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14. Ibid.
15. Ibid., 773.
16. Ibid., 774–76.
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26. Allen, "Minor Distractions," 772.
27. Andrea M. Matwyshyn, "Generation C: Childhood, Code and Creativity," Notre Dame Law Review 87 (2012): 1979, 2020, and 2024–25.
28. Ibid., 1984–88.
29. Allen, "Minor Distractions," 773.
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36. *We Know What You're Doing*, http://www.weknowwhatyouredoing.com/, accessed March 5, 2013.
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Coercing Privacy and Moderate Paternalism: Allen on Unpopular Privacy

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

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

DEFINING PRIVACY[1]

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

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

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

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

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

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

Moreover, a crucial distinction that Allen does not seemingly address is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition where privacy is obtained. An example would be Parent's definition, "[p]rivacy is the *condition* of not having undocumented personal knowledge about one possessed by others."[7] If a specified state or condition holds then privacy obtains. A normative account, on the other hand, makes references to moral obligations or claims. For example, when DeCew talks about what is of "legitimate concern of others," she includes ethical considerations.[8]

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

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

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

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

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

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

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

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

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

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

In each of these cases Allen is talking about something other than mandated or coerced privacy. To put the point another way, only an over-expansive conception of privacy would include an opt-in policy for telemarketing, coerced isolation for criminals, and legally protected doctor/patient confidences to count as paternalistically forced privacy. Allen writes, "Few readers will disagree with me that liberal governments can, do, and should mandate at least some privacies. Surely government can insist that our neighbors do not peer into our bedroom windows, tap our phones, or hack into our investment accounts."[12] But none of these examples—peeping toms, phone taps, or investment hack—are cases of coerced or mandated privacy. The information target in each of these examples could waive her privacy rights, thus sanctioning peeping, tapping, or hacking. I have no qualms if Allen's point in mentioning these sorts of cases is to highlight areas where the government should protect individual privacy rights that have not been waived. Such a claim, however, would be rather uninteresting.

A CRITIQUE OF ALLEN'S ARGUMENT FOR WEAK-PATERNALISM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

NOTES

1. Parts of this section draw from material originally published in Adam D. Moore, "Defining Privacy," *Journal of Social Philosophy* 39 (2008): 411–28.
2. Anita Allen, *Unpopular Privacy: What Must We Hide?* (Oxford University Press, 2011), 4, 29.
3. Ibid., 30.
4. See, for example, Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, 1997), chapters 1–4; S. Warren and L. Brandeis, "The Right to Privacy," *The Harvard Law Review* 4 (1890): 193–220; Paul A. Freund, "Privacy: One Concept or Many?" Privacy [Nomos XIII], eds. Pennock and Chapman (Atherton, 1971), 182; Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968); Ruth Gavison, "Information Control: Availability and Control," in *Public and Private in Social Life*, eds. Stanley Benn and G. F. Gaus (New York: St. Martin's Press, 1983), 113–34; Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 295; W. A. Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12 (1983): 269; Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992); Adam D. Moore, *Privacy Rights: Moral and Legal Foundations* (Penn State University Press, 2010) and "Privacy: Its Meaning and Value," *American Philosophical Quarterly* 40 (2003): 215–27.
5. Aristotle, *Eudemian Ethics*, in *The Complete Works of Aristotle, Vol. II*, Jonathan Barnes, ed. (Princeton University Press, 1984), VII, 2: 1236a16-32.
6. The idea of central cases and peripheral cases comes from Finnis, who is citing Aristotle. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 11.
7. Parent, "Privacy, Morality, and the Law," 269.
8. DeCew, *In Pursuit of Privacy*, 62.
9. See Moore, *Privacy Rights*; "Privacy: Its Meaning and Value"; and "Defining Privacy."
10. Allen, *Unpopular Privacy*, 37.
11. Ibid., 38.
12. Ibid., 10.
13. Ibid., 20.
14. Ibid., 13.
15. Moore, *Privacy Rights*.
16. Allen, *Unpopular Privacy*, 91.
17. Ibid.
18. Ibid., 75.
19. Angelique Chrisafis, "Nicolas Sarkozy Says Islamic Veils Are Not Welcome in France," *The Guardian*, June 22, 2009.

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

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

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

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