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Privacy: Restrictions and Decisions.

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A. Introduction

Anita Allen's *Uneasy Access: Privacy for Women in a Free Society* was one of the first books to try to work out a feminist perspective on privacy, given long-standing feminist doubts and ambivalences about its effects on women.¹ In contrast to a philosophical literature which largely ignored feminist concerns with privacy, Allen set out to consider privacy from an explicitly feminist perspective, drawing on philosophical and American legal debates in order to do so. The result was a highly readable book, which provided an excellent survey of competing attempts to describe the nature and value of privacy, and a helpful account of their relative strengths and weaknesses. Arguing that feminists should revise, not reject, privacy, Allen showed that the ability to restrict unwanted access to our bodies and thoughts is essential to freedom for women, as for men.

I discovered Allen's book as a graduate student at MIT, working on what I called 'A democratic conception of privacy', in response to feminist criticism of privacy. Allen's guided tour through competing ways of defining privacy saved me from drowning in an overwhelming, and rather bewildering, literature, whose consequences for feminist concerns were rarely clear. Allen's frank defence of abortion rights from a privacy perspective was also welcome, with its recognition that children necessarily eat into parental time and will do so even if parenting occurs on a more sexually egalitarian basis than at present. Above all, I admired, and continue to admire, Allen's treatment of privacy for women in public, with its sensitive and thoughtful effort to understand why, and how,

¹ Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society*, (Rowman and Littlefield, New Jersey, 1988).

women might feel that their privacy is invaded by pornographic displays of *other* women's bodies, and its discussion of the harm of 'catcalling', even where it does not amount to harassment.²

Catcalling is one of those quintessentially awkward behaviours which, while superficially trivial – since no one actually hurts you, nor even intends to harm you – can be distressing. Girding yourself to run the gauntlet, wondering how best to face it, wondering why it is distressing and whether it ought to be – all these may form a good part of women's experience of city life, especially in hot weather. Naturally, a philosophical literature that was unconcerned with domestic violence in its reflections on privacy was not going to discuss anything so seemingly trivial. But as Allen showed, there *was* something important and useful to be said about the phenomena, about the way it marked public space, the way it marked public status – or tried to – and the way that it intruded on opportunities for peaceful reflection and daydreaming which can be so scarce when one is at home. So when I decided briefly to discuss the harm of 'flashing', in the context of a discussion of racial profiling in an august journal,³ I was partly inspired by Allen's discussion of catcalling and its significance for women's privacy.

I am, then, grateful to have an opportunity to celebrate Allen's work and, in particular, a book which has inspired me over the years. Nonetheless, I must agree with Judith DeCew, in her review of *Uneasy Access*, that its central claims are not wholly persuasive.⁴ In particular, Allen's insistence that decisional and restricted access privacy have nothing to do with each other leaves it unclear how the *content* of our claims to solitude, anonymity, confidentiality and seclusion are to be determined and, normatively, how we are to decide which forms of privacy are valuable and which are not. This problem is relevant to Allen's critique of Catherine MacKinnon which, as deCew notes, is too brief to be satisfying.⁵ Even if we agree with Allen that one way of interpreting the historical record is to say

² Allen, ch. 5, especially pages 128-140.

³ A. Lever, "Why Racial Profiling is Hard To Justify: A Response to Risse and Zeckhauser" in *Philosophy and Public Affairs* 33.1. (Jan. 2005) 94-110. The discussion of flashing is at 99-100.

⁴ Judith Wagner DeCew, review of *Uneasy Access*, in *The Philosophical Review*, 101.3. (July 1992), pp. 709-711

⁵ Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press, Cambridge, 1987), ch.... Allen's critique of MacKinnon can be found at pp. 55-56, 71-72. Interpreting MacKinnon as holding that what history dictates must remain, Allen insists that women need not be bound by past forms of privacy. But this risks missing the conceptual and normative aspects of MacKinnon's claims, which are meant to *explain* why, in the case of privacy, we are dealing with something that is irredeemably inegalitarian, whereas in the case of voting rights, this is not the case. I provide a sympathetic reconstruction and critique of MacKinnon's arguments, and the evidence for them, in 'Must Privacy and Sexual Equality Conflict? A Philosophical Examination of Some Legal Evidence', *Social Research: An International Quarterly of the Social Sciences* 67.4. (2000), 1137-1171.

that women have had too much of the wrong sort of privacy and not enough of the right sort, this will only disprove MacKinnon's claims about the sexually inequalitarian character of privacy if we have some way to distinguish the wrong sort from the right sort, and some reason to suppose that protections for the latter can be secured without cementing the former.

MacKinnon is aware that women sometimes benefit from privacy, and that they often desire it. The force of her criticism, then, is that *even when* women seem to benefit from privacy – from the solitude, the intimacy, the scope for decision-making that it provides – privacy remains a threat to sexual equality, and therefore to their wellbeing. Hence, according to MacKinnon, feminists must distrust privacy, like Trojans must distrust Greeks, *especially* when they are offered what looks like a gift.⁶

In response, Allen explains that she shares feminist criticisms of the private sphere, as constituted by home and family life, but that what concerns her is that 'women have been confined to it and that it has not always been a context in which women can experience and make constructive use of opportunities for privacy'. (80-81). She says, 'My criticism...is only a criticism of a certain poor quality of life within the private sphere and not a rejection of the concept of a separate, private sphere. I leave open the question whether a normative distinction between the public and private spheres can ultimately be drawn, and if so, what principles ought to govern individual, group and governmental conduct respecting each'. (81).

However, it is hard to see how we are to defend the idea of a 'separate private sphere' without supposing *that* some form of public/private distinction is justified; and it is hard to see how we are to respond to feminist criticisms of privacy, which centrally concern its role in justifying and providing content for a public/private distinction, without taking a stand on *whether* such a distinction can ever be justified. Likewise, Allen claims that 'In so far as privacy has an economic basis, economic equality is a background condition for greater privacy'. (p. 81). However, this does not counter the argument, shared by feminists and Marxists, that privacy is itself an obstacle to economic equality because it restricts access to the wealth of the wealthy and precludes us from contesting the terms on which

⁶ Catherine A. MacKinnon, p. 100

wealth is distributed to begin with.⁷ In short, one of the difficulties with this important book, philosophically, is that it gives us many reasons to think that privacy is valuable and consistent with the equality of women, but never manages to demonstrate this, by explaining how we are to distinguish 'good' from 'bad' forms of privacy, or to render privacy consistent with sexual equality and democratic government.

These problems arise, I think, because Allen is insufficiently sensitive to what we might call the 'archaeological dimensions of privacy' – the way our contemporary notions and practices reflect different, often competing, conceptions of privacy from the Greco-Roman through to the medieval, the liberal and Socialist. Here, I think, Patricia Boling is a better guide than Allen,⁸ both in illuminating the republican distrust of privacy, echoes of which can be found even in such supposedly 'liberal' thinkers as Tocqueville,⁹ and in illuminating the intersection of republican and socialist concerns about privacy in the ambivalence about privacy, and the public/private distinction in 'liberal' feminists, such as Susan Moller Okin.¹⁰ No one, I imagine, would want to say that the mixture of American Constitutional ideas about personal identity and autonomy, sexual freedom and expression, the importance of independent schools and families fit naturally into other conceptions of privacy. But nor, I think, should we suppose that these different aspects of the American constitutional tradition fit neatly together from a philosophical perspective, or that their internal similarities are more striking than their differences. So instead of assuming that there is some central conception of privacy which can be distinguished from some concept of 'decisional privacy' embodied in American constitutional law, we may do better to suppose that ordinary conceptions of

⁷ I discuss this problem, in the context of Judith Thomson's claims that rights to privacy are just property rights in disguise in *On Privacy*, ch. 4, and in 'Privacy, Private Property, and Collective Property' in *The Good Society*, 21.1.(2012), a symposium on Property-Owning Democracy. As I try to show, the natural tendency to link claims to privacy and to private property are misplaced, because our interests in privacy can justify forms of collective as well as private property. And while our interests in privacy justify some forms of differences and of inequalities, they provide no justification for claims to monopolise valuable social or economic assets.

⁸ Patricia Boling, *Privacy and the Politics of Intimate Life*, (Cornell University Press, Ithaca, 1996), especially ch. 2, 'Privation and Privilege'. Boling is deeply ambivalent about privacy. So while she insists that the personal is not always political, she is deeply concerned about the ways privacy can block political discussion and change. I try to address those concerns in 'Privacy Rights and Democracy: A Contradiction in Terms?' *Contemporary Political Theory*, 5. (2006), 142-162.

⁹ Alexis de Tocqueville, *Democracy in America*, vol 2, Ch. 6 'What Sort of Despotism Democratic Nations Have to Fear'. Of the modern citizen, he thinks, 'Each one of them, withdrawn into himself, is almost unaware of the fate of the rest. Mankind, for him, consists in his children and his personal friends. As for the rest of his fellow citizens, they are near enough, but he does not notice them. He touches them but feels nothing. He exists in and for himself, and though he still may have a family, one can at least say that he has not got a fatherland'. Tocqueville, 1966, 692).

¹⁰ Susan Moller Okin, *Justice, Gender and the Family*, (Basic Books, NY 1989), especially ch. 6, 'Justice from Sphere to Sphere: Challenging the Public/Private Dichotomy'.

privacy, philosophical accounts of privacy and legal rights to privacy all embody a variety of archaeological elements, often implicit and unacknowledged, whose conceptual and normative coherence are far from clear, although linguistically they fit well-enough with ordinary usage.

Seen in this way, the challenge of providing a philosophically satisfactory account of privacy – assuming that such an account is possible – is to find some common starting point from which we can articulate and evaluate competing intuitions and perspectives on privacy – on what it is, on how it differs from related concepts such as liberty, on whether it is valuable, and on whether it deserves legal protection as of right. Otherwise, we are left with the trading of intuitions, which dominates much of the philosophical literature on privacy, and which does little to illuminate the *relative importance* of solitude and confidentiality to a persuasive conception of privacy, or the *relative importance* of these compared to more romantic and expressive dimensions of privacy.¹¹

For these reasons I think the importance of defining privacy, for philosophical purposes, is overstated, and that we would generally do better to leave this task until we have a much better sense of what it is that we wish to define. Brandeis' summed up his ideas about the differences between privacy and property in the common law with the claim that we have a 'right to be left alone'.¹² This is clearly unsatisfactory as a definition of privacy, and Brandeis clearly did not envisage his epithet that way. But its deficiencies apply as well to Allen's idea of privacy as restricted access – which suggests that a right to privacy is simply a restricted right to be let alone. As with other

¹¹ Compare, for example, Julie C. Innes, *Privacy, Intimacy and Isolation*, (Oxford University Press, 1992), for whom intimacy is the essential element of privacy, conceptually and normatively, or compare the different emphases on seclusion as opposed to intimacy in Timothy Scanlon, 'Thomson on Privacy', *Philosophy and Public Affairs*, 4 (1975), J. James Rachels, 'Why Privacy is Important' in *Philosophy and Public Affairs*, 4, (1975) and Jeffrey H. Reiman, 'Privacy, Intimacy and Personhood' in *Philosophy and Public Affairs*, 6. 1. (1976). The articles by Rachels and Reiman, like the article by Judy Thomson, which they criticize, can be found in ed. Ferdinand D. Schoemen, *Philosophical Dimensions of Privacy: An Anthology*, (Cambridge University Press, 1984). Unfortunately, the article by Scanlon is not reprinted there.

¹² See Samuel D. Warren and Louis D. Brandeis, 'the Right to Privacy [the implicit made explicit]', originally published in *The Harvard Law Review*, and republished in ed. Schoeman, pp 74-103. It is important to realise that the point of Brandeis' article was not to offer a definition of privacy, but to argue that common law protections of privacy need to be distinguished from common law protections of property, because our interests in seclusion, solitude and creative self-expression are not reducible to interests in property ownership. The force of that argument is unchanged by the lack of a definition of privacy for common law purposes, as is Brandeis' insistence that ordinary people, not just Millian eccentrics, or the wealthy, have fundamental interests in privacy. The contrast between Mill and Brandeis in this respect is important: Mill's argument for freedom of tastes and pursuits importantly depends on the social utility of the eccentric and talented. It provides little reason to grant privacy to the rest of us, with our banal diaries, conversations, love-lives and the rest, except as this might help the eccentric and talented. But for Brandeis, it does not matter whether your paintings are any good or not, just as it does not matter whether or not they have any economic value, because your interests in self-expression give you claims to prevent others from looking at, let alone taking them, without your express permission. In short, our interests in individuality are given a more democratic interpretation in Brandeis' article, for all its high-society background, than they are in Mill's passionate defence of liberty of tastes and pursuits.

definitions of privacy, it is at once overbroad, and so fails adequately to distinguish privacy from other values, and too narrow when compared to the variety of things with which privacy is associated. This is inevitable, given the lack of necessary and sufficient conditions for determining what counts as an instance of privacy – or of liberty and equality, for that matter. However, philosophical study of liberty and equality has been able to proceed on matters of substance in the absence of any agreed definitions, so it is doubtful that the lack of an agreed definition is a significant obstacle to philosophical reflection on privacy.

How, then, might we proceed if we want to vindicate the idea that some forms of privacy are valuable? The first thing to do, I think, is to treat privacy as a combination of seclusion and solitude, confidentiality and anonymity, intimacy and domesticity – leaving it open whether or how these different elements amount to a singular and distinctive value.¹³ Privacy as generally understood includes these different elements, although some conceptions of privacy will put more importance on some of these elements, rather than others. Moreover, if we suppose that ‘reasonable pluralism’¹⁴ means that people can define their values in rather different ways, and may also differ quite fundamentally in their evaluations of privacy, it would be a mistake to start our analysis by privileging some aspects of ‘privacy’ over others for moral reasons, not just for conceptual or methodological ones. If our values are to be consistent with the equality of men and women, we need to make sure that we do not arbitrarily privilege familiar or favoured aspects of privacy in our conceptual and normative analysis – otherwise, we will end up with conceptions of privacy which attach undue importance to the intuitions, experiences, desires, and interests of some people rather than others. Precisely because we cannot tack an ‘equal’ in front of the word ‘privacy’ and expect that to resolve doubts about the implications of privacy for equality, it is essential that our substantive account of the nature and value of privacy try to avoid confusing ‘privacy’ with any one of its many historical and contemporaneous usages.

Secondly, we must acknowledge openly that most conceptions of privacy are not democratic, in the sense that most reflect ideas about fact and value which are either incompatible with the idea that people should be political equals, or are as consistent with assumptions about the desirability of undemocratic forms of government as they are with democratic ones. So, if we want our ideas about privacy to reflect the view that democratic governments (for all their problems) have a presumptive

¹³ My argument here builds on A. Lever, ‘A Democratic Conception of Privacy’, unpublished thesis, MIT, 1997. Available at www.alever.net and ‘Feminism, Democracy and the Right to Privacy’, *Minerva* 9. (2005), 1-31

¹⁴ For the concept of reasonable pluralism, and its normative differences from other forms of pluralism, see Joshua Cohen, ‘Moral Pluralism and Political Consensus’, especially pp. 281 – 285, in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer, (Cambridge, 1993).

March 2013

legitimacy which the alternatives lack, we need to make that assumption explicit and build it into the empirical, normative and social-theoretic framework we use to identify and evaluate the importance of privacy.

Obviously, this is not easy, both because actual democracies are very imperfect examples of democratic ideals, and because our conception of democratic ideals and values is also imperfect, incomplete and contested. We clearly need, then, to work with as uncontroversial a conception of democracy as possible, while accepting that our assumptions must be substantive enough to capture the reasons why people might think that democracy is an attractive and presumptively legitimate form of government, even if it may not be the only legitimate form one around.

To that end, I suggest that we think of democracies as countries whose governments are elected by universal suffrage, and where people have an equally weighted vote and are entitled to participate in collective decisions, no matter their wealth, knowledge, virtue or pedigree. I will also assume that democracies require 'one rule for rich and poor' and for governors and governed- that they are constitutional governments – although the extent to which democracies must have formal systems of law, and distinctive legal institutions, is by no means settled. Still, whether democracies have the clear separation of powers that Americans aim for, and whether or not they make room for customary law of various sorts, I assume that democracies must have well-known and generally effective protections for political, civil and personal freedoms of association, expression and choice. Allowing for the familiar gaps between ideals and reality, democracies will entitle people to form a variety of associations through which to advance their interests, express their ideas and beliefs, and fulfil their duties as they see them. Democracies, therefore are characterised by protection not just for political parties, unions, interest groups and churches but also by the protections they secure for soccer-clubs, scientific societies, families, charities, and associations of the like-minded. Hopefully, this will give us enough information with which to evaluate competing claims about privacy, without prejudging important questions in the philosophy of democracy, or begging too many questions about what it is realistic to believe and do, or what, in an ideal world, we *would* do.¹⁵

Finally, I suggest that we use the example of the secret ballot to illustrate the differences between democratic and undemocratic ideas about privacy. The secret ballot can help us to understand the

¹⁵ Because we also need to find some acceptable assumptions about sexual equality, liberty, rights and duties with which to work – if we hope to find a common and acceptable framework to evaluate competing claims about privacy, in *On Privacy* I also suggest that we start by taking whatever forms of liberty are uncontroversially necessary to democratic government as examples of freedom; and that we take whatever forms of equality are uncontroversially necessary to democratic government as examples of equality. We can then use standard democratic rights to illustrate people's legal and moral rights, bearing in mind that the precise relationship of the legal and moral is controversial. So, in the first instance, we can clarify ideas about what it is to have a right or a duty by thinking about familiar democratic rights and duties whether legal or moral.

value of privacy, because it is unquestionably democratic, and an example of our rights to confidentiality and anonymity.¹⁶ Of course, using the secret ballot to illustrate anything about privacy presupposes that secrecy and privacy are not unrelated concepts and that, in so far as they share some content, the 'Australian ballot, as it used to be called, falls within that shared realm.¹⁷ This looks like a reasonable assumption, in so far as the secret ballot entitles voters to reveal how they have voted, if they so wish, while ruling out legal obligations to reveal their political choices. That is why the secret ballot is supposed to be compatible with freedom of expression. For most purposes, then, the 'secret ballot' could just as well be called the 'anonymous ballot', suggesting that whatever we ultimately conclude about the conceptual and normative differences between privacy and secrecy, we can use the 'secret' ballot to illustrate the former as well as the latter.

The Secret Ballot and the Value of Privacy

A familiar justification for the secret ballot is that it helps to protect people from coercion and intimidation. However, a moment's thought suggests that this is not its sole justification, important though that undoubtedly is. Were the secret ballot justified only because it protects us from bribery and intimidation, we would have to suppose that there would otherwise be nothing wrong with forcing people to discuss their voting intentions and acts with anyone who asks. In fact, it was precisely because he believed this that, after much agonising, John Stuart Mill voted against the secret ballot, on the grounds that by the 1860s voters should have no serious fear of bribery or intimidation, and could be expected to stand up to pressure from others.¹⁸ More recently, Geoffrey Brennan and Phillip Pettit have argued that the secret ballot is undesirable, although sometimes necessary.¹⁹ So, if the standard justification for the secret ballot were correct, we would have to concede, with Mill, Brennan and Pettit, that there would be no objection to getting rid of it were it not for worries about the safety of voters, and the fairness of elections.

Arguments for open voting suppose that because we can harm others by our vote, and vote on mistaken or immoral considerations, we should be forced to vote openly. That way, others can

¹⁶ The following paragraphs draw on A. Lever, 'Mill and the Secret Ballot: Beyond Coercion and Corruption', *Utilitas* 19.3. (2007) 354- 378; A. Lever, 'Neuroscience v. Privacy: A Democratic Perspective' in eds. S. Richmond, G. Rees and S. J. L. Edwards, *I know What You're Thinking: Brain Imaging and Mental Privacy*, (Oxford University Press, 2012, 205-223; A. Lever, 'Privacy and Democracy: What the Secret Ballot Reveals', forthcoming in *Law, Culture and Humanities*, 2013, available online at <http://lch.sagepub.com/content/early/2012/10/12/1743872112458745.full.pdf> ;

¹⁷ For the problem of how best to understand the relationship of privacy and secrecy see Allen, pp. 24-25.

¹⁸ See John Stuart Mill, *Considerations on Representative Government*, ch. 10 in H. B. Actons collection of Mill's *Considerations, Utilitarianism and On Liberty*, (Everyman, London, 1984). For an excellent discussion of Mill's political theory, and of his changing stance on the secret ballot, see Nadia Urbinati's excellent *Mill on Democracy: From the Athenian Polis to Representative Government*, (Chicago University Press, 2002).

¹⁹ Geoffrey Brennan and Philip Pettit, 'Unveiling the Vote', *British Journal of Political Science*, 20.32 (July 1990), 311-333.

correct our mistakes and the prospect of being exposed as selfish, insensitive or stupid will promote morally sensitive and considered voting. However, transparency will only improve the quality of voting if there are enough other people willing and able to correct, rather than to ignore or approve, our defects. And, of course, we must assume that people who are immune to information and arguments when they are free not to listen to them will prove willing and able to accept them when forced to do so. So the case for open voting is problematic even in cases where we are unconcerned with coercion and intimidation.

However, a more serious problem with open voting is this: that democratic citizens are *entitled* to vote whether or not others approve of this, or of their likely voting patterns. They are entitled to a say in the way that they are governed whether they are rich or poor, well-educated or not. Secret voting for citizens, then, reflects an important democratic idea: that citizens' entitlement to vote does not depend on the approval of others, or on the demonstration of special virtues, attributes or possessions. So, while democratic legislators may be more vulnerable to intimidation than citizens – as they are relatively few in number, and hold special power and authority *qua* legislators - it is the latter, not the former, who are entitled to keep their votes to themselves.

If these points are persuasive, it looks as though we can use fairly uncontroversial assumptions about democratic government to illuminate the nature and value of privacy, and to adjudicate morally amongst competing claims to privacy. People's claims to privacy, on a democratic conception of privacy, depend on the nature of the powers and responsibilities that they hold, and the status of citizen provides the baseline for determining what constitutes *special* power and influence over others, and special responsibility to and for them.²⁰ Hence the different claims to privacy of citizens and legislators and, as the Supreme Court recognised in *NAACP v. Alabama*, the different claims to privacy of the followers and leaders in voluntary and civic organisations.²¹ Because citizens can be employers and employees, mothers and fathers, parents and children, priests and parishioners, a democratic conception of citizenship constrains the way that we can understand people's claims to privacy in these different circumstances or roles.

²⁰ This, in part, is what explains the problem with Mill's argument. For Mill, citizens have the same duties of openness as legislators, because voting is a *privilege*, not a *right*. I discuss Mill's reasons for rejecting the idea of a *right* to vote, despite his evident belief that people can be morally entitled to vote, and reconstruct his case against the secret ballot in 'Mill and the Secret Ballot'.

²¹ *NAACP v. Alabama*, 375 U.S. (1958), in which Justice Harlan held, for a unanimous Court, that 'Inviolability of privacy in group association may, in many circumstances, be indispensable to freedom of association, particularly where a group espouses dissident beliefs'. I use the case as a tool for thinking about the importance of privacy to security in A. Lever, 'Democracy and Terrorism', originally presented to a discussion on 'Terrorism, Democracy and the Rule of Law, at the House of Lords, London, UK in July 2009, and published as *Thinkpiece* no. 56 by *Compass: Direction for the Democratic Left* in 2009. It is available online at <http://www.compassonline.org.uk/publicationsthinkpieces/>

For example, it highlights the difficulty of reconciling the very weak protections for worker privacy, in America, with the idea that workers are people who are the political equals of their employers and so cannot be treated either as irresponsible children, in need of constant surveillance and monitoring, or simply as tools for their employers' purposes and power²² In America, employees can be fired for failing truthfully to answer detailed questionnaires about their personal life and the number of siblings they have; they can be fired because employers do not like the charitable or voluntary work that they do in their spare time. They can be subject to medical and drug tests, and the scrutiny of their email, the contents of their desks, their phone calls. They can even be required to conduct their personal brokerage trade with their employer, rather than with other firms, so that their employer can track their personal trading patterns more easily!²³ This lack of privacy seems to be an expression of a deeply inegalitarian picture of the employer-employee relationship, sharing more in common with that between an absolute monarch, and his or her subjects, than between people who see each other as equals. Hence, it is difficult to reconcile democratic government with an idea of the workplace as a privacy-free zone, or one in which employee privacy is a privilege, dependent on the whim of employers.²⁴

Or consider the UK Guardianship Act of 1973, which was passed in response to the success of Joan Vicker's Private Members' Bill of 1965, and finally specified that the guardianship of children, in the UK, should belong to mothers and fathers equally.²⁵ Prior to its passage, women in England and

15. Finkin's Piper Lecture of 1996, published as 'Employee Privacy, American Values and the Law' in *the Chicago-Kent Law Review* 72, 1996-7), 221- 269, and his 'Some Further Thoughts on the Usefulness of Comparativism in the Law of Employee Privacy', in 14 *Employee Rights and Employment Policy Journal* (2010) pp. 11 – 53, with the discussion of the more recent cases of *Jespersen v. Harrah's Operating Co., Inc.*, 444 F. 3d 1104 (9th Cir. 2006) and *Ellis v. United Parcel service Inc.*, 523 F. 3d 823 (7th Cir. 2008). The former case concerned a female bartender who, after twenty years' successful service, was fired when she refused to wear makeup, as required by the new owners of her bar. The latter case concerned a United Parcel Service manager who was fired, after twenty years with the company, when it was discovered that he had a long relationship with, and eventually married, someone working in a different unit of the postal service, thereby contravening the company's blanket ban on 'fraternization'. Allen discusses the implications of this deeply undemocratic conception of workplace privacy at pp141-5, paying particular attention to problems of sexual harassment and the ways that this reflects and reinforces women's subordinate status in the workplace. However, part of the problem facing women is that American workplaces provide so little protections for their employees, whatever their sex or sexual orientation, and this obviously has particularly deleterious effects on those who are least well-placed to protect themselves by themselves.

²³ These examples come from Finkin 1996-7 pp. 226-7, 238-9, 241-2.

²⁴ For an extension of this argument in response to American laws on employee dismissal, and the tendency of American courts to extend the qualified privilege to disclose the grounds for an employees dismissed for misconduct to the entire plant, store or office workforce, see Matthew W. Finkin, 'Discharge and Disgrace: A Comment on the "Urge To Treat People As Objects"' in *Employee Rights and Employment Policy Journal* (1.1. Fall 1997) 1- 23. Why, Finkin asks, should we 'allow employers to treat people, even the morally miscreant, as public "object lessons"' for others. P.22

²⁵ For more details of the Guardianship Act, and the half-century-long struggle to grant women legal guardianship of their children, see Stephen Cretney's fascinating book, *Law, Law Reform and the Family* (Oxford University Press, 1998), pp 180-83. I use the example of this struggle against a self-evidently unjust and undemocratic law to question the force of arguments against judicial review by those, such as Jeremy

Wales, who were not widows, had to seek the consent of their husbands, even if they were estranged from them, in order to open a bank account for their children, to get a passport for them, even to arrange surgery for them. So British law rendered otherwise competent adult women incapable of taking moral and legal responsibility for key aspects of their children's wellbeing. Privacy, in other words, was understood in ways that denied women, as parents, freedoms and forms of seclusion, anonymity and even intimacy, which were taken for granted by men, with deleterious consequences for sexual equality within the family and outside it.

Of course, the Guardianship Act might have left it up to parents to decide for themselves who to designate as legal guardian of their children, or whether they would both hold guardianship jointly. For practical purposes, the state could have required all families to choose a guardian or guardians, and it could have provided procedures for families to alter these arrangements. Had the Guardianship Act let parents decide this matter for themselves, it would formally have increased parents' scope for private decision-making – for making decisions concerning their family affairs by themselves, and according to their own best judgements. However, without the legal requirement to include mothers as joint guardians of children with fathers, it is quite likely that many women would have been excluded from guardianship, whether they liked it or not. Their financial dependence would have made it difficult to insist on joint guardianship, and the force of precedent and of custom would have meant that the demand for joint guardianship would have seemed in need of a special justification that the 'natural', 'practical', 'convenient' option of sole male guardian would have seemed to lack. So, there are very good practical and symbolic reasons why we should celebrate the fact that the Guardianship Act insisted on joint guardianship, as opposed to some other alternative to husbands as sole guardians of children.

For some people, what was at issue in the Guardianship Act – joint custody of children – has nothing to do with privacy, properly understood. This seems to be Allen's position, since what is at issue is not 'restricted access' to *us* but, at best, parents' access to their *children*. For Allen, it is just a consequence of sexual inequality that increasing women's ability to decide familial, sexual and reproductive matters - seen as issues of liberty, not privacy - *also* increases their ability to restrict access to themselves.²⁶ So, conceptually, decisional privacy, including decisions in our intimate relationships, is unrelated to solitude, seclusion, confidentiality and anonymity.

We can now see why this position is hard to sustain, whatever one's beliefs about the value of privacy. The problem is that seclusion, solitude and anonymity *are* directly affected by laws that

Waldron, who assume that the proper site for changes to unjust laws must be the legislature, not the judiciary. See A. Lever, 'Democracy and Judicial Review', *Perspectives on Politics*, 7.4. 82009) 805-822.

²⁶ Allen, pp. 32-34, 98-101

force us to seek the consent of others before we act, whether we are elderly voters, pregnant teenagers, or parents with kids to look after. Inevitably, in explaining what we want and why, what we fear and why, what we can or will do, and why, we must expose our ways of thinking and feeling, acting, arguing and persuading, and not just our particular beliefs and commitments.²⁷ So if you believe that diaries are presumptively private, conceptually and normatively, you have reasons for thinking that decisions about voting, abortion and the care of children *also* concern seclusion, solitude, anonymity and confidentiality *even if* you ultimately conclude that other aspects of these decisions preclude classifying or treating them as (purely) private.

Moreover, as the secret ballot shows, what is at issue in the ways we conceptualise privacy is our *status*, not just the forms or extent of our solitude, anonymity and confidentiality. And it is our status as moral, not just political, equals that is at stake. The link between ‘decisional’ privacy and ‘restricted access’ privacy, then, is not simply that self-justification may expose us in ways that no-one desired or anticipated – but that who has to justify themselves to whom affects who is deemed to *deserve* privacy, on what terms, and why. If women cannot be trusted to look after children, there are, presumably, a great many *other* things that they cannot be trusted with either, and that, ideally, they should not be left alone, unsupervised by men, to be, to think, to feel, and to do. So our views of who is, or is not, allowed to make, or share in, decisions affects the ways we can conceptualise and evaluate privacy, even if we limit ourselves to privacy in the sense of seclusion, solitude, confidentiality and anonymity.

I have argued that the ability to make good on Allen’s claims about privacy requires us to find a set of background assumptions of fact and value that we can use to distinguish privacy from other things, and to distinguish ‘good’ from ‘bad’ forms of privacy. I have shown that familiar ideas about democratic government can provide that background, and that we can use the secret ballot to improve our understanding of the conceptual and normative aspects of privacy.

Obviously, this has only been a brief sketch of some of the terrain necessary to flesh out a democratic interpretation of the nature and value of privacy, and of the ways that it differs both from other conceptions of privacy and from other democratic values. For example, there is a second problem with arguments against the secret ballot – their indifference to the arbitrary and inegalitarian nature of public shaming as a way to prevent and to punish wrongdoing – which has important consequences for the way we approach disputes over the relationship of privacy, freedom

²⁷ Jean Cohen, ‘Redescribing Privacy : Identity, difference and the Abortion Controversy’ in *Columbia Journal of Gender and Law*, 3.1, 48-118. So far as I know, Jean Cohen was the first to treat the limits that privacy sets to public accountability as a strength, not merely a weakness, if care about democracy. In so doing, she took a familiar argument against privacy, from a democratic perspective, and turned it around.

March 2013

of expression and freedom of the media.²⁸ Further reflection on the secret ballot, therefore, highlights the importance of privacy to what I think of as a central democratic duty: the duty to treat each other as equally entitled to rule. This is not an easy duty to fulfil, but it is of great moral importance and helps to distinguish a democratic conception of ethics from alternatives. We all have duties not to cause gratuitous harm to sentient beings, as Utilitarians insist, and duties to not to treat others simply as means to our own ends, as Kantians note. These are duties we would have whatever the government under which we lived, and no matter our particular views of the legitimacy of democratic government. It is only if we think that democracy is a legitimate form of government that we *also* have the duty to see each other as beings with equal claims to rule over others. The consequences of this duty for our conceptions of privacy, freedom of expression and property ownership are complex, but important. Unfortunately, I cannot discuss them here. However, I hope that I have done enough to show why Allen's book is so important, if we care about a democratic conception of privacy, and how we might try to extend and develop its insights.

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²⁸ See 'Mill and the secret ballot' and *On Privacy*, ch. 2 for a discussion of the implications of this argument for the ethics of 'outing', the publication of 'kiss and tell' stories and celebrity journalism. As I try to show, the importance of being able to discuss our own lives publicly may warrant greater legal protections for 'kiss and tell' stories, even though these inevitably expose the lives of others, than for journalistic efforts to expose the relationships and sex lives of consenting adults who have no desire or intention of talking to the press.