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# **PRIVACY RIGHTS AND DEMOCRACY: A CONTRADICTION IN TERMS?**

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### **Privacy and Democracy?**

Do legal rights to privacy have a democratic justification? This question gets its importance from three things: first, that many people believe that the right to privacy is an important democratic right; second, that privacy rights have been accused of justifying and perpetuating sexual inequality; and, thirdly, that 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.

A brief look at the recent literature on privacy rights can illustrate these concerns. In 1967 Alan Westin published a substantial book on the right to privacy, called Privacy and Freedom. It started from the supposition, common in those days, that whereas regimes with totalitarian aspirations deny that individuals have legitimate interests in privacy, democracies are premised on the belief that individuals may legitimately keep certain areas of their life private, or free from unwanted scrutiny and interference by others (Westin, 1967, 23). Adequate protection for the privacy of individuals, Westin argued, is a hallmark of a society that values freedom, and his book concluded with a study of the threats to privacy posed by devices such as lie-detector tests, wire and telephone tapping and the like (Westin, 1967, ch. 14).

Until recently, however, discussions of the right to privacy largely ignored Westin's view that privacy rights are necessary to democratic government, when not actively challenging the

assumptions on which he had relied. For example, the philosophical literature on privacy scarcely mentions the word democracy, presumably believing that inquiries into democracy are unnecessary to resolve debate about the conceptual coherence of privacy rights, or their moral justification.

(Thomson, 1986; Scanlon, 1975; Rachels, 1975; Rieman, 1975; Parent, 1983; Innes 1992). Granted that this literature is generally preoccupied with moral, rather than legal rights, indifference to the political dimensions of privacy, and complacency about the virtues of intimacy, confidentiality and solitude characterise much, though not all, of this literature (Benn, 1984, Gavison, 1984. and DeCew, 1997 are notable exceptions).

Not so, it must be said, about feminist treatments of the right to privacy. For feminists the idea that individuals have legitimate interests of their own is appealing. Indeed, the feminist movement can be understood as an effort to extend this familiar liberal insight to women. However, feminists have shown, efforts to move from this insight to the claim that individuals have a right to privacy typically depend on arbitrary assumptions about the differences between personal and political objects, relationships, activities and spaces, even when these assumptions remain tacit, or implicit (Pateman, 1989, ch. 6; Fraser, 1992, ch. 6; MacKinnon, 1983, ch. 8; Anne Philips, 1991, ch. 4). In particular, they have argued, these arbitrary assumptions have reflected the idea that some things are intrinsically personal and therefore private, whereas others are intrinsically public and therefore political. But the assumption that the personal is private rather than political is not self-evident, nor is it always neutral or benign. On the contrary, our ideas about what is personal and political, they showed, have been fundamentally tainted by sexually inequalitarian beliefs about the natures of men and women, their capacities, interests, proper behaviour, aspirations and roles. As a result, even though democracies are, rightly, committed to protecting the freedom and equality of

individuals, feminists conclude, they cannot expect to achieve this end as long as rights are based on the belief that there are natural, self-evident, intrinsic or fundamental differences between personal and political matters.

Still, according to Iris Marion Young, if feminist criticisms of the public/private distinction pose some of the severest challenges to Westin's view that democracy requires protection for privacy, they also provide some of its strongest support. For feminist criticisms of the public/private distinction were not merely criticisms of the way that privacy rights have been conceptualised and justified in the past, but of political rights as well.<sup>1</sup> Even if shaped by past politics, Young suggests, the personal desires, interests and capacities of individuals must form part of the content and motivation for democratic politics, the stuff out of which individuals shape and realise their collective interests. As Carol Pateman has argued, the idea that the common good, or collective interest, can be determined in any other way inevitably implies that some people – usually privileged white males – have superior insight into what is for the good of all; and that those who are most closely involved in the provision of personal care or service for others are, ipso facto, unsuited to participate in collectively binding decisions.<sup>2</sup> These are precisely the assumptions that feminists have criticised in republican political theory and practice, that justified undemocratic rule in Greek democracies, and that seem to have been adopted, albeit unconsciously, by the new left movements that provoked “second generation” feminism (Philips, 1991, 93-4; Sirianni, 1993).

It seems, then, that individuals have legitimate interests in privacy, because the moral and political capacities of individuals can be manifested and nurtured through activities other than politics. (Ruddick, 1980, 342-367; Tronto, 1996; Boling, 1996, ch. 5). Such activities include the

care of the sick, the raising of children, artistic creation, the pursuit of knowledge, and the search for truth. These, no less than political participation itself can reflect the moral and political equality of individuals, their capacities for self-direction, for rational thought and action, for the realisation of self and the care of others. So, we can conclude, it is wrong to believe that individuals' interests and activities are illegitimate until touched by the magic wand of political activity – however democratic that activity. To suppose otherwise, indeed, deprives us of any substantive grounds for distinguishing democratic from undemocratic forms of politics.

But if feminist scholarship suggests that some form of privacy rights are consistent with democratic government, even required by democratic principles, we still lack a clear sense of what such rights might look like, or why they are necessary in a society where individuals have democratic rights of political choice, association and expression. Indeed, while two recent discussions of privacy by feminist theorists are suggestive, neither serves to remove the worry that privacy rights are, at best, redundant and, at worst, a Trojan horse, in a scheme of democratic rights.

For example, Patricia Boling suggests that individuals have at least four interests in privacy: (1) interests in protecting the spontaneity, openness and trust that nurture intimate and loving relationships; (2) interests in freedom from “Big Brother”, or over-weening, intrusive and paternalistic government; (3) interests in protecting and respecting diversity; and (4) interests in experimentation “as we develop intimate relationships with others” (Boling, 1996, 78-80). However, while arguing that “outing” is a violation of individuals' legitimate interests in privacy, and urging that feminists be sensitive to the value of privacy when politicising personal issues, (139-143; 143-152; 155-6), Boling refrains from concluding that individuals have a right to privacy. On the contrary,

as she makes clear, she remains deeply ambivalent about the value of privacy. In fact, she says in her conclusion, “I find convincing both the criticism that ‘the private’ obscures questions of power and the argument that privacy protects central and defining aspects of life” (159).

But if Boling is right to insist on the “double-edged” aspects of privacy, there is something unsatisfactory about leaving matters there, as she, herself, seems to sense. After all, according to Boling, arguments for outing often “posit a fundamental likeness that unites all gay and lesbian people into ‘the gay community’, ignoring or discrediting the variety of gay experience” (150). Outing robs individuals of the ability to decide who should know about their sexual identity and/or practices, although it is the outed person who will probably have to bear most of the costs that follow from publicity, and these can be extremely high, and often unforeseeable by strangers.<sup>3</sup> So, while Mohr, for example, persuasively maintains that the costs of protecting the privacy of other gays can involve one in duplicity and hypocrisy, perpetuate hateful stereotypes and foster self-contempt, the political case for outing is problematic (Mohr, 1992, ch. 1 esp. 26-31). This is not simply because outing may fail to generate the desired ends, although it may. The point, rather, is this: that “outing”, as generally practiced, seems to involve an undemocratic arrogation of power over the lives of others in its indifference to the personal burdens it imposes on individuals,<sup>4</sup> and its lack of accountability and of procedural fairness in the selection of who is to be outed and who is to do the outing (For a similar concern see Gavison, 1984, 368)

It does not seem, then, that we are condemned to choose between an uncritical embrace of privacy rights and the insistence that privacy has costs as well as benefits. On the contrary, the example of outing suggests that a distinction between democratic and undemocratic forms of politics

can help us to identify and evaluate the costs and benefits of protecting privacy. Though doing so may still leave us uncertain what to conclude about the value of privacy in particular cases, Boling's work points to the conclusion that individuals have legitimate interests in privacy which, on occasion, may merit protection by legal rights. However, without systematic attention to the relationship between privacy and democracy, it is impossible to know whether or not this is really the case.

By contrast with Boling, Jean Cohen is confident that individuals have legitimate interests in privacy, and that these are sufficiently important to merit legal protection. For Cohen, our interests in privacy are interests in "securing decisional autonomy, inviolability of personality...bodily integrity and a degree of control over one's identity needs as socialized, solidary individuals" (Cohen, 1996, 192). Protection for these interests "frees one from the pressure to adopt as one's own reasons the reasons that everyone accepts", (p.202) and thus helps us to reconcile a commitment to treating people as equals with the variety of needs, beliefs and tastes that they may have. Hence, she maintains, "To cast the right to abortion as a privacy right is to acknowledge women's 'difference' while leaving it up to each individual how to define this difference" for herself. (p. 207) Rejecting what she sees as unrealistic accounts of public space or politics, which seek simultaneously to realise such things as "open-ended discursive reflection on public norms, legally binding decisions, the agonistic enactment of individual and social identities and the elimination of substantive inequalities" amongst citizens, she argues that privacy rights are necessary to achieve the diverse goals of democratic government, and to secure the freedom and equality of individuals.<sup>5</sup>

This is an appealing argument, which draws on liberal insights into the value of privacy, but frames them in terms of democratic ideals and concerns. Our interests in privacy, she makes clear,



are not the interests of individuals whose personal needs and circumstances are unshaped by politics. On the contrary, they are the interests of individuals for whom this is, precisely, the case. As Cohen says, “privacy rights shielding personality development protect the inviolability of socialized individuals”(102). But that is not simply because politics is often undemocratic. Rather, Cohen suggests, our interests in democratic government can, themselves, justify the interests that privacy rights protect, because democracy authorises individuals to define their own interests, and recognises that these need not look alike.

On this conception of our interests in privacy, politics can legitimately shape the personal interests of individuals. But that is no reason to suppose that individuals lack legitimate interests in privacy. All it means is that individuals’ privacy interests, in so far as they are legitimate, will be different in key respects from those they would have under other forms of government, and different from those they would have in a state of nature – or, if stateless, or deprived of citizenship in any country.

This is, I think, the import of Cohen’s work, and it takes us a long way to a democratic justification of privacy rights. It suggests that we might tie individuals’ interests in privacy to their interests in democracy, without implying that those interests are simply evidence of the deficiencies of democratic rule, or merely means to secure democracy in a world where our political choices are seriously constrained. However, the difficulty with Cohen’s argument is that her account of democratic politics is too thin to sustain the claim that privacy rights are consistent with democratic government, let alone necessary to it. This is largely because Cohen is principally concerned to rebut misconceptions about the right to privacy, misconceptions which she correctly believes to have

obscured the democratic potential of privacy rights.<sup>6</sup> As a result, her positive account of the content and justification of those rights is relatively brief, and does not systematically address the relationship between privacy rights and political rights in a democracy. In particular, it fails to explain why individuals need privacy rights if they already have democratic political rights, and how far the justification for privacy rights is consistent with the justification of democratic rights of political choice and participation.

In what follows, I hope to clarify these issues, by presenting an account of our interests in privacy, one which starts from what I hope will prove reasonably clear and uncontentious assumptions about the content and justification of democratic political rights. I will try to show why individuals have legitimate interests in privacy, even in a democracy, where they have equal rights to vote, to stand for political office, to assemble, form parties, petition and remonstrate with government and generally to publicise their opinions about the proper conduct of collective affairs.

I will argue that while privacy rights are not costless, or free of risk to democratic government, from a democratic perspective those costs are usually justified by our interests in democratic forms of political participation and association. Developing the idea implicit in Westin, and partially worked out in Boling and Cohen, I will argue that a justification for privacy rights is implicit in a democratic vision of politics as the free cooperative activity of equal citizens.

I will be making certain assumptions about democratic rights, for the purposes of clarity and simplicity. First, I will assume that legal rights are consistent with democratic government, and generally necessary to it, in order to focus on the justification for legal rights to privacy.<sup>7</sup> I will

assume that legal rights protect individuals' interests, and thus that they may be justified in terms of the legitimate interests that they protect.<sup>8</sup> Hence, I suppose, a democratic justification of privacy rights needs to reflect a democratic account of the legitimate interests of individuals. Secondly, I will assume that while there are different forms of (constitutional) democracy, the essential features of democracy are: (1) that it protects the freedom and equality of individuals; (2) that all individuals who are bound by the laws of a democracy are, in principle, entitled to participate in determining those laws; (3) that in a democracy individuals will have civil rights and socio-economic rights, as well as political rights, although the precise boundaries amongst these different types of right may be controversial.

In short, I will be assuming that in a democracy individuals are to be treated as free and equal, that rights are designed to protect this freedom and equality, and that all individuals have legitimate interests in political participation, whatever their other legitimate interests. So, while my assumptions about democracy are inconsistent with the idea that we can identify democracy with majority rule simpliciter, they reflect the assumption that sexual equality is essential to democratic government and so can legitimately constrain the decisions of even democratically elected political majorities (Joshua Cohen, 1994 and 1996).

### Defining Political Rights

Defining and justifying rights in a democracy can be frustrating, because if these rights are to protect the freedom and equality of individuals, they must also be revisable by individuals who are free and equal. So their content and justification cannot be settled once and for all. Still, for the

purposes of this paper, I think that we can define political rights as rights of political choice, association and expression, using “collective” as a synonym for “political” where that would be helpful.

This gives us three broad categories of political rights with which to illuminate and test the claim that privacy rights have a democratic justification. It accords with standard examples of fundamental political rights in democracies and has a certain theoretical and intuitive appeal. As the content of democratic political rights is necessarily open-ended and hard to define, the definition of “political” needs to be sufficiently open so as not to prejudge questions central to the freedom and equality of individuals. On the other hand, because democratic politics is meant to be in the collective interest of individuals and, in principle, to be open to every one, treating democratic political rights as rights of collective choice, association and expression seems appropriate, consistent with feminist criticisms of the public/private distinction, and with reasonable assumptions about democratic government.

### Defining Privacy Rights

Having defined political rights as rights of collective choice, association and expression, I think we can define privacy rights as rights of personal choice, association and expression. This has a certain intuitive appeal, enables us to look at privacy rights generally, and without making unnecessarily controversial assumptions about their content and justification, and preserves the contrast between the personal and political that lies at the heart of feminist concerns with the right to privacy.

This certainly is not the only way we might think of privacy rights, and nothing of substance is meant to turn on defining them this way. In particular, as I will show, we are not committed to justifying privacy rights on personal grounds simply because we have described them as rights of personal choice, association and expression. However, this way of describing privacy rights is attractive because it enables us to avoid choosing amongst competing accounts of the right to privacy in the philosophical and legal literature, or deciding, for example, whether or not a right to privacy would include a right to abortion – democratic or otherwise. This is desirable to avoid unnecessary controversy over conceptual and normative matters that may simply be irresolvable, or resolvable only once we have established whether or not privacy rights have a democratic justification. Thus, because privacy rights are often thought to include rights of personal choice, association and expression, by both their critics and proponents, and because this way of looking at them accords with a relatively intuitive or naïve list of what counts as a privacy right, I hope this way of defining them will prove helpful.

### **Justifying Privacy Rights**

Individuals have good reasons to protect privacy by right in a democracy. Rights of personal choice, association and expression can help to secure the political rights of individuals and to ensure that these are, in fact, democratic. For example, rights of personal choice can help to protect rights of political choice in ways analogous to the protection that the latter offer for the civil and socio-economic rights of individuals. That is, rights of personal choice may provide a relatively simple and effective way of preempting threats to democratic political rights, thus strengthening and facilitating

the exercise of the latter.<sup>9</sup> Equal rights to privacy can help to ensure that political rights are, in fact, defined and justified in ways that reflect the freedom and equality of individuals, by giving them a means that is not dependent on the exercise of political rights with which to define and pursue their legitimate interests.

For example, equal rights of personal choice can provide a way for individuals to test the claim that their political rights in fact reflect their freedom and equality as individuals, and to revise their political rights, should these be undemocratic. They do this by enabling individuals to discover what is valuable or important to them in life, and enabling them to act accordingly in ways that are consistent with the freedom and equality of others. Hence, as Jean Cohen claims, when suitably defined, “personal privacy rights protect the constitutive minimal preconditions for having an identity of one’s own. Moreover, they ensure respect and protection for individual difference – for individual identities that seem to deviate from the ‘norm’ embraced by society at large (in law) or by one’s particular subgroup”(Jean Cohen, 201, emphasis in text).

At the limit, privacy rights give one the right to refuse political participation, to screen out the demands of others for one’s willing or enthusiastic support or, even, for one’s presence. Hence, they facilitate forms of protest and non-compliance that, while relatively non-confrontational and costless, can be politically effective, by depriving meetings of their members, or would-be leaders of their followers. Less drastically, privacy rights give individuals the flexibility that facilitates political participation, by enabling them to prioritise their time, to share tasks with others, and to engage in ad-hoc or more formal arrangements that are mutually beneficial. In short, because rights of personal choice, where equal, give individuals the chance to define and pursue a variety of different ends,

alone or in conjunction with like-minded others, they provide a useful, sometimes necessary, support for democratic rights of political choice.

Similarly, equal rights of personal association can be critical to the ability of individuals to protect their political interests, even if they have democratic political rights – and useful, even when not strictly necessary. They can enable individuals who are timid, unsure of their political skills and value, or uncomfortable with established forms of politics to develop self-confidence, politically relevant skills, and forms of association that better reflect their interests, experience and sense of themselves (Sirianni, 1993; Philips, 1991, ch. 5). They can also directly help to combat forms of inequality and unfreedom that are likely to undermine even the most democratic political rights.

For example, if rights of political association are to be democratic, it is clearly important that individuals be capable of exploring competing conceptions of politics, different ways of associating together, and different reasons for doing so.<sup>10</sup> Were this not so, the freedom and equality of individuals would be consistent with laws suppressing organised dissent, that made "loyal opposition" a contradiction in terms, and that allowed one model and one model only for deciding how society should be governed. As such laws are clearly the antithesis of democracy, not its fulfillment, we can expect democracies to contain a range of organisations through which individuals clarify and promote their political interests as they understand them, even though this may generate confusion and conflict or leave individuals with divided loyalties at times.<sup>11</sup>

Two implications for the personal associations of individuals follow from this conception of democratic political rights. First, that as long as their associations are voluntary and free of exploitation, deception and subordination, individuals should not have to show that their associations

are political rather than personal, concerned with the common interest rather than with some subset of that, in order to be legitimate. Such demands are likely to reinforce existing views of politics, discourage democratic forms of political organisation and license arbitrary constraints on the associative liberties of individuals in ways that privilege the interests of those who are already well represented politically at the expense of those who are not. Secondly, because a common tactic for discouraging political organisation is to strike at the personal associations of individuals - to separate friends and loved ones, to sow dissension, doubt, fear and hate amongst individuals - a democracy needs to ensure that individuals are able to sustain personal ties to others, as well as to ensure that these adequately reflect their freedom and equality.

Feminist criticisms of existing political institutions and associations can illustrate the first point, as can the experience of those who participated in "consciousness raising" groups (Eisenstein, 1983, ch. 4; MacKinnon, 1989, ch. 3). Established political organisations, feminists have argued, are frequently insensitive to the needs and interests of women, when not actively hostile to them (Lovenduski and Hills, 1981; Maroney, 1986). As a result, neither their ends, nor their internal structure do justice to the complexity of women's lives, or adequately counteract their difficulties in organising politically. Moreover, because women themselves may not always be able to pinpoint the factors that disadvantage them individually and as a group, it is important that they be able to explore their lives together, to experiment with different ways of organising and of representing their interests, free from the need to win the approval of others, publicly to defend the merits of their efforts, or to claim that these are of general, rather than particular or personal significance. This is because the personal can be politically valuable or beneficial even when individuals are currently unable to show why this is so, and because a concern for the associative freedom and equality of others strongly suggests that the associations of individuals should be generally tolerated, whether or not they serve any definable public purpose, so long as they do not depend on the coercion or subordination of members.



The second point supports the first, because individuals may legitimately differ in their needs for the love, care and support of others, as in their capacity to provide these goods. Youth, age, infirmities of one sort or another, as well as different life experiences, values and the like, all mean that our capacities for political participation frequently depend on our ability to form ties of love, friendship, trust and loyalty. Though not invariably political in their motivations or their consequences, individuals can have political interests in forming such relationships in a democracy, and in ensuring that these, like their other associations, do not compromise their freedom and equality. As Boling notes, (p. 118) women's organisational styles and their role as mothers have often been connected in movements for urban renewal, temperance, compulsory education and social work, although there is no necessary connection between mothering and democratic politics.<sup>12</sup>

Similarly, participation in sporting activities and associations have promoted the health and self-confidence of women and their willingness to challenge sexist priorities and expectations at the local sports club as well as at universities, schools and workplaces, although such activities are often pursued out of self-interest rather than a concern for the common good (MacKinnon, 1987, ch. 10; Young, 1990, ch. 8). Where voluntary and free of subordination, such associations are no less expressions of the political freedom and equality of individuals than any others. As such, individuals can have political interests in forming a variety of personal ties to others that a democracy will recognise and protect, although what is distinctive, valuable or special about these personal associations may not always be easy to define.<sup>13</sup>

Finally, equal rights of personal expression can help individuals to secure democratic forms of political expression and to democratise the exercise of important democratic rights. As individuals may, legitimately, be uncertain about the political worth of their views, the best way to present them, or their likely effects, equal rights of personal expression can be essential to democratic government.

Privacy rights enable individuals to confide in those that they trust, and to examine and revise their ideas before presenting them to strangers. By providing a framework through which individuals can develop and test their powers of persuasion and self-expression, equal rights of personal expression can enable even the shy, the socially disadvantaged, or the politically unpopular to share their political views with others, and to enjoy the benefits of democratic expression and communication.<sup>14</sup>

Again, such rights can be especially important to historically disadvantaged groups who, after all, may be quite sceptical of the value of democratic political rights, uncertain that they are secure, and uncomfortable exercising them. Although important forms of political expression in a democracy will be relatively anonymous – such as participation in a mass demonstration, joining a large political party, or casting a secret ballot – most forms of political expression are not. They require us to stand up, speak out and be counted in ways that can be unfamiliar or alien, and in circumstances that may be hostile. It is very important, therefore, that in a democracy individuals have other opportunities to express their political sentiments and ideas, and to experiment with unconventional forms of political communication.<sup>15</sup> Without such opportunities, we can expect much political debate to be counterproductive, self-defeating and unreasonably costly to the most vulnerable members of society, and that socially privileged groups will continue to set the terms of collective decisions, even in a democracy.<sup>16</sup>

### The Costs of Privacy Rights

That is not to say that privacy rights are costless, or that they are always democratic in their effects. Privacy rights, to be politically effective, must constrain the ways we define and pursue our

political interests. Nor, even with sincere effort, are they always democratic. So privacy rights are not always justified by the political interests of individuals, even if they sometimes are. Indeed, because democratic political rights will, inevitably, help to protect the personal freedom and equality of individuals, and will be aided in this task by other democratic rights and institutions, it is possible that on occasion privacy rights will serve no useful political purpose, and so lack a democratic justification. On the other hand, one should not exaggerate the difficulties of the political justification for privacy rights. The fact that privacy rights work by constraining the ways individuals pursue their political interests is the way that political rights work. Off hand, there is no reason to think this any less democratic in the one case than the other. Indeed, it is hard to see how it could be otherwise, when it is the same set of interests – democratic political interests – to which justification appeals in both cases.

While it is true, in other words, that privacy rights may prevent us from politicising some issues that ought to be politicised because doing so is inconsistent with the personal choices, associations and expression of individuals, it does not follow that the constraint is undemocratic or illegitimate. Not only does democratic politics preclude the simultaneous politicisation of all legitimate grievances, but it depends on the ability and willingness of individuals with different interests, needs and beliefs to converge and cooperate on particular goals and objectives. Thus, the inability to politicise an issue, or difficulty in doing so, cannot as readily be equated with unjustified self-blame – or unjustified blame by others – as critics sometimes suggest.<sup>17</sup> There are, after all, a variety of reasons why an issue that merits political attention may not receive it – including the fact that, in a democracy, it is relatively easy to publicise legitimate grievances and concerns, and so it is likely that at any one point many of these will already be competing for public attention.

Nor can the depoliticising effects of privacy rights be as readily connected to deprivation as Boling sometimes believes. Such an assumption, after all, ignores the fact that democratic participation, itself, can be burdensome, frustrating and risky, and its rewards uncertain. The fact that an issue merits politicisation does not mean that one ought to be the person to politicise it, or to participate with others in doing so, as there are a variety of other factors – strategic and more personal – that legitimately merit consideration as well. In short, while it is likely that privacy rights as currently defined and justified do place undemocratic constraints on politics, and unjustly deprive individuals of opportunities for political participation, this is no more a necessary feature of privacy rights than of political rights themselves. Rather, it is an artifact of the way that privacy rights have generally been defined and justified – that is, in ways that are insensitive to individuals' legitimate interests in political participation.<sup>18</sup>

So, I suspect, the costs of privacy rights cannot as readily be identified with depoliticisation as some critics suppose, though they can be nonetheless real for that – as we may suffer from selfishness, loneliness, irrationality, conflict and even coercion without this being attributable to some failure in our political institutions, (or remediable by political means).<sup>19</sup> Hence, it seems important to insist that in a democracy we cannot be indifferent to the way that the costs of privacy rights are distributed, nor to the possibility of lessening those costs consistent with the rights of others. While this is not the place to pursue this point in more detail, (nor, unfortunately, do I yet have anything very useful to say on the matter!), it seems likely that the sorts of devices that theorists advocate to minimise and equalise the costs of freedom of expression and other rights, might usefully be adapted for privacy rights (Joshua Cohen, 1993, pp.245-250 and 1996, 110-113; Okin, 1989, 180-182). Thus,

subsidies for the exercise of privacy rights might be justified in certain cases to facilitate the formation of private associations by those who might otherwise face obstacles in associating together – such as the old, sick, young, poor.

These need not take the form of subsidies for privacy rights specifically, because such things as decent public transport, well-lit and safe streets, rooms in the town hall, library, church, school or YMCA, for example, might facilitate the exercise of political as well as privacy rights. So, too, with affordable and decent childcare and other familiar items, such as safe and effective contraception, that feminists habitually press for. In other words, theory suggests that privacy rights can have a variety of negative features that may need to be distinguished; and practice precludes easy optimism about our willingness and, perhaps, our ability, to address them. But neither provide reasons for thinking that privacy rights are intrinsically undemocratic, or that as a general matter our politics will be any more democratic, or our rights secure, in their absence .

A focus on the depoliticising effects of privacy rights, however, should not lead us to ignore another way in which privacy rights might prove problematic.<sup>20</sup> It is, in principle, possible that protecting the privacy of individuals requires us to protect undemocratic beliefs and, even, explicitly anti-democratic associations, even in a democracy. While the justification of privacy rights offered here provides no license for the coercion and exploitation of individuals, whether as members of a particular group or as outsiders, it provides no clear guidance in the case where an organisation or association is avowedly undemocratic in its aims, but seeks to realise these through democratic means. In short, because an organisation can be democratic on some dimensions and not others it is, I think, a genuinely contentious matter whether or not privacy rights will extend to the internal

organisation and communication of racist, sexist and religiously intolerant organisations that do not engage in violence, deception or the exploitation of others.

The problem is a familiar one from debates about the justification for rights (of freedom of expression) that allow the public expression of racist and sexist views, or ( in the case of religious rights) that protect the religious practices and organisations of the intolerant. In the privacy case, the problem is that a group may be entitled to protection of its privacy, given some of the reasons for protecting privacy by right in a democracy, whereas on others the state would be justified in limiting its activities, scrutinising its internal records and memos, and monitoring its conversations.

What the state should do in such cases is a complicated matter, because we must judge not only the relative moral importance of contrasting reasons for protecting privacy in a democracy, but the significance of empirical and other factors too. But the fact that we may have to make such complicated decisions is no reason to reject the right to privacy. As we have seen, individuals have legitimate political interests in privacy and these are fully as important, and as deserving of legal protection, as individuals' interests in political choice, association and expression. Moreover, absent evidence that democracy is an all-or-nothing affair, rather than a matter of the degree to which different requirements and goals are met, there is no reason to assume that the application of democratic rights ought to be free of the sorts of problems canvassed here. After all, unless there is a simple test for democracy, there can be no simple way of determining the legitimate claims of individuals in a democracy.

Nonetheless, it may be worth noting the broad applicability of the United States Supreme Court's reasoning in NAACP v. Alabama.<sup>21</sup> The case concerned Alabama's demand that the National Association for the Advancement of Colored People disclose its full membership list to them. The Supreme Court denied the request, arguing that Alabama's legitimate interests in holding organized groups accountable for any harms that they cause could adequately be met by a list of the leaders of the NAACP alone. To demand that all members sacrifice their anonymity in order to exercise their rights of association, the Court argued, would deter people from forming and joining associations, particularly if these are unpopular or oppositional in their politics. In short, the Court concluded, freedom of association and accountability in association can generally be reconciled by distinguishing the privacy rights of leaders from those of ordinary members.

The NAACP is an organization motivated by the legitimate desire to overturn laws and customs that subordinate blacks to whites. While it used civil disobedience, in the past, to realise its aims, it studiously avoided the use or advocacy of violence. As such, it clearly has stronger claims to privacy than groups which are avowedly racist in their objectives and/or whose attitude to violence is ambiguous or worse. Still, considerations of principle and practicality suggest that the Court's distinction between the privacy of leaders and of ordinary members of an association provides an appropriate baseline, or starting point, for judging the privacy claims of different groups in a democracy. Greater power requires greater responsibility and accountability – to one's members and to third parties. If, in a democracy, this means that legislators cannot automatically expect the privacy in voting that is appropriate for ordinary citizens, it also means that the leaders of racist organizations must accept more onerous restrictions on their privacy than their members. What those restrictions should be in either case requires the detailed consideration of matters of fact and principle

that would merit a paper in its own right. Still, it seems worth reiterating that NAACP v. Alabama illustrates both the political importance of protecting privacy in a democracy, and the importance to a democratic conception of privacy of the relative power, influence and prestige of individuals.

### **Conclusions**

So, privacy rights have a political justification in democracies although some ways of defining and justifying privacy rights are undemocratic. It is a justification that reflects feminist criticisms of the public/private distinction, because it does not depend on drawing a sharp distinction between privacy rights and political rights, as the same set of interests in freedom and equality underpin each. More particularly, it reflects the fact, as feminists contend, that the personal can be political, while recognising that our beliefs, actions, interests, and circumstances may be nonetheless personal for that: being our particular circumstances, beliefs, actions and interests, even if they are also shared by other people.

The political justification of privacy rights is an instrumental justification, but it is not the only such justification consistent with democratic principles. After all, privacy rights may be necessary or helpful in protecting our civil or socio-economic interests and rights, not merely their political counterparts. Privacy rights, for example, can help to protect us from arbitrary arrest and imprisonment, or from unfair economic competition, when they are defined and justified in a way that reflects our freedom and equality. Privacy rights are not obviously reducible to such rights – in part



because our interests in personal choice, association and expression are not simply interests in civil or socio-economic liberties. So, in principle, it is possible that privacy rights might be justified in a democracy because of their role in protecting civil and socio-economic freedoms and equality, and not simply because they help to secure our legitimate interests in political choice and participation.

Finally, I would suggest that it should be possible to develop a non-instrumental justification of privacy rights that reflects democratic principles and commitments. For what we have seen, I believe, is that individuals have legitimate claims to privacy that merit legal protection in their own right, and not merely because they contribute to other important ends, such as political participation, or freedom from torture. Equal rights of personal choice, association and expression not only protect the political freedom and equality of individuals, but their personal freedom and equality too. Indeed, the ability to make important personal decisions for oneself, to form close ties to others, and to express oneself freely, without fear of unwanted intrusion – all these are important forms of personal freedom.<sup>22</sup> They enable individuals to seek happiness in ways they might otherwise lack, to develop and exercise capacities that are valuable, but might otherwise go unrecognised or unfulfilled,<sup>23</sup> and to avoid forms of discomfort, pain and suffering that might otherwise be difficult to avoid. Not only is their protection important to the freedom of individuals, but, where it is equally available to all, it constitutes an important respect in which individuals are equal. After all, personal choice is as much a form of freedom as political choice and, as such, as capable of reflecting the equality of individuals as the latter.

Democratic forms of politics enable individuals freely, and as equals, to develop and exercise their capacities for reflective choice and action, and to find meaning and satisfaction in

life. These are good things in themselves, in a democracy, because individuals have legitimate interests in developing these capacities, and in pursuing lives that they believe to be valuable, reasonable and right. Without the capacity for reflective choice and action, individuals will lack important forms of freedom. Without the ability to develop and exercise these capacities, they will lack important forms of equality with others. Without the opportunity to lead lives that they believe worthwhile, individuals will likely lack reasons to preserve their freedom, equality or, indeed, their lives. So, whatever the other reasons to protect individuals' interests in political choice, association and expression in a democracy, a central reason for doing so is that political choice, association and expression, when consistent with the freedom and equality of others, can be valuable, and valued, activities.

So, too, with personal choice, association and expression. These, no less than their political counterparts, are ways in which individuals develop and exercise their moral capacities, and seek meaning and satisfaction in life. Where free and equal they are, in principle, as valuable as their political equivalents. Indeed, even if individuals have democratic political rights, they can have legitimate interests in personal choice, association and expression. For most people, their personal impact on collective decisions is too hard to discern, or too negligible, for political participation to be a wholly satisfying expression of their interests in reflective choice and action.<sup>24</sup> In fact, for some people, political participation may be something that they engage in out of a sense of duty, whereas it is in artistic, religious or scientific endeavours, or through the care of others, that they find self-fulfillment, experience moral freedom, and come to value their personal attributes and capacities. That is why, I believe, there are many reasons to value privacy in a democracy, and many ways in which we can start to reinterpret this most contentious right.

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<sup>1</sup> This is clear in Fraser, Pateman and Philips. See also, S Benhabib, ch. 3

<sup>2</sup> See Pateman, pp. 123 – 4; Young, pp. 118 – 19, although I am unconvinced by her argument that the ideal of impartiality lies at the root of the problems that she has diagnosed.

<sup>3</sup> See for example, the story of Oliver Sipple, who was openly gay in San Francisco, but had not come out to his parents, in Boling, pp. 29 – 30; and for a fine discussion of the dangers facing gays, especially gay men, see Kendall Thomas, (1992 1431 - 1516).

<sup>4</sup> For example, at p. 34 Mohr says: “To lose a child in a custody case for prejudicial reasons is, to be sure, to suffer an indignity” – but this hardly seems an adequate description of the harm, even were Mohr right that “to insist on being closeted to protect one’s parenting is simply to give effective voice to those social conditions that degrade gays in general”. Indeed, Mohr concludes that “because the indignity bred and maintained by the convention of The Secret is so great and pervasive, it is unlikely that any individual indignity suffered will cancel the dignity gained in the convention’s destruction through outing”.

<sup>5</sup> Cohen, pp. 190 – 191. She argues that “the ability to reconcile identity and difference, universality and particularity will depend not only on the proper safeguards for the multiplicity of different voices in public space...but also very much on ‘bringing the private back in’....At the very least, some of the fundamental preconditions for building and defending different, unique identities will depend on maintaining the necessary political and legal protection for privacy”. (p. 191)

<sup>6</sup> Cohen, pp. 194 – 199 criticises the claims of Mary Ann Glendon and Michael Sandel that treating decisional autonomy as part of an individual’s right to privacy commits one to untenably individualistic views about moral agency, and to devaluing communal values and institutions. In an earlier work she provided, as well, an extensive critique of Catherine MacKinnon’s objections to the right to privacy. See Jean Cohen (1992).

<sup>7</sup> For the argument that rights are consistent with feminism, see Kiss (1995). For the view that they’re consistent with economic equality, see Cornell, (1984). For the view that they are consistent with racial equality see Williams, (1991) Ch. 8; and for an interestingly ambivalent position on rights see ch. 5 “Rights and Losses” in Wendy Brown, (1995). I analyse Brown’s view of rights in Lever, (2000b)

<sup>8</sup> For the idea that rights protect individual interests see MacCormick, (1982), p. 143, and MacCormick, (1977) 189 - 209. The fact that rights protect interests does not mean that they must be justified in terms of interests rather than, say, values, duties, collective goods. But it does suggest that they can be justified this way.

<sup>9</sup> But see Wendy Brown, p. 121 footnote 41 for the reminder that whether or not this is possible depends on the type of juridical institutions and resources available. She asks, “who, today, defends their rights without an army of lawyers and reams of complex legal documents?” While I doubt that any developed legal system can avoid these complexities, access to good legal advice and aid could, and should, be more equally distributed than is currently the case in most societies.

<sup>10</sup> Mansbridge in ed. Benhabib, pp. 56 – 7: “For participation to help people to understand their interests better, participants often need issues on which they have direct experience. They also often need a variety of different arenas for deliberation”, and at the bottom of p. 57 she refers to Nancy Fraser’s idea of “subaltern counterpublics”.

<sup>11</sup> Unwillingness to accept the implications of this point makes communitarian accounts of the right to privacy so unconvincing, at least as an account of a democratic right to privacy, as our interests in privacy cannot be reduced to interests in maintaining community values, or presuppose agreement on the value of existing institutions, beliefs and practices. For a discussion of these problems see Jean Cohen, p. 199, and Kymlicka, (1990) pp. 226 - 9

<sup>12</sup> See Boling's sceptical response to some of Ruddick's less plausible claims about the virtues of mothering as an activity and perspective on the world, at pp. 114 - 117

<sup>13</sup> For example, there is no reason to think that your claims to form a sports group should depend on showing that churches, workplaces etc. don't organise sports events - nor on the claim that it would be impossible for them to do so. In short, people should not have to make implausible claims for the uniqueness, merits and need of their associations in order to be free to join with others on some common project. As Weinstein notes, discussing Hegel, there are good reasons to value the fact that privacy removes the need to overstate the merits of one's position or association. W.L. Weinstein, (1971) footnote 29, p. 47

<sup>14</sup> As Justice Harlan held, for a unanimous Court in *NAACP v. Alabama*, (357 U.S. 1958), "Inviolability of privacy in group association may, in many circumstances, be indispensable to freedom of association, particularly where a group espouses dissident beliefs".

<sup>15</sup> Young (1996), pp 122 and 124; Mansbridge, (1991); Sanders, (1997). Bernard Manin interestingly discusses political polling in this context. He maintains that polling is a way in which individuals can, within the limits of the questions put to them, air their political concerns, comment on the appeal of different options and influence political platforms and proposals. However, this is possible only where the confidentiality of polling is relatively secure - a point that Manin largely takes for granted both in his relatively optimistic account of the commercialisation of polling, and its increasing autonomy from political parties. See Manin, (1997) pp. 230 - 31, where he claims that "The extra-parliamentary voice of the people is both made more peaceful and rendered commonplace" by the increasing use of public-opinion surveys, conducted by professional and commercial groups.

<sup>16</sup> For example, Sanders reports that studies of jury deliberation show that (p. 367) "verdict-driven deliberations are more in keeping with a male style of discourse and more likely to occur when men head juries". By contrast, "evidence-driven" deliberation (p. 360) tends to promote discussion and participation even of those who are otherwise silent, and leaves jurors more satisfied with their participation. As Sanders shows, even in juries, some of the most democratic of American institutions, social expectations, prejudice and disparities of experience mean that white men tend to dominate proceedings. As she shows, this cannot be explained in terms of their greater expertise, superior skills or cooperative abilities.

<sup>17</sup> See Wendy Brown, p. 126: "the same device [i.e. rights] that confers legitimate boundary and privacy leaves individuals to struggle alone, in a self-blaming and depoliticised universe, with power that seeps past rights and with desire configured by power prior to rights". Brown is open to the possibility that arguments for privacy rights can further equality. However, she worries that advocates of rights, such as Patricia Williams, too readily ignore the limitations of rights as instruments for empowerment. For my purposes the difficulty with her arguments - which are often compelling - is that it is difficult to disentangle her worries about privacy rights, for example, from her concerns about rights in general. By contrast, Boling's concern with privacy, to my mind, suffers from the failure to establish that what she sees as specific to privacy - the risk of depoliticising injustice - is as closely and uniquely a privacy problem as she believes.

<sup>18</sup> For two examples, see the Majority decisions in *Harris v. McRae* (448 US, 1980) and *Bowers v. Hardwick*, (478 US, 1986), and the comments on these in MacKinnon, "Privacy v. Equality", which I discuss in Lever, (2000a).

<sup>19</sup> For a brief, but helpful, discussion of privacy, deception and manipulation see Gavison pp. 367 - 8

<sup>20</sup> Thanks to Deborah Modrak for suggesting the following problem and example.

<sup>21</sup> For the full reference, and a quotation from Justice Harlan, see footnote 35 supra.

<sup>22</sup> This seems to be a point on which Rawls, MacKinnon and Mill would all agree, to name a few. See, for example, Rawls, (1993) Part 3, Lecture VIII, "The Basic Liberties and their Priority"; MacKinnon's "Privacy v. Equality, which criticises privacy rights for denying women privacy and worthwhile forms of intimacy; and John Stuart Mill's *On Liberty*, (1975) particularly ch. 3.

<sup>23</sup> As Blackmun claimed, in his dissenting opinion in *Bowers v. Hardwick*, our personal associations can develop and reflect our moral commitments, in addition to being a source of personal happiness for most people.

<sup>24</sup> Hence, in part, the familiar problem of explaining voting in terms of the rational self-interest of individuals.

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