

JUSTIFYING A RIGHT TO PRIVACY

Master thesis

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Introduction

What is privacy and why do we want to protect it? Sometimes privacy is valued as important or necessary and it is claimed that there is a ‘right to privacy’. How can this claim be justified?

In an age where information technologies are growing rapidly, the importance of a right to privacy seems, on the one hand, to decrease with the collection of big data and making accurate predictions about people’s behaviour by both companies and governments. (*Individual* privacy seems of less importance.) On the other hand, those very same acts of data collection seem to increase people’s anxiety about privacy. Consequently there is a stronger demand for a right to privacy better protected by law. In this thesis I develop one way of justifying a right to privacy.

To be able to justify such a right, we might first want to analyse the concept of privacy. This seems to be problematic, given that privacy is a complex value and described by various and distinct meanings. In **Chapter I** I will develop an account of privacy in which I will distinguish normative accounts from descriptive ones. I also will distinguish definitions given in terms of *access* from those given in terms of *control*.

If we have the goal of justifying a right to such privacy, then it is useful to explore why we want such a right. In **Chapter II** I will explore the value and meaning of privacy by looking at the values behind control of, or access to, information. I will explore why people could value privacy by describing the value of privacy for liberty, autonomy, participation of citizens as equals and the maintaining of social relationships. I will also explore why people would argue against a right to privacy by focusing on the paradoxes and trade-offs invoked in this debate: media-exhibitionism, security or efficiency, could be claimed to be of more value than privacy. I will also explain the feminist critique of privacy.

Now that I have an account of privacy, and have established its value and the values with which it is in competition; I can go on to develop a justification for a right to privacy in **Chapter III**. I argue that privacy is necessary to achieve the diverse goals of democratic government. In Annabelle Lever’s democratic justification for privacy rights I find a reconciliation of the values and worries found in chapter two. However, Lever is unclear in motivating her definition of privacy rights. My findings of chapter one and two are then used as an explanation of and addition to Lever’s democratic justification for privacy rights. Together they make the claim that

privacy rights are necessary to achieve the diverse goals of democratic government and, ultimately, therefore privacy rights are justified.

Chapter I An account of privacy

Judith Jarvis Thomson begins her famous essay on the right to privacy (1975) by saying that nobody seems to have any clear idea of what it is. To be able to give an account of what the right to privacy is, we might first want to get a notion of what the *concept* of privacy is. But this also seems to be problematic because, as Robert Post writes, “privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all” (2000, p.2087). One point on which there seems to be near-unanimous agreement, says Helen Nissenbaum (2009), is that privacy is a messy and complex subject.

In this chapter I will try to provide an account of privacy by looking at Helen Nissenbaum’s and Herman Tavani’s ideas. Nissenbaum states:

[T]he landscape of theoretical work on privacy is vast, spanning disciplines from philosophy to political science, political and legal theory, media and information studies, and increasingly computer science and engineering (2009, p.67).

Her book *Privacy in Context* contains a selective look at some of these contributions. She provides an organizational scheme, which incorporates three dimensions of difference. In this chapter I will look at the first two of three: the first distinguishes normative accounts from descriptive ones, the second distinguishes definitions given in terms of access from those given in terms of control. I will also explicate Tavani’s Restricted Access/Limited Control (RALC) theory of privacy, which can be linked to both the two dimensions of difference stated by Nissenbaum. I will use and assess Tavani’s theory to provide an account of the concept of privacy.

1.1 Descriptive and normative accounts

Nissenbaum distinguishes descriptive accounts of privacy from normative accounts. She claims that the confusion over the concept of privacy may have arisen from a failure to recognize the difference between descriptive or neutral conceptions and normative ones (2009). To provide a

neutral conception is to state what privacy is without incorporating into its meaning that privacy is a good thing. By contrast, a normative conception of privacy incorporates a presumption that privacy is something valuable, deserving of protection. Nissenbaum points at Ruth Gavison's (1980) argument, supporting the need for a neutral conception as a solid foundation for building moral and legal conceptions, as probably the most complete and best known. Gavison defines privacy as a measure of the access others have to you through information, attention, and physical proximity. Nissenbaum calls this something like a scale according to which people are described as having more or less privacy based on the degree to which information about them is either secret or known to others, the degree to which they are anonymous and unnoticed or under the watchful gaze of others, and the degree to which they operate in solitude or in the close physical proximity of others.

One of the benefits of starting with a neutral conception of privacy is that it enables us to describe losses of privacy, without or before talk of claims and violations. Those who propose a neutral conception do not deny the possibility of normative accounts of privacy, but maintain that normative accounts are built upon a neutral conception. Most experts however, are drawn to issues surrounding privacy's normative significance and ask the question whether a neutral conception is either plausible or needed (Nissenbaum, 2009). There are also others who explicitly deny both the need for and existence of such a conception, arguing that since there are virtually no uses of privacy with purely descriptive meaning, one should assume that normative intent is integrated into its core meaning (Robert Post, with whom I started this chapter, is one of them).

To Nissenbaum it is unclear whether choosing a side in this debate makes a substantive difference for the specific concerns of her project; that is to devise a justificatory framework for evaluating the current practices concerning privacy. Herman Tavani, however, is one of the philosophers who supports the distinction between descriptive and normative accounts of privacy. With his Restricted Access / Limited Control (RALC) theory of privacy, Tavani differentiates between descriptive and normative aspects of privacy, which he claims, enables us to distinguish between concerns having to do with the loss of privacy (in a purely descriptive sense) and claims alleging a violation or invasion of privacy (in a normative sense involving a

right to privacy) (2007). First I will further explain Nissenbaum's dimensions of an account of privacy, after which I will come back to Tavani's RALC theory of privacy.

1.2 Accounts in terms of access and control

Nissenbaum's second dimension of an account of privacy concerns two common approaches in the literature on privacy. These approaches include one that characterizes privacy as a constraint on *access*, and another that characterizes it as a form of *control*. Although the access and control in question could extend to personal information, as well as to people and their actions, Nissenbaum's discussion is limited to personal information. Nissenbaum argues that although most of what is written about privacy assumes it to be a form of control, accounts in terms of access have tended to be more precise and conceptually better developed. She points out to Gavison (1980) again, and her claim that privacy is a condition that is measured in terms of the degree of access others have to you through information, attention and proximity. Nissenbaum also mentions Jeffrey Reiman (1976), who defines privacy as the condition under which other people are deprived of access to either some information about you or some experience of you.

For the most part, however, conceptions of privacy adopted in scholarship, law, and policy incorporate control as a component of privacy, or, one might say, constitute privacy as a particular form of control. In literature on information privacy and the law, Alan Westin's book *Privacy and Freedom* (1967) is frequently cited. Westin defines privacy as the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others (1967). In another paper that is frequently cited, legal philosopher Charles Fried claims that privacy is not simply an absence of information about us in the minds of others, rather it is the control we have over information about ourselves (1968). Nissenbaum argues that common usage suggests that intuitions behind both the constraint and control conceptions are sound; namely, that control over information about oneself is an important dimension of privacy, but so is the degree of access that others have to this information, irrespective of who is in control (2009). Intriguing challenges have been posed by those supporting one of these conceptions to those supporting the other: does a person stranded on a desert island really have privacy? Has a person who intentionally posts

photographs of himself to a website such as Flickr lost privacy? In Nissenbaum's view, the effect of these challenges is not to prove that one or the other of these approaches is correct, but that both capture essential aspects of privacy that we seem to care about.

1.3 An analysis of the basic or standard philosophical and legal theories of privacy

Precisely that notion, that both the access- and control approach capture essential aspects of privacy, is used by Herman Tavani in the explication of his Restricted Access / Limited Control (RALC) theory of privacy. Tavani claims that none of the classic privacy theories provide an adequate account of privacy and that RALC is the alternative (2007). Tavani assesses these classic theories of privacy before he goes on to design one of his own. He organizes these into four broad types of categories of theories:

1. the *seclusion* theory
2. the *nonintrusion* theory
3. the *control* theory
4. the *limitation* theory

The *seclusion* theory of privacy holds that privacy is identified with 'being alone'. Gavison describes a person as enjoying 'perfect privacy' when that person is "completely inaccessible to others" (1980, p.428). Westin describes privacy as the "voluntary and temporary withdrawal of a person from the general society through physical [means] in a state of solitude" (1967, p.7). The seclusion theory avoids confusing the content or condition of privacy with a right to privacy, because it provides an account of privacy that is essentially descriptive. However, in describing privacy in terms of one's being secluded from others, the seclusion theory tends to confuse privacy with solitude (Tavani, 2007). It would seem that what Gavison calls 'perfect privacy' would be obtained when a person is stranded on an island in which there are no human inhabitants. It is questionable whether a person in such a situation would enjoy privacy in a meaningful sense. Another question Tavani addresses is whether one's ability to experience solitude is essential for an individual to have privacy. It is possible for one to enjoy privacy while not necessarily having solitude, contrary to what is implied in the seclusion theory.

Nonintrusion theories often describe privacy in terms of ‘being let alone’ or being free from intrusion. Tavani first notes that some versions of the nonintrusion theory tend to confuse the condition (or content) of privacy with a right to privacy. This confusion is for example apparent in the writing of nonintrusion theorists, such as Louis Brandeis, who defines privacy as “the *right* to be let alone” (1928, p.475; italics added), and William Brennan, who describes privacy as the “*right* of the individual (...) to be free from unwarranted government intrusion” (1972, p.453; italics added). Another kind of problem with the nonintrusion theory is that it does not recognize the importance of setting up contexts of privacy to limit or restrict others from access to one’s personal information. Does one enjoy privacy in a meaningful sense when one is free from intrusion? Just ‘being let alone’ does not fully capture the essence of having privacy, since it does not say anything about the amount of control one has in communicating personal information to others.

Tavani notes that both the nonintrusion and seclusion theories address privacy concerns that pertain to physical access to individuals (2007). But the concept of privacy has evolved, initially by being associated with intrusion (physical access), then being associated with concerns about interference (in decision making), and, more recently, being associated with concerns about the flow of personal information. Recent privacy theories, therefore, have tended to analyse the concept of privacy in terms of conditions having to do with access to and control over personal information. Whereas privacy is the initial organizing principle defining the scope of Nissenbaum’s book, as the book proceeds, however, it frames its claims, indeed, in terms of personal information flows.

Above I have showed that accounts of privacy can be given in terms of access and control. Although Tavani thinks both the access- and control approach capture essential aspects of privacy, he argues that both theories fail in providing an complete and adequate account of privacy.

Tavani argues that the most important insight of *control* theories, is recognizing the role of choice that an individual who has privacy enjoys (2007). But the control theory is unclear with respect to two points. It first of all is unclear in telling us which kinds of personal information one can expect to have control over. We can ask whether someone can reasonably expect to have control over all of his or her information. Tavani mentions an example of being seen by an

acquaintance while shopping at a certain grocery store: one has no control over whether the acquaintance has gained information about the fact that one shops at this particular store. Tavani suggests that perhaps the kind of personal information over which you can expect to have control is limited to ‘nonpublic personal information’ (NPI), which include information about sensitive and confidential data, such as financial and medical records. A distinction between one’s having control over ‘nonpublic personal information’ and ‘public personal information’ (PPI) is not explicitly made by those who subscribe to the control theory of privacy. The second point about which the control theory is not clear is telling us *how much* control one can expect to have over one’s personal information. Tavani claims that control theorists need to specify more clearly how much control over one’s personal information, in particular how much control over one’s PPI versus one’s NPI, one can expect to have in order to enjoy privacy. Control theorists can also be interpreted as holding a conception of privacy that is counterintuitive with regard to our conventional understanding of that notion: many control theorists seem to imply that one could reveal every bit of personal information about oneself and yet still enjoy privacy, but this seems counterintuitive. Tavani suggests that the control theory confuses privacy with autonomy (2007).

The last category of theories of privacy that Tavani examines is the *limitation* theory of privacy: one has privacy when access to information about oneself is limited or restricted in certain contexts. One virtue of the limitation theory of privacy is that it correctly recognizes the importance of setting up contexts of privacy to limit or restrict others from access to one’s personal information (Tavani, 2007). Another strength of this theory is that it avoids confusing privacy with autonomy, as well as with solitude. The limitation theory, however, seems also to underestimated the role of control or choice that is also required in one’s having privacy. It does not take into account that someone who has privacy can choose to grant others access to information about himself or herself, as well as to limit (or even deny) others from access to that information. The theory seems to imply that one has privacy only to the extent that access to information about oneself is limited or restricted. On this view, the more one’s personal information can be withheld (or kept secret) from others, the more privacy one has. In the account of privacy offered in the limitation theory, privacy can easily be confused with secrecy (Tavani, 2007).

1.4 RALC theory of privacy

Tavani's aim is to articulate a definition of privacy that will serve as the foundation for an adequate theory of privacy and how this theory enables us to frame online privacy policies that are clear, transparent and consistent. I have noted above that both accounts of privacy in terms of access and control capture essential aspects of privacy that we seem to care about (Nissenbaum, 2007). Tavani also considers how key elements in the two theories of limitation and control can be incorporated into one unified and comprehensive account of privacy.

In further work with James Moor (1990, 1997) Tavani further developed the RALC theory of privacy. RALC proceeds on the assumption that an adequate theory of privacy needs to differentiate the *concept* of privacy from both the *justification* and the *management* of privacy. The RALC framework thus has three components: an account of the concept of privacy, an account of the justification of privacy, and an account of the management of privacy.

In analysing the concept of privacy, RALC distinguishes between the condition of privacy (what is necessary to have privacy in a descriptive sense) and a right to privacy. Tavani shows how this distinction enables us to differentiate between a loss of privacy and a violation or invasion of privacy. Privacy is defined by RALC as follows: an individual has privacy:

[I]n a situation with regard to others [if] in that situation the individual (...) is protected from intrusion, interference, and information access by others (Moor, 1997, p.30).

The notion of a 'situation', which has a critical role in the definition of privacy, is left deliberately indeterminate or unspecified so that it can 'range over states of affairs' that we normally regard as private (Tavani, 2007). According to Moor, a situation can be an "activity in a location", a "relationship", or the "storage and access of information, such as that stored in (...) or manipulated in a computer" (1990, p.76). One has descriptive or 'natural' privacy in a situation in which one is naturally protected or shielded from intrusion and access by others. RALC draws an important distinction between a naturally private situation and a normatively private situation (Tavani, 2007). In a naturally private situation, individuals are shielded or blocked from observation, interference and intrusion by natural means. Tavani mentions an example of physical boundaries in natural settings, such as when one is hiking in the woods. In such a naturally private situation, privacy can be lost but not violated or invaded, because there

are no norms – conventional, legal or ethical – according to which one has a right to be protected. In normative private situations this is not the case. These can include the following: locations, such as a person's house (where outsiders are expected to knock and get permission to enter); relationships, such as religious confessions; activities, such as voting; and information, such as medical records (Tavani & Moor, 2001). In these situations privacy can be violated or invaded, in addition to being lost, because of laws and norms that have been established to protect those situations. As I have noted above Tavani differentiates between what Nissenbaum calls descriptive and normative accounts of privacy. He enables us to distinguish between concerns having to do with the loss of privacy (in a purely descriptive sense) and claims alleging a violation or invasion of privacy (in a normative sense involving a right to privacy). Thus far I have explicated the first component of the RALC theory; an account of the *concept* of privacy. In his RALC theory Tavani differentiates between an account of the concept of privacy and the accounts of the *justification* and *management* of privacy.

Until this point I would say that RALC initially appears to be simply a variation of the limitation theory, because RALC defines privacy in terms of protection from intrusion and information gathering by others (through situations or zones that are established to restrict access), not in terms of control.

Tavani, however, argues that RALC is not merely another variation of the restricted-access theory, by pointing out that RALC also recognizes the role that 'limited control' plays in privacy. The 'control part' is explained in his accounts of the *justification* and *management* of privacy. Tavani asks us to consider the example of one's medical information. That information is private because a normative zone has been established to restrict people from accessing the information, not because an individual has complete control over who has access to that information within a medical setting. Doctors, nurses, financial administrators, and insurance providers may have legitimate access to pieces of this information. He claims that in this case a justification of privacy could be avoiding embarrassment or discrimination. In this chapter I want to give an account of the concept of privacy and not a justification for privacy: this will be further explicated in chapter two and three. Therefore I do not want to pay too much attention to Tavani's austere justification of privacy. I am using his RALC theory to formulate an account of privacy. So far, I think Tavani still neglects the role choice plays in an account of privacy, even

though he claims to have integrated it into his theory by his justification of privacy. He argues that privacy policies that protect information in a particular situation by normatively restricting others from accessing that information provide individuals with limited control. But restricting some people access by such a normative zone as in the medical setting, justified by the individual seeking to avoid embarrassment or discrimination, does not necessarily provide this individual choice in controlling his or her personal information. The information is controlled, but not in control of oneself (at least so far). Trying to grasp the concept of privacy, so far Tavani is only able to formulate privacy as restricted access or a limitation theory.

However, in his account of the management of privacy – and the last of three components of his RALC theory – Tavani (2007) does recognize the importance of control and choice. In managing one's privacy one need not have absolute control over information about oneself, instead, an individual needs to have some degree of control with respect to three elements: choice, consent, and correction. About the first element Tavani says:

A person needs some control in choosing situations that offer others the level of access the person desires, which can range from total privacy to total publicity” (Tavani, 2007, p.12).

One could also manage privacy through the consent process. For example, one can waive one's right to restrict others from access to certain kinds of information about oneself. The last element of Tavani's account of the management of privacy is *correction*: individuals need to be able to access their information and to amend it if necessary. Tavani argues that limited controls such as choice, consent, and correction are made possible by adequate privacy policies. Tavani designs such a policy himself, based on his RALC theory of privacy (Tavani, 2007).

1.5 An account of privacy

Although privacy is a complex subject I have tried to provide, in this opening chapter, a basic account of its structure. I showed that it can be understood in both descriptive and normative terms. This distinction enables us to distinguish between concerns having to do with the loss of privacy (in a purely descriptive sense) and claims alleging a violation or invasion of privacy (in a normative sense involving a right to privacy). The nonintrusion and seclusion theory of privacy cannot provide a good account of the concept, because they confuse privacy with, respectively, a

right to privacy and to solitude. They also neglect the role that control or choice plays in having privacy. Both the access and control theories of privacy capture essential aspects of the concept, but are not able in providing a complete account of it. The Restricted Access/Limited Control theory of privacy tries to capture both essential aspects from these theories. RALC says that one can have normative privacy in a situation where one is protected by explicit norms, policies, or laws that have been established to protect individuals in that situation. Although privacy here is defined in terms of protection and restricted access, Tavani claims that the notion of limited control also plays an important role in the RALC framework, both in justifying and in managing privacy. I think Tavani is unable in showing that limited control plays a role in the justification of privacy. However, he is able to show how limited control plays a role in the management of privacy. An account of privacy could now be taken as: one can have normative privacy in a situation where one is protected by explicit norms, policies, or laws that have been established to protect individuals in that situation; provided that one has limited control in managing one's privacy with respect to three elements: choice, consent, and correction.

Chapter II Locating the value of privacy

In building a justification for a right to privacy, it is useful to explore why we would want such a right. In this chapter I will explore the values and meaning of privacy: why does personal information need protection? And what values might be invoked to argue against a right to privacy? The previous chapter developed this account of privacy: that one can have normative privacy in a situation where one is protected by explicit norms, policies, or laws that have been established to protect individuals in that situation. This is so, provided that one has limited control in managing one's privacy with respect to three elements: choice, consent, and correction. Looking at values underpinning this account of privacy I found values behind both the parts restricted access and limited control. I will first describe these values, before splitting them into categories. While privacy has certain values, there might be other values that trump privacy's values in balancing the two: some paradoxes and trade-offs are discussed in the second paragraph of this chapter. Discussion of the concept is even more complicated by the fact that privacy not only appears to be something we value as a means of providing a sphere within which we can be free from interference by others. It also appears to function negatively, as the cloak under which one can hide domination and degradation; for example, of physical harm to women and others. In the last paragraph negative aspects of privacy are explicated, particularly by the feminist critique of privacy.

2.1 The values behind control and access

I have showed that both the access and control theories of privacy capture essential aspects of the concept and that these aspects can be united in one account of privacy. Reasons why privacy is valuable can be found both in the control and limitation of personal information. William Parent (1983) sees primary value in the control of information. He describes personal information as facts that most persons choose not to reveal about themselves, such as facts about health, salary, weight, sexual orientation, etc. He defines the condition of privacy as a moral value for people who prize individuality and freedom.

Ruth Gavison (1980) argues that interests in privacy are related to concerns over accessibility to others, i.e., what others know about us, the extent to which they have physical access to us, and the extent to which we are the subject of the attention of others. Related functions of privacy are “the promotion of liberty, autonomy, selfhood, human relations, and furthering the existence of a free society” (Gavison, 1980, p.347). Anita Allen (1988) also characterizes privacy in degrees of inaccessibility. She views seclusion, solitude, secrecy, confidentiality, and anonymity as forms of privacy. Allen urges that privacy is required by the liberal ideals of personhood, and the participation of citizens as equals. Building on the views of Gavison, Allen and others, Adam Moore (2003) offers a control over access account of privacy (comparable to the account established in chapter one). Moore argues that privacy is relative to species and culture, but that privacy is nevertheless objectively valuable: human beings that do not obtain a certain level of control over access will suffer in various ways. Privacy, like education, health, and maintaining social relationships, is an essential part of human flourishing or well-being (Moore, 2003). Samuel Warren and Louis Brandeis, who wrote one of the first entries on the right to privacy (1890), claimed that there is a single value connecting the privacy interests, a value they called “inviolable personality”. Edward Bloustein (1964) claims it is possible to give a general theory of individual privacy that reconciles its divergent strands, and “inviolable personality” is the social value protected by privacy. He argues that “inviolable personality” defines one’s essence as a human being and it includes individual dignity and integrity, personal autonomy and independence. Bloustein (1964) argues the common conceptual thread linking diverse privacy cases – prohibiting, amongst other things, dissemination of confidential information, eavesdropping and surveillance – is the value of protection against injury to individual freedom and human dignity. Bloustein admits these terms are somewhat vague, however he defends this analysis as conceptually coherent and illuminating. I am not supporting Bloustein, Warren or Brandeis in naming inviolable personality a single value that privacy should protect, however I think that their description relates to several important values of privacy.

So far several values have been enumerated. Parent mentions individuality and freedom (1983). Gavison (1980) links liberty, autonomy, selfhood, human relations, and furthering the existence of a free society to privacy. Allen (1988) emphasizes the liberal ideals of personhood and the participation of citizens as equals. Moore (2003) argues that privacy is an essential part of human flourishing or well-being. Finally, Bloustein, Warren and Brandeis talk about inviolable

personality as an overarching value. I will go on further by exploring these values of privacy in the following categories:

1. liberty
2. autonomy, authenticity and individuality
3. participation of citizens as equals
4. maintaining social relationships

Adequate protection for the privacy of individuals is a hallmark of a society that values *liberty* (Westin, 1967). Boudewijn de Bruin claims that privacy invasions may decrease a person's negative freedom (the absence of obstacles, barriers or constraints) as well as a person's knowledge about the negative freedom she possesses (De Bruin, 2010). Extrinsic losses of freedom (such as ridicule, loss of a job or denial of benefits) occur when people curtail outward behaviours that might be unpopular, unusual or unconventional (Nissenbaum, 2009). Intrinsic losses of freedom are the result of internal censorship caused by awareness that one's every action is being noted and recorded. People are deprived of spontaneity and full agency as they self-consciously formulate plans and actions from a third party perspective: those being watched begin to view themselves and their actions from the perspective of those watching (Nissenbaum, 2009).

Privacy mitigates against both these losses because it functions "as a means of protecting freedom, moral personality, and a rich and critical inner life" (Reiman, 1995). That takes us from liberty to *autonomy, authenticity and individuality*: Reiman has argued that privacy, when it is asserted as a capacity to withdraw from scrutiny, amounts to an expression of individual sovereignty or self-ownership. Nissenbaum (2009) claims something similar: privacy is to be understood as a form of autonomy. Specifically, it is self-determination with respect to information about oneself. Reiman also talks about a risk of psycho-political metamorphosis: if people are subjected to constant surveillance, they will be stunted not only in how they act, but in how they think. They will seek and come up with a 'happy medium' in their thoughts. We can defend privacy as a set of norms necessary not only to control access but also to enhance personal expression and choice. Privacy enables people to be authentic, to express themselves as they are. Jeroen van den Hoven (1999) particularly talks of *moral* autonomy as a reason to protect privacy. According to Van den Hoven moral autonomy is "the capacity to shape our own

moral biographies, to reflect on our moral careers, to evaluate and identify with our own moral choices, without the critical gaze and interference of others and pressure to conform to the ‘normal’ or socially desired identities” (1999). Because privacy constitutes one of the conditions for developing critical faculties and moral independence, a liberal state ought to make a political commitment to privacy: “Data protection laws thus provide protection against the fixation of one’s moral identity by others than one’s self and have the symbolic utility of conveying to citizens that they are morally autonomous” (Van den Hoven, 1999).

Linked to these values is the value of *participation of citizens as equals*. When the flows of personal information are not systematically constrained, the benefits may accrue disproportionately to some parties over others. This is what Van den Hoven (1999) calls informational inequality. Take, for example, the existing market in personal information in which corporate and governmental actors agglomerate transactional and biographical information on customers and consumers. Individuals engaging with these providers of goods and services may be unaware that information is being systematically collected, have no idea what happens to it beyond the point of the initial transaction, and do not realize that information they share freely has a value in the information marketplace. Institutional structures in society generally do not provide individuals with mechanisms for engaging as agents in this marketplace. As a result, the information marketplace has insufficient protections in place to ensure that exchanges are governed by “openness, transparency, participation, and notification on the part of business firms and direct marketers to secure fair contracts” (Van den Hoven, 1999). Oscar Gandy (1993) also draws connections between inadequate privacy protections and inequalities. From initial positions of vast inequalities in power and status that are exacerbated by unequal access to information, systems and practices of aggregation, profiling and segmentation yield a ‘panoptic sort’. Inequalities of starting position, filtered through the panoptic sort, result in an insidious form of discrimination among individuals and groups. Some are deemed worthy of various privileges (such as special offers on consumer products, mortgages, discount coupons, credit cards) and others deemed unworthy. There is a self-reinforcing dynamic whereby simply knowing more, for example about an applicant for a loan, makes them more “creditworthy” while another candidate who is equally creditworthy is viewed as more of a risk simply because less is known about them (and they are less able to correct this situation).

James Rachels (1975) defends the view that privacy is necessary to *maintain a variety of social relationships* (not just intimate social relationships). Rachels attributes to privacy a key role in differentiating the variety and distinctiveness of relationships people need to maintain:

[T]he value of privacy [is] based on the idea that there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. (Rachels, 1975, p. 326)

He concludes that there is an explanation of the value of privacy in ordinary situations in which we have nothing to hide: even in the most common and unremarkable circumstances, we regulate our behaviour according to the kinds of relationships we have with the people around us. If we cannot control who has access to us, sometimes including and sometimes excluding various people, then we cannot control the patterns of behaviour we need to adopt or the kinds of relations with other people that we will have (Rachels, 1975).

So far I have emphasized the importance of privacy for individuals, but these values can also be translated to societies and common values. Priscilla Regan (1995) claims privacy to have a common value, because values such as freedom of speech, association, and religion, are crucial to the flourishing of liberal societies. She also claims that privacy has a public value for the various ways it supports democratic political systems, particularly liberal democracies. Moore (2003) mentions anti-oppression as a set of values. Privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If individuals have rights to control personal information and to limit access to themselves, within certain constraints, then the kinds of oppression that we have witnessed in the twentieth century would be near impossible. Put another way, if oppressive regimes are to consolidate and maintain power, then privacy rights must be eliminated or severely restricted. If correct, privacy rights would be a core value that limited the forces of oppression.

2.2 Paradoxes and trade-offs

So far in this chapter I have described several values that underpin the value of privacy, claiming it worthy of protection. However, a privacy-skeptic could draw attention to several points that weigh against this. One of these points is a paradox of people's behavior towards valuing

privacy, which arises from another paradox in information technology. Many users want information to be quickly accessible and easy to use. People desire that it should come at as low a cost as possible, preferably free (Sullins, 2014). But users of information technology also want important and sensitive information to be secure, stable and reliable. The early web pioneer Steward Brand sums this up in the following quote:

[O]n the one hand information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other (Clarke, 2000).

Since security and stability, on the one hand, and free and quickly accessible information, on the other, are impossible to reconcile, they are likely to continue to be at the heart of moral debates in the use of information technology (Sullins, 2014).

Out of this paradox arises another. There are countless polls and surveys in which people express the importance of privacy, how worried and indignant they are over its erosion, and how dissatisfied and suspicious they are about current levels of protection (examples of polls can be found in Nissenbaum, 2009, p.104-105). But privacy skeptics argue that what people do counts more than what they say, and what they do expresses quite the opposite of what is indicated by the polls (Nissenbaum, 2009). Nissenbaum claims that in almost all situations in which people must choose between privacy and just about any other good, they choose the other good. Citing this as evidence, skeptics conclude that people's actions convey the message loud and clearly that privacy is not of great value after all; or, at least not of comparable value to other goods (Nissenbaum, 2009).

Like Nissenbaum, I do not endorse this conclusion. What skeptics claim to be choices may not truly be choices, not truly deliberate or free. People often are not fully aware that information is being gathered or recorded. Nissenbaum adds: "nor do they fully grasp the implications of the informational ecology in which they choose and act" (2009, p.105). It might be unfair to characterize a choice as deliberate when the alternative is not really viable. Life without a credit card, telephone or search engines requires unreasonable sacrifice. Nissenbaum quotes some studies (2009, p. 105-106) that reveal the false assumptions people have and the preference of consumers to purchase from online merchants with better privacy policies even if, in some instances, this means paying more for the goods.

Skeptics point out another phenomenon that shows people's very little care for privacy: the so-called media-exhibitionism. People are ready, even eager, to bear their souls to the world. The trend of media exhibitionism has been evident for many years in television shows, and since the mid-nineties people express themselves in a variety of forms online in what can be called 'new media exhibitionism' (Nissenbaum, 2009). Privacy skeptics offer these phenomena as evidence that people do not care about privacy very much. My view is that there are certainly those people who do not care about privacy very much, but there are also a lot of other people who certainly do care: difference among people in valuing certain things will always be the case. As for myself, I do not want to be part of a reality television show, nor do I put every detail of my personal life online. As many are with me, I think a relatively small group of people is fond of media exhibitionism. Therefore I think the skeptics here use the wrong argument for privacy being of no value. From the fact that some people are fond of media exhibitionism one cannot conclude that privacy does not have to be protected. However, I nevertheless understand the worry even some strong proponents of privacy protection have about the phenomenon of media exhibitionism. Anita Allen, one of these strong proponents, worries that the phenomenon of public and new media exhibitionism demonstrates a shift in norms, an eroding of our taste for privacy (1998).

Besides these paradoxes, privacy skeptics can hold another position. The skeptic I have described above denies the value of privacy. But skeptics may very well accept that privacy is a value with functional connections to other values, but at the same time deny that it is a very important value by demonstrating that privacy claims are appropriately trumped by other, more important ones. One of the most frequently cited conflicts is the one between privacy and security. Especially in the wake of the 9/11 attacks, there has been a steady rise in institutionalized watchfulness (Nissenbaum, 2009). Those who might object to this as privacy violation are easily shamed into capitulation by the illogic, as described by Priscilla Regan (1995): privacy is a selfish value which needs to be sacrificed for the collective benefits of security. Etzioni and Marsh (2003) provide a varied collection of essays on balancing rights and public safety after 9/11. The essays contain views on where the government will need to expand its authority in fighting the war against terrorism, and where it risks overreaching its authority.

Another trade-off pits privacy against the desire or need for greater efficiency, which has been a significant driver in the collection, aggregation, and analysis of personal information. One of the most common applications is marketing (Nissenbaum, 2009); businesses wishing to identify suitable customers, seek as much information as possible about habits, interests, past activities and purchasing choices of identifiable members. Privacy advocates complain that these practices should be stopped because they violate privacy. Others insist that businesses should not be stopped in their pursuit of information, because individual privacy interests in consumer information are not a match for the business interests of companies gathering, selling, and using it (Nissenbaum, 2009). They say it outweighs the values of privacy because it promises greater profits through greater efficiency or consumer satisfaction and convenience. Nissenbaum explains: “Furthermore, these benefits to business interests may ‘trickle down’ to customers in the form of lower prices and, replacing the scattershot of so-called junk mail, enable more effectively targeted ads and special offers” (2009, p.110).

Of course there are more values that can be pitted against privacy: the value of art for example (is a photo of you, taken without your consent, a violation of privacy?) or the value of freedom of expression (Eugene Volokh opposes policies that would prevent private entities from freely sharing with other private entities, 2000). However, I think when balancing values of privacy with other values, security and efficiency are the main subjects of discussion, at least today.

2.3 The feminist critique of privacy

Besides claiming that privacy is of no value, or that other values outweigh the value of privacy, there is another more specific critique of a right to privacy. The feminist critique of privacy argues that granting special status to privacy is detrimental to women and others because it is used as a shield to dominate and control them, silence them, and cover up abuse (MacKinnon, 1989). Feminists have shown that efforts to move from the insight that individuals have legitimate interests of their own, to the claim that individuals have a right to privacy, typically depend on arbitrary assumptions about the differences between personal and political objects, relationships, activities and spaces, even when these assumptions remain implicit. Feminists have

argued that these arbitrary assumptions have reflected the idea that some things are intrinsically personal and therefore private, whereas others are intrinsically public and therefore political. Lever argues: “But the assumption that the personal is private *rather than* political is not self-evident, nor is it always neutral or benign. On the contrary, our ideas about what is personal and political, [feminists] showed, have been fundamentally tainted by sexually in-egalitarian beliefs about the natures of men and women, their capacities, interests, proper behavior, aspirations and roles” (2006, p.143). DeCew, in her entry on privacy in the Stanford Encyclopedia of Philosophy, argues: “if distinguishing public and private realms leaves the private domain free from any scrutiny, then these feminists such as Catherine MacKinnon (1989) are correct that privacy can be dangerous for women when it is used to cover up repression and physical harm to them by perpetuating the subjection of women in the domestic sphere and encouraging nonintervention by the state.” (2015, chapter 2.4). Feminists conclude: as a result, even though democracies are (rightly) committed to protecting the freedom and equality of individuals, they cannot expect to achieve this end as long as rights are based on the belief that there are natural, self-evident, intrinsic or fundamental differences between personal and political matters (Lever, 2006). Jean Bethke Elshtain (1981, 1995) and others suggest that it appears feminists such as MacKinnon are for this reason rejecting the public/private split, and are recommending that feminists and others jettison or abandon privacy altogether.

The feminist critique rejects privacy because it enables covering up repression and physical harm to women (and others). This relates to a more general critique of privacy that emphasizes the darker side of privacy: because it protects people from the public gaze, it can enable them to perform immoral (or even illegal) behavior. Opponents of privacy argue that less privacy would decrease racism, sexism, egoism, insulting and other behavior that is considered immoral. The general idea behind privacy critics is: why would you want privacy if you have nothing to hide? A call for privacy is based on the need to conceal something one does not want others to know; which often means one is up to no good. Privacy proponents would argue that privacy protects people from the particular notion of shame. However, privacy opponents would argue that shame can actually serve a beneficial function. There might be a good reason why a person feels ashamed. The public gaze generates shame, which helps the enforcement of norms. Proponents argue that full transparency might be grim, opponents, however, say full privacy most certainly is.

Chapter III Justifying a right to privacy

Leif Wenar (2015) describes rights as entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states. There is a distinction between rights as trumps and rights as goals. By an account of rights as trumps, someone claiming a right to privacy is claiming that those in a position to provide it cannot justifiably refuse to do so, even if some social aim would be served by doing otherwise. Goal-based rights, on the other hand, are concerned with over-all social outcomes. In this case over-all interests of society as a whole are taken into account. When talking about a right to privacy here, I am talking about goal-based rights. This means when considering over-all interests, there might be interests that trump interests in a right to privacy.

In chapter two I explicated why we do and do not want to protect a right to privacy. We do want to protect a right to privacy because privacy entails values such as liberty, autonomy, the participation of citizens as equals and the maintaining of social relationships. A right to privacy might be overridden by interests in other values, such as security or efficiency. We might not even care about a right to privacy, since people's media-exhibitionism or the trade-offs they make for fast and free information. Besides these trade-offs there is the more specific feminist critique of privacy, that argues that granting special status to privacy is detrimental to women and others because it is used as a shield to dominate and control them, silence them, and cover up abuse.

How can we reconcile these values in a justification for privacy rights? I argue that privacy is necessary to achieve the diverse goals of democratic government. Annabelle Lever developed a democratic justification for privacy rights, which protects the interests we have in privacy and also does justice to the feminist worries about claiming such a right. She is able to show how privacy rights secure political rights, which justifies a right to privacy. However I think her method (which I will explain below) is clear, I think her argument lacks support with respect to the following: she does not give a detailed description or motivation for her account of privacy rights, which I think is needed to ultimately justify such a right. My findings of chapter one and two are used as an explanation for Lever's description of privacy rights. This motivation gives

Lever's account a more sound conceptual basis. Together they make a solid claim that privacy rights are necessary to achieve the diverse goals of democratic government and, ultimately, therefore privacy rights are justified.

3.1 Debunking a reductionist view of privacy

Before I go on to develop a justification for a right to privacy, I would like to quote Judith Jarvis Thomson's ideas of such a right, in probably the most famous reductionist view of privacy. In her essay Thomson examines several cases that have been thought to be violations of the right to privacy (1975). Thomson believes all those cases can be adequately explained in terms of violations of property rights or rights over the person, such as a right not to be listened to. The right to privacy, according to Thomson, is merely a cluster of rights. She claims:

[T]he right to privacy is derivative in this sense: it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy. Indeed, the wrongness of every violation of the right to privacy can be explained without ever once mentioning it (Thomson, 1975, p.313).

In this case, privacy is derivative in its importance and justification, as any privacy violation is better understood as the violation of a more basic right, most notably rights to property and bodily security (Thomson, 1975). But privacy cannot *always* be reduced to claims of property ownership and bodily security. According to Lever (2013) Thomson's claim that this is always true rests on fairly controversial assumptions about the nature and content of our moral rights, and there seems no particular reason to accept these. A right to privacy cannot be ruled out in this sense. I will not explicate Lever's critique of Thomson's reductionist view here further and accept her conclusion that a right to privacy cannot be ruled out.

3.2 From the feminist critique to a right to privacy

Feminists reject the public/private split because privacy can be dangerous for women (and others) when it is used to cover up repression and physical harm to them by perpetuating the subjection of women in the domestic sphere and encouraging non-intervention by the state.

Elshtain (1981, 1995) mentions that some feminists therefore recommend jettisoning or abandoning privacy altogether, but she points out this alternative as too extreme. According to Anita Allen (1988), a more reasonable view is to recognize that while privacy can be a shield for abuse, it is unacceptable to reject privacy completely based on harm done in private. A rejection of a right to privacy would leave the domestic sphere open to complete scrutiny and intrusion by the state. According to Allen, women for example surely have an interest in privacy that can protect them from state imposed sterilization programs or government imposed drug tests for pregnant women mandating results sent to police, for instance, and that can provide reasonable regulations such as granting rights against marital rape. Therefore rejecting a right to privacy is not a reasonable solution to feminists, regardless of their previous stated critique. Feminists now struggle with the following question: how to make sense of an important and valuable notion of privacy that provides a realm free from scrutiny and intervention by the state, without reverting to the traditional public/private dichotomy that has in the past relegated women to the private and domestic sphere where they are victims of abuse and subjection? Annabelle Lever took up this challenge of finding a justification for a right to privacy which takes into account both the feminist critique of privacy (e.g. domestic abuse that used to be allowed in the name of privacy) and at the same time the worry of state intervention of all the most intimate parts of women's lives. As DeCew (2015) notes: "this means drawing new boundaries for justified state intervention and thus understanding the public/private distinction in new ways".

3.3 A democratic justification for privacy rights

3.3.1 Connecting privacy to democracy

Feminists conclude that even though democracies are committed to protecting the freedom and equality of individuals, democracies cannot expect to achieve this end as long as rights are based on the belief that there are natural, self-evident, intrinsic or fundamental differences between personal and political matters (Lever, 2006). Lever argues that attention to the differences between democratic and undemocratic forms of politics can enable us to meet feminists' concerns (Lever, 2006).

Democracy can be described as a method of group decision making, characterized by a kind of equality among the participants at an essential stage of the collective decision making (Christiano, 2015). I would like to add some aspects of a definition by Gutmann and Thompson (2009): “Persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives”. While participation and equality are key components of the first description, the latter adds autonomy and the importance of a sincere expression of what one thinks.

Cohen (1996) thinks our interests in privacy are: interests in

[S]ecuring decisional autonomy, inviolability of personality ... bodily integrity and a degree of control over one's identity needs as socialized, solidary individuals (Cohen, 1996, p.192).

Cohen claims protection for these interests helps us to reconcile a commitment to treating people as equals with the variety of needs, beliefs and tastes that they may have (Cohen, 2006). She argues that privacy rights are necessary to achieve the diverse goals of democratic government, and to secure the freedom and equality of individuals. This is similar to Westin's claim (1967) that privacy rights are necessary for democratic government. For Lever this is an appealing argument, since she is trying to provide a justification for a right to privacy which does justice to the feminist critique, but at the same time provides a realm free from scrutiny and intervention. The argument draws on liberal insights into the values of privacy, but frames them in terms of democratic ideals and concerns.

3.3.2 A definition of privacy rights

However the described relationship between privacy and democracy is appealing in finding a justification for a right to privacy, Cohen is not able to sustain the claim that privacy rights are consistent with democratic government, let alone necessary to it. She fails in explaining why individuals need privacy rights if they already have democratic political rights, and how far the justification for privacy rights is consistent with the justification of democratic rights of political choice and participation. Lever (2006) wants to clarify these issues by providing accounts of privacy and political rights and ultimately argue that a justification for privacy rights is implicit

in a democratic vision of politics as the free cooperative activity of equal citizens. I will explain her method and argue that one more motivation is needed for it to work.

For her argument Lever (2006) assumes that in a democracy individuals are to be treated as free and equal and that all individuals have legitimate interests in political participation, whatever their other legitimate interests. Her assumptions about democracy takes feminist worries into account, with reflecting the assumption that sexual equality is essential to democratic government and so can legitimately constrain the decisions of even democratically elected political majorities (Cohen, 1993, 1997).

Lever (2006) uses her definition of political rights to define what privacy rights are. She defines political rights as rights of political (or collective) choice, association and expression. She says democratic politics is meant to be in the collective interest of individuals and, in principle, to be open to everyone. Treating democratic political rights as rights of *collective* choice, association and expression then seems appropriate, consistent with feminist criticisms of the public/private distinction, and with reasonable assumptions about democratic government. I will accept Lever's definition of political rights for the purpose of my argument.

Lever (2006) then uses this definition of political rights to define privacy rights: privacy rights then are rights of *personal* choice, association and expression. She does this for a number of reasons: it has a certain intuitive appeal, it enables us to look at privacy rights generally, without making unnecessarily controversial assumptions about their content and justification, and preserves the contrast between the personal and political that lies at the heart of feminist concerns with the right to privacy. I think this is not the only way we might think of privacy rights and Lever (2006) acknowledges this.

I think Lever does not give a very detailed description of why we should particularly choose for these definitions. With this account of privacy rights she argues for a justification for a right to privacy, by looking at how individual rights of choice, association and expression secure our democratic political interests; and therefore are needed and justified in a democracy. I think however Lever's method is clear, her account of what privacy rights are needs a more solid foundation than the one she gives and is explicated above. Motivations like 'it has an intuitive appeal' or 'it enables us to look at something more generally' are insufficient. For her argument

to work (and ultimately for justifying a right to privacy), one needs a motivation for privacy rights being *rights of personal choice, association and expression*. In chapter one I have developed an account of privacy, in chapter two I have found several interests for a right to such privacy. These findings can explain why we can describe privacy rights as rights of personal choice, association and expression.

The account of privacy developed in chapter one is framed as ‘one can have normative privacy in a situation where one is protected by explicit norms, policies or laws that have been established to protect individuals in that situation, provided that one has limited control in managing one’s privacy with respect to three elements: choice, consent and correction’. Linking Lever’s description of privacy rights, *rights of personal choice, association and expression* to this account of privacy, we can see that the rights Lever describes on the one hand offers some protection (by explicit norms, policies or laws that follow from this right), because others are restricted in interfering in one’s choice, association and expression. At the same time the description also guarantees a form of limited control in managing one’s privacy: one has limited control in choosing, associating and expressing.

Interests in privacy (or the values of privacy we do want to protect) are liberty, autonomy, the participation of citizens as equals and the maintaining of social relationships. At the same time feminists worry that privacy can be dangerous to women (and others) but they also want protection from state intervention. Lever’s description of privacy rights as rights of personal choice, association and expression reflect these values of privacy found in chapter two. First, rights of personal choice, association and expression would ensure civilians liberty, autonomy and the maintaining of social relationships. Second, sexual equality is essential to democratic government. So, these rights must be granted equally: the value of participation of citizens as equals then is respected and the public/private distinction no longer rests on inegalitarian beliefs. Third, these rights would also protect women (and others) from (state) intervention, which was a feminist worry in jettisoning the private/public split.

The account of privacy found in chapter one and the values of privacy found in chapter two motivate the description of privacy rights being rights of personal choice, association and expression. Now I can further explicate Lever’s method and ultimately argue that privacy is necessary and a right to privacy is justified.

3.3.3 From personal to political: choice, association and expression

Lever (2006) argues that rights of personal choice, association and expression help to secure the political rights of individuals and to ensure that these are democratic. Therefore a right to privacy is justified.

First of all, equal rights of personal *choice* can help to protect rights of political choice. Equal rights to privacy can help to ensure that political rights are defined and justified in ways that reflect the freedom and equality of individuals, by giving them a means that is not dependent on the exercise of political rights with which to define and pursue their legitimate interests (Lever, 2006, p.149). Would there be no right to privacy, people would expect a public gaze or be afraid that information about themselves would ultimately be known by the general public or certain others (i.e. employers). This would be detrimental to forming one's own opinion and (learning) to express it. Rights of personal choice are therefore necessary to enhance personal expression and political choice. Privacy rights, for example, could enable individuals to discover what is valuable or important to them in life, and enable them to act accordingly in ways that are consistent with the freedom and equality of others. In that way, rights of personal choice can provide a way for individuals to test the claim that their political rights in fact reflect their freedom and equality as individuals, and to revise their political rights, should these be undemocratic. As Cohen (1996) claims "personal privacy rights protect the constitutive minimal preconditions for having an identity of one's own. Moreover, they ensure respect and protection for *individual difference* – for individual identities that seem to deviate from the 'norm' embraced by society at large (in law) or by one's particular subgroup" (p.201, emphasis in text). At the limit, Lever (2006) argues, privacy rights give one the right to refuse political participation. Privacy rights facilitate forms of protest and non-compliance that, while relatively non-confrontational and costless, can be politically effective (Lever, 2006, p.150). Lever concludes:

[B]ecause rights of personal choice, where equal, give individuals the chance to define and pursue a variety of different ends, alone or in conjunction with like-minded others, they provide a useful, sometimes necessary, support for democratic rights of political choice (2006, p.150).

Similarly, equal rights of personal *association* can be critical to the ability of individuals to protect their political interests (Lever, 2006, p.150). Rights of personal association can enable

individuals who are timid, unsure of their political skills and value, or uncomfortable with established forms of politics to develop self-confidence, politically relevant skills, and forms of association that better reflect their interests, experience and sense of themselves (Philips, 1991; Sirianni, 1993). Rights of personal association can also help to combat forms of inequality and un-freedom (Lever, 2006). If rights of political association are to be democratic, it is clearly important that individuals be capable of exploring competing conceptions of politics, different ways of associating together, and different reasons for doing so (Lever, 2006, p.150). Were this not the case, the freedom and equality of individuals would be consistent with laws suppressing organized dissent and allowed one model only for deciding how society should be governed. Such laws and models are clearly not democratic. Lever (2006):

We can expect democracies to contain a range of organizations through which individuals clarify and promote their political interests as they understand them, even though this may generate confusion and conflict or leave individuals with divided loyalties at times (p.150).

From this conception of democratic rights follow two implications for the personal associations of individuals. First, as long as their associations are voluntary and free of exploitation and deception, individuals should not have to show that their associations are political rather than personal, in order to be legitimate (Lever, 2006, p.150). Individuals should not have to show that their associations are concerned with common interest rather than personal interests. Lever argues that such demands often reinforce existing views of politics and discourage democratic forms of political organization (2006). They privilege the interests of those who are already well represented politically at the expense of those who are not. Feminist criticisms of existing political institutions and associations illustrate this first point. Feminists have argued that established political organizations are frequently insensitive to the needs and interests of women, when not actively hostile to them (Lovenduski and Hills, 1981; Maroney, 1986). As a result, neither their ends, nor their internal structure do justice to the complexity of women's lives, or adequately counteract their difficulties in organizing politically (Lever, 2006, p.151). Moreover, Lever argues:

[B]ecause women themselves may not always be able to pinpoint the factors that disadvantage them individually and as a group, it is important that they be able to explore their lives together, to experiment with different ways of organizing and of representing their interests, free from the need to win the approval of others, publicly to defend the merits of their efforts, or to claim that these are of general, rather than particular or personal significance (2006, p.151).

The second implication for personal association of individuals that follows from democratic rights, is that a democracy needs to ensure that individuals are able to sustain personal ties to others, as well as to ensure that these reflect their freedom and equality (Lever, 2006). This comes from a common tactic for discouraging political organizations, striking at the personal associations of individuals, “to separate friends and loved ones, to sow dissension, doubt, fear and hate among individuals” (Lever, 2006, p.151). This second implication supports the first, because individuals may legitimately differ in their needs for the love, care and support of others, as in their capacity to provide these goods. Although maybe variably political in their motivations, individuals can have political interests in forming such relationships in a democracy, especially in ensuring that these, like their other associations, do not compromise their freedom and equality. For example, participation in sporting activities and associations have promoted the health and self-confidence of women and their willingness to challenge sexist priorities and expectations at the local sports club as well as at universities, schools and workplaces, although such activities are often pursued out of self-interest rather than a concern for the common good (Young, 1990). While voluntary and free of subordination, such associations are no less expressions of the political freedom and equality of individuals than others (Lever, 2006, p.152).

Finally, equal rights of *expression* can help individuals to secure democratic forms of political expression (Lever, 2006). They can also help in democratizing the exercise of important democratic rights. Individuals may be uncertain about the political worth of their views, the best way to present them, or their likely effects. Equal rights of personal expression might therefore be essential to democratic government. Privacy rights enable individuals to examine and revise their ideas before presenting them to strangers. By providing a framework through which individuals can develop and test their powers of persuasion and self-expression, equal rights of personal expression can enable even the shy, the socially disadvantaged or the politically unpopular to share their political views with others, and to enjoy the benefits of democratic

expression and communication (Lever, 2006). Lever emphasizes that such rights can be especially important to historically disadvantaged groups who may be quite sceptical of the value of democratic political rights, uncertain that they are secure, and uncomfortable exercising them. Most forms of political expression are not anonymous. These situations require us to stand up, speak out and be counted in ways that can be unfamiliar or alien, and in circumstances that may be hostile. Therefore it is important that in a democracy individuals have other opportunities to express their political sentiments and ideas, and to experiment with unconventional forms of political communication. Without such opportunities political debate may be costly to the most vulnerable members of society and socially privileged groups will continue to set the terms of collective decisions, even in a democracy.

3.4 Conclusion

Lever (2006) argues that rights of personal choice, association and expression help to secure the political rights of individuals and to ensure that these are democratic. Therefore, she claims, a right to privacy is justified. Lever's argument draws on liberal insights into the values of privacy, but frames them in terms of democratic ideals and concerns. It also reflects feminist criticisms of the public/private distinction, because it does not depend on drawing a sharp distinction between privacy rights and political rights, as the same set of interests in freedom and equality underpin each (Lever, 2006, p.156). More particularly, it reflects the fact that the personal can be political. Therefore it also answers to privacy critics who claim that a public gaze is good because it generates shame, which would help the enforcement of norms. Lever shows that people need rights of personal choice, association and expression, not (or at least not solely) to cover up shameful information, but to form their own opinion, to learn to express it, to protect their political interests, to examine and revise their ideas before presenting them to strangers and not the least to ensure respect and protection for individual indifference when one deviates from the norm embraced by society at large.

I do support Lever's argument, but think it needs one more motivation regarding the use of privacy rights as rights of personal choice, association and expression. With the account of privacy of chapter one, and the values found in privacy in chapter two, I have showed that

privacy rights indeed can be described as rights of personal choice, association and expression. This addition strengthens Lever's claim (2006) by giving it a more sound conceptual basis. Since Lever's method accompanied by my addition show that privacy is necessary to achieve the diverse goals of democratic government, I believe a right to privacy is justified.

The political justification of privacy rights is one instrumental justification and other justifications of a right to privacy might also be possible. Lever (2006) acknowledges this and adds that privacy rights may be not only necessary or helpful in securing our interests in political choice and participation, but might also be necessary or helpful in protecting our civil or socioeconomic interests and rights. While I do think my argument for a democratic justification of a right to privacy holds, I think there are other ways possible in providing a justification of a right to privacy.

I have tried to build a justification for a right to privacy that integrates its values we would like to protect, as well as critiques of such a right. The justification does not mention how to balance a right to privacy with security, efficiency or the lack of care people sometimes seem to have for their privacy¹ (in chapter two considered as values that might trump a right to privacy). One could argue that, even when a right to privacy is justified, in some situations a right to security might trump the right to privacy. Or one could argue the other way around: Moore (2000) argues that privacy claims should carry more weight when in conflict with other social values and interests. Annabelle Lever (2006) claims: while privacy rights are not costless, or free of risk to democratic government, from a democratic perspective those costs are usually justified by our interests in democratic forms of political participation and association. I would not argue that this is 'usually' the case, like Lever does, but given the justification that is explicated in this thesis I would say that there are certain situations in which security or efficiency measures cannot trump a right to privacy. In these situations costs in security or efficiency are justified by our interests in democracy.

¹ In view of growing media-exhibitionism and the worry that this phenomenon demonstrates a shift in norms and an eroding taste for privacy (Allen, 1998), Anita Allen and Adam Moore have written several pieces on paternalism and privacy rights, which I will not explicate here further (see Allen's 'Coercing Privacy', 'Unpopular Privacy' and Moore's 'Coercing Privacy and Moderate Paternalism: Allen on Unpopular Privacy' or his review of 'Unpopular Privacy')

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