

Privacy, Democracy and Freedom of Expression

Annabelle Lever

Assoc. Prof. University of Geneva

Annabelle.lever@unige.ch

August. 2014

**Forthcoming in *The Social Dimensions of Privacy*, eds. Beate Roessler and Dorota
Mokrosinska, (Cambridge University Press, 2014)**

Must privacy and freedom of expression conflict? To witness recent debates in Britain, you might think so. Anything other than self-regulation by the press is met by howls of anguish from journalists across the political spectrum, to the effect that efforts to protect people's privacy will threaten press freedom, promote self-censorship and prevent the press from fulfilling its vital function of informing the public and keeping a watchful eye on the activities and antics of the powerful.[Brown, 2009, 13 January]¹ Effective protections for privacy, from such a perspective, inevitably pose a threat to democratic government via the constraints that they place on the press.

Such concerns with privacy must be taken seriously by anyone who cares about democratic government, and the freedom, equality and wellbeing of individuals. But if it is one thing to say that privacy and freedom of expression cannot always be fully protected, it is another to suppose that protections for the one must always come at the expense of the other. After all, the economics of contemporary politics and journalism would seem to be partly responsible for our difficulties in protecting personal privacy while sustaining robust and informative forms of public discourse. [Moore, 2010, 10 -141]² Most newspapers are loss-making businesses and the need to reduce those losses and, if possible, to turn a profit, make investigative journalism an increasingly expensive proposition as compared to both "comment" and more or less elevated forms of gossip. At the same time, politics has increasingly become the prerogative of a narrow group of people with access to the large sums of money necessary successfully to compete for high office. In those circumstances, the need for critical scrutiny is as important as it is difficult.

Revising our ideas about privacy and its protection cannot alone reduce the tensions between freedom of expression and personal privacy typical of our societies, necessary though such revision may be. Moreover, this paper can only touch on some aspects of the ways in which we need to rethink our interests in privacy, in order adequately to reflect people's diverse interests in freedom of expression, and the important role of a free press to

¹ <http://www.theguardian.com/media/2009/jan/13/pcc-chairman-christopher-meyer-press-freedom> ; the indifference to privacy by many journalists is noted by Alan Rusbridger in his review of Joshua Rozenberg (2005). see <http://www.theguardian.com/books/2004/mar/27/highereducation.news>

² Adam Moore has a helpful – and depressing – discussion of the issue for the USA. Apparently, at the end of 1945 80% of USA newspapers were independently owned. By 1982, 50 corporations owned almost all major media outlets in the USA, including newspapers, magazines, radio and television stations, book publishers and movie studios. By 1987, 29 corporations owned them all, and by 1999 they were 9.

democratic government. Nonetheless, I hope to suggest ways of thinking about people's claims to privacy which can be generalised fairly readily, and can help us to think constructively about the nature, causes and solutions to some important social and political problems, even if, in its nature, philosophical analysis rarely tells us what to do.

More specifically, this paper argues that people are entitled to keep some true facts about themselves to themselves, should they so wish, as a sign of respect for their moral and political status, and in order to protect themselves from being used as a public example in order to educate or to entertain other people. The "outing" - or non-consensual public disclosure - of people's health records or status, or their sexual behaviour or orientation is usually unjustified, even when its consequences seem to be beneficial. Indeed, the paper claims, the reasons to reject outing, as inconsistent with democratic commitments to freedom and equality, are reasons to insist on the importance of privacy to freedom of expression. While a free press is of the utmost importance to democratic government, it is not identical with the free expression of individuals and, on occasion, the former may have to be constrained in order to protect the latter. [Barendt, 2007, 231]. Hence, the paper concludes, we should distinguish the claims of individuals to publish reports about their lives – even if this necessarily involves revealing the private lives of others – from journalistic claims to publish information about the sex lives of consenting adults. I will start by briefly situating my argument within a democratic approach to privacy, before using the "outing" of Oliver Sipple to examine people's claims to privacy and their implications for freedom of expression and of the press. I will be assuming that some forms of privacy are legitimate, in order to focus more closely on the question of what information, if any, people may keep to themselves.

Democracy and Methodology

We need to democratise our conceptions of privacy for philosophical and other purposes -or so I have argued in previous work. [Lever, 2011 and 2014]³ The ideas about privacy we have inherited from the past are marked by beliefs about what is desirable, realistic and possible which predate democratic government and, in some cases, predate constitutional

³ For my articles on privacy, see www.alever.net

government as well. Hence, I have argued, although privacy is an important democratic value, we can only realise that value if we use democratic ideas about self-government, and the freedom, equality, security and rights of individuals to guide our ideas about its nature and value. This paper, therefore, starts from what I consider to be the central democratic idea: that people are entitled to govern themselves even if they are not distinguished by special virtues, knowledge, resources or interests. People, therefore, do not need to be especially interesting, literate or morally attractive in order to publish their ideas, or to express themselves publicly. [Cohen, 1993, 207 -64 and 2009] However, democratic principles also mean that respect for privacy cannot be limited to the meek and self-effacing, nor to the public-spirited and upstanding.

The 'democratic conception of privacy' which I seek to present is, then, an interpretation of the nature and value of privacy, and of its implications for public policy, which is based on democratic principles, ideas and institutions. I do not assume that there is only one form of democracy.⁴ On the contrary, I imagine that there can be more liberal, republican, socialist, utilitarian and communitarian ways of interpreting central democratic ideas, rights and values, and of embodying these in customs and institutions. However, I am concerned with what must be common to any form of democratic government and society, rather than what might distinguish them. That is, I assume that democratic moral and political principles provide the appropriate perspective for determining what rights and duties to attribute to individuals and, therefore, what forms of privacy, if any, are to be treated as part of the structure of democratic politics. In turn, I assume that the claims to privacy – and to political participation, for that matter – which are necessary for democratic government provide the appropriate starting point for thinking about the claims of those who do not live under democratic governments, or who are stateless or not yet members of any political society at all. This is necessary to ensure that our reflections on people's moral rights and duties adequately reflect their legitimate interests in democratic government, whatever their current circumstances.

The foundational distinction for my approach to privacy, then, concerns the differences between democratic and undemocratic governments, as we best understand them, rather

⁴ Hence my concern with Corey Brettschneider's interesting attempt to justify privacy rights. See A. Lever, 2012, available from their website at <http://lch.sagepub.com/content/early/recent>, Oct. 16, 2012.

than the differences between consequentialist and deontological moral theories, or between liberal and republican political principles. [Lever, 2014, 188 -190] Given how little we know about democracy, and the imperfect character even of what we think we know, the analysis of the myriad forms of undemocratic government strikes me as a necessary guide to what democracy requires. As there is nothing inherently democratic about republicanism, liberalism, socialism, or utilitarianism, nor of consequentialist and deontological moral theories, none of these seem a particularly helpful starting point if we want understand the nature and value of privacy on democratic principles. So, while may be unusual to take the differences between democratic and undemocratic governments as our starting point for moral and political reflection, I believe that it provides our best chance of finding common terrain on which to resolve the competing philosophical, empirical, political and legal debates about privacy and freedom of expression in our different societies.⁵

Defining and Describing Privacy

Before proceeding, however, it may help briefly to clarify some points of terminology and methodology. A great deal of philosophical and legal debate about privacy concerns the best way to define it. [Allen, 1988 ch. 1, and Moore, ch. 2] However, the main reason why it is hard to define privacy – the absence of a set of necessary and sufficient conditions which distinguish privacy from allied concepts – suggests that the fuzziness of our concepts of liberty, equality, and rights, rather than some particular obscurity in the concept of privacy, itself, likely explains why the boundaries of privacy are hard to fix. No definition of privacy will remove that problem. However, for the purposes of this paper, we can think of privacy as referring to some combination of seclusion and solitude, anonymity and confidentiality, intimacy and domesticity. Whatever else the word “privacy” is used to describe, it is used to describe these four groups of words; and whatever else talk of privacy as a moral or political right is meant to illuminate, it is normally meant to illuminate our rights and duties in these.

⁵ What legitimate claims to privacy, or to anything else, people have in non-democratic circumstances (situations with no state or undemocratic states) should, in my view, be determined by considering what they are entitled to under democratic regimes and then working out from there. This helps to ensure that our assumptions about human rights, for example, are consistent with the legitimacy of democratic government, and the rights, duties and interests which it involves.

Democracy

Just as privacy has many meanings, whose merits are controversial, so with most of the other concepts with which we must work, including that of democracy. I will therefore follow standard contemporary usage in referring to democracies as countries whose governments are elected by universal suffrage and where people have an equally weighted vote. I will also assume that democracies require “one rule for rich and poor” and for governors and governed- that they are constitutional governments. I also assume that democracies enable people to form a variety of associations through which to advance their interests, express their ideas and beliefs, and fulfil their duties as they see them. They are therefore characterised by protection not just for political parties, unions, interest groups and churches but by the protections they secure for soccer-clubs, scientific societies, families, charities, and like-minded.

Freedom/Liberty, Equality and Rights

Clarifying the way I will be using the word democracy helps to explain the ways I will be using words like “freedom” and “equality”. Completely different things have been taken to epitomise freedom and equality. I therefore suggest that we take whatever forms of liberty are uncontroversially necessary to democratic government as examples of freedom; and we take whatever forms of equality are uncontroversially necessary to democratic government as examples of equality. So, taking some familiar features of democratic government can help us to clarify our ideas about freedom and equality, and can give us a shared reference point for resolving disputes about the relationship of privacy, liberty and equality.

As with freedom and equality, so with rights, we can 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 a matter of controversy in most democracies. We can therefore think of the right to vote as both a moral and a legal right - a right which, in democratic countries, is legally protected partly because people are morally entitled to participate in forming their government. Problems clarifying the idea of a right, therefore, can be resolved in the first instance by thinking about familiar democratic rights - whether legal or moral.

A. Oliver Sipple and the Ethics of "outing"

Oliver Sipple was a former US Marine, injured while serving in Vietnam. Sipple lived in San Francisco, and on September 22, 1975, he joined the crowd gathered outside the St. Francis Hotel to see President Ford. He was standing beside Sara Jane Moore, when she pulled out a gun to shoot the President. Sipple managed to deflect her aim, and to prevent further shots. The police and the secret service immediately commended Sipple for his action at the scene. President Ford thanked him with a letter, and the news media portrayed Sipple as a hero.

Harvey Milk, San Francisco's openly gay City Councillor, and a friend of Sipple's, saw this as his chance to strike a blow for gay rights. So, without consulting Sipple, he leaked the fact that Sipple was gay to Herb Caen, of the *San Francisco Chronicle*. Caen duly published the news, which was picked up and broadcast round the world.

Though he was known to be gay among members of the gay community in San Francisco, and had even participated in Gay Pride events, Sipple's sexual orientation was a secret from his family, for whom it came as a shock. Outraged, Sipple sued the *Chronicle* for invasion of privacy, but the Superior Court in San Francisco dismissed the suit. Sipple continued his legal battle until May 1984, when a State Court of Appeals rejected his case on the grounds that Sipple had, indeed, become news, and that his sexuality was part of the story. Sipple died in February 1989, aged 47.

Several things seem to be wrong with outing Sipple. The first is that Milk's failure to ask Sipple for permission to talk to the press seems exploitative and contemptuous. Even if one's sexuality were altogether unremarkable, one might object to having it broadcast to all the world; and if it were likely to make one notorious, the subject of hateful abuse and, even, violence, one might well hesitate to have it widely known, even if one felt no shame about it. Secondly, Sipple's case highlights how easily we can be deceived (or can deceive ourselves) into thinking that we know more about other people's lives and interests than we do. Most cases of outing do not involve one friend outing another, but are motivated by anger at what is, or seems to be, the hypocrisy, injustice or selfishness of some else. So

Sipple's experience suggests that those doing the outing are very likely to underestimate the harm that they inflict on others – both on their immediate victims, and on those who care for, or depend upon, them. Thus, Richard Mohr claims that “To lose a child in a custody case for prejudicial reasons [i.e. because of prejudice against homosexuality or homosexuals] is, to be sure, to suffer an indignity” – before arguing in favour of outing as a political strategy. This is, however, a breathtakingly inadequate description of one of the harms that outing can cause. [Mohr, 1992, 34] Outing will, then, often be unjustified on instrumental or consequentialist grounds – because its benefits are uncertain, unpredictable and, such as they are, may be achievable in other ways. By contrast, the harms are usually considerable, unavoidable and the full extent of the damage from outing can be easy to underestimate.

Outing means using someone simply as a means to one's own ends. Strikingly, the Sipple case suggests that this can be morally troubling even when those ends are ones which the victim shares, and has actively endorsed. And this interesting feature of the Sipple case points, I think, to the *political* dimension of *ethical* objections to outing, and to the ways that these differ from a consequentialist weighing of likely benefits and costs, or a Kantian concern with the ways that people can be misused by others. Those are objections to outing which we might have regardless of the society we live in, or our assumptions about the legitimacy of democratic government. By contrast, a political perspective on outing centres on the power which outing involves, and the difficulties of justifying this type of power from a democratic perspective.

Outing involves one person or a group claiming the right to make potentially life-changing decisions for a competent adult, although they have not been authorised to do so, are typically in no position to make amends for any harms their actions cause; and cannot be considered either impartial or expert judges of the claims which they propose to over-rule. Such unilateral, unrepresentative and unaccountable power over others is difficult to reconcile with democratic political principles, which limit the extent, form and justification of the power we can exercise over others. Moral and political objections to absolute government, therefore, help to explain what is ethically troubling about outing, even when it achieves legitimate objectives, including ones which have the support of its victim.

The Estlund Challenge

Of course, to say that “outing”, as usually practiced, is at odds with democratic commitments to accountable, representative and participative government is not to say that it is not *also* at odds with the freedom and equality of individuals. Rather, it is a way of specifying in *what ways and why* outing violates people’s freedom and equality, given that at a purely formal level outing pits my claims to freedom and equality against yours, and therefore seems to provide no reasons to condemn – or to favour – outing.

We cannot settle for purely formal conceptions of freedom and equality if we care about democratic government, because attention to how power is distributed and used is essential to creating the conditions in which people can share in the authorisation of collectively binding decisions. The importance of this point for the ethics of outing – and for claims to privacy and freedom of expression more generally – becomes apparent once one considers what I will call “the Estlund Challenge” to my analysis of outing. If concerns with a lack of accountability, representation and participation are at the heart of democratic objections to outing, Estlund asked, would not outing be acceptable if settled on as a policy through suitably democratic political procedures, such as majority votes by a government elected by a majority of the electorate?⁶

The Estlund challenge gains its appeal from the fact that legitimate government would be impossible if all error or injustice were forbidden. Democratic legitimacy, therefore, must be consistent with some injustice as well as some error. However, the fact that some unjust decisions are consistent with democratic procedures and legitimacy does not mean that all are, and it is genuinely hard to see how a policy of outing could be reconciled with the idea that governments must protect the legitimate interests of all citizens.

No amount of voting, for instance, will make ‘employment at will’ a democratic form of employment contract, given the forms of power involved in the ability to hire and fire workers at will.⁷ Likewise – or so I would suggest – no amount of voting will make ‘outing’

⁶ My discussion here is a response to a question that David Estlund put to me at the conference “Facts and Norms”, 22 -23 August, 2013, The University of Copenhagen.

⁷ The following paragraphs draw on the work of Matthew W. Finkin and, in particular, on his 1996 Piper Lecture, published in Finkin 1996, 221-269.

at will consistent with democratic forms of freedom and equality. The reasons for this are at once simple and complex. They are simple, in so far as such unaccountable power over others more closely resembles the power of an absolute monarch over his/her subjects than the powers appropriate to people who see each other as equal and as, therefore, owed an explanation for behaviour which harms them. Hence, as I have argued elsewhere, [Lever, 2011, ch. 3] inadequate protections for the privacy of American workers, consequent on the use of work contracts which entitle employers to fire workers for ‘good reasons, bad reasons and no reason at all’, illustrate the importance of distinguishing democratic from undemocratic forms of privacy.

But the reasons why outing and employment at will are undemocratic are complex, as well as simple. They are complex, because democratic government is, itself, a complex political ideal and practice and one which can be instantiated in many ways. It is therefore rare for there to be only one democratically acceptable way to organise or distribute power amongst citizens, whether we consider their relations as voters, as producers and consumers, or as family members. Democratic objections to employment at will, I suspect, do not depend on the thought that it is a particular individual – an ‘employer’ who is able to fire you, but on the thought that *no-one* should be able to have such untrammelled power over something so critical to wellbeing and social status as the ability to earn a living. On the other hand, the fact that most employment practices put the ability to hire and fire *in the same hands* and, usually, in the hands of those who supervise and regulate our work lives, clearly exacerbates the undemocratic aspects of employment at will. Hence, centralising the power to ‘out at will’, or whenever it might lessen prejudice, by granting that power to a corporate body of some kind, rather than to unaffiliated individuals, is unlikely to alleviate democratic concerns about the powers involved in outing and may, indeed, exacerbate them.

Of course, what powers, in practice, are distributed by legal rights to hire and fire at will depends on the context in which hiring and firing occur. But even under the most favourable circumstances – a developed welfare state, a lack of stigma attached to unemployment – employment at will involves a dramatic ability to disrupt the lives of workers, their relationships to others, their way of life and their sense of themselves. Under

less favourable circumstances, the results can be devastating.⁸ Likewise, what harms one can actually inflict by outing someone depends very much on the extent to which information disclosed in one context can be reused or broadcast in others, and on the sorts of penalties which exist and are enforced for the misuse of information. Anderson, 1999, 139 -167] Nonetheless, I have argued, the nature of the power implicit in outing is usually inconsistent with democratic norms of government, even under favourable circumstances in which the information generated by outing cannot be endlessly used, reused and broadcast forever.

Contra Estlund, then, a democratic vote is *insufficient* to render outing legitimate, given the forms of power over others that it usually involves. Nor is a democratic vote *necessary* to the justification of outing in those cases where democratic concerns for freedom and equality might justify it. We do not need a democratic vote to be justified in publicising evidence of bribery, corruption or serious illness by powerful figures. Serious ill-health in a powerful politician, for example, is a matter of legitimate interest by citizens, in so far as it can affect the outcome of important deliberations, their ability to think calmly in crises, and their ability to cope with the stresses and exhaustion that politics at the highest levels often involves. Likewise, it seems perfectly fair for journalists and citizens to ask Tony Blair, then Prime Minister, whether he had given his children the combined Mumps Measles and Rubella (or “German Measles”) vaccine – the MMR - given anxious debate around its safety at the time, and Blair’s public statements of confidence in it. Were it not for the privacy of his children, I would have thought it legitimate for journalists or citizens actively to seek out such information.

Blair’s statement of confidence in the MMR vaccine was not really necessary to allay public anxieties at the time, given the overwhelming weight of medical evidence in its favour, and the possibility of disaggregating the triple vaccine into its component parts so that children did not have to have the injections in one go. There was, therefore, no justification for infringing the privacy of Blair’s children in order to allay public anxiety, or to substantiate Blair’s readiness to fit actions to words. But it is easy to imagine cases where their claims to

⁸ For an example, see Matthew W. Finkin, 1997, 1- 23, which is Finkin’s protest against allowing ‘employers to treat people, even the morally miscreant, as public “object lessons’ for others’.

privacy would seem less powerful – if, say, Blair had been trying to reassure us about the safety of British beef and its freedom from “Mad Cow disease”⁹, rather than the safety of a vaccine which could be taken in ways that were not controversial at all. A willingness to eat British beef and to feed it to one’s children *would* be an appropriate way of substantiating one’s claims, as Prime Minister, to confidence in its safety – perhaps the only way, in the circumstances, to show that one means what one says. It would therefore be appropriate for the press to ask what the Prime Minister’s family were eating, and to try to find out, if no answer were forthcoming, whatever the claims to privacy of the PM’s family.

Democratic principles, then, mean that individuals and the press must be free to publish true personal information about politicians, in so far as this bears on their willingness to live by rules that they urge on others, or aim to impose on them. These interests in expressive freedom and in democratic government are *constraints* on the ways that governments can regulate privacy, because they mark the boundaries between democratic and undemocratic forms of politics, rather than forming one democratic choice amongst others. It is therefore wrong to suppose that a democratic conception of privacy means that voting is necessary or sufficient to resolve the ethics of outing. Democracy is not reducible to voting, and our interests in privacy include interests in being seen and treated as the equal of others.

Generalising From the Sipple Case: Privacy and the Ethics of Publication

The Sipple case suggests that democratic concerns for freedom, equality and responsibility mean that people ought to have broad, though not absolute, rights over true information about themselves, whether the point of publicising that information is to enlighten others, to entertain them, or to advance a legitimate moral or political cause. Publicising sensitive personal information, however true, undermines people’s privacy, and threatens their social standing and equality with others. It turns some people into instruments for public amusement or edification regardless of the damage that this may do to their self-respect,

⁹ “Mad Cow Disease” is the colloquial designation of Bovine Spongiform Encephalopathy (BSE), and its human form is a version of Creutzfeldt-Jakob disease. More details about BSE and its impact on the UK can be found at http://en.wikipedia.org/wiki/Bovine_spongiform_encephalopathy.

their ability to command the respect, trust, affection and loyalty of others, and regardless of its impact on third parties.¹⁰

Such publication, we are often told, is justified by the moral failings of the victim, whether those failings involve acts of hypocrisy, ingratitude, sexual infidelity, attention-seeking or, indeed, illegality. [Dacre, 2008]¹¹ But while our interests in controlling sensitive information may be self-serving, there is more to our interests in privacy than that. Control of personal information enables us to protect the feelings of other people, as Sipple's case shows, and to respond to their needs and concerns, even when we do not share them. Such control enables us to act with tact, discretion, respect, and out of a sense of duty, whether or not confidentiality protects our own interests. It enables us to distinguish what is owed to those who have cared for us from what is owed to those for whom we have no special duties. In short our interests in confidentiality are not reducible to interests in avoiding embarrassment, pain, shame or indignity, but include interests in meeting the needs and claims of others for whom, with all their limitations of imagination and sympathy, we may feel love, as well as obligation.

Protection for privacy, therefore, can promote personal, as well as political, freedom and our ability to form a variety of personal and political, ties to others. Whether our expressive interests are artistic, scientific, sexual or religious – and whether our medium of communication is gestures and behaviour or words and pictures – protection for privacy protects our ability to explore the world and our place within it, and to communicate what we have found to others without exaggerating its importance, or having to vouch for its

¹⁰ For two recent, egregious cases of public insensitivity to privacy see Laurie Shrage's discussion of the expectation that the Caster Semanya's medical results would be publicly released, and the British case of the former boxing promoter Kellie Maloney, who was forced to go public with news of her sex-change operation after threats from a newspaper to 'out' her. See <http://www.theguardian.com/sport/2014/aug/13/kellie-maloney-public-life-woman-newspaper-boxing-promoter> and Laurie Shrage, 2012, 225-47

¹¹. Paul Dacre rightly complains that Britain's libel laws constantly threaten newspapers and journalists with bankruptcy for publishing matters of legitimate public interest. 'Today, newspapers, even wealthy ones like the *Mail*, think long and hard before contesting actions, even if they know they are in the right, for fear of the ruinous financial implications. For the local press, such actions are now out of the question. Instead, they stump up some cash, money they can't afford, to settle as quickly as possible, to avoid court actions - which, if they were to lose, could, in some cases, close them'. However, he also appears to suppose that it is the role of the media to police the nation's morals, and therefore takes it as self-evident that consensual sadomasochistic sex is so evidently 'perverted, depraved, the very abrogation of civilised behaviour' that newspapers ought to be entitled to publish accounts of that behaviour, if they can persuade one of the participants to furnish the salacious details for pay. <http://www.guardian.co.uk/media/2008/nov/10/paul-dacre-press-threats>.

truth, beauty or utility. Democratic claims to privacy for expressive and creative activities, as Louis Brandeis recognised, [Warren and Brandeis, 1890, 193] do not depend on their economic or artistic value, nor on Millian concerns with the conditions necessary for genius to flourish. [John Stuart Mill, 1869]¹² Rather, they reflect the claims of even ordinary, unremarkable, individuals freely to develop and exercise their expressive capacities and to do so as the political equals – not the superiors or subordinates – of others.

Rights to privacy are not absolute, however, nor do they invariably trump rights to freedom of expression if, and when, the two conflict. If you are well-known and obviously ill, for example, you can expect to be the object of gossip and speculation. But it hardly follows that you should therefore have to anticipate what, now, is almost inevitable: the public broadcasting of such gossip, and its treatment as a means to fame and fortune by strangers. Likewise, if you are well known and seen to be staggering around drunk, or hanging out with people who are notorious, you can expect to be regarded unfavourably by those in the know. As John Stuart Mill emphasised, such knowledge and personal condemnation is the inevitable consequence of social life in a free society. [Mill 1869, ch. 4] What is not inevitable, however, is the industrialisation of gossip and of its marketing to a mass audience as a form of entertainment, titillation and education. Such industrialised gossip is hard to justify morally, even if we are inclined to think that it should be legal. As Stanley Benn argued, it is wrong to treat an entertainer's life simply as a source of entertainment.¹³ Doing so wrongly treats the entertainer as a person with no feelings which can be hurt, and no aspirations or plans which can be harmed by our intrusive attention. So, whatever legitimate purposes the publication of gossip serves can usually be met without humiliating and degrading people, however foolish or complicit they may have been in their humiliation.

B. Privacy, Freedom of Expression and the Press.

¹² John Stuart Mill's concern with the need to protect genius in order to ensure social progress underpins his utilitarian justification for protecting the liberty 'of tastes and pursuits' in *On Liberty* ch. 3. In essence, the privacy claims of ordinary people, therefore, depend on the conditions necessary for genius to flourish. Brandeis' approach to the protection of privacy is, therefore, consistent with democratic principles in ways that Mill's is not, important though both of their arguments are to any democratic conception of privacy. The full text of *On Liberty* is available free of charge at <http://www.bartleby.com/130/>

¹³ Stanley Benn, 1984, 233: "To even an entertainer's life simply as material for entertainment is to pay no more regard to him as a person than to an animal in a menagerie".

It would therefore be wrong to confuse freedom of the press with freedom of expression, or to suppose that privacy and freedom of expression are antagonists, locked in a zero sum game, in which gains to the one can only come at the expense of costs to the other. Our interests in being able to express ourselves freely, and to communicate with others, are varied and not reducible to interests in untrammelled access to other people's ideas and experiences. Protection for people's privacy, therefore, means that it should be legally possible to demand and win damages for wrongful invasions of privacy, and that the press should be regulated in a way that respects people's claims to privacy. Hence we cannot resolve conflicts over the respective claims of privacy and press freedom by assuming that the one is intrinsically more valuable than the other.¹⁴ Instead, we will have to identify and evaluate the expressive and privacy interests at stake, when conflict arises, bearing in mind that if the right to publish, in a democracy, does not depend on literary, moral or political merit, respect for privacy is not just for the virtuous, sensible or the uninteresting. In some cases this means that autobiographical accounts of people's lives will have claims to invade the privacy of other people which will be lacking in journalistic and biographical accounts of seemingly similar subject-matter.

There is, for example, little to recommend the average "kiss and tell" story, recounting the one-night stand, or lengthy affair of someone who is not famous with someone who is. The format does not lend itself to much variation or reflection, but provides an excellent vehicle for personal grudges, self-justification and self-congratulation. However citizens must be free publicly to describe their lives and affairs, and to use their lives as art, as science and as an example to others. Because our lives are bound up in the lives of others, it follows that if we are legally entitled to describe and publicise the details of our lives, there is much about the lives of others which we must be legally entitled to publish also, and which we must be able to publish without their permission. Otherwise, most people would find it nearly

¹⁴ My views on this question fit perfectly with those of Eric Barendt and Adam Moore, who strongly criticise the American constitutional tradition of giving near absolute weight to freedom of expression, and their preference for the European Human Rights approach, which treats privacy and freedom of expression as rights of equal intrinsic importance, whose relative strength must be determined by the facts of a particular case. Thus, Barendt considers that "the case for detailed, ad hoc balancing may be stronger in privacy cases than it is in libel, because of the infinite variety of ways in which privacy may be infringed", (p. 244), and Moore, (p.134) claims that "The ascendancy of speech protection in the legal realm...is due to an expansive and unjustified view of the value or primacy of free expression" and (p.149): "On my view, speech that is low-value and violates informational privacy rights should be more readily liable to prior restraint and, once broadcast, should expose its publishers to civil and criminal damages. Given that we have no general moral right not to be offended, low-value speech that simply offends would still be protected".

impossible freely to describe, discuss and publicly to explore the significant events, relationships, constraints and opportunities in their lives. It must therefore be legal to publish stories, autobiographies and reports which are of questionable quality and taste, and which exhibit moral failings such as selfishness, complacency, insincerity and dishonesty, so long as they are not libellous, defamatory or extortionate.

“Kiss and tell” stories, I would suggest, are an example where the privacy interests of those who wish to avoid publication are unlikely to justify legal constraints on a person’s ability to publish “their story”, and to profit financially from the legal freedom to do so. Even if their moral or aesthetic quality, on the whole, is poor, the subject matter of these stories – what it is like to enter a privileged social circle and to be the lover of someone famous, when one is, oneself, unknown – is a legitimate object of personal reflection and public communication in a democracy. It is therefore difficult to see how kiss and tell stories could be made illegal, on democratic principles, simply because their first-person narratives are unlikely to meet with the approval of one of the parties to the ‘kiss’.

Protection for privacy still has a role in determining other aspects of the publication of ‘kiss and tell’ stories, even when it is insufficient to prevent publication. For example, it may be desirable to limit how intensely, and how frequently journalists are allowed to pursue and try to question third parties to such stories, such as children and spouses, even if this makes it more difficult to question the story’s author and its main subject. In the UK, for example, the families of those caught up in a media frenzy suffer from behaviour – packs of journalists and photographers following them around; endless ringing of their doorbells and of their phones; the inability to leave the house without being surrounded by a scrum of journalists – which looks very much like harassment and which is likely to be frightening for children, and even for the adults involved. No one’s right to self-expression justifies such behaviour, nor is there any ‘right to publish’ or to know what people are feeling or thinking, which does so either.

It may be also desirable for newspapers to report the sums they offered, and subsequently, paid for their “kiss and tell” stories; to inform their readers whether they were the ones who solicited the story, or merely agreed to publish it, and so on. Were these standard practices, readers would be better placed to judge how far newspapers are being used to

carry out a grudge or feud, and how actively they are instigating stories which, under the guise of autobiography, publicly describe and evaluate the private life of well-known figures. Reporting the fees that such stories command may increase their supply for a while, and the invasions of privacy that accompany them. As it is public knowledge that selling one's story of sex with the famous is a way to make money and, even, to launch a career, there is no reason why newspapers should not disclose the sums involved, and the way that they are negotiated. Doing so would promote public understanding of the economics of a lucrative branch of journalism, and would make it easier to understand the market price, if not the value, of privacy.

However, autobiographical justifications for publishing privacy-invasive material do not automatically apply to third-person publications, or publications by strangers, whether biographical or journalistic. Where celebrities do not wish to relinquish their privacy, and have taken steps to secure it, it is hard to see why journalists should be entitled actively to pursue them, and to publish stories about their sex lives. Such stories may be entertaining, even informative, but curiosity about the sex lives of consenting adults cannot explain why people who are otherwise entitled to privacy should be deprived of it. Hence, the reasons why it should be legal to publish kiss and tell stories, invasive though they are of people's privacy, do not apply to those cases where none of the people involved wish to relinquish their privacy.

This is not because autobiography is more important, more expressive or more interesting than biography, nor that it is morally superior to write about oneself than about other people. Often the reverse is true. Any democratic conception of freedom of expression will provide significant protections for journalistic and biographical accounts of people's ideas, actions and experiences, and the importance of protecting such expression will very likely justify limits on the privacy of politicians and of other people who hold positions of political power and influence.¹⁵

In writing your authorised biography, for example, it may be appropriate, with your consent, to discuss a formative love affair even if it has hitherto been secret, and the other partner

¹⁵ For a helpful discussion of privacy for politicians – and one which pays attention to questions of power and responsibility within different government bodies and administrative agencies, see Dennis F. Thompson 1987 ch. 5. See also Barendt, p.139, p.231, pp. 241-244

wishes it to remain so. Whatever the ethical considerations of a biographer in such circumstances, it should surely be legal for me, with your consent, publicly to report experiences, sentiments and beliefs that you are entitled to publish yourself. Likewise for my unauthorised biography of you: I should be legally entitled to publish, with their consent, intimate information and opinions that others are entitled to publish as part of the story of their lives.¹⁶ However, when it comes to stories about the sex lives of celebrities, or would-be celebrities, I have argued, people have a stronger claim to publish stories about their own lives, even if this means publishing details about the lives of others, than they do to publish stories about people who, however fascinating, have neither the desire nor the obligation to relinquish their privacy.¹⁷

Conclusion:

In this paper, I have argued that people have important personal and political interests in confidentiality, which are intimately related to democratic ideas about the way power should be distributed, used and justified in a society. On that view, ordinary people, with their familiar moral failings and limited, though real, capacities for sensitivity, altruism and wisdom are entitled to govern themselves and, in so doing, to take responsibility for the lives of others. This suggests that they are not in need of constant hectoring or supervision in order to act well, although they are rightly accountable to appropriate public authorities for their exercise of public powers, their use of public resources and their respect for others' rights. Hence, as we have seen, people's claims to confidentiality do not depend on the usefulness of that confidentiality to others, or, on the moral, aesthetic or, even, the political and economic, worth of the things that they wish to do with it.

¹⁶ For an interesting philosophical discussion of the ethics of biography and, in particular, the ethics of focusing attention on the sex lives of people famous for other things, see Susan Mendus, 2008, ch. 16, pp. 299 -314. This is a critique of Thomas Nagel's 'The Central Question', a book review of Nicola Lacey's biography of Hart in the *LRB*, available at <http://www.lrb.co.uk/v27/n03/thomas-nagel/the-central-questions>. I share Mendus' doubts about an author's work "floating free" from their life, as Nagel would have it, and her more general worries about Nagel's ideas on the public/private distinction. But that does not mean Nagel is wrong to worry about the ethics of dwelling on the sex life of someone, like Wittgenstein or Russell, who were our near contemporaries and were entitled, and chose, to keep this aspect of their lives private. It therefore matters that Hart's widow authorised the disclosure of information about Hart's sexuality in ways that Wittgenstein and, seemingly, Russell, did not. See Joanna Ryan's letter in response to Nagel's review of Nicola Lacey's biography of Hart in the *London Review of Books* 'Letters', 27.4 (17 February, 2005) available at <http://www.lrb.co.uk/v27/n04/letters#letter2>

¹⁷ See Davies, 2010 at <http://www.theguardian.com/media/2010/apr/10/newspapers-phone-hacking-inquiry>. On 3 October, 2010 *The News of the World* printed an apology to Vanessa Perroncel for invading her private life, and accepted that its claims that she had had an affair with the footballer John Terry were untrue. See also, Greenslade, 2010 at <http://www.guardian.co.uk/media/greenslade/2010/oct/07/newsoftheworld-john-terry>

Acknowledgements Many thanks to Beate Roessler and Dorota Mokrosinska for inviting me to contribute to this volume, and to Dorota and Adam Moore for their very helpful comments on a previous version of this article. James Rule’s review of my book, *On Privacy*, prodded me to expand the discussion of my methodological approach to privacy, and David Estlund’s question to me, at a conference in 2013, had a similarly galvanising effect on my discussion of “outing”. I am grateful to them both. Juha Räikkä kindly invited me to a conference, ‘Justice: Public and Private’ at the University of Turku, Finland, just as I was doing last-minute revisions to this paper. I am grateful to all the participants there for their suggestions for final changes. Lastly, I am grateful to Routledge for permission to reuse parts of ch. 2 of *On Privacy* in this chapter.

Bibliography

- Allen, Anita, 1998. *Uneasy Access: Privacy for Women in a Free Society*. New Jersey: Rowman and Littlefield.
- Anderson, David A., ‘The Failure of American Privacy Law’ in Basil Markesinis, ed. 1999, 139 - 167.
- Barendt, Eric, 2007. *Freedom of Speech*. Oxford University Press.
- Benn, Stanley, 1984. ‘Privacy, Freedom and Respect for Persons’ in F. Schoeman, ed., 223 - 244.
- Brown, Maggie, 2009. ‘PCC Chairman Warns of European Threat to Press Freedom’, 13 Jan. <http://www.theguardian.com/media/2009/jan/13/pcc-chairman-christopher-meyer-press-freedom>
- Cohen, Joshua, 1993. ‘Freedom of Expression’. *Philosophy and Public Affairs* II.3, 207 -63
- Cohen, Joshua, 2009. *Philosophy, Politics, Democracy: Selected Essays*. Cambridge, MA: Harvard University Press.
- Dacre, Paul, 2008. ‘The Threat to our Press’, *The Guardian*, 10 November. <http://www.theguardian.com/media/2008/nov/10/paul-dacre-press-threats>

Davies, Nick, 2010. 'Exclusive: Inquiry over Vanessa Perroncel phone-tapping allegations'.

<http://www.theguardian.com/media/2010/apr/10/newspapers-phone-hacking-inquiry>

Finkin, Matthew W., 1996. 'Employee Privacy, American Values and the Law'. *Chicago-Kent Law Review* 72, 221 -269.

Finkin, Matthew W. 1997. 'Discharge and Disgrace: A Comment on the "Urge to Treat People As Objects"'. *Employee Rights and Employment Policy Journal* 1.1, 1-23.

Greenslade, Roy, 2010. 'Two Newspapers Apologise to Vanessa Perroncel For Breaching Her Privacy'. *The Guardian Newspaper*,

Media.,<http://www.theguardian.com/media/greenslade/2010/oct/07/newsoftheworld-john-terry>

Kramer, Matthew H. et al. 2008. *The Legacy of H.L.A.Hart: Legal, Political and Moral Philosophy*.

Lever, Annabelle, 2011. *On Privacy*. New York: Routledge

Lever, Annabelle, 2014a. *A Democratic Conception of Privacy*. London: Authorhouse

Lever, Annabelle ,2014b 'Book Review. Response to James B Rule', *Law, Culture and Humanities* X.1, 188 -190.

Lever, Annabelle, *forthcoming*, 'Privacy and Democracy: What the Secret Ballot Reveals'. *Law, Culture and Humanities*.

Markesinis, Basil, 1999. *Protecting Privacy: The Clifford Chance Lectures V.4*. Oxford University Press.

Mendus, Susan, 2008. 'Private Faces in Public Places', in eds. Kramer, Grant, Colburn and Hatzistravou, 299 -314.

Mill, John Stuart, 1869. *On Liberty*. London: Longman, Roberts and Green.

- Mohr, Richard, 1992 *Gay Ideas: Outing and Other Controversies*. Boston: Beacon Press.
- Moore, Adam D. 2010. *Privacy Rights: Moral and Legal Foundations*. Pennsylvania University Press.
- Nagel, Thomas, 2005. 'The Central Question'. *London Review of Books*, 27.3. 12 -13.
<http://www.lrb.co.uk/v27/n03/thomas-nagel/the-central-questions>
- Rozenberg, Joshua 2005. *Privacy and the Press*. Oxford University Press.
- Rusbridger, Alan, 2004. 'The Fame Game', in *The Guardian*, March 27, Books.
<http://www.theguardian.com/books/2004/mar/27/highereducation.news>
- Ryan, Joanna, 2005, 'Letters' *London Review of Books*, 27.4.
<http://www.lrb.co.uk/v27/n04/letters>
- Schoeman, Ferdinand D., 1984. *Philosophical Dimensions of Privacy: An Anthology*. Cambridge University Press.
- Shrage, Laurie, 2012. 'Does the Government Need to Know Your Sex?' *The Journal of Political Philosophy*, XX.2, 225-47.
- Thompson, Dennis F., 1987. *Political Ethics and Public Office*. Cambridge, MA: Harvard University Press.
- Warren, Samuel D., and Louis D. Brandeis, 1890. 'The Right to Privacy: [The Implicit made explicit]'. *Harvard law Review* 4, 193.

