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VALUING PRIVACY

*Youngjae Lee**

Anita Allen's characteristically rich, fascinating, and thoughtful lecture contains much that is worth mulling over. I find especially interesting her description of privacy as a "foundational good,"¹ and my comments will focus on what it would mean to call privacy a foundational good.

Professor Allen defines a "foundational good" as a good that, like freedom and equality, is a prerequisite for many other important goods. She explains:

[W]e require a "liberty of privacy" to have lives of our own, rich with other goods. . . . For example, if one wants to enjoy the good referred to as "reputation," then anonymity, confidentiality, secrecy, and data protection are prerequisites. If one wants to be a scholar or an artist, then opportunities for solitude may be a prerequisite. Seclusion is a prerequisite of forms of intimate relationships (sexual, familial) that thrive on unembarrassed self-revelation and free expression.²

She argues further that, as privacy is a foundational good, "a just and good society governed by the rule of law" should have "legal protections for foundational privacies," and this, in a nutshell, is her case for privacy rights.³

I raise two questions here. First, if privacy is a foundational good, how easy should it be for individuals to waive, and, second, how difficult should it be to breach? These two questions are, of course, often raised about a variety of rights, but what I am interested in is exploring special tensions that may have been introduced by Allen's formulation of privacy as a good that makes other important goods possible.

First, the language of "rights" suggests the picture of an individual in control of his or her own privacy—he or she may or may not waive it and reveal parts of himself as he or she sees fit. One example Allen discusses is reputation, which requires, as she points out, "anonymity, confidentiality, secrecy, and data protection."⁴ However, formation of reputation also requires the opposite: revelation and publicity, at least at times. This

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1. Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 *FORDHAM L. REV.* 1187, 1212 (2012); see also ANITA ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE?* xi, 13, 21, 171 (2011).

2. Allen, *supra* note 1, at 1212.

3. *Id.*; see also ALLEN, *supra* note 1, at 21.

4. Allen, *supra* note 1, at 1212.

example suggests that privacy and its associated goods are not only about hiding things, but are also about revealing things at appropriate moments under appropriate circumstances, as determined by the holder of privacy.

At the same time, much of Allen's lecture is about her discussion, with approval, of Judge Andrew Jackson Cobb's analogy of invasion of privacy to slavery in *Pavesich v. New England Life Insurance Co.*⁵ The slavery analogy in turn suggests a right that is so fundamental that it is not waivable. People certainly have a right against slavery, but there is no right *to be* a slave. If the right of privacy is like the right against slavery, then it appears that it should be difficult to waive one's right to privacy. But this of course cannot be the case. Not only do people often waive their privacy in ways that are unproblematic,⁶ but Allen's own discussions of reputation and self-revelation in intimate relations also suggest that the right to waive one's privacy is perhaps *as important* as the right to maintain one's privacy. Otherwise, it is unclear how the kinds of goods that privacy is supposed to help people realize will actually be realized.

Now, of course, this may be a misreading of Allen's argument. What is like slavery is "invasion of privacy," not, say, revelation of personal information. When a person waives his or her privacy, there is no *invasion* of privacy; there is only permission. Therefore, the kinds of concerns I raised seem inapposite. When Allen says that invasion of privacy can be like slavery in a deep way, she is not making any statements about the moral significance of voluntary waivers of privacy.

But is it as easy as that? It is true that Judge Cobb was talking only about invasions of privacy and not about waivers of privacy, and Allen's approval of the analogy is by extension also about invasions of privacy and not about waivers of privacy. Yet, as I return to her discussion of confidentiality, solitude, and seclusion and their connections to other goods like reputation, scholarly or artistic life, and intimate relationships, I see her voicing reasons to worry not just about invasions but also about waivers of privacy. For instance, if there is indeed such a strong connection between seclusion and intimate relationships, then it seems that one who waives privacy too freely may be damaging one's ability to pursue the goods associated with intimate relations, which are very important ingredients of a good life.

My impression that Allen is worried not just about invasions of privacy but also about waivers is confirmed in her book *Unpopular Privacy*, in which she writes that privacy rights "should not be thought of as something that can be waived by intended beneficiaries at will."⁷ In the book, she also makes the following arresting claim: "[T]he liberal ideal becomes an ironic joke in a society in which people freely choose to be always in others' lines of sight, much as it is a joke in a society in which they freely choose utter

5. 50 S.E. 68 (Ga. 1905); Allen, *supra* note 1, at 46–62.

6. Allen, *supra* note 1, at 1212 ("[I]ndividuals often prefer association and disclosure to privacy.").

7. ALLEN, *supra* note 1, at xii.

domination.”⁸ She argues at another point that “[a] degree of paternalism in public policies aimed at harm prevention is warranted when it comes to foundational liberty (hence the ban on voluntary slavery), and . . . foundational privacy.”⁹ In these sentences, she makes an explicit link between lack of privacy and slavery. And she is talking not just about invasions of privacy but also about voluntary waivers of privacy, and is warning us that a society in which people excessively waive their right to privacy is like a society in which people waive their right to liberty by submitting to domination.

So it appears that my initial worry may be warranted after all. That is, on one hand, in order for privacy to do its work as a foundational good, or a good that is a prerequisite for other goods, it *must be* waivable at appropriate moments by the individual. Yet, because it is such an important good, it may be the kind of good that should be difficult to waive, like the right to liberty. How we are to manage this tension is not very clear, and the idea that privacy is a foundational good by itself does not provide much guidance. Allen is of course aware of this tension, which is why she says that “privacy is often a duty to oneself . . . as well as a right.”¹⁰

Another question is whether privacy, by being a prerequisite to other goods, is valuable merely instrumentally, or whether it is an independent good, worthy of having for its own sake. On one hand, Allen’s emphasis that it is “foundational” seems to suggest that privacy is valued for its own sake, but on the other hand, her explanation that foundational goods are important because they enable other goods to be realized suggests that the real value of privacy is that it makes it possible for individuals to realize other important goods. What this means is that there may be times when these other goods are better realized through sacrifices of the foundational good.

Allen herself seems to have this possibility in mind when she says her “perspective is consistent . . . with the notion that privacy rights are not absolute and commonly must give way to the demands of security, law enforcement, or public health.”¹¹ What this sentence highlights is that privacy rights must have limits because of competing considerations. Of course, it is generally the case that rights have limits, need to be specified in particular circumstances, and can be traded off at times. But by calling them “rights,” what we are seeking to prevent are situations where important interests are given up without special justification.¹² However, when Allen says that privacy is a good that is important because it serves as a prerequisite for other goods, it seems that her vision of rights may be even

8. *Id.* at 172.

9. *Id.* at xii.

10. Allen, *supra* note 1, at 1212.

11. *Id.*

12. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90–100 (1977); Frederick Schauer, *A Comment on the Structure of Rights*, 27 *GA. L. REV.* 415, 428–30 (1993); Jeremy Waldron, *Rights in Conflict*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 203, 208–11 (Douglas MacLean ed., 1993).

weaker than what this general and commonly held account of rights suggests.

Here, I return to her discussion of reputation, scholarly or artistic life, and intimate relationships. She says these are the sorts of goods that privacy makes possible. However, it is also the case that privacy can interfere with one's attainment of these goods. A person who wants to maintain her privacy and anonymity at all times and avoids doing things in public will only have one kind of reputation, that of someone "who keeps to herself," which, as reputations go, is fairly thin, minimal, and blank. A scholar or an artist who wants to be secluded at all times will not have opportunities for scholarly or artistic clashes and exchanges through which one may promote and improve one's work, thereby helping one maintain the life of being a scholar or an artist. A person who is overly protective of his own privacies and never learns to overcome his shyness is unlikely to have many opportunities to develop intimate relationships. It seems, then, that there may be times when privacy *ought to be sacrificed* so that these other goods that privacy supposedly makes possible may be pursued. And it may not always make sense to leave the decision whether to maintain one's privacy to that individual.

In other words, built into Allen's justification of the right to privacy is a way to justify sacrificing the right to privacy, because these other goods that privacy makes possible may be more important than privacy. This built-in limitation, in turn, provides a ready argument in favor of limiting the right to privacy. This feature of Allen's justification of the right to privacy may in the end be a strength and not a weakness, but it is nevertheless a feature that can ultimately render her version of privacy protection weaker than what the language of rights suggests.

So, we end with the following picture: privacy is a foundational good, important for pursuing other goods. In order for those goods to be pursued, individuals must be free to waive the right to privacy, but leaving the decision to waive it up to each individual may interfere with his or her pursuit of those other goods. It is a right, not to be interfered with, but if it is never interfered with, that too can lead to a situation where important goods are not sufficiently realized by individuals. Individuals should be free to waive their privacy protections, but not always. Privacy must be protected but should be sacrificed sometimes. As Allen is fully aware, it is not a tidy picture, but it is difficult to imagine a guide better suited to lead us around the complexities than her.