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STEVEN SCALET AND CHRISTOPHER GRIFFIN, CO-EDITORS

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FROM THE EDITORS

Edition in Tribute to Anita L. Allen

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Anita L. Allen is the vice provost for faculty and the Henry R. Silverman professor of law and professor of philosophy at the University of Pennsylvania. Professor Allen has made privacy concerns the main subject of her influential scholarship. Professor Allen helped define this area of study at a time when privacy concerns became—and continue to be—pressing public policy topics. In this volume Professor Allen responds to commentaries by Professor Annabelle Lever (University of Geneva), Andrea Matwyshyn (University of Pennsylvania), Adam Moore (University of Washington), and Beate Roessler (University of Amsterdam).

Professor Lever challenges Professor Allen's views in *Uneasy Access: Privacy for Women in a Free Society*, particularly about how to distinguish good from bad privacy and the relationship between privacy, sexual equality, and democratic government. Professor Matwyshyn reflects on Professor Allen's analysis of the Children's Online Privacy Protection Act of 1998 (COPPA). Professor Moore challenges two central claims in *Unpopular Privacy: What Must We Hide*, the definition of privacy offered in that book, and her justification for moderate paternalism. Professor Roessler identifies a tension in Professor Allen's philosophical approach in *Unpopular Privacy* and argues that a better defense of her conclusions should proceed without the commitment to paternalism. Professor Allen defends her views and develops further responses to the range of these critiques.

The editors thank the commentators and Professor Allen for their substantive, instructive, and detailed engagement. This edition is part of a series honoring and analyzing the writings of influential theorists in legal, social, and political philosophy. The format is to invite several commentaries and responses by a feature philosopher. The goal is to establish an engaging and lively exchange of ideas that contributes to the profession and is accessible to a broad audience, as befits the unique place of the *APA Newsletters*.

ARTICLES

Privacy: Restrictions and Decisions

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INTRODUCTION

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

I discovered Allen's book as a graduate student at MIT, working on what I called "a democratic conception of privacy," in response to feminist criticism of privacy. Allen's guided tour through competing ways of defining privacy saved me from drowning in an overwhelming, and rather bewildering, literature, whose consequences for feminist concerns were rarely clear. Allen's frank defense of abortion rights from a privacy perspective was also welcome, with its recognition that children necessarily eat into parental time and will do so even if parenting occurs on a more sexually egalitarian basis than at present. Above all, I admired, and continue to admire, Allen's treatment of privacy for women in public, with its sensitive and thoughtful effort to understand why, and how, women might feel that their privacy is invaded by pornographic displays of *other* women's bodies, and its discussion of the harm of "catcalling," even where it does not amount to harassment.²

Catcalling is one of those quintessentially awkward behaviors which, while superficially trivial—since no one actually hurts you, nor even intends to harm you—can be distressing. Girding yourself to run the gauntlet, wondering how best to face it, wondering why it is distressing and whether it ought to be—all these may form a good part of women's experience of city life, especially in hot weather. Naturally, a philosophical literature that was unconcerned with domestic violence in its reflections on privacy was not

going to discuss anything so seemingly trivial. But as Allen showed, there was something important and useful to be said about the phenomena, about the way it marked public space, the way it marked public status—or tried to—and the way that it intruded on opportunities for peaceful reflection and daydreaming which can be so scarce when one is at home. So when I decided briefly to discuss the harm of “flashing,” in the context of a discussion of racial profiling in an august journal, I was partly inspired by Allen’s discussion of catcalling and its significance for women’s privacy.³

I am, then, grateful to have an opportunity to celebrate Allen’s work and, in particular, a book that has inspired me over the years. Nonetheless, I must agree with Judith DeCew, in her review of *Uneasy Access*, that its central claims are not wholly persuasive.⁴ In particular, Allen’s insistence that decisional and restricted access privacy have nothing to do with each other leaves it unclear how the *content* of our claims to solitude, anonymity, confidentiality, and seclusion are to be determined and, normatively, how we are to decide which forms of privacy are valuable and which are not. This problem is relevant to Allen’s critique of Catherine MacKinnon which, as deCew notes, is too brief to be satisfying.⁵ Even if we agree with Allen that one way of interpreting the historical record is to say that women have had too much of the wrong sort of privacy and not enough of the right sort, this will only disprove MacKinnon’s claims about the sexually inegalitarian character of privacy if we have some way to distinguish the wrong sort from the right sort, and some reason to suppose that protections for the latter can be secured without cementing the former.

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

In response, Allen explains that she shares feminist criticisms of the private sphere, as constituted by home and family life, but that what concerns her is that “women have been confined to it and that it has not always been a context in which women can experience and make constructive use of opportunities for privacy.”⁷ She says, “My criticism . . . is only a criticism of a certain poor quality of life within the private sphere and not a rejection of the concept of a separate, private sphere. I leave open the question whether a normative distinction between the public and private spheres can ultimately be drawn, and if so, what principles ought to govern individual, group and governmental conduct respecting each.”⁸

However, it is hard to see how we are to defend the idea of a “separate private sphere” without supposing *that* some form of public/private distinction is justified; and it is hard to see how we are to respond to feminist criticisms of privacy, which centrally concern its role in justifying and providing content for a public/private distinction, without taking a stand on *whether* such a distinction can ever be justified. Likewise, Allen claims that “In so far as privacy

has an economic basis, economic equality is a background condition for greater privacy.”⁹ However, this does not counter the argument, shared by feminists and Marxists, that privacy is itself an obstacle to economic equality because it restricts access to the wealth of the wealthy and precludes us from contesting the terms on which wealth is distributed to begin with.¹⁰ In short, one of the difficulties with this important book, philosophically, is that it gives us many reasons to think that privacy is valuable and consistent with the equality of women, but never manages to demonstrate this, by explaining how we are to distinguish “good” from “bad” forms of privacy, or to render privacy consistent with sexual equality and democratic government.

These problems arise, I think, because Allen is insufficiently sensitive to what we might call the “archaeological dimensions of privacy”—the way our contemporary notions and practices reflect different, often competing, conceptions of privacy from the Greco-Roman through to the medieval, the liberal, and Socialist. Here, I think, Patricia Boling is a better guide than Allen, both in illuminating the republican distrust of privacy, echoes of which can be found even in such supposedly “liberal” thinkers as Tocqueville, and in illuminating the intersection of republican and socialist concerns about privacy in the ambivalence about privacy, and the public/private distinction in “liberal” feminists, such as Susan Moller Okin.¹¹ No one, I imagine, would want to say that the mixture of American constitutional ideas about personal identity and autonomy, sexual freedom and expression, the importance of independent schools and families fit naturally into other conceptions of privacy. But nor, I think, should we suppose that these different aspects of the American constitutional tradition fit neatly together from a philosophical perspective, or that their internal similarities are more striking than their differences. So instead of assuming that there is some central conception of privacy that can be distinguished from some concept of “decisional privacy” embodied in American constitutional law, we may do better to suppose that ordinary conceptions of privacy, philosophical accounts of privacy, and legal rights to privacy all embody a variety of archaeological elements, often implicit and unacknowledged, whose conceptual and normative coherence are far from clear, although linguistically they fit well enough with ordinary usage.

Seen in this way, the challenge of providing a philosophically satisfactory account of privacy—assuming that such an account is possible—is to find some common starting point from which we can articulate and evaluate competing intuitions and perspectives on privacy—on what it is, on how it differs from related concepts such as liberty, on whether it is valuable, and on whether it deserves legal protection as of right. Otherwise, we are left with the trading of intuitions, which dominates much of the philosophical literature on privacy, and which does little to illuminate the *relative importance* of solitude and confidentiality to a persuasive conception of privacy, or the *relative importance* of these compared to more romantic and expressive dimensions of privacy.¹²

For these reasons I think the importance of defining privacy, for philosophical purposes, is overstated, and that we would generally do better to leave this task until we have a much better sense of what it is that we wish to define. Brandeis

summed up his ideas about the differences between privacy and property in the common law with the claim that we have a “right to be left alone.”¹³ This is clearly unsatisfactory as a definition of privacy, and Brandeis clearly did not envisage his epithet that way. But its deficiencies apply as well to Allen’s idea of privacy as restricted access—which suggests that a right to privacy is simply a restricted right to be left alone. As with other definitions of privacy, it is at once overbroad, and so fails adequately to distinguish privacy from other values, and too narrow when compared to the variety of things with which privacy is associated. This is inevitable, given the lack of necessary and sufficient conditions for determining what counts as an instance of privacy—or of liberty and equality, for that matter. However, philosophical study of liberty and equality has been able to proceed on matters of substance in the absence of any agreed upon definitions, so it is doubtful that the lack of an agreed upon definition is a significant obstacle to philosophical reflection on privacy.

How, then, might we proceed if we want to vindicate the idea that some forms of privacy are valuable? The first thing to do, I think, is to treat privacy as an combination of seclusion and solitude, confidentiality and anonymity, intimacy and domesticity—leaving it open whether or how these different elements amount to a singular and distinctive value.¹⁴ Privacy as generally understood includes these different elements, although some conceptions of privacy will put more importance on some of these elements, rather than others. Moreover, if we suppose that “reasonable pluralism” means that people can define their values in rather different ways, and may also differ quite fundamentally in their evaluations of privacy, it would be a mistake to start our analysis by privileging some aspects of “privacy” over others for moral reasons, not just for conceptual or methodological ones.¹⁵ If our values are to be consistent with the equality of men and women, we need to make sure that we do not arbitrarily privilege familiar or favored aspects of privacy in our conceptual and normative analysis—otherwise, we will end up with conceptions of privacy that attach undue importance to the intuitions, experiences, desires, and interests of some people rather than others. Precisely because we cannot tack an “equal” in front of the word “privacy” and expect that to resolve doubts about the implications of privacy for equality, it is essential that our substantive account of the nature and value of privacy try to avoid confusing “privacy” with any one of its many historical and contemporaneous usages.

Secondly, we must acknowledge openly that most conceptions of privacy are not democratic, in the sense that most reflect ideas about fact and value that are either incompatible with the idea that people should be political equals, or are as consistent with assumptions about the desirability of undemocratic forms of government as they are with democratic ones. So, if we want our ideas about privacy to reflect the view that democratic governments (for all their problems) have a presumptive legitimacy which the alternatives lack, we need to make that assumption explicit and build it into the empirical, normative, and social-theoretic framework we use to identify and evaluate the importance of privacy.

Obviously, this is not easy, both because actual democracies are very imperfect examples of democratic ideals, and because our conception of democratic ideals and values

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

To that end, I suggest that we think of democracies as countries whose governments are elected by universal suffrage, and where people have an equally weighted vote and are entitled to participate in collective decisions, no matter their wealth, knowledge, virtue, or pedigree. I will also assume that democracies require “one rule for rich and poor” and for governors and governed—that they are constitutional governments—although the extent to which democracies must have formal systems of law, and distinctive legal institutions, is by no means settled. Still, whether democracies have the clear separation of powers that Americans aim for, and whether or not they make room for customary law of various sorts, I assume that democracies must have well-known and generally effective protections for political, civil, and personal freedoms of association, expression, and choice. Allowing for the familiar gaps between ideals and reality, democracies will entitle people to form a variety of associations through which to advance their interests, express their ideas and beliefs, and fulfill their duties as they see them. Democracies, therefore, are characterized by protection not just for political parties, unions, interest groups, and churches but also by the protections they secure for soccer-clubs, scientific societies, families, charities, and associations of the like-minded. Hopefully, this will give us enough information with which to evaluate competing claims about privacy, without prejudging important questions in the philosophy of democracy, or begging too many questions about what it is realistic to believe and do, or what, in an ideal world, we *would* do.¹⁶

Finally, I suggest that we use the example of the secret ballot to illustrate the differences between democratic and undemocratic ideas about privacy. The secret ballot can help us to understand the value of privacy because it is unquestionably democratic and an example of our rights to confidentiality and anonymity.¹⁷ Of course, using the secret ballot to illustrate anything about privacy presupposes that secrecy and privacy are not unrelated concepts and that, in so far as they share some content, the “Australian ballot,” as it used to be called, falls within that shared realm.¹⁸ This looks like a reasonable assumption, in so far as the secret ballot entitles voters to reveal how they have voted, if they so wish, while ruling out legal obligations to reveal their political choices. That is why the secret ballot is supposed to be compatible with freedom of expression. For most purposes, then, the “secret ballot” could just as well be called the “anonymous ballot,” suggesting that whatever we ultimately conclude about the conceptual and normative differences between privacy and secrecy, we can use the “secret” ballot to illustrate the former as well as the latter.

THE SECRET BALLOT AND THE VALUE OF PRIVACY

A familiar justification for the secret ballot is that it helps to protect people from coercion and intimidation. However,

a moment's thought suggests that this is not its sole justification, important though that undoubtedly is. Were the secret ballot justified only because it protects us from bribery and intimidation, we would have to suppose that there would otherwise be nothing wrong with forcing people to discuss their voting intentions and acts with anyone who asks. In fact, it was precisely because he believed this that, after much agonizing, John Stuart Mill voted against the secret ballot, on the grounds that by the 1860s voters should have no serious fear of bribery or intimidation, and could be expected to stand up to pressure from others.¹⁹ More recently, Geoffrey Brennan and Phillip Pettit have argued that the secret ballot is undesirable, although sometimes necessary.²⁰ So, if the standard justification for the secret ballot were correct, we would have to concede, with Mill, Brennan, and Pettit, that there would be no objection to getting rid of it were it not for worries about the safety of voters, and the fairness of elections.

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

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

If these points are persuasive, it looks as though we can use fairly uncontroversial assumptions about democratic government to illuminate the nature and value of privacy, and to adjudicate morally among competing claims to privacy. People's claims to privacy, on a democratic conception of privacy, depend on the nature of the powers and responsibilities that they hold, and the status of citizen provides the baseline for determining what constitutes *special* power and influence over others, and special responsibility to and for them.²¹ Hence the different claims to privacy of citizens and legislators and, as the Supreme Court recognized in *NAACP v. Alabama*, the different claims to privacy of the followers and leaders in voluntary and civic organizations.²² Because citizens can be employers and employees, mothers and fathers, parents and children, priests and parishioners,

a democratic conception of citizenship constrains the way that we can understand people's claims to privacy in these different circumstances or roles.

For example, it highlights the difficulty of reconciling the very weak protections for worker privacy, in America, with the idea that workers are people who are the political equals of their employers and so cannot be treated either as irresponsible children, in need of constant surveillance and monitoring, or simply as tools for their employers' purposes and power.²³ In America, employees can be fired for failing truthfully to answer detailed questionnaires about their personal life and the number of siblings they have; they can be fired because employers do not like the charitable or voluntary work that they do in their spare time. They can be subject to medical and drug tests, and the scrutiny of their email, the contents of their desks, their phone calls. They can even be required to conduct their personal brokerage trade with their employer, rather than with other firms, so that their employer can track their personal trading patterns more easily.²⁴ This lack of privacy seems to be an expression of a deeply inegalitarian picture of the employer-employee relationship, sharing more in common with that between an absolute monarch and his or her subjects, than between people who see each other as equals. Hence, it is difficult to reconcile democratic government with an idea of the workplace as a privacy-free zone, or one in which employee privacy is a privilege, dependent on the whim of employers.²⁵

Or consider the U.K. Guardianship Act of 1973, which was passed in response to the success of Joan Vicker's *Private Members' Bill* of 1965, and finally specified that the guardianship of children, in the United Kingdom, should belong to mothers and fathers equally.²⁶ Prior to its passage, women in England and Wales, who were not widows, had to seek the consent of their husbands, even if they were estranged from them, in order to open a bank account for their children, to get a passport for them, even to arrange surgery for them. So British law rendered otherwise competent adult women incapable of taking moral and legal responsibility for key aspects of their children's well-being. Privacy, in other words, was understood in ways that denied women, as parents, freedoms and forms of seclusion, anonymity, and even intimacy, which were taken for granted by men, with deleterious consequences for sexual equality within the family and outside it.

Of course, the Guardianship Act might have left it up to parents to decide for themselves who to designate as legal guardian of their children, or whether they would both hold guardianship jointly. For practical purposes, the state could have required all families to choose a guardian or guardians, and it could have provided procedures for families to alter these arrangements. Had the Guardianship Act let parents decide this matter for themselves, it would formally have increased parents' scope for private decision-making—for making decisions concerning their family affairs by themselves, and according to their own best judgments. However, without the legal requirement to include mothers as joint guardians of children with fathers, it is quite likely that many women would have been excluded from guardianship, whether they liked it or not. Their financial dependence would have made it difficult to insist on joint guardianship, and the force of precedent and of custom would have

meant that the demand for joint guardianship would have seemed in need of a special justification that the “natural,” “practical,” “convenient” option of sole male guardian would have seemed to lack. So, there are very good practical and symbolic reasons why we should celebrate the fact that the Guardianship Act insisted on joint guardianship, as opposed to some other alternative to husbands as sole guardians of children.

For some people, what was at issue in the Guardianship Act—joint custody of children—has nothing to do with privacy, properly understood. This seems to be Allen’s position, since what is at issue is not “restricted access” to us but, at best, parents’ access to their *children*. For Allen, it is just a consequence of sexual inequality that increasing women’s ability to decide familial, sexual, and reproductive matters—seen as issues of liberty, not privacy—also increases their ability to restrict access to themselves.²⁷ So, conceptually, decisional privacy, including decisions in our intimate relationships, is unrelated to solitude, seclusion, confidentiality, and anonymity.

We can now see why this position is hard to sustain, whatever one’s beliefs about the value of privacy. The problem is that seclusion, solitude, and anonymity are directly affected by laws that force us to seek the consent of others before we act, whether we are elderly voters, pregnant teenagers, or parents with kids to look after. Inevitably, in explaining what we want and why, what we fear and why, what we can or will do, and why, we must expose our ways of thinking and feeling, acting, arguing and persuading, and not just our particular beliefs and commitments.²⁸ So if you believe that diaries are presumptively private, conceptually and normatively, you have reasons for thinking that decisions about voting, abortion, and the care of children also concern seclusion, solitude, anonymity, and confidentiality even if you ultimately conclude that other aspects of these decisions preclude classifying or treating them as (purely) private.

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

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

and that we can use the secret ballot to improve our understanding of the conceptual and normative aspects of privacy.

Obviously, this has only been a brief sketch of some of the terrain necessary to flesh out a democratic interpretation of the nature and value of privacy, and of the ways that it differs both from other conceptions of privacy and from other democratic values. For example, there is a second problem with arguments against the secret ballot—their indifference to the arbitrary and inegalitarian nature of public shaming as a way to prevent and to punish wrongdoing—that has important consequences for the way we approach disputes over the relationship of privacy, freedom of expression, and freedom of the media.²⁹ Further reflection on the secret ballot, therefore, highlights the importance of privacy to what I think of as a central democratic duty: the duty to treat each other as equally entitled to rule. This is not an easy duty to fulfill, but it is of great moral importance and helps to distinguish a democratic conception of ethics from alternatives. We all have duties not to cause gratuitous harm to sentient beings, as Utilitarians insist, and duties not to treat others simply as means to our own ends, as Kantians note. These are duties we would have whatever the government under which we lived, and no matter our particular views of the legitimacy of democratic government. It is only if we think that democracy is a legitimate form of government that we also have the duty to see each other as beings with equal claims to rule over others. The consequences of this duty for our conceptions of privacy, freedom of expression, and property ownership are complex, but important. Unfortunately, I cannot discuss them here. However, I hope that I have done enough to show why Allen’s book is so important, if we care about a democratic conception of privacy, and how we might try to extend and develop its insights.

NOTES

1. Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Rowman & Littlefield Publishers, 1988).
2. *Ibid.*, chapter five, especially pages 128–40.
3. Annabelle Lever, “Why Racial Profiling is Hard To Justify: A Response to Risse and Zeckhauser,” *Philosophy and Public Affairs* 33, no. 1 (2005): 94–110. The discussion of flashing is at 99–100.
4. Judith Wagner DeCew, review of Allen’s *Uneasy Access* in *The Philosophical Review* 101, no. 3. (1992): 709–11.
5. Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987). Allen’s critique of MacKinnon can be found on pages 55–56, 71–72. Interpreting MacKinnon as holding that what history dictates must remain, Allen insists that women need not be bound by past forms of privacy. But this risks missing the conceptual and normative aspects of MacKinnon’s claims, which are meant to explain why, in the case of privacy, we are dealing with something that is irredeemably inegalitarian, whereas in the case of voting rights, this is not the case. I provide a sympathetic reconstruction and critique of MacKinnon’s arguments, and the evidence for them, in “Must Privacy and Sexual Equality Conflict? A Philosophical Examination of Some Legal Evidence,” *Social Research: An International Quarterly of the Social Sciences* 67, no. 4 (2000): 1137–71.
6. MacKinnon, *Feminism Unmodified*, 100.
7. Allen, *Uneasy Access*, 80–81.
8. *Ibid.*, 81.
9. *Ibid.*
10. I discuss this problem, in the context of Judith Thomson’s claims that rights to privacy are just property rights in disguise in *On Privacy* (Routledge, 2011), chapter four, and in “Privacy, Private

Property, and Collective Property," in *The Good Society* 21, no. 1 (2012), a symposium on Property-Owning Democracy. As I try to show, the natural tendency to link claims to privacy and to private property are misplaced because our interests in privacy can justify forms of collective as well as private property. And while our interests in privacy justify some forms of differences and of inequalities, they provide no justification for claims to monopolize valuable social or economic assets.

11. Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca, NY: Cornell University Press, 1996), especially chapter two, "Privation and Privilege." Boling is deeply ambivalent about privacy. So while she insists that the personal is not always political, she is deeply concerned about the ways privacy can block political discussion and change. I try to address those concerns in "Privacy Rights and Democracy: A Contradiction in Terms?" *Contemporary Political Theory* 5 (2006): 142–62. See also Alexis de Tocqueville, *Democracy in America*, vol. 2, chapter six, "What Sort of Despotism Democratic Nations Have to Fear." Of the modern citizen, he thinks, "Each one of them, withdrawn into himself, is almost unaware of the fate of the rest. Mankind, for him, consists in his children and his personal friends. As for the rest of his fellow citizens, they are near enough, but he does not notice them. He touches them but feels nothing. He exists in and for himself, and though he still may have a family, one can at least say that he has not got a fatherland." (Tocqueville, 1966, 692). Also see Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), especially chapter six, "Justice from Sphere to Sphere: Challenging the Public/Private Dichotomy."
12. Compare, for example, Julie C. Innes, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992), for whom intimacy is the essential element of privacy, conceptually and normatively, or compare the different emphases on seclusion as opposed to intimacy in Timothy Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4, no. 4 (1975): 315–22; J. James Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4, no. 4 (1975): 323–33; and Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6, no. 1 (1976): 26–44. The articles by Rachels and Reiman, like the article by Judy Thomson, which they criticize, can be found in Ferdinand D. Schoeman, ed., *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984). Unfortunately, the article by Scanlon is not reprinted there.
13. See Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy [the implicit made explicit]", originally published in the *Harvard Law Review*, and republished in Schoeman, *Philosophical Dimensions of Privacy*, 74–103. It is important to realize that the point of Brandeis's article was not to offer a definition of privacy but to argue that common law protections of privacy need to be distinguished from common law protections of property, because our interests in seclusion, solitude, and creative self-expression are not reducible to interests in property ownership. The force of that argument is unchanged by the lack of a definition of privacy for common law purposes, as is Brandeis's insistence that ordinary people, not just Millian eccentrics or the wealthy, have fundamental interests in privacy. The contrast between Mill and Brandeis in this respect is important: Mill's argument for freedom of tastes and pursuits importantly depends on the social utility of the eccentric and talented. It provides little reason to grant privacy to the rest of us, with our banal diaries, conversations, love-lives, and the rest, except as this might help the eccentric and talented. But for Brandeis, it does not matter whether your paintings are any good or not, just as it does not matter whether or not they have any economic value, because your interests in self-expression give you claims to prevent others from looking at, let alone taking them, without your express permission. In short, our interests in individuality are given a more democratic interpretation in Brandeis's article, for all its high-society background, than they are in Mill's passionate defense of liberty of tastes and pursuits.
14. My argument here builds on Annabelle Lever, "A Democratic Conception of Privacy," unpublished thesis, MIT, 1997. Available at <http://www.alever.net>; and "Feminism, Democracy, and the Right to Privacy," *Minerva* 9 (2005): 1–31.
15. For the concept of reasonable pluralism, and its normative differences from other forms of pluralism, see Joshua Cohen, "Moral Pluralism and Political Consensus," in *The Idea of Democracy*, eds. David Copp, Jean Hampton, and John E. Roemer (Cambridge University Press, 1993), especially 281–85.
16. Because we also need to find some acceptable assumptions about sexual equality, liberty, rights, and duties with which to work—if we hope to find a common and acceptable framework to evaluate competing claims about privacy, in *On Privacy* I also suggest that we start by taking whatever forms of liberty are uncontroversially necessary to democratic government as examples of freedom, and that we take whatever forms of equality are uncontroversially necessary to democratic government as examples of equality. We can then use standard democratic rights to illustrate people's legal and moral rights, bearing in mind that the precise relationship of the legal and moral is controversial. So, in the first instance, we can clarify ideas about what it is to have a right or a duty by thinking about familiar democratic rights and duties whether legal or moral.
17. The following paragraphs draw on Annabelle Lever, "Mill and the Secret Ballot: Beyond Coercion and Corruption," *Utilitas* 19, no. 3 (2007): 354–78; A. Lever, "Neuroscience v. Privacy: A Democratic Perspective," in *I Know What You're Thinking: Brain Imagining and Mental Privacy*, eds. S. Richmond, G. Rees, and S. J. L. Edwards (Oxford University Press, 2012), 205–23; A. Lever, "Privacy and Democracy: What the Secret Ballot Reveals," forthcoming in *Law, Culture and Humanities*, 2013, available online at <http://lch.sagepub.com/content/early/2012/10/12/1743872112458745.full.pdf>.
18. For the problem of how best to understand the relationship of privacy and secrecy see Allen, *Uneasy Access*, 24–25.
19. See John Stuart Mill, *Considerations on Representative Government*, chapter ten in H. B. Acton's collection of Mill's *Considerations, Utilitarianism, and On Liberty* (London: Everyman, Ltd., 1984). For an excellent discussion of Mill's political theory, and of his changing stance on the secret ballot, see Nadia Urbinati's excellent *Mill on Democracy: From the Athenian Polis to Representative Government* (Chicago University Press, 2002).
20. Geoffrey Brennan and Philip Pettit, "Unveiling the Vote," *British Journal of Political Science* 20, no. 32 (July 1990): 311–33.
21. This, in part, is what explains the problem with Mill's argument. For Mill, citizens have the same duties of openness as legislators because voting is a privilege, not a right. I discuss Mill's reasons for rejecting the idea of a right to vote, despite his evident belief that people can be morally entitled to vote, and reconstruct his case against the secret ballot in "Mill and the Secret Ballot."
22. *NAACP v. Alabama*, 375 U.S. (1958), in which Justice Harlan held, for a unanimous court, that "inviolability of privacy in group association may, in many circumstances, be indispensable to freedom of association, particularly where a group espouses dissident beliefs." I use the case as a tool for thinking about the importance of privacy to security in my "Democracy and Terrorism," originally presented to a discussion on Terrorism, Democracy, and the Rule of Law, at the House of Lords, London, UK, in July 2009, and published as *Thinkpiece* no. 56 by *Compass: Direction for the Democratic Left*, 2009. It is available online at <http://www.compassonline.org.uk/publicationstinkpieces>.
23. Finkin's Piper Lecture of 1996, published as "Employee Privacy, American Values, and the Law," in the *Chicago-Kent Law Review* 72 (1996–97): 221–69; and his "Some Further Thoughts on the Usefulness of Comparativism in the Law of Employee Privacy," in *Employee Rights and Employment Policy Journal* 14, no. 1 (2010): 11–53, with the discussion of the more recent cases of *Jespersen v. Harrah's Operating Co., Inc.*, 444 F. 3d 1104 (9th Cir. 2006) and *Ellis v. United Parcel Service Inc.*, 523 F. 3d 823 (7th Cir. 2008). The former case concerned a female bartender who, after twenty years' successful service, was fired when she refused to wear makeup, as required by the new owners of her bar. The latter case concerned a United Parcel Service manager who was fired, after twenty years with the company, when it was discovered that he had a long relationship with, and eventually married, someone working in a different unit of the postal service, thereby contravening the company's blanket ban on "fraternization." Allen discusses the implications of this deeply undemocratic conception of workplace privacy on pages 141–45, paying particular attention to problems of sexual harassment and the ways that this reflects and reinforces women's subordinate status in the workplace. However, part of the problem facing women is that American workplaces provide so little protections for their employees, whatever their sex or sexual orientation, and this obviously has particularly deleterious effects on those who are least well-placed to protect themselves by themselves.
24. These examples are from Finkin, "Employee Privacy," 226–27, 238–39, 241–42.
25. For an extension of this argument in response to American laws on employee dismissal, and the tendency of American courts to extend the qualified privilege to disclose the grounds for an

employees dismissed for misconduct to the entire plant, store, or office workforce, see Matthew W. Finkin, "Discharge and Disgrace: A Comment on the 'Urge To Treat People As Objects,'" in *Employee Rights and Employment Policy Journal* 1, no. 1 (1997): 1–23. Why, Finkin asks, should we "allow employers to treat people, even the morally miscreant, as public 'object lessons' for others?" (22).

26. For more details of the Guardianship Act, and the half-century-long struggle to grant women legal guardianship of their children, see Stephen Cretney's fascinating book, *Law, Law Reform, and the Family* (Oxford University Press, 1998), 180–83. I use the example of this struggle against a self-evidently unjust and undemocratic law to question the force of arguments against judicial review by those, such as Jeremy Waldron, who assume that the proper site for changes to unjust laws must be the legislature, not the judiciary. See Annabelle Lever, "Democracy and Judicial Review," *Perspectives on Politics* 7, no. 4 (2009): 805–22.
27. Allen, *Uneasy Access*, 32–34, 98–101.
28. Jean Cohen, "Redescribing Privacy: Identity, Difference, and the Abortion Controversy," *Columbia Journal of Gender and Law* 3, no. 1 (1992): 44–117. So far as I know, Jean Cohen was the first to treat the limits that privacy sets to public accountability as a strength, not merely a weakness, if we care about democracy. In so doing, she took a familiar argument against privacy, from a democratic perspective, and turned it around. See also Anita Allen's *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (Rowman & Littlefield Publishers, 2003), and my brief review of this book in *Philosophy In Review* 24, no. 1 (2004): 1–3.
29. See "Mill and the Secret Ballot," 354–78. and *On Privacy*, chapter two, for a discussion of the implications of this argument for the ethics of "outing," the publication of "kiss and tell" stories, and celebrity journalism. As I try to show, the importance of being able to discuss our own lives publicly may warrant greater legal protections for "kiss and tell" stories, even though these inevitably expose the lives of others, than for journalistic efforts to expose the relationships and sex lives of consenting adults who have no desire or intention of talking to the press.

Of Teenagers and "Tweenagers": Professor Allen's Critique of the Children's Online Privacy Protection Act in Historical Perspective

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Professor Anita Allen's work spans multiple decades and an impressive breadth of privacy law arenas, touching on many important and underexplored privacy issues. In particular, her work had addressed the connections between privacy and each of gender, race, and childhood.¹ Her work on childhood and technology privacy has explored the challenges faced by families as children increasingly use the Internet as part of their daily existence.² In her piece *Minor Distractions: Children, Privacy, and E-Commerce*, Professor Allen explores the impact of Internet penetration and the Children's Online Privacy Protection Act ("COPPA") on families and children's data protection.³ In this brief piece, I set forth Professor Allen's argument from over a decade ago and examine its continuing applicability today. Despite recent amendments to COPPA, the forward-looking critiques levied by Professor Allen remain relevant and current.⁴

In *Minor Distractions*, Professor Allen highlights that while adequate access to the Internet for adults has been a dominant policy concern, in the context of children's access to the Internet, the concern is actually inverted.⁵ In other

words, challenges arise from children's unfettered access to the Internet at home, in schools, and in libraries, she argues.⁶ As she explains, "[m]any young people today know more about computers and internet use than their parents and grandparents ever will."⁷ Yet, she points out that many children's advocates want to limit children's access to "the single most powerful source of knowledge and vehicle of communication of all time."⁸ She explains that these instincts to limit access are driven by at least five perceived threats to children's safety online: time diversion from more appropriate pursuits such as homework, exposure to inappropriate content, risk of sexual exploitation of minors by adult predators, facilitation of knowing and unknowing criminality by children, and familial information privacy.⁹

To commence the discussion, Professor Allen sets forth COPPA's requirements of verifiable parental consent to data collection from children under the age of thirteen.¹⁰ She argues that COPPA's second requirement, which permits parents to prohibit future use of children's information, constitutes a particularly strong consumer right with respect to the commercial enterprise—a strong right that "goes beyond typical formulations of fair information practices."¹¹ She then moves to assessing the statute's efficacy using three factors. First, she asks whether commercial websites are complying with the requirements of the statute. Second she examines whether parents are supervising children on the Internet and cooperating with industry efforts to comply with COPPA. Third, she asks whether the Federal Trade Commission (FTC) has been willing and able to enforce the statute. Based on these factors, Professor Allen goes on to voice some skepticism with respect to whether the statute is optimally crafted. Compliance analysis offers a mixed picture, as does the scope and efficacy of parental involvement post COPPA, she points out. She also mentions that the FTC's level of activity with respect to enforcement is "not especially aggressive" though, she says, "arguably appropriate, given the climate affronted regulatory activity in the privacy arena that has caught many in the industry off guard."¹²

Professor Allen also explains the statute's several normative weaknesses. In particular, COPPA draws a "line of dubious justification between teenagers and 'tweenagers,'" "rendering the selection of age thirteen "morally arbitrary."¹³ Professor Allen continues by arguing that the asserted policy objectives of COPPA are "barely served" because the statute limits access to commerce but not to adult content. In other words, COPPA causes parents to act as intermediaries between beneficial information and online activities of children—an approach which exemplifies "paternalism and authoritarianism."¹⁴ She argues, however, that from the point of view of family law, this structure of putting parents in between children and access to the Internet is an appropriate choice. "Children may be more likely than adults to make poor judgments about yielding personal information in the context of electronic commerce."¹⁵ Yet, Professor Allen explains, privacy advocates are not decided about the effectiveness of COPPA at addressing the stated policy concerns it allegedly seeks to address. She concludes that "[p]rivacy protections that barely protect privacy, that seem morally arbitrary, that aggravate parents, frustrate children, and block access to information communication may come at too high a cost." She warns that COPPA "is not a solution to all of these [existing] problems" and that its efficacy "will

depend upon the success of government led efforts at education and enforcement.”¹⁶

Professor Allen’s critiques of COPPA have withstood the test of time. Although the FTC recently issued new regulations clarifying the applicability of COPPA, in particular, the statute’s efficacy and regulatory approach continue to be called into question.¹⁷ During the first decade of its effectiveness, COPPA has received mixed reviews at best.¹⁸ In particular, four of Professor Allen’s critiques continue to plague the statutory regime: (1) compliance deficits in the business community with limited FTC enforcement; (2) the multimodal distribution of technology skills, which renders parental supervision difficult or functionally impossible in many cases; (3) the arbitrariness of age thirteen as a statutory benchmark; and (4) children’s tendency toward greater information sharing than adults.

COMPLIANCE DEFICITS PERSIST AND FTC ENFORCEMENT CONTINUES TO BE LIMITED

As Professor Allen predicted, COPPA is a statute now viewed by most scholars, businesses, and child welfare experts as well-intentioned but misguided in its approach. COPPA failed to take into account the norms of corporate conduct that would arise to circumvent its restrictions, and a large number of websites that are governed by COPPA are simply noncompliant; they are willingly to risk prosecution rather than investing effort in an attempt to comply with COPPA. Several studies estimate corporate compliance to be generally approximately 60 percent, and even websites that attempt compliance are frequently using an age verification process that is easily circumvented. Businesses have continued to complain that the cost of COPPA compliance associated with monitoring usage, drafting privacy policies, and obtaining proof of parental consent can run as much as \$200,000 per year by some estimates. In some cases, companies have allegedly deemed the costs of COPPA compliance prohibitive and have ceased operations as a result. For example, some websites have asserted that they have removed highly interactive elements from their sites shortly after COPPA’s passage, alleging that compliance costs rendered certain lines of business unsustainable. Meanwhile, because COPPA grants no private rights of action to parents, enforcement of COPPA is the sole province of the FTC, which is an understaffed and overburdened agency.¹⁹ Since COPPA’s passage, fewer than twenty-five FTC COPPA enforcement actions appear to have occurred based upon a review of the Federal Trade Commission’s website.²⁰ Thus, the deterrent effect of COPPA prosecutions continues to appear limited.²¹

MULTIMODAL DISTRIBUTION OF TECHNOLOGY SKILLS CONTINUES

Professor Allen highlighted the role of parents as information intermediaries and the challenges that this roles presents. As I explained elsewhere through the lens of developmental psychology theory, Professor Allen’s argument is well-supported by the developmental psychology literature: technology skills, just like human development, do not always map onto chronological age, and they are instead nonlinear. COPPA’s framework, however, presents a static framework that does not take into account these nonlinear

developmental realities. COPPA continues to be predicated on the idea that an adult parent’s proficiency with technology necessarily surpasses that of her child, an assumption that research demonstrates to be unsustainable.²² Teens tend to be more engaged with technology than adults on average, with 95 percent of twelve to seventeen-year-olds using the Internet regularly and 93 percent of teens having a Facebook account as of 2011.²³

Precisely because technology learning and development do not cleanly map on to chronological age, parents frequently feel their ability to monitor their children’s activities online requires going to special lengths, such as opening social media accounts primarily for the purpose of monitoring their children.²⁴ COPPA also continues to take into account only one computing context, the home, and presumes a parent is available during the child’s Internet time. However, as Professor Allen pointed out, children frequently access the Internet and give away information about themselves using computers at school, at friends’ houses, in the home when parents are not present, and in the library. Therefore, a regulatory paradigm presuming parental presence does not reflect the reality of children’s situated learning in multiple contexts. Hence, essentially, COPPA continues to primarily protect the data of children who wish to have their data protected. For children who simply wish content access, in many cases immediate workarounds to the statute’s protections are readily available; often the child merely needs to log in by providing a false birth date to gain access to the material to which they were denied access. The crafting of the statute continues to ignore the practical realities of child-technology and child-parent interactions. COPPA linear, static developmental view in addressing children’s activities online continues to demonstrate limitations as a regulatory paradigm.²⁵

THE ARBITRARINESS OF AGE THIRTEEN AS A STATUTORY BENCHMARK REMAINS A PROBLEM

Professor Allen identified the arbitrary nature of COPPA’s attempting to distinguish between teenagers and what she called “tweenagers.”²⁶ Indeed, as I have explained elsewhere, the age of capacity to consent to data gathering stipulated in COPPA, age thirteen, appears to have been selected arbitrarily and developmentally illogically. During early adolescence, large divergences in development are visible, perhaps even more so than in later life, and psychologists tell us that children’s experimentation peaks in mid adolescence—i.e., after age thirteen.²⁷

In particular, using the age of thirteen as the ostensible age of consent for privacy contracting in digital spaces creates an irreconcilable conflict with the minority doctrine in contract law. Contract law has historically considered these concerns of child judgment when crafting its own rules. Since the issue that COPPA at least in theory seeks to address relates to a particular contracting context—data privacy and information security contracting—a logical age of consent is one which mirrors contractual capacity generally. Applying a contract law analysis, the usual age of contractual capacity is eighteen, not thirteen. In fact, because Congress’s express intention has been that digital contracts and physical space contracts be treated with parity, the contract law approach from physical spaces should logically extend

into this context of children's data contracting, not COPPA's disconnected framework hinging on age thirteen. Although COPPA superficially adopted a contract-like approach to children's data protection and accountability, it did not create contractual parity between Internet and physical space contracting. In other words, a decade after Professor Allen's article, COPPA continues to set up an unsustainable tension between itself and broader contract law.²⁸

CHILDREN'S TENDENCY TOWARD GREATER INFORMATION SHARING THAN ADULTS HAS BECOME MORE PROBLEMATIC

As Professor Allen argued, children tend to overdisclose information.²⁹ Particularly as technology has become progressively more aggressive in its data aggregation and leveraging, using the age of thirteen as the bright line end of child protection online is developmentally illogical when viewed in context of children's self-disclosure and tinkering behaviors. Children frequently fail to fully analyze the impact of their online disclosures, nor can they effectively foresee how their data sharing may harm themselves or others in the future.³⁰ In fact, even ordinarily careful adults frequently fall prey to a false sense of security in social media and overshare.³¹ Many people forget to set privacy settings on their posts, set them incorrectly, or don't know how to use privacy settings.³² Meanwhile, social media sites frequently make the process of configuring privacy settings in a manner sometimes perceived to be unnecessarily complicated, and some studies indicate that companies may be evolving privacy settings to encourage greater disclosure as users are becoming increasingly proficient with using privacy settings.³³ Privacy settings can also be particularly difficult to negotiate on mobile devices, such as smartphones.³⁴

For example, in a now infamous stunt to demonstrate the perils of overdisclosure in social media contexts, a website called "Please Rob Me" aggregates Twitter feeds from overdisclosing users who share information about when they will not be at home (and thereby notifying would-be robbers of their windows of opportunity).³⁵ Meanwhile, another website called "We Know What You're Doing" aggregates information users post about their alcohol and drug usage in Facebook and Twitter feeds.³⁶ Although these websites were intended at least partially as privacy consciousness-raising experiments, there have, in fact, been cases where social media postings by teens have led to robberies and rampant property destruction.³⁷ For instance, a Google search on "Facebook post" and "party" will yield numerous horror stories from all over the world of teens imprudently posting party invitations that spread like wildfire and result in thousands of dollars of property destruction by party crashers.³⁸ In other words, it is inevitable that some of the information children imprudently share online through social media in particular will be reused in ways that they will not fully anticipate at the time of sharing. A parental-consent-based regime such as the one COPPA provides does not address this reuse problem.

In a commercial world where databases of aggregated information become increasingly central in screening in various contexts in later life, children are losing the ability to make mistakes in their lives. Although many children do not realize it at the time, the digital record of information

that they have shared will follow them for the remainder of their lives. Because a great number of employers now use social network profile information for purposes of screening, individuals may be denied employment opportunities in later life because of imprudent postings they make as teens, and colleges frequently use social network information as the basis for screening for admission as well.³⁹ Indeed, the FTC has approved archiving of social media accounts by third parties for up to seven years.⁴⁰ This means that a fourteen-year-old's imprudent Facebook account postings can impact his job search at age twenty. When we consider phenomena such as the teen "sexting" epidemic, we realize that it is older teens—teens not within COPPA's regime—who are perhaps most likely to post content that will prove stigmatizing later. Similarly, because of the seemingly perpetual memory of the Internet, digital trails of cyberbullying can also follow a victimized child long after the bullying stops in real time. Finally, as digital tracking becomes progressively more sophisticated, the disclosures of children relate not only to what the children knowingly disclose, but also extends to information that they (or their gadgets' default settings) accidentally or behaviorally disclose. Thus, the increasingly "tethered" nature of digital space to physical space means that children's Internet behavior is now more likely to result in negative consequences in physical spaces than it would have at the time of COPPA's passage.⁴¹

In conclusion, Professor Allen's insightful piece *Minor Distractions* has withstood the test of time: over a decade later, the challenges of crafting a workable regime for children's data protection remain. The critiques Professor Allen voiced have not been addressed to date, and they warrant meaningful consideration in the next generation of children's technology privacy paradigms.

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NOTES

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2. Allen, "Minor Distractions," 752.
3. *Ibid.*, 751–54; Children's Online Privacy Protection Act of 1998, 15 U.S.C. §6501-6505 (Supp. V. 2000).
4. *FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Children's Online Privacy Protection Rule*, Federal Trade Commission, December 19, 2012, <http://www.ftc.gov/opa/2012/12/coppa.shtm>.
5. Allen, "Minor Distractions," 755.
6. *Ibid.*
7. *Ibid.*, 754.
8. *Ibid.*, 755.
9. *Ibid.*, 756–58.
10. *Ibid.*, 759.
11. *Ibid.*, 763.

12. *Ibid.*, 767–71.
13. *Ibid.*, 772.
14. *Ibid.*
15. *Ibid.*, 773.
16. *Ibid.*, 774–76.
17. *FTC Strengthens Kids' Privacy*, <http://www.ftc.gov/opa/2012/12/coppa.shtml>.
18. See Andrea M. Matwyshyn, "Technology, Commerce, Development, Identity," *Minnesota Journal of Law, Science, and Technology* 8 (2007): 515, 545.
19. *Ibid.*, 545–46.
20. Bureau of Consumer Protection, *Children's Privacy*, Federal Trade Commission, <http://business.ftc.gov/legal-resources/30/35/?sort=newest>, accessed March 1, 2013.
21. Matwyshyn, "Technology, Commerce, Development, Identity," 545–47.
22. *Ibid.*, 532–49.
23. Joanna Brenner, "Pew Internet: Teens," *Pew Internet and American Life*, April 27, 2012, <http://pewinternet.org/Commentary/2012/April/Pew-Internet-Teens.aspx>.
24. "More Parents Using Social Media to Keep Tabs on Kids, Survey Shows," *TechNewsDaily*, November 26, 2012, <http://pewinternet.org/Media-Mentions/2012/More-parents-using-social-media-to-keep-tabs-on-kids-survey-shows.aspx>.
25. Matwyshyn, "Technology, Commerce, Development, 546–47.
26. Allen, "Minor Distractions," 772.
27. Andrea M. Matwyshyn, "Generation C: Childhood, Code and Creativity," *Notre Dame Law Review* 87 (2012): 1979, 2020, and 2024–25.
28. *Ibid.*, 1984–88.
29. Allen, "Minor Distractions," 773.
30. For example, Michael Dell's daughter Alexa may have recently exposed the family to unanticipated safety risks. According to recent press accounts, in the course of her social media posts, Alexa detailed her family's physical location in advance and provided pictures that would allow for easy identification of members of the family. She posted a picture of her brother Zachary on Instagram and pointed to it with her Twitter account. On the same Twitter account, Alexa detailed the current location of her family and future events her family would be attending. These social media posts had apparently been overlooked by the family's security detail, despite the potentially serious impact on the privacy and even perhaps physical safety of the family. Ashlee Vance, "The Very Real Perils of Rich Kids on Social Networks," *Bloomberg Businessweek*, August 10, 2012, <http://www.businessweek.com/articles/2012-08-10/the-very-real-perils-of-rich-kids-on-social-networks>.
31. See, e.g., Todd Wasserman, "Google Engineer Accidentally Posts Rant about Google+," *Mashable*, October 12, 2011, <http://mashable.com/2011/10/12/google-engineer-rant-google-plus/>.
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33. See, e.g., Somini Sengupta, "Study: Facebook Users More Protective Even as They Reveal More About Themselves," *New York Times*, March 5, 2013, <http://bits.blogs.nytimes.com/2013/03/05/study-facebook-users-more-protective-even-as-they-reveal-more-about-themselves/>.
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37. Matwyshyn, "Generation C: Childhood, Code, and Creativity," 2024.
38. See, e.g., Eamon McNiff, "Teen Party Crashers Allegedly Cause \$45,000 Worth of Damage to House," *ABC News*, March 31, 2010, <http://abcnews.go.com/TheLaw/Technology/teen-party-crashers-arrested-destroying-house/story?id=10240377>; Louie Smith, "It Was Like Belfast in the 1970s' Terrified Neighbours Take Cover as 800 Gatecrashers Riot at Facebook Party," *Mirror*, December 10, 2012, <http://www.mirror.co.uk/news/uk-news/facebook-riot-party-800-gatecrashers-1483816>; Kirsten Grieshaber, "Party Crashers! 1,500 Flood Girl's Birthday Bash after Facebook Invite," *New York Post*, June 5, 2011, http://www.nypost.com/p/news/international/party_crashers_flood_girl_birthday_1RKg1gEaAno0Rcfow5BS6O; Kate Loveys, "£1m Home Trashed by Gatecrashers after Boy Advertises Party on Facebook," *Daily Mail*, February 6, 2010, <http://www.dailymail.co.uk/news/article-1248923/1m-home-trashed-drunken-gatecrashers-boy-posts-party-ad-Facebook.html#ixzz2MjRw4JWC>.
39. Matwyshyn, "Generation C: Childhood, Code, and Creativity," 1999–2000.
40. Rich Harris, "FTC Says "Yes" to Facebook Activity Inclusion in Background Checks," *ZDNet*, June 20, 2011, <http://www.zdnet.com/blog/feeds/ftc-says-yes-to-facebook-activity-inclusion-in-background-checks/3973>.
41. Matwyshyn, "Generation C: Childhood, Code, and Creativity," 1999–2026.

Coercing Privacy and Moderate Paternalism: Allen on Unpopular Privacy

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For over twenty-five years Professor Anita Allen has written about privacy and influenced a host of scholars across numerous disciplines. Allen's most recent book, *Unpopular Privacy: What Must We Hide?*, centers on a neglected area of privacy scholarship. There are areas of privacy that are fundamental and should be protected by liberal egalitarian governments despite the wishes of those who would like to waive these rights. For example, the "don't ask, don't tell" policy adopted by the U.S. military in the 1990s forced privacy on soldiers who may have wanted to disclose their sexual preferences.

While there is much that we agree about, I will focus on areas of disagreement. My hope is that by challenging two of the central claims of *Unpopular Privacy*, Professor Allen will be encouraged to expand or further clarify her views. First, I will critique Allen's definition of privacy as being overly broad. In my view, including forced seclusion or isolation with rights to control access to and uses of locations and information within the category of "privacy" is a mistake. Similarly, to describe legal protections for keeping doctor and patient confidences as coercing, rather than protecting privacy rights, seems a stretch. Second, I will challenge Allen's justification for moderate paternalism. Our government may indeed be treating us like children in a variety of ways, but such policies are unjustified and create or sustain the very weaknesses they are supposed to ameliorate.

DEFINING PRIVACY¹

Throughout *Unpopular Privacy* Allen employs several rather loosely connected conceptions of privacy. She writes, "I began . . . with examples of physical privacy (violation by a peeping tom) and informational privacy (violation by a

confidentiality breaching physician), we can also speak of 'decisional,' 'proprietary,' associational,' and 'intellectual' privacy." She continues, "Seclusion is perhaps the most basic, tangible notion of privacy—a physical separation for others."² Allen also uses words like "solitude," "loneliness," and "isolation" to characterize states of privacy.

Allen seems to advocate that privacy includes all of these ideas—she states, "there is no definitive taxonomy" of privacy.³ In this way she can claim that forcing criminals into solitary confinement or mandating medical quarantines are examples of coerced privacy. I think this is too fast and ultimately based on an overly broad and perhaps vague account of privacy. After briefly defending my own conception of privacy, I'll return to several of the most important cases discussed in Allen's book and argue that they are not examples of mandated or coerced privacy at all.

Admittedly there is little agreement on how to define privacy.⁴ But like other contested concepts, for example, liberty or justice, this conceptual difficulty does not undermine its importance. If only Plato were correct and we could gaze upon the forms and determine the necessary and sufficient conditions for each of these concepts. But we cannot and neither intuitions nor natural language analysis offers much help. Not doing violence to the language and cohering with our intuitions may be good features of an account of privacy. Nevertheless, these features, individually or jointly, do not suffice to provide adequate grounds for a definition; the language and the intuitions may be hopelessly muddled.

Moreover, as indicated by the analysis of examples offered throughout this paper, there are central cases of privacy and peripheral ones. Aristotle discussed this idea of central and peripheral cases in talking about friendship. He writes, "so they are not able to do justice to all the phenomena of friendship; since one definition will not suit all, they think there are no other friendships; but the others are friendships."⁵ The same may be said of privacy. Some of the core features of the central cases of privacy may not be present in the outlying cases. One of the ways a conception is illuminated is to trace the similarities and differences between these examples.⁶

Evaluation is a further tool that aids in arriving at a defensible conception of privacy. A perfectly coherent definition of privacy that accords faultlessly with some group's intuitions may be completely useless. In the most general terms, we are asking "what is this or that way of classifying privacy good for?" At the most abstract level the evaluation may be moral. We ask "does this way of carving up the world promote, hinder, or leave unaffected human well-being or flourishing?" Perhaps the best that can be done is to offer a coherent conception of privacy that highlights why it is distinct and important.

Moreover, a crucial distinction that Allen does not seemingly address is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition where privacy is obtained. An example would be Parent's definition, "[p]rivacy is the *condition* of not having undocumented personal knowledge about one possessed by others."⁷ If a specified state or condition holds then privacy obtains. A normative

account, on the other hand, makes references to moral obligations or claims. For example, when DeCew talks about what is of "legitimate concern of others," she includes ethical considerations.⁸

One way to clarify this distinction is to think of a case where the term "privacy" is used in a non-normative way, such as someone saying, "When I was getting dressed at the doctor's office the other day I had some measure of privacy." Here the meaning is non-normative; the person is reporting that a condition was obtained. Had someone breached this zone the person may have said, "You should not be here, please respect my privacy!" In this latter case, normative aspects are stressed.

I favor what has been called a "control"-based definition of privacy. A privacy right is an access control right over oneself and to information about oneself. Privacy rights also include a use or control feature. For example, privacy rights allow me exclusive use and control over personal information and specific bodies or locations. A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information and access to one's body, capacities, and powers. Limiting public access to oneself and to information about oneself is a right. Privacy also includes a right over the use of bodies, locations, and personal information. If access is granted accidentally or otherwise, it does not follow that any subsequent use, manipulation, or sale of the goods in question is justified. In this way privacy is both a shield that affords control over access or inaccessibility and a use and control right that yields justified authority over specific items, such as room or personal information.

I have defended this conception of privacy elsewhere and a rehearsal would take us far afield.⁹ Nevertheless, this account is passably clear, does not do violence to the language, and is important or non-trivial. Moving through several cases that Allen considers in *Unpopular Privacy* will further highlight the advantages of this conception.

Related to telemarketers intruding into the sanctuary of our homes, Allen writes, "The severity of the problem of interrupted lives was sufficiently great in my view to warrant a categorical ban on telemarketing or an opt-in 'calls permitted' registry."¹⁰ Banning such telemarketing is justified because some individuals don't realize the importance of privacy. Moreover, this sort of intrusion interferes with essential freedoms.

In my view these are two very different proposals with only the first being aptly called unpopular or coerced privacy. An outright ban on telemarketing would violate the liberty of those who wanted to receive such calls and the liberty of advertisement agencies to reach out to prospective clients. Thus, in this case privacy is coerced and isolation from telemarketing is mandated regardless of one's wishes. If we assume an "opt-in" model, where only those who register to be contacted are called, then privacy is not mandated—it is simply protected. Those who wish to be contacted waive their privacy rights and register to be called, while those who do not wish to be contacted have their privacy rights protected. In the latter case, there is no coerced or mandated privacy. On my account, a total ban on telemarketing would

be a violation of liberty and privacy rights while the legally protected “opt-in” model would be categorized as protecting individual privacy rights.

Aside from the definitional question, why should I not be allowed to opt-in to telemarketing? What fundamental or essential value am I unwisely tossing aside? More importantly, why is this loss so compelling that it would justify the government overriding my considered wishes along with those of the telemarketers? With calls coming in from overseas, voice-over IP, and the like, it is difficult to determine how such a prohibition would be effective against those who would waive their privacy rights.

Consider Allen’s analysis of privacy as coerced isolation, seclusion, or imprisonment. Criminals who are placed in solitary confinement or under house arrest have privacy mandated. “Confinement of people who break the law in jail, prisons, and detention centers is a large important class of mandated seclusion.”¹¹ But if we view criminal activity as waiving one’s liberty and privacy rights, then house arrest or isolation in prison would be chosen not mandated—criminals, through their actions, waive liberty and privacy rights. Moreover, if privacy is valuable, then physiological and psychological forms of coerced isolation would not fall into the category. In any case, it would be hard to say that this form of privacy protects fundamental values important enough to coerce. As with an “opt-in” model related to telemarketing, it seems odd to call the isolation forced on criminals a mandated privacy.

Turning to informational privacy, Allen considers confidential professional privacies. Part of a flourishing and free society includes having the information that one shares with lawyers, doctors, and so forth kept private. Laws that protect medical information, for example, mandate privacy. But this could be viewed as a case in which an individual’s health-related informational privacy rights and general right to make contracts are both protected by the law. The patient could broadcast her medical records on the evening news—thus waiving her privacy rights—privacy is not paternalistically mandated in this case. This is also true of the confidences kept by lawyers, psychologists, and bankers.

Allen might reply by noting that while the information target in a doctor/patient case can broadcast his information, the doctor may never disclose patient information. The patient could publish his medical records, yet his doctor may still be mandated to protect privacy. But at this point the notion of being mandated to protect privacy becomes rather vacuous. Moreover, we may ask what fundamental value is being protected by coercing doctors to protect patient privacy where the patients themselves have publically disclosed their own medical information.

In each of these cases Allen is talking about something other than mandated or coerced privacy. To put the point another way, only an over-expansive conception of privacy would include an opt-in policy for telemarketing, coerced isolation for criminals, and legally protected doctor/patient confidences to count as paternalistically forced privacy. Allen writes, “Few readers will disagree with me that liberal governments can, do, and should mandate at least some privacies. Surely government can insist that our neighbors

do not peer into our bedroom windows, tap our phones, or hack into our investment accounts.”¹² But none of these examples—peeping toms, phone taps, or investment hack—are cases of coerced or mandated privacy. The information target in each of these examples could waive her privacy rights, thus sanctioning peeping, tapping, or hacking. I have no qualms if Allen’s point in mentioning these sorts of cases is to highlight areas where the government should protect individual privacy rights that have not been waived. Such a claim, however, would be rather uninteresting.

A CRITIQUE OF ALLEN’S ARGUMENT FOR WEAK-PATERNALISM

In my view, Allen correctly puts the burden of justification squarely on those who would interfere with the peaceful and considered goals of competent adults. Allen notes, “Under principles of liberalism defended for nearly two hundred years by John Stuart Mill . . . and like minded thinkers . . . state coercion requires special justification.”¹³ The special justification Allen endorses and what makes her a weak-paternalist comes from what she calls a dignitarian and “respect for persons” view of privacy. Privacy is a foundational human good and it is at least sometimes permissible for government to protect, promote, or even mandate this value. Allen offers support by noting that individuals are often poor decision makers prone to bias, procrastination, lack of self-control, and information deficiency. Moreover, the very overabundance of choices can be a type of tyranny much like information overload.¹⁴ Allen notes that in some cases the best way to promote the dignity, autonomy, and self-worth of individuals is to paternalistically limit the choices, goals, and projects of otherwise competent and peaceful adults. She understands privacy, personal freedom, and race or gender equality as foundational political goods—necessary for individual well-being, dignity, and a just society.

First, I’ll mention a few minor problems I have with Allen’s work. Allen notes that many individuals don’t care enough about privacy. Individuals are also weak-willed, biased, and overly spontaneous. But these are characteristics of government actors as well. It is not as if those in government are less susceptible to bias, faulty reasoning, or lapses in self-control. More importantly, one could argue that when the government makes bad policy, by incorrectly mandating privacy or using the wrong legal instruments, for example, the consequences for individual autonomy, self-respect, and dignity could be profound. This is not likely the case when an individual makes a bad decision. Second, Allen claims to be offering an account of mandated or coerced privacy that is (1) consistent with a liberal, feminist, egalitarian, democracy, and (2) promotes dignity and autonomy. This focus leaves aside the arguments and views of those who are not liberal (in the modern sense), egalitarian, or feminist. Why is this world-view so privileged? Admittedly we all start out with assumptions, but this is a rather contentious set of claims that arguably stacks the deck in favor of her main conclusions.

I will not quibble with Allen’s claim that privacy is a foundational human good, necessary for health and well-being, as I have written in support of this view on numerous occasions.¹⁵ Nevertheless, there are several problems that I would like to present. First is what I call the “sky-hook” problem. By grounding privacy and weak paternalism in

an appeal to dignity or respect for persons Allen places the entire argument on undefended and rather vacuous premises. A sky-hook comes down from nowhere to support a specific viewpoint. Imagine in reply a libertarian asserting that liberty trumps dignity and respect for persons and thus Allen's paternalism is successfully blocked. Who could think that autonomy, dignity, and self-respect are enhanced by forcing peaceful, competent adults to keep locations and information private? In this case, we have a competing "sky-hook" dropping down from the heavens. Without getting into the actual arguments all of these positions are left simply hanging in the air.

Note further what would be required to establish Allen's weak-paternalism. First, one would have to demonstrate that giving away too much privacy is disvaluable (as mentioned above, I do not take issue with this claim). Second, one would have to argue that from this disvalue we can generate a moral obligation or duty. Individuals ought not to do such things. Making good on this task would require crossing the value/ought divide. Next, we would need an argument that individuals who fail to live up to the demands of morality in this area can be justifiably forced to comply by government. Finally, any defeating principles or arguments would need to be considered. Perhaps the cure, weak-paternalism, is worse than the loss of privacy, or, more forcefully, perhaps weak-paternalism undermines autonomy, self-respect, and dignity.

To press this last point further, there are many unintended consequences that undermine autonomy and dignity by adopting a policy of coercing privacy. An obvious example was the U.S. military's "don't ask, don't tell" policy regarding sexual preference. Allen argues for coerced privacy in relation to nude dancing; she states that the rule should be no "touching." Consider the level and types of government surveillance necessary to catch nude dancers who allow direct touching in the lap dance areas of strip clubs. Are we to pay law enforcement to enter these establishments and entice the strippers to offer private encounters with direct stimulation? Are we, in the name of dignity, going to fine, take to trial, and imprison those who fail to live up to the privacies mandated by government? Finally, one wonders at the financial costs of enforcing these rules.

The notion of dignity and the value of dignity-based privacy play a central role in this book and yet there is little discussion of what dignity is or why it is valuable. Suppose we say that dignity is something akin to self-worth and the moral right to choose the course and direction of one's own life—dignity would be a part of "self-government."

Being touched while nude dancing may be undignified or degrading, especially if the dancer has been forced into the profession. But if nude dancing were a considered choice, then bans on touching would constitute an assault on everyone's dignity. We are all to be treated like kids. Peaceful adults in private places are not wise enough or lack the self-control to make various decisions—in most cases these activities are banned because of overly religious views or simple prudishness. Consider laws against fornication, sodomy, interracial marriage, and co-habitation. By prohibiting certain activities we impose our preferences and views of what is right and good, thereby undermining dignity

and autonomy. Moreover, as already noted, this assault on dignity continues with fines, imprisonment, and shaming.

Allen may reply, "unless the woman is touched or confined, she cannot be overpowered."¹⁶ The possibility of being overpowered and physically controlled makes an erotic encounter between dancer and patron demeaning. "The rule against physical contact protects women from one particularly cruel, subordinating, dehumanizing danger, physical rape . . ." ¹⁷ Thus, laws that prohibit touching within the setting of nude dancing mandate physical privacy.

I am unconvinced. Women in these clubs may be as safe from rape and assault as women in other professions. Allen writes as if the mere possibility of being raped in the context of an erotic encounter automatically demeans and degrades. But this is way too stringent. It is possible for a woman to be raped during an erotic encounter with her spouse—and yet we would refrain from claiming that touching between married couples is demeaning or degrading. Moreover, the view that providing pleasure to another human being for compensation is dehumanizing or degrading needs adequate defense.

Also, consider forms of control other than physical control. Allen rejects concealment prohibitions on Muslim apparel, such as the burka found in France. These rules are unjustifiably paternalistic and discriminate based on religious preferences. In this sort of case Allen would respect and protect the privacy rights of Muslim women who wish to cover up for religious reasons. While there may be times when the required removal of these coverings is justified (courtroom testimony, driver's licenses), Allen would make these exceptions and not the rule. Assimilation into the larger culture would not justify such practices.

It should be obvious that this case is not an example of coerced or mandated privacy. Nevertheless, Allen's critique of laws that would prohibit wearing burkas is troubling for someone who champions liberalism, equality, and feminism. My worry is not so much with the conclusion that Allen offers but her reasons for attacking such laws. According to Allen, "modesty ought to be a right for those who consider it a core religious value."¹⁸ My question is, why are religious individuals so privileged? What if I, an atheist, donned a burka or anti-monitoring suit? Moreover, suppose upon asking why I would wear such a suit I proclaim that it is my right to privacy and as long as I am doing nothing illegal or there is no special reason for me to disrobe—it is no one's business who I am.

While there is much that I would disagree with in modern feminist gender theory, I would agree that there is something deeply troubling with ideological and religious world-views shoved down the throats of the young, especially views that lead individuals within these systems to be controlled and oppressed. If reasons matter, then it would seem that religious-based reasons for covering up should be no more weighty than my secular-based reasons. In 2009 President Sarkozy of France said, "The problem of the burka is not a religious problem, it's a problem of liberty and women's dignity. It's not a religious symbol, but a sign of subservience and debasement."¹⁹ In general, I am troubled with the tension between Allen's views on nude dancing and her argument

to strike down concealment prohibitions on Muslim apparel. On the one hand, consensual, peaceful, adult contact is to be prohibited on grounds of dignity. At the same time we are to tolerate, as a form of religious preference, what is in many cases a successful form of control and domination? My own view is that we should allow competent, peaceful adults the liberty to cover up if they wish (with obvious exceptions) and to engage in acts of touching.

Consider Allen's analysis of the Children's Online Privacy Protection Act (COPPA). COPPA requires that website administrators who collect information about children under thirteen must maintain the confidentiality, security, and integrity of the information they collect. What makes this mandated privacy is that even the parents of these children cannot waive certain restrictions. Allen endorses COPPA, including its privacy coercing features, in part because children and parents don't realize or care about the value of privacy.

Here again there is a tension. Parents are considered too unwise, biased, or uncaring to choose correctly for their children regarding online privacy, yet they are held competent enough to choose, in many cases, the arc of a child's life. We are to tolerate fundamentalist religious indoctrination of kids, sports-crazy parents pushing their kids to become soccer or tennis stars, or parents obsessed with academic achievement. Most, if not all, of these activities deeply impact a child's life and well-being, sometimes in profoundly negative ways. If we are justified in interfering with parental choice related to online privacy, then it would seem that we will have provided grounds for a wider, more robust paternalism. It is unclear how Allen would resist this stronger form of paternalism given the arguments she employs in *Unpopular Privacy*.

CONCLUSION

I was delighted to be asked to write about Anita Allen's professional contributions and have chosen to address her latest work. *Unpopular Privacy: What Must We Hide?* is full of interesting cases, analysis, and arguments. My hope is that by critiquing Allen's definition of privacy and her argument for weak-paternalism she will be encouraged to expand or further clarify the arguments and views found in this important work.

NOTES

1. Parts of this section draw from material originally published in Adam D. Moore, "Defining Privacy," *Journal of Social Philosophy* 39 (2008): 411–28.
2. Anita Allen, *Unpopular Privacy: What Must We Hide?* (Oxford University Press, 2011), 4, 29.
3. *Ibid.*, 30.
4. See, for example, Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, 1997), chapters 1–4; S. Warren and L. Brandeis, "The Right to Privacy," *The Harvard Law Review* 4 (1890): 193–220; Paul A. Freund, "Privacy: One Concept or Many?" *Privacy [Nomos XIII]*, eds. Pennock and Chapman (Atherton, 1971), 182; Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968); Ruth Gavison, "Information Control: Availability and Control," in *Public and Private in Social Life*, eds. Stanley Benn and G. F. Gaus (New York: St. Martin's Press, 1983), 113–34; Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 295; W. A. Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12 (1983): 269; Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992); Adam D. Moore, *Privacy Rights: Moral*

and Legal Foundations (Penn State University Press, 2010) and "Privacy: Its Meaning and Value," *American Philosophical Quarterly* 40 (2003): 215–27.

5. Aristotle, *Eudemian Ethics*, in *The Complete Works of Aristotle, Vol. II*, Jonathan Barnes, ed. (Princeton University Press, 1984), VII, 2: 1236a16–32.
6. The idea of central cases and peripheral cases comes from Finnis, who is citing Aristotle. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 11.
7. Parent, "Privacy, Morality, and the Law," 269.
8. DeCew, *In Pursuit of Privacy*, 62.
9. See Moore, *Privacy Rights*; "Privacy: Its Meaning and Value"; and "Defining Privacy."
10. Allen, *Unpopular Privacy*, 37.
11. *Ibid.*, 38.
12. *Ibid.*, 10.
13. *Ibid.*, 20.
14. *Ibid.*, 13.
15. Moore, *Privacy Rights*.
16. Allen, *Unpopular Privacy*, 91.
17. *Ibid.*
18. *Ibid.*, 75.
19. Angelique Chrisafis, "Nicolas Sarkozy Says Islamic Veils Are Not Welcome in France," *The Guardian*, June 22, 2009.

Autonomy, Paternalism, and Privacy: Some Remarks on Anita Allen

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Few privacy scholars in law or philosophy have been more prolific, influential, or productive than Anita Allen. She was among the first people to add the topic of privacy to the agenda, both in law and in philosophy. Her 1988 book entitled *Uneasy Access* was a bold attempt to develop a normative liberal theory of privacy that took feminist theories into account as well as the relevant legal approaches.

Allen remains one of the few privacy scholars to have argued for normative points with an impressive knowledge of the relevant liberal and feminist philosophical positions as well as an equally impressive breadth of legal decisions. Her most recent work adds a new twist to her position: not only is privacy a fundamental liberal right that ensures individual autonomy, liberty, and dignity, but it must also be seen as a *duty*. It is precisely because privacy is of such fundamental value that people may sometimes have to be pushed towards appreciating the value of privacy for and in their own lives; this sort of pushing is commonly called paternalism. Allen indeed defends some form of legal and philosophical paternalism with respect to privacy, while at the same time insisting on the value of liberal individual choice.

Her most recent book is not only fascinating because of this slight shift in her position but also because the great variety of the legal and societal problems she presents and discusses, which demonstrates the enormous influence that privacy issues have on our daily lives. In what follows, I have

focused my comments on the question of paternalism and its relation to liberal autonomy in Allen's work. In a first step, I discuss the problematic on a rather general level, whereas the second section attempts to demonstrate the tension in Allen's theory with the help of a concrete example, viz. her discussion of lifelogs. In a third step, I attempt to show that it is possible to argue for Allen's aims without necessarily arguing for paternalism.

My general thesis is that there is a tension in Allen's work. On one hand, she has a liberal and feminist approach towards privacy, with a central focus on individual choice and freedom. On the other hand, she has paternalistic, perhaps even communitarian, tendencies. In her discussions of paternalism, concepts like human flourishing and identity play the central justificatory role, since autonomy and individual freedom stand in direct conflict with paternalistic visions. In elucidating the different justificatory reasons for privacy to which Allen refers, I wish to show that her paternalistic ideas not only seem not to be normatively convincing, but also that doubt could be raised as to whether they would really help to secure privacy in our society.

PATERNALISM VERSUS LIBERALISM

Allen suggests different descriptions of what she means by paternalism or paternalistic laws in her work. Here, I mostly restrict myself to her most recent *Unpopular Privacy* (2011) and make only occasional use of her other work. For instance, consider the following quotation: "Privacy is so important and so neglected in contemporary life that democratic states, though liberal and feminist, could be justified in undertaking a rescue mission that includes enacting paternalistic privacy laws for the benefit of uneager beneficiaries."¹ Later in the book, she maintains that some privacy should not be optional or waivable.² In the same way as some degree of paternalism is warranted when basic liberties are concerned (as in the case of forbidding voluntary slavery), paternalism is justified when privacy is concerned in order "to prevent serious harm," harm not only to others, one would have to add, but to the person herself.³ In her 1988 book Allen operates with a rather general definition of paternalism, saying that "paternalism denotes interference with the conduct of another with their best interest in mind."⁴ Her example in this case is a prisoner who has to be protected if he is in danger of committing suicide. Therefore, obviously, it is not only "the best interest" of the subject that is relevant for a definition of paternalism but also the assumption that the action or the law is against his or her will.

In the following, I want to differentiate between three levels of paternalism—from a weak and rather uncontested level up to a third and rather rich one—in order to be able to better understand and analyze Allen's arguments. However, let me first define paternalism. As Gerald Dworkin writes, we are confronted with an instance of paternalism when rules or policies "are justified solely on the grounds that the person affected would be better off, or would be less harmed, as a result of the rule, policy, etc., and the person in question would prefer not to be treated this way."⁵ This definition goes back to Mill's influential discussion of paternalism and his thesis that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or mental, is not a sufficient warrant."⁶

Given this definition and the normative tension between liberalism and paternalism, liberal democratic states offer a surprising number of paternalistic laws and policies. On a first level, paternalism is relatively undisputed in society with respect to the group of people that comprises young children and (other) people who are unable to make fully autonomous decisions. Although in individual cases it might be disputed who belongs to this group, there is a general liberal consensus that this kind of paternalism is justified. Allen refers to this first level of paternalism in her discussion of COPPA (the U.S. Children Online Privacy Protection Act) and in arguing for restrictions on Internet use by children under the age of thirteen.⁷ Allen argues effectively that, since parents are responsible for their (younger) children, it does make sense to protect them with respect to goods that parents find central to their life and which society and the state view as goods or values that enable young people to learn what it means to live an autonomous, flourishing life. Allen writes that "COPPA has incentivized website operators to adopt practices that reduce the likelihood that personally identifiable information will be sought from young children. While the law is paternalistic, coercive, and draws arbitrary lines, its moral and political legitimacy are by now scarcely in doubt."⁸

However, the Children Online Privacy Protection Act is concerned with children up to the age of thirteen, so why should paternalism be plausible with respect to adult and autonomous people? Remember Mill's argument that the state can only legitimately interfere in order to prevent harm to *others*, provided that the person in question is fully autonomous; paternalistic laws are laws, to repeat, which are meant to be in the interest of the protected without their consent or against their will or, in Allen's words, for the "benefit for uneager beneficiaries."⁹

On a second level, the most widespread form of paternalism in liberal laws is the form based on preventing harm to oneself in a very basic, almost literal sense. Paternalistic laws on this level assume that people have an interest in living, but are unclear about the proper means to achieve this. Here, the claim that the law knows better than the person herself what is good for her is based not on any substantial idea of the individual good life but on a rather formal and fundamental idea of the person's interest in life and health and of preventing harm to herself. Examples of paternalism on this level are the obligation to use seatbelts in cars and mandatory health insurance. As we know, however, even this very basic justification of paternalistic laws is already far more disputed than the first level of paternalism and accepted in different societies or cultures in very different ways.

On this second level, harm to oneself is taken rather literally. However, things appear to be different when it comes to privacy. If we extend the arguments that were used to defend the act to protect children's online privacy and try to apply them to adults, we must use much stronger ideas of harm to oneself than the basic and quite literal meaning used in the seatbelt case. Therefore, we must take the step to a third level in order to see more clearly which form of paternalism Allen is advocating. As she writes, "my view is that for the sake of foundational human goods, liberal societies properly constrain both government coercion and individual choice, including the choice to forgo privacies we will typically need

for a lifetime of self-respect, trusting relationships, positions of responsibility, and other forms of flourishing.”¹⁰ This is, of course, rather a rich idea of “harm to oneself”: a more substantial idea of the individual good life is used here in order to defend or justify potentially paternalistic laws and policies in order to secure privacy.

On the first level of paternalism, we do not encounter a real conflict between autonomy and state intervention.¹¹ Likewise, second-level paternalistic laws are often agreed upon in liberal democratic societies, although they are normatively disputed in different and differently severe ways. It is the third level paternalism that must explicitly refer to normative conceptions of the good life, which is problematic and clearly much more substantial than a more sober liberal and basic idea of preventing harm to oneself.

Although there are, naturally, no clear-cut boundaries between the three levels, it is here, on the third level, that there appears to be tension in Allen’s work between conceptualizing the value of privacy with reference to freedom and autonomy, on one hand, and with reference to more substantial ideas of a good life, on the other. It is the idea of freedom to live an autonomous life (privacy as a right) that stands opposed to the idea of the paternalistic prescription of which life to live (privacy as a duty). It is the conflict between my right to have my privacy respected (and my corresponding duty to respect other people’s privacy) and my duty to guard and to keep my own privacy.

Allen’s liberal and antipaternalistic intuitions seem to be clear from the passages in which she discusses the sort of good or value that privacy has in the liberal society: “I want to urge that some forms of privacy are extremely important human goods—I will say ‘foundational’ human goods—on which access to many other goods rests.”¹² This does not sound like an argument for a value that could be paternalistically forced upon people. Here, privacy is analyzed as a good because it provides us with the enabling condition to lead an autonomous life. In the same vein, Allen argues that privacy should be seen as a Rawlsian primary good and should therefore be added to the list of primary goods that Rawls argues for in his *Theory of Justice* and, slightly differently, in his *Political Liberalism*. This is the sort of argument that Allen uses, for instance, in the following passage: “Privacy institutions and practices play a role in creating and sustaining the capable free agents presupposed by liberal democracy, and for that reason are properly deemed foundational.”¹³

Let us have a brief look at Rawls’s idea of primary goods: in his *Theory of Justice*, he writes that primary goods are “things that every rational man is presumed to want. These goods normally have a use whatever a person’s rational plan of life.”¹⁴ In his *Political Liberalism*, he argues that “to identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents.”¹⁵ If we add privacy to this list of goods, then we assume that privacy is something everybody is naturally interested in when pursuing their different conceptions of the good. However, if privacy is conceived of as a primary good, then it is very difficult to imagine how laws designed to protect privacy could be paternalistic. The state does not

force people to use primary goods; the state just assumes that they are fundamental for any lifeplan. So it seems that either privacy is a primary good or paternalistic laws are needed to protect privacy, but they both do not go together. Primary goods can be waived—if I do not need wealth or income, I am certainly not forced to have it. However, Allen argues that privacy cannot be waived because of the inherent value it has for each individual person.¹⁶

This means, I believe, that she has a slightly different idea of the meaning of primary goods. In her interpretation, primary goods are compatible with a certain modest form of perfectionism in the sense that the state enforces ideas of the individual good life, if need be, against the will of the “beneficiary.” This implies that we would only have a real free, autonomous, and good life if we made use of certain goods, such as the good of privacy. The state is paternalistic if it tries to get people to value things against their will, and it is in this sense that privacy is a duty and not only a right. Privacy is a duty when it is a demand that is directed at the citizen herself: she must respect her own privacy in the sense that she should not publish too much about herself (also literally, in the sense of clothing).¹⁷

Note that this form of paternalism is stronger than the weak “nudge”-paternalism of Thaler and Sunstein, in which people still have a choice. With nudges, people are pushed to make certain choices because the choice is being presented and framed in a certain way; therefore, people choose the right kind of thing (fruit instead of chocolate). But they can still choose.¹⁸ Compare the case of telemarketing calls, which Allen discusses: Allen argues for an “opt-in” solution as the default position in the conflict about whether telemarketing calls should be banned. This means that people would have to become active if they wanted to receive these calls. As a default their privacy would be protected and not interrupted or disturbed by these calls. The de facto default is, however, an “opt-out” solution that asks people to actively register on the “Do Not Call Registry.” The opt-in solution is more paternalistic with respect to privacy than the opt-out: the state seeks to protect the privacy of people as the standard default position and not their possible interest as consumers. However, people still have a choice and, therefore, this case does not present a case of real paternalism but rather a nudge-form.¹⁹

By definition, paternalistic laws do not leave people a choice, or if they choose to act against them they have to face legal consequences.²⁰ Although Allen mostly argues in favor of retaining the liberal individual choice idea, this is not always the case.²¹ An example in which Allen seems to refer to a substantial idea of the good life and, therefore, to a form of perfectionism is where she discusses nudity as a problem of modesty (and privacy). Allen argues on the one hand that “government should try to protect women’s free modesty choices,” but she also says that “liberal democratic regimes can embrace mandatory modesty laws restricting nudity grounded in principles of harm avoidance,” where the harm consists in “mutually subordinating debasements.”²² This is more than nudging, since it is paternalistically avoiding harm to oneself without leaving the women (or men) a choice. Here, I believe, privacy is clearly not being referred to as a primary good.

Nonetheless, I still believe that Allen's liberal intuitions are stronger than her paternalistic tendencies; one reason for this opinion is that she is often unusually vague when she talks about the paternalistic issues. The next section focuses on this tension.

IDENTITY AND THE GOOD LIFE

A closer look at what I believe is one of Allen's most fascinating articles, "Dredging up the Past," clarifies her conception of freedom and autonomy, on the one hand, and identity, the good or flourishing life, on the other. It also brings to light the tension that we saw in the previous section between privacy as a good that *enables* us to live a good life and privacy as a good that we have a duty to use if we want to live a good life.

In "Dredging up the Past," Allen discusses in detail recent technological developments around self-observation, self-tracking, and lifelogging. For the privacy scholar, this is a dangerous development because of the data involved in lifelogging and the potential for misuse. However, this development also presents a problem for the liberal scholar who is interested in the normative question of paternalism, which we have been discussing. Lifelogs are the most obvious case of how, by abandoning one's own privacy, one can endanger one's freedom and potentially damage one's own personality and identity such that, in the end, this giving up of privacy could prevent one from leading a good life.

This problem of giving away too many private details of one's own life has been thoroughly researched over the last few years with respect to social network sites, such as Facebook, and the link between protecting one's own privacy and developing different forms of social relationships online.²³ However, research into the significance and dangers of lifelogs has only just started and Allen is one of the first to philosophically and normatively discuss this issue.²⁴

What is a lifelog? Allen herself quotes the definition of Dodge and Kitchin: "A life-log is perceived as a form of pervasive computing consisting of a unified digital record of the totality of an individual's experiences, captured multimodally through digital sensors and stored permanently as a personal multimedia archive."²⁵ On one hand, Allen writes, in a rather optimistically veined, that "systematic, intentional lifelogging could someday significantly complement existing memory preservation practices. It could do the work of a diary, journal or day-book; a photo album, scrap book or home video. . . . The lifelog of the future could store data pertaining to biological states derived from continuous self-monitoring of, for example, heart rate, respiration, blood sugar, blood pressure, and arousal."²⁶

However, Allen also diagnoses two pressing problems with lifelogs, each of which has its own specific dangers. The first problem concerns what she calls "pernicious memory," while the second problem relates to "pernicious surveillance."²⁷

Memory as we know it is fallible and deceptive. We forget a lot of things and we also sometimes seem to remember events at which we were not even present.²⁸ In order to support our memory, we keep diaries, agendas, and notebooks. However, in its ideal lifelog version, memory is made almost superfluous because everything is remembered digitally; lifelogs freeze the past. Why should this be pernicious?

Precisely because, Allen argues, it is part of our identity and our idea of a good and flourishing life that we can change ourselves, that we can grow into a different person, thereby often re-interpreting the past. A lifelog makes this changing and re-interpreting difficult, if not impossible. Past wrongdoing will always remain part of an individual's personality, but, without lifelogs, it would usually play different roles in the different narratives that the person tells about herself and her life. This is not the case with lifelogs. It is precisely the task of a lifelog to remember everything in the same digital unchanging form, and although we will still forget things, we will always be able to turn to the lifelog to check them—the past easily and eternally present.

This freezing of the past becomes especially worrying when we consider Allen's second point: the pernicious surveillance. The downside of lifelogs as a form of *sousveillance*—where activities are recorded by the agents themselves—is the possibility of continuing surveillance, since *sousveillance* can go hand in hand with surveillance.²⁹ And it is not only other people who could be spying on us; it is the danger of the government checking the lifelogs. As Allen puts it: "A government that has traditionally enjoyed access to communications and correspondence will want access to lifelogs, too."³⁰ Mayer-Schoenberger makes the same point in his highly acclaimed *Delete*, but even more forcefully: "As digital memories make possible a comprehensive reconstruction of our word and deeds, even if they are long past, they create not just a spatial, but a temporal version of Bentham's panopticon, constraining our willingness to say what we mean, and engage in our society."³¹

Taking both points together, Allen effectively argues that the loss of the fragility and fallibility of memory imprisons us in our own past and freezes our identity. At the same time, not only societal spying but also governmental surveillance endangers our freedom and autonomy. If everybody had a lifelog, then the life we would be living would not be an autonomous or free life; it would not be a good, flourishing, dignified life. The experience of privacy, Allen argues, is ethically mandatory because states of privacy—the experience of retraction, seclusion, or intimacy—are essential for a flourishing life.³² People would be "potentially deprived of highly valued states that promote their vital interests, and those of fellow human beings with whom they associate."³³ Lifelogs prevent people from having these experiences because they are, by definition, oriented towards total and continuous accessibility. Therefore, Allen argues that "we need to restrain choice. If not by law, then somehow. Respect for privacy rights and the ascription of privacy duties must both be a part of a society's formative project for shaping citizens."³⁴ In the same vein, she says, "some privacy should not be optional, waivable, or alienable."³⁵

However, the idea of privacy being a *duty* and the idea of *shaping citizens* could make some liberals nervous. It is evident, I believe, that Allen here uses a much richer conception of identity, of the flourishing, of the good and valuable life than the liberal notions of freedom and autonomy would allow for. The concepts she uses seem to belong more to a perfectionist body of thought than to a Rawlsian liberalism. Respect for a person's privacy is necessary in order to protect her autonomy and identity; this is something Allen has argued for from the start of her

theoretical endeavors. However, it is a long way, perhaps too far, from this point (arguing for preventing harm to others) to being forced to protect one's own privacy, to privacy as a duty.

AUTONOMY, IDENTITY, AND THE SOCIAL VALUE OF PRIVACY

I agree with most of Allen's diagnosis: that we are losing more and more privacy, that we are giving up too much privacy, and that privacy in general does not play a sufficiently important, let alone central, role in our liberal system of values. In a way, the dangers Allen describes and analyzes are even worse than she suggests. If it is true that we will all have lifelogs in the future, then not only will we have little or no privacy, but we will also have changed norms of what it means to remember something, what it means to know oneself, what social relations should be like, and what the meaning of intimacy is. The transformation of these fundamental social norms will change our society and our lives; for all we know, this transformation may have already started.

However, I do not agree with most of Allen's therapy. I believe that there could be a different way of analyzing the privacy problems and that there may, therefore, be different ways of dealing with them, ways that would be normatively less problematic than paternalistic laws (of the third level I was describing in my first section).

My re-interpretation of the analysis Allen offers is actually suggested by Allen herself, at the end of chapter seven.³⁶ She briefly refers to Daniel Solove and Jeff Reiman and to their theses, which note that a loss of privacy is not only bad for the individual but also bad for the society if others are confronted with too much privacy from a person. Here, what serves as a reason for holding back private details is clearly not the respect for someone else's privacy but the respect for the needs of others *not to be confronted* with too much of a person's own private life. This is an important step: if we re-interpret our societal privacy rituals and privacy practices in this way, then policies to protect them would not have to be justified paternalistically, but purely liberally through the idea of harm to others—and let us for the sake of the argument assume that this slight broadening of the notion of harm is one most liberals might be willing to accept. If I publish everything about myself in a lifelog or social network site it might also be harmful to myself; however, this would not, in itself, be a sufficient reason to stop me from my publishing activities. A good liberal reason to stop me from doing so would be if I harmed others in *their* freedom and autonomy and was a burden and hindrance to them. Solove cautions us against a suffocating society that showers too much privacy on the public space, which not only enables surveillance, with all its dangerous consequences, but also clogging the public space.³⁷

This line of argument would not have to use paternalistic ideas to convince people not to publish too many private details from their lives. The value appealed to here would not be a rich conception of the individual good life but the social value of privacy, the value that privacy and its protection has for society as a whole. The idea is that we do not want to live in a suffocating society and are therefore interested in the protection of privacy from the third-person perspective as

well as from the first-person perspective. This social value of privacy, and the suffocating society, would have to be spelled out with respect to all the different social privacy norms and privacy practices much along the lines Allen discusses.³⁸

However, even if the argument is based on a liberal social value of privacy and remains a liberal argument, it is still difficult to imagine that we could get at a stage where we would have adequate laws to protect a society from suffocating through too much privacy. But there are other possibilities and means to help influence social processes, policies, social behavior: public debates in the different public spaces and social media, for instance. The awareness that privacy is a good that we should cherish, the sensitivity vis à vis the dangers of surveillance, and the consequences that too much private data on social network sites might have are much clearer now than they were a couple of years ago. Moreover, laws enforcing the *right* to privacy can also work in this sense and help people realize the value of privacy, a value which they then could acknowledge and esteem also from the first-person perspective.

So we might not have to rely on paternalistic laws in the end. Given that Allen, at times, does not seem to be too convinced by her own paternalistic suggestions, she might actually agree.

NOTES

1. Anita Allen, *Unpopular Privacy. What Must We Hide?* (Oxford University Press, 2011), XI.
2. *Ibid.*, 172.
3. *Ibid.*, XII.
4. In *Unpopular Privacy*, Allen discusses paternalism in various chapters, although, as far as I can see, she does not define it precisely, rather referring to a general idea of paternalism (see, e.g., 6ff. 78ff. 171ff. 173ff).
5. Dworkin in his *Stanford Encyclopedia* contribution; see also his "Moral Paternalism," and Feinberg, "Legal Paternalism," 5ff.
6. John Stuart Mill, *On Liberty*, ed. with introduction by Gertrude Himmelfarb (London: Penguin Classics), 68.
7. See Allen's detailed and cautious discussion of the Children Online Privacy Protection Act in her *Unpopular Privacy*, on 177ff, especially 183ff for the question of the legitimacy of the paternalism involved.
8. *Ibid.*, 190.
9. Feinberg, for instance, suggests a different classification of forms of paternalism. See his "Legal Paternalism," 5ff; see also the discussion of the principles in Dworkin, "Moral Paternalism," 307ff.
10. Allen, *Unpopular Privacy*, 13.
11. There is no conflict if one assumes that the objects of the intervention are not autonomous in the full sense of the concept; if one underlines that if they are not fully autonomous, they seem to be at least partially autonomous, then the conflict is only softened rather than fully resolved. See again the discussion of paternalism in Dworkin and Feinberg.
12. Allen, *Unpopular Privacy*, XII.
13. *Ibid.*, 18.
14. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 62.
15. John Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1993), 76.
16. Allen, *Unpopular Privacy*, 8f., 172.
17. See Allen's discussion of nudity (*Unpopular Privacy*, 78ff), to which I'll turn briefly below.

18. One could argue that this “nudge-choice” is not fully autonomous because framing is supposed to unconsciously prefigure the choice, in ways the subjects are not aware of, and its efficacy depends on that. But even if there is this tension between the idea of an autonomous choice and being nudged, I want to underline the difference between being legally forced to do something (by paternalistic laws) and being nudged to do something. See Thaler and Sunstein, *Nudge*, 9ff.
19. See Allen, *Unpopular Privacy*, 35ff on the telemarketing case and her detailed discussion of it.
20. *Ibid.*, 172.
21. *Ibid.*, 20f.
22. *Ibid.*, 95. Also see her critique of certain commercial voyeurism and masturbation practices as “violating Kantian intuitions,” since it is “commerce without mutual respect” (*Unpopular Privacy*, 94).
23. Allen herself refers to research in *Unpopular Privacy*, 190ff; see also Nissenbaum, *Privacy in Context*; see also Steeves, “Reclaiming the Social Value of Privacy,” and Boyd and Marwick, “Privacy in Networked Publics,” to name but a few.
24. See, for instance, Passig, “Unsere Daten”; also Hall and Johansson, “Recomposing the Will.”
25. Allen, “Dredging Up the Past: Lifelogging, Memory, and Surveillance,” *University of Chicago Law Review* 75 (2008): 48.
26. *Ibid.*; Allen, *Unpopular Privacy*, 164.
27. Allen, “Dredging Up the Past,” 55ff.
28. See Oliver Sacks, “Speak, Memory.”
29. See Allen, “Dredging Up the Past,” 54, fn 31, for the origin of the concept of sousveillance; and 54ff, for the detailed discussion of the relation between sousveillance and surveillance.
30. Allen, *Unpopular Privacy*, 168.
31. Viktor Mayer-Schoenberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009), 197.
32. Allen, *Unpopular Privacy*, 171ff.
33. *Ibid.*, 172.
34. *Ibid.*
35. *Ibid.* Also see 71f. 74. Here, Allen is much more cautious in her recommendations on how to deal legally and politically with lifelogs and other forms of ambient sousveillance-technology; the shift in her position has, I believe, taken place between writing that article and finishing the book.
36. *Ibid.*, 172.
37. For more detail on these problems see Roessler and Mokrosinska, “Privacy and Social Interaction.”
38. See also Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Palo Alto: Stanford University Press, 2010), who demonstrates that informational privacy norms are bound up with the respective contexts of privacy problems.

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Our Privacy Rights and Responsibilities: Replies to Critics

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More than twenty-five years ago I began writing books and articles about privacy. The editors of the American Philosophical Association *Newsletter on Philosophy and Law* recently invited a group of scholars to publish assessments of my privacy-related scholarship. Two Americans accepted the invitation—Professor Adam Moore from the philosophy department and Information School of the University of Washington and Professor Andrea Matwyshyn from the department of legal studies at the University of Pennsylvania’s Wharton School. Two Europeans also accepted. They are Professor Beate Roessler, a German philosopher specializing in ethics and the history of ethics, based at the University of Amsterdam in the Netherlands, and Professor Annabelle Lever, a normative theorist from the department of political science and international relations of the University of Geneva, Switzerland. I have been given an opportunity to respond in the newsletter to these four distinguished and innovative scholars’ criticisms. I am honored to do so.

I. AIMS AND CONTRIBUTIONS

The decades of my professional career in academic philosophy and law (1985 to present) have corresponded to the international rise of privacy, private life, and data protection as major foci of law and values. As my newsletter critics point out, I was the first American philosopher to make this cluster of focal points the main subjects of his or her work. The central aim of my work has been to articulate practical understandings of privacy and associated concepts and values that are increasingly at play in everyday morality, professional ethics, social practice, and the law. I

have explored the complex ways that privacy and related concepts are employed in modern settings, especially in law and medicine in the United States. Professor Lever urges me to be “sensitive to what we might call the ‘archaeological dimensions of privacy’—the way our contemporary notions and practices reflect different, often competing, conceptions of privacy.”¹ When it comes to the archaeology of privacy, I am already a principal investigator, deep in the field. My boots are plenty muddy.

My philosophical work relating to privacy has prominent descriptive dimensions but has grown increasingly normative. Lately I have focused on why it matters that certain privacies face extinction, whether privacy rights protected by our laws are foundational,² and whether individuals have ethical responsibilities of self-care relating to information privacy.³ I may be a descriptivist or normativist in a given instant, but I am always, at root, an applied philosopher, trained in analytical philosophy, open to exploring the implications of an eclectic mix of competing political, metaethical, and epistemological approaches to privacy that might move individuals and societies to better places. Of special significance to my thinking have been progressive critiques of private life and public accountability mounted by liberals, egalitarian feminists, critical race theorists, and LGBTQ scholars, among others. I am perhaps best known for my work defending privacy and private reproductive choice for women; privacy and confidentiality in health care; strong, even, paternalistic, data protection laws; and ethical obligations of modesty and reserve in a world that includes life-logging and social media. I am a published critic of the concept of “racial privacy” in the United States and of privacy as a blanket excuse for a lack of accountability for private life.

I launched what has turned into a career as a privacy scholar in 1988, when I published *Uneasy Access: Privacy for Women in a Free Society*.⁴ This was an ambitious book for its day, a book about the philosophical definition of privacy, the ethical and social value of privacy, and the place of privacy and privacy laws in American women’s lives. I have published two additional books about privacy, *Why Privacy Isn’t Everything: Feminist Reflections on Personal Accountability* (2003) and *Unpopular Privacy: What Must We Hide* (2011).⁵ My newsletter critics generously discuss *Uneasy Access* and *Unpopular Privacy*. However, for me, *Why Privacy Isn’t Everything* is a crucial unit of the trilogy, arguing that important values of trust, loyalty, care, and freedom from violence often countermand privacy. My three philosophical books engage law and culture broadly, but they have in common a desire progressively to mine the insights of liberalism, feminism, and other theories for fuller theoretical and practical appreciation of a cascading array of practical concerns. In addition to my books, I have published dozens of practically focused interdisciplinary articles and essays about privacy and confidentiality in journals of law, philosophy, health, and other disciplines, along with book chapters and encyclopedia articles, including several articles on a topic of special interest to me, privacy in medicine.⁶ Because lawyers need to be educated about the ends and means of privacy law and policy, I often speak to professionals at seminars and conferences; and as a resource for law school courses such as the ones I have taught continuously in universities in the United States and abroad since 1986, I have published several editions of hefty textbooks about privacy law. The

most recent, *Privacy Law and Society* (2011),⁷ introduces law students to common law, statutory and constitutional privacy doctrine, data protection law, and surveillance law.

II. DEFINING PRIVACY

Professor Moore suggests that the definition of privacy implicit in *Unpopular Privacy* is unclear and too broad. Moore objects to my decision to frame concerns about isolation, confinement, modesty, and professional confidentiality as privacy concerns, alongside classic concerns about intrusion and information privacy. Ironically, Professor Lever suggests my definition of privacy in *Uneasy Access* was too narrow, chiefly because I distinguish and exclude decisional privacies from my “restricted access” definition of privacy. I will try to respond to this contradictory pair of criticism with an explanation of why I deliberately employ an inclusive approach to privacy discourse today but attempted an exclusive philosophical definition years ago.

A. PHILOSOPHERS DEFINE PRIVACY

Why did I begin in 1988 with the task of philosophically defining privacy? And why with a book that engaged feminist controversies? An understanding of the context is key. “Privacy” was introduced into legal and policy discourse in the United States in the 1960s and 1970s at a time when there was a limited academic tradition of conceptual analysis surrounding the concept of privacy or the term “privacy.” A survey of the literature reveals only a smattering of published discussions of privacy prior to the 1970s, when philosophers turning their attention to the topic for the first time viewed legal uses of “privacy” not as rich and complex, but as confused or confusing.

In constitutional law at the time, “privacy” was being used to mean, first, freedom from duties to disclose political ties to government, as in *NAACP v. Alabama* (1959); second, independent health and family decision-making, free from most government interference, as in *Griswold v. Connecticut* (1965), *Loving v. Virginia* (1967), *Roe v. Wade* (1973) and, on the state level, *In Re Quinlan* (1976); and third, freedom from both arbitrary search and seizure and compelled self-incrimination, as in *Katz v. United States* (1964) and *Schmerber v. California* (1966).⁸ In tort law “privacy” meant, first, freedom from highly offensive interference with seclusion; second, freedom from offensively misleading and embarrassing publicity; and third, control over attributions of identity such as name and likeness. These diverse meanings in tort law were culled from case law and presented by William Prosser in 1960 in a famous *California Law Review* article.⁹ In the domain of state and federal statutes, “privacy” meant fair limits on the collection, retention, and disclosure of information. The Privacy Act of 1974 regulated information practices of the federal government and the Family Education and Right to Privacy Act (1974) regulated the information practices of schools receiving federal funding.¹⁰ Many state statutes regulated the collection and disclosure of records relating to health care, library usage, tax payment, adoption, motor vehicle registration and licensure, and so on. At least as early as the mid-1980s Robert Ellis Smith began publishing indexes of such laws under the rubric of state and federal “privacy” laws entitled *Compilation of State and Federal Privacy Laws*; he includes more than 700 laws in his 2013 edition.¹¹

The extant constitutional, tort, and statutory legal uses of “privacy” in the 1970s were diverse. This was in large part because ordinary people interacting with and shaping the legal system used the word “privacy” to denote different kinds of conditions relating to a host of values and things valued—freedom, dignity, independent thought, tranquility, limited government, equality, identity, reputation, and so on. This reality of ordinary and official discourse troubled analytical philosophers committed to linguistic clarity and precision. Moreover, conservative philosophers, jurists, and policy makers alike were disturbed that the new privacy jurisprudence might be not only “confused” but also successfully deployed for radical uses, such as criminal defendants’ rights, women’s rights, patient rights, and racial equality. Best illustrated by the abortion and euthanasia debates, some philosophers came to associate privacy jurisprudence with progressive causes tied to race and gender, and with morally questionable medical practices. As described in greater detail elsewhere, this was the context in which philosophers and legal theorists began to write about privacy.¹²

In the 1970s and into the 1980s, philosophers and legal theorists focused on the task of cleaning up privacy discourse, so to speak, by clearly defining privacy and its value for the sake of law and public policy relating to important domains affecting private life. Among mainstream traditional philosophers, writing about privacy meant defining it and explaining its value as an aspect of freedom, dignity, personhood, or property. As the same time, feminist activists, political theorists, and philosophers focused on exposing the harm done to the vulnerable in modern Western societies structured around patriarchy, racism, and colonialism with the aid of ideologies of privacy, private property, and private choice. When I began to write in the late 1980s I understandably wrote in response to the only two significant bodies of literature about privacy out there—both the definitional literature of the 1970s and early 1980s, and the normative literature, some the work of mainstream analytic philosophers, but the richest and most provocative sector of which was the work of feminist thinkers. I found in both bodies of literature a striking tendency to overstate the case against privacy. I set out on an ironic mission of analysis—to rescue an important set of concepts and values from the zeal of conservatives and radicals alike.

B. THE BEST DEFINITION

Professor Moore maintains that I am insufficiently attentive to questions of definition in *Unpopular Privacy*. His own work includes a definition of the right to privacy, which he repeats in his newsletter contribution. There are two reasons I did not dwell on the definition of privacy in *Unpopular Privacy*. First, I have grown skeptical about the value of “defining” privacy in the a-contextual abstract as we philosophers often did in the 1970s and 1980s. Second, I did not want *Unpopular Privacy* to simply repeat what I have said in the past about the definition of privacy. But by not defining privacy explicitly I may have misled Moore (and other readers) into assuming I am dismissive of the matter and have not thought it through. Moreover, my very deliberately inclusive approach to the subject matter of privacy in a book centrally about informational and physical privacies may have caused Moore (and other readers) to miss out on why I can suppose it is a virtue and not a vice of my book that examples range from

telemarking to modesty dress, imprisonment, professional confidentiality, and self-revelation on the Internet.

In *Uneasy Access* I did what I imagine Moore would have liked me to do again in *Unpopular Privacy*. I devoted a full chapter (Chapter 1) to setting forth and comprehensively defending a philosophical definition (conceptual analysis) of privacy—an analysis inspired by Ruth Gavison’s account in an often-cited 1980 *Yale Law Review* article, “Privacy and the Limits of Law.”¹³ In that chapter I gave a structured account of the varied purposes of and approaches to philosophical definition. I distinguished connotative and denotative meaning, I offered and defended a proposed non-normative denotative definition of “privacy” arguably suitable for a range of purposes tied to the law and morality. Consistent with many characteristic uses, I said, privacy denotes “a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others.”¹⁴ I characterized my definition as descriptive and neutral. Privacy is a neutral condition, a state of affairs, which can be evaluated as good or bad in specific circumstances, I urged.

I defended my definition in the face of alternatives such as Warren and Brandeis’s (being let alone), William Parent’s (accessing undocumented information), Judith Thomson’s (liberty and property), and Alan Westin’s (control over communication of information).¹⁵ The “control” definition struck me as the strongest contender to the “restricted access” definition I developed. However, I rejected the classic control-based definition of the sort Westin initiated and Moore has now modified and embraced. A person is not in a condition of privacy because she has control; she is in a condition of privacy because circumstances, which she may or may not control, limit her accessibility. Control over information is not a sufficient condition for the experience of privacy, since one can use one’s control to invite access and abrogate conditions of privacy as easily as one can use it to restrict access and embrace conditions of privacy. On the other hand, *rights* of privacy ought to include rights to control whether one can enjoy certain states of privacy if one chooses to. A major concern of our times is that Internet users lack adequate control over the collection and use of information about online content and behavior.¹⁶

Moore plausibly described the right to privacy as “a right to maintain a certain level of control over the inner spheres of personal information and access to one’s body, capacities, and powers.”¹⁷ Moore defines privacy rights by reference to control, and he seems to furthermore define privacy itself by reference to states of control. I believe this is why he objects to my treating helpless and unwelcome modes of existence such as solitary confinement in prison and forced domesticity as privacies—the subject lacks control. But, again, I understand physical and informational privacy as conditions of inaccessibility, even if they are lonely and unwanted.

In terms of its definition, I do not burden the concept of privacy with the norms. I reserve the question of whether restricted access is good or, as in the case of forced domesticity, bad. I do not think that people who find themselves in conditions of unobserved isolation due to criminal activity are in happy conditions, though they are in conditions that entail too much, unwanted privacy. Now, once we get past the

definitional issues, there is probably very little substantive disagreement between Moore and me over criminal justice policy. On the other hand, I do reject his suggestion that prison privacies cannot be unwanted because people who intentionally commit crimes waive privacy and freedom. This notion takes the idea of “you brought it upon yourself” too literally.

C. INCLUSIVENESS AS A MIRROR OF SOCIAL PRACTICE

Moore argues that my implicit definition of privacy and unwanted privacy in *Unpopular Privacy* is seriously over-inclusive. In *Uneasy Access* I specifically addressed concerns about definitional inclusiveness. I addressed how and why we might understand privacy as a “parent or umbrella concept.”¹⁸ Like the term “privacy,” the terms “secrecy,” “confidentiality,” seclusion, “solitude,” “modesty,” and “reserve” denote diverse conditions of inaccessibility to people, their mental states, or information about them. In many of my publications I have discussed that the controversial decisional usage of privacy found in American constitutional birth control, abortion, and right to die cases is not easily accommodated by a restricted access definition.¹⁹ Yet, I explain, decisional privacy, defined as limited official and other outside interference with choices about reproduction, sexuality, health, and family life, is a tool of liberty that can be used to create opportunities for physical and informational—restricted access—privacy. (For example, since parenting obligations cut down on opportunities for privacy, choosing to abort a fetus will determine the amount of physical privacy a woman may expect to enjoy over the course of her life.) In *Uneasy Access* and several articles I noted some theorists were politically motivated by opposition to abortion rights to claim that that the decisional usage of “privacy” confuses privacy with liberty.

Professor Lever refers to my supposed “insistence that decisional and restricted access privacy have nothing to do with each other.” I do draw a conceptual distinction between them in *Uneasy Access*, as she states. But using the language of “insistence” is a misleading; I argue, as she does, that physical and informal privacies have practical links in ordinary life with decisional privacies.²⁰ I believe concepts of privacy and private choice both have roots in the public/private distinction we have inherited from the Greeks.²¹ My published invocations of Hannah Arendt’s analysis of the public and the private have made this point.²²

D. SKEPTICISM ABOUT TRADITIONAL DEFINITIONAL PROJECTS

I stand behind most of what I said about the concept of privacy and its definition in *Uneasy Access*. My chapter on the definition of privacy is still one of the most comprehensive and is a valuable summary of where we were on issues of definition prior to the Internet age. Yet I am self-critical. I have grown skeptical about the value of “defining” privacy. I do not believe the problem with privacy law and policy is that we lack a good all-purpose philosophical definition of privacy. After a decade of defending a definition of privacy that met certain facts and certain ideals, I have concluded that the definitional project is largely beside the point for work in applied philosophy and law. I have watched as more

and more laws and policies have been developed under “privacy” rubrics. And more and more theorists compete with idiosyncratic definitions of privacy—some inclusive, some exclusive; some normative, some descriptive; some stipulative, some prescriptive. No one has succeeded in getting everyone else to use “privacy” in just the way he or she recommends.

I do not re-engage the definitional project of my early work in *Unpopular Privacy* because I have shifted fully to a different sort of conceptual project that was always a part of what I was interested in doing: cataloging and explaining how courts, lawmakers, policy advocates, scholars, and the general public use the term “privacy,” whether they ideally ought to or not. Moore notes that in *Unpopular Privacy* I briefly state that there are physical, informational, decisional, proprietary, associational, and intellectual uses of privacy. I did not elaborate the six-fold taxonomy because I have so often done so in my publications,²³ which the book cites, perhaps too subtly, in footnotes. The taxonomy is evolving. The original catalogue consisted of three uses (physical, informational, and decisional), and three more were added (in this order, proprietary, associational, and intellectual). In my legal textbook and elsewhere I have given examples from the law of each usage and sometimes traced its origins and connections with other usages. Seeing only the list and not the work behind it, as Moore did, it is understandable that he would feel something important was missing.

Today my goal is not to tell people how to talk about privacy but, rather, to observe (as I often do with fascination) how people talk about privacy, and to explain the goals, purposes, and history of their doing so. The archeologist (returning to Lever’s metaphor) does not tell people how to make pots, she unearths the pots and shards of pots others have made and explains their contexts. I am an archeologist. But I wear another hat. I am an advocate. I believe many forms of privacy are very valuable for worthy forms of life. I try in my work to explain why privacy has value with the hope that others, including policy makers, will come to agree.

Having described the context of my early work and my current aims as architect and advocate, it may be clearer why I regard it as a virtue of my latest book that I have included an arresting array of practices and policies. I am describing usage and prescribing values. The array of usages I include are the instances on the margins (isolation, appropriation, modesty), at the core (seclusion, publicity), and in between (confidentiality, reserve). My goal for *Unpopular Privacy* was not to dictate privacy talk, but to accurately describe it and creatively map it; and then to encourage fresh ways of seeing the value for ourselves and others of many of the things we have come to call our “privacy.”

Moore worries about an “over expansive conception of privacy” in my work. In this regard, Moore objected to my characterization of professional confidentiality as a kind of unwanted *privacy*. Speaking of medical confidentiality, confidentiality is about the patient’s privacy, he argues. Then he asks, as if the answer is clearly “none,” “What fundamental value is being protected by coercing doctors to protect patient privacy where patients themselves publically disclosed their own medical information?” I am glad Moore asked this question.

I wrote *Unpopular Privacy* in a way I hoped would lead people to ask such questions, for trying to answer them unsettles comfortable mainstream notions of privacy, so that discourse of freedom of choice will not lead us to ignore other values relating to disclosure and nondisclosure. To underscore the deep, rich, and complex norms at stake in practice and policy, I intentionally encourage conversations about privacy that ask us to rethink.

Let's think harder about patient privacy, often reduced today to a signature scrawled on a HIPAA consent form. The professional and data subject are in a relationship. The relationship may not be perfectly symmetrical as to rights and duties, but both are bound by norms of non-disclosure. In some respects, patients can disclose more freely than their doctors. But medical patients are not morally and legally free to disclose their own health information in just any way they choose and in any context. For example, it would be unethical for a college professor to shower her students with unsolicited photos of her breast cancer wound. It would be unethical for a woman disappointed in love to harass an ex-lover with multiple copies of her brain MRIs because she blamed him for her migraines and multiple sclerosis flare up. If there are false statements about third parties in a health record, a patient who publicizes them could be liable for defamation (imagine, "I am having an affair with X and X gave me the STD for which I need treatment"). Like doctors', patients' ethics, contexts, and roles bear on whether they can disclose, may disclose, or must disclose otherwise confidential health information.

For patients as for physicians, health privacy can be unwanted and coerced by law and other norms. Doctors cannot publish their patient's medical records at will just because the patient has chosen to publish their medical records. And doctors who know their patients may lack full understanding of their medical condition and its implications might have ethical reasons to keep quiet about matters their patients have unwisely chosen to broadcast. Privacy-related norms are rich and complex. If we look closely, freshly, and subtly at cultural practices and values, we can see why it is anything but "vacuous" to describe laws requiring a professional to keep quiet about information learned in the context of the professional role as laws that impose obligations of privacy on the professional. Professionals' relationships are their lives too. My "unwanted privacy" framing of professional obligations of confidentiality calls attention to the difficult limits of *self-disclosure* that come with jobs that place people in relations of confidence with others.

III. PATERNALISM

My defense-in-concept of "privacy paternalism" in the article "Coercing Privacy"²⁴ and the book *Unpopular Privacy* has been my response to "tell-all" media, "reality show" entertainment, and self-disclosing uses of cell phones, the Internet, the web, life-logging and social media.²⁵ Professors Roessler and Moore offer both friendly amendments and fundamental challenges to *Unpopular Privacy*. In response to their charges of unresolved tensions and unpersuasive arguments, I offer elaborations of why I continue to believe a just society can enact certain laws limiting the capacity of individuals to make choices about their own informational and physical privacy. I also explain why I believe there is a role for an ethic of privacy in contemporary life, one which

understands privacy-protection both as a self-regarding and as an other-regarding moral imperative.

We have a privacy problem. In a world dominated by portable electronics, Internet social media, "reality" television, and "shock" radio, many of us are losing our sense of privacy, our taste for privacy, and our willingness to respect privacy. Roessler agrees with my diagnosis of society's privacy ills: a disturbing disregard for privacy, our own and others'. But she has grave reservations about the treatment plan involving strong paternalism I highlighted in *Unpopular Privacy*. Roessler supports another treatment option I suggest near the end of the same book, which does not involve controversial paternalism and which is more consistent with the liberalism she believes is the strongest thread in my thought. This option is to interfere with adults' privacy practices when and only when they harm other people. It turns out many current privacy practice harm others. Giving away too much of our own privacy can be harmful to others by making them uncomfortable. As I have pointed out elsewhere, giving away personal information harms another when the information is shared, as where two people share a genetic profile or a bank account.²⁶ Giving away personal information can harm others' interests where some people's indifference to their privacy makes it harder for others who care about their privacy to convince firms and officials to institute data protection measures. Thus, there will be a legitimate basis for mandating privacy and duties of privacy that do not involve paternalism—a simple application of Mill's harm principle.

Our privacy practices can be worrisome because of the harm they do to others, but they can also be worrisome because of the harm they do to ourselves. I make what has proven to be a highly controversial claim that we should be open to laws that paternalistically intervene in the lives of adults (as well as children and youth), even when avoiding harms to third parties is not part of the picture. I make this claim purporting to be a liberal and a feminist. Why stick to my guns on this, if, as Roessler suggests, I don't need to? I stick because I believe there are plausible classic harms to others-based rationales for privacy laws and ethical responsibilities, and because I believe there is, in addition, harm to self-based rationales worth airing. In addition to Kantian-style arguments focusing on harm we do to ourselves, I air aretaic (virtue-based) rationales and utilitarian ones.

Roessler does a nice job of distinguishing the contested from the uncontested forms of paternalism found in Western (and U.S.) privacy law.²⁷ In addition, she points to ambiguities in my description of privacy as a foundational good—something akin to a Rawlsian privacy good. Whether privacy is such a good will depend upon the precise formulation of such good, to be sure. Roessler is correct when she suggests that my legal liberalism is more dominant in my thinking than my legal paternalism. She notes that I am "unusually vague" when I talk about paternalism. The kind of vagueness I own to is really a vagueness of omission: having defended the concept of paternalistic privacy laws that go beyond child protection and Sunstein/Thaler nudging, I do not give many examples of actual paternalistic privacy laws I would like to see enacted.

This is where it helps to understand my work as situated in a historical context of policy debate and legislation on

unfamiliar ground. With rapidly advancing technologies and changing social practices, it has not always been clear what specific privacy laws and policies will work best and are likely to survive our political processes. Some of the privacy laws enacted in the United States in the past fifteen years—from the HIPAA health privacy and data security regulations, to Gramm-Leach-Bliley financial privacy regulations to the Children’s Online Privacy Protection Act—have been unsatisfying.²⁸ One way they have been unsatisfying to me is that they do nothing to preserve or create robust experiences of privacy. My goal has been less to recommend paternalistic laws than to explain that such laws are a policy option, since it is fundamentally important for people to *have the experience* of privacy as oppose to merely *having the option* of the experience of privacy.

My claim is not that we must necessarily enact unwanted, unpopular privacy laws in light of current trends. It is rather that we could do so without deeply offending liberalism’s bias against coercion based on moralism and paternalism. How? Coercive measures to ensure that people experience privacy even if they do not want to can be justified where they are called for. The need to protect privacy is a foundational good—the kind of good presupposed by a variety of visions of the good life. My inspiration is Rawls, as Roessler discerns, but I note here in passing that a human capabilities theory might allow for a similar result. Just as we paternalistically bar people from selling themselves into slavery, we must paternalistically bar people from privacy-related choices that very seriously constrain their freedoms, opportunities, and dignity. Paternalistic interferences with liberty are called for where market failures, psychological realities, and certain other factors impair the capacity of mature adults to protect themselves from major harms. It’s hard for individuals to bargain about privacy with large business concerns. The complexity and novelty of privacy-compromising technologies makes it extremely difficult for individuals to protect their own privacy. Not only do educated individuals not necessarily understand the ramifications for privacy of the technologies they use, but we as a society don’t have a clear idea of how voluntary disclosures we make today will bear on our future opportunities. Having said this, let me not be interpreted to declare adults helpless fools. On the contrary, individuals can and should do more than we typically do to protect our own privacy by limiting use of life-logging technologies (Roessler discusses my views on these), social media, and exercising greater reserve in everyday life offline.²⁹ Privacy ethics may be as or more important to the goal of privacy protection as privacy laws, paternalistic or otherwise.

By design, there are a number of tensions at play in *Unpopular Privacy*. There is playful tension in the very title of the book: that which is presumed wanted is unwanted! Some of my critics assume I am unaware of the tensions I create or that I do not realize how pernicious they really are. The more obvious tensions in my work are really tensions within the traditions of thought I seek to respond to and elaborate. As to these, I cannot by logical maneuver make the “tension” between freedom and coercion, particularism and universalism, individual and community go away. I play up tensions within liberalism in my discussions of modesty and clothing laws. Referring to French, U.S. and Canadian law I discuss the “veiling” debate in one chapter and the

“nude dancing” debate in another precisely to point up a tension in modern secular liberal constitutional thinking about protecting women.³⁰ Women are “free” in these liberal secular societies, but, whatever their own identities and preferences, their freedom is supposed to require that they clothe and unclothe precisely to the extent—no more, no less—that legal authorities insist.

IV. REGULATORY POLICY

Professor Matwyshyn argues that my assessments of the nation’s first and only pure Internet privacy law, the Children’s Online Privacy Protection Act, are applicable today. In an article “Minor Distractions,”³¹ and again in *Unpopular Privacy*,³² I present COPPA as an example of a paternalistic privacy law to suggest that Americans do not fear, and should not fear, all privacy paternalism. But I also present COPPA to illustrate that even paternalistic laws appropriately aimed at children face enormous problems of design and efficacy. As a general matter, I agree with Professor Moore’s warning that coerced privacy can have “pernicious unintended consequences” and that government actors are not uniformly wise and well-informed. I offer a muted version of his warning in my discussion of paternalistic children’s Internet law.

COPPA is a well-intended, but not perfect, law. Indeed, as Matwyshyn recites, elaborating my points, compliance deficits persist and FTC enforcement continues to be limited; multimodal distribution of technology skills continues; the arbitrariness of age thirteen as a statutory benchmark remains a problem; and children’s tendency toward greater information sharing than adults has become problematic.

One lesson I draw from my experience as an early, ambivalent critic of COPPA is that public-minded philosophers can indeed play a useful role, insightfully assessing novel legislation; but we, like everyone else, have a limited capacity to predict precisely how new technologies will change social practices. When COPPA was enacted, the paradigm child Internet user sat at a desk in his or her own home keyboarding at a PC. They could be easily supervised by adult caregivers. Over the years, children’s Internet use has become portable, shifting from bulky desk-bound PCs to phones and smartphones, laptops and tablets. The model of parental supervision that made sense in 2000 makes less sense today. The original COPPA statute regulated “website operators.” Recent COPPA amendments make app developers but not telecom companies, Internet service providers, Google or Apple’s app store liable if the apps children under thirteen download collect personal information. At the time COPPA was enacted, there was no Facebook or YouTube, no popular concept of an “app” or “app store,” and no dream that tens of millions of American children would have daily access to handheld devices through which they could access the Internet at will. More attention needs to be given to how children use technology and always to, in Matwyshyn’s words, “the next generation of children’s technology privacy paradigms.”³³

My work on COPPA is not just work on the abstract issue of paternalism in liberal societies. It is also work about justice, about what constitutes justice for children, a vulnerable group often discriminated against on flimsy grounds. As Lior Strahilevitz observes with approval, unlike most privacy scholarship, mine has often attended to the “distributive” implications of privacy law.³⁴ Specifically, I have addressed

issues of class, gender, race, age, and sexual orientation. I believe distributive implications bear on the strategies persons of conscience employ to comply with ethical mandates relating to privacy practices.³⁵ For example, I have argued that the privacy tort designed by Samuel Warren and Louis Brandeis in the late nineteenth century was highbrow and elitist in tone and was aimed at benefitting people of privilege, at a cost to ordinary consumers of cheap gossip and the media.³⁶ I have further argued that many of the original privacy tort cases of the late nineteenth and early twentieth centuries appeared to have been brought to vindicate women's presumed interests in feminine modesty, seclusion, and decency.³⁷ Focusing on cases brought by LGBT plaintiffs after 1960, the year William Prosser published his fourfold taxonomy of the privacy tort,³⁸ I have assessed the (limited) extent to which the common law of privacy, including the disclosure of private fact tort, has been helpful to gay and lesbian plaintiffs claiming invasions of privacy in their individual quests for social respect and legal justice.³⁹ Moving to the twenty-first century, I have argued that children and families were not much benefitted by the passage of the Children's Online Privacy Protection Act.⁴⁰ Telephone customers without a taste for unsolicited calls benefitted greatly from the Federal Trade Commission's National Do Not Call Registry law, which delivered a major loss to commercial telemarketers and their employees.⁴¹ Finally, a failed California "Racial Privacy" referendum would have harmed racial minorities coping with difference and discrimination in need of group-specific programs and services. The proponents of the referendum claimed that an amendment to the California constitution barring state racial data collection would have ushered in color-blind practices.⁴² Whatever one thinks about particular privacy policies, all must agree that government officials, academic policy analysts, and business strategists evaluating privacy laws should attend to their actual consequences, including distributive consequences, as should the individual participants in the democratic polity—citizens, residents, voters, and consumers affected by privacy laws.

The normatively distributive dimension of my work places me in sync, I believe, with Lever, whose scholarship justifies privacy regimes in relation to ideals of democracy. If we value democracy then we have a powerful metric for distinguishing "good" from "bad" forms of privacy, she suggests. Maybe associational privacy is good because it enables people belonging to disadvantaged minority groups to secretly plan and forge political strategies with like-minded others. Maybe decisional privacy about birth control and abortion is good because it makes stronger, more actively participating citizens of women. Maybe erecting barriers to children's access to the Internet discriminatorily is bad because it offends democratic notions of intellectual freedom and personal autonomy, or good because it limits their participation in the market until they can act with greater discernment and autonomy. In light of public choice and median voter theory results suggesting that certain elite politicians, celebrities, lobbyists, and certain voters effectively control elections and passage of laws, I am not persuaded that the secret ballot does as much in the long run for democratic ideals or ideal privacy regimes as Lever hopes.⁴³

V. FEMINIST ENOUGH

In the 1980s I rejected leading feminist critiques of privacy,

but fully agreed that privacy concepts can and have been marshaled to help justify shielding wrongdoing as horrific as slavery and wife-beating.⁴⁴ The problem for women, I argued, was not privacy per se but too much of the wrong kinds of privacy. Lever appears to side, without my reservations, with the 1980s feminist critique, taking issue with my attack on Catherine MacKinnon and her rejection of the privacy right at the heart of *Roe v. Wade*.⁴⁵

The jurisprudence of *Roe* was flawed in ways I have detailed in writing subsequent to *Uneasy Access*.⁴⁶ Yet women need a degree of control over their pregnancies. *Griswold* and *Roe* overturned laws criminalizing birth control and abortion that were inconsistent with such control, as are the social institutions that permit men to dominate women's thoughts and behavior. Since 1989 the U.S. High Court has abandoned its abortion privacy discourse and, symbolized by *Gonzales v. Carhart*, ramped up a false and inconsistent discourse of maternalism and paternalism, whereby the lawmakers must protect women—whose highest calling is motherhood—from the reality of abortions they are presumed not to understand.⁴⁷ Women can run businesses and decide between lumpectomy and mastectomy, but they are constructed as incapable of choosing abortion without onerous informed consent procedures.

MacKinnon's feminist rejection of privacy jurisprudence struck me as wrong-headed for two reasons that I still stand behind. First, some, but not all, privacy practices are harmful to women and powerless persons. MacKinnon herself has explicitly registered agreement with me on this point. She cannot be read as believing that no forms of privacy should be protected by law under any rubric of privacy. Second, MacKinnon legitimately questioned the efficacy of *Roe v. Wade*'s privacy argument. Yet the argument worked. As I have argued elsewhere, there is no evidence whatsoever that an equality or non-subordination argument in the courts at the time would have worked better.⁴⁸ Either the judges and legislators want women to have meaningful reproductive choices and funding or they do not.

I regret that Lever does not engage the analysis of privacy and accountability found in my book *Why Privacy Isn't Everything*. Of my writings, this one best addresses her central concerns about the limitations of my early work in responding to the challenge of feminist critiques of privacy. My taxonomy of accountability is spirited by feminist and liberal principles.⁴⁹ I make a sustained effort to show the limits of privacy values when confronted with legitimate demands for accountability in private life. I argue that families, social groups, and the larger community can make legitimate demands for accountability. In a discussion of illegal drug use,⁵⁰ for example, I reject the libertarian "it's-my-body" ethical perspective. Indeed, I argue that neither drug use nor interracial marriage is purely self-regarding behavior, and draw on personal experience to argue that whole families are affected by intimate choices in ways that require moral accountability practices.⁵¹

VI. CONCLUSION

The newsletter commentators raise important criticisms, too numerous to address here. Even so, not every category of criticism that can and has been leveled against my work is reflected in their essays. Progressives have sometimes balked at my efforts to reclaim privacy—which they associate

with subordination, selfish individualism, and unbridled capitalism premised on private property—as a feminist and critical value. Mainstream liberals and libertarians have sometimes turned a skeptical eye toward my willingness to constrain certain popular liberties in the name of richer and more complex conceptions of freedom and personal responsibility. Some privacy theorists have given up on American and Enlightenment-tinged approaches to privacy reflected in my work, seeking insight and inspiration in alternative postmodern and other twentieth-century European philosophical traditions. Among moral philosophers, some theorists prefer distinctly Aristotelian, utilitarian, or cost/benefit approaches to my mixed but heavily Kantian approach to privacy ethics, and some maintain that personal privacy is a significantly outmoded ethical value when compared to publicity and networking. In my direct responses to my newsletter critics, I hope to have spoken to other, unrepresented, critics and commentators as well.

NOTES

1. Annabelle Lever, "Privacy: Restrictions and Decisions," *APA Newsletter on Philosophy and Law* 13, no. 1 (2013): 1–7.
2. Anita L. Allen, *Unpopular Privacy: What Must We Hide* (New York: Oxford University Press, 2011), 13, 21, 171; hereinafter, *Unpopular Privacy*. Cf. Anita L. Allen, "Natural Law, Slavery, and the Right to Privacy Tort," *Fordham Law Review* 81 (2012): 1187–1216.
3. See Anita L. Allen, "Is There a Duty to Protect One's Own Privacy?" *Alabama Law Review* 64 (2103): 845–66.
4. Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman & Littlefield Publishers, 1988), hereinafter, *Uneasy Access*.
5. Allen, *Unpopular Privacy*; Anita L. Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability*, (Rowman & Littlefield Publishers, 2003), hereinafter, *Why Privacy Isn't Everything*.
6. A complete bibliography of my publications is found in the detailed curriculum vitae available at <https://www.law.upenn.edu/cf/faculty/aallen/>.
7. Anita L. Allen, *Privacy Law and Society* (Minneapolis, MN: ThomsonReuters, 2011), hereinafter, *Privacy Law and Society*.
8. See *NAACP v. Alabama* 357 U.S. 449 (1959); *Katz v. United States*, 389 U.S. 347 (1964); *Griswold v. Connecticut* 381 U.S. 479 (1965); *Schmerber v. California* 384 U.S. 757 (1966); *Loving v. Virginia* 388 U.S. 1 (1967); *Roe v. Wade* 410 U.S. 113 (1973); *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (NJ 1976).
9. William Prosser, "Privacy," *California Law Review* 48 (1960): 383–423.
10. See the Privacy Act of 1974, 5 U.S.C. § 552a; Family Education and Right to Privacy Act of 1974, 20 U.S.C. § 1232g.
11. *Privacy Journal*, <http://www.privacyjournal.net/works.htm>.
12. See Anita L. Allen, "Privacy," *The Oxford Handbook of Practical Ethics* (New York: Oxford University Press 2003), 485–513; Anita L. Allen, "The Jurispolitics of Privacy," in *Reconstructing Political Theory*, eds. Uma Narayan and Mary Lyndon Shanley (Cambridge, UK: Polity Press, 1996), 68–83.
13. Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89 (1980): 421–71.
14. Allen, *Uneasy Access*, 15.
15. *Ibid.*, 1–34.
16. Anita L. Allen, "Privacy as Data Control: Conceptual, Practical, and Moral Limits of the Paradigm," *Connecticut Law Review* 32 (2000): 861–75.
17. Adam Moore, "Coercing Privacy and Moderate Paternalism: Allen On Unpopular Privacy," *APA Newsletter on Philosophy and Law* 13, no. 1 (2013): 10–14.
18. Allen, *Uneasy Access*, 19.
19. See Anita L. Allen, "Feminist Moral, Social, and Legal Theory: Taking Liberties: Privacy, Private Choice, and Social Contract Theory," *U. Cincinnati Law. Rev.* 56 (1987): 461–91, 467; Anita L. Allen, "Autonomy's Magic Wand: Abortion and Constitutional Interpretation," *Boston University Law Rev.* 83 (1992): 672–98.
20. Allen, *Uneasy Access*, 33.
21. *Ibid.*, 32.
22. See Anita L. Allen, "Privacy," in *A Companion to Feminist Philosophy*, eds. Alison M. Jaggar and Iris Marion Young, 456–65, 461, discussing friendly and unfriendly feminist approaches to privacy. Cf. Anita L. Allen, "The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution," *Harvard Journal of Law and Public Policy* 18 (1995): 419–55.
23. See, e.g., Allen, *Privacy Law and Society*, 4–6.
24. Anita L. Allen, "Coercing Privacy," *William and Mary Law Review* 40 (1999): 723–57.
25. My interest in these matters began in the late 1990s, as reflected in Anita L. Allen, "What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure," *St. Thomas Law Review* 25 (Fall 2012): 1–18; Anita L. Allen, "The Offensive Internet," *Ethics & Int'l Aff.* 26 (2012): 152; Anita L. Allen, "Dredging-Up the Past: Lifelogging, Memory, and Surveillance," *University of Chicago Law Review* 75 (2008) 47–72 ; Anita L. Allen, "Gender and Privacy in Cyberspace," *Stanford Law Review* 52 (May 2000): 1175–200.
26. Anita L. Allen, "Is There a Duty to Protect One's Own Privacy?" *Alabama Law Review* 64 (2103): 845–66.
27. Beate Roessler, "Autonomy, Paternalism, and Privacy: Some Remarks on Anita Allen," *APA Newsletter on Philosophy and Law* 13, no. 1 (2013): 14–19.
28. See the Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996); The Gramm–Leach–Bliley Act (GLB), Title V, Financial Services Modernization Act of 1999, (Pub.L. 106–102, 113 Stat. 1338, enacted November 12, 1999); and the Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501–6506 (Pub.L. 105–277, 112 Stat. 2581–728, enacted October 21, 1998).
29. Allen, "Is There a Duty to Protect One's Own Privacy?," 845–66.
30. Allen, *Unpopular Privacy*, 47–96.
31. Anita L. Allen, "Minor Distractions: Children, Privacy and E-Commerce," *Houston Law Review* 38 (2001): 751–56.
32. Allen, *Unpopular Privacy*, 173–94.
33. Andrea M. Matwyshyn, "Of Teenagers and 'Tweenagers': Professor Allen's Critique of the Children's Online Privacy Protection Act in Historical Perspective," *APA Newsletter on Philosophy and Law* 13, no. 1 (2013): 7–10.
34. Lior Strahilevitz, "Toward A Positive Theory of Privacy," *Harvard Law Review* 113 (2013): 2010–42.
35. Anita L. Allen, "Privacy Law: Positive Theory and Normative Practice," *Harvard Law Review Forum* 126 (2013): 241–51.
36. Anita L. Allen and Erin Mack, "How Privacy Got Its Gender," *Northern Illinois University Law Review* 10 (1990): 441–78, hereinafter, "How Privacy Got Its Gender."
37. *Ibid.*, 442.
38. William Prosser, "Privacy," *California Law Review* 48 (1960): 383–423.
39. Anita L. Allen, "Privacy Torts: Unreliable Remedies for LGBT Plaintiffs," *California Law Review* 98 (2010): 1711–64.
40. See work cited, note 31.
41. Allen, *Unpopular Privacy*, 34–37.
42. *Ibid.*, 123–55.
43. Strahilevitz, "Toward a Positive Theory of Privacy."
44. See Allen, *Uneasy Access*, 36, 55, 71, 80, in which I reject views in Catharine A. MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade," in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), 93–102. See generally Anita L. Allen, "Privacy," 456, in which I discuss "friendly and unfriendly" feminist approaches to privacy.

45. Her views were also laid out in Catharine A. MacKinnon, "Reflections on Sex Equality Under Law," *Yale Law Journal* 100 (1991): 1281, 1326–28.
46. Anita L. Allen, "What Roe v. Wade Should Have Said," in *Rewriting Roe v. Wade*, ed. Jack Balkin (New York: NYU Press, 2005).
47. I develop this point in Anita L. Allen, "Atmospherics: A Llewellynesque Comment on Abortion Law," in *On Philosophy in American Law*, ed. Francis J. Mootz III (Cambridge University Press, 2009), discussing *Gonzales v. Carhart*, 550 U.S. 124 (2007).
48. Anita L. Allen, "The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution," *Harvard Journal of Law & Pub. Pol'y* 18 (1995): 419–55.
49. Allen, *Why Privacy Isn't Everything*, 15-51.
50. *Ibid.*, 56–78.
51. *Ibid.*, 101–07, identifying ethical principles relevant to the moral status of interracial marriage.