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**Must Privacy and Sexual Equality Conflict?  
A Philosophical Examination of Some Legal Evidence**

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Are rights to privacy consistent with sexual equality? In a brief, but influential, article Catherine MacKinnon trenchantly laid out feminist criticisms of the right to privacy. In “Privacy v. Equality: Beyond *Roe v. Wade*” she linked familiar objections to the right to privacy and connected them to the fate of abortion rights in the U.S.A. (MacKinnon, 1983, 93-102). For many feminists, the Supreme Court’s decision in *Roe v. Wade* (1973) had suggested that, notwithstanding a dubious past, legal rights to privacy might serve feminist objectives, and prove consistent with sexual equality. By arguing that *Roe*’s privacy justification of abortion rights was directly responsible for the weakness and vulnerability of abortion rights in America, MacKinnon took aim at feminist hopes for the right to privacy at their strongest point. Maintaining that *Roe*’s privacy justification of abortion is intimately, and not contingently, related to the Supreme Court’s subsequent decision in *Harris v. McRae*, (1980) MacKinnon concluded that privacy rights cannot be reconciled with the freedom and equality of women, and so can have no place in a democracy.<sup>1</sup> In *Harris*, the Supreme Court held that the State need not provide Medicaid coverage for abortions that are necessary to preserve the health, but not the life, of a pregnant woman, effectively depriving poor women of almost all state aid for abortions.<sup>2</sup> Moreover, the Court’s subsequent decision in *Bowers v. Hardwick* (1986) appeared to confirm the truth of MacKinnon’s observation – though this case concerned gay rights, rather than abortion rights, and occurred several years after MacKinnon’s condemnation of *Harris*.

This paper examines MacKinnon’s claims about the relationship of rights to privacy and equality in light of the reasoning in *Harris* and *Bowers*. When we contrast the Majority and Minority decisions in these cases, it shows, we can distinguish interpretations of the right to privacy that are consistent with sexual equality from those that are not. This is not simply

because the two differ in their consequences – though they do - but because the former, unlike the latter, rely on empirical and normative assumptions that would justify sexual inequality whatever right they were used to interpret. So while I agree with MacKinnon that the Majority's interpretation of the right to privacy in *Harris* is inconsistent with the equality of men and women, I show that there is no inherent inconsistency in valuing both privacy and equality, and no reason why we must chose to protect the one, rather than the other. Indeed, an examination of MacKinnon's article, I suggest, can help us to see why rights to privacy can be part of a scheme of democratic rights, and how we might go about democratising the right to privacy in future. To avoid confusion I should emphasise that my arguments are of a philosophical, not a legal, nature. Thus, I will be ignoring the specifically legal and constitutional aspects of MacKinnon's article, and of the Supreme Court decisions, in order to bring their philosophical significance into focus.

### *MacKinnon's Critique of Privacy*

#### *The First Objection*

MacKinnon's first objection to the right to privacy is that privacy is the right to be let alone, or to be free from state action. Because privacy gives individuals rights to be let alone by the state, she argues, it leaves the powerful free to oppress the vulnerable without fear of state scrutiny and accountability. Though the right to privacy limits the concerted use of state power to crush any particular individual, she believes, it promotes individualised forms of oppression. Putting her thesis in succinct polemical form, she claims that the right to privacy enables men to oppress women one by one. (102)

As MacKinnon notes, liberals believe that the right to privacy is necessary to protect the freedom and equality of individuals.<sup>(96)</sup> Liberals claim that privacy protects the legitimate differences between individuals because it gives them the right to be let alone by the state. In this way, liberals believe, the autonomy of individuals is secured, and individuals are, then, free to cooperate together as equals, despite their differences. MacKinnon, however, believes that the case for a right to privacy rests on a basic error. It presupposes, she argues, that state action is the primary threat to the freedom and equality of individuals and ignores the fact that state action may be necessary to secure these.<sup>3</sup> According to MacKinnon, poverty, different bodily powers and the legacy of past inequality can all provide more potent obstacles to individual autonomy than state action, and state action could remove or substantially alleviate these.<sup>4</sup>

For example, women may be unable to prevent conception and pregnancy though the state does not prohibit contraceptive use, because they are ignorant of the relevant biological facts or of their right to use contraceptives. They may be prevented by poverty, youth, geographical location and the opposition of others, from using contraceptives even if they want to. They may be discouraged from using contraceptives though they want to prevent pregnancy, because contraceptive use has a social meaning which women "did not create" - namely, that one is "loose", has no moral standards, is willing to have sexual intercourse with any man.<sup>(95)</sup> Because women cannot control these interpretations of contraceptive use, and these make it more difficult for women successfully to refuse sex with men, MacKinnon notes that women may be unwilling to use contraceptives, though otherwise they would do so. Hence, she maintains, the right to

privacy justifies inequality because it assumes that individuals are free and equal when they are not.

Recognising that the state cannot wholly prevent pregnancy from rape or contraceptive failure, and that it cannot ensure that men as well as women can become pregnant, MacKinnon assumes that the state can, nonetheless, prevent a woman's sexual capacities from becoming the source of particular disadvantage and indignity. The state can shape the circumstances in which women conceive, bear children and have abortions, so that these do not, as they now do, disadvantage women relative to men. But this, she believes, the right to privacy prevents, by wishing away sexual inequality and coercion. Far from protecting the freedom and equality of individuals, as liberals claim, MacKinnon believes that the right to privacy justifies the exploitation and subordination of women by men. Far from protecting the legitimate differences between individuals, she argues, protection for privacy perpetuates illegitimate differences in the wellbeing and life prospects of different women. Hence, she concludes, feminists should reject the right to privacy, for all that right means is that "women with privileges get rights". (100)

### *The Second Objection*

The association of privacy and intimacy provides the grounds for MacKinnon's second objection to the right to privacy. Whereas her first objection is that privacy rights associate freedom and equality with the absence of state regulation, her second objection is that they associate freedom and equality with the male-dominated family and with heterosexual intimacy. Thus, MacKinnon believes,

"It is probably no coincidence that the very things feminism regards as central to the subjection of women - the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; the very feelings, intimate - form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition". (101, emphasis in text)

Liberals believe that privacy protects the autonomy and equality of individuals by enabling them to form personal associations whose terms they are largely free to regulate for themselves.<sup>5</sup> In this way privacy rights allow individuals to pursue their own good, and to know together goods which they could not know alone, to paraphrase Sandel's happy phrase.<sup>6</sup> Liberals hope that this will give individuals equal access to things which are valuable, but which would be devalued or unavailable were choice prohibited.<sup>7</sup> For example, mutual care, love, affection and friendship, trust and support seem to be fundamental human goods, and ones which depend on the voluntary participation of individuals for their being and sustenance. But because they are vulnerable to interference from others, liberals think that the state can only ensure these goods for individuals indirectly. By protecting intimate, sexual and familial relationships by privacy rights, then, they hope that the state can protect indirectly what it cannot ensure directly, and can, thus, further the happiness as well as the freedom and equality of individuals.

However, MacKinnon claims, the degree of intimacy has been "the measure of the oppression" of women by men (p.100).<sup>8</sup> The liberal case for protecting intimate relationships, she believes, presumes that the state has no legitimate interest in setting the terms of personal associations, or regulating them, in order to exclude exploitative, damaging or unjust associations. It supposes that intimacy precludes exploitation and injustice and, thus, that the state has no legitimate interest in regulating the internal relations of intimate associations:

"...intimacy is implicitly thought to guarantee symmetry of power. Injuries arise in violating the private sphere, not within and by and because of it". (100)

These premises, MacKinnon believes, are mistaken, because sexual inequality forces women into disadvantageous and exploitative associations with men. As Okin and others have noted, women are expected to marry, to have children and to be their primary caretakers.<sup>9</sup> They are supposed to devote themselves to the care and fulfillment of others, rather than of themselves. Such social expectations shape the treatment and self-images of women from infancy, and shape, therefore, their opportunities for learning, work and for personal satisfaction and enjoyment in our society. The result is that women are encouraged to choose a course of life that makes them dependent on men for their well-being, and face a wide variety of obstacles to doing otherwise. In particular, they face the obstacle presented by men who endorse this perception of women, or who resent, fear, or are indifferent to the pursuit of independence by women.<sup>10</sup>

Moreover, MacKinnon argues, it is a mistake to believe that intimacy secures the choice and well-being of individuals, and thus assures mutuality in relationships. Intimacy, in itself, need not counter-act the egoism, or misperception of the worth of others and oneself, which leads to injustice. On the contrary, it may allow these free play and intensify injustice.<sup>(95)</sup><sup>11</sup> As both Mill and MacKinnon observe, intimacy may increase the pressures on women to behave in ways that please or flatter men, or which support their often unconscious sense of what is owed them by women, because they are men.(Mill, 1970, 136) Intimacy with men, in short, may increase the pressure on women to be subservient, passive and self-sacrificing, rather than alleviating this pressure as liberals expect. Thus, MacKinnon maintains, "When the law of privacy restricts



intrusions into intimacy, it bars changes in control of that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect".(101)

So, privacy perpetuates sexual inequality and unfreedom, according to MacKinnon, by hiding and justifying oppression because it is intimate and chosen. By protecting existing forms of intimate association, privacy rights suppress legitimate differences between individuals over sex-roles, the choice of sexual partner, or the conduct of sexual and familial relations. By perpetuating the subordination of women to men in the name of intimacy, privacy rights promote "the intimate degradation of women as the public order".(100) By endorsing oppressive and exploitative relationships because individuals commonly accept these, privacy rights militate against alternatives. For they make sexually egalitarian relationships - whether heterosexual or homosexual - appear aberrant, unreasonable, perverse. Thus, privacy rights inhibit and undercut the quest for better ways of relating to others, of caring for, and loving them, as equals.

### *The Third Objection*

MacKinnon's third reason for believing that privacy is incompatible with equality is that privacy rights endorse and maintain the public/private distinction, or the distinction between the political and personal. But this distinction, she claims, is precisely what feminists have had to "explode" in order to press their claims for sexual justice (100), because the public/private distinction distinguishes the political from the personal in ways that privilege the interests, voices and persons of men, over those of women. Hence, feminists have insisted, the personal is

political, in order to show the connection between individual acts of sexual violence and exploitation and the way that our society creates and distributes political power.<sup>12</sup>

In liberal thought the right to privacy is meant to ensure that the uses of state power are determined by impersonal or neutral means. This, it is thought, is necessary if state power is to be justified and compatible with the freedom and equality of individuals.<sup>13</sup> By requiring individuals to distinguish between the personal and the political, the right to privacy is supposed to ensure that the uses of state power are determined by the common interest of citizens, rather than by the whims, caprice, and prejudice of the powerful. By protecting the personal interests of citizens from political decision-making, the public/private distinction is supposed to encourage fearless participation in public life, even by the relatively powerless or the socially unpopular.<sup>14</sup> Protection for the right to privacy and the public/private distinction, then, are meant to be evidence of a state's commitment to impartiality between the competing interests of citizens, and to the freedom and equality of individuals in public and private life. In this way, liberals believe, the public/private distinction can secure the foundations of constitutional democracy, and avert the evils of absolute government.

According to MacKinnon, there are two main difficulties with this picture of the public/private distinction. First, it presupposes that the private is not already political. Second, it presumes that the personal/political distinction is, itself, neutral and impersonal. Neither, she claims, is the case. So, far from promoting freedom and equality, she thinks, the public/private distinction perpetuates sexual inequality and places precisely those beliefs, practices and institutions which most contribute to sexual inequality, beyond democratic accountability and

redress. The public/private distinction "is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps the private beyond public redress and depoliticises women's subjection within it". (102)

The private is political, MacKinnon argues, because its existence depends on support from government, without which there would be no legal protection of privacy. Moreover, government's maintenance of privacy rights is no more politically neutral than its other acts - for example, raising and spending taxes, or regulating the press and communications media. In each case, the state distributes political power - or the ability to determine how the state is governed - by its grant of rights. In each case, it does so for reasons that are at least as likely to be influenced by political calculation - or calculations of what will be advantageous to those with power - as by convictions about the justice or goodness of one course of action rather than another.<sup>15</sup> So, if open and accountable government is meant to protect citizens from the abuse of state power by those who have it, we should abandon privacy rights in the interests of democratic government. Absent the belief that the private is not political, MacKinnon argues, the rationale for privacy rights advanced by liberals collapses, and privacy can be seen for what it is: a threat to the freedom and equality of citizens.

Moreover, MacKinnon believes, it is untrue that the personal/political distinction is neutral between the interests of persons and, therefore, provides an impersonal guide to resolving conflicts between them. What is considered personal is considered unsuitable for political discussion and for collective action.<sup>16</sup> But this means that sexual inequality and injustice can be

dismissed as a personal matter, as not appropriately political. Thus, the public/private distinction, according to MacKinnon, depoliticises sexual injustice and inequality, leaving its victims without effective means for enlisting the help of others in defence of their rights. Far from providing a neutral or impartial standard for resolving conflicts over the uses of state power, MacKinnon concludes, the public/private distinction prevents their principled and democratic resolution. It guarantees, she believes, that oppressed and disadvantaged social groups will lack impartial judges in those institutions which our society uses to hear, judge and redress the grievances of individuals, whether courts, parliaments or public opinion. Hence, she concludes, "To fail to recognize the meaning of the private in the ideology and reality of women's subordination by seeking protection behind a right *to* that privacy is to cut women off from collective verification and state support in the same act".(101-2, emphasis in text).

### *Summary*

MacKinnon argues, then, that the right to privacy is fundamentally incompatible with the freedom and equality of women. The things that it protects - unaccountability, the male-dominated heterosexual family, the public/private distinction - are, precisely, those things which are responsible for the domination of women by men. Hence, she claims, it is not accidental that *Harris* justified sexual inequality, nor just bad luck that *Roe's* privacy justification of abortion rights for women had such results. Rather, she thinks, this is exactly what one would expect. Thus, she concludes, *Harris* fulfills the logic of *Roe's* privacy perspective on abortion and shows us that *Roe's* claim that women have a right to privacy is, indeed, "an injury got up as a gift".(100)

*THE CRITIQUE OF MACKINNON*

*General Remarks*

These, then, are MacKinnon's reasons for believing privacy rights a threat to sexual inequality, and they seem compelling. For it does look as though privacy rights have justified sexual inequality in the ways alleged. What is less clear, however, is that privacy rights are therefore intrinsically and uniquely incompatible with equality, as MacKinnon implies. From the fact that privacy rights have justified inequality, for example, it does not follow that they must do so, anymore than the justification of undemocratic voting rights shows that equality is incompatible with the right to vote. Indeed, *Harris* did not claim that state funding for abortion rights is inegalitarian or incompatible with the privacy rights of those who oppose abortion. Nor, in fact, does MacKinnon argue that *Roe's* justification of abortion made state funding for abortion impossible.<sup>17</sup> As a result, there seems no compelling reason to assimilate *Harris* to *Roe*, even if one agrees with MacKinnon - as I do - that *Harris* justifies sexual inequality.

Moreover, MacKinnon's critique of the right to privacy is ambiguous in several ways. She shows that our equal right to privacy has justified sexual inequality and concludes that rights to privacy must undermine the equality of individuals. However, her evidence suggests that interpretations of the right to privacy which justify sexual inequality depend on dubious premises about the equality and rights of individuals. Get rid of these, *Roe* suggests, and there is as little reason to reject the right to privacy on egalitarian grounds as there is to abandon the right to vote. So without denying that *Harris* and *Bowers* justify inequality, there seems no reason to condemn the right to privacy out of hand, or to conclude, with MacKinnon, that privacy rights are the enemy of sexual equality.

In what follows, I will try to substantiate these ideas or hypotheses. Looking at MacKinnon's three objections to the right to privacy, I will show that sexist conceptions of equality and inadequate theories of rights both underlie the Majority's arguments in *Harris* and *Bowers*. When we recognise the place of these in justifying sexual inequality, I believe, we can accommodate MacKinnon's claim that privacy has justified sexual inequality, whilst rejecting her conclusion that rights to privacy and equality must conflict. This is possible without assuming that moral and legal rights are identical, or that the state can legitimately enforce every moral claim by law. Nor, indeed, is it necessary to suppose that individuals' claims to privacy and equality must be obvious, or susceptible to only one interpretation. Because neither is the case, my analysis of the Supreme Court decisions in *Harris* and *Bowers* focuses on the interpretive principles and assumptions that guide the Majority and Minority conclusions about the right to privacy, rather than on those conclusions themselves. In this way I hope to show that on widely accepted assumptions about democratic rights we can reject the decisions in *Harris* and *Bowers* without rejecting the right to privacy itself.

### *The Right To Be Let Alone*

Two arguments are critical to *Harris*' conclusion that *Roe*'s privacy right to abortion is compatible with denying poor women state funding for abortion.<sup>18</sup> The first is the claim that the government is not responsible for the poverty of poor women. The second, that the government has a duty to remove only those obstacles to the exercise of rights which it, itself, has created. Hence, the Majority state: "Although government may not place obstacles in the path of a

woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category".(*Harris*, 298)

The first claim is certainly contentious and, if rejected, it would seem that the state would have a duty to aid poor women, because their right to privacy gives them a right to be let alone by the state. However, I will concentrate on the second claim in *Harris*. I do not think that a woman's right to funding for abortion ought to turn on complex, and inevitably contentious, questions about the role of the state in causing the poverty of poor women. But if we accept the second claim of the *Harris* Majority, this is unavoidable. Moreover, it is this second claim which illustrates MacKinnon's contention that the right to privacy justifies inequality because it rests on the mistaken premise that individuals would be free and equal if left alone by the state. This belief does inform the *Harris* decision and does justify inequality, as MacKinnon claims. However, the right to privacy need not have these results. The Majority here advance a general claim about rights that they then use to interpret the content of the right to privacy. It is, I believe, this thesis about rights that we should reject as inegalitarian and not, as MacKinnon thinks, the right to privacy.

The Majority believe that the constitution *requires* government to remove only government-caused obstacles to the exercise of rights, although it *permits* the government to remove other obstacles to individual action.<sup>19</sup> Whether or not this claim is correct as a matter of constitutional interpretation, this thesis about individual rights (and state duties) justifies inequality and seems incompatible with a democratic theory of rights. It supposes that poverty can be an absolute bar to the exercise of fundamental rights in cases where the government is not causally responsible

for poverty. Thus, it assumes that the freedom and equality of individuals are adequately protected where natural catastrophe, or the results of legitimate third party actions, create poverty-based obstacles to the exercise of basic rights - or ones critical to freedom and equality. But such a conclusion makes no moral sense, and is hard to reconcile with basic principles of right. After all, if one can effectively be deprived of even fundamental rights through no fault of one's own, it is hard to see why we should care about rights, or suppose them necessary to protect our freedom and equality.

That is not to say that the government has a duty to remove poverty-based obstacles to the exercise of rights in every case. Though there are good reasons to believe that poverty threatens the freedom and equality of individuals,<sup>20</sup> particularly where it coexists alongside great wealth, it is not clear that a democratic society must ensure that the poor are capable of exercising all their rights, on pain of injustice. However, in circumstances where it is possible for government to remove poverty-caused obstacles to the exercise of *fundamental* rights, and of doing so without threatening the rights of others, it seems that government would have a duty to remove them - by subsidising the exercise of those rights and/or by alleviating poverty. Thus, contrary to the Majority's assumption that the State is morally responsible for poverty only where it is causally responsible for its existence,<sup>21</sup> basic principles of right suggest that the state has a duty to remove poverty based constraints on the exercise of fundamental rights so long as it can do so without threatening the rights of others.

There is, therefore, no reason to agree with MacKinnon that the right to privacy must justify inequality because it is the right to be left alone by the state, because the *Harris* principle of state



duties would justify inequality whatever right was in question.<sup>22</sup> It is hardly surprising then, and no mark against the right to privacy, that *Harris'* interpretation of *Roe's* privacy right to abortion justified sexual inequality, as it does not seem reasonable to agree with the Majority's theory of individual rights. In any case, whether or not one agrees with the Majority, their justification of inequality cannot be blamed on the right to privacy. So, while true that *Harris* justifies inequality and coercion, we need not therefore conclude that equality and the right to privacy must conflict.

In fact, the *Harris* decision illustrates quite well the reasons for thinking that privacy rights can be necessary to protect the freedom and equality of individuals. According to the Minority,<sup>23</sup> the Hyde Amendment is incompatible with the privacy and equality of poor women, because it illegitimately deprives them of personal choice and, thus, fails to protect their equality. By looking at the Minority's objections to the Hyde Amendment, I will show that the right to privacy can protect the legitimate differences between individuals, as liberals suppose, and need not, as MacKinnon claims, justify inequality amongst them.

The Minority argue that the Hyde Amendment is incompatible with the privacy of poor women.<sup>24</sup> The right to privacy, they claim, means that poor women have a right to terminate a pregnancy *rather than* to continue it. Because the choices a pregnant woman faces are dichotomous, if we prevent a woman from terminating a pregnancy, we inevitably force her to continue it. This, the Minority believe, we may not do without violating her right to privacy. But this is what the Hyde Amendment does. By denying poor women funding for abortions while funding childbirth, the state makes poor women an offer that they cannot well refuse.<sup>25</sup>

Through selectively funding dichotomous options, the Hyde Amendment injects "coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free of governmental intrusion". (*Harris*, 333) As a result, the Minority argue, the Hyde Amendment deprives indigent women of their freedom to choose abortion over maternity and so "imping[es] on the due process liberty right recognised in *Roe v. Wade*".

The Minority, then, assert that the state can violate the privacy of poor women by refusing to fund abortion. They take issue with the Majority's contention that the Hyde Amendment creates no new obstacles to a poor women's reproductive choice, and so does not affect the privacy of poor women.<sup>26</sup> As the Minority note, the Majority assume that the poverty of poor women is itself an absolute bar to reproductive choice, and so believe that the Hyde Amendment does not (and, indeed, cannot) deprive poor women of choice.

According to the Minority, this assumption is false. Poverty only prevents women from having abortions if the state withholds funding for abortion. It is, therefore, the combination of poverty and the Hyde Amendment's selective funding of reproductive choice that forces poor women to continue unwanted pregnancies. Though "*Roe* and its progeny" do not mean that "the State is under an affirmative obligation to ensure access to abortions for all who may desire them", the Minority hold that the state has a duty to fund abortions for poor women. (*Harris*, 330)<sup>27</sup> They believe that *Roe* prevents the State from "wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion". Because it violates this requirement, they conclude, the Hyde Amendment is incompatible with the privacy of poor women.

Furthermore, the Minority argue, the Hyde Amendment is incompatible with the equality of poor women. There is no reason to believe that poor women have a lesser interest in abortion than rich women, or a lesser interest in privacy than men. But only on these assumptions would the Hyde Amendment be compatible with the equality of poor women. For the principal way in which the Hyde Amendment promotes or "encourages" childbirth is by preventing poor women who want abortions from exercising their right to abortion,<sup>28</sup> although there is nothing about promoting childbirth which justifies such a result.<sup>29</sup> Thus, the Minority claim, the means that the Hyde Amendment uses to promote childbirth are discriminatory, although the goal of promoting childbirth might otherwise be legitimate.<sup>30</sup>

So, instead of showing that privacy and equality must conflict, the Hyde Amendment and *Harris* illustrate the reasons for thinking that protection for privacy can be necessary to protect the equality of individuals. Individuals may reasonably differ on matters of fundamental importance. Without rights to differ in such matters - rights that we hold against each other and against the state - it is hard to see how we can ensure the freedom and equality of individuals. *Harris* and the Hyde Amendment both show that rights to privacy by themselves are insufficient to protect the equality of individuals. Yet that does not show that we have no right to be left alone by the state, anymore than it shows that we have no right to equal treatment by law for, in their different ways, both the Hyde Amendment and *Harris* display indifference, and even hostility, to the rights of individuals. This, I believe, is because of, not despite, their indifference to legitimate differences in individuals' needs and beliefs, and their apparent contempt for what *Roe* called a fundamental right - the right to privacy.<sup>31</sup>

*The Right Of Personal Choice and Intimacy*

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

MacKinnon appears to believe that there is no way to protect the intimate relations of individuals by privacy rights without assuming that heterosexual intimacy is uniquely valuable and that the male-dominated heterosexual family is private. Hence, she supposes, privacy rights must protect heterosexual relations, however oppressive, and deny legal protection to homosexual associations, however egalitarian. She seems to assume that the male-dominated family must provide the model for defining those intimate relations that privacy rights protect. Hence, she assumes that privacy protection for unmarried heterosexual intercourse inevitably perpetuates the subordination of women to men within families, although why this should be so is unclear. Similarly, she supposes that the right to privacy cannot be compatible with rights of homosexual marriage, family formation and non-marital intercourse. However, I will argue, Blackmun's dissent in *Bowers* shows that we can distinguish the private from the familial through equal rights of intimate association.

The Majority<sup>32</sup> in *Bowers* claim that the state may legitimately prohibit consensual adult homosexual associations, even if they occur where others need not see them.<sup>33</sup> They argue that this would be compatible with the privacy and equality of individuals, because the right to

privacy is not some broad right to intimate association. Rather, they maintain, the right to privacy protects only certain types of personal decisions, namely, decisions about marriage, child-rearing and education, procreation and reproduction. (*Bowers*, 190-91) Homosexual associations have no clear connection to either of these matters, they claim. Hence, they conclude, laws prohibiting such associations are compatible with the right to privacy and with the equality of individuals.

The argument of the Majority, here, depends on the premise that homosexual associations have no connection to matters of family formation or procreation. (*Bowers*, 191) The Majority do not defend this premise and it is a controversial one. It is far from clear that homosexual association must lack a connection to interests in family formation and procreation, although our laws prevent homosexual marriage and child-raising. Hence, if we denied the Majority's premise, there would be no need to accept its conclusion that homosexual associations are excluded from privacy protection, even on the Majority's definition of the right to privacy.

But the Majority's account of the right to privacy itself merits critical attention. The Majority present a very narrow account of the right to privacy, one which largely identifies the private with the familial. They fail to explain what unites the diverse content of the right to privacy, as they understand it, but appear to assume that rights of reproductive choice can be treated as natural extensions of our interests in family formation. In this way, they assimilate privacy protection for the use of contraceptives in non-marital heterosexual intercourse, and for the right to abortion, into an existing model of the right to privacy based on the family.<sup>34</sup> Hence, the Majority's account of the right to privacy treats all legal forms of heterosexual intercourse as

though they were directly connected to our interests in family formation, while excluding all forms of homosexual association, however committed, from protection by privacy rights. As a result, their account of the right to privacy appears to illustrate MacKinnon's objections to the right to privacy, because they divorce our interests in privacy from our interests in equality.

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

Blackmun contends that we cannot define the right to privacy in the way that the Majority propose. Instead we must try to establish what unites those things that the right to privacy protects and distinguishes them from the things that it excludes. This the Majority do not do. They fail to explain what, in their opinion, makes homosexual associations like incestuous or adulterous associations, which privacy rights exclude, rather than like those heterosexual associations covered by the right to privacy. (*Bowers*, 209-10, n.4) As a result, Blackmun contends, the Majority fail to identify the legitimate interests which privacy rights protect. Consequently, they arbitrarily deny that consensual adult homosexual associations fall within the realm of the right to privacy.

Central to the legitimate interests that privacy rights protect, Blackmun argues, are our interests in self-definition and self-determination through intimate and sexual association with others. (*Bowers*, 204-5) Individuals have, he supposes, a fundamental interest in defining who they are and what they cherish, through close personal ties to others. The choice of companions and conduct of our intimate relations are generally important expressions of our identities and values, and form an important ingredient of our happiness and well-being. "[T]he ability independently to define one's identity that is central to any concept of liberty", Blackmun states "cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others'".<sup>35</sup> Hence, he believes, rights of self-definition and self-determination in intimate relations form an essential aspect of the right to privacy: "[The] concept of privacy embodies the 'moral fact' that a person belongs to himself and not others nor to society as a whole".<sup>36</sup>

Unlike the Majority's, Blackmun's interpretation of our interests in privacy makes room for our interests in equality. By associating our interests in intimacy with our interests in self-definition and self-determination, Blackmun is able to explain why individuals have an equal interest in privacy, and to constrain the right to privacy in ways that support our equality. Thus, Blackmun maintains that the state may prohibit coercive and exploitative relations because individuals have an equal interest in determining the nature of their intimate ties to others.<sup>37</sup> However, he claims, this means that the state cannot deny individuals privacy simply because some people find their behaviour offensive and immoral. He argues that "the fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting such relationships, and that much of the richness of a relationship will come from the

freedom an individual has to *choose* the form and nature of these intensely personal bonds".<sup>38</sup> Thus, Blackmun concludes that equal rights to privacy are inconsistent with state-enforced conformity to one model of intimate or sexual association.

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

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



*The Public/Private Distinction*

MacKinnon's third objection to the right to privacy is that this right creates a distinction between public and private things, between the political and the personal. Such distinctions, she argues, justify sexual coercion and inequality because they assume that the personal is not already political, and that the personal ought not to be political. As a result, they prevent inequality in the private sphere, or in the personal relations of individuals, from being recognised as political issues, demanding public redress.

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

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

The Majority in both *Harris* and *Bowers* relied heavily on claims about the rights of the majority of citizens to determine what the state should do. Hence, they stressed their duty, as unelected judges, not themselves to "legislate" by ruling legislation unconstitutional without good reason.<sup>39</sup> On these grounds, they claimed that the Hyde Amendment and Georgia statute are constitutional, because they could not see any compelling reason to consider them incompatible with the privacy and equality of individuals. Far from claiming that the personal is not political, or ignoring the fact that the legislature and they, themselves, were determining the content of privacy rights, they explicitly recognised these facts in their reasoning, though reaching conclusions about justice at odds with those of MacKinnon or the Minority.

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

And this seems plausible: because we can still distinguish amongst our rights, even though they may be dependent on each other. For example, the respective content and justification of the right to vote and the right to freedom of expression are interdependent. The content and justification of the one, in other words, constrains the content and justification of the other. Yet,

we suppose, individuals should have rights to both. Though we may find it hard to know how to distinguish the two, or to establish where one ends and the other begins, we are not indifferent to the need to do so, or agnostic about the appropriate means of doing so. Thus, we recognise that we may need to distinguish between these rights in order to protect them both - as when we consider whether or not we can rightly make "hate speech" or pornography crimes.<sup>40</sup> And we recognise that the reasons for trying to distinguish between the right to vote and the right to freedom of expression tell against resolving disputes in such matters by tossing coins or rolling dice. Instead, we generally think, the appropriate way to resolve disputes about the respective content of our rights should involve the reasoned consideration of opposing positions, so as to minimise, as far as possible, arbitrariness in our protection of individual rights.

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

Hence, I do not think that we can interpret the feminist claim that the personal is political as an objection to all forms of public/private distinction, rather than to particular ways of distinguishing the two.<sup>41</sup> Otherwise, we will be unable to distinguish the feminist claims from a defence of absolute government, or government by whim, personal prejudice and self-interest. Though MacKinnon has shown, then, that some ways of drawing the public/private line justify inequality, this does not mean that rights to privacy and equality must conflict. What it shows is that undemocratic conceptions of politics and of persons are interdependent, and can be mutually supporting. Some conceptions of persons justify inequality - racist and sexist ones, for example. But we cannot do without some distinct conception of persons in determining what justice requires, nor without some conception of personal choice. In short, we need to be able to distinguish between individuals and amongst choices, because the interests and choices of one are not necessarily those of all.

### *Summary*

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

## *CONCLUSIONS*

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

### *Privacy and Equality*

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

There are, then, egalitarian conceptions of the right to privacy. In this, privacy can be distinguished from slavery. It is difficult to reconcile slavery with the equality of individuals. Indeed, accounts of slavery which assume that it is compatible with equality seem to rest on unreasonable assumptions of fact and value. For example, they assume, with Aristotle, that there are natural slaves and natural masters, and that slavery is equally good for both.<sup>42</sup> Or they assume

that slavery can be consistent with the liberty of individuals, as do Locke and Nozick, although supposing absolute government to be unjust and liberty to be valuable.<sup>43</sup> So without denying that some things which people have valued are fundamentally incompatible with equality, there seems no reason to count the right to privacy amongst these.

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

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

so, we might think, will fail to isolate those factors which lead privacy, like slavery, inevitably to justify inequality.

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

As Marx noted, there is no mystery how slave and serf economic systems perpetuate inequality, because the coercion they justify is so manifest.<sup>44</sup> Because the coercive aspects of capitalism, which perpetuate inequality, are less manifest, he thought that we need to demystify capitalism in order to see why it is a morally unacceptable form of social cooperation. Similarly MacKinnon supposes that there would be no mystery about the way in which privacy rights justify inequality if individuals did not have equal rights to privacy. However, because individuals have equal rights to privacy, and because privacy looks like a reasonable object of equal rights, she thinks that we must demystify the right to privacy in order to understand the causes of inequality in our societies. So, I suspect, there is no better description of the right to privacy which shows that privacy and equality must conflict. Thus, it seems fair to conclude from MacKinnon's account of privacy, that the right to privacy need not justify inequality although, historically, it has often done so.

### *Interdependence*

As we have seen, MacKinnon believes that our conception of the nature and value of equality depends upon our conception of the right to privacy. Hence, she argues, we can only have an adequate account of the equality of individuals if we reject the right to privacy. Her views imply that, but for the right to privacy, the Supreme Court decisions in *Harris* and *Bowers* would have had a different outcome. Hence, so her views suggest, if we look at the reasoning in these cases we will find that the right to privacy stopped an otherwise acceptable account of equality in its tracks - and that this is why, in *Harris* and in *Bowers*, the Majority reached the decisions it did.

However, I have tried to show, there is no warrant for this interpretation of the Majority decisions. *Harris* reflects an unreasonable account of the rights of individuals, which would itself justify inequality whatever right was in question. In particular, it provides an unreasonable account of the equality of individuals, because it supposes that causal responsibility is a prerequisite for moral responsibility – at least in the case of state duties of aid. Similarly, the Majority's decision in *Bowers* includes an unreasonable account of equality. It supposes that the prejudices of some can justify the use of state power against others. But if it is wrong to deny individuals rights to interracial marriage, because doing so reflects unreasonable beliefs about the harm of miscegenation and, plausibly, the inferiority of blacks to whites, then it is similarly wrong to deny homosexuals intimacy based on prejudice about sodomy or against homosexuals. In each case, one aspect of the harm inflicted on individuals is denial of their equality with others, and respect for their moral capacities and agency.



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

In fact, though the conflict thesis appears to assume that our beliefs about the right to privacy are wholly independent of our beliefs about equality, this assumption makes it hard to understand how liberal beliefs about privacy can justify inequality. Unless we believed equality valuable, there would be no reason to give individuals equal rights to privacy - however valuable we took privacy to be. Unless we believed that equality was compatible with privacy, there would be no justification for rights to privacy, if we assumed that individuals should have equal rights. But it is only because the right to privacy justifies inequality, despite equal rights to privacy, that there is any reason to suspect that it must be intrinsically inegalitarian.

It seems mistaken, then, to attribute inegalitarian accounts of the right to privacy to the nature of privacy rights. To do so ignores the role of our theories of rights, and our understanding of

equality, in determining the privacy rights of individuals. This leads to a misleading picture of the right to privacy, and a simplistic picture of how privacy rights justify inequality. It provides a misleading image of the right to privacy as some sort of free - floating entity, whose content and justification bears no relationship to our beliefs about the equality or rights of individuals. It provides a simplistic account of the ways in which inequality is justified, by obscuring the fact that egalitarian assumptions about the rights and the equality of individuals can, and have, justified inequality.

### *Interdependence and Conflict*

Finally, I conclude that the interdependence of rights to privacy and equality explains why privacy and equality need not conflict. If privacy and equality are interdependent rights, then we can revise our accounts of the content and justification of each in light of our best understanding of the other. Though this in itself provides no guarantee that our rights to privacy and equality will be democratic, our ability reflectively to revise both provides us with the means to accommodate the distinctive value of each in a democratic scheme of individual rights.

So the Majority's account of the right to privacy justifies the oppression of women, and the denial of privacy to homosexual associations, although the Minority's does not. Nor is this "accidental", to use MacKinnon's vocabulary, as the Minority's account of the right to privacy reflects our legitimate interests in equality, whereas the Majority's does not. We can, then, embrace the Minority's account of the right to privacy without justifying sexual inequality and can reject the conception of privacy and equality implicit in MacKinnon's thesis.

Rights to privacy and equality, then, need not conflict because they are interdependent, as well as distinct, and this point is of practical, as well as theoretical, significance. Our ability to see privacy and equality as rights that share common premises and motivations is a precondition for distinguishing democratic from undemocratic versions of each. Likewise, our ability to distinguish the content and justification of rights to privacy and equality is necessary if we are to identify the place of each in a democratic system of rights – or, indeed, to understand the role that each has had in justifying, and perpetuating, sexual inequality and undemocratic government. In short, because rights to privacy and equality are interdependent as well as distinct, we can use our best understanding of each to advance our interpretation of the other, and to clarify the role that both might play in a democratic system of rights. In this way, we can make sure that people’s rights to privacy indeed reflect their claims to equality – sexual and otherwise – and that the various rights protecting their equality do justice to their claims to privacy. Hence, I conclude, the interdependence of rights to privacy and equality enables us to reject the conflict thesis, and to see how we might reconstruct our rights on more democratic lines.

### *Notes*

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1 For similar arguments see Law, 1984, 955-1040; Olsen, 1983; and Sunstein, 1992. Following MacKinnon and these authors, I will be assuming that sexual equality is a prerequisite for democracy.

2 In *Harris*, the Supreme Court was ruling on the constitutionality of the Hyde Amendment, which passed Congress in 1976. The Amendment, in its original form, limited Medicaid funding for abortion only to cases where pregnancy

threatened the mother's life, or where it was the result of incest or rape. For more information on the Hyde Amendment, see footnote 11 below.

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

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

5 Benn, 1984, pp. 223 - 244.

6 Sandel, 1982, p.183. Sandel, here, is speaking of politics, but the phrase seems as appropriate for smaller communities.

7 See, for example, Schoeman, 1984, pp. 91 and 111-2; Fried, 1968, pp. 475-93.

8 MacKinnon, here, appears to echo a point made by Mill: "...every one who desires power, desires it most over those who are nearest to him, with whom his life is passed, with whom he has most concerns in common, and in whom any independence of his authority is oftenest likely to interfere with his individual preferences". John Stuart Mill, 1970, p.136. See also Susan Okin, 1989, p. 136: marriage and family "constitute the pivot of a societal system of gender that renders women vulnerable to dependency, exploitation and abuse".

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

10 Booth, McDowell, and Simpson, Jan 18 1993, p.41.

11 See also Estrich, 1987, especially pp 23-4.

12 For discussions of the slogan "the personal is political", and of different interpretations of this see: Nicholson, 1986, pp. 17 - 43; Phillips, 1991, pp. 92 - 119; Pateman, *supra* pp. 131 - 134. Pateman notes that "The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle, and comments "it is, ultimately, what the feminist movement is about", p.118.

13 Benn and Gauss, eds., 1983, p 40; Rosenblum, 1987, p. 60.

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

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

16 See Phillips, 1991, pp. 93-4.

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

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

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

20 See Marshall's objections to the Court's interpretation of the Equal Protection Clause, in his *Harris* dissent, pp. 341 - 3.

21 For a similar critique of the Majority's understanding of state duties, see Unger's objections to the "truncation" of the equal protection analysis in Unger, 1983, pp. 44-52.

22 Indeed, it seems to have done so most strikingly in *DeShaney v. Winnebago County Department of Social Services*, 1989.

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

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

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

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

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

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

29 See Marshall's Opinion, p.343.

30 All the members of the Minority deny that the Hyde Amendment can be understood as a rational means of promoting childbirth, as the Majority claim (p. 325). For example, Steven notes that the effects of the Hyde Amendment are irrational on fiscal as well as medical grounds, and so that the Hyde Amendment could not be rationally related to the object of promoting childbirth, because it harms the whole pool of Medicaid recipients in order to prevent abortions. Moreover, Petchesky has noted that while the government denied Medicaid funding for abortions, it continued Medicaid funding for sterilization - a policy hard to reconcile with the Majority's interpretation of the Hyde Amendment. See Petchesky, 1984, p. 296.

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

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

33 "The fact that homosexual conduct occurs in the privacy of the home does not affect" the right of the state to prohibit such conduct, the Majority claim. See pp. 195-6 for their argument that *Stanley v. Georgia*, (1969) is not applicable to the case, though *Stanley* protected the possession of pornographic materials in the home that would be illegal outside it. For Brennan's objections to the Majority's interpretation of *Stanley* as, essentially a First Amendment ruling, see pp. 206-7.

34 For an excellent discussion, see Kaplan, 1997, pp. 43 – 36 and pp. 217 – 224.

35 p. 205. Blackmun is here quoting from *Roberts v. United States Jaycees*, 1984, p.619.

36 See p. 204. Here Blackmun cites Stevens' concurring opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, 1985) p.777 footnote 5. There Stevens quoted from Charles Fried, 1977, pp. 288 - 89. Charles Fried condemns the Majority decision in *Bowers* in Fried, 1991, pp. 81-83.

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

38 p. 205. Emphasis in text. Blackmun cites Karst, 1980, pp. 624 and 637.

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

40 See, for example, MacKinnon, 1985, pp. 1 - 70; Fiss, 1992, pp. 2041 - 62; Cohen, 1993, pp.207-263

41 Okin, pp. 127-8; Gavison, 1992, pp. 30-35.

42 in Aristotle, 1988, Book 1, sections 3-7

43 Locke, 1960, ch. 4; and Nozick, 1974, p.331.

44 See Marx, 1976, pp. 345-6.

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*Abstract*

This paper is a philosophical examination of Catherine MacKinnon's "Privacy v. Equality: Beyond *Roe v. Wade*" in light of the evidence in *Harris v. McRae* and *Bowers v. Hardwick*. Though the latter case postdates MacKinnon's article, MacKinnon's criticisms of the right to privacy appear to find support in this decision, no less than in *Harris*, which she, herself, cites. However, this paper argues, MacKinnon's reasons for believing that privacy justifies sexual inequality do not support the conclusion that all forms of the right to privacy must do so. Indeed, this paper suggests, some forms of privacy are necessary to sexual equality and it is, therefore, important to differentiate interpretations of the right to privacy that justify sexual inequality from those that do not. The paper then shows *that* this is possible, and explains *why* this is possible, by contrasting Majority and Minority interpretations of the right to privacy in these two important Supreme Court cases on the right to privacy. It concludes that while some forms of privacy justify sexual inequality, and do so for precisely the reasons that MacKinnon has identified, it would be wrong to suppose that privacy rights must justify sexual inequality. Hence, privacy rights are like voting rights, rather than the right to own slaves - rights that can be interpreted in ways that justify sexual inequality even though protection for both privacy and voting may be necessary to sexual equality and, therefore, to democratic government.