONCLUSION

In this chapter I have tried to show that we can parlay agreement on some fundamental aspects of privacy into agreement on its importance and value, despite controversy about the relationship of privacy to other values, and disagreement over the best justification for particular rights. For most critics and advocates of privacy could, reasonably, acknowledge that we have important privacy interests in self-determination, peace of mind and generational care, although we have different values and interests and privacy rights may, in fact, protect these to varying extents.

Such agreement, I believe, is implicit in familiar philosophical and political conceptions of privacy, though generally buried and obscured by the surrounding controversy about privacy. Bringing this agreement to the surface, therefore, and showing how it underpins familiar, if opposing, views of privacy has been an important goal of this chapter. Though the agreement that it points to and tries to expand is far from universal, I have tried to show that it commands support from a wide range of perspectives and from consideration of equality and other values.

Thus, I have tried to foster agreement on privacy, without denying that controversy exists or supposing that it can be easily resolved or dismissed. For that reason, I have insisted that we need not choose which one of several values best embodies the value of privacy. The view that choice is necessary, I have argued, is mistaken and likely to be self-defeating. It is mistaken, because no significant moral or political objection to privacy is removed by showing that privacy matters are, at bottom, homogenous rather than various. It is self-defeating, because the attempt to treat privacy as a single value is all too likely to support inegalitarian conceptions of privacy and to exacerbate claims that privacy has no moral content of its own.

So, I conclude that privacy can be valuable and compatible with equality, although it is a controversial political value. The next chapter, I hope, will bear this out, and help to lessen some of that controversy. In it I show that rights to privacy can give substance and sustenance to our ideals of equality, by helping us to constitute a democratic conception of persons and politics.

CHAPTER 3

THE RIGHT TO PRIVACY

A. INTRODUCTION

The previous chapter showed that attention to the equality of individuals can help us to describe the moral and political value of privacy in ways that are reasonable and consistent with sexual equality. In this chapter I will use this account of privacy to provide an interpretation of the content and justification of privacy rights in a democracy. Privacy rights, I will show, have a democratic justification and function because they can help us to preserve the freedom and equality of individuals. Thus, I will argue, the fact that the public/private distinction is not sharp does not show that we can dispense with legal protection for the privacy of individuals. Rather, it shows that there is no sharp distinction between the right to privacy and the right to vote, or between the justification of fundamental rights in a democracy.

Individuals have legitimate interests in political participation, choice and decision making. These interests underpin the justification for familiar political rights in a democracy, because legal rights are generally helpful, and sometimes necessary, to secure the political

freedom and equality of individuals.[164] As a result, no democratic justification of privacy rights is possible if we ignore the legitimate interests of individuals in political choice and participation. So, if our interests in privacy are to merit legal protection by right, and to be consistent with the equality of men and women, we need to see how they can be reconciled with the content and justification of political rights in a democracy.

This would be impossible were there no connection between our interests in privacy and our interests in equality, or between the personal interests of individuals and their political ones. But, as we have seen, neither is the case, as individuals can have equality interests in privacy, and political interests in personal choice. Thus, in the second part of the chapter I show that individuals' legitimate interests in privacy have an inescapably political dimension, and one connected to their prospects for equality with others. As a result, I argue, legal rights to privacy can reflect a commitment to democratic forms of association and participation, and can help to secure the freedom and equality of individuals.

Important though the political dimensions of privacy are, however, they are not the only reason why privacy rights have a place in a democracy. Our legitimate interests in privacy, so Chapter 2 suggests, are personal as well as political, a function of our particular desires, needs and convictions and not only of our political relations and collective ties to others. In the third part of the chapter, then, I show that protection for the personal interests of individuals is no less important to their equality than protection for their political interests, and can justify legal rights to privacy in a democracy.

Finally, I test and support these claims, by showing that they enable us to distinguish democratic accounts of the right to privacy from alternatives. Despite their strengths and the important differences between them, I argue that liberal and communitarian accounts of the right to privacy typically rest on arbitrary and

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[164] Drucilla Cornell, "Should a Marxist Believe in Rights?" in *Praxis International*, vol. 4, (April 1984).

undemocratic assumptions about the public/private distinction, and so are likely to justify sexual and other forms of inequality. Whereas liberal conceptions of the right to privacy typically ignore or underestimate the importance of our political interests in privacy, communitarians tend to devalue our personal ones. Hence, what distinguishes a democratic account of the right to privacy from alternatives, I conclude, is that the former, unlike the latter, gives equal weight to our personal and political interests in privacy, even when it distinguishes amongst the two.

B. THE PROBLEM OF JUSTIFICATION

Feminism claims that there is no sharp distinction between the personal and political, because the way in which a society distributes political power necessarily structures the personal relations of individuals.[165] This claim is persuasive and consistent with familiar assumptions about rights in democracies, as an important reason for believing that individuals should have equal rights of political choice is that these help to protect their equality as individuals. Hence, the evil of undemocratic voting rights is not merely that they deny individuals a chance to influence collective decisions, but that they expose some people to the malice, negligence and coercion of others.

165 See, for example, Frances Olsen, "Unravelling Compromise", where she states that "the public/private distinction is false—the state is implicated in the 'private' sphere. Created by the 'public', the 'private' suffers from a serious power imbalance", p. 113, and p. 1497 of her "The Family and the Market: A Study of Ideology and Legal Reform", in *Harvard Law Review*, vol. 96, no. 7, (1983); also Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy", in *The Disorder of Women*, ed. C. Pateman, (Stanford University Press, Stanford, 1989); Susan Okin, *Justice, Gender and the Family*, (Basic Books, New York, 1989), chs. 6 and 7; Deborah Rhode, *Justice and Gender: Sex Discrimination and the Law*, (Harvard University Press, Cambridge, 1989), chs. 9 and 10; Catherine MacKinnon, *Feminism Unmodified*, (Harvard University Press, Cambridge, 1987), ch. 8.

Attention to the justification of political rights in a democracy also supports the feminist assumption that the effort to create or maintain a rigid public/private distinction threatens the equality of individuals. If political rights are to protect their personal freedom and equality, individuals must be able to use these rights to alter, or restructure, their personal and political relations. Thus, for example, individuals must be able to use their political rights to secure their personal freedom, and be able to redefine their personal relations so that they are consistent with sexual equality. Thus, attention to the justification and use of political rights in a democracy supports the feminist assumption that the public/private distinction cannot be sharp or unchanging if it is to be compatible with the freedom and equality of individuals.

The fact that there is no sharp distinction between the personal and the political, the public and the private, poses problems for the justification of privacy rights in a democracy. At best, it seems to imply that privacy rights are otiose or redundant, since political rights protect the personal freedom and equality of individuals. At worst, it suggests that privacy rights are an illegitimate constraint on the political rights of individuals and, therefore, on their personal freedom. In either case, privacy rights seem to lack a democratic justification and to bear an uncertain relationship to the legitimate interests of individuals.

This problem, however, is more apparent than real, although privacy rights have often been undemocratic: for the fact that the public/private distinction is not sharp no more implies that we lack democratic rights to privacy than that we lack democratic rights of political choice. Just as the justification of political rights does not depend on the thought that there is some way sharply to define the content or subject matter of politics, so privacy rights do not stand or fall on the supposition that "out there", somewhere, we can discern a realm of private or personal things, untainted by politics. Indeed, as feminists suggest, such a view mystifies the nature of politics in ways that are likely to justify sexual inequality. By supposing that the collective interests of individuals can be discovered or defined without ever considering their personal interests, it assumes that the particular interests of women, in so far as these differ from those of men, are irrelevant to political life, or to deciding what is for the common good.

If the justification of political rights in a democracy does not depend on the assumption that the personal and political are two separate orders of reality, two mutually exclusive categories into which the world might be divided, there is no reason to think this of privacy rights. Granted that once we abandon the idea of a sharp public/private distinction some ways of justifying privacy rights are automatically ruled out as undemocratic, it is still open to us to consider alternatives. In particular, it is open to us to consider the possibility, obscured by traditional assumptions about the public/private distinction, that privacy rights can be justified on much the same lines as political rights—or that, in other words, the distinction between privacy rights and political rights is intrinsically no greater than amongst political rights themselves, although in each case it is possible, and sometimes necessary, to make such distinctions.

Such an hypothesis gets plausibility from the fact that, if feminists are right, there is no way to protect the political equality of individuals that ignores their claims to equality in their personal relations. For if this is so, it is plausible that implicit in the justification of democratic political rights lies a justification for privacy rights that is, itself, democratic. Similarly, if feminists are right, there is no way to treat individuals as equal persons if we ignore their claims to equality in their political relations. So, it seems, whichever way we look at it, the reasons for rejecting traditional conceptions of the public/private distinction point in a direction which suggests that privacy rights are closely related to political rights in content and justification, even if it is possible and sometimes necessary to distinguish them.

The next two sections of this chapter explore and test this possibility, first by seeing whether privacy rights could be justified on the grounds that they help to ensure that political rights are, indeed, democratic. The second section then tests the possibility that privacy rights are justified in a democracy because the personal freedom and equality of individuals are, themselves, important democratic goods independent of their contribution to the political equality of individuals. Were this the case, privacy rights could then be justified in a democracy not simply on the grounds that they help to preserve

democratic rights of political choice, but on the grounds that, like such political rights themselves, they help to secure the personal freedom and equality of individuals.

The aim in the next two sections, then, is to explore two ways of justifying privacy rights suggested by feminist criticisms of the public/private distinction. Those criticisms suggest that individuals can have political interests in privacy, because protection for the personal freedom of individuals is necessary to secure their capacities for political choice and participation. It seems plausible, therefore, that we can justify privacy rights in a democracy based on a familiar strategy for justifying other rights: namely, by establishing that these are necessary to secure political rights themselves.[166] That is the possibility that the next section explores. By showing that we have political interests in privacy, and that these justify protecting privacy by right, it provides what I call a "political justification" of privacy rights. Thus, by contrast with the idea that privacy rights must be justified by reference to some non-political reality or principle, I will show that the same concern to protect the political equality of individuals, which underpins the justification for political rights in a democracy, also provides a justification for legal rights to privacy.

However, feminist criticisms of the public/private distinction suggest more than this, as does their connection to familiar ideas about democracy. For if feminism has shown that our conceptions of privacy are frequently inegalitarian because they ignore individuals' claims to participate in politics, feminists have also shown that established conceptions of politics often justify inequality because they devalue all other activities, such as the love and care of children, the maintenance of a safe, comfortable and aesthetically pleasing home and environment, the nurturing and development of the emotional and expressive capacities of individuals themselves.

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[166] See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*, (Harper and Row, New York, 1948), and Cass R. Sunstein, *Democracy and the Problem of Free Speech*, (Free Press, New York, 1993).

These criticisms of politics, I believe, point to another justification for democratic rights in general, and for the right to privacy in particular. Though frequently couched as objections to the ways in which women have been excluded from the political life of their societies,[167] they challenge the assumption that political participation *per se* is the fundamental good that a democratic society realizes, or that it is, in itself, of greater intrinsic importance, or more intimately connected to the aims and purposes of democratic government, than the private activities of individuals.

Feminists have rarely developed the implication of this insight in part, I suspect, because it seems uncomfortably close to the liberal ideals of privacy that they rightly wish to reject. But this is, I think, a mistake. It is not self-evident that political participation is intrinsically more valuable or worthy of respect than a life spent caring for others or, indeed, than the pursuit of salvation, truth, beauty, fame, excellence and the like. Nor is it at all clear why, in a society committed to the equality of individuals, rights should be justified on such an assumption. As this assumption is, to some extent arbitrary, and one that individuals might reasonably reject without being selfish, immoral or unjust, it is hard to see how even the justification for political rights in a democracy can, in fact, rest on this premise.

If this is so, then not only is it the case that we must justify the political rights of individuals on grounds that accept the legitimacy of other ends than political participation itself, but we can also reject the assumption that our political interests provide a privileged starting point for justifying rights in a democracy. That is not to say that individuals lack interests in political participation, or that these are any less important than their interests in personal freedom and equality. Rather, it is to acknowledge that the former are of no more intrinsic importance than the latter, nor is there any reason to treat the one as more intrinsically democratic or fundamental than the other.

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[167] See, for example, Carol Pateman supra.

This is the idea that underpins the second justification of privacy rights that I will explore in this chapter. I call this the "personal justification" of privacy rights to distinguish it from the one that justifies them based on their contribution to the political choice and participation of individuals. It departs from the thought that if it is right and appropriate to characterize democracy as a form of government in which individuals participate in politics freely and as the equal of others, it is no less appropriate to think of democracy as that form of government in which individuals are able to pursue their own conceptions of the good freely and as the equal of others.

What distinguishes democracy from other ways of organizing social cooperation is not simply the important fact that in a democracy individuals are treated as political equals and seek to define their common good on this basis. In addition, and no less remarkably, a democratic society is one in which all individuals are held to have lives of their own to lead, to have personal interests and capacities, which they have equal claims to develop and pursue. Why this feature of democracy should be thought any less important to the definition and justification of democratic rights strikes me as a puzzle. For many people, indeed, this *is* what distinguishes democracy from other regimes, and accounts for its moral and political superiority to them. Granted, this sentiment may partly reflect a natural rejection of enforced political participation, and disgust at the hollow rhetoric of much political life in both self-described democracies and regimes with totalitarian aspirations. Still, there is no reason to believe that securing the personal freedom and equality of individuals is any less of an achievement than to secure their political counterparts, or that success in the one is any more important to characterizing and justifying a democratic society than success in the other.

If these points are credible, then feminist criticisms of the public/private distinction may support two different accounts of why privacy rights are justified in a democracy. As there cannot be a sharp distinction between the personal and political in such a society so, I suppose, there will be none between these two justifications of privacy rights. However, as a society committed to the freedom and equality of individuals must provide some basis for distinguishing the

personal interests of individuals from their collective ones, I assume that these justifications do differ and may, in some cases, conflict. But the implications of the potential for conflict between personal and political perspectives in a democracy, and its implications for the right to privacy in particular, are best examined when we have considered how such justifications might, in fact, proceed.

C. POLITICAL INTERESTS IN PRIVACY

Individuals have, I suppose, legitimate interests in political choice or decision making, association and expression, and these interests underpin the justification of political rights in democracies. Hence, individuals have the right, and the same right as each other, to vote, to stand for election, to form political associations and to form and publicize their opinions, beliefs and concerns about the conduct of public affairs. Individuals have these rights because the ability to participate freely in collective decisions, and to do so as the equal of others, is both a valuable exercise of their moral capacities and one that helps to protect their legitimate interests.[168]

The justification of political rights in democracies, and the conception of politics that inspires them, suggest that individuals have political interests in self-definition, in intimate association, and in confidentiality. These interests are both intrinsic and instrumental and it is often not easy to tell the two apart, for if privacy rights can help to protect the political rights of individuals, they can themselves be implicit in the justification of political rights in a democracy.

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[168] My account of democratic government relies on the following sources: John Rawls, *A Theory of Justice*; Joshua Cohen, "Pluralism and Proceduralism", *Chicago—Kent Law Review*, no. 69, (1994); his "Procedure and Substance in Deliberative Democracy", in ed. Seyla Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political*, (Princeton University Press, Princeton, 1996) and his "Freedom of Expression", in *Philosophy and Public Affairs*, vol. 22, no. 3, (1993); also Jim Johnson and Jack Knight, "What sort of Political Equality Does Democratic Deliberation Require?", Unpublished Paper, (August 1996).

For the sake of simplicity, I will focus on our instrumental interests in privacy before looking at their more immanent counterparts although, as we will see, given the variety of our interests in democracy, no bright line actually separates the two.

Instrumental Interests in Privacy

Our interests in privacy, as we saw in Chapter 2, can be described as interests in self-definition and self-determination, in intimacy and closeness to others, and in confidentiality. As we saw, protection for these interests can help to protect the equality of individuals by enabling them to withstand or oppose coercion and subordination as well as neglect and indifference. Hence, we can bring out the political interests of individuals in privacy by examining the ways in which protection for their privacy interests can support and protect their capacities for political choice, association and expression.

Self-Definition

Individuals have political interests in self-definition and self-determination because these enable them to decide what is in their own interest and how this relates to the interests of others. They have political interests in self-definition, in other words, because they have interests in collective choice and decision, and in ensuring that they are able to pursue these interests free from coercion, manipulation, deceit, subordination and ignorance of relevant information or alternatives.

Protection by right for our equal interests in personal choice, then, can promote political choice and judgement, and these are important if politics is to be democratic and consistent with the freedom and equality of individuals. As Adam Smith noted, where some groups are better informed about their interests, and willing and able to prosecute them at the expense of others, what passes for the common interest will be merely the sectional interests of one

part of society.[169] So, by giving individuals equal rights to decide what matters to them as individuals, privacy rights can protect and equalize important political resources, and can encourage individuals to examine the nature of their relations to others.[170]

This suggests that privacy rights can encourage political participation and responsibility and not merely the acquisition of politically relevant capacities and information.[171] Because political questions can be complex, political procedures intricate and intimidating, and political responsibility competitive and onerous, individuals may lack the self-confidence and motivation to exercise their political rights although they have interests in doing so. By encouraging and protecting the ability to decide complex matters for themselves, to form and pursue a variety of projects, and to identify, assess and defend their interests, rights of self-definition and self-determination can encourage participation in collective decisions, and make participation in public affairs more accessible to individuals. In these ways privacy rights can support the exercise

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169 See, for example, his discussion of the interests of employers, in Book 1 ch. 11, para. 10 of *The Wealth of Nations*, pp 266-7 in vol. 1 of Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*, eds., R. H. Cambell and A. S. Skinner, (Liberty Classics, Indiana, 1981). For a discussion of Smith's views on the matter see John Robertson, "The Scottish Enlightenment beyond the Civic Tradition: Adam Smith on Government and Economic Development" in *History of Political Thought*, 1984.

170 For similar ideas, see Jean Cohen, "Democracy, Difference and the Right to Privacy", in ed. Benhabib, supra, and Zillah Eisenstein, "Equalizing Privacy and Specifying Equality", in *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory*, ed. Nancy J. Hirschmann and Christine Di Stefano, (Westview Press, Colorado, 1996) and Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, Princeton) pp. 119-121.

171 For a discussion of this see Jim Johnson and Jack Knight, p. 36 and Joshua Cohen, "Pluralism and Proceduralism", p. 613 on the connection between public recognition of one's worth and one's personal sense of self-worth.

of political rights and contribute to forms of collective decision that are open, reasoned, and consistent with the freedom and equality of individuals.

Intimacy

Similarly, individuals have political interests in intimacy, friendship, and other forms of domestic and personal association. They have political interests in ensuring that these associations are consistent with their equality and free from manipulation and abuse by others, or from abusive or punitive measures by the state. Hence, privacy rights can help to support the political rights of individuals, by alleviating the fear that their political positions will jeopardize the safety and well-being of their friends and loved ones, or will deprive them of the means to be with those they care for.

This is particularly important, if we care about freedom of political association, and about the ability of individuals to collaborate as equals. Too often individuals have been intimidated into abandoning or betraying their political associates by threats to the well-being of their families and friends, or by the fear that they will be separated from them for ever. Pitting personal loyalties and interests against political ones, in other words, is a common way to discourage political participation, and to punish it. By removing this power from the state, legal rights to privacy can protect the political freedom of the politically unpopular and vulnerable and, by lowering the costs of political association, can equalize the political opportunities of individuals who may differ in their family responsibilities and political connections, as well as in their courage.

Moreover, as feminists have suggested, the unequal distribution of power within heterosexual relationships is often an obstacle to political participation by women, and to their ability to see themselves, and be seen by others, as the political equals of men. By equalizing control over the definition and conduct of intimate

relationships,[172] then, equal rights to privacy can further the political equality of women. For example, by enabling women to define their interests in sexual relations, to refuse ones that are demeaning or threatening, and to explore their connection to other women, privacy rights can help to ensure that the domestic and sexual relations of individuals in fact support relations of equality, rather than undermining them, as is currently the case. Hence, as feminists have rightly emphasized, to suppose that rape within marriage is an impossibility or, if possible, not worth defining as a crime, is not only seriously to obscure the extent of violence against women[173] but effectively to imply that their freedom, equality and bodily integrity are of little or no importance from a political perspective. But as such a position cannot be squared with a commitment to democratic political rights, it is reasonable to conclude that granting, and enforcing, equal rights to privacy can be an essential step in securing the political equality of individuals.

Confidentiality

Finally, individuals have political interests in confidentiality and protection for these can be necessary to their freedom and equality. Political expression cannot be consistent with the freedom and equality of individuals if some people are able to threaten others with impunity, as the Supreme Court recognized in *NAACP v. Alabama*.[174] This means that individuals must be able to keep their political choices and views confidential, when necessary, through

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172 For the importance of this see Catherine MacKinnon, supra.

173 See Sylvia Walby, *Theorizing Patriarchy*, (Basil Blackwell, Oxford, 1990) pp. 136-9

174 *NAACP v. Alabama*, 357 U. S. (1958) and *NAACP v. Button*, 371 U.S. (1963). As Justice Harlan held, for a unanimous Court, "Inviolability of privacy in group association may, in many circumstances, be indispensable to freedom of association, particularly where a group espouses dissident beliefs". For a discussion of these cases see Westin, *Privacy and Freedom*, pp. 350 – 351.

devices such as the secret ballot and, more broadly, through privacy rights to withhold personal information from others. Thus, privacy rights can help to protect the political interests of those who are unpopular, unconventional or lacking in political representation and organization, thus facilitating their participation in politics.

This is particularly important in a democracy, where individuals of different generations, occupations and religious, ethnic and sexual affiliations must have equal opportunities to organize and press their demands on others. Typically this has not been possible, because those with power have been able to withhold information when it suits them, and to extort, threaten or compel information from others.[175] So, by equalizing the control of personal information, privacy rights of confidentiality can help to ensure that political debate is democratic and not merely a vehicle for the prejudices, feuds, curiosity and self-interest of privileged individuals.

So, individuals have legitimate interests in privacy, because these can contribute to, or support accessible, reasonable, voluntary and egalitarian forms of politics. Legal rights to privacy, therefore, can be justified because they promote the freedom and equality of individuals and their ability to discover and pursue their common interests.

This does not mean that privacy rights are costless, or immune from abuse. Indeed, we have every reason to suppose that rights of self-definition, personal association and confidentiality can

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[175] Thus, as Westin emphasizes, employers have not been far behind government agencies in their eagerness to use new surveillance techniques to secure information from their employees, and except when barred by law, have been willing to require employees to disclose information which they, themselves, would be loath to reveal. See, in particular, chapters 5 and 9 of *Privacy and Freedom*. For a more topical example of the problem, see "Naming and Blaming: Media Goes Wilding in Palm Beach", contrasting the favorable, indeed deferential, treatment of William Kennedy Smith with that meted out to Patricia Bowman, in Katha Pollit, *Reasonable Creatures: Essays on Women and Feminism*, (Vintage Bookds, New York, 1994).

have undemocratic as well as democratic consequences.[176] Still, if this means that the instrumental justification for privacy rights, in a democracy, is inevitably a matter of weighing competing considerations and consequences, this is no reason to deny that privacy rights can have democratic effects. Granted that there may always be other—or better – ways to ensure that individuals are able to exercise their political rights, legal protection for the privacy of individuals may still have a legitimate place and function in a democracy.

In this respect, privacy rights are like political rights. Although it is reasonable to define democracy as government for the people by the people, it is not the case that rights of political choice and participation are always democratic in their effects. In fact, universal suffrage has sometimes been used to legitimize dictatorial rule, and concerns about the vulnerability of plebiscites and referenda to manipulation extend also to more established forms of political choice.[177] Yet, despite legitimate worries on this score, it is reasonable to believe that these have an important place in a democracy. Not only is it possible to guard against their worst abuses, in various ways, but we have every reason to believe that this will be easier where political rights are equal than where they are not: for by limiting and equalizing the power of individuals over each other, equal rights of political choice and participation increase the likelihood

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176 See the discussion of these in chapters 1 and 2.

177 I have in mind Louis Napoleon's famous, or perhaps infamous exploitations of universal suffrage to ratify his quest for power—the point here being that where background conditions feature coercion and other forms of inequality the suffrage, far from counteracting them, may simply reflect or reinforce them. For a survey of the relevant rational choice literature and a discussion of some of the problems involved, see Jim Johnson and Jack Knight, supra, pp. 23 – 25

that government will reflect the legitimate interests of individuals in self-government.[178]

So with privacy rights in a democracy. Where these are defined and justified in ways that reflect our claims to political freedom and equality, they will be less susceptible to undemocratic forms of abuse and manipulation than would otherwise be the case. For example, once we relinquish the idea that love or marriage can rightly deprive women of political rights and opportunities necessary to their equality with men, there is no reason to believe that privacy rights must systematically disadvantage women relative to men.[179] Although historically privacy rights have protected forms of manipulation and coercion that have made it harder for women to protect their political interests, as individuals and as a group, there is no reason why we should ignore this fact when defining rights of self-definition, personal association and confidentiality.

Thus, just as we can use "watch-dogs" and other institutional devices to try to ensure that political rights are not abused, so with privacy rights.[180] Similarly, just as subsidies for political expression can be used to protect the speech of disadvantaged social groups, so they might be used to increase the opportunities of women for self-definition, confidentiality and freedom in their intimate relations

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178 Hence the argument of those, like Joshua Cohen, who believe that procedural equality is not enough, and their concern with the background socio-economic conditions necessary to ensure that rights of political choice, association and expression in fact can serve as instruments of democratic government..

179 This, effectively is the argument of Jean Cohen, cited above.

180 My argument borrows, here, from the ideas in Joshua Cohen about how one might equalise opportunities for expression and association amongst different social groups in a society. Thus, subsidies for coffee-groups, reading groups, consciousness-raising groups, artistic groups and the like, could be the counterpart to subidies for women's distinctively political interests in expression and association. For other examples that might be relevant, although I believe that they are defined too narrowly, see the final chapter in Susan Moller Okin's, *Justice, Gender and the Family*.

with men. In such ways, we can try to ensure that rights to privacy indeed have democratic consequences, and that our political interests in self-definition, personal association and confidentiality are as secure as we can make them in a democracy.

If these points are right, then legal rights to privacy can have a political justification in a democracy. Because privacy rights can have politically beneficial consequences that a democratic society may rightly value, a concern for the equality of individuals can justify equal rights to privacy, and efforts to minimize and equalize the burdens such rights may impose. A consideration of political rights suggests that this can be possible and desirable, because equal rights to privacy can provide security for the political rights of individuals and, when seen as part of a schema of democratic rights, can be legitimately defined and institutionalized in ways that minimize their politically troubling consequences.

Privacy Rights and a Democratic Conception of Politics

But if privacy rights have an instrumental justification in a democracy, because they can protect and promote the exercise of political rights, this is not the extent of their importance. Rather, privacy rights have a more intimate connection to the justification of political rights and to a conception of politics as the cooperative activity of free and equal individuals. Thus, protection for self-definition, intimacy and confidentiality are implicit in the justification of democratic rights and in a democratic conception of politics, and not simply one means amongst others to ensure that government is democratic.

For example, no democratic conception of politics is possible where individuals are forced to participate against their will, or on pain of suffering irreparable harm to their basic interests. Thus, in a democracy, we cannot deprive individuals of their political rights simply because they have failed to exercise them, nor can individuals be required to exercise their political rights in any particular way on pain of civil or political disability. This is not simply a matter of prudence, or of concern that such measures would undercut the

efficacy of political rights as instruments of collective choice but, rather, of the normative justification of these rights themselves.[181]

Political rights are meant to protect the interests of individuals in collective decision making, in a democracy, not simply because this promotes utility, good government, or the collective interest, but because this reflects the legitimate interests of individuals themselves. Thus, political rights are justified because they enable individuals to develop and advance political interests of their own, or to exercise freely, and as the equals of others, their capacities for self-government and political association.

From this perspective, the justification of privacy rights is that they reflect the moral and political freedom and equality of individuals. They pay tribute to the ability of individuals to define their identities and interests in ways that are consistent with the legitimate claims of others,[182] and to seek forms of cooperation that answer to their different needs, capacities and interests. By protecting the self-definition, personal associations and confidentiality of individuals, a society can express and institutionalize its commitment

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[181] In that respect, I think that Mill's justification of the secret ballot underestimates the case for secret voting: for whilst Mill assumes, on quasi-republican grounds that open voting should be the rule, and exceptions justified only in order to avoid oppression, it is unclear why individuals should subscribe to this particular conception of politics, especially if, as seems reasonable, one reason why individuals should have the vote is that this is necessary to protect their particular, or personal, interests. See John Stuart Mill's *Representative Government*, in *On Liberty and Other Essays*, (Oxford 1991) pp. 355-6. Indeed, Mill's tendency to see the suffrage as the exercise of a duty, rather than a right, ("voting, like any other public duty, should be performed under the eye and criticism of the public") seems hard to reconcile with a democratic conception of rights.

[182] For the significance of this point to a theory of justice see John Rawls' "Social Unity and Primary Goods" in A. Sen and B. Williams (eds.) *Utilitarianism and Beyond*, (Cambridge University Press, Cambridge, 1982), pp. 168-9 and in his *Political Liberalism*, (Columbia University Press, New York, 1993), pp. 185-7.

to a politics that treats the legitimate claims of individuals as a reason for collective action, and the self-conceptions of individuals as the basis for defining the common good.[183]

Of course, privacy rights will not embody a democratic conception of politics unless their content as well as their form reflects the equality of individuals. But that is merely to say that a commitment to democratic government requires us to ensure the personal freedom and equality of individuals and to redefine or reject forms of privacy that are inconsistent with these. Thus, if privacy rights systematically disadvantage women, or racial and political minorities, by making them seem unreasonable, untrustworthy or immoral, we would have good reason to reconsider how privacy rights of confidentiality, for example, were defined, and to reconsider the ways in which rights of self-definition privilege the identities, customs and beliefs of some individuals and social groups over others.

As feminists have argued, we cannot expect our collective institutions to treat women equally if our legal procedures reflect the assumption that women are more likely to be confused or to lie than men.[184] Nor can we expect women to have the same political opportunities and prospects as men if the basic institutions of our society—political, economic or familial—tacitly depend on the assumption that women should bear the bulk of responsibility for the care of children and the maintenance of the home.[185] But, given a democratic conception of politics, this is a reason to revise rather than reject privacy rights of self-definition, personal association and

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183 Hence the emphasis, in both Rawls and Joshua Cohen on the need to take seriously individuals' conception of their moral duties in public debate, or when advancing some policy proposal: for to confuse a person's belief that they are morally bound to act in some particular way with their personal preferences or, even, with their self-interest or desire for self-expression, is to confuse quite different reasons for action, and the different weight these can properly have for individuals. See Rawls, pp. 205-211 and Joshua Cohen's "Freedom of Expression", footnote 46, p. 224.

184 See, for example, Susan Estrich, Real Rape, p. 49.

185 See Susan Okin, op. cit.

confidentiality as these claims, if true, show that collective institutions and rights underestimate or ignore the personal interests and well-being of women.

Protection for the privacy of individuals, then, follows from a democratic conception of politics, in which government is not only by the people but for the people. For this to be the case, individuals must be capable of redefining the content and justification of collection action and institutions in light of their personal beliefs and interests.[186] Otherwise, there is no reason to suppose that what is done in the name of all will bear any relationship to the capacities and interests of individuals in self-government.

It is, therefore, not a contingent fact about democracies that they suppose that politics is properly limited by the personal interests of individuals. Instead, as Westin argues, this is a necessary feature of a society committed to freedom.[187] Whereas regimes with totalitarian aspirations believe the personal to be presumptively illegitimate, in a democracy the personal claims and interests of individuals are an essential ingredient of politics, properly shaping both the

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[186] Hence feminist frustration with the refusal of authorities to recognise that rape, domestic violence, economic discrimination and sexual harrassment are authentically political problems, deserving of collective scrutiny and action. See, also, the criticisms of Seyla Benhabib and Nancy Fraser of Habermas' conception of the public sphere in Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, (Routledge, London, 1992), ch. 3, (also available in ed. Calhoun) and Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in ed. Craig Calhoun, *Habermas and the Public Sphere*, (M.I.T. Press, Cambridge, 1992) However, like Jean Cohen, I find these theorists' rather single-minded focus on rethinking the public, rather than the private, to be unduly constraining. See Jean Cohen, in ed. Benhabib, pp. 190-91.

[187] "With their demand for a complete commitment of loyalties to the regime, the literature of both fascism and communism traditionally attacks the idea of privacy as 'immoral', 'antisocial', and 'part of the cult of individualism'", Westin, p. 23.

form and content of collective decisions.[188] Whereas authoritarian regimes suppose that the consent of the governed is irrelevant to the legitimacy of government, or at most a useful formality, democracies suppose that consent is essential to the legitimate exercise of power over others and must be secured in ways that reflect the interests of individuals in free, equal and reasoned choice.[189]

As a result, privacy rights have a natural place in a democratic conception of politics, even though they are not always necessary to ensure the freedom and equality of individuals.[190] They can have symbolic, as well as instrumental, value in the sense that they can express a collective commitment to democratic government, whether or not individuals actually need, or desire, to use them. But, more importantly I think, they institutionalize a democratic conception of politics by establishing grounds on which individuals can claim legal redress against the state, can justify their political actions to others, and can test and prove their claims to care about the common good.[191]

Thus, a consideration of the content and justification of political rights in a democracy suggests that individuals have political interests in privacy that merit protection by right. Protection for personal choice, association and expression, indeed, are no less a feature of democratic politics than protection for their collective counterparts,

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188 Hence, according to Iris Marion Young, "The purpose of protecting privacy is to preserve liberties of individual action, opportunity and participation", (emphasis in text), *Justice and the Politics of Difference*, p. 121.

189 See Joshua Cohen, in ed. Benhabib, pp. 100 – 101.

190 I.e. the protections that privacy rights secure may overlap with other rights, and so be protected by them. Moreover, it is always possible—though not terribly likely in practice—that a society could protect the freedom and equality of individuals perfectly well without the device of legal rights to privacy or anything else. For doubts on this score, however, see Drucilla Cornell, "should a Marxist Believe in Rights?" in *Praxis International*, vol. 4 (1984).

191 See Jean Cohen, pp. 201–2.

as each is as integral as the other to political freedom and equality. Thus, privacy rights in a democracy are not in need of special pleading or justification, nor should they be the prerogative of some individuals rather than others. Instead, like political rights, their justification lies in their ability to protect the freedom and equality of individuals and, like the latter, need to be revised or rejected if they are unable to do so. So, while it is true that the public/private distinction cannot be sharp or rigid in a democracy, this is no reason to disparage or ignore the right to privacy: for individuals have political interests in privacy and these are as important and as legitimate as their interests in collective choice and action on a democratic conception of politics.

D. PERSONAL INTERESTS IN PRIVACY

Important though they are in a democracy, our political interests in privacy are not the sole justification for privacy rights. Though politics, or collective action, are an essential feature of a democratic society, they are neither the sole end nor means of democratic association. Artistic endeavor, for example, may be neither communal nor political in substance or consequence, and yet still be a legitimate, lively, desired and valuable feature of a democracy.[192] Similarly with sporting or leisure activities: the desire and interest of individuals in these may be sufficient justification for their protection and, even, encouragement in a democracy even if they have no discernible impact on the ability of individuals to participate in collective decisions or to see each other as free and equal beings.[193]

These points can be related to the conception of persons implicit in what might be called *liberal* democracy, to distinguish it from the conception of democracy found in Greek thought. Whereas in the latter Socrates could be tried and sentenced to death for his teachings,

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[192] See Westin, p. 24.

[193] See, for example, Rawls' discussion of "The Idea of Social Union", para. 79, of TJ, especially pp. 526-7.

in the former, freedom to expound and practice one's philosophic and religious ideas is considered a basic right, not simply because this may be necessary to preserve the equal standing of citizens, but because individuals are thought to have legitimate and fundamental interests in discovering what is true, good and right.

These ideas, I think, are implicit in a plausible account of what it means for government to be *for* the people, as well as *by* them. Thus, in so far as we wish to identify democratic government with both, and have good reason to do so, I would suggest that implicit in a commitment to democracy, as currently understood, is a commitment to preserving the personal freedom and equality of individuals whether or not doing so is *also* necessary to secure their opportunities for political participation.

The idea that democracy is government for the people, and not simply by them, distinguishes democracy from theocracy, aristocracy and authoritarian regimes. Assuming that government is for the people, rather than for the glory of god, the nation or some particular individuals, it implies an account of the ends of government that constrains and clarifies the idea of government by the people. Moreover, by suggesting a particular view of the individuals who form "the people" in a democracy, it provides us with a way to articulate a democratic conception of persons, and not merely of politics, which can be used in justifying basic rights.

First, the idea that government is for the people assumes that individuals can have legitimate interests that are not simply an artifact of politics, or the actions of government. That is not to say that, as members of a political society, individuals do not have interests that are importantly different from those that they would have in the absence of social cooperation. Rather, the point is that these interests socially created and shaped as they are, are the interests of individuals and not of government, or some preexisting moral or political entity. Hence, the purpose of government is to serve the interests of individuals, and not vice-versa.

If the first point is that democracy assumes that individuals have interests of their own, which they can and should be able to define for themselves, the second is that these are not simply interests

in government. Otherwise there would be no sense in saying that government should be for the people as well as by them. Thus, the second point about individuals that seems to follow from democratic theory is that they are people who, if they have interests in governing themselves, also have interests in indefinitely many things—such as comfort, happiness, the pursuit of knowledge, salvation, love, beauty, glory and the like—things that cannot simply be reduced to interests in self-government, or in defining and pursuing their common good.

Third, the idea that government is for the people clearly assumes that individuals may need government if they are to pursue their different ends, and that they can legitimately make claims on its attention and aid. Finally, the idea that government is for the people and not simply by them, suggests that it is not through acts of collective choice alone that government furthers the different projects of individuals, although this is clearly an important way in which it does so. In addition, by establishing and protecting basic rights, government provides the framework within which individuals can pursue their personal and collective projects—under their own steam or in collaboration with others—free from coercion or subordination.

Put that way, the identification of democratic government with government for the people suggests a view of persons as moral agents capable of independent, as well as collective, action and with as much interest in exercising their capacities for the one as the other. Put more simply, within a plausible and attractive conception of democracy, individuals are thought of as beings whose interests in self-government do not exhaust their legitimate interests, and whose capacities for moral choice and action can be exercised, quite properly, in ways that do not involve defining and pursuing common projects.

Of course, from the fact that individuals are assumed to have legitimate personal as well as collective interests it neither follows that the former are inevitably democratic, nor yet that a democracy must have rights to privacy. Though the implication of a democratic conception of persons is that individuals may have rights to engage in a variety of activities, whether or not this is necessary to ensure their chances for political participation, there is as little reason to suppose

that individuals can pursue whatever personal goals they want, as that that all ways of defining their collective goals are equally legitimate. Thus, while we may admire the pyramids or the building, furnishing and gardens of Versailles, for example, we need not believe that these are compatible with democracy or should be emulated in a society that prohibits slave labor, absolute monarchy and an aristocracy of vast and inherited wealth. So, while gracious living, civility, beauty, the commemoration of individuals may all be valuable and deserving of legal protection in a democracy, this in no way implies a belief that the freedom and equality of individuals do not matter, or that they can be sacrificed to the former at the say—so of the powerful.[194]

However, as rights of collective choice protect not only the political freedom and equality of individuals but their personal freedom as well, it is natural to wonder why individuals should have privacy rights in a democracy, even if they have legitimate personal interests of their own. To that extent, indeed, even on a quasi-liberal conception of democracy, it is far from obvious why individuals should have rights to privacy, even if, unlike illiberal alternatives, this conception of democracy does not foreclose their justification.

This point, I believe, is important, because it can seem as though any personal justification of privacy rights must depend on a sharp public/private distinction, or on the thought that privacy rights can be justified by reference to some apolitical conception of persons. But that is not so. In the first place, as democratic political rights must protect the personal equality of individuals in some measure, such rights, whether justified on personal or political grounds, will always raise the possibility that privacy rights are redundant or unnecessary in a democracy. Moreover, because privacy rights constrain the ways in which we may act on our collective interests, the personal

[194] Thus, for example, there is no need to espouse perfectionist moral and political theories in order to think that such things have a place in a democracy—nor, for reasons that Rawls explains, can perfectionist considerations take precedence over others when justifying basic rights, such as the right to privacy, see *TJ* para. 50, "the Principle of Perfection", and pp. 526-7.

justification of privacy rights, no less than the political one, has to explain why this is justified consistent with a commitment to the freedom and equality of individuals.

There is, therefore, nothing about the idea of a personal justification for privacy rights which commits us to thinking that individuals lack political interests in privacy or even, that these are less important than their personal ones. Granted that from a personal perspective the justification of political rights is that they enable individuals to pursue ends that they personally believe to be worthwhile and right, this is quite consistent with the idea that individuals *also* have collective interests, and that these, too, figure in the justification of basic rights in a democracy. Indeed, as Dworkin has argued, in a liberal democracy, individuals may very well identify their personal good with the good of their society, thus rating the success of their own lives, as a whole, by the extent to which their society is flourishing or otherwise.[195] Thus, there is no reason to suppose that a personal justification of privacy rights must be *ipso facto* undemocratic, or that the personal interests of individuals must be wholly distinct from their collective ones.

If these points are right, then there can be a personal justification for privacy rights in a democracy, one distinguishable from the political justification we have just considered, but of no less importance for that. This is because the personal, or the private, can be of value in itself, and deserving of protection by democratic rights, given the variety of ends and interests that individuals can legitimately pursue.[196] Put otherwise, because democratic forms of politics are only one of the many human ends that a democratic society can realize, we should expect there to be a variety of non-political reasons for protecting privacy by right in a democracy.

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[195] See Ronald Dworkin, "Liberal Community" in *Communitarianism and Individualism*, ed. Shlomo Avineri and Avner de Shalit, (Oxford University Press, 1992), pp. 219 – 220.

[196] See Joshua Cohen in "Moral Pluralism and Political Consensus", in *The Idea of Democracy*, eds. David Copp, Jean Hampton and John Roemer, (Cambridge University Press, Cambridge, 1993) and in ed. Benhabib, p.96.

For example, individuals can have personal interests in privacy because this enables them to define and distinguish themselves as individuals, to pursue what matters to them in life, and to contribute to the well-being of others, or of their society as a whole, in ways that reflect their particular needs, talents and capacities.[197] Thus, individuals can value personal choice because without it the world might seem alien and threatening, their own existence meaningless or senseless, even if they have a say, and the same say as others, in the conduct of collective affairs. After all, in a democracy one's personal impact on public affairs can be all but indiscernible and for most of us it would be sheer hubris to believe that our personal efforts and contributions are indispensable or distinguishable in any lasting way from those of others.[198] So it would be a mistake to suppose that individuals' interests in self-definition and self-determination can be exhausted, or adequately fulfilled, by political participation alone, however satisfying it might prove for most of us some of the time.

Individuals' interests in personal choice, therefore, can justify limiting the scope of politics in a society, so that individuals are able to define themselves as individuals and to find meaning and personal satisfaction in life.[199] This is a proper and legitimate aim of democratic government, because individuals have equal claims to happiness and to lead lives they believe worthwhile, morally compelling and right.

Equal rights of self-definition can help to secure this, even though individuals can be mistaken in their conception of their own interests and uncertain about the nature and significance of their personal

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197 See Jean Cohen, in ed. Benhabib, p. 201: "Personal Privacy rights protect the constitutive minimal preconditions for having an identity of one's own . . .they ensure respect and protection for *individual difference*—for individual identities that seem to deviate from the 'norm' embraced by society at large . . .or by one's particular subgroup". (emphasis in text).

198 Hence, in part, the familiar problem of explaining voting in terms of the rational self-interest of individuals—although it is reasonable to suppose that this problem is broader than the voting example suggests.

199 Westin, p. 24.

attributes. Not only can individuals learn from their mistakes, as Mill urged or, with Descartes, use their doubts and uncertainties to construct a sense of themselves that they can live with, but they can also find in the personal interest and concern of others reasons to develop their personal capacities, and to find value in doing so.[200] Hence, if we believe that the lives of individuals matter equally, we have good reason to suppose that their claims to self-definition are as much personal as political, and no less deserving of legal protection in a democracy for that.

Similarly, individuals' interests in personal association can themselves justify privacy rights in a democracy, independent of their interests in political choice. Our interests in associating freely, and as the equal of others, are not exhausted by our interests in deciding what is for the common good, but include interests in being with those we like, love or are curious about. They are interests, as well, in obtaining the help and participation of others in activities that we enjoy even if we know, and understand, that others may dislike or be indifferent to them. Thus, we can have interests in forming clubs or associations to promote particular recreational or artistic activities, just as we can enjoy familial, educational or workplace reunions for their conviviality, and the chance to catch-up on the lives of those we were once close to.

Protection for these interests in privacy are no less important in a democracy for not being political, and can, indeed, be valued as a respite from the demands and conflicts of politics.[201] Individuals legitimately disagree about the respective merits of personal and

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200 Hence the force of Carol Gilligan's rejection of efforts to identify autonomy, or personal moral development more generally, with separation from others, in her famous *In a Different Voice*. See, also, Nancy Hirschmann, "Revisioning Freedom: Relationship, Context and the Politics of Empowerment", in *Revisioning the Political.*

201 See Westin, pp. 36 and 44-5 and, more generally, the discussion of the importance of privacy for public figures, or those with special, in political responsibilities, in Dennis F. Thompson, *Political Ethics and Public Office*, (Harvard University Press, Cambridge, 1987), ch. 5

political life, and even if they are actively and happily engaged in public life[202] they may feel the need to "get away" or relax, from time to time with those who have different daily interests and concerns than their own.

The fact that privacy rights limit the hold of political life and obligations on individuals, then, can be justified by the personal needs and desires of individuals in a democracy. Individual rights of personal association reflect the fact that recreational, professional, familial, artistic and religious associations can have claims of their own that politics should respect, given the variety of individuals interests in personal association and the diverse personal ends and obligations that individuals have reason to acknowledge.

Finally, the fact that individuals can value the ability to trust and confide in others can itself be a justification for privacy rights in a democracy. Whatever the personal importance of confidentiality to individuals, this is a good that individuals may be unable to secure for themselves unless others are empowered by law to behave in ways that are likely to inspire the trust and confidence of others.[203] Hence, the personal importance of privacy can justify privacy rights in a democracy.

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202 See Bonnie Honig's discussion of Bernice Johnson Reagon's "Coalition Politics", in "Difference, Dilemmas and the Politics of Home", ed. Benhabib. As Honig notes, while Reagon speaks of the need for respite from political activity, she clearly relishes the latter, and is humorously disparaging about the need for a break from it. Indeed, were it not for the humour, Reagon's attitude seems very like that of Hannah Arendt, in *The Human Condition*, for whom privacy is a necessary, but seemingly resented, precondition for a life given over to political conflict, self-expression and coalition.

203 See Westin, pp. 24-5, and Rachel Gerstein, "Privacy and Self-Incrimination" in ed. Schoeman. In short, individuals must be empowered to keep the confidence of others if they are to inspire trust: hence the justification for protecting the secrets of the communion box, of the journalist, marital partner or friend and associate.

Confidentiality can be an important personal good, because it can enable individuals to express their faith in others, and to reciprocate their trust in return. It can be an expression of mutual concern and appreciation, and a way of distinguishing and marking what is important about oneself and special to others.[204] Thus, we can have personal interests in confidentiality distinct from our political ones, because what matters to us as individuals may be of no general concern and, indeed, ungeneralizable in many ways, and yet legitimate and deserving of legal protection nonetheless.[205]

For example, much of the stuff of friendship, love or of religious or professional relations may be quite trivial from a political perspective, or one concerned with the general or collective interests of individuals. Indeed, some of it may be acknowledged as trivial even by the individuals involved. Yet individuals may rightly value the ability to keep such matters secret, both because what is trivial or silly sometimes is best kept to oneself, and because discretion and

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[204] This is the aspect of confidentiality emphasized by Rachels and Fried.

[205] This is clearly the implication of the pluralism of Rawls and Joshua Cohen, as of more traditional liberal variants, which they democratize. It is also the implication of Nagel's *Equality and Partiality*, which influences my discussion in the succeeding paragraphs, although I share G. A. Cohen's concern with the political conclusions that Nagel draws from his arguments. Thomas Nagel, Equality and Partiality, (Oxford University Press, Oxford, 1991), especially ch. 2; and G. A. Cohen, "Mind the Gap" in *The London Review of Books*, (May 14, 1992)pp. 15 – 17See, also, Seyla Benhabib, "The Generalized and the Concrete Other: the Kohlberg—Gilligan Controversy and Feminist Theory" in *Feminism as Critique*, eds. Seyla Benhabib and Drucilla Cornell, (Basil Blackwell, Oxford, 1987), pp. 77-95.

the ability to keep a confidence can be valuable in themselves.[206] Thus, by limiting political rights in the interests of our personal claims to confidentiality, a democratic society can acknowledge the particularity of individuals' needs and tastes and the limits of abstract and collective perspectives in identifying and protecting them.

Our personal interests in privacy, in other words, do not have to be political to be important, or to merit protection by right. To that extent, the feminist slogan that the personal is political understates the extent of our legitimate interests in privacy and their connections to democracy. As a protest against undemocratic conceptions of politics it was, in many ways, well-judged and useful. As a response to arbitrary and sexually inegalitarian conceptions of the personal, however, it appeared to concede and ratify the assumption that the personal is legitimate only so far as it is political. But, as we have seen, there is no warrant for that belief in a democracy, nor is it one that does justice to the variety and distinctiveness of our legitimate interests.

It is, for example, unreasonable to believe that the only things in life which are valuable are those which can be shared with others, communicated to them, or created with them. Individuals differ in their tastes, beliefs and capacities and must be able to do so if we are to treat them as equals. So it would be both arbitrary and unjust to assume that what is particular, personal, ungeneralizable and uncommon must, on that account, prove illegitimate.

This explains, I believe, the importance of privacy rights to the freedom and equality of individuals, and the personal justification of privacy rights in a democracy. Privacy rights grant individuals immunity from the need to explain or justify themselves to others

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[206] Thus, as privacy theorists commonly insist, private matters do not have to be objectively important, threatening our fundamental interests or those of others, in order for us to have good reason to want to protect them from the curiosity, amusement, or suspicion of others. See, for example, Ferdinand Schoeman, "Privacy and Intimate Information", Stanley I. Benn, "Privacy, Freedom and Respect for Persons", or, Warren and Brandeis, "The Right to Privacy", in ed. Schoeman.

and though this would lack justification if we supposed that individuals could and should be personally accountable to others for everything that they do, such immunity is justified by a democratic conception of persons.[207] Although much in life can and should be shared, and individuals may, therefore, be held accountable by others for the use they have made of collective goods and resources, it would be an intolerable burden on the freedom of individuals if they were in principle subject to collective judgement on every particular of their lives. Indeed, in some cases it would be tantamount to denying them freedom and equality, both because our intuitions can, legitimately, outrun our capacities for conceptualization and explication and because the motives, experiences and needs of individuals, if unusual, may wrongly seem incredible.[208]

It is, therefore, important that individuals' collective interests in self-definition, personal association and expression, be institutionalized and protected in ways that acknowledge the personal interests of individuals in these. If the former, for example, can justify rights to marry, the latter suggest that it is wrong and unjust to make the exercise of this right contingent on an ability to explain or justify one's personal preference for this person rather than that one, as a marital partner. Not only would such constraints license arbitrary and burdensome restrictions on the personal freedom of individuals, given

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207 Jean Cohen puts the matter especially well, I think, when she says that "a privacy right entitles one to choose with whom one will attempt to justify one's existential decisions [although I think we need not limit it to those, although the case for these is especially pressing], with whom one will communicatively rethink conceptions of the good, and indeed, whether one will discuss certain matters with anyone at all".

208 Hence, perhaps, the problems facing Anita Hill, soldiers returning from wars, civilians returning from concentration camps, and the like. Not only is it the case that other people may simply not want to hear, or be unable to cope with stories that they recognize, if true, to be horrible or horrendous, but where the experiences of others are unusual enough, and we lack the special knowledge of their truthfulness, soundness of judgement and the rest, it may well be impossible to credit what we hear.

the contingencies and complexities of personal taste and affection, but it would also threaten their equality. For, absent evidence of coercion, dissimulation or manipulation of the sort we may properly demand of any democratic association, there is no reason for others to prefer their own judgements about the good of individuals to that of the parties involved. In fact, as we know, the reverse assumption has unjustly deprived individuals of the power to marry and, in so doing, has ratified and perpetuated undemocratic forms of power and privilege.[209]

Similarly, rape is a crime that threatens the legitimate interests of individuals and, in particular, of women who are its primary victims. It is an abuse of power and one that likely reflects invidious social distinctions between men and women.[210] But rape is wrong, and legitimately treated as a crime, because of the personal harm it inflicts on individuals, whether they are male or female, and it is a grave injustice whether or not it has any discernible impact on the political opportunities of individuals or groups.

Thus, it would be arbitrary and unjust to require victims of rape to prove that their political rights have been harmed, in order to sustain a successful prosecution. It would be arbitrary, because the relative political standing of individuals may in no way reflect the injuries s/he has sustained, and because the personal injury of rape is itself quite sufficient to merit moral and political condemnation in a society committed to the equality of individuals. So, though the political, or collective, consequences of rape are a legitimate object of concern, and though the incidence and distribution of rape can legitimately motivate political reproach and action, it would be as inconsistent with the freedom and equality of individuals to make the

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209 The case of anti-miscegenation laws might be one such example, but it is easily generalised to families who cut off, or refused to allow their children to make a socially disadvantageous marriage—in particular, one that crossed lines of class, religion or race.

210 See Catherine MacKinnon, *Feminism UnModified*, ch. 6 and Rosemarie Tong, *Women, Sex and the Law*, (Rowman and Littlefield, Maryland, 1984), chs. 4 and 6.

definition, prosecution and judgement of rape dependent on claims to political disadvantage as it would be to exempt the powerful or privileged from the need to answer their accusers.

If these claims are correct, then the fact that individuals have personal interests in privacy is as significant to the justification of basic rights in a democracy as the fact that they have political interests. It means that individuals can have legitimate claims to privacy independent of their claims to political freedom and equality and that the two can, and sometimes need, to be distinguished. For if the pursuit of collective goods can rightly constrain the personal interests of individuals, protection for personal choice, personal values, personal initiative and personal interest are all necessary to their freedom and equality, and so, to the content and justification of democratic government.

There are, therefore, at least two possible justifications for privacy rights in a democracy, the one personal, the other political.[211] As with the public/private distinction, moreover, their relationship is one of

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[211] Thus, in so far as Harry Brighouse means to contradict this claim, I think we can modify his statement that: while some fundamental rights can be justified on the grounds that their violation would threaten the equal access to political influence of citizens others, such as the right to privacy, cannot. According to Brighouse, while privacy rights may facilitate political equality, "such arguments are likely to place great emphasis on contingent and disputed psychological claims. Furthermore, it is doubtful that the value of those rights is exhausted by their service to democratic participation, even if the do significantly serve participation". I f the arguments thus far are correct, than we can accept the latter statement without denying that privacy rights have a political justification and that this justification is no more contingent or unreasonable than in the case of other rights. Indeed, we can accept his last point without supposing that this is unique to privacy rights: for the suffrage, too, serves important goals other than democratic participation. I would like to thank Jim Johnson for bringing this article to my attention. See Harry Brighouse, "Egalitarianism and the Equal Availability of Political Influence" in *The Journal of Political Philosophy*, vol. 4 no. 2, (1996), p. 139.

complementarity as well as opposition. Thus, just as a democratic conception of politics implies a democratic conception of persons so, too, the differences between the personal and political can provide contrasting but complementary accounts of the rights of individuals, and of the proper boundaries between the personal and political.

For instance, the belief that individuals may properly choose their friends and marital partners because they love or like them, and should have a right to do so, is justified both by the personal and political interests of individuals in self-determination, intimacy and confidentiality. Whereas the former may stress the importance of such rights to the personal dignity, integrity and happiness of individuals,[212] the latter may rather stress its importance to the freedom, equality and the stability of collective institutions.[213] Though contrasting justifications of the right to marry, these can both be mutually supportive, because the dignity, integrity and happiness of people are good reasons for caring that collective institutions be stable and democratic.

Thus, given the variety of individuals' personal and political interests in privacy, there may be no sharp distinction between the two justifications of privacy rights, and the one may turn out simply to be the obverse of the other on closer inspection. But the differences between the two are not always superficial or immaterial to the justification of privacy rights, because there are legitimate differences in the needs and circumstances of individuals that we must recognize if we are to ensure their equality.

As we have seen, from a political perspective, the claims of some individuals to personal choice, association and expression may seem

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[212] As is the case with Inness, Fried, Rachels, Benn, Schoeman, and Blackmun in his dissent in *Bowers v. Hardwick*.

[213] This, I think, is the implication of Elshtain's views in *Public Man, Private Woman*, to be discussed below. It is, in other words, the sort of justification that we would find from within the republican political tradition, and to that extent has its echoes in the Aristotelian view that the justification for domestic relations is that they help to maintain a life of political participation.

less morally compelling than they are. Thus, because it may make no difference to your political rights and prospects whether you marry this person rather than that one, the political justification of privacy rights may not treat your interests in deciding the matter with the weight it deserves, given its significance for your personal happiness and well-being. It is not that the political justification necessarily ignores your interests in personal choice—if it is democratic it will not. The problem, rather, is that from a political perspective the choice itself may seem trivial or, more likely, trivial compared to the collective interest in ensuring such things as the care and well-being of children, the stability and legitimacy of sexual and familial institutions, the alleviation of poverty, unemployment and violence. As these are proper concerns of government, and legitimate objects of political choice, it is not surprising that your personal interests in marriage should get lost in the pile, so to speak, or prove a victim, albeit unintended, of the collective efforts and actions of others. By contrast, the personal justification of privacy rights would rate your interests in marriage more highly, partly because it assumes that your interests in personal choice have moral weight, whether or not they are politically consequential, and because it is more sensitive to the personal particularities of individuals.[214]

To some extent, these differences between personal and political justifications of privacy rights, real though they are, are relatively easy to handle in a democracy, given the distinction between legislative and judicial institutions, and implicit or conventional understandings of what is personal and political. The division of power and function between legislature and judiciary, for example, can help to ensure that the claims

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[214] This is one instance, I think, of the contrast between the particular and the universal perspective that Nagel examines in *Equality and Partiality* and that underpins feminist concern that the identification of justice with the universal rather than the particular, in fact fails to do justice to the latter and, thereby to women, who are typically identified with the particular. See, for example, Benhabib's "General and Concrete Other", Carol Pateman's "Feminist Critiques of the Public/Private Dichotomy", supra, and Joan C. Tronto, "Care as a Political Concept", in *Revisioning the Political*.

of individuals to privacy are given adequate concern, be they personal or political in nature. And intuition and convention can legitimize such decisions so that individuals do not have to seek the aid of legislatures, in the first instance, in order to challenge the actions of government or neighbours for invasion of privacy.

But the difference between the personal and political justifications of privacy rights can be contentious, and with it, the legitimate uses of state power. In so far as the personal and political differ, in other words, they can support competing claims to privacy, and it may be genuinely difficult and disputed as to how they should be resolved. Thus, whether the personal claims of rape victims or homosexuals to anonymity justify the condemnation of "outing" in newspapers or TV may legitimately be contentious, as may the extent to which teachers and religious leaders should publicize their personal convictions about what is right or good.[215] In the former case, the personal claims of individuals to confidentiality may conflict with the claims of others to political expression, and to challenge and undermine the hypocrisy and indifference of citizens. In the latter, concerns about the personal influence of individuals, given their special position and authority, may conflict with the rights of individuals to define and express themselves, and to fulfil their personal responsibilities, as they see them.

But while such examples illustrate the difficulties of reconciling the personal and political dimensions of privacy, and thus of determining the content and justification of privacy rights, they are not instances of some global conflict between privacy and equality, nor evidence that we must choose between the personal and the political in a democracy. Not only would this exaggerate the difficulties of justifying privacy rights, but it

[215] See, for example, Katha Pollit's "Naming and Blaming", Nancy Hirschmann's "Revisioning Freedom".

would underestimate the extent to which such disputes or disagreements are intrinsic to, and justified by, democratic government itself.[216]

As we have seen, there is no reason to suppose that our personal or political interests are internally homogenous, or all of a piece, any more than that the two sets must be identical. After all, individuals disagree about what is personal and political in part because these are genuinely contentious matters, reflecting different life-experiences and self-conceptions, as well as different estimates of what is feasible, desirable or right. In a democracy these differences are not only likely but justified. So while the relative weight and justification of competing claims to privacy may be contentious in a democracy, this is no reason to disparage the right to privacy, nor to ignore the variety and strength of our privacy interests in democracy.

E. CONCLUSION

By way of conclusion, I will show that these arguments require us to reject or revise some familiar liberal and communitarian accounts of the right to privacy. Although liberal and communitarian values and commitments have a place in a democracy, and properly influence the content and justification of privacy rights, their conceptions of the equality of individuals are frequently problematic and likely to promote arbitrary and undemocratic conceptions of the right to privacy.

For example, liberal premises and traditions tend to privilege claims to personal liberty at the expense of the collective interests of individuals

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[216] 216I take this to be one of the points that Bonnie Honig wishes to emphasise both in her "Difference, Dilemmas, and the Politics of Home", in ed. Benhabib, and in her *Political Theory and the Displacement of Politics*, (Cornell University Press, Ithaca, 1993). While I am sympathetic to Honig's concern that political theorists tend to be too quick to lament such conflict and to try to circumvent it is some way, thus ignoring the creativity and vitality that conflict can produce, she tends to counteract a too-one-sidedly critical view of such conflicts with an equally one-sided celebration of their positive aspects—although there is something refreshing and bracing in this.

and so to justify inequalities that are systemic in nature and relatively impervious to individual action. As a result, as feminists amongst others have claimed, liberals tend to suppose that sexual inequality is a product of bad luck, ignorance or personal failing, and so relatively easy to redress by such things as education, anti—discrimination laws and the promotion or encouragement of individual fortitude and initiative.[217]

These difficulties, I believe, are reflected to a considerable extent in the philosophical literature on privacy, and not only in familiar polemics by politicians or "public intellectuals". Thus, much of the philosophical literature on privacy appears to suppose that individuals lack interests in political equality, or that these interests are largely irrelevant to the justification of privacy rights. Hence, privacy rights are justified on the grounds that they promote intimacy and care for others, autonomy and moral personhood, inwardness, spirituality and creativity, or relations of love, trust and respect, as though these were all self-evidently personal goods and unconnected to the political circumstances and interests of individuals.[218]

Reiman may be an extreme example, but one that helps to illustrate the difficulties of such assumptions.[219] According to Reiman, what is distinctive about the right to privacy is that it protects the personhood of individuals, or their ability to see themselves as beings with legitimate

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[217] See, for example, Nancy Hirschmann, op. cit.; Andrea Jagger's excellent *Feminist Politics and Human Nature*, (Rowman and Allanheld, New Jersey, 1983), and Sylvia Walby's *Theorizing Patriarchy*, (Basil Blackwell Ltd., Oxford, 1990) for an examination of the theoretical and empirical adequacy of liberal explanations of sexual inequality.

[218] See, for example, the accounts in Inness, Schoeman, Gerstein, Rachels, cited in chapter 2.

[219] See Jeffrey H. Reiman," Privacy, Intimacy and Personhood" in *Philosophy and Public Affairs*, vol. 6 no. 1, (1976).

claims on others.[220] But not only is it the case that some ways of describing and justifying privacy rights deny this ability to some people, but the ability of privacy rights to protect the moral personhood of individuals is true also of their political rights.[221] In other words, it is simply not true that privacy rights are distinctive in the way that Reiman suggests, whether we think of them as moral or legal rights. Nor could we expect to protect the personal freedom and equality of individuals on such a conception of rights, since its clear implication is that other rights do not protect the fundamental interests of individuals.[222]

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220 Reiman, p38: "What we are looking for is a fundamental interest, connected to personhood, which provides a basis for a right to privacy to which all human beings are entitled (even those in solitary confinement) and which dos not go so far as to claim a right never to be observed (even on a crowded street)". The answer, Reiman proposes, pp. 41-42, is our interests in moral personhood, or "moral ownership" of ourselves, and our interest in having that acknowledged by other people.

221 Indeed, as Anita Allen notes, it is true in principle of all the moral rights of individuals, and so fails to distinguish our moral claims to privacy from any other claims that we might make on others. See Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, (Rowman and Littlefield, New Jersey, 1988), p. 45.

222 In other words, by tacitly identifying the right to privacy with the concept of a right, Reiman seems to make it impossible to explain how individuals could have any moral or legal rights that constrain the right to privacy. Benn's account of the right to privacy in "Privacy, Freedom, and Respect for Persons" can partly illustrate and explain the problem: for as Benn shows, a general principle of privacy based on respect for persons is going to be pretty insubstantial, and a more substantive account of individuals' claims to privacy will have to make much more considerable claims about the nature of human interests. The difficulty with Benn's article, however, is that he appears to suppose that privacy rights must rest on distinctively liberal assumptions about the interests of persons, and not simply that they have typically done so. Moreover, it is unclear what the relationship is between the general principle of privacy and its more substantive development.

Similarly, while Fried is right to believe that privacy rights have intrinsic as well as instrumental value and that this is connected to the ability of individuals to love, trust and respect each other, there is no way adequately to flesh out or substantiate this claim if we ignore the political interests of individuals.[223] This is partly because relations of love, trust and respect are not simply personal, but collective goods,[224] but also because the plurality of ultimate values that Fried acknowledges means that appeals to these goods are insufficient to show that privacy is of ultimate or intrinsic value.[225]

This matters because, as Fried claims, we are likely to underestimate the strength and importance of privacy rights if we suppose these to be justified simply on consequentialist grounds.[226] To some extent, I suspect, this explains why Fried, amongst others, assumes that the equality of individuals is undermined by appeals to our political interests in privacy. But as we have seen, though these can certainly, and quite properly, be instrumental, they are not exclusively so. Nor is it possible to do justice to the variety of our personal interests in privacy if we suppose that these are wholly distinct from our interests in political choice and participation. As a result, it is difficult to square Fried's justification of privacy rights

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223 See Charles Fried, "Privacy [A Moral Analysis] in ed. Schoeman, especially pp. 205-7.

224 See Jeremy Waldron, "Can Communal Goods Be Human Rights?" in his *Liberal Rights: Collected Papers 1981-1991*, (Cambridge University Press, Cambridge, 1993), especially pp. 354-359.

225 See pp. 206-7.

226 See pp. 203-5. Fried's discussion of the electronic monitoring of parolees is particularly interesting, see. p. 204 and pp. 215-8. The dilemma, as Fried notes, is this: "as long as monitoring depends on the consent of the subject, who feels it is preferable to prison, to close off this alternative in the name of a morality so intimately concerned with liberty is absurd . . .. [However] it involves costs to the prisoner which are easily overlooked"—namely costs to love, respect and trust. Hence, Fried concludes, "The seductions of monitored release disguise not only a cost to the subject but to society as well".

with the legitimate differences amongst individuals although, as Fried acknowledges, the ability to do so is essential to their equal freedom.

We cannot, then, expect to provide a democratic justification of privacy rights if we assume, as do Fried and Reiman, that our political interests in privacy can be reduced to our personal ones, or that the former must give way to the latter, should the two conflict. Yet this is the implication of their view that we can justify privacy rights without examining the nature and extent of our interests in political choice, association and expression. But even though it is possible to distinguish our individual and collective interests in privacy, and so to provide both personal and political justifications for privacy rights, this is only because the personal can be political, and our interests in personal choice and dignity consistent with the collective interests of others.

The difficulty of these liberal justifications of privacy rights, however, does not mean that we should embrace communitarian assumptions uncritically. Though it is true, as communitarians claim, that liberals in fact justify coercion and inequality because they privilege personal ends and values over collective ones, communitarians have properly been criticized for doing the reverse.[227] Thus, if liberals tend to assume that the legitimate interests of individuals can be reduced to claims of personal choice and judgement without losing some of their most morally and politically significant aspects, communitarians tend to suppose that personal choice is of no intrinsic importance or value, even if one cares about the freedom and equality of individuals.

For example, communitarian accounts of the right to privacy typically suppose that appeals to personal choice are a sign of moral desperation, or of an inability to see and defend what is valuable

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[227] See Will Kymlicka's *Contemporary Political Philosophy: An Introduction*, (Clarendon Press, Oxford, 1990), ch. 6 and, in particular, Jean Cohen's excellent and lengthy discussion in "Redescribing Privacy: Identity, Difference and the Abortion Controversy", *Columbia Journal of Gender and Law*, vol. 3, no. 1, (1992), and her summary of these arguments in ed. Benhabib.

and worthy of respect in the lives of individuals. Thus, Michael Sandel chides Justice Blackmun for assuming that what is wrong with the majority decision in *Bowers* is that it ignores the personal choice of homosexuals.[228] The result, Sandel believes, is that Blackmun's justification of privacy rights of homosexual intimacy, like the majority's denial of their legitimacy, disparages the virtues of homosexual unions and, with it, the goods that heterosexual marriage can secure.[229]

Such an interpretation of the dissent, however, requires us to ignore Blackmun's rather Sandelian argument that one reason for protecting marriage as an institution *is* that it enables individuals to develop moral capacities, and to discover moral goods, that they could not achieve alone.[230] Moreover, Sandel's complaint assumes

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228 See, for example, Michael Sandel's "The Procedural Republic and the Unencumbered Self", in *Political Theory*, vol. 12, no. 1 (1984), and his discussion of privacy in *Democracy's Discontent: America in Search of a Public Philosophy*, (Harvard University Press, Cambridge, 1996), on which I will concentrate here. For the discussion of *Bowers v. Hardwick*, see pp. 103-108.

229 Hence, for Sandel, one of the problems with a voluntarist justification of homosexual rights is "the quality of respect that it secures . . ..The problem with the neutral case for toleration is the opposite side of its appeal; it leaves wholly unchallenged the adverse views of homosexuality itself. But unless those views can be plausibly addressed, even a court ruling in their favor is unlikely to win for homosexuals more than a thin and fragile toleration. A fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals lead. But such appreciation is unlikely to be cultivated by a legal and political discourse conducted in terms of autonomy rights alone". *Democracy's Discontent*, p. 107.

230 For a discussion of this see chapter 1, pp. 44 – 5, and pp. 204 – 5 of the Minority opinion in *Bowers*. Moreover, it is important to note that Blackmun explicitly took issue with the Majority's efforts to treat consensual adult homosexual relations as though they were the moral or political equivalent of adultery, incest, and the possession of dangerous weapons, rather than of heterosexual marriage and non-marital consensual adult associations. See *Bowers*, pp. 209 – 210, footnote 4.

that claims to personal freedom, or to choice of one's intimate companions, are inessential to a solidaristic, respectful and democratic account of the right to privacy.[231] But as we have seen, this simply is not so. The belief that individuals are capable of deciding how to live, and have interests in doings so, is an essential ingredient in a conception of democratic citizenship. Without it, we would be entitled to suppose that those who deny, or fail to live up to, our personal ideals are therefore lesser human beings, properly deprived of the rights and responsibilities of citizens, when not actively thought incapable of rights at all.

The difficulty for communitarians, then, which Sandel's disparaging comments illustrate, is that protection for the personal choice of individuals helps to constitute democratic forms of citizenship, and so justifies attacks on inegalitarian, but established, customs, beliefs and institutions. As a result, we cannot reduce claims to privacy to claims that reflect established values, without threatening the freedom and equality of individuals, nor suppose, as Sandel does, that individuals must be able to see and acknowledge the substantive virtues of alien ways of life. To do so, unfortunately, ignores the extent of prejudice, fear and hostility against homosexuals

[231] For example, an appreciation for the moral good of autonomy would not threaten the quality of respect that a voluntarist justification of homosexual rights entails. After all, in so far as homosexual practices are autonomous, we would then expect them to embody the virtues and to promote the desirable ends and dispositions that justify privacy protection for consensual heterosexual relations. That does not mean that you must think autonomy the preeminent moral and political good, as Sandel apparently supposes, but simply that one recognizes it to be one moral and political good that rights should protect.

in contemporary America but overlooks, as well, the legitimate differences between individuals.[232]

It is not, for example, self-evidently wrong or unjust to believe that sodomy is immoral, perverse or unnatural, although these claims are contentious, and rightly so. But if one holds these views, it is quite reasonable to deny that homosexual unions *are* virtuous, or that the goods that they might achieve outweigh the evils that they foster. The point, however, is this: that if these views are to be reasonable and consistent with democracy, then their proponents must acknowledge what too often they are unwilling to do, namely, that their personal convictions in these matters, however strong, sincere or credible, are grounds for eschewing homosexuality themselves, for urging others to do likewise, but no grounds at all for the legal prosecution of homosexuality.[233]

Communitarians generally are unwilling to make such claims, because they deny that we can treat our beliefs as right, our institutions as legitimate and our customs, associations and identities as valuable, if we believe these to be contingent or partial

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[232] It is interesting, for example, that Sandel complains that liberals fail adequately to recognize the distinctive perspectives of those whose identities and "constitutive attachments" are not liberal or voluntarist, when his objections to the minority in *Bowers* itself seems to take insufficiently seriously what is distinctive, and illiberal, about the beliefs of many people. See p. 116 *Democracy's Discontent*: " . . .treating persons as freely choosing, independent selves may fail to respect persons encumbered by convictions or life circumstances that do not admit the independence the liberal self-image requires".

[233] See Mill's *On Liberty*, for a famous version of this argument, and p. 205 of the Minority decision in *Bowers*.

in any way.[234] The consequence, as critics have pointed out, is that communitarians are prone to justify quite arbitrary differences between individuals, on the grounds that these are essential to social solidarity, and to treat the democratic rights as though they were of no particular significance in themselves.[235]

Thus, if the claims of community have a place in a democratic society, and in an adequate account of the content and justification of privacy rights, we must distinguish between the associations and communities that can properly claim the allegiance of individuals. This is impossible if we disparage the importance of personal choice in democracy, or ignore the variety of personal and political communities which democratic institutions might support. Thus, just as we cannot expect to protect the equal freedom of individuals if our conceptions of privacy subordinate the political to the personal on principle, so we cannot provide a foundation for democratic

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234 This may seem odd, given communitarians' perfectly reasonable stress on the contingency of many of our beliefs and practices, as well as the ways in which they seem to happen to us, rather than to be chosen by us. But in asking us to accept these, unquestioningly, as the basis for our moral and political judgements and rights, they also imply that critical reflection *must* be a solvent for personal loyalties and attachments, as though our love for others, for example, must inevitably be threatened by the realization that our meeting was a product of chance, rather than destiny, or that the qualities we cherish in those we love may not be unique to them. But if some of our attachments could not withstand even such minimal scrutiny, there is no reason to suppose that none of them can.

235 See pp. 226-9 of Kymlicka, and Jean Cohen, in ed. Benhabib, pp. 200-1: "by narrowing down privacy rights to the right to be let alone, by assuming that decisional autonomy has to entail an arbitrary relation between the individual and her ends, by saddling the new privacy with an abstract conception of the individual that allegedly ignores the real individuality of members of concrete communities, the communitarian critics are deprived of an important source of protection for the integrity of individual as well as group identities which may differ from that which the state at any time seeks to promote".

community or solidarity if we treat privacy rights as badges of community approval, or as guarantors of the stability and legitimacy of conventional arrangements.

It is possible, therefore, to distinguish democratic accounts of the right to privacy from alternatives, by examining the ways that they identify and distinguish our personal and political interests in privacy. This is possible without reifying the public/private distinction, or assuming that it can be an unchanging or uncontested guide to the rights of individuals, as we can use disagreements, or discrepancies in the justification of rights, to test and elaborate claims that particular forms of privacy are consistent with the freedom and equality of individuals, and with the virtues of solidarity and respect amongst citizens.

Thus, in this chapter I have shown that there are at least two justifications for privacy rights in a democracy—the one personal, the other political. These justifications are not easy to distinguish, as we saw, because there is no easy way to separate the personal and the political in a democracy. Nevertheless, that does not mean that such distinctions are unimportant or irrelevant from either a moral or a political perspective. On the contrary, rights of collective choice and action may not adequately protect individuals' interests in self-definition, intimacy and confidentiality, although such protection is necessary to both their personal and political equality. Hence in a democracy, where the protection for each defines the ends and justifications of government, individuals can have personal as well as political claims to privacy, and these can merit legal protection by right.

Hence, I conclude that privacy rights can help to reconcile the equality of citizens with the legitimate differences amongst them. As such, they can acknowledge and protect both our interests in collective choice and action, and our claims to personal freedom and equality. So we can no more choose between privacy and equality, in a democracy, than we can between personal and political freedom—for there is no democratic conception of equality that ignores the privacy of individuals, and no way to secure democratic government in the absence of individual choice.

CHAPTER 4

PRIVACY, EQUALITY AND ABORTION

A. INTRODUCTION

The challenge to those who would provide a democratic justification of abortion rights is to explain why women should have a legal right to abortion when it is fully possible that abortion is murder. Although it is neither unreasonable nor immoral to deny that abortion involves the killing of a being with a right to life, nothing about the right to life in a democracy shows conclusively that the foetus lacks such a right, or that abortion would be consistent with such a right in most circumstances So, if women are to have legal rights to abortion in democracies, we need to know why their interests in abortion are sufficiently compelling to justify what may be the moral and legal equivalent of murder.

In *Roe v. Wade*, the Supreme Court answered that question by claiming that women have a right to privacy.[236] Women's interests in privacy, the Court affirmed, are sufficiently broad and important

[236] *Roe v. Wade*, 410 U.S. (1973).

to explain why women must be free to make the abortion decision for themselves. However, (though *Roe* did not deny this,) feminists generally believe that the reason why women should have a legal right to abortion is because this is necessary to their equality with men.[237] Indeed, some feminists believe that we should prefer an equality justification of abortion to a privacy one, even if there is no necessary incompatibility between the two, because on pragmatic grounds it may be easier to articulate and defend a right to abortion if we focus on women's claims to equality rather than on what can seem more amorphous and controversial claims about the privacy of women.[238]

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[237] See Catherine A. MacKinnon, "Privacy v. Equality"; Deborah Rhode, *Justice and Gender*, pp. 211-2; Sylvia Law, "Rethinking Sex and the Constitution", Judith Jarvis Thomson, "A Defence of Abortion", ch. 1 of her *Rights, Restitution and Risk: Essays in Moral Theory*, ed. William Parent, (Harvard University Press, Cambridge, 1986).

[238] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*", *North Carolina Law Review*, vol. 63, (1985) is one example, as she believes that it would have been easier to justify funding for abortion had abortion been justified in the name of the equality, rather than the privacy of women. Lawrence Tribe appears to share this belief, although in other respects he is a noted defender of Roe, in "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence", *Harvard Law Review*, vol. 99, (1985) Cass Sunstein's "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)", *Columbia Law Review*, vol. 2, (1992) also appears to be someone who thinks that there is no necessary incompatibility between privacy and equality justifications of abortion, although he favors the latter. However, his views on the matter are not as clear as they might be. By contrast, Catherine MacKinnon, supra, and Frances Olsen are clearly considerably more hostile to privacy justifications of abortion. See Frances Olsen, "Unravelling Compromise", in *Harvard Law Review*, vol. 103, (1989). Donald H. Regan's "Rewriting *Roe v. Wade*", *Michigan Law Review*, vol. 77, (1979), by contrast, favors equality over privacy based justifications of abortion on constitutional grounds alone, and seems to have no especially feminist motivations or interests.

In this chapter I will argue that though there may be pragmatic reasons to present the abortion right one way rather than another, protection for the privacy of women is necessary to a democratic justification of abortion. As a result, I believe, we can no more choose between privacy and equality justifications of abortion rights in a democracy, than we can between the personal and political equality of women.

That is not to say that women's privacy and equality interests in abortion are identical or indistinguishable, because they are not. Indeed, as I will show, there are important differences between the two that we can examine by contrasting women's interests in personal and political choice, association and expression. However, the distinction between these interests cannot be sharp or absolute in a democracy, nor can we choose between them without justifying coercion and subordination. Hence, while there are many ways in which we might justify abortion rights, given the variety of women's interests in abortion, these must reflect women's interests in privacy if they are to be democratic, and so consistent with the freedom and equality of women.

The argument will proceed in three stages. First, I will show that in a democracy women have privacy interests in abortion, and that these interests importantly include interests in equality. I will then argue that women's interests in privacy and equality justify a broad right to abortion in a democracy, although abortion may be murder. Finally, I will show that we can distinguish democratic from undemocratic accounts of the right to abortion because, unlike the latter, the former reflect the importance of privacy to the personal and political equality of women.

B. WOMEN'S INTERESTS IN ABORTION

General Comments

Women have legitimate interests in privacy, as we have seen, and these justify privacy rights in a democracy. We cannot protect the freedom and equality of women if we deny them the right to decide what ends and relationships they should pursue as individuals, or if we prevent them from seeking personally fulfilling lives. Because

this is so, women have privacy interests in reproductive choice and these include interests in terminating, as well as continuing, their pregnancies. What significance to attribute to one's reproductive capacities is a fundamental question for most women, not only because these typically distinguish women from men, but because the bearing and raising of children can significantly affect a woman's life. Though the demands of pregnancy and childbirth vary from woman to woman, the fact that pregnancy typically takes nine months and ends in the birth of a being that is of one, but not one, makes it a unique event and one with important implications for the privacy of most women.

But if the ability to bear children can be a source of great pleasure for women, it can as well be a cause of grief and anguish. Some women are unable to conceive, or carry a pregnancy to term, no matter how much they desire to do so. For others the problem is the reverse—and unwanted pregnancy has been a blight on the lives of many women. As contraception can fail, and rape can lead to pregnancy, so women have come to see access to safe and legal abortion as a necessity if they are to avoid the evils of unwanted pregnancy, evils which can include death, debility, and the destruction of one's hopes for oneself and for other people.[239]

These problems are, clearly, very different and there can be conflicting interests amongst women as a result. However, I will be assuming that all women have basic interests in privacy and equality and that it is these general interests which explain why

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[239] See Rosalind P. Petchesky, Abortion and Woman's Choice: *The State, Sexuality, and Reproductive Freedom*, ch. 5 on the technical and social problems of contraception. Regarding the latter, MacKinnon notes that women may be prevented from using contraceptives by their male partners, and may be reluctant to use contraceptives because contraceptive use has the social implication that one is sexually experienced and sexually available. See "Privacy v. Equality", p. 95. As early abortions are significantly safer than carrying a pregnancy to term, *Roe* held that a concern for the health of women cannot justify prohibiting abortion anymore, although once it might have done so. *Roe*, pp. 148-150.

women must have a right to abortion, whether or not they will ever need, or consider, using it. Thus, I will start by describing women's privacy interests in abortion before examining how far it is possible to distinguish these from women's interests in political equality with men.

Women's Privacy Interests in Abortion

Women have privacy interests in self-definition, freedom of personal association and in confidentiality, and these help to justify privacy rights for women in a democracy. Thus, women have rights to marry, bear children and care for them in a democracy, because they have legitimate interests in privacy and protection for these is necessary to their freedom and equality with men. But these interests are also at stake in the abortion decision, because the ability to decide the place of reproduction in their lives can critically affect the privacy and equality of women.

Unwanted pregnancy can threaten the self-definition of women, and seriously constrain their ability to guide their lives in ways that they deem valuable, reasonable and right.[240] Unwanted pregnancy can force women to be mothers, though they do not want to be, and can force women to have more children than they can care for. Both these events, which safe and legal abortion could prevent, make it hard, or even impossible, for women to pursue their own interests and to decide the significance of motherhood in their lives. By turning biology into destiny, then, restrictive abortion laws deprive women of the means to act on aims and goals that are legitimate and important and, otherwise, protected by privacy rights in a democracy.

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[240] Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment*, (Routledge, New York, 1995), ch. 2; Margaret A. Simons, "Motherhood, Feminism and Identity", in *Hypatia Reborn*, (Indiana University Press, Bloomington, 1990), Beverly Smith, "Choosing Ourselves: Black Women and Abortion", in ed. Alison M. Jaggar, *Living with Contradictions: Controversies in Feminist Social Ethics*, (Westview Press, Boulder, 1994) and Judith Thomson, "A Defence of Abortion" supra.

This is particularly troubling, because the right to define one's own ends and goals is an important form of personal freedom and one closely connected to one's interests in equality. This is borne out by women's interests in abortion. Unwanted motherhood, like unwanted marriage, forces on women an identity that they may reasonably reject, whether or not adoption is an option for them. It is, moreover, an identity associated with the denial that women have legitimate interests of their own, and with the foreclosing for women of prospects for self-realisation outside marriage and motherhood.[241] This is a matter of historical fact, if not a logical implication of restrictive abortion laws. However, because forcing women to bear children is, itself, a very substantial denial of personal freedom, and because it imposes serious burdens on women's prospects for self-realization in other ways, both the freedom and equality of women are at stake in their ability to terminate unwanted pregnancies, even where motherhood would be compatible with sexual equality.

What is true of women's interests in self-definition is also true of their interests in freedom of personal association. Most obviously, pregnancy forces women into a complex, but very personal, relationship with a being that is not her, but within her.[242] Nor, absent abortion, can women halt this relationship for themselves, although it can come to an end through miscarriage. Thus, because pregnancy involves a close and continuous relationship with another

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241 Sunstein, supra. pp. 36-7: "the problem with restrictions on abortion is not merely that they impose on women's bodies, but that they do so in a way that is inextricably intertwined with the prescription by law and thus the state, of differnt roles for men and women, different roles that are part of second-class citizenship for women". See also Kristin Luker, *Abortion and the Politics of Motherhood*, (University of California Press, Berkeley, 1984), for the fullest discussion of the centrality of opposing perceptions of the nature and role of women to people's positions on abortion.

242 See Iris Marion Young, "Pregnant Embodiment: Subjectivity and Alienation" in *Throwing Like a Girl and other Essays in Feminist Philosophy and Social Theory*, ((Indiana University Press, Bloomington, 1990).

being, women have good reason to want both to prevent unwanted pregnancy and to terminate it safely and promptly once begun. This is particularly so, because an unwanted foetus can feel very much like an alien and hostile being, and it's presence and demands can be as intrusive as those of anyone else.[243]

There is, then, a continuity between a woman's interests in privacy and her interests in abortion, because pregnancy involves a continuous, close and inevitably personal relationship between a pregnant woman and a foetus. As a woman cannot take a day off from this relationship, and she can be reminded of its existence in unwelcome and unpredictable ways, her privacy interests in abortion are no less important and legitimate than her interests in determining the nature of her other personal relationships. Indeed, there is no sharp distinction between the two, because pregnancy can involve women in unwanted and harmful relations with others and can preclude desirable and desired forms of intimacy.[244]

Both these features of pregnancy are connected to women's interests in privacy and equality because women have legitimate interests in avoiding coercion and intimidation and in sustaining supportive and affectionate relations with their family and friends. Unwanted pregnancy can threaten these interests even when sex is voluntary, because some men may not be good fathers, or become violent and resentful in the course of a pregnancy. Nor is it always possible for a woman, even with a supportive and loving partner, to

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243 Judith Thomson has been much criticized, even by feminists, for her comparison of a foetus to a burglar, or an unwanted intruder. But as images of unwanted pregnancy they seem adequately to convey what may well be feelings of fear and hostility to the foetus, as well as to the man who had impregnated her.

244 Daniel Wikler, "Abortion, Privacy and Personhood: From *Roe v. Wade* to the Human Life Statute, in eds. Garfield and Hennessy, *Abortion: Moral and Legal Perspectives*, (University of Massachusetts Press, Amherst, 1984), pp. 238-259.

handle the demands of a child, given other pressures upon her.[245] So, women can have interests in abortion because they have interests in determining the nature of their personal relations to others.

Privacy rights protect the interests of individuals in confidentiality, as well as in self-definition and choice of associates. This is not only because the former can be necessary to the latter, but because confidentiality can be valuable in itself. We may not need to prevent others from knowing what we think or feel in order to be able to acknowledge and to pursue our interests. Nor may we need confidentiality to maintain close ties to others. Nonetheless, we may value it for the freedom it gives us to relax, drop our guard, to define an occasion or confidence as special, and to show concern, trust and consideration for the needs of others.

This suggests that women can have legitimate interests in terminating their pregnancies and in doing so promptly and without

[245] The quotations in ch. 3 of Carol Gilligan's *In A Different Voice: Psychological Theory and Women's Development*, (Harvard University Press, Cambridge, 1982), well illustrate this point as does Katha Pollitt's "Children of Choice", in her *Reasonable Creatures: Essays on Women and Feminism*, (Vintage Books, New York, 1995). Moreover, as Jaggar and Okin both emphasize, under current conditions women are expected to do the vast majority of childcare, and this adversely affects their prospects for equality in their relations with others. See Alison M. Jaggar, "Abortion and a Woman's Right to Decide" in *Living with Contradictions*, pp. 281-286, and Susan Moller Okin, *Justice, Gender and the Family*, chs. 6 and 7.

the knowledge of others.[246] They may want to prevent intrusive and unsolicited advice, however well-meant, as well as the constant reminder that what for others is a source of joy and congratulation, is a source of unhappiness and even despair for them. Women can also have privacy interests in terminating their pregnancies in order to avoid harmful or spiteful gossip and speculation about their behaviour, plans for the future, and their relationship with others. Indeed, they may wish to prevent others from knowing that they do not want a child, or have had, or are seeking, an abortion.[247]

This is not simply a matter of self-protection, although women can have perfectly legitimate concerns on this score, given the unpredictability of people's reactions and the contentiousness of sexual morality and abortion. However, as with their interests in confidentiality more generally, women may wish to avoid hurting or distressing others, by keeping the fact that they are pregnant, or are

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246 Hence I disagree with Wikler's claims that "It takes no profound analysis to reach the conclusion that if abortion rights follow upon privacy rights, the privacy in question is not primarily of the sensory or informational sort", p. 240 and "If these laws [i.e. restrictive abortion laws] do abridge a right to privacy, then, it is not because they force unwanted disclosure of the self". in ed. Garfield and Hennessy, p. 240 Indeed, concerns about confidentiality help to explain feminist objections to spousal and parental notification requirements, although a concern with confidentiality is not the only one involved. See, for example, Judith Jarvis Thomson, "Abortion", in *The Boston Review*, (Summer 1995), p. 11 and see *Planned Parenthood v. Danforth*, 428 u. S. (1976) and *City of Akron v. Akron Center for Reproductive Health*, 462 U. S. (1983).

247 See "Choosing Ourselves" in ed. Jaggar, op. cit.

seeking an abortion to themselves, or by discussing this with others only when the time seems right.[248]

These are important interests and perfectly legitimate ones. Because we cannot control the expectations of others, our personal freedom can depend on our abilities to limit the dissemination of personal information. In the case of unwanted pregnancy this can be critical, given the pervasive, and often coercive, nature of sexual stereotypes[249] and the assumption that bearing and raising children will interfere with a woman's work and with her commitment and drive in other areas of her life. Such concerns can motivate a woman's quest for abortion, and her efforts to keep her pregnancy secret. Until women need not fear such problems, their prospects of equality, as well as freedom, will depend on their access to abortion and on its ready availability and confidentiality.

So the reasons why women have legitimate interests in privacy illuminate women's interests in abortion: for abortion can be as critical to the personal freedom and equality of women as their ability to bear children, or to use contraceptives. Indeed, the connection between these are very close, for not only is there a continuity between women's interests in abortion and in contraception, but the same is true of women's interests in childbirth and abortion.[250]

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248 Cornell emphasises this point when she talks about the "spectre" of unwanted pregnancy. See Cornell, pp. 51-2 and, in a footnote to p. 90 she notes that the demonization of abortion may make it very difficult for women to express their sense of loss, even if they believe that an abortion was the right thing to do. Hence, p. 60, she reiterates the importance of women being free to develop their own interpretation of their abortion experience, and rejects restrictive abortion laws, and simplistic rhetoric, for preventing precisely this.

249 For some examples, see Suzanne Uttaro Samuels, *Fetal Rights, Women's Rights: Gender Equality in the Workplace*, (University of Wisconsin Press, Madison, 1995), especially part 2; and Katha Pollitt's "Foetal Rights, Women's Wrongs", in *Reasonable Creatures.*

250 Katha Pollitt, "Children of Choice", and Gilligan ch. 3, supra

Denying women a right to bear a child denies them a fundamental personal freedom, and one that cannot be dissociated from their abilities to act on their conscientious convictions, and to express their love and faith in others. Such a denial implies either that a woman is incompetent to decide what is best for her, or that what is best for her is less important than what is best for other people, in a matter where her own freedom and wellbeing are critically at stake.[251]

This is as true of legal restrictions on abortion as of legal restrictions on childbearing, and explains why the freedom and equality of women are critically affected by the legal status and accessibility of both. Denying women a right to abortion inevitably implies that women are either wrong to believe that this is in their interests, or that those interests are less important than those of other people. But though it may prove possible to square this assumption with legal protection for the freedom and equality of women, there is no reason to think that this will be easy, or any easier than it would be to deny women a right to procreate.

So, an examination of women's interests in privacy suggests that women have legitimate and important interests in abortion, ones closely connected to their interests in equality and meriting protection by democratic rights. However, that does not mean that women's interests in privacy are essential to a democratic justification of abortion rights. Indeed, given the importance of women's interests in equality, life, health, bodily integrity, religious freedom and the like, it is unclear why women's privacy interests in abortion are integral to the case for abortion.[252]

To see whether or not this is so, therefore, we need to distinguish women's privacy and equality interests in abortion. Following the

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[251] See, for example, The Johnson Controls decisions, in Samuels, pp. 144-7. Ronald Dworkin makes a similar point in Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom, (Alfred A. Knopf, New York, 1993), p. 159.

[252] For a summary of the reasons for supposing that they are not, see Peter S. Wenz, *Abortion Rights as Religious Freedom*, (Temple University Press, Philadelphia, 1992), especially pp. 30-44, for the criticisms of *Roe*.

example of chapter three, I suggest that we do this by distinguishing women's interests in personal choice, association and expression from their political, or collective, counterparts. Though there are other ways in which we might make the distinction, women have political interests of their own in a democracy, and as protection for these is necessary to their equality with men, an examination of these interests suggests an attractive and plausible way to investigate women's equality interests in abortion.

Women's Political Interests in Abortion

Women have fundamental interests in political choice, association and expression, and these are as critical to their lives and prospects as their personal equivalents. The ability to decide what one's society should do can be valuable in itself, and without it individuals have no assurance that their legitimate interests will be given the consideration that they deserve in collective deliberations. The same holds true for freedom of political expression and association. Not only are these freedoms which individuals may care about quite apart from other considerations, but they are essential if individuals are to have the assurance that their basic interests will be protected even if this offends the sensibilities, or conflicts with the interests, of the powerful. Hence individuals in a democracy typically have legal rights of political choice, expression and association and these, as with their privacy rights, are justified by their intrinsic importance and their connection to democratic forms of association.[253]

These various political interests are at stake in the abortion decision and are connected to the freedom and equality of women. If women are to be able to participate in politics as the equals of others it is critical that they not be prevented from doing so by the fact that they can become pregnant, whether they want to or not. Granted that sexual equality requires us to ensure that women are not disabled politically by even wanted pregnancies, and that this will likely

[253] See chapter 3.

require very substantial changes in the political institutions of most societies,[254] women can still have political interests in legal rights to abortion.

For example, women's interests in political choice give them interests in making politically important decisions for themselves, as well as in participating, as equals, in collective forms of decision-making. Legal prohibitions or extensive restrictions on abortion are likely to threaten both these interests, because state regulation of abortion is inseparable from state regulation of women's bodies and, like reproductive politics more generally, cannot be readily separated from the politics of sex, race, class and religion.[255] This means that absent legal rights to abortion, women have good reason to fear that their capacities for political choice will be subject to the prejudice and hostility of others, and that their prospects for political equality will be vulnerable to even small shifts in the balance of political interests, or of competing political forces.

Historically this has been the rule rather than the exception, and this suggests the importance of abortion rights to the political freedom and equality of women.[256] Concerns with population control, for example, have frequently justified assaults on the reproductive freedom of women, as well as efforts to relegate women to the home and childcare. Such efforts have typically involved the arbitrary and unjustified use of state power against women and men from poor and disfavored social groups, ranging from forced sterilization and abortion to incarceration of one sort or another. As such efforts are incompatible with women's ability freely to

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254 See Okin, supra, and also Kathryn Kolbert, "A Reproductive Rights Agenda for the 1990s" in ed. Jaggar, pp. 292-297.

255 This is a point effectively emphasized by MacKinnon, Sunstein and Luker.

256 For an interesting series of articles on this topic see "Forum: Population and the State in the Third Republic" in *French Historical Studies*, vol. 19, no. 3, (Spring 1996). I thank Jean Elisabeth Pederson for bringing these articles to my attention, and warmly recommend her "Regulating Abortion and Birth Control: Gender, Medicine, and Republican Politics in France, 1870 – 1920", in the issue. See also "Choosing Ourselves", in ed. Jaggar.

decide how state power should be used, and to ensure that these are compatible with sexual and other forms of equality, women's interests in political choice give them equality interests in abortion rights, or the legal ability to decide the abortion decision for themselves.

Similarly, women's interests in political association are interests in forming associations that advance their particular interests as individuals, and their collective interests in freedom and equality. Restrictive abortion laws threaten these interests, even when motherhood is consistent with sexual equality, because they put pressure on women to have children or to show that they have not had an abortion. Such pressures are likely to handicap women's ability to assume leadership roles in political organizations, even if they do much of the day to day work of maintaining and running them. As such, they are likely to exacerbate existing forms of political inequality as well as to generate inequalities of their own, by fostering the suspicion that childless women are a political liability and unsuitable as political leaders and associates.

This is particularly troubling not only because established political institutions are far from sexually egalitarian in their structure and concerns, but because such laws are likely also to handicap women's quest for alternative forms of association. Typically women have organized politically not only around issues of maternal health and childcare, but around reproductive rights and workplace equality. Were abortion to become illegal it is likely that women would find it harder to organize around the latter and that within women's associations themselves, therefore, the representation of women's political interests would suffer. Thus, given women's interests in political association and representation, women have political interests in abortion rights and protection for these can be necessary to their political freedom and equality.

Finally, women have interests in political expression, or in politicizing sexual coercion and inequality, and in participating as equals in matters of collective concern and dispute. These interests are threatened by restrictive abortion laws, as these are likely to chill public support for abortion by politically vulnerable groups, and to prevent women from publicizing and politicizing their experiences

of inequality and coercion. This is hard to square with the freedom and equality of women, because feminist forms of political expression typically challenge conceptions of politics which deny that the personal can be political, and the "abortion narrative", like testimony to rape, sexual harassment and discrimination, has been particularly important in this endeavour.[257]

It is likely, therefore, that women's efforts to challenge established conceptions of politics will be threatened by restrictive abortion laws at least in part because the latter will chill egalitarian forms of sexual expression. More generally, it will make it harder for women to assert the legitimacy of their interests, in so far as these differ from those of men, children or the state, and so to challenge patriarchal forms of authority, whether legal, medical, religious, familial or educational. To that extent, women have expressive interests in abortion, for abortion can symbolize the claims of women "to choose themselves", and the interests of women in sexual freedom and equality.

Women have, therefore, political interests in abortion, and these are no less legitimate and deserving of legal protection than their privacy ones. Until opportunities for political choice and participation are equally accessible to men and women, there is good reason to believe that restrictive abortion laws will reflect sexist conceptions of persons and politics, and that they will exacerbate political disabilities that have no place in a democratic society.[258] Moreover, it is perfectly reasonable to believe that abortion rights can express a society's commitment to the political freedom and equality of women, even when motherhood is no obstacle to political participation. Thus, abortion rights can embody a collective commitment to ensure that the uses of state power reflect the

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[257] I adapt the term "abortion narrative" from the phrase "conversion narrative", used by historians, amongst others to discuss narratives of religious conversion or transformation which, though individualized in some ways, tend to have common structural features. For examples see Drucilla Cornell, supra.

[258] This is a point emphasized by all feminist accounts of abortion.

distinctive interests and capacities of women, and so support their political freedoms and equality.

If these points are right, then women have equality interests in abortion which can be distinguished from their interests in privacy. Thus, we can contrast women's collective interests in ensuring that abortion laws are not sexually discriminatory, with the different personal reasons that they may have for seeking an abortion. Alternatively, we can contrast a women's desire to avoid the birth of an additional child, with her interest in ensuring that other women are capable of having a safe and legal abortion and are free to advocate and publicize the practice. In each case, we can acknowledge that women have personal interests in abortion, whether or not this is necessary to their equality with men, just as they can have political interests in abortion rights even if they, themselves, are unable to conceive or are personally opposed to abortion.[259]

Thus, the fact that women have privacy interests in abortion, connected to their interests in equality, does not mean that women's equality interests in abortion are exclusively personal. But the reverse is also true: that there is no reason to disparage women's privacy interests in abortion, or their importance to sexual equality, just because women have political interests in abortion and these are connected to their prospects for freedom and equality. Not only may personal considerations motivate women's quest for abortion, whether or not their social and political standing in the community would be threatened by pregnancy,[260] but women's political interests in abortion, themselves, may have a special personal importance for some women.

Thus, it is *because* women have collective interests in personal choice that they have political interests in reproductive rights, despite

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[259] See Mario Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective, in *More Than Words*, (St. Martin's Press, New York, 1993), cited in J. Thomson, "Abortion", for the reasons why one might distinguish one's personal beliefs about the morality of abortion, from one's views about what the law should be.

[260] This is a parallel to the case of rape discussed in ch. 3.

their different beliefs and situations. Similarly, it is *because* women have personal interests in sexual equality that they have collective interests in reproductive freedom and equality, whether or not they are likely to have an abortion. Were this not so, women's political interests in abortion would be consistent with laws that mandated abortions in the interests of sexual equality, or that forbade abortion once motherhood were no obstacle to political office.[261]

As we have seen, however, women's political interests in abortion are more subtle and wide-ranging than that, because they are interests in personal freedom and equality and not simply in collective choice, association and expression. Sharply to distinguish the two is impossible without making arbitrary distinctions amongst women,[262] or supposing that some reasons for seeking an abortion are intrinsically more personal or egalitarian than others.[263] But this is simply inconsistent with a commitment to sexual equality, as women can legitimately differ in their personal and political interests and, thus, in their reasons for seeking an abortion. So, we cannot describe women's equality interests in abortion if we ignore their interests in privacy, because it is hard to see what a commitment to sexual equality could mean if women lack an interest in personal choice.

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261 Hence I agree with Jean Cohen and Rosalind Petchesky, who think it improbable that we could call a society sexually egalitarian if it denied women reproductive choice, however attractive the society in other respects. Compare Jean Cohen, p. 58 *Columbia Journal of Gender and Law*, and Petchesky, p. 13, with Sunstein: "Movements in the direction of sexual equality . . .unquestionably weaken the case for an abortion right by removing one of the factors that support its existence", p. 39, or Andrea Jaggar, p. 285 in ed. Jaggar. See also Dworkin, p. 56.

262 See Jean Cohen in ed. Benhabib, p. 207.

263 In fact, even abortions based on preferences for a child of one sex rather than another are going to be subject to different interpretations in circumstances where women are treated with the same respect and concern as men. Hence, I don't see why a choice in favor of a male child must reflect sexual inequality, although currently it is very likely to do so, nor is it at all easy to classify this choice as intrinsically personal or political.

Thus, the fact that we can distinguish women's privacy and equality interests in abortion does not mean that we must choose between them in a democracy. Though the personal and political are not always the same, and can conflict, women's equality interests in abortion have both personal and political dimensions. Whereas political considerations may legitimately persuade us to present women's case for abortion rights in terms of their interests in equality rather than privacy, if our account is to be democratic and consistent with the legitimate interests of women, our reasons for thinking that women have a right to abortion must, nonetheless, include the reasons for thinking this necessary to their privacy.

If this is so, then a privacy justification of abortion rights can perfectly well embody a concern for the equality of women, just as an adequate account of women's interests in life, health, or religious freedom must assume that women have legitimate interests in privacy as well as equality with men.[264] So, while there are a variety of ways in which we might justify abortion rights in a democracy, of which privacy justifications are only one, to be adequate and consistent with the equality of women each of these must protect the privacy of women, although they may provide slightly different reasons for doing so.

C. THE RIGHT TO ABORTION

Women have privacy and equality interests in abortion, then, which are important and legitimate. But do these justify a right to abortion in a democracy, given that abortion may be murder? After

[264] Hence, I am unpersuaded by Wenz that we should prefer religious-freedom based justifications of abortion to privacy ones on moral grounds, although it may be that constitutionally the one is easier to justify than the other. However, a lot of the arguments here tend to depend on excessive suspicion of the constitutional right to privacy in America, and excessive optimism about the possibility of persuading a court that is hostile to privacy justifications of abortion that constitutional mandates for equality, religious freedom and the like justify a constitutional right to abortion.

all, murder is a serious business, and if women have legitimate interests in abortion they also have interests in preserving their lives and the lives of others. So why should we suppose that women's interests in privacy and equality outweigh our collective interests in preserving life?

The answer, I believe, is this: that democratic principles of right preclude the state from forbidding abortion on the grounds that abortion is murder. Though it is not unreasonable to hold such a view of abortion, the nature of controversy over the morality of abortion is such as to prevent restrictive abortion regulations in a democracy. However, as we will see, there are no other grounds for denying women a right to abortion. Hence, the fact that women have a fundamental right to privacy explains why women have a right to abortion in a democracy, given the nature of moral conflict over abortion.

Democratic principles of right preclude the government from resolving moral and political controversy in any way it sees fit. In particular, they require the government to provide a justification for actions that limit the liberty of individuals because only in this way can individuals be assured that government actions serve some legitimate purpose and are not wholly arbitrary constraints on their liberty.[265]

However, where political controversy concerns the basic rights of individuals themselves, or government action would curtail such rights, the justificatory burden that government faces increases. In such cases, it is not sufficient for it to show that its actions are rationally, if controversially, related to some legitimate objective, but rather, it must provide compelling grounds for acting in a way that curtails basic rights. Such justificatory burdens are justified by the fact that rights protect the legitimate interests of individuals by limiting

[265] These points are based on common principles of constitutional interpretation in America, but the rationale for these principles derives from philosophical reflections on the nature and purpose of rights, and so seems generally applicable.

the ways that government can pursue even legitimate objectives. The more important the right, therefore, the higher the threshold[266] that it raises to government action that would curtail the ability of individuals to pursue their legitimate interests.

The implication of these points is this: that government faces a very high standard of proof if it is to show that restrictive abortion laws are justified by the general interest of individuals, or consistent with democratic principles of right. This is particularly the case because restrictive abortion laws not only constrain important privacy rights but that they do so in a way that is necessarily unequal in its impact on women and men. Thus, in addition to raising concerns that they would constitute an arbitrary and unjustified violation of the privacy of women, such laws also appear to be inconsistent with their equality.

The belief that abortion is murder looks as though it could meet this burden of proof. Because women as well as men both value life, there seems nothing unjust or discriminatory about prohibiting abortion on the grounds that it violates the right to life of foetuses, although abortion prohibitions place severe and unequal burdens on the privacy of women. As it is reasonable to believe that abortion is murder—one need not, in fact, be a misogynist or indifferent to the rights of women in order to hold this view—it seems that a democratic society should be able to prohibit abortion and that it might, in fact, have a duty to do so.

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[266] For the idea of rights as raising thresholds to government action, rather than acting as trumps or side-constraints, see David Lyons, "Utility and Rights", in *Theories of Rights*, ed. Jeremy Waldron, (Oxford University Press, Oxford, 1984), p. 115.

However, if it is reasonable to believe that abortion is murder, it is no less reasonable to deny that this is so.[267] Nothing about a commitment to the equality and rights of others implies that the foetus has a right to life, let alone that that right makes most abortions the moral equivalent of murder. Contrasting views on the matter can be both fully reasonable and consistent with democracy, because nothing about the facts of foetal development, nor of democratic rights themselves, implies that the similarities of the foetus to other human beings are any more or less important

[267] For the view that abortion is almost always murder see John Finnis, "The Rights and Wrongs of Abortion", in *The Rights and Wrongs of Abortion*, eds. M. Cohen, T. Nagel and T. Scanlon, (Princeton University Press, Princeton, 1974); and Pope John Paul II, *The Gospel of Life*, [*Evangelium Vitae*], (Random House, New York, 1995). See also Ronald Dworkin, *Life's Dominion*, ch. 2. However, I find his claim that assumptions about a foetal right to life are largely inessential to conflict over the morality of legalising abortion unpersuasive. He seems to forget relevant points about the limits of one's claims to life made by J. Thomson in ed. Parent, and to underestimate their importance to proponents as well as opponents of abortion. After all, given the weight of women's interests in abortion, unless the foetus has a right to life it is very hard to see any reason to deny women a right to abortion, as men have no right forcibly to impregnate women, and as the point of rights, and thus of women's rights to privacy and equality, is precisely to limit the ways in which we can pursue otherwise reasonable collective goals. As Dworkin himself has always emphasized this latter point, and reiterates it in *Life's Dominion*, it is perfectly reasonable to believe that conflict over abortion is, in large part, conflict over the claim that the foetus has a moral, and should have a legal, right to life.

than the differences.[268] As a result, while a commitment to reason and democracy precludes us from denying that abortion may be murder,[269] it also prevents us from confusing what we have good reason to believe with what is necessarily so.

It is, perhaps, worth noting that given the sources of disagreement about the morality of abortion, there is no reason to think that we lack some relevant information that would enable all reasonable people to agree upon the matter. It is not as though we lack knowledge of the essentials of foetal development, and so are in any doubt about physical facts relevant to deciding whether or not abortion is murder. We know that the foetus is a form of human life and that, prior to viability, there is no way for the foetus to survive outside the womb. Thus, there is no dispute about the fact that abortion causes the death of the foetus, and that this is relevant to assessing the morality of abortion.

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[268] Thus, as Cuomo says, "those who endorse legalized abortions . . .aren't a callous alliance of anti-Christians determined to overthrow our moral standards", quoted in Thomson, "Abortion". On the other hand, those who oppose abortion do not have to deny women's claims to equality with men, as Sunstein recognizes at p. 36. The implication of this, however, is that it is not as clear that most abortions are consistent with the assumption of a foetal right to life as Sunstein, Thomson or Regan believe. After all, as Thomson notes, how much of a right to life you have should not turn on whether you were the product of rape. But, if this is so, it is genuinely unclear why women should have a right to abortion, even in cases of rape. Compare Thomson, pp. 3, 11, and 18, in ed. Parent.

[269] I say "democracy" as well as reason, because denying that the foetus *might* have a right to life is hard to reconcile with the fact that in some respects the foetus is like other beings with rights, being dependent, capable of feeling pain at some point in its development, etc. So, unless we want to threaten protection for the rights of dependent, sick, or disabled human beings, or to make our rights dependent on accepting some particular conception of what it is to be a person, we have good democratic reasons to distinguish what we have reason to believe from what, in fact, is so.

Nor is it evident that our moral concepts are inadequate simply because they are unable to tell us definitively whether or not abortion is murder. Because the situation of the foetus is unique, it is necessarily the case that our moral concepts should license different interpretations of its situation, and that these should support equally reasonable, though mutually inconsistent, conclusions about the morality of abortion. Thus, it is not as though there is something wrong with the familiar distinction between justified and unjustified killing, for example, simply because the distinction provides no unique answer to questions about the morality of abortion. Nor is there any reason to suppose that there is some moral concept or discovery out there, waiting to be made, that could resolve the matter for us. The distinction between just and unjust killing is a reasonable one and, indeed, one necessary to protect the equality and rights of individuals. But if no likely discovery could call this distinction into question, then none could show us that there is a uniquely correct answer to moral questions about abortion, because none could show us that abortion is more like unjustified than justified killing.

Disagreement about the morality of abortion, however, would be no obstacle to state laws prohibiting it, were it not the case that such laws severely restrict the privacy and equality of women. There may, for example, be nothing to recommend a speed limit of 65, rather than 70 miles an hour, given contrasting but equally legitimate interests in safe, speedy driving, and the efficient use of scarce resources. Nevertheless, there is nothing illegitimate in a state resolving controversy over the speed limit one way rather than another, given a legitimate interest in setting such a limit. But this is because no basic rights are threatened by adopting a speed limit of 65 rather than 70—or vice-versa—whereas the basic rights of women, in particular, are directly threatened by restrictive abortion laws.

In the abortion case, therefore, we cannot be indifferent as to how controversy over abortion is resolved, even if we have legitimate interests in resolving moral and political conflict over the practice. And as individuals may, quite reasonably, deny that abortion is murder, the belief that it is cannot itself justify depriving women of privacy rights in a democracy. Put otherwise, because women have a

privacy right to terminate their pregnancies unless abortion is murder, the fact that the evidence is rationally inconclusive on this score, and necessarily so, precludes state regulation of abortion on the grounds that it is murder.

This argument has seemed deeply unreasonable and counterintuitive to some people, and it is not difficult to see why this should be so. After all, one might think, as long as it is reasonable to believe that abortion is murder we have compelling grounds for forbidding abortion. Thus, one might think, even though it is reasonable to deny that abortion is murder the mere fact that one can, consistent with reason and basic principles of right, hold that it is, should be sufficient to justify restrictive abortion laws.[270]

The problem with such a position, though, is this: that because the rights of women frame and constrain the ways that the state may respond to the belief that abortion is murder, the belief itself, however reasonable, does not justify limits on abortion. This is because the right to privacy gives women rights to self-definition, intimacy and confidentiality in part because their fundamental interests may be controversial, be considered immoral, and be vulnerable to suppression from others. Thus, given the nature of controversy over abortion – or the fact that individuals, quite reasonably, may hold conflicting moral views on matters critical to their self-definition, intimacy and confidentiality—the reasonableness of the belief that abortion is murder cannot justify legal prohibitions on abortion. The belief that abortion is murder, in other words, gives women a privacy right to continue their pregnancies rather than to terminate them,

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[270] Hence, for example, Sandel believes that the Supreme Court's professed neutrality on the moral status of the foetus was, in fact, no such thing. Thus, he claims that: "the more confident we are that foetuses are, in the relevant sense, different from babies, the more confident we can be in bracketing the question about the moral status of the foetus for political purposes… While the Court claimed to be neutral on the question of when life begins, its decision presupposed a particular answer to that question". See *Democracy's Discontent*, pp. 100-101. See also Ely, supra, for similar concerns.

given the importance of the abortion decision to their privacy, and the reasonableness of the belief that abortion is murder. But it cannot justify prohibiting abortion, because precisely the same considerations that justify a privacy right to refuse abortions justify a right to have an abortion too. In short, the nature of controversy over abortion is itself a reason for holding that women have a right to decide the matter for themselves: because only in this way is it possible to acknowledge both the importance of the abortion decision to their privacy, and the legitimacy of conflict over the morality of abortion itself.

The parallel to the case of religious freedom is appropriate here.[271] Individuals in a democracy have a privacy right to practice their religion, as well as a political right to advocate the virtues of their religion publicly. This right is not absolute, but means that individuals cannot be forbidden to practice their religion simply because others believe it to be false or mistaken—though such hostile beliefs may, in fact, be perfectly reasonable and consistent with basic principles of right.

Democratic privacy rights include a right to practice one's religion because the religion one adopts, if any, can fundamentally determine how one should lead one's life. As individuals have legitimate interests in deciding how they should live, the right to privacy protects their ability to resolve reasonable controversy on this score for themselves, or to adopt positions that they have good reason to believe are reasonable, moral or right. As conflicting religious beliefs, if reasonable, will reflect the equality and rights of others, there is no justification for restrictive state regulation of such beliefs—nor of the religious practices to which they give rise. Hence, in a democracy, there can be no justification for depriving individuals of the right to practice their religion: for if there is, so far as one can tell, no religion that reason alone establishes to be uniquely true or correct, there are many that are clearly consistent with the rights of others and that

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[271] My discussion draws on the treatment of religious liberties in John Rawls' *Theory of Justice*, paragraphs 33-35, pp. 205-221.

individuals can, without ignorance, confusion or coercion, believe that they must pursue.

Here, as in the case of abortion, the existence of rationally irresolvable conflict means that individuals have a democratic privacy right to adopt and act upon one of several different, and even mutually inconsistent, moral points of view. They have this right *in addition* to their right to publicize their conscientious conviction, because in addition to rights of political expression, in a democracy, individuals have a right to privacy, and the one is as intrinsically important and deserving of legal protection as the other.[272]

So, the fact that it is reasonable to believe that abortion is murder no more justifies prohibiting abortion in a democracy than reasonable objections to Catholicism justify its suppression. Thus, it is sufficient to recognize that the abortion decision critically affects the privacy of women *and* that it is legitimately controversial, to see why women must have a right to abortion in a democracy: for the alternative is to deny that women have a right to privacy, or that this right is critical to their freedom and equality with men.

If these arguments are correct, it is possible to reject the claim that the privacy justification of abortion rights is unprincipled, or

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[272] I emphasize that privacy rights here are supplements to, not replacements for, public expression of one's religious commitments because this point seems, unaccountably, to have caused considerable confusion. Thus, critics of *Roe*, from MacKinnon to Glendon and Sandel seem to suppose that treating abortion or religion as a private matter is to deprive individuals of the legal ability to publicize their ideas, to take political stands on the issue or to engage in advocacy on such matters. Only in this way, I think, can one identify privacy rights with "the impoverishment of political discourse", as Glendon's subtitle to *Rights Talk* implies, or with the image of individuals as "lone rights—bearer[s]", claims that she shares with Sandel but also with MacKinnon. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, (The Free Press, New York, 1991).

that it fails to take seriously the strength of objections to abortion.[273] Such claims, I believe, rest on a confusion about what can count as a principled solution to conflict over abortion in a democracy, and what it can mean to take seriously the case against abortion once one is committed to the moral and political equality of men and women.

Given the fact that conflicting moral positions can be fully reasonable and consistent with basic rights, there simply can be no principled solution to conflict over abortion that requires us to assume either that the foetus has a right to life that makes abortion murder, or that it lacks such a right altogether.[274] The majority in *Roe* were quite right to insist on this point, but also to claim that a principled solution to conflict over abortion is nonetheless available to us if we consider the rights of women. Thus, the privacy justification of abortion does not suppose that all moral choices are equally legitimate. Nor is Sandel right to maintain that asking people to tolerate abortion, despite their moral convictions, is tantamount to asking them to tolerate slavery because some people have thought it a personal right.[275]

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[273] See, for example, Glendon's claim that *Roe* shows that the right to privacy, like property rights before it, quickly becomes an absolute right, and its claims infinitely expandable and uncontrollable by relevant moral or legal considerations. *Rights Talk*, pp. 58-59.

[274] Hence what it means to "engage rather than avoid the substantive moral and religious doctrines at stake" in controversy over abortion cannot mean, as Sandel supposes, that one must show that abortion is murder or that it is not. As there is simply no way to do these things, in a democracy, it cannot be the case that principled resolution to conflict over abortion depends on this ability. Compare Sandel, *Democracy's Discontent*, p. 21.

[275] See "Tolerating the Tolerant' in *The New Republic*, July 15 and 22, 1996, p. 25. Again, Sandel insists that as long as one believes that abortion is murder it is illogical to believe that abortion should be legally tolerated. Hence, he supposes, there is no way to resolve controversy over abortion except by showing that abortion is not murder. See also *Democracy's Discontent*, pp. 21-24.

The privacy justification of abortion centrally turns on the fact that there are many different positions on abortion that individuals, quite reasonably, can adopt. Protecting the ability of individuals to act on such beliefs freely and as equals, in no way implies that all positions on abortion are equally reasonable and moral, nor that the state cannot legitimately distinguish amongst different beliefs on abortion when deciding how to act. On the contrary, the privacy justification of abortion implies that the state may legitimately prevent individuals from acting on unreasonable beliefs about abortion, as on other matters, where this is necessary to protect the rights of other people. Hence, the state may prevent individuals from forcing others to have abortions against their will, just as it may prevent those opposed to abortion from denying women the means to exercise their rights.

The fact that the privacy justification of abortion supposes that there are a range of fully reasonable positions on abortion, then, rather than only one, in no way implies that all positions on abortion are reasonable, or that women have a privacy right to decide the abortion decision in any way they want. Certainly, as with other rights, the right to privacy can be abused. So, though the justification of abortion rights reflects the interests of women in making reasoned and morally compelling decisions about their lives, it is always possible that women may make the abortion decision hastily, on the basis of inadequate information, or based on false and pernicious views about morality.

In such cases there is, inevitably, a gap between the justification of abortion rights and the practical outcomes that a society must tolerate in order to protect those rights.[276] But there is absolutely no reason to believe this intrinsically greater in the case of the right to abortion

[276] I take these points from the discussion of "innocent" rather than "malign" abuse of rights in Joshua Cohen, "Freedom of Expression" in *Philosophy and Public Affairs*, vol. 22, no. 33, (Summer, 1993), p. 232. To borrow James Madison's phrase, quoted there, "some degree of abuse is inseparable from the proper use of everything".

than in the case of other rights, or for supposing that the potential for abuse deprives the privacy justification of abortion of moral coherence or importance.

In fact, a democracy can try to minimize such abuses in at least two ways, consistent with the reasons for granting women a right to abortion. First, as *Roe* claimed, it is legitimate for the state to require women to have abortions in medically safe facilities—thus pre-empting decisions that are likely seriously to undermine their health. Secondly, the state can try to ensure that all women have ready access both to medically safe resources for childbirth and abortion but, also, to the information and support necessary for them to make reflective, well informed and personally compelling decisions about the use of their sexual and reproductive capacities.

How far such considerations extend to laws covering third trimester abortions, waiting periods, consent requirements and the like, is a serious moral question. Because the right to abortion is so important to the privacy of women, the state has a morally compelling interest in ensuring that women are able to exercise that right free from coercion, intimidation, ignorance of their rights, the unscrupulousness of others and other morally relevant factors. It also has an interest in ensuring that women exercise their rights in a way that is consistent with the rights of others. These considerations suggest that, like other fundamental rights, the right to abortion is not absolute, and so is consistent with some forms of government regulation. However, as is true of other rights, which limits are, in fact, justified is a matter of dispute both because the justification for state regulation or "action" is, itself, controversial, and because

the likely effects of a law are not always easy to determine.[277] Thus, familiar principles of right are perfectly compatible with the privacy justification of abortion, for nothing about the justification for this right supposes that the right to abortion is absolute, or that the state may not regulate the abortion decision in order to protect the legitimate interests of individuals.

Thus, there is no warrant for condemning privacy justifications of abortion as unreasonable and immoral. Such justifications are fully reasonable, given the connections between women's interests in personal freedom, equality and a right to abortion. They are principled and based on moral and political considerations appropriate to a democracy, for they recognise that some personal choices are more critical than others and, thus, that women have morally compelling grounds to make the abortion decision for themselves, even though they have no privacy right to drive at whatever speed they choose on the motorway. Far from eviscerating the substance of moral and political argument, therefore, or obliterating fundamental moral and political decisions, the privacy justification of abortion recognizes that democratic debate and action can only take place against a background of basic rights that accommodate the freedom and equality of individuals and, therefore, their potential for fundamental, but reasonable, disagreement.

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[277] Thus, in my opinion the Majority in *Casey* were wrong to conclude, on the evidence that they cite, that 24 hour waiting periods are not unduly burdensome to the privacy of women. Moreover, though on philosophical (not legal) grounds I am sympathetic to the "undue burden" test, as presented by the *Casey* Majority, I am unconvinced either that the State has an interest in "potential life" of the nature and strength they suppose, or that there is any justification for lengthy consent requirements (and so, of waiting periods), when there are countless other, and less coercive, means to ensure that women make an informed decision about both childbearing and abortion. See *Planned Parenthood of Pennsylvania v. Casey*, (505 U. S., 1992) in Ian Shapiro, (ed.), *Abortion: The Supreme Court Decisions*, (Hackett Publishing Company, Inc. Indiana, 1995), pp. 221-3 and 226.

Thus, Sandel is wrong to suppose that one must refute the belief that abortion is murder in order to justify abortion rights, on pain of suggesting that slavery could be justified by the fact that some people have thought it just. It is unnecessary to deny that abortion is murder in order to justify abortion rights in a democracy, nor is there any democratic justification for doing so, as the belief is neither unreasonable nor inconsistent with the rights of others. By contrast, the idea that slavery is justified is unreasonable and inconsistent with democratic principles of right. In neither case, therefore, do the bare beliefs of individuals justify one account of basic rights rather than another. Instead, it is the reasons which can be offered in favor of those beliefs that are determinative and, as we will see, explain why women have a privacy right to abortion although they have no right to enslave themselves or others.

Two standard defences of slavery are relevant here. The first holds that some people may be legitimately enslaved because they are not fully human. The second holds that it is possible and legitimate to enslave a being who is, unquestionably, fully human. The former view is associated with Aristotle, and the justification of slavery in a supposedly democratic state. The second is associated with thinkers like Locke and Nozick, for whom the moral equality of individuals is consistent with political inequality and undemocratic forms of government.[278]

Nothing about the justification of abortion rights requires us to accept either of these premises and, in fact, both are condemned by a democratic theory of rights. The justification of abortion does not imply that slaves are not fully human, although it is consistent with the familiar assumption that it would be unjust to hold individuals legally responsible for their behaviour if youth or disability prevent

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[278] See Aristotle, *Politics*, ed. Stephen Everson, (Cambridge University Press, Cambridge, 1988), Book 1, sections 3 – 7; John Locke, *Two Treatises of Government*, (Cambridge University Press, Cambridge, 1960), the Second Treatise, ch. 4; and Robert Nozick, *Anarchy, State and Utopia*, (Basil Blackwell, Oxford, 1974), p. 331.

them from understanding or controlling their actions. All the justification of abortion rights implies, therefore, is that the evident differences between the foetus and all other human beings justify depriving the foetus of rights that are the moral prerogative of all other human beings.

This is not to deny the humanity of the foetus, or even the validity of believing that it has a moral right to life. Instead, it is to acknowledge that whether or not this is so, we cannot grant the foetus legal rights over women without treating women simply as vehicles for the fulfilment of the moral beliefs or particular ends of other people. For as long as one's body can be commandeered by another at will, one will lack an essential form of moral and political freedom, and there is no reason to believe that the law should impose this risk on women, when women have the same interests in freedom and equality as men.

That does not mean that women cannot legitimately consent to continue unwanted pregnancies, although they cannot consent to enslave themselves in democracies.[279] Granted the existence of reasonable alternatives, women may decide that they freely choose to continue their pregnancies once begun, because they believe that this is the right thing to do. However, absent such consent, and conditions that make consensual obligations consistent with sexual equality, there is no warrant for ascribing legal rights to a foetus, or for believing that women are morally bound to continue their pregnancies simply because the foetus is clearly a form of human life.

Thus, there is no analogy between abortion and slavery on the first justification of slavery, and this gives us good reason to suspect that there will be none on the second, either. After all, if the difficulty of the first view is that it requires us to believe that there are some people who are not fully human, all evidence to the contrary notwithstanding, the difficulty of the second view is that it assumes

[279] Nor does there seem much room for consent on the Aristotelian view of slavery, since one is either a slave by nature, and so may properly be enslaved, or one is not.

that the equality of individuals is compatible with slavery, although all evidence suggests that this cannot be so.

These difficulties are evident in Locke's effort to explain why slavery is not a civil or political relationship, and so consistent with his condemnation of absolute government.[280] According to Locke, no one can legitimately consent to enslave themselves, and so slavery can only be justified as an appropriate punishment for defeat in a just war. But, like it or not, slavery is still the absolute dominion of one person over another. If such dominion is illegitimate in the case of the absolute monarch, then it must also be illegitimate in the case of the slave-owner. That is why it is impossible to square slavery with democracy: for where individuals are free and equal, it would be madness for them to consent to slavery, and where they are not, it is unjust to take advantage of their plight.

These points are perfectly consistent with the justification of abortion, with which they share common premises. These are that human beings cannot legitimately treat each other as beings who lack interests of their own, or simply as means for the fulfilment of their particular ends. To confuse humans, or even animals, with things is a grave injustice and no differences amongst humans, of biology or convention, can justify confusing a person with an inanimate object.

But the justification of abortion rights in a democracy involves no such confusion. It in no way implies that the foetus is a being that women may use as they please, or whose interests they have no moral or legal obligation to consider. Thus, it denies that women may

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[280] Nozick faces similar difficulties, because its hard to give substance to the claim that liberty is a fundamental human good, (let alone that individuals have an absolute right to liberty, as Nozick believes), if one thinks that individuals could be justified in enslaving themselves without being forced to do so.

torment the foetus,[281] simply because they have a right to terminate their pregnancies, and denies that women may enslave or kill their newborns, simply because they lack a special obligation to preserve and care for them.

There is no inconsistency in such views, because while women can reasonably deny that abortion is immoral, they can perfectly well acknowledge that it would be wrong to torment a foetus, once it is capable of feeling pain,[282] and wrong to deny that it has a full complement of human interests and rights once it is born, and surviving outside the womb.[283]

Thus, the fallacy of the second analogy between slavery and abortion is that it confuses legitimate differences in the treatment of the foetus and other human beings with illegitimate differences in the treatment of those who are clearly moral equals.

Whatever may be said on behalf of the foetus, it is unclear why women should consider its claims on their body to be as good as their

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281 As Dworkin says, a creature—human or not—who can feel pain has an interest in avoiding it. Thus, just as it is wrong and unjust to torture animals, so with the foetus, once it is capable of feeling pain. This development, however, only occurs late in pregnancy—in about the seventh month or thirtieth week at the earliest—because until that point the brain is not sufficiently developed for the foetus to register an experience as pain. For a summary of the technical issues, see *Life's Dominion*, pp. 16-17, and also for the moral relevance of this fact.

282 This in no way means that late abortions must be immoral or prohibited by law, although once the foetus can feel pain it is reasonable to expect that limits on abortion that would otherwise be unjustified might now be justified. Whatever one's views of human life, it is wrong to inflict gratuitous pain on a being that can feel pain—a principle that we acknowledge, if somewhat half-heartedly, perhaps—in the case of animals.

283 Thus, for example, one can distinguish abortion and infanticide, for the purpose of legal rights, as the latter, unlike the former, involves the killing of a being who was alive and surviving outside the body of its mother. For a further discussion of this issue, see Jonathan Glover, *Causing Death and Saving Lives*, (Penguin Books, London, 1977), ch. 12.

own. Indeed, such views are, quite reasonably, rejected as degrading by many women, and it is difficult to see how they can be justified without confusing the right to life with the right to be born.[284]

So there is no warrant for comparing slavery to abortion, or for supposing that the latter, like the former, is immoral and unjust. On the contrary, one can condemn slavery and believe that abortion is morally appropriate and even obligatory in many circumstances.[285] Once can also believe abortion morally wrong, and yet justified by the rights of women in a democracy. This is because there are relevant moral and political differences in the situation of the foetus and the slave, differences that anyone in a democracy should be able to acknowledge, and which women may rightly insist upon.

D. CONCLUSION

I conclude, therefore, that women's claims to privacy, in a democracy, are sufficiently broad and important to justify a legal right to abortion. As we have seen, women's interests in privacy are also interests in equality, and in political as well as personal choice. Though that does not mean that we must justify the right to abortion on privacy grounds, the strength and variety of women's claims to privacy are integral to the right to abortion in a democracy.

It is possible, therefore, to distinguish democratic from undemocratic accounts of the right to abortion by the significance that they attach to the privacy of women. The latter assume that the privacy of women is irrelevant to the justification of abortion and, as a result, assume that women can be forced to bear children against their will, or constrained to have an abortion. By contrast, the former

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284 For the difficulties of this supposition, see J Thomson, in ed. Parent, and J. Glover ch. 4 on actual and potential people.

285 There are many reasons why one might think abortion morally obligatory in some circumstances, reasons that focus on the good of the foetus itself, on the good of people other than the foetus, for example. See Glover, p. 145 for a defence of the view that it is sometimes morally right to abort a foetus.

insists that as the regulation of reproductive choice critically affects the freedom and equality of women, the content and justification of abortion rights must reflect women's legitimate claims to privacy.

For example, it is possible to imagine societies in which women had a legal right to abortion, but in which the justification of this right depended simply on the whims of a majority of citizens, on considerations of utility, or on the belief that abortion is of no more moral or political significance than swatting a fly. None of these justifications of abortion is consistent with the privacy of women, and so can be distinguished from the justification of abortion in a democracy.

The majoritarian justification looks democratic on its face,[286] and the decisions of a majority of citizens can justify abortion rights in a democracy.[287] However, not all majority decisions are democratic, so it is a mistake to equate democratic government with majority rule *simpliciter*. Not only is it impossible to constitute a democratic majority if we overlook women's claims to personal choice, association, and expression, for example, by denying them an equally weighted vote, but we cannot treat these interests as purely formal or procedural without eviscerating the substance of

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[286] As majority rule is customarily thought consistent with democratic government.

[287] At least, I see no reason why such decisions must be made by courts, or by non-legislative bodies. However, I also see no reason to suppose that judicial review is ipso facto undemocratic, either as a general matter, or in the specific case of abortion. For debate on this issue, see, *Constitution, Democracy and State Power: The Institutions of Justice*, eds. Joshua Cohen and Archon Fung, (Edward Elgar, Cheltenham, 1996), introduction, pp. 17-22 (in type script).

democratic government.[288] In short, as majority decisions are not inevitably democratic in substance or form, we cannot leave the privacy of women to the whims of political majorities, or suppose that the decisions of majorities are equally legitimate no matter the care, scrupulousness, integrity and fairness of the decision-procedure involved.

For similar reasons a purely utilitarian justification of abortion rights cannot be squared with the legitimate interests of women.[289] Just as there is no reason to believe that the latter will be politically popular, or the object of majority choice in all circumstances, so there is not reason to assume that abortion rights will maximize general happiness, however justified they be on democratic principles. The fallacy in each case is the same: to assume that the legitimate interests of women have no independent weight in determining whether or not they have a right to abortion, or that justice can be served by making the fundamental rights of women contingent on the wishes and desires of other people.

Finally, it is unreasonable to believe that the abortion decision is morally or politically insignificant, or that its moral and political

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[288] See Joshua Cohen, in ed. Benhabib, pp. 98-9 and 106-8. The general point can be seen from the discussion of slavery *supra*: as long as one thinks that individuals have fundamental interests in such things as freedom and equality, one is likely to be as unimpressed by the idea that majority decisions can justify slavery, as that individual decisions, or personal choice, can do so. In other words, as long as one thinks that equality and freedom are substantive moral and political values, it is hard to understand why one should endorse a decision process for treating people as free and equal, if it lacks any institutional features that reflect the substantive goods of freedom and equality.

[289] For general objections to utilitarianism, of which these comments are merely one instance, see the essays by Rawls, Williams, Scanlon, Nozick and Nagel in *Consequentialism and its Critics*, ed. Samuel Scheffler, (Oxford University Press, Oxford, 1988). As these authors make clear, some of the objections against utilitarianism apply more generally to consequentialist theories of justice although, as Scanlon argues, not all of them do.

significance detracts in any way from women's legitimate claims to personal choice.[290] In fact, as we have seen, it is *because* the regulation of abortion is of great moral and political moment that pregnant women must have the right to decide for themselves whether or not to continue their pregnancies. Were this not so, it would be impossible to understand why the treatment of women should matter in a democracy. After all, to suppose that abortion is a matter of no consequence is to suppose that the lives of women are of no intrinsic significance, and that their personal freedom, equality and happiness are irrelevant from a moral or political perspective.

It is, therefore, not surprising that in a democracy women should have a legal right to abortion, or the right to decide for themselves how to act on a deeply controversial matter. In fact, it would be more surprising were this not so: for as we saw in chapter three, democratic government requires trust in the ability of individuals to take responsibility for morally and politically disputed matters. To suppose, therefore, that women are incapable of informed decision on matters critical to their wellbeing, can hardly be squared with respect for the equality of women. Nor, once one concedes the equality and ability of women, is it possible to deny the weight and legitimacy of their interests in abortion. It is scarcely credible, after all, that women should lack a compelling interest in deciding the abortion decision for themselves, when they have both the ability and the right

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[290] The latter, I think, is the implication of the positions in Glendon and Sandel as, more generally, in the views of those, like Justice White, who think that the fact that abortion is morally and politically controversial is itself sufficient to show that it should be made by majority decision. But the difficulty with this position is that it makes the fundamental rights of individuals dependent on their ability to avoid doing anything controversial. As Mill famously noted in *On Liberty*, once one holds that view, the defence of individual liberty is pretty well at an end. See, for example, his defence of "intemperance" in the articulation of one's views, and not only in the content of the views themselves in *On Liberty*, (ed. Wollheim, pp. 65-68).

to decide morally and politically important questions on their own behalf, and on behalf of other people.

Thus, we need not deny the moral and political importance of abortion in order to justify abortion rights for women in a democracy. Though this has seemed deeply counterintuitive to some people, on a democratic conception of privacy it is hardly mysterious: for were it necessary that women should bow to the wills of others in all matters of substance, there would be no reason to care about sexual equality or to consider the interests of women in a democracy. (effectively, the position of Aristotle) So, while it is true that the privacy and equality of women may be objects of moral and political controversy, women have legitimate claims to privacy in a democracy and these justify a legal right to abortion.

CONCLUDING THOUGHTS

This book has argued that we can distinguish privacy from equality without showing that it is either redundant or undemocratic. By doing so, it provides us with the foundations for resolving philosophical and political disputes about the nature and value of privacy, and its place in a democratic society. It has shown the relevance of feminist concerns and analysis to central questions of political philosophy. By way of conclusion, therefore, I would like to clarify these claims in order to highlight what is distinctive and, I hope, significant, about the conception of privacy developed in this book.

The book shows that determining the relationship of privacy to equality is critical to resolving philosophical and political disputes about the nature of privacy and the justification of privacy rights: for unless we can distinguish privacy from equality, there is no way to distinguish privacy from other democratic values, or to determine whether or not legal rights to privacy can be consistent with the freedom and equality of individuals. To resolve these disputes, therefore, we need some way to tell privacy and equality apart that acknowledges both the difficulty of determining what privacy is, and the extent of controversy about its value.

This is possible, I've argued, because there are legitimate grounds for disagreement about the nature and value of privacy. Individuals can, quite reasonably, hold different conceptions of what is valuable and important in life and, as a result, may differ both in the ways that they distinguish privacy from other values and in the importance that they attach to privacy as a moral and political value. Although the

legitimacy of such disagreement would seem to make it impossible to describe privacy and to determine its value in fact, as we saw, it makes it easier. It makes it easier because it lowers the standard that a conception of privacy must meet in order to be reasonable, and so spares us the need to exaggerate the difference between privacy and other values, and to make unsustainable claims about its intrinsic importance or value.

Thus, in Chapter 2, we saw that privacy is neither redundant nor undemocratic, even if there is no hard and fast distinction between privacy and equality. Our interests in privacy, we saw, can reasonably be described as interests in self-definition and self-determination, in intimacy and confidentiality, because this illuminates the moral and political connections amongst familiar conceptions of privacy, and is consistent with the assumptions about privacy held by both its critics and advocates alike. As our interests in privacy, so understood, are not inevitably consistent with the equality of individuals, this way of describing privacy enables us to distinguish privacy from equality. However, because individuals have legitimate interests in self-definition, intimacy and confidentiality, protection for the privacy of individuals can be consistent with, and even necessary to, the equality of individuals. Thus, as we saw in Chapter 2, we do not have to distinguish privacy sharply from equality in order to show that it is a distinctive and important democratic value.

Chapters 3 and 4 confirmed this, by examining the content and justification of rights to privacy in a democracy. We saw that individuals can have legal rights to privacy in a democracy, because these are generally helpful and necessary to protect their interests in freedom and equality. Amongst these privacy rights is the right of women to decide whether or not to have an abortion. Because our legitimate interests in privacy are interests in equality as well as in self-definition, intimacy and confidentiality, the justification of privacy rights in a democracy implies that women must be free to decide the morality of abortion for themselves.

Moreover, because there is no way to describe the equality of women in a democracy without acknowledging that they have legitimate claims to personal choice, association and expression, the

fact that abortion rights are necessary to the equality of women shows the importance of privacy rights in a democracy. Thus, just as privacy does not have to be reduced to equality in order to show that it can be a democratic value, so the right to privacy can be distinguished from the right to equality, and be an important democratic right nonetheless.

This account of our interests in privacy, and their place in a democracy, helps to clarify not only the relationship of privacy to equality, but its relationship to liberty and community as well. To that extent, therefore, an explicitly democratic conception of privacy can help us to establish the relationship between a variety of democratic values and rights, and to distinguish between democratic and undemocratic accounts of basic values and social institutions.

As we saw in Chapter 3, there are many different values and human interests that a democracy might realize. Though this means that we can no more identify privacy straightforwardly with the protection of liberty and community than we can with solitude and intimacy, this does not mean that privacy is inimical to these values. On the contrary, a democratic conception of privacy reveals their importance to a democratic conception of persons and politics, and indicates the ways in which we may reconcile and institutionalize these different, and sometimes competing, values.

I hope, then, to have clarified the relationship between privacy and equality in ways that are helpful in thinking about the relationship of privacy to other democratic values, and useful in resolving disputes about the limits of legitimate state action in a democracy. Though I do not pretend to have done more than provide a basic sketch of a democratic conception of privacy, I have tried to show how we might resolve some important and longstanding disputes about its nature and value by working outwards, so to speak, from a commitment to the equality of individuals and to democratic forms of government. In so doing, I have tried to show why it is essential to distinguish democratic from undemocratic conceptions of privacy, and how we might do so without forgetting that, like privacy, equality and democracy are often highly contentious moral and political values.

It is one of the great virtues of feminism to show that this is so and why we should not forget this fact if we care about freedom, equality and democratic government. Without denying that these are fundamental political values, feminists have made clear the arbitrariness and injustice that lie behind many of their most established formulations and embodiments. In particular, feminists have shown that many of our beliefs about equality and democratic government have little more to recommend them than that they are familiar and that we currently lack more adequate alternatives.

This book has been an effort to acknowledge the force of these criticisms and to suggest one way in which we might respond to them. It shows, as feminists have claimed, that the right to privacy and the public/private distinction, are likely to justify sexual inequality, as they are generally understood, because they assume that the interests of women are identical to those of men, or of no philosophical and political significance in their own right. As a result, philosophical and legal conceptions of privacy often subordinate the legitimate interests of women to those of other people—be it men, the foetus, or "the community"—and do so in ways that are likely to exacerbate invidious differences amongst individuals based on race, class and sexual orientation.

Formulating a democratic conception of privacy, and distinguishing it from alternatives, is one way to respond to the practical and philosophical problems that feminism has raised. By showing how protection for the privacy of individuals can help to identify and protect the legitimate differences amongst them, it acknowledges the force of the feminist claim that there is no way to treat women as equals if we assume away their distinctive reproductive capacities and interests, or acknowledge these only in ways that turn them into a source of disability and oppression.

Similarly, by showing that the personal can be political and still justify rights to privacy, I have tried to respond to the need, which feminism has made both evident and pressing, for an account of the public/private distinction that reflects a commitment to democracy. As feminists have shown, we cannot treat the public/private distinction as self-evidently democratic and yet apolitical in its nature,

because what is personal is, inevitably, shaped by the ways that society conceptualizes and distributes political power. As a result, if the right to privacy is to have a democratic justification, we need to be able to see how it can be consistent with the political rights of individuals, without either collapsing the personal into the political, or denying that privacy rights inevitably constrain the ways in which individuals might pursue their collective interests.

It is possible to do this by distinguishing our personal and political interests in privacy, and relating these to the justification of basic democratic institutions and rights. Not only is privacy useful to achieving democratic ends, and protecting democratic institutions, but its protection for personal choice, association and expression, we saw, can constitute part of a democratic conception of their political, or collective, counterparts. As a result, we can acknowledge that the personal is political, as feminists claim, without denying that that is all there is to it, or forgetting that in a democracy the personal interests of women are a legitimate and binding constraint on the ways that we pursue collective, as well as personal, objectives.

Feminist politics and philosophy, then, cannot be ignored if we care about the equality of individuals, or wish to determine the nature and justification of basic values and rights. Though it might be easier were this not so, the problems created by sexual inequality are too fundamental for that, and infect not only the basic institutions of our society, but some of our most abstract and esoteric ways of thinking. Moreover, it is both foolish and arrogant to suppose that the sustained and committed efforts of feminist scholars and activists should have no bearing on the resolution of abstract problems of philosophy, let alone on the justification of privacy rights, on which they have lavished considerable critical attention. Thus, while I hope that this effort to formulate and defend a democratic conception of privacy can help to resolve some central questions in feminist theory, I hope that it will also persuade more traditional moral and political philosophers to examine, or reassess, the contributions which feminists have made to their respective endeavours.

BIBLIOGRAPHY

Selected Supreme Court Decisions

Akron v. Akron Center for Reproductive Health. 462 U. S. (1983).

Bowers v. Hardwick. 106 U. S. (1986).

Planned Parenthood of Pennsylvania v. Casey. 505 U. S. (1992).

City of Akron v. Akron Center for Reproductive Health. 462 U. S. (1983).

Eisenstadt v. Baird. 405 U. S. (1972).

Griswold v. Connecticut. 381 U. S. (1965).

Harris v. McRae. 448 U. S. (1980).

NAACP v. Alabama. 357 U. S. (1958).

NAACP v. Button. 371 U. S. (1963).

Planned Parenthood v. Danforth. 428 U. S. (1976).

Roe v. Wade. 410 U.S. (1973).

Thornburgh v. American College of Obstetricians and Gynaecologists. 476 U. S. (1985).

Selected Articles and Books

Allen, Anita. *Privacy for Women in a Free Society*. Rowman and Littlefield, New Jersey, 1988.

Aquinas, Thomas. *On Law, Morality and Politics*. Hackett Publishing Co., Cambridge, 1988.

Arendt, Hannah. *The Human Condition*. University of Chicago Press, Chicago, 1958.

Aristotle. *Politics*. Cambridge University Press, Cambridge, 1988.

Avineri, Shlomo and Avner de Shalit, eds. *Communitarianism and Individualism*. Oxford University Press, Oxford, 1992.

Benhabib, Seyla and Drucilla Cornell, eds. *Feminism as Critique*. Basil Blackwell, Oxford, 1987.

Benhabib, Seyla. *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*. Routledge, London, 1992.

Benhabib, Seyla, ed. *Democracy and Difference: Contesting the Boundaries of the Political*. Princeton University Press, Princeton, 1996.

Benn, Stanley I. and G. F. Gauss, eds. *Public and Private in Social Life*. Croon Helm, London, 1983.

Benn, Stanley I. "Privacy, Freedom and Respect for Persons" in ed. Schoeman, 1984.

Bettelheim, Bruno. "The Right to Privacy is a Myth" in *The Saturday Evening Post*. July 27, (1968).

Bork, Robert. *The Tempting of America: The Political Seduction of Law*. The Free Press, New York, 1990.

Brighouse, Harry. "Egalitarianism and the Equal Availability of Political Influence" in *The Journal of Political Philosophy*. Vol. 4, No. 2, (1996).

Calhoun, Craig. ed. *Habermas and the Public Sphere*. M. I. T. Press, Cambridge, 1992.

Chapman, J. W. and J. R. Pennock, eds. *Privacy: Nomos XIII*. Atherton Press, New York, 1971.

Chapman, J. W. and J. R. Pennock, eds. *Property*. New York University Press, New York, 1980.

Cohen, G. A. "Mind the Gap". *The London Review of Books*. May 14, 1992

Cohen, Jean. "Redescribing Privacy: Identity, Difference and the Abortion Controversy" in *Columbia Journal of Gender and Law*. Vol. 3, No. 1, (1992).

Cohen, Jean. "Democracy, Difference and the Right to Privacy" in ed.Benhabib, 1996.

Cohen, Joshua. "Freedom of Expression" in *Philosophy and Public Affairs*. Vol. 22, No. 3. (1993).

Cohen, Joshua. "Moral Pluralism and Political Consensus" in eds. Copp, Hampton and Roemer, 1993.

Cohen Joshua. "Pluralism and Proceduralism" in *Chicago-Kent Law Review*, Vol. 69, (1994).

Cohen, Joshua. "Procedure and Substance in Deliberative Democracy" in ed. Benhabib, 1996.

Cohen, Joshua and Archon Fung, eds. *Constitution, Democracy and State Power: The Institutions of Justice*. Edward Elgar, Cheltenham, 1996.

Cohen, M., T. Nagel and T. Scanlon, eds. The Rights and Wrongs of Abortion. Princeton University Press, Princeton, 1974.

Copelon, Rhonda. "Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change" in ed. Lobel, 1988.

Copp, David, Jean Hampton and John Roemer, eds. *The Idea of Democracy*. Cambridge University Press, Cambridge, 1993.

Cornell, Drucilla. "Should a Marxist Believe in Rights?" *Praxis International*, Vol. 4, (April 1984).

Cornell, Drucilla. *The Imaginary Domain: Abortion, Pornography and Sexual Harassment*. Routledge, New York, 1995.

Cuomo, Mario. *More Than Words*. St. Martin's Press, New York, 1993.

Dworkin, Ronald. "Liberal Community" in eds. Avineri and de Shalit, 1992.

Dworkin, Ronald. *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom*. Alfred A. Knopf, New York, 1993.

Eichbaum, J. "Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy" in *Harvard Civil Rights—Civil Liberties Law Review*, Vol. 14, (1979).

Eisenstein, Zillah, "Equalizing Privacy and Specifying Equality" in ed. Hirschmann and Di Stefano, 1996.

Eistenstein, Hester. *Contemporary Feminist Thought*. G. K. Hall and Co., Boston, 1983.

Elshtain, Jean. *Public Man, Private Women: Women in Social and Political Thought*. Princeton University Press, Princeton, 1981.

Ely, John Hart. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" in *Yale Law Journal*. Vol. 82, (1973).

Estrich, Susan. *Real Rape: How the Legal System Victimizes Women Who Say No*. Harvard University Press, Cambridge, 1987.

Finnis, John. "The Rights and Wrongs of Abortion" in eds. Cohen, Nagel and Scanlon, 1974.

Fish, Stanley, "There's No such Thing as Free Speech" in *Boston Review*, Vol. 17, (Jan.-Feb. 1992).

Fiss, Owen. "Freedom and Feminism" in *Georgetown Law Review*. Vol. 80, No. 6, (Aug. 1992).

Fraser, Nancy, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in ed. Calhoun, 1992.

Fried, Charles. "Privacy [A Moral Analysis]" in ed. Schoeman, 1984.

Fried, Charles. *Order and Law: Arguing the Reagan Revolution—A Firsthand Account*. Simon and Schuster, New York, 1991.

Garfield, Jay L. and Patricia Hennessey. *Abortion: Moral and Legal Perspectives*. University of Massachusetts Press, Amherst, 1984.

Gavison, Ruth. "Privacy and the Limits of the Law" in ed. Schoeman, 1984.

Gersein Rachel. "Privacy and Self-Incrimination" in ed. Schoeman, 1984.

Gerstein, Robert S. "Privacy and Self-Incrimination" in ed. Schoeman, 1984.

Gilligan, Carol. *In A Different Voice: Psychological Theory and Women's Development*. Harvard University Press, Cambridge, 1982.

Ginsburg, Ruth Bader. "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*" in *North Carolina Law Review*. Vol. 63, (1985).

Glendon, Mary Ann. *Rights Talk: The Impoverishment of Political Discourse*. The Free Press, New York, 1991.

Glover, Jonathan. *Causing Death and Saving Lives*. Penguin Books, London, 1977.

Grey, T. C. "The Disintegration of Property" in eds. Chapman and Pennock, 1980.

Habermas, Jurgen. *Legitimation Crisis*. Beacon Press, Boston, 1975.

Hart, H. L. A. *Liberty and Morality*. Stanford University Press, Stanford, 1963.

Hirschmann, Nancy and Christine Di Stefano eds. *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory*. Westview Press, Colorado, 1996.

Honig, Bonnie. "Difference, Dilemmas and the Politics of Home" in ed. Benhabib.

Honig, Bonnie. *Political Theory and the Displacement of Politics*. Cornell University Press, Ithaca, 1993.

al Hybri, Azizah Y. and Margaret A. Simons, eds., *Hypatia Reborn*. Indiana University Press, Bloomington, 1990.

Innes, Julie C. *Privacy, Intimacy and Isolation*. Oxford University Press, Oxford, 1992.

Jagger, Andrea. *Feminist Politics and Human Nature*. Rowman and Allanheld, New Jersey, 1983.

Jaggar, Alison M., ed. *Living With Contradictions: Controversies in Feminist Social Ethics*. Westview Press, Colorado, 1994.

Johnson, Jim and Knight, Jack. "What Sort of Political Equality Does Democratic Participation Require?" Unpublished Paper. (Aug. 1996).

Kairys, D. ed. *The Politics of Law: A Progressive Critique*. Pantheon Books, New York, 1990.

Kendall, Thomas. "Beyond the Privacy Principle" in *Columbia Law Review*, Vol. 92, (1992).

Kolbert, Kathryn. "A Reproductive Rights Agenda For the 1990s" in ed. Jaggar, 1994.

Kymlicka, Will. *Contemporary Political Philosophy: An Introduction*. Clarendon Press, Oxford, 1990.

Law, Sylvia. "Rethinking Sex and the Constitution" in *University of Pennsylvania Law Review*. Vol. 132, (1984).

Leach, E. *A Runaway World? The Reith Lectures 1967*. Oxford University Press, London, 1968.

Lobel, J. ed. *A Less Than Perfect Union*. Monthly Review Press, New York, 1988.

Locke, John. *Two Treatises of Government*. Cambridge University Press, Cambridge, 1960.

Luker, Kristin. *Abortion and the Politics of Motherhood*. University of California Press, Berkeley, 1984.

Lyons, David. "Utility and Rights" in ed. Waldron, 1984.

MacKinnon, Catherine. *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press, Cambridge, 1987.

MacKinnon, Catherine. "Pornography, Civil Rights and Speech" in *Harvard Civil Rights—Civil Liberties Law Review*. Vol. 20, No. 1, (1985).

Marx, Karl, "On the Jewish Question" in ed. Tucker, 1978.

Marx, Karl. *Capital*, vol. 1. Penguin, Harmondsworth, 1976.

Meiklejohn, Alexander. *Free Speech and Its Relation to Self-Government*. Harper and Row, New York, 1948.

Mill, John Stuart. "The Subjection of Women" in ed. Rossi, 1970.

Mill, John Stuart. *Three Essays*, ed. Richard Wollheim. Oxford University Press, Oxford, 1975.

Nagel, Thomas. *Equality and Partiality*. Oxford University Press, Oxford, 1991.

Nicholson, Linda J. *Gender and History: The Limits of Social Theory in the Age of the Family*. Columbia University Press, New York, 1986.

Nozick, Robert. *Anarchy, State and Utopia*. Basil Blackwell, Oxford, 1974.

Nussbaum, Martha. *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*. Cambridge University Press, Cambridge, 1986.

Okin, Susan. *Justice, Gender and the Family*. Basic Books, New York, 1989.

Olsen, Frances. "The Family and the Market: A Study of Ideology and Legal Reform" in *Harvard Law Review*. Vol. 96, No. 7, (1983).

Olsen, Frances. "Unraveling Compromise" in *Harvard Law Review*. Vol. 103, (1989).

Parent, W. A. "Privacy, Morality and the Law" in *Philosophy and Public Affairs*, Vol. 12, (1983).

Pateman, Carol. ed. *The Disorder of Women*. Stanford University Press, Stanford, 1989.

Pederson, Jean Elisabeth. "Regulating Abortion and Birth Control: Gender, Medicine and Republican Politics in France, 1870-1920" in *French Historical Studies*. Vol. 19, No. 3, (Spring 1996).

Petchesky, Rosalind Pollack. *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom*. Northeastern University Press, Boston, 1984.

Philips, Anne. *Engendering Democracy*. Pennsylvania State University Press, Pennsylvania, 1991.

Philips, Anne. *Democracy and Difference*. Pennyslavania State University Press, Pennyslavania, 1993.

Pollit, Katha. *Reasonable Creatures: Essays on Women and Feminism*. Vintage Books, New York, 1994.

Pope John Paul II. *The Gospel of Life*. Random House, New York, 1995.

Rachels, J. "Why Privacy is Important" in *Philosophy and Public Affairs*, Vol. 4, (1975).

Rawls, John. *A Theory of Justice*. Harvard University Press, Cambridge, 1971.

Rawls, John. "Social Unity and Primary Goods" in eds. Sen and Williams, 1982.

Regan, Donald H. "Rewriting *Roe v. Wade*" in *Michigan Law Review*. Vol 77, (1979).

Reiman, Jeffrey H. "Privacy, Intimacy and Personhood" in *Philosophy and Public Affairs*, Vol. 6, No. 1, (1976).

Rhode, Deborah. *Justice and Gender: Sex Discrimination and the Law*. Harvard University Press, Cambridge, 1989.

Robertson, John, "The Scottish Enlightenment Beyond the Civic Tradition: Adam Smith on Government and Economic Development" in *History of Political Thought*, (1984).

Rosenblum, Nancy. *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought*. Harvard University Press, Cambridge, 1987.

Rossi, Alice C. *John Stuart Mill and Harriet Taylor Mill: Essays on Sex Equality*. University of Chicago Press, Chicago, 1970.

Samar, V. J. *The Right to Privacy: Gays, Lesbians and the Constitution*. Temple University Press, Philadelphia, 1991.

Samuels, Suzanne Uttaro. *Foetal Rights, Women's Rights: Gender Equality in the Workplace*. University of Wisconsin Press, Madison, 1995.

Sandel, Michael J. *Liberalism and the Limits of Justice*. Cambridge University Press, Cambridge, 1982.

Sandel, Michael. "The Procedural Republic and the Unencumbered Self" in *Political Theory*. Vol. 12, No. 1, (1994)

Sandel, Michael. *Democracy's Discontent: America in Search of a Public Philosophy*. Harvard University Press, Cambridge, 1996.

Sandel, Michael. "Tolerating the Tolerant" in *The New Republic*, (July 15 and 22 1996).

Scanlon, T. "Thomson on Privacy" in *Philosophy and Public Affairs*, Vol. 4, (1975).

Scheffler, Samuels, ed. *Consequentialism and its Critics*. Oxford University Press, Oxford, 1988.

Schoeman, Ferdinand. *The Philosophical Dimensions of Privacy*. Cambridge University Press, New York, 1984.

Simons, Margaret A. "Motherhood, Feminism and Identity" in eds. Hybril and Simons, 1990.

Smith, Adam. *An Inquiry into the Nature and Wealth of Nations*. eds. R. H. Campell and A. S. Skinner. Liberty Classics, Indiana, 1981.

Smith, Beverly. "Choosing Ourselves: Black Women and Abortion" in ed. Jaggar, 1994.

Spiro, H. J. "Privacy in Comparative Perspective", in eds. Chapman and Pennock, 1971.

Sunstein, Cass R. *Democracy and the Problem of Free Speech*. Free Press, New York, 1993.

Sunstein, Cass R. "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)" in *Columbia Law Review*. Vol. 92, No. 1, (1992).

Taub, N. and E. M. Schneider. "Women's Subordination and the Role of Law" in ed. Kairys, 1990.

Thompson, Dennis F. *Political Ethics and Public Office*. Harvard University Press, Cambridge, 1987.

Thomson, Judith Jarvis. "Abortion" in The Boston Review. (Summer 1995).

Thomson, Judith Jarvis. *Rights, Restitution and Risk*. Harvard University Press, Cambridge, 1986.

Tong, Rosemarie. *Women, Sex and the Law*. Rowman and Littlefield, Maryland, 1984.

Tribe, Lawrence H. *American Constitutional Law*. The Foundation Press, Inc., New York, 1988.

Tribe, Lawrence. "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Action and the Dilemma of Dependence" in *Harvard Law Review*. Vol. 99, (1985).

Tronto, Joan C. "Care as a Political Concept" in eds. Hirschmann and Di Stefano, 1996.

Tucker, Robert C. *The Marx-Engels Reader*. W.W. Norton and Co. New York, 1978.

Unger, Roberto Mangabeira. *The Critical Legal Studies Movement*. Harvard University Press, Cambridge, 1983.

Walby, Sylvia. *Theorizing Patriarchy*. Basil Blackwell, Oxford, 1990.

Waldron, Jeremy. *Liberal Rights: Collected Papers 1981-1991*. Cambridge University Press, Cambridge, 1993.

Waldron, Jeremy, ed. *Theories of Rights*. Oxford University Press, Oxford, 1984.

Warren, Samuel and Louis Brandeis. "The Right to Privacy [The Implicit Made Explicit]", in ed. Schoeman, 1984.

Wasserstrom, Richard A. "Privacy: Some Arguments and Assumptions" in ed. Schoeman, 1984.

Weinstein, M. A. "The Uses of Privacy in the Good Life" in eds. Chapman and Pennock, 1971.

Weinstein, W. L. "The Private and the Free: A Conceptual Inquiry" in eds. Chapman and Pennock, 1971.

Wenz, Peter S. *Abortion Rights as Religious Freedom*. Temple University Press, Philadelphia, 1992.

Westin, Alan. *Privacy and Freedom*. Atheneum Press, New York, 1967.

Wikler, Daniel. "Abortion, Privacy and Personhood: From *Roe v. Wade* to the Human Life Statute" in eds. Garfield and Hennessey, 1984.

Woolf, Virginia. *A Room of One's Own*. Harcourt Brace Jovanovich, New York, 1989.

Young, Iris Marion. *Justice and the Politics of Difference*. Princeton University Press, Princeton, 1990.

Young, Iris Marion. *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory*. Indiana University Press, Bloomington, 1990.