

*A Democratic Conception of Privacy*

**Ch. 2: The Value of Privacy**

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## A. Introduction

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

The previous chapter suggests, and ordinary experience confirms, that the term "privacy" and its cognates can refer to rather different things. Thus, the majority in Bowers v. Hardwick referred to both procreative and familial decisions as private matters, although the familial and the procreative are by no means identical.<sup>1</sup> Similarly the minority decision in Bowers associated privacy with intimacy, but also with self-definition and self-determination.<sup>2</sup> Yet, as MacKinnon notes, there is so little natural connection between these that the former can undermine the latter.<sup>3</sup>

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<sup>1</sup> Bowers v. Hardwick, 106 U. S. (1986), pp. 190 - 91

<sup>2</sup> Bowers v. Hardwick p. 205

<sup>3</sup> C. A. MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade" in Feminism Unmodified: Discourses on Life and Law, (Harvard University Press, Cambridge, Ma., 1983), pp. 93 - 102.

The seemingly heterogeneous character of "private matters" raises two obvious questions about the place of privacy in normative political argument. First, do "private matters" have any identifiable characteristic that distinguishes them from other matters - whether religious, political, artistic? Second, do these characteristics, if there are any, add anything important or useful to our understanding of moral and political values - or do appeals to privacy merely reiterate and obfuscate the reasons for caring about such values as life, liberty and the pursuit of happiness?<sup>4</sup>

These questions are the object of considerable political, philosophical and legal debate. Thus, lawyers have argued for some time about what harms, if any, are privacy offenses according to the common law.<sup>5</sup> More recently, constitutional lawyers have tried to explain which reasons for limiting state action distinguish the right to privacy in American law, from other constitutional rights.<sup>6</sup> Meanwhile, philosophers want to know if privacy is a coherent and distinctive moral and political value.<sup>7</sup>

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<sup>4</sup> For the contention that the latter is the case see J. J. Thomson, "The Right to Privacy" in Rights, Restitution, and Risk, (Harvard University Press, Cambridge, Massachusetts, 1986), pp. 117 - 134

<sup>5</sup> See, for example, the contrasting analyses of William L. Prosser and Edward J. Bloustein in F. Schoeman ed. Philosophical Dimensions of Privacy: An Anthology, (Cambridge University Press, City, 1984).

<sup>6</sup> Compare, for example, Ruth Gavison's "Privacy and the Limits of the Law", in ed. Schoeman, pp. 346 - 401 with Tom Gerety's "Redefining Privacy", Harvard Civil Rights - Civil Liberties Law Review 12 (1977).

<sup>7</sup> See, for example, the different responses of Scanlon, Rachels and Reiman to Thomson, in the journal Philosophy and Public Affairs. T. Scanlon, "Thomson on Privacy," in Philosophy and Public Affairs, vol. 4, 1975, pp. 315 - 22; J. Rachels, "Why Privacy is Important," in Philosophy and Public Affairs, vol. 4, 1975, pp. 323 - 333; J. Reiman, "Privacy, Intimacy and Personhood," in Philosophy and Public Affairs, vol. 6, 1976, pp.

I am interested in the philosophical problem of distinguishing privacy from other values, such as liberty, only as this illuminates the relationship of privacy and equality. I will, therefore, be examining only a small part of the literature which these controversies have provoked and so have a correspondingly modest contribution to make to it. However, the fact that there is quite sharp disagreement on the ingredients of privacy and its relationship to values other than equality, places obvious constraints on the quest for an egalitarian interpretation of privacy. For if the latter is to have any merit as an account of privacy, and to carry any conviction in resolving disputes about privacy rights, it needs to depart from reasonably uncontroversial premises about privacy, or ones to which people with widely differing views could reasonably assent.<sup>8</sup> Thus, a concern to clarify the relationship of privacy and equality means that we cannot ignore, even if we cannot resolve, controversy about the relationship of privacy to a variety of different values.

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

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26 - 44; also F. Schoeman "Privacy: Philosophical Dimensions of the Literature", in ed. Schoeman, pp. 1 - 33

<sup>8</sup> J. Cohen, "Freedom of Expression," in Philosophy and Public Affairs, vol. 22, 1993, pp. 223 - 4

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

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

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

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

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

For example, Anita Allen and Ruth Gavison treat inaccessibility as the conceptual and moral core of privacy, for political and legal purposes.<sup>9</sup> Hence, they are committed to explaining any personal control of information or intimate relations which privacy licenses, by reference to the nature and importance of inaccessibility. By contrast, Inness

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<sup>9</sup> A. Allen Uneasy Access: Privacy for Women in a Free Society , (Rowman and Littlefield, New Jersey, 1988)

R. Gavison, "Privacy and the Limits of the Law" in ed. Schoeman, pp. 346 - 402

believes that relations of love and care form the conceptual and moral core of privacy.<sup>10</sup> She holds, therefore, that the different components of privacy as a political value can be explained in terms of the fundamental connection between privacy and intimacy.

In the final part of the paper I examine such claims and show how they arise as a response to philosophical and political doubts about the coherence and importance of privacy. However, while sympathetic to the view that privacy can be distinguished from other political values such as liberty, equality and freedom of expression, and that moral and political argument may require us to make such distinctions, I believe that privacy is a less determinate political concept and value than these writers suggest. Because we can reinterpret and revise our values - even those with a long and august pedigree - this indeterminacy strikes me as neither peculiar to privacy nor an obvious defect. Indeed, in the case of privacy this indeterminacy enables us to democratise attractive aspects of privacy while rejecting features which, though historically and politically important, have no place in a democracy. Thus, in this chapter I aim to advance the claim that privacy is compatible with equality by examining widely recognised and agreed upon features of privacy in moral and political argument.

## **B. Personal Choice and Private Matters**

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<sup>10</sup> J. C. Inness, Privacy, Intimacy, and Isolation, (Oxford University Press, New York, 1992)

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

### Privacy, Solitude and Inaccessibility

Privacy is frequently associated with solitude and the ability to exclude others, or to make oneself inaccessible.<sup>11</sup> Hence, privacy commonly figures in political argument in support of demands for personal inaccessibility and control over the ways in which others can approach, sense or monitor us. In political philosophy, protection for the solitude and inaccessibility of individuals is almost universally recognised to be an important feature of privacy, and this inaccessibility is

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<sup>11</sup> See in particular Allen p.15, Gavison p. 350, Scanlon p. 315

commonly recognised to be psychological as much as physical. Thus Scanlon, Allen and Westin believe that privacy appeals to personal choice can protect emotional reticence and reserve quite as much as physical distance, and emphasise privacy's protection for anonymity as well as for solitude.<sup>12</sup> In fact, Westin claims that "The manner in which individuals claim reserve and the extent to which it is respected or disregarded by others is at the heart of securing meaningful privacy in the crowded, organization-dominated settings of modern industrial society and urban life".<sup>13</sup>

Critics of privacy also prominently link privacy with inaccessibility. Thus, Thomson supports her argument that privacy is a redundant political value by arguing that limits on personal accessibility can be justified perfectly well without reference to privacy by appealing instead to our rights and interests in bodily integrity, liberty and the protection of private property.<sup>14</sup> Similarly moral critics have generally objected that privacy supports loneliness and isolation, fosters exclusivity and a failure to acknowledge a common humanity because privacy enables individuals to erect walls around themselves and so to deflect the concern, curiosity and interest of others.<sup>15</sup> For example, Edmund Leach maintains that "Privacy is the source of fear and violence.....I am isolated, lonely and

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<sup>12</sup> Scanlon p. 316; Allen pp. 17, 23 - 24; and A. F. Westin Privacy and Freedom, (Atheneum, New York, 1967) pp. 31- 42

<sup>13</sup> Westin p. 32

<sup>14</sup> Thomson pp. 124 - 8

<sup>15</sup> for a discussion of these views see M. A. Weinstein, "The Uses of Privacy in the Good Life" in J. R. Pennock and J. W. Chapman (Eds.) Privacy: Nomos XIII, ( Atherton Press, New York, 1971), 88 - 104; and R. A. Wasserstrom, "Privacy: Some Arguments and Assumptions" in ed. Schoeman, pp. 317 - 332.

afraid because my neighbour is my enemy".<sup>16</sup> Thus, the ability to isolate oneself from others is widely acknowledged to be an important feature of privacy in normative political argument, by its critics and admirers.

### Privacy and Intimacy

The second reason generally given for treating some matters as private is that they are intimate, sexual or familial.<sup>17</sup> Thus the choice of personal companion, lover and spouse is generally treated as a matter for individuals to decide for themselves, and appeals to privacy aim to enforce this norm against the government, parents and others who wish to intervene.<sup>18</sup>

The idea that intimacy or close and sustained relations of an affectionate, sexual or family nature are normatively important elements of privacy is widely acknowledged even if personal choice for such relationships is one of the most controversial and oft-criticised features of privacy. Although friendship, love, sexual desire and kinship are rather different bases for relationships, they are all commonly thought of as private by virtue of the highly personalised demands that they make on

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<sup>16</sup> E. Leach, A Runaway World? The Reith Lectures 1967, (Oxford University Press, London, 1968), p. 46

<sup>17</sup> Inness chapters 5 and 7; Allen p. 19; and both C. Fried, "Privacy: [a moral analysis]", pp. 203 - 221 and F. Schoeman, "Privacy and Intimate Information", pp. 403 - 417 in ed. Shoeman.

<sup>18</sup> Gavison is unusual amongst privacy theorists in defining privacy in such a way as to exclude intimacy. For Gavison "An individual always loses privacy when he becomes the subject of attention", and she characterises privacy in terms of "three independent and irreducible elements: secrecy, anonymity and solitude". pp. 353 - 4

individuals, and of the pleasures to which they give rise.<sup>19</sup> The same applies also to friendships and to the other personal associations of a non-sexual nature which are thought to owe their existence to the personal qualities, interests and avocations of their participants.

Thus intimacy is commonly recognised to be a privacy reason for allowing personal choice, and for limiting the say that the state or other people can have in the conduct of our affairs. This is attested to also by critics of privacy. For example, MacKinnon argues that privacy sacrifices sexual equality to intimacy, and Okin makes a similar point when considering the inegalitarian distribution of income between men and women within families.<sup>20</sup> Indeed, privacy protection of current forms of intimacy forms an essential aspect of feminist concerns with privacy as a political value.

### Privacy and the Control of Personal Information

The third reason typically taken to underlie claims to privacy, involves the control of personal information. Protection for privacy is meant to protect individuals from the unconsensual publication or dissemination of information about themselves.<sup>21</sup> Such protection is

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<sup>19</sup> S. Benn, "Privacy, Freedom and Respect for Persons" pp. 101, 104 - 5 in ed. Schoeman

<sup>20</sup> MacKinnon p. 100 and S. Okin Justice, Gender and the Family, ( Basic Books, New York, 1989) ch. 7

<sup>21</sup> S. D. Warren and L. D. Brandeis, "The Right to Privacy [the Implicit Made Explicit]", pp. 75 - 103 in ed. Shoeman; and Westin's Privacy and Freedom are the classic examples of this view. Thus, Westin defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". p. 7

generally thought to cover information about a person's habits, beliefs, emotional and physical state and appearance in so far as they are not evident to all, or of legitimate political or judicial concern.<sup>22</sup> Privacy protection is also commonly thought to protect individuals from the involuntary publication of artistic or creative works, as well as of more mundane personal records and communications. While such works may not communicate information about their author or creator in any clear or unambiguous way, they are generally thought to be expressions of one's personality and to indicate one's feelings, beliefs and technical capacities. Hence, as Warren and Brandeis emphasise, privacy protection against the involuntary publication of creative endeavours does not depend on their artistic or creative merit, but on the fact that their creator does not want to expose his or her efforts to general view and evaluation.<sup>23</sup>

The importance of information control to privacy is suggested by its critics as well as its admirers. Thus Thomson attempts to show that privacy is redundant by explaining how appeals to liberty, personal security and the protection of property can sustain claims to control what is known about us and, thus, the enjoyment and use others can make of our capacities, misfortunes and possessions.<sup>24</sup> Similarly, feminist critics of privacy are commonly concerned that privacy protects the public

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<sup>22</sup> For these limits on privacy see Warren and Brandeis pp. 87 - 9 and Westin pp.370 - 376

<sup>23</sup> Warren and Brandeis.pp 79 - 80.

<sup>24</sup> Thomson pp. 128 - 134 although at p. 128 Thomson maintains that "none of us has a right over any fact to the effect that the fact shall not be known by others. You may violate a man's right to privacy by looking at him or listening to him: there is no such thing as violating a man's right to privacy by simply knowing something about him".

standing and respectability of wife-batterers, rapists and child molesters and, in general, shrouds coercion and exploitation in silence, anonymity and ignorance. Thus, MacKinnon concludes that "the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor", and argues that it has "cut women off from collective verification" of their rights and wellbeing.<sup>25</sup>

### Privacy and Moral Personhood

Finally, a characteristic of private matters frequently thought to be important is its alleged protection of personal dignity and moral personhood. By this is generally meant respect for the moral agency and capacities of individuals, and acknowledgement and protection for their moral separateness and independence. Thus Reiman, Benn and Schoeman associate privacy reasons for protecting personal choice with the view that individuals are each the source of moral claims, so that no one should ever be used merely as a means for the well-being of others or for the achievement of some public policy.<sup>26</sup> Similarly Eichbaum claims that "[t]he human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a life-style which allows expression of their uniqueness and individuality".<sup>27</sup>

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<sup>25</sup> MacKinnon pp. 101 - 2

<sup>26</sup> eg. Reiman "privacy is a social ritual by means of which an individual's moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes - and communicates to the individual - that his existence is his own. And this is a precondition of personhood", p. 39; Schoeman pp. 414 - 6; and Benn pp. 228 - 9

<sup>27</sup> J. Eichbaum, "Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy," in Harvard Civil Rights - Civil Liberties Law Review, vol. 14, (1979), p. 365

Privacy appeals to the protection of personal choice along these lines also commonly reflect the fact that individuals need to develop their capacities for reflective choice and agency - or their most distinctively human attributes. As a result, the humanity of individuals is vulnerable both to bad luck and other developmental misfortunes and to the malice, neglect and capriciousness of others. So dignitarian or moral-personhood accounts of privacy as a political value commonly assume with Reiman, that privacy protection for personal choice is not merely a tribute or recognition of an individual's humanity, but part of what constitutes and maintains it.<sup>28</sup>

Emphasis on the dignitarian aspects of privacy is commonly thought to explain the importance privacy attaches to preventing unwanted behaviour that does not create any noticeable harm or injury or even the risk of such harm. For example, Benn appeals to our dignitarian interests in privacy to explain what is wrong with treating people as entertaining objects to be sighted and studied without their knowledge or consent in ways analogous to bird-watching.<sup>29</sup> Conversely, critics of privacy acknowledge this feature of privacy when they argue that privacy misrepresents and threatens the dignity of individuals by holding hostage the conscious pursuit of common affairs and interests to individual whim, prejudice, self-interest and confusion.<sup>30</sup>

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<sup>28</sup> "The right to privacy, then, protects the individual's interest in becoming, being and remaining a person", Reiman p. 44.

<sup>29</sup> Benn pp. 225 - 7

<sup>30</sup> Marx's critique of civil society, and of the distinction between the private man and the public citizen suggests this line of thought. See Karl Marx "On the Jewish Question" and

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

There is, clearly, considerable overlap between these different reasons for protecting personal choice or what we might also call different aspects of privacy. Thus, most obviously, the idea that privacy supports claims to inaccessibility overlaps with the belief that privacy gives individuals control of personal information. Indeed, the latter can sometimes seem to be merely a more specific version of the former, indicating more clearly in what ways a respect for privacy requires us to be left alone.<sup>31</sup> With Warren and Brandeis and with Westin and Benn the control of personal information is also explicitly linked to human dignity, as it is thought to be an essential dimension of such dignity or personhood. Thus, Warren and Brandeis contrast the concern for our spiritual needs and interests manifested by privacy protection against the unconsensual publication of personal information with the concern for

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"Contribution to the Critique of Hegel's Philosophy of Right: Introduction" in ed. Tucker The Marx-Engels Reader.(Norton?).... See also the republican depreciation of privacy in favour of the political life, of which Hannah Arendt's The Human Condition is an example. Hannah Arendt The Human Condition (University of Chicago Press, Chicago, 1958)

<sup>31</sup> W. A. Parent, "Privacy, Morality and the Law," in Philosophy and Public Affairs, vol. 12, 1983

our material needs and interests manifested by legal protections against theft and exploitation.<sup>32</sup> Similarly, Benn argues that resentment and not just fear is an appropriate response to the indignity threatened by a national data centre. He claims that, for similar reasons, it is wrong to treat even an entertainers' life as material for entertainment. In each case, he suggests, the dignity of individuals is threatened or violated if their lives can be subject to the scrutiny of others at will.<sup>33</sup>

Privacy concerns for intimacy and inaccessibility also frequently overlap. Thus Allen argues that intimacy is one of the goods which privacy protects by limiting others' access to us - a position whose force is suggested by the importance to many homosexuals of being able to hide, disguise and otherwise limit knowledge of their sexual and amatory preferences<sup>34</sup>. Similarly, Inness maintains that the importance we attach to relationships of affection, love and care underlies privacy claims to personal choice both because these emotions cannot generally be forced and out of respect for individuals as "emotional choosers".<sup>35</sup> Some such view, indeed, underpinned Blackmun's minority argument in Bowers, which linked privacy claims to intimacy to our interests in dignity. Thus Blackmun held that privacy, as a political value, has generally protected

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<sup>32</sup> Warren and Brandeis p. 79. They also contrast an interest in securing the just material reward for one's endeavours by controlling their publication, with the value of privacy to an individual, which lies "in the peace of mind or the relief afforded by the ability to prevent any publication at all".

<sup>33</sup> Benn pp. 231 and 133.

<sup>34</sup> Allen p. 19. See also V. J. Samar, The Right to Privacy: Gays, Lesbians, and the Constitution, Temple University Press, Philadelphia, 1991, especially pp. 142 - 51 and 157 - 171 and Fried's influential, if contentious, claim that control of personal information is essential to intimacy in ed. Shoeman pp. 205, 211 - 213.

<sup>35</sup> Inness p. 91

an individual's quest for sexual and emotional fulfillment through intimate association with others because such fulfillment is an important element in the happiness of most people and typically enables us to express our fundamental values and to develop and exercise our moral powers.<sup>36</sup>

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

### Privacy and Heterogeneity

As reasons for protecting personal choice there are important differences between solitude and personal inaccessibility, intimacy, control of personal information, and dignity. For example, some common reasons for valuing personal inaccessibility, such as the desire for peace and quiet, for personal security, the ability to concentrate, can tell against

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<sup>36</sup> Bowers v. Hardwick p102. Hence, Blackmun claimed, "the fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests...that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds". (emphasis in the text).

family life, romance and the fulfillment of sexual desire.<sup>37</sup> Similarly, some of the reasons for caring about intimacy or the control of personal information may have nothing much to do with moral dignity: The pursuit of pleasure or happiness, self-expression and self-interest, while important to us, may be neither dignified nor particularly worthy. Devotion to family can make us hostile to the claims of others and love can inhibit moral judgement and action. Hence Leach's condemnation of "the family, with its narrow privacy and tawdry secrets", in A Runaway World?<sup>38</sup> The control of personal information, moreover, can foster secretiveness and distrust of others, even where one has nothing to hide and no reason to fear others.<sup>39</sup> In short, these different reasons for protecting personal choice may point in different directions and support conflicting personal and political choices.

Nonetheless, it seems possible to describe affinities or connections between these different reasons for protecting personal choice, even if there is no natural or inevitable connection between them. For cultural factors and historical contingency may have a role in maintaining the cohesion and legitimacy of a society's values, (or those of a particular individual), just as these factors may also lead to "legitimation crises",

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<sup>37</sup> Michael Weinstein in ed. Pennock and Chapman, p.102 focusses on the intellectual and creative activities which privacy can support. W. L. Weinstein explicitly rejects the view that privacy implies intimacy, when he claims, p. 33, and notes at p. 32, footnote 6 that intimate relations may conflict with the equality, autonomy and dignity of persons. W. L. Weinstein, "The Private and the Free: A Conceptual Inquiry" in Privacy, (Eds.) J. R. Pennock and J. W. Chapman, ( 1971), pp. 27 - 55.

<sup>38</sup> E. Leach p. 44

<sup>39</sup> Hence the concerns of Bruno Bettelheim about privacy. See B. Bettelheim, "The Right to Privacy is a Myth," in The Saturday Evening Post, (July 27, 1968), p.9 and Leach op. cit.

and efforts at individual moral reform.<sup>40</sup> In the case of privacy, for example, it is often noted that the things which contemporary American and European societies consider private differ from those in other societies and, even, from those considered private in America and Europe a generation or so ago.<sup>41</sup> Thus it seems reasonable to imagine that at least some of the moral connections between different aspects of privacy need to be explained in light of individual and social needs provoked by historical change and development.

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

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<sup>40</sup> J. Habermas, Legitimation Crisis, (Beacon Press, Boston, 1975)

<sup>41</sup> Westin pp. 29 - 30, and pp. ch. 13, pp. 330 - 364; and also H. J. Spiro, "Privacy in Comparative Perspective" pp. 121 - 148 in ed. Pennock and Chapman

survie in the modern age of scientific penetration of house, auto, office, and meeting room unless the courts and public mores install a curtain of law and practice to replace the walls and doors that have been swept away by the new instruments of surveillance".<sup>42</sup>

But the fact that control of personal information emerged as a distinct ingredient of privacy, if it did, in response to technological development and urbanisation, does not mean that it cannot come to have an independent place in our conceptions of privacy. For the pressures that can make control of personal information important to established conceptions of privacy may lead us, in time, to see control of personal information as an independent good, which privacy claims to personal choice should protect. In other words, we may be brought to revise or reinterpret our conceptions of solitude, intimacy or dignity in light of the importance we come, on reflection, to place on the control of personal information. Thus, for example, we might expand our ideas of intimacy to include telephone conversations, and may come to value this particular form of communication and to care about the way in which its access is regulated. Or, perhaps, we come to distrust apparently innocuous requests for information about us once we realise how little say we have over the physical life and use of this information. In short, the fact that there is no natural or inevitable connection between different aspects of privacy does not suggest that their relationship is merely fortuitous, and that their connection is wholly lacking in moral or political significance.

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<sup>42</sup> Westin p. 398

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

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

### **C Privacy Interests**

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

The first such interest is the interest in self-definition and self-determination. By this I mean the interest that individuals have in forming a personal identity and sense of themselves, of discovering what they value and deem important in life, and in living their lives according to their beliefs and aspirations.<sup>43</sup> Without some sense of who we are, and of the ends that we ought to pursue, we will lack the means to develop and exercise our capacities for moral thought and action. Thus, it is reasonable to suppose that individuals have fundamental interests in self-determination, even though our identities, values and opportunities are not wholly the product of, or susceptible to, personal choice.<sup>44</sup>

This interest, I believe, helps to illuminate the connections between privacy protection for solitude, intimacy, the control of personal information and personal dignity. Not only are these important to our ability to constitute a sense of ourselves as distinct moral persons, but

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<sup>43</sup>See Jean Cohen, "Redescribing Privacy: Identity, Difference and the Abortion Controversy", in Columbia Journal of Gender and Law, vol. 3 no. 1, (1992), pp. 101 and 114 - 6; Rhonda Copelon, "Unpacking Patriarchy", in A Less Than Perfect Union, ed. J. Sobel, (Monthly Review Press, New York, 1988), pp. 316 - 9

<sup>44</sup> Hence what Martha Nussbaum identifies as "the fragility of goodness" and the philosophical concern, which she shares with Bernard Williams, that one's moral standing, in one's own eyes and those of other people, depends so often on matters over which we have little or no control. As Nussbaum writes: "...that much that I did not make goes towards making me whatever I shall be praised or blamed for being; that I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me into a position in which I cannot help being false to something or doing some wrong; that an event that simply happens to me may, without my consent, alter my life; that it is equally problematic to entrust one's good to friends, lovers, or country and to try to have a good life without them - all these I take to be not just the material of tragedy, but everyday facts of lived practical reason". M. C. Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy, (Cambridge University Press, Cambridge, 1986), p. 5

they are, as well, ways in which we express and seek to exercise, our powers of personal choice. Thus, our personal relations with others help to define who we are and what we care about, as Blackmun maintained in Bowers v. Hardwick.<sup>45</sup> Solitude and the ability to isolate, or seclude, themselves, gives individuals opportunities for self-reflection and self-knowledge, relaxation and experimentation that sustain their capacities for judgement and decision - making, and may, themselves, be sought as intrinsically desirable goods.<sup>46</sup>

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

It is, perhaps, a truism to say that individuals need close and varied contact with others, even though they may differ both in the extent of

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<sup>45</sup> See p. 204, Bowers v. Hardwick. Also, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. (1985), p. 772

<sup>46</sup> This point is emphasised by Alan Westin, pp. 32 - 42 and by Michael A. Weinstein in "The Uses of Privacy in the Good Life" in Privacy, eds J. Roland Pennock and John W. Chapman, (Nomos XIII, Atherton Press, New York, 1971), pp. 88 - 104.

that need, and in the degree to which they value personal relationships as ends in themselves. The love, care, support and concern of others is generally necessary for us to flourish and even to survive, and our ability to reciprocate and to develop such relations is generally valued and cultivated by individuals for its own sake, and for its contribution to one's self-respect, social standing, personal fulfillment and sense of belonging.

This interest in companionship helps to illuminate privacy protection for seclusion and solitude, as well as for dignity and freedom of personal communication. As Rachels, Fried and Schoeman have argued, our ability to distinguish and to maintain different personal associations importantly depends on our ability to control access to ourselves, and to vary the degree of intimacy and formality inherent in our relations with others.<sup>47</sup> Such control enables us to respond to the needs of others, and to personalise our relations to them. Hence an interest in intimacy and companionship helps to illuminate the connections between the heterogeneous aspects of privacy and to explain why privacy protection for a variety of personal associations is a central ingredient of privacy as a moral and political value.

Finally, our interests in confidentiality help to give substance and coherence to the different aspects of privacy. Individuals have interests in confidentiality because they have interests in expressing their faith and trust in others, and in being able to reciprocate these, as occasion

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<sup>47</sup> Thus, Rachels claims that "...our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have...[This] is, I think, one of the most important reasons why we value privacy". Rachels, p. 329

demands.<sup>48</sup> Confidentiality enables individuals to express themselves freely, without fear of misunderstanding or manipulation, and so to take risks or explore possibilities that they would otherwise fear and avoid.<sup>49</sup> In these ways confidentiality can promote self-confidence, as well as trust in the integrity and ability of others. A concern for confidentiality, therefore, can illuminate privacy protection for the inaccessibility, intimacy and dignity of individuals, as these can be seen both as ways to protect our abilities to give and receive confidences, and as themselves expressions of trust and concern for others.

If this analysis is right, individuals have basic interests in privacy, and these can be used to illuminate the moral and political connections between the different aspects of privacy. However, before proceeding, it may be helpful to consider the relationship between these three privacy interests. For, off hand, an interest in self-definition seems a considerably broader interest than either the interest in intimacy or in confidentiality, and this raises natural concerns about the internal coherence and analytic purchase of the account of privacy offered here. In particular, it is natural to worry, as does Robert Bork, that appeals to self-definition in the interpretation of privacy, are likely to prove endlessly expandable, and to make it impossible to distinguish privacy claims from a claim to get what one wants.<sup>50</sup>

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<sup>48</sup>See, for example, Westin, p. 37, Schoeman...

<sup>49</sup> See, for example, the discussion of Consciousness - Raising Groups, in Hester Eisenstein, *Contemporary Feminist Thought*, (G. K. Hall and Co., Boston, 1983), ch. 4 and Catherine MacKinnon, *Towards a Feminist Theory of the State*, ch. 3?

<sup>50</sup> See Robert H. Bork, *The Tempting of America: The Political Seduction of Law*, (Free Press, New York, 1990), especially p. 98 and pp. 110 - 126.

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

In the first place, the ability to form a personal identity, or sense of oneself as a distinct moral agent, though complex is not meaningless. In particular, the interest in self-definition is a moral and political one, motivated by the fact that individuals are typically capable of moral judgement and agency and have an interest in developing and exercising these capacities even though others may find it advantageous to stop them. Thus, the concern here is not with protecting all choices, whatever they may be, but with the ability of individuals to decide what ends they believe to be reasonable, worthwhile and right, as free and equal beings. Granted that it may not always be easy to distinguish the interest in self-definition from the interest in getting one's way in all circumstances - particularly as we are likely to believe that those who hold ends of which we disapprove are unreasonable, immoral and selfish - we are not helpless to distinguish egoism from self-definition, or protection for all choices from self-determination. Indeed, the importance of recognising that individuals have an interest in deciding how they should live derives partly from this: that once one grants such an interest one must make the effort to listen and attend to the moral views of others, rather than

assuming that these can be simply dismissed as nonsense, immoral or self-serving whenever they conflict with our interests.

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

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

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

There are, then, three ways that we can describe the moral affinities between the different aspects of privacy. Though one might wish to focus on one rather than the others, each is an important interest and has a place in illuminating our particular judgements about privacy. For instance, privacy is often associated with the protection and toleration of diversity; with the allowance and encouragement of individuality; and

with social stability and generational continuity.<sup>51</sup> My account of privacy interests accords with these aspects of privacy, which figure prominently in arguments for and against privacy rights. Thus, critics of privacy commonly charge that it leads us to overvalue personal choice and individuality; that it threatens accepted moral standards and dissolves common bonds and responsibilities; and left-wing critics, in particular, charge that privacy perpetuates the power of an irresponsible social elite.

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

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<sup>51</sup> See, for example, Ruth Gavison, p. 367. However Gavison notes that by tolerating social deviancy, as long as it is quiet or hidden, "privacy reduces our incentive to deal with our problems". This concern about the limits of privacy can be seen also in R. Copelon, "Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change" in A Less Than Perfect Union, (Ed.) J. Lobel, (Monthly Review Press, New York, 1988).

Thus, it seems possible to characterise the interests underlying privacy protection for personal choice by appealing to, and developing, acknowledged and comparatively uncontroversial assumptions about privacy and its moral and political significance. The comparatively uncontroversial character of my account of privacy interests is important for several reasons. First, because it is directly related to the plausibility and usefulness of this interpretation of privacy. Secondly, because there is a fairly close connection between the uncontroversial and accessible nature of one's assumptions, for purposes of moral argument, and their compatibility with equality. Respect for equality can require us to respect and accommodate the diverse values individuals may reasonably hold.<sup>52</sup> Hence, evidence that privacy is compatible with a wide range of moral perspectives itself provides a reason for thinking it compatible with equality.

And it is reasonable to believe that privacy is compatible with a wide range of values - religious, secular, individualist or communitarian. For concerns with self-determination and self-definition, with companionship and confidentiality are neither narrow nor sectarian, the preserve of some one social group, or some moral or religious sect. Different people may,

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<sup>52</sup> See, for example, J. Cohen, "Moral Pluralism and Political Consensus" in The Idea of Democracy, (Eds.) D. Copp, J. Hampton and J. E. Roemer, (Cambridge University Press, Cambridge, 1993), pp. 270 - 288., and "Freedom of Expression" pp. 223 - 4. Gavison rejects the attempt to provide an intrinsic -value account of privacy for similar reasons. Arguments that privacy is inherently valuable, she believes, "obscure the specific functions of privacy". Moreover, "They prevent any discussion with people who do not share the intuitive belief in the importance of privacy". Gavison p. 360

reasonably, attach different importance to each of these, given their particular values, and there may well be competing interpretations of the particular content or meaning of each. However, it is difficult to think of a group, or a moral position for which these privacy interests have no value - even if, in some cases, the value accorded to personal choice, for example, is instrumental and seen as a necessary accommodation to a morally distasteful world.<sup>53</sup>

The connection between these three privacy interests and equality can also be described more directly. Thus, self-definition and self-determination are goods that commonly motivate quests for equality and democratic rights, just as our capacities to identify with others and to cooperate with them are essential to the achievement of equality.<sup>54</sup> Confidentiality can protect individuals from oppression and subordination, as well as enabling them to recognise and to discover common interests, hitherto unacknowledged or suppressed.<sup>55</sup> Similarly, love, friendship and companionship can motivate individuals emphatically to reject the subordination of one person to another (Mill) and, by providing examples or models of reciprocity, can help us better to see what it might mean to treat each other as equals. In these ways, then, privacy can enable individuals to affirm the importance of equality as a

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<sup>53</sup> Similarly, Gavison claims that "privacy may be linked to goals such as creativity, growth, autonomy, and mental health that are accepted as desirable by almost all such theories [of the good life], yet in ways that are not dictated by any single theory". Gavison pp. 361 - 2

<sup>54</sup> See, for example, Sara Evans, Personal Politics, "Fraternity", in Anne Philips, Democracy and Difference, (Pennsylvania State University Press, Pennsylvania, 1993), ch. 1 and ch. 3 of Engendering Democracy,

<sup>55</sup> See Westin, pp. 350 - 351, also Eisenstein and MacKinnon on consciousness raising, *supra*.

moral and political value, and to challenge the claims of those who believe that the subordination of some people to others is natural, inevitable or just.

For these reasons, then, it seems fair to treat privacy and equality as distinct but compatible values. That is not to say that they cannot conflict, or that privacy protection for particular personal choices is always egalitarian. It almost certainly is not. Our interests in generational equality, for instance, may tell against privacy protection for some personal choices associated with privacy - in the distribution of income and property, say.<sup>56</sup> However, such possibilities give us no reason to conclude that privacy and equality must be incompatible, or that respect for the equality of individuals requires us to forgo all personal choice in our beliefs, attachments and loyalties. Thus, our privacy interests, as described, support the view that (1) some important moral concerns unite the diverse features of privacy as a moral and political value; and (2) that these are compatible with, and can even promote, the equality of individuals.

Thus far I have argued that privacy can have a variety of controversial and even conflicting features without being an arbitrary and incoherent mish-mash of different values. I have also argued that the different normative concerns connecting paradigmatic features of privacy are compatible with equality. In this, the final part of the chapter, I will

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<sup>56</sup> Rawls says, at section 46, p. 301 "Even in a well-ordered society that satisfies the two principles of justice, the family may be a barrier to equal chances between individuals". See also section 77 pp. 511 - 2

connect these two arguments, by examining some competing philosophical claims about the fundamental and unifying features of privacy. These claims, taken singly, conflict both with my own and with each other - although taken together, I believe, they support my emphasis on the diverse and mutually irreducible features of privacy. So, in what follows, I will argue that attention to the diverse and contradictory features of privacy is necessary if we are to reach general agreement on the value of privacy, and if this agreement is to prove compatible with the equality of individuals.

#### **D Equality and Diversity**

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

those in Bowers and Harris , justify inequality in the name of an equal right to privacy<sup>57</sup>.

Because a concern for equality requires us to recognise the diversity of our interests in privacy, it is important to see that this is perfectly compatible with the belief that privacy is a distinctive and important political value. For the philosophical literature on privacy suggests that a concern to distinguish privacy from other values leads to pressure to ignore or downplay the heterogeneous and contradictory aspects of privacy. For example, Allen, Inness, Reiman and Parent all reject Thomson's contention that privacy is a confused and redundant value. They agree with Thomson that privacy is made up of rather different things, but dispute her claim that there is no common connection amongst these, giving privacy its *raison d'etre* .<sup>58</sup> Moreover, each interprets Thomson's challenge in a similar way: as requiring them to find the one value connecting together the different ingredients of privacy. In short, each takes it that they must find that one paradigmatic feature of privacy which underlies all other commonly recognised aspects of privacy, and which gives these their moral importance. Though sharply disagreeing about which this foundational value is, therefore, these authors agree on what it would take to disprove Thomson's claim that privacy is a redundant hodge-podge of other values.

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<sup>57</sup> See the discussion of these cases in the previous chapter pp. ...

<sup>58</sup> Reiman pp. 27 - 28, and 43 - 44; Inness pp. 28 - 29 in particular; Allen p. 41; Parent pp. 269 - 271, 278 - 280

If I am right, however, this methodological assumption is both unnecessary and misguided. It is unnecessary because we can identify important privacy concerns by thinking of private matters as heterogeneous and loosely connected to each other. Far from needing to find one core value, organising the rest, we can treat privacy as made up of equally important, mutually irreducible elements, without making it a moral and conceptual jumble. For there can be close affinities between the different aspect of privacy, even if there is no logical or necessary connection between them. Thus Scanlon agrees with Thomson "that the rights whose violation strikes us as [an] invasion of privacy are many and diverse, and that these rights do not derive from any single overarching right to privacy".<sup>59</sup> Yet he, like Rachels, believes that our interests in privacy, though diverse, may provide a common foundation for the disparate rights that make up "the right to privacy cluster".<sup>60</sup>

Nor is this so surprising. For Thomson's concern is not that privacy is made up of different parts, but that there is no logical or moral connection between these which illuminates their moral status. What is chiefly responsible for Thomson's belief that the right to privacy is a redundant amalgam of different rights is the sense that "the fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster".<sup>61</sup> Thus, a successful response to Thomson -

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<sup>59</sup> Scanlon p. 315

<sup>60</sup> Scanlon p. 315, and Rachels p. 323, and Thomson's article for the idea of a "right to privacy cluster".

<sup>61</sup> Thomson pp. 132 - 3. I will be looking at the case for a right to privacy in the subsequent chapter. For now, I am concerned with the prior question whether or not the term "privacy" refers to anything useful or valuable to which it would make sense to claim a right.

if there is one - does not consist in showing that privacy is *really* one thing - whether inaccessibility, intimacy, dignity, control of personal information or what have you - but in explaining what moral or other concerns tie various features of privacy together and make it a useful part of moral and political discourse. For that, if I am right, one must identify and elaborate the diverse features of privacy, in order to establish their connections. So, a belief that privacy is an important political value does not commit us to finding some one moral concern at its core, or to the belief that privacy provides only one main reason for protecting personal choice.

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

For example, Allen believes that privacy can be identified with inaccessibility, for moral and political purposes. Thus, she describes different aspects of privacy in terms of their connection to inaccessibility. This works relatively well when it comes to confidentiality, anonymity and reserve which, as Allen claims, are ways of limiting others' access to

us.<sup>62</sup> But, as she acknowledges, things are not so straight-forward when it comes to intimacy. Though we customarily treat intimacy as a form of privacy, and an important one, we are, as Allen recognises, at least as likely to think of inaccessibility and intimacy as opposites, as to consider the latter a case of the former. Hence, Allen notes that "Intimacy would seem to fall outside the privacy concept as denoting a degree of openness to communication or contact with selected others, rather than a degree of inaccessibility".<sup>63</sup>

Allen's response to this problem is to note that inaccessibility is often a means to intimacy.<sup>64</sup> This is true, but insufficient. For intimacy is not just a form of inaccessibility,<sup>65</sup> or a way of making ourselves inaccessible to others. Indeed romantic conceptions of intimacy commonly treat personal reserve as an obstacle or barrier to intimacy, locating intimacy in the full and free communion of individuals. Moreover, the presence of others may, in fact, prove as necessary to the sustenance of intimate relationships as the ability of individuals temporarily to isolate themselves.<sup>66</sup> Hence, there seems nothing in the

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<sup>62</sup> For reserve, see p. 19 and pp. 23 - 24 for Allen's account of anonymity and confidentiality.

<sup>63</sup> Allen p. 19

<sup>64</sup> "In practice seclusion and intimacy are closely related...Intimacy is..facilitated by and closely associated with the form of privacy known as seclusion". p. 19

<sup>65</sup> Allen seems to want to claim that it is, or can be treated as such, when she says "Yet, when viewed as a condition of selective disclosure, intimacy also denotes inaccessibility", although she does not expand on this point. p. 19

<sup>66</sup> Other people may be necessary to intimacy in the sense that they provide material support and aid, and because they help to fulfill the diverse psychological needs of individuals which cannot always, if ever, be met in diadic or small-group relationships. Some such ideas, clearly, influence the beliefs of those, like Leach, who believe the nuclear family stultifying. "The family looks inward upon itself", Leach complains, and as

nature of intimacy to support Allen's claims about the importance of inaccessibility to privacy. Rather, a concern for intimacy might lead us, with Leach, to condemn privacy as a political value, or to question the importance of personal inaccessibility to a reasonable conception of value.

The relationship of personal inaccessibility and intimacy, and their relative importance to privacy, then, depends both on our circumstances and on our values. As it is reasonable to think that these may differ without showing that privacy is unattractive or redundant, Allen's account of privacy illustrates Tribe's complaint that, "by focussing on the inward-looking face of privacy" some accounts "slight those equally central outward-looking aspects of self that are expressed less through demanding secrecy, sanctuary or seclusion than through seeking to project one identity rather than another upon the world".<sup>67</sup> It appears also to illustrate some of the reasons why MacKinnon thought privacy a threat to equality. For by identifying privacy with inaccessibility, Allen downplays or ignores the way in which privacy depends on the support and help of others and on the active cooperation of the state.<sup>68</sup> As the outcome in Harris suggests, such conceptions of privacy are likely to perpetuate social inequality, though they need not invariably do so. Hence MacKinnon's complaint against Harris: that "State intervention [or

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a result "there is an intensification of emotional stress between husband and wife, and parents and children". Leach op. cit. p. 44

<sup>67</sup> L. H. Tribe, American Constitutional Law, (The Foundation Press, Inc., Mineola, New York, 1988 ), pp. 1303 - 4.

<sup>68</sup> Thus MacKinnon believes that, for women, " a right to privacy looks like an injury got up as a gift. Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered", p. 100.

state funding for abortion] would have provided a choice [poor] women did not have in private".<sup>69</sup>

Despite the importance of personal inaccessibility to most moral and political conceptions of privacy, then, there seems no reason to try to define privacy in terms of inaccessibility alone. In fact, rather than promoting agreement on the nature and importance of privacy, insistence on the importance of inaccessibility relative to other core features of privacy seems likely only to promote controversy and to justify inequality. For our conceptions of personal inaccessibility are not always coherent and egalitarian. Thus, if we are to modify these, without conceding that privacy is incoherent or a threat to fundamental values, our conceptions of privacy must include, and give independent weight to, values other than inaccessibility. And this we cannot well do by insisting that the importance attached to personal inaccessibility is sufficient to distinguish privacy from other moral and political values.<sup>70</sup>

I have focussed on the difficulties with Allen's claim that inaccessibility forms the essential and dominant element of privacy as a political value. But the difficulties with her conception of privacy give us no reason to adopt the alternatives proposed by Inness, Parent or Reiman. For we have no more reason to believe that intimacy, personal information, or personal dignity are inherently coherent and egalitarian

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<sup>69</sup> MacKinnon p. 101

<sup>70</sup>In fact, it would seem that a concern for personal inaccessibility, like a concern for personal dignity, is important to our interests in freedom of expression, and so cannot sharply differentiate privacy from other values, as Allen believes. See J. Cohen "Freedom of Expression", pp. 225 - 229

political values than we have to believe this of personal inaccessibility. As a result, if we insist on the intrinsic importance of any one of these to privacy we are likely rather to uphold arbitrary and inegalitarian conceptions of value than to illustrate or illuminate the integrity and importance of privacy.<sup>71</sup>

Consideration of MacKinnon's concerns with privacy can illustrate this claim. As MacKinnon argues, the association of privacy with intimacy has made sexual inequality appear both inevitable and desirable.<sup>72</sup> Inevitable, because based on supposedly natural differences between individuals; desirable, because supportive of, and necessary to, some particular conceptions of the good life for individuals and for society. In fact, as MacKinnon argues - and as Inness agrees - there is nothing particularly natural or appealing about traditional forms of intimate and family arrangements; nor need intimacy preclude coercion and inequality.<sup>73</sup> This being so, identifying privacy with intimacy is likely to perpetuate sexual inequality, and so to undermine rather than support the claim that privacy is an attractive political value.

According to Inness the content of privacy is determined by its connection to intimacy alone, so that decisions can properly be called

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<sup>71</sup> Similarly, it seems, Gavison thought that it would be counterproductive to insist that privacy is inherently valuable, when trying to explain why privacy is valuable. See Gavison, p. 360

<sup>72</sup> MacKinnon pp. 99 - 101

<sup>73</sup> Inness p. 99 notes that though "it may be a psychological truth that the agent's love, care, and liking are difficult to compel, there is no reason to suppose that such compulsion is impossible. In fact, people often end up closely tied after such compulsion", as can happen in some cases of kidnapping or abduction, of arranged marriages, or in an unwanted pregnancy. (emphasis in text).

private only so far as they are intimate.<sup>74</sup> But despite her own objections to the majority's reasoning and conclusions in Bowers, this contention is likely to deny privacy protection to forms of consensual adult association which do not fit traditional or established conceptions of intimacy.<sup>75</sup>

Indeed, Inness herself would apparently deny privacy protection to consensual adult sexual relations which are based purely on lust<sup>76</sup>, or, one might suppose, on curiosity, rather than on the "love, liking and care" which she takes to be the essence of intimacy.<sup>77</sup> In other words, by separating our interests in intimacy from our interests in self-expression, in equality or in self-discovery, Inness removes the possibility of finding, within a conception of privacy, the resources for correcting sexually inequalitarian conceptions of intimacy and morally arbitrary limits on privacy. Not only, then, is her conception of privacy likely to justify

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<sup>74</sup> Inness p. 56, and ch. 5 on the content of privacy (pp. 56 - 73). By contrast, W. L. Weinstein insists that "There is a wide range of instances where to speak of something as private is not to imply intimacy". p. 33

<sup>75</sup> Inness believes that the majority should have granted privacy protection to homosexual associations because they are intimate. p. 125 The result in Bowers, then, she attributes to the "the Court's failure to locate intimacy as the conceptual and moral core of privacy". But this ignores the fact that, as both majority and minority agree, not all intimate relationships are legally private - incestuous and bigamous ones, for example. Moreover, it fails to address the prejudice of the majority and its role in denying homosexuals privacy. For the majority might well have connected homosexual relationships to the interests in procreation and family formation that they identified as private. Furthermore, an important part of their decision depended on the claim that a legislative majority may prohibit behaviour merely on the grounds that it is considered immoral, offensive and disgusting by some people. In short, it is hard to agree with Inness' diagnosis of the result in Bowers, or to see how her conception of privacy promotes sexual equality.

<sup>76</sup> Inness p. 92

<sup>77</sup> See ch. 6 "Intimacy: the core of privacy", pp74 - 94. I am unsure how this highly moralised conception of intimacy fits with Inness' recognition that coercion does not preclude intimacy - unless she is assuming that coercion and subordination must cease before love and intimacy develop. But this proposition is hard to square with the putative case of the kidnap victim which she cites at p. 99

sexual inequality, but it appears to undercut, for no good reason, support for privacy by eccentrics, non-conformists, the solitary, shy, creative and artistic for whom the protection of intimacy may be a relatively minor privacy good.

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

Nor do we promote respect for privacy by insisting that privacy is distinguished from other political values by its protection for personal information or for personal dignity. After all, as feminists have long noted, privacy rights have too often prevented us from recognising the extent of sexual violence and coercion in our societies, thus protecting the reputations of men at the expense of the reputations and safety of

women<sup>78</sup>. Instead of fostering dignity, protection for privacy has, as MacKinnon suggests, often cost women their self-respect, and the respect and sympathy of others.<sup>79</sup> Thus it seems undesirable to stake the value of privacy on its protection for personal information and the protection of personal dignity, for privacy protection of personal choice on these grounds has, clearly, been both arbitrary and sexually inegalitarian.

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

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<sup>78</sup> Hence, traditionally the stringency and intrusive nature of the "corroboration" requirements placed on women who would charge a man with rape, for, as Susan Estrich shows, courts have traditionally been concerned that "errant young girls and women coming before the court" would "contriv[e] false charges of sexual offences by men". See Susan Estrich Real Rape: How the Legal System Victimizes Women Who Say No (Harvard University Press, Cambridge, 1987), p. 43.

<sup>79</sup> MacKinnon p. 100 on battered women, and p. 95 on rape trials.

of these in a straightforward way so long as one wants to claim that privacy is valuable.

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

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

reasonable concerns that appeals to privacy are morally meaningless, or just a cover for the sectional interests of the privileged and powerful.

Hence, acknowledging the importance of intimacy, inaccessibility, personal dignity and personal information to established conceptions of privacy does not require us to identify privacy with one rather than another of these, nor to treat these values as more quintessentially private than alternatives. Indeed, if the argument of this chapter is correct, it is unreasonable to suppose that we can describe the value of privacy without reflecting on the equality of individuals, and allowing for the diverse values which people can reasonably endorse. For what distinguishes privacy from other values, and what makes it valuable, depends on our conceptions of equality and of other values. As a result, a reasonable and egalitarian conception of privacy cannot require us to identify privacy with only one value, because the interests, intuitions, beliefs and values of people can be both different and reasonable.

It is, therefore, unsurprising that the value of privacy can be described in a variety of ways and that these can be mutually incompatible. This does not mean that privacy is morally incoherent, nor that there is anything peculiar about privacy as compared to other values. After all, there are competing conceptions of equality, and these are not each unreasonable just because they are not fully harmonious.<sup>80</sup> Similarly, as Thomas Grey has shown, there is no natural or inevitable connection between different property rights, and thus between right to

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<sup>80</sup> As J. Cohen remarks, "two inconsistent views may both be fully reasonable, though they cannot both be true". J. Cohen "Freedom of Expression", footnote 43, p. 223

use, sell and bequeath property.<sup>81</sup> Yet Thomson is not unreasonable to group them into a bundle, and to treat protection for property as an important moral and political good.<sup>82</sup> In short, recognition of the diverse aspects of privacy seems essential to an egalitarian conception of privacy, and so, to a reasonable understanding of its importance and value.

That is not to say that there is anything intrinsically wrong with disaggregating privacy for the purposes of moral or political analysis, as Thomson suggests that we do. The point of my analysis, in other words, is not to show that there is something about privacy as a value over and above the value of its component parts. My point, rather, is this: that there is nothing bizarre or especially problematic about privacy simply because it is made up of heterogenous elements or any reason, therefore, to suppose that it is senseless or misleading to talk about privacy as a single (composite) entity or value.

For some purposes, perhaps, it may be simpler to disaggregate the different elements of privacy, or to discuss one of its elements in isolation from the others. In the case of some of the more narrowly technical issues raised by informational privacy, for example, this might be perfectly appropriate. However, as there clearly are important moral and political connections between our different privacy interests - connections that we are likely to overlook if we treat privacy simply as a jumble of

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<sup>81</sup> T. C. Grey, "The Disintegration of Property" in Property, (Eds.) J. R. Pennock and J. W. Chapman, (New York University Press, New York, 1980), pp. 69 - 85.

<sup>82</sup> Thomson, pp. 120 - 121: "To own a picture is to have a cluster of rights in respect of it. The cluster includes, for example, the right to sell it ...the right to give it away, the right to tear it, the right to look at it...To own a picture is also to have certain 'negative rights' in respect of it, that is, rights that others shall not do certain things to it..."

unrelated interests - it seems perfectly sensible and legitimate to insist on the basic integrity of privacy as a moral and political value. Indeed, as with the concept of property so with the concept of privacy: it is likely that sustained analysis of the different elements involved, and their place in moral and political analysis, is most easily conducted by recognising their connection to a broader whole of which they form a part, than by treating each in isolation from the other. But be that as it may, if the fact that privacy can be thought of as a single, though composite, value does not mean that we have to think of it in this way, it is still worth noting that such a possibility is open to us, and that it may prove helpful in analysing and critically evaluating our values.

### **E. Conclusion**

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

Such agreement, I believe, is implicit in familiar philosophical and political conceptions of privacy, though generally buried and obscured by the surrounding controversy about privacy. Bringing this agreement to the surface, therefore, and showing how it underpins familiar, if opposing,

views of privacy has been an important goal of this chapter. Though the agreement that it points to and tries to expand is far from universal, I have tried to show that it commands support from a wide range of perspectives and from consideration of equality and other values.

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

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