

## Feminism, Democracy and the Right to Privacy

*Annabelle Lever*

### Abstract

This article argues that people have legitimate interests in privacy that deserve legal protection on democratic principles. It describes the right to privacy as a bundle of rights of solitude, intimacy and confidentiality and shows that, so described, people have legitimate interests in privacy. These interests are both personal and political, and provide the grounds for two different justifications of privacy rights. Though both are based on democratic concerns for the freedom and equality of individuals, these two justifications for privacy can be distinguished because the one is principally concerned with protecting the personal freedom and equality of individuals, while the other is principally concerned with their political equivalents. Feminists have often been ambivalent about legal protection for privacy, because privacy rights have, so often, protected the coercion and exploitation of women, and made it difficult to politicise personal forms of injustice. However, interpreting the content and justification of privacy rights in light of the differences between democratic and undemocratic forms of politics can enable us to meet these concerns, and to distinguish a democratic justification of privacy rights from the alternatives.

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Can legal rights to privacy be reconciled with democratic principles of government?

Although many people believe that the right to privacy is an important democratic right, privacy rights have been accused of justifying and perpetuating sexual inequality and, to date, we lack a persuasive account of the relationship between privacy rights and the political rights of individuals in a democracy. Indeed, given feminist criticisms of the right to privacy, it is an open question whether or not it is possible to justify legal rights to privacy on democratic grounds.

This paper claims that it is possible to provide a democratic justification for privacy rights, but only if we take seriously, and seek to accommodate, feminist criticisms of the right to privacy. To do so, it shows, we must revise standard liberal justifications of privacy rights in light of republican insights into the value of political participation. But to reconcile

privacy rights with democratic government, we must also draw on the strengths of liberal political thought, in order to remedy the overestimation of political ends, relative to all others, characteristic of republican ideas. Both steps, I argue, are justified by feminist critiques of the public/private distinction, and illuminate the importance of liberal and republican ideals to democratic theory and practice.

Liberalism and republicanism are distinctive ways of analyzing and practicing politics, even though there are many varieties of each, and neither has grown up in isolation from the other, or from alternatives like utilitarianism or marxism. While their internal variety means that they come in more or less democratic versions, I will largely be concerned with the ways in which they each tend to justify sexual inequality and undemocratic forms of power and privilege. In this way, I hope to illuminate feminist concerns with the right to privacy and, by relating them to the distinctive characteristics of liberal and republican thought, broadly construed, will show how we might reinterpret the right to privacy along more democratic lines.

For instance, what distinguishes liberalism, as a political tradition, is a tendency to identify the freedom, equality and happiness of individuals with the absence of state scrutiny and regulation. (Gutmann 1996, 64-68). But women, like other disadvantaged social groups, will often need state aid in order to achieve the freedom and equality promised by their legal rights. In so far as privacy rights prevent the state from altering the balance of power

between men and women, therefore, they will perpetuate sexual inequality and undemocratic government in ways that are typically liberal (MacKinnon 1983, ch. 8).

By contrast, republican political thought is associated with the idea that the freedom consists in self-government, and is threatened not just by foreign domination but by any needs, desires and beliefs that interfere with our capacities for active citizenship and identification with the common good (Pocock 1975). Not surprisingly, this is a political perspective that treats privacy with some suspicion, however natural or necessary it may be. Yet Virginia Woolf is not alone in believing that women need privacy to be the equals of men, and that their lack of privacy is, itself, a mark of their status as subordinates (Woolf 1929). So if an unduly sanguine approach to privacy can lead to characteristic justifications of inequality and coercion, reluctance to recognize the legitimacy of individuals' claims to privacy may also lead to recognizable patterns of subordination.

That, at least, is the hunch that this paper explores in the hope that feminist critiques of these two vibrant, influential and contrasting approaches to politics can illuminate the democratic potential of privacy. Thus, I will start by reviewing feminist critiques of the public/private distinction, in order to show why a democratic interpretation of privacy requires us to revise typical features of both liberal and republican views of politics, before turning to the justification of privacy rights, themselves, and the ways in which they can reflect, and build upon, a democratic conception of politics.

It might be helpful to note, at the outset, that I take democratic principles to require freedom for all adults, as this is generally understood, to vote and stand for election to positions of civil and political responsibility. They also require them to have access to the education and other resources necessary to participate in civil and political life freely and as each other's equals. Though I do not suppose that this requires strict equality of resources and opportunities, I assume that it sets fairly stringent limits to socio-economic inequality, although what these are, and how stringent they should be, are all well-known matters of controversy. Beyond that, I assume that the standard civil and political freedoms are required, in order to ensure that government is by the people, for the people.

#### **A. Feminism and the Right to Privacy**

The public/private distinction is meant to mark the legitimate limits of state action, although it can serve other purposes as well. (Weintraub and Kumar 1997, ch. 1). But that distinction, feminists often fear, is impossible to reconcile with the equality of men and women – or with principles of democratic government.<sup>1</sup> Indeed, the feminist slogan that the personal is political neatly encapsulates both the theoretical problem of conceptualising the public/private distinction in democratic terms, and the practical results of our failures to do so.

The slogan that the personal is political was a protest against sexual injustice and a challenge to the main obstacles to removing it which feminists had encountered. It was a

protest against the violence, exploitation and humiliation that characterised so much of women's lives not only in the workplace, or as members of political organisations and movements, but in the home and, more broadly, in their sexual and domestic relations with men. It was a protest, in other words, against practices quite common in the 1960s and 1970s – such as the exclusion of women from the professions, and from higher education, or the difficulties that they encountered if they wished to set up a bank account in their own name, and to get paid adequately for work that they had done. It was, as well, a protest against the difficulties that they faced if they wished to delay or even forego, marriage and child-bearing, and the high price that was demanded of them if they did so in social exclusion, ostracism, harassment and intimidation.<sup>2</sup>

But the slogan that the personal is political was, as well, a way of encapsulating women's insights into the ways that these practices had been justified in the past, and into the obstacles to overcoming them in the present. For it neatly and accurately summarised the idea not only that women are victims of injustice, but that these injustices have political causes, consequences and remedies, and should be treated as such. They have political causes, because sexual inequality is not simply a personal misfortune that falls from the sky, or the product of the personal deficiencies of particular women and men, but the predictable, and sometimes intentional, result of the ways in which societies distribute and justify power over others. But, once one grants the claim that the personal is political, it is hard to see what the public/private distinction could be referring to, or what could possibly be the point and justification of privacy rights. If the personal identities, aspirations and

relations of individuals are fundamentally shaped by political factors, and have important political consequences, then normatively and empirically it will be hard to determine what, if anything, is personal *rather than* political.

These problems are well illustrated by the limitations of contemporary justifications of privacy rights. These limitations reflect the seemingly endless, and apparently irresolvable, controversies amongst lawyers and legal theorists over Brandeis' claim that common law protection for privacy is not reducible to torts against defamation, theft, misappropriation and misrepresentation.<sup>3</sup> It dominates discussion of the extent to which the US constitution supports a distinctive right to privacy that is not simply a right to marry, procreate and be free from certain ways in which government can intimidate, threaten and demoralise its opponents.<sup>4</sup> In each case, what is at issue is this: the coherence of thinking that individuals have a distinctive set of interests that can count as privacy interests, and the justification for believing that, so described, these interests merit legal protection by right.

Similarly, philosophers find it hard to explain why individuals have a moral right to privacy – let alone one that deserves recognition and enforcement by law. At present, therefore, there is an unresolved debate amongst moral philosophers about the best way to understand the content and justification of privacy rights, and how far, if at all, these various solutions serve to meet sceptical complaints that talk of privacy rights — though, not necessarily, of other rights — is what Bentham so memorably referred to as ‘nonsense upon stilts’.<sup>5</sup>

In short, feminist objections to the public/private distinction and the right to privacy do not depend simply on the fact that these have often justified undemocratic forms of coercion and subordination, but on the apparent difficulty of coming up with anything better. Granted, feminists have sometimes blithely suggested that it would be no loss to the world if heterosexual love and families ceased in any recognisable form, or if we simply scrapped the laws and conventions that protect the privacy of individuals. For the most part, however, they have been deeply reluctant to make such claims, or to pursue what, so it might seem, is the logical conclusion of their ideas. This is as true of participatory democrats like Carol Pateman or Iris Marion Young, as of liberal feminists like Susan Okin. The result is that each ends their respective, and pretty trenchant, critiques of the public/private distinction, by calling for us to recognise that women, as well as men, have legitimate interests in privacy. (Pateman 1989, 133-6; Young 1990, 119-121; Okin 1989,128).

Jarring as such conclusions can seem, in light of the criticisms of privacy that preceded them, they are not philosophically unmotivated, nor unhelpful, given the problems that we have examined. For feminists are ambivalent about privacy precisely because their critiques of the public/private distinction are not simply objections to the way that privacy has generally been defined and protected, but — and importantly — to conceptions of politics that ignore or disparage anything but political activity, values, and ideas. Consequently, feminist criticisms of the public/private distinction are as much directed at

republican or participatory democrats, who celebrate political engagement and participation, and who exhort us to focus on the common good, as they are at liberals and democrats whose predominant concern is with the evils of government, or with the need to preserve the family as ‘a haven in a heartless world’.

For example, feminists like Carol Pateman and Joan Tronto have persuasively shown that the overestimation of political participation, relative to the activities involved in loving and caring for others, plays an important role in justifying sexual inequality (Pateman 1989, 122-3; Tronto 1996, ch. 7). The idea that love and care are natural, instinctive and mindless activities not only seriously underestimates their moral and political complexity but, inevitably, disparages the worth of those — typically women — who are most associated with them. The results, however, are not simply the legitimation of male power over women — important as that is. As Hannah Pitkin has shown in her critique of Hannah Arendt, such efforts to create a politics free from the personal needs and constraints of daily life turns politics into an arena for mindless self-display, and confuses the creativity and virtues that politics, at its best, can demand with the coercion and manipulation of others (Pitkin, 1981).

This is not because love and care are always valuable, or because the personal interests of individuals are inevitably consistent with the legitimate claims of others. Replacing the overestimation of political activity with an idealisation of personal attachments is, as most feminists acknowledge, no gain for our understanding of sexual equality, or of the



demands of political legitimacy. The point of feminist criticisms of republicanism, therefore, is that they, no less than their liberal counterparts, depend on an unduly sharp distinction between the personal and political interests of individuals. Consequently they, like their liberal counterparts, end up confusing the freedom and equality of women with both personal and political forms of subordination, and identifying the dignity of individuals with arbitrary distinctions between different ways of life. In short, as Anne Phillips has argued, feminist criticisms of the public/private distinction preclude a comfortable identification of democratic government with republican political ideals, even as they expose the limitations of liberal conceptions of politics. (Phillips, 2000)

### **B. Justifying Privacy Rights**

Feminist ambivalence about privacy, then, is not simply a product of neurosis, a failure of critical thinking, or of disingenuousness about the implications of their ideas. Rather it testifies to the ways that this work has exposed the limitations of even the best critical thinking on democracy, and of those political movements and social ideals from which feminists, like other men and women, have drawn their insights, inspiration and energy. Still, as we have seen, democratic government is justified not simply because the sharing of political power, or the alternation of ruling and being ruled are all valuable, and reasons to prefer democratic government to the alternatives. In addition, and no less significantly, one might add that where this is the case, democracy is justified by all the other things that it makes possible: the pursuit of knowledge, beauty, love, happiness, freedom from want or from illness – and that it makes possible not just for the privileged or fortunate few, but

for the many. So, if feminist criticisms of the public/private distinction are right, there should be nothing sexist or undemocratic in thinking that while organised collective effort can enable us to achieve ends and values that would otherwise be impossible so, too, it can prevent individuals from discovering what their interests are, and from pursuing these under their own steam, or in association with people who they like and trust.

It follows, therefore, that individuals have legitimate interests in personal as well as political forms of freedom and equality. As each is as important as the other, and neither is wholly reducible to the other, a democracy must protect both – even though there is no sharp or unchanging difference between them. Thus, whichever side of the public/private distinction we look at, individuals have legitimate interests that are both personal and political, and that constrain how a democracy can rightly treat its members, as the personal and political interests of individuals serve to justify state action, where it is justified, and to condemn it, where it is illegitimate. In short, whether we look at principles of democratic government, or at the demands of sexual equality, a concern for people's personal, as well as political, freedom and equality explains when government action is justified, and the differences between legitimate and illegitimate forms of government.

To show that this is the case, and to illuminate the reasons why this is so, I suggest that we distinguish between two ways that we might justify privacy rights on democratic principles. The one, I will call 'the political justification of privacy rights', the other, I will call 'the personal justification'. Whereas the former justifies privacy rights based on

individuals' interests in democratic forms of political choice and participation, the latter justifies them on the grounds that they help to protect the personal freedom and equality of individuals. Fully worked out, I believe, the two justifications of privacy rights will be very similar, because people's claims to personal life, in a democracy, must take account of other people's interests in political participation and judgement – and vice-versa. However, in the interests of clarity and brevity, I cannot fully lay out each of these justifications of privacy here. Instead, I will focus on those aspects of them that most clearly reflect feminist criticisms of the public/private distinction, and their implications for liberal and republican ideas about politics. Thus, I will argue that legal rights to privacy are justified even where individuals have democratic political rights — such as rights to vote, to form political parties, unions and the like — because, suitably defined, privacy rights represent a society's commitment to the freedom and equality of its members, and are useful, sometimes, necessary devices to ensure that legal rights are, indeed, democratic.

To avoid unnecessary complexities, I will assume that legal rights can be justified on democratic principles,<sup>6</sup> and will try to stick to pretty intuitive and generally accepted assumptions about what, if anything, a privacy right looks like, and what must be granted about politics in a democracy. Thus, I will think of privacy rights as primarily, but not exclusively, rights of solitude, intimacy and confidentiality – as whatever the controversy over these rights, privacy rights are generally thought to include these three. Similarly, I will assume that democratic politics involves making and enforcing decisions that will

affect everyone, aggregating and representing the different interests of individuals, and pursuing common ends through cooperation and competition. For there is, I suspect, no credible conception of democracy that excludes these elements, although different conceptions of democracy may emphasise some of these more than others.

*The Political Justification*

The political justification of privacy rights has two aspects: one, a claim that such rights are useful devices for promoting political participation and for testing that rights of political choice, association and expression adequately protect the legitimate interests of individuals. The other, is that protection for privacy itself is worthwhile, given a commitment to a politics that is free, and a reflection of the equality of individuals. Each obviously depends on the assumption that privacy rights can serve a useful purpose in a democracy, by supplementing the other rights of individuals. However, the emphasis in each case is slightly different, for the former stresses the political uses of privacy rights, whereas the latter locates their justification more directly in the political ideals of democracy itself.

The secret ballot, for instance, reflects the ways in which protection for the confidentiality of individuals can promote their political freedom and equality. However democratic our political rights look on their face, they will obviously fail to protect the legitimate interests of individuals if violence and intimidation can prevent their exercise, or determine the uses

to which these rights are put. Thus, the standard justification for the secret ballot is that it helps to ensure that voting is voluntary, by ensuring that no-one can force anybody to vote, or to vote in one way rather than another.

But the justification for the secret ballot is not purely instrumental, given democratic principles - despite the views of those, like John Stuart Mill, who believe that everyone should, in principle, know how everyone else has voted (Mill, 1993, ch. 10 and especially 323-9). Mill's idea, clearly, is that people must be accountable to each other for the way that they have voted, because voting can fundamentally affect the wellbeing of others. People can be entitled to vote, he claims, because voting can be necessary to their self-protection. However, Mill insists that a person's vote 'is not a thing in which he has an option; it has no more to do with his personal wishes than the verdict of a jurymen. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good' (324). Hence, he maintains, while secrecy can be justified in exceptional circumstances, publicity in voting amongst citizens, as amongst M.P.s, themselves, should be the norm (323 and 329).

Mill's view, here, reflects a republican concern with people's ability to form and then act on judgements without needing to defer to others, and a corresponding indifference to power differentials once this capacity is met. (Phillips 2000, 13-15) It is the independence of one's will in voting, not the weight of one's vote, that matters to Mill. Consequently, he supposes that were intimidation not so great a risk, the same standards of publicity should

apply to ordinary voters and legislators alike, despite the differences in their power, influence and responsibility.

But, in a democracy, voting is a right, and not simply a duty that one may have to exercise in certain circumstances. It is a right, because individuals have legitimate interests in political participation of their own, and these are not simply an expression of their duties to others. Thus, the standards of publicity and participation necessary to ensure that public officials are accountable to those they represent are not directly appropriate to the conduct of ordinary citizens: for the rights and duties of those who hold special trust for the wellbeing of citizens are properly different from those which define the essential ingredients of citizenship itself.

By contrast, the United States Supreme Court recognised in NAACP v. Alabama, that protection for freedom of association requires us to distinguish the claims to confidentiality of ordinary members of an association from those of its leaders or directors.<sup>7</sup> (The case concerned the rights of the National Association for the Advancement of Colored People to keep its membership list secret at a time when the Association was involved in a bitter fight with the State of Alabama over desegregation and the right to vote). As the Supreme Court emphasised, this distinction between the privacy of members and leaders of associations can be critical to ensure the political freedom and equality of individuals, while holding groups accountable for any harms that they cause. The political significance of this, as the Court saw, does not depend on the

ways that a group defines its principles and purposes, or on whether it is actually legally registered as a political organisation. In fact, the NAACP neither defined itself as a political organisation, nor sought to defend the privacy of its members by showing that it should be treated as a political organisation for the purposes of Alabama State Law. Nonetheless, the Court concluded, Alabama could not legitimately compel people to disclose their membership in the NAACP, as ‘Inviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs’.

These arguments can be generalised, I think, to explain the importance of privacy on a democratic conception of politics. For while the Supreme Court’s arguments, appropriately, reflected the particular features of the American Constitution, and the struggles over desegregation and voting rights in 1950s Alabama, the force of their arguments, philosophically, does not depend on these facts. The more onerous the requirements of legal association — administratively, as well as in terms of raw physical courage — the more likely it will be that these discriminate against groups who are poor, whose members are geographically dispersed, or against groups who are unpopular, or whose legal status is uncertain. Consequently, a concern to protect the democratic political interests of individuals can justify legal protection for their confidentiality as a complement to, not a substitute for, democratic rights of political choice and participation.

Individuals' political interests in privacy, however, are not simply interests in confidentiality, but in intimacy and solitude as well. These are not the same, because physical assault and coercion can perfectly well be anonymous and intimate, as with rape. Nor is it necessary for the state to violate our confidentiality in order for it to punish political dissent by ransacking our homes, or separating us from friends and loved ones. While, conceivably, privacy protection for our confidentiality, in conjunction with our other democratic rights, may be sufficient to protect our legitimate political interests, these examples suggest that we cannot take this for granted. Nor, indeed, from a democratic perspective is there any reason to privilege individuals' interests in confidentiality over their interests in intimacy or solitude. So far as one can tell each of these is as capable as the other of reflecting people's interests in political choice and participation and, thus, equally deserving of distinct legal recognition and protection.

For example, privacy protection for solitude and for associations based on mutual affection, love and care, can help to ensure that politics is voluntary, and that the costs of political defeat or failure do not threaten people with the loss of their lives, bodily integrity, or relationships that they cherish, and which comfort and sustain them. Privacy protection for the solitude and intimacy of individuals, moreover, can reflect the fact that there is no sharp distinction between the personal and political interests of individuals on a democratic view of politics, nor between the ways that individuals conduct their everyday lives and the ways that they collectively identify, represent and pursue their interests.



Take, for instance, Virginia Woolf's account of the importance of 'a room of one's own' to a writer in her book of that name. At one level, that significance is personal. Without it, Woolf suggests, budding writers will lack the chance to develop their talents and, above all, to view such development as legitimate. The hypothetical story of Shakespeare's sister (46-49) is meant to illustrate the point that 'any woman with a great gift in the sixteenth century would certainly have gone crazed, shot herself, or ended her days in some lonely cottage outside the village, half witch, half wizard, feared and mocked at'. (49) Indeed, Woolf notes, even so wonderful a novelist as Jane Austen believed that there was something discreditable in writing novels and was, according to her nephew, in the habit of hiding her manuscripts whenever 'servants or visitors or any persons beyond her own family party' came into the common sitting room where she worked (67).

But the point is not purely personal or artistic, even for Woolf. As Woolf sees, until women have some experience of lives lived independent of the needs of men and children, they will have only a partial and incomplete picture of the different relations in which women can stand to each other, the sorts of lives to which they can aspire, and the opportunities and resources they can claim as their due. Hence she looks forward to the day when a woman might write a novel where two women — one of them married, with children — might be presented as sharing a laboratory together and liking each other without this seeming in any way peculiar, to the novelist herself, or to her readers (82-4). At that point, women would no longer serve 'as looking glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size' (35), or have to

engage in childish competitions and comparisons in order to prove their individual and collective worth (106): for men and women would then be equals, even though they are different.

I would, therefore, disagree with Michael Sandel that privacy rights to solitude, properly understood, have nothing to do with the use of contraception by the unmarried, or with access to safe, legal and affordable abortion for women. (Sandel, 1996, ch.4) Leaving aside the historical and legal aspects of his arguments about the constitutional right to privacy in America, this picture of the right to privacy is morally and politically flawed. It requires us to idealise heterosexual marriage and to denigrate the alternatives, in order to maintain that the state can limit contraceptive use to married couples without violating the privacy of individuals. Moreover, it seems woefully indifferent to the costs of pregnancy, childbearing and childrearing on the privacy of women. However wanted the child, and however much we might improve the conditions under which women bear and care for them, they leave one with few opportunities for solitude and seclusion, and make one vulnerable to the nosiness and interference of others, even as they may leave one feeling deeply, desperately, alone.

Likewise, people need protection for their intimate relationships because prejudice and hostility, where widespread, can undermine people's capacities to defend their interests politically, and because democratic politics often takes the form of oppositional sexual and familial associations that are meant to illustrate the deficiencies of conventional moral and

political ideas. Companionate marriage, interracial marriage, marriage across religious lines – these are all ways in which people have challenged what they recognized as unjust subordination, and tried to put into practice their beliefs about the dignity of the person they love, and of the social groups to which that individual belongs. Similarly, people have challenged the value of marriage and, with it, traditional notions of morality, sexuality and human nature, by living openly together although unwed, or by refusing to marry just because they are going to have a child and to raise it as a couple. Demonstrating, not merely advocating, is an important form of political persuasion and necessary to political testimony. Thus, with the usual provisos for coercion, exploitation and deception, it is necessary for people to have broad rights of intimate association given a democratic conception of politics.

The flip side of this, of course, is that denying people the rights to have sex together, to marry or form families are all ways in which states can punish non-conformity, and entrench favoured patterns of power and privilege. Thus, in order to maintain white supremacy, the state of Virginia, like fifteen other states in 1967, forbade marriages between whites and blacks, and made such marriages legally punishable with imprisonment of between one and five years.<sup>8</sup> As the Court saw, when it struck down such laws, the fact that Virginia was willing to punish whites and blacks equally did not make these laws any less an affront to racial equality, or an unjust deprivation of freedom. Granted, even when people have the choice, they typically marry within, not across, lines of class and race – or of religion, in societies divided along religious lines. So, privacy in

these matters may replicate, rather than undermine, unjust patterns of power and privilege. But, at least, the coercive power of the state will no longer be used to maintain and justify these hierarchies; and once that happens, it becomes possible to consider how state action might help in the hard task of creating more democratic social and political arrangements.

### *The Personal Justification*

What, though, of the personal justification of privacy rights on democratic principles? Like the political justification it, too, has instrumental and intrinsic features. Whereas the former stress the ways that protection for privacy can promote the personal freedom and equality of individuals, the latter stress the importance to a democratic conception of persons of solitude, intimacy and confidentiality. Thus, in important respects the personal and political justifications of privacy rights are very similar — as we might expect — and reflect the fact that, on democratic principles, there are no hard and fast differences between voting rights and other rights, or between the personal and political interests of individuals.

For example, the reasons to protect the confidentiality of individuals by privacy rights is that this gives individuals considerable flexibility in their interactions with others (Rachels, 1975). The social conventions these support mean that people do not have to engage in elaborate rituals in order to be courteous, nor do they need to know, or pretend to know, the details of a person's life or social position, in order to show concern for them

as a matter of course. In this, as Judith Shklar and Nancy Rosenblum have emphasised, the face to face interactions of relative strangers in a democracy can be distinguished from those that are typical of aristocratic societies, and from the rudeness, condescension, bullying, and nosiness that makes even the most ordinary interaction with officials so burdensome and frustrating in authoritarian regimes (Shklar 1984, 136; Rosenblum 1998, 351-4). Moreover, because privacy rights enable individuals to relinquish their privacy voluntarily, and to different degrees in different contexts, protection for privacy by legal rights enables individuals to confide in those they trust, and to make physical proximity an expression of love and intimacy. More generally, privacy rights enable individuals to give personal meaning and nuance to their interactions with others, even when these are of a relatively common or stereotyped kind.

Thus, while protection for the privacy of women is often necessary to promote equality in the workplace, or in their treatment by those with whom they may have to interact regularly, its justification is not purely instrumental. Prohibiting employers from asking women about their marital status, sexual habits and reproductive plans, for instance, is clearly critical to their personal freedom and equality, in a world where paid employment is important to the wellbeing, status and self-respect of most people, and in which women can be harmed by prejudiced and coercive questions. In addition, it can reflect the democratic idea that it is for employees, as much as for employers, to determine the quality of their personal relations. Thus, the sharing of intimate or personal information should not be a reflection of the differences in power between employer and employee, as

it is when employees are forced to divulge information of a sensitivity and quantity that an employer never reveals; or when an employer can maintain the secrecy of information that will affect the job-prospects of an employee, but not vice-versa. Altering the privacy rights of individuals to reflect women's claims to freedom and equality with men, therefore, can enable a society to alter conventions and habits that are oppressive and demeaning to women, and that are hard to reconcile with a democratic conception of human relations.

What about the personal justification for solitude and intimacy? In each case, as with privacy protection for confidentiality, what matters is that legal protection be consistent with the personal freedom and equality of individuals, and with the differences between democratic and undemocratic governments. Hence, the instrumental reasons to protect the solitude and intimacy of individuals include, but are not limited to, the ways in which doing so helps people to pursue the things that they value, whether or not those ends are best realised separately or in conjunction with others. Privacy protection for solitude and intimacy enables individuals to determine which trade-offs between these goods best suit them at any one time, and over the long run. This is important to protect them from coercion and exploitation, because solitude and intimacy are not always jointly realisable, and individuals can, quite properly, differ in their needs, as well as their tastes and capacities, for each.

For example, some people feel most relaxed, most themselves and happiest in work that involves a great deal of solitude and independence, whether this means sitting at a desk or

working outdoors in the countryside or in the city. Such people have significant interests in seeing that they can pursue work that meets these personal characteristics, as they may be unable adequately to compensate for unhappiness at work by the security, pay or leisure that it provides. By contrast, some people hate to work alone and highly value the companionship that work provides. Thus, they prefer to work in places where they can form and maintain friendships through their work. Indeed, for some people, it is through their work that they feel most able to express love, tenderness and concern for others, and to find the happiness that others seek through sex, and romantic and familial attachments.

Protection for the solitude and intimate associations of individuals, then, are closely connected to democratic ideals and practices. We must often act collectively in order to achieve our ends, and must often associate with people we dislike. Protection for our solitude, as for associations based on our preferences, desires and interests, not only helps to make this bearable but reminds us that we are, nonetheless, individuals with distinctive rights and duties of our own. Privacy rights, from this perspective, symbolize, as they help to guarantee, our independence and equality as citizens by carving out areas of life in which, imaginatively and in fact, we can create a life that is recognizably our own.

People cannot easily think of themselves as free, or as the equal of others, when the state dictates to them what they must desire, or how they must conduct their intimate affairs. Thus, while the state has legitimate and important interests in ensuring that children are raised in loving, nurturing homes, it is increasingly clear that states cannot pursue these

legitimate interests by forbidding extramarital sex, making divorce and remarriage especially onerous, curtailing access to contraception and abortion or, indeed, by forbidding homosexual sex and marriage. Such policies, inevitably, reinforce unfounded prejudices about the capacities and value of individuals and these, in turn, inevitably affect the way we decide who is deserving of public trust, honour and leadership. As Justice Kennedy wrote, in his majority opinion in Lawrence et al. v. Texas, ‘When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres’.<sup>9</sup> However popular, therefore, such policies seem a travesty, rather than a realization of democratic values, and remind us that efforts to provide a purely procedural, or majoritarian, account of democracy are doomed to failure.

This means that we cannot identify the content and justification for privacy rights, in a democracy, by assuming that individuals have much the same needs and tastes for privacy, or that the connections between the privacy and the personal freedom and equality of individuals will be easy to define generically. For example, religious beliefs, not sexual and familial affection, define the nature and importance of intimacy in the lives of some people. For others, by contrast, love of country, of one’s troops, of music or sport form the prototype on which a lovable person or object is based. None of these, so far as one can tell, is inherently more consistent with the freedom and equality of individuals than the other. Nor is one of these intrinsically more meritorious or deserving of public recognition and support on democratic grounds. Hence, we should not expect privacy rights to



privilege family life over religious obligation, or these over love of nature or of art – for each is, in principle, as capable as the rest of reflecting people’s personal interests in freedom and equality.

In this the personal justification of privacy rights can be distinguished from liberal and republican ones. For while a democratic conception of persons reflects the liberal idea that people can legitimately differ in their needs and tastes, it extends and deepens that idea in two ways. It extends it by noting that because this is so, we cannot treat individuals’ legitimate interests in privacy simply as matters of taste, preference and conviction, as though people do not need solitude or intimacy, on occasion, in order to vindicate their freedom and equality. But attention to democratic principles deepens our sense of the connections between protection for the privacy of individuals, and protection for their freedom and equality. Hence, the reasons to protect personal privacy, in a democracy, mean that we cannot be indifferent to the ways that family circumstance and structure affect the life-prospects of individuals, or the ways in which the relations within, as well as between, families, may threaten democratic forms of privacy.

Feminist objections to the public/private distinction suggest that we must distinguish democratic claims to solitude and intimacy from liberal ones, but they also illuminate the differences between democratic and republican approaches to basic rights. Even if people have legitimate interests in political choice and participation, it does not follow that they must find their happiness in politics, or experience political engagement as an expression

of freedom, rather than of duty. Nor, indeed, is there anything especially democratic about the idea that individuals must be willing and able successfully to participate in politics in order to protect their legitimate interests in privacy, or anything else. Whether because they are old, young, sick, distracted by fear and anxiety, or because of their personal beliefs, obligations and temperaments, it can be hard for some people successfully to engage in collective action. Hence we cannot make success in electoral competition, however democratic, a requirement in order to guarantee the basic rights of individuals.

Thus, whether we look at democracy as a special form of government, or as a distinctive type of society, and whether we concentrate on the political or the personal dimensions of people's lives, it appears that privacy rights are justified on democratic grounds. Indeed, we can distinguish a democratic justification of privacy rights from alternatives whether we are more attracted to liberal and representative conceptions of democracy, or to republican and participatory ones. So, it seems fair to conclude that privacy rights are consistent with democratic government, and with the legitimate interests of men and women.

### **Conclusion**

There are, therefore, at least two ways to justify privacy rights in a democracy and, in principle, there may be many more. After all, it would be silly to insist that we *must* distinguish individuals' personal and political interests simply because we *can*. Indeed,

that would be to ignore the implications of feminist criticisms of the public/private distinction: for these imply that there can be many ways to determine the legitimate limits of state action, as there is nothing especially important, or distinctive, about the differences between the personal and political interests of individuals.

Thus, we could, in principle, work out a justification for privacy rights based on utilitarian and natural rights theories. Whatever the problems of such theories as they stand, women and men clearly have legitimate interests in happiness, and in rights if they are stateless. In fact, most conceptions of democracy owe a good deal to both traditions, as do most conceptions of legal rights. For these reasons, I suspect that it would be no harder, and just as useful, to use utilitarian and natural rights theories in the ways that I have just used liberal and republican ones - in order to work out a democratic account of the privacy rights of individuals, and to distinguish them from alternatives.

But it is unnecessary to go into such matters here. On a democratic justification of privacy rights, everyone has legitimate interests in privacy that include, but are not limited to, interests in solitude, intimacy and confidentiality. As these legitimate interests in privacy reflect the importance of democratic government to the freedom and equality of individuals, whether or not they actually live under such governments, it seems fair to suppose that the case for privacy rights we have just considered justifies legal protection for our privacy no matter who, or where, we are. But interesting and important as such

matters are if we want fully to develop and analyse a democratic theory of privacy rights, they are best left for another time and another paper.

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## NOTES

<sup>1</sup> MacKinnon 1983, ch.8; Olsen 1983; Pateman 1989, ch. 6; Okin 1989, ch. 6; Taub and Schneider 1990, ch. 7.

<sup>2</sup> Weisstein, 33-34; Kesselman, 42; Densmore, 72 – 3; Freeman, 176 and Spero, 368-9 in Blau, DuPlessis and Snitow, 1998. On the slogan that the personal is political, see Nicholson 1986, 17 – 43; and Phillips 1991, 92 – 119.

<sup>3</sup> Compare Warren and Brandeis 1984, Prosser 1984 and Bloustein, 1984.

<sup>4</sup> Compare Ely 1973; Bork 1990 and Glendon 1991 ch. 3; with Gerety 1977; and Gavison 1984.

<sup>5</sup> For classic examples of this debate see Thomson 1975; Scanlon 1975; Rachels 1975; and Reiman 1976. For more recent work on the subject see Allen 1988; Inness 1992; Boling 1996; DeCew 1997.

<sup>6</sup> For some doubts on this score, see Brown 1995, ch. 5.

<sup>7</sup> NAACP v. Alabama, 357 US, (1958). For a discussion of this case, see Westin 1967, 350 - 351.

<sup>8</sup> See Loving v. Virginia, 388 U.S. 1 (1967) It should be noted that blacks were allowed to marry people who were not black, as long as they were not white – whites, by contrast, were only allowed to other whites.

<sup>9</sup> Lawrence et al. v. Texas, 123 S.Ct. 2472, (2003) This case overturned a prior Supreme Court decision which held that the right to privacy did not cover consensual adult homosexual intercourse, even where it occurred in the home. That case was Bowers v. Hardwick, 478 U.S. 186 (1986).

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*Annabelle Lever is an Honorary Senior Fellow in the Philosophy Department of University College London, and is working on a book on privacy for Routledge.*

E-mail: [Annabelle@alever.net](mailto:Annabelle@alever.net)