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REFLECTIONS ON COERCING PRIVACY

NEAL DEVINS*

Should privacy be a matter of coercion? Anita Allen thinks so, and her provocative essay *Coercing Privacy*¹ explains why. For Allen, “although the liberal conception of private choice is flourishing . . . the liberal conception of privacy is not.”² In other words, society’s increasing tolerance of alternative lifestyles (privacy of choice) is not enough; privacy cannot withstand the attack from within, that is, from individuals who—while empowered to lead private lives—do not value their privacy. Making matters worse, Allen thinks it “too difficult” to turn this tide of diminished expectations through “preaching and teaching.”³ Consequently, Allen calls for regulatory measures that allow people to “experience privacy” and thereby live more genuinely expressive lives.⁴

No doubt, desperate times sometimes call for desperate measures. Nevertheless, as I will argue below, Allen’s proposal is unworkable. Institutional limitations in governmental decision-making make the successful implementation of Allen’s proposal little more than a pipe dream. Rather than protecting and serving the liberal conception of privacy, Allen’s call to regulate privacy almost certainly will limit types of privacy that Allen and other liberals deem essential to self-expression and, with it, self-definition.

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1. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

2. *Id.* at 727-28.

3. *Id.* at 735.

4. *Id.* at 756; see also *id.* at 755 (arguing for government intervention in private lives to preserve the values of privacy).

I. IS GOVERNMENTAL REGULATION NECESSARY TO COUNTERMAND THE EROSION OF PRIVACY?

Let me start with the quite plausible assumption that Allen is correct and that some government-sponsored invasions of privacy may be necessary to protect privacy from itself. After all, in this age of cybersex, the *JenniCam* website, MTV's *The Real World*, Jerry Springer, and the like, it may be that the liberal commitment to privacy is best served by a government that sometimes leaves us alone (privacy of choice) and sometimes protects us from doing what we want (privacy). Allen's proposal cannot escape the inherent limitations of governmental decisionmaking.

Allen commits error in assuming the possibility of a beneficent government able to overcome its prejudices, and thereby expand privacy of choice, while simultaneously limiting personal autonomy in ways consistent with liberal ideals. This assumption does not wash. To counteract false stereotypes about, say, women who choose to abort their fetuses or same-sex relationships, it may well be necessary for the private to be made public. Social reform, as Linda McClain notes, sometimes requires "self-disclosures and confessions."⁵

An inverse relationship between privacy and privacy of choice may well be endemic to our imperfect world. Tolerance of alternative lifestyles requires exposure to those lifestyles. Abortion rights and gay rights illustrate this phenomenon.

A. *Abortion Rights*

Before 1962, the prospect of public support for abortion rights seemed remote.⁶ That year, Sherri Finkbine—a pregnant twenty-nine year old Arizona woman and married mother of four—sought an abortion after learning that her taking of the medicine thalidomide likely would result in severe deformities to the baby she was carrying. Unable to have an abortion in Arizona,

5. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy* 40 WM. & MARY L. REV. 759, 790 (1998).

6. See Barbara Hinkson Craig & David M. O'Brien, ABORTION AND AMERICAN POLITICS 39-41 (1993).

Finkbine travelled to Sweden, had an abortion, and learned that her fetus was severely deformed.⁷ With extensive news coverage, Finkbine's "very public ordeal . . . altered the national consciousness concerning abortion."⁸ In particular, because Finkbine seemed "the perfect suburban housewife and mother," journalists began to treat abortion as a sometimes unavoidable human tragedy, not the subject of crime news.⁹

Three years later, in 1965, an epidemic of rubella again propelled the abortion issue into the national consciousness. Because rubella was linked to birth defects, a significant number of married, middle class, stay-at-home housewives sought abortions.¹⁰ With *The Atlantic*, *Time*, *Redbook*, and *Look* magazines publishing prominent stories about these women, public opinion in support of abortion rights began to grow. A January 1966 Gallup poll, for example, uncovered that seventy-seven percent of Americans supported some form of abortion rights.¹¹ Undoubtedly, public exposure to these tragic stories affected public attitudes and, ultimately, contributed to both legislative abortion reform initiatives and the Supreme Court's decision in *Roe v. Wade*.¹² In contrast, attempts by abortion opponents to vilify the destruction of fetuses through films like *The Silent Scream*¹³ have largely failed. Consequently, notwithstanding political challenges to *Roe*, abortion rights may well be more secure today than ever before.

B. Gay Rights

Public acceptance of same-sex relationships is linked to the "courageous entry [by gay men and lesbians] into the cultural

7. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 286, 288 (1994). For a detailed account of this story, see *id.* at 285-90.

8. *Id.* at 288.

9. *Id.* at 288-89.

10. See *id.* at 300-01.

11. See *id.* at 302.

12. 410 U.S. 113 (1973).

13. This film, graphically depicting an abortion, first aired nationally on ABC's *Nightline*. See *Nightline* (ABC television broadcast, Feb. 12, 1985).

debate over same-sex relationships and sexuality.”¹⁴ For example, through sympathetic media treatments of the real life stories of, among others, Margarethe Cammermeyer¹⁵ and Sharon Bottoms,¹⁶ most Americans have been exposed to positive images of gays and lesbians.¹⁷ Moreover, a spate of human interest stories in nearly all major newspapers, as well as *Time*, *Newsweek*, and other newsmagazines, have portrayed same-sex couples as committed both to each other and to raising a family.¹⁸ Thanks to this avalanche of media coverage, as Anita Allen and Linda McClain recognize, there is increasing societal tolerance for same-sex relationships.¹⁹

In stark contrast, consider *Bowers v. Hardwick*,²⁰ the 1986 repudiation of same-sex sodomy. Unable to see same-sex relationships as anything but abhorrent and deviant, the *Bowers* majority closed itself to the possibility that homosexual sodomy could occupy the same place for gays as intercourse does for heterosexuals.²¹ For Justice Lewis F. Powell, Jr. (who cast the decisive fifth vote in *Bowers*), homosexual relations simply were incomprehensible.²² In a conversation with one of his clerks (who, unbeknownst to Powell, was gay), Powell confided, “I don’t believe I’ve ever met a homosexual,” and asked, “[a]re gay men

14. McClain, *supra* note 5, at 790.

15. See *Serving in Silence: The Margarethe Cammermeyer Story* (NBC television broadcast, Feb. 6, 1995) (television movie depicting the case). Margarethe Cammermeyer was a highly decorated military officer who was dismissed from the Armed Services because of her lesbian orientation.

16. See *Two Mothers for Zachary* (ABC television broadcast, Sept. 22, 1996) (television movie based on the case). Sharon Bottoms lost custody of her child because of her lesbian orientation.

17. In addition to these made-for-television movies, Hollywood has embraced gay rights through films such as *Philadelphia*, *The Birdcage*, and *In and Out* as well as television programs such as *Ellen* and *Roseanne*.

18. See John Cloud, *A Different Fathers' Day*, TIME, Dec. 29, 1997, at 106; *Gay Couple Who Adopted Child Have Union Blessed*, ARIZ. REPUBLIC, June 22, 1998, at A5, available in 1998 WL 7779865; Margo Harakas, *'Gayby Boom,'* CHI. TRIB., June 12, 1998, at 7, available in 1998 WL 2866170; Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50; Ching-Ching Ni, *Fathers' Day*, NEWSDAY (N.Y.), Mar. 1, 1998, at G8, available in 1998 WL 2683233.

19. See Allen, *supra* note 1, at 727; McClain, *supra* note 5, at 789-90.

20. 478 U.S. 186 (1986).

21. See *id.* at 190-91.

22. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521 (1994).

not [sexually] attracted to women at all?"²³ "What Powell found so difficult to grasp," according to his biographer John Jeffries, "was that homosexuality was not an act of desperation, not the last resort of men deprived of women."²⁴ In the words of his clerk: "He had no concept of it at all. He couldn't understand the idea of sexual attraction between two men. It just had no content for him."²⁵

The lesson here is simple: Our society is not sufficiently tolerant to embrace an "anything goes" attitude toward lifestyle choices. Consequently, abstract notions of privacy—even when defended with vigor and eloquence—will not protect alternative lifestyles. Rather, societal acceptance is necessary and, as such, private lives must become public. Otherwise, false stereotypes, not empathy, will rule the day. For this reason, Allen's call for private lives to stay private may well be counterproductive.

II. THE LIMITS OF GOVERNMENT

In calling on government to validate private choices without hearing the stories of individuals whose privacy is constrained, Allen commits a second type of error. While it may be that privacy and private choice cannot flourish simultaneously without enlightened governmental action, Allen never considers how courts and elected officials shape public policy. After all, limitations on religious observance, same-sex relationships, abortion, and the like are the handiwork of elected government (often with the judiciary's blessing). For that reason, rather than hope that government will get it right,²⁶ liberal liberals, like Allen,

23. *Id.*

24. *Id.*

25. *Id.* In contrast, Powell joined the majority opinion in *Roe* because, while in private practice, he "was moved" by the tragedy of a firm employee whose girlfriend had died at the hands of a back-alley abortionist. See David Westin, *Eulogy*, *TIME*, Sept. 7, 1998, at 29.

26. While recognizing that "one legitimately worries that public policies will penalize certain behaviors unfairly" and, correspondingly, that "[f]ear of a government misstep is sometimes a reason for recommending government inaction," Allen nonetheless argues for "public policymakers [to] begin to take account of the cumulative effects of eroding privacy tastes and expectations, and weigh the risks of either doing something or doing nothing." Allen, *supra* note 1, at 755-57. In asking government to "weigh the risks" without specifying how government should "take account

should take into account the social and political forces that animate governmental decisionmaking.

Compare, for example, the ways in which supporters of the Defense of Marriage Act (DOMA)²⁷ and opponents of Supreme Court nominee Robert Bork spoke of marriage and parenting in advancing their conflicting agendas. Bork opponents sought to "pluck the heartstrings of [the] middle class" by having abortion subsumed into the larger issue of privacy.²⁸ This strategy was implemented in a full-page ad that appeared in *The Washington Post*, *The New York Times*, and other newspapers on the eve of Bork's Senate testimony, September 14, 1987.²⁹ Sponsored by Planned Parenthood, the ad warned that the stakes of the Bork nomination were "[d]ecades of Supreme Court decisions uphold[ing] your freedom to make your own decision about marriage and family, childbearing and parenting" and that "[i]f the Senate confirms Robert Bork, it will be too late. Your personal privacy, one of the most cherished and unique features of American life, has never been in greater danger."³⁰

DOMA supporters likewise cautioned against radical changes in marriage and parenting. In stark relief to anti-Bork forces, however, the villain was judicially created privacy rights. Specifically, fearful that courts would "redefine marriage" and thereby fuel the flames of hedonism, narcissism, and self-centered morality,³¹ DOMA proponents fought fire with fire, speaking of heterosexual marriage as "the sure foundation of all that is stable and noble in our civilization," including "responsible procreation and child-rearing."³² In other words, by placing same-sex couples out

of the cumulative effects" of eroding tastes for and expectations of privacy, however, Allen ultimately leaves it to government to do what it thinks best.

27. H.R. REP. NO. 104-664, at 12, 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2916, 2916-17.

28. MICHAEL PERTSCHUK & WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 257 (1989) (quoting historian James McPherson).

29. See Planned Parenthood, *Robert Bork's Position on Reproductive Rights: You Don't Have Any*, WASH. POST, Sept. 14, 1987, at A9.

30. *Id.*

31. Marc Sandalow, *Washington: A Village of Different Viewpoints*, SAN FRANCISCO CHRON., Dec. 29, 1996, at 9, *available in* 1996 WL 3234261 (quoting DOMA sponsor Bob Barr (R-Ga.)).

32. H.R. REP. NO. 104-664 at 12, 13, *reprinted in* 1996 U.S.C.C.A.N. 2916-17; see

of the mainstream, DOMA supporters—like the opponents of Robert Bork before them—plucked at the heartstrings of the middle class.

DOMA's passage and Bork's defeat, of course, underscore the power of interest groups (with the backing of public opinion polls) to get their way. More significantly (at least for Anita Allen), Congress's willingness to embrace sharply conflicting views of private choice casts doubt on the government's ability to value privacy when privacy is valuable and regulate it when it is not. When it comes to elected officials, this conclusion seems no more than a statement of the obvious. Yet it applies with equal force to judges. Witness, for example, *Planned Parenthood v. Casey*.³³ By manipulating stare decisis limitations to reaffirm abortion rights and simultaneously gut *Roe*'s stringent trimester test, the Court placed politics ahead of principle. In particular, no longer willing to pay the price for its absolutist ruling in *Roe*, the Court sought to win popular approval by steering a middle ground on abortion rights. Remarkably, the Court came close to conceding this point. Acknowledging that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary,"³⁴ the Court seemed to believe that "the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions."³⁵ This emphasis on public acceptance of the judiciary seems proof positive that Supreme Court Justices, while not necessarily following the election returns, cannot escape those social and political forces that engulf them.

The point of all this is rather obvious: Big Brother cannot be trusted. For liberal liberals, like Allen, it is risky business to call

also John E. Yang, *House Votes to Curb Gay Marriages; Bitter Debate Precedes Lopsided Outcome; Clinton Would Sign Bill*, WASH. POST, July 13, 1996, at A1 (quoting Representative Steve Largent's (R-Okla.) declaration that "no culture that has ever embraced homosexuality has ever survived"):

33. 505 U.S. 833 (1992).

34. *Id.* at 865.

35. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 715 (1994). Lou Fisher and I have made a similar claim in another essay. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 91-98 (1998).

on government to strike a healthy balance between good and bad privacy. While government may facilitate private choice through funding and other measures, it is at least as likely that government will set limits on private choice. Indeed, the saga of abortion rights makes clear that government—including the judiciary—is at least as likely to restrict private choice as it is to protect it. For this reason, even if Allen is correct in suggesting that government intervention is necessary to protect privacy from itself, she nevertheless commits error both in pooh-poohing “preaching and teaching” as “simply . . . too difficult” and in failing to define the contours of how government should act.³⁶

III. THE LIMITS OF PHILOSOPHER KINGS AND QUEENS

That politicians (including judges) and interest groups behave, well, like politicians and interest groups, of course, comes as no surprise. What is surprising, I think, is the belief that any individual has the capacity to sort out the parameters of a regulatory scheme that appropriately values privacy of choice and privacy. Consider, for example, Anita Allen—a talented, thoughtful, well-meaning philosopher queen if there ever was one. Up until now, I have focused on practicalities—that is, problems that elected government may have in putting Anita Allen’s vision of privacy into effect. But what if she is wrong? For three quite distinctive reasons, I find some of Allen’s suggestions problematic.

First, Allen might be willing to regulate out of existence good kinds of privacy. Cybersex (something that clearly troubles Allen³⁷), for instance, offers “a [safe] place for sexual reconstruction” and, as such, appeals to “good kinds of privacy—that is, privacy that allows persons to form and revise their identities and to form associations.”³⁸ In other words, the dignitarian and consequentialist benefits of privacy of which Allen speaks may not support government regulation of the kind Allen has in mind.

Second, combatting bad forms of privacy—child abuse, for example—may require a more intrusive governmental presence

36. Allen, *supra* note 1, at 735.

37. See Allen, *supra* note 1, at 730-31 & nn.32-35.

38. McClain, *supra* note 5, at 793.

than Allen would allow. It is not enough to say that the *DeShaney* problem ("public neglect of private violence"³⁹) can be solved by making "better use of evidence."⁴⁰ Because parental rights can be terminated only if there is clear and compelling evidence of abuse,⁴¹ it may be necessary for the state to monitor (through social service worker visits) homes where abuse is suspected. Indeed, these visits may well be necessary to collect the type of evidence of which Allen speaks.

Third, the cause of our diminished expectation of and taste for privacy may be linked to the rise of the regulatory state and, consequently, proposals to cure this problem through regulation seem backwards.⁴² Put simply: the bigger the public sphere, the less we look to the family and other private arrangements to define our lives. Instead, we see our lives as public and, consequently, have a diminished expectation of privacy.⁴³ The willingness of liberal liberals at times to call for government regulation of bad forms of privacy and speech is emblematic of the pervasiveness of big government and, with it, our proclivity to look to government as a panacea for whatever ill befalls us.⁴⁴

* * *

How much privacy is appropriate? I, for one, do not have a clue. I suspect, however, that others cannot come up with the golden pass key, whether they be politicians affected by interest group pressures or theorists who only care about getting the right answer. In other words, while Anita Allen's instincts might well be better than mine, I am nonetheless skeptical of Allen's

39. Allen, *supra* note 1, at 746 (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

40. *Id.*

41. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

42. Thanks to John McGinnis for suggesting to me a link between big government and our reduced taste for privacy.

43. Combusting with this tendency, the communications explosion (e.g., the Internet, cable television) has called attention to this decline in privacy in ways that were unimaginable a decade ago. See Allen, *supra* note 1, at 730.

44. See Neil A. Lewis, *Switching Sides on Free Speech*, N.Y. TIMES, Apr. 26, 1998, at 4-1 (noting the changing views of some liberals as to whether government should regulate certain forms of speech).

suggestion "that regulatory measures aimed at curbing the culture of exposure . . . [could] be consistent with liberal values."⁴⁵ From my vantage point, when the appropriate policy is undiscernible, the best solution is to leave the government out.

45. Allen, *supra* note 1, at 753. Allen, too, is skeptical but nevertheless encourages government to pursue "a fresh line of thinking about privacy, culture, and regulative norms." *Id.* at 757; *see also supra* note 26 (criticizing Allen's proposal that government "take account of the cumulative effects" of eroding tastes for and expectations of privacy).