



# Privacy and Democracy

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right can be resolved in the first instance by thinking about familiar democratic rights - whether legal or moral.

That, I hope, is enough clarification to be going on with, and it is now time to turn to the problem of what value, if any, privacy might have for a democratic society.

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## **Chapter I: Privacy and Democracy**

There are at least two ways to think about the value of anything, including privacy. The first is to treat it as instrumental to something else, which one knows or assumes is valuable; and the second is to treat it as intrinsically valuable, or valuable for what it is, rather than what it does. Conversely, we can think that something is bad because its consequences are bad in some way, or because we think it is bad even if, as sometimes happens, it is a bad thing which occasionally yields good consequences. We may feel that way about lying or cheating, for example. On the other hand, we might believe that a charitable disposition is intrinsically good or praiseworthy even though its consequences are not always beneficial.

This four-fold division captures the main ways for thinking about privacy and there is something to be said for each of them. For example, philosophers like Stanley Benn and Jeffrey Reiman associate our willingness to grant other people privacy with respect for them, and see this as the heart of a non-consequentialist account of privacy's value.<sup>10</sup> What is morally wrong with staring at the victims of accidents on the motorway, they imply, is not that this brings motorway traffic to a crawl, or causes needless traffic jams, but that such behaviour inappropriately treats people who may be frightened, injured, even dying, as objects of idle curiosity, speculation and exclamation by those driving by. The appeal of such views is that it seems to explain why privacy can be valuable even though the consequences of wrongful invasions of privacy may differ widely, because people differ in their tendency to be upset by the tactless or intrusive behaviour of others, and differ in the degree to which they are willing to expose their lives, bodies and possessions to others.

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<sup>10</sup> Stanley I. Benn, 'Privacy, Freedom and Respect for Persons' in ed. Schoeman, pp. 223- 244; and Jeffrey H. Reiman, 'Privacy, Intimacy and Personhood', pp. 300-316 in the same volume.

By contrast, James Rachels thinks that the value of privacy largely comes from the way it enables us to distinguish friends from colleagues and lovers from doctors.<sup>11</sup> Assuming that the ability to make such distinctions is desirable, he argues that privacy is valuable because it enables us to disclose and withhold information about ourselves in different ways and to different degrees, thereby enabling us to be business-like and professional with some people, and loving and nurturing with others. The implication of Rachels' account of privacy – like that, more recently, of Thomas Nagel – is that if privacy did not enable us to distinguish what we do and say in different situations, there would be no particular reason to value it.<sup>12</sup> Nor would there be any reason to think privacy valuable, on their view, if we conclude that the desire to be or say different things in different situations was undesirable – evidence of deceit, hypocrisy, fear or inauthenticity, say – rather than evidence of social sensitivity, respect and tact. So, one of the nice things about this account of privacy is that it seems to capture a common belief that if privacy is valuable, it is because it does something good, although the desire for privacy is sometimes morally discreditable.

There are, however, characteristic difficulties in constructing instrumental and intrinsic arguments about value, and these difficulties are reflected in current debates on privacy. The main difficulty with instrumental arguments about privacy, is that even if privacy has beneficial consequences, this may not be a reason to value *privacy*, rather than its *consequences*. There may be other ways of achieving those beneficial consequences and these may have more attractive features or fewer defects than privacy. Or, it may be hard to determine how often, or how reliably, privacy produces these good consequences, in part because it is hard to determine the precise boundaries or characteristics of privacy. Very often, we also lack the empirical evidence necessary persuasively to resolve questions of cause and effect. So, the characteristic difficulty with instrumental arguments is that we can value the consequences that something produces without being sure that this is a reason to value the way it was produced.

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<sup>11</sup> James Rachels, 'Why Privacy is Important' in ed. Schoeman, pp. 290-299.

<sup>12</sup> Thomas Nagel's essay 'Concealment and Exposure', first published in the journal *Philosophy and Public Affairs*, is also available in a collection of essays and book reviews, many of which are concerned with issues of privacy, called *Concealment and Exposure and Other Essays*, (Oxford University Press, 2002).

Thomas Nagel's interesting account of the political importance of privacy faces these difficulties. Nagel believes that the breakdown of established conventions of privacy, since the 1960s, has led to two undesirable results. On the one hand, he thinks, political analysis and debate has been displaced by political gossip about the loves, personal habits and foibles of politicians and public officials while, on the other hand, greater understanding of the complexity and ambivalence of people's sexual lives and desires has been impeded by the rather infantile level of public discussion of sex.<sup>13</sup> On this view, privacy is valuable mainly for the good consequences to which it gives rise: the ability to focus on things that matter, rather than being overwhelmed or distracted by trivia, or seduced by reductive and simplistic ideas about people's character, based on sensational or prurient claims about their sexuality.

However, the factors shaping contemporary political debate and analysis may have less to do with changing norms of privacy, or any overall 'loss' of privacy since the 1960s, than with changes in the ownership, economics and regulation of the media, which have made it increasingly difficult to keep newspapers afloat financially, and have forced even 'highbrow' television and radio channels to compete for audience share and advertising revenue with more popular stations. Were this so, there would be no particular reason to expect respect for privacy to affect the quality of political debate – whether for good or ill. Indeed, in the UK, where people are more tolerant of homosexuality than they once were, and increasingly hostile to press efforts to expose the homosexual experiences or relationships of politicians, the appetite for serious political analysis seems no greater than it was twenty years ago, when people were far more censorious about homosexuality. So, Nagel's claims about the value of privacy depend on a causal link between privacy and the quality of public debate which is quite tenuous and hard to substantiate.<sup>14</sup>

However, claims that privacy is intrinsically valuable have their own characteristic problems. The familiar problem, which most of us will have encountered at some point, is the difficulty of persuading others that something is valuable when they do not find it valuable at all. The

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<sup>13</sup> In addition to his essay, 'Concealment and Exposure', readers may be interested in his on-line debate in *Slate* with the American journalist, Michael Kinsley, sparked by 'the Monica Lewinsky Affair', or US President Clinton's sex life. <http://www.slate.com/id/3627>

<sup>14</sup> Sue Mendus has an interesting critique of Nagel's desire to reinstate clear differences between the private and public aspects of the lives of philosophers and artists in 'Private Faces in Public Places' in *The Legacy of H.L.A Hart: Legal, Political and Moral Philosophy*, eds. Matthew Kramer et al. (Oxford University Press, 2008) 2299-315.

less familiar, but no less difficult, problem is that if we have conflicting pictures of value in mind, what I describe as intrinsically valuable may appear an example of instrumental value to you. People can distinguish one value from another in a variety of different ways, thereby affecting what counts as an example of intrinsic, rather than instrumental, value. Those who believe that privacy is intrinsically valuable, therefore, face a familiar set of difficulties in substantiating their arguments, although these difficulties may have less to do with the nature of privacy, *per se*, than with the difficulty of substantiating claims about intrinsic value.

For example, Jeffrey Reiman wants to show us that privacy is intrinsically valuable, rather than desirable because it produces *other things* which are valuable. But getting this argument to work requires us to agree *both* that the things which Reiman thinks are valuable are, indeed, valuable, and that they instances of *privacy*, rather than of something else. ‘Privacy is a social practice’, he explains. ‘It involves a complex of behaviours that stretches from refraining from asking questions about what is none of one’s business to refraining from looking into open windows one passes on the street, from refraining from entering a closed door without knocking to refraining from knocking down a locked door without a warrant...Privacy is an essential part of the complex social practice by means of which the social group recognizes – and communicates to the individual – that his existence is his own’. So, Reiman’s way of dealing with the difficulty of showing that privacy is intrinsically valuable is to identify something which he assumes we will readily agree to be valuable – our ability to see ourselves as moral persons or agents – and then to describe privacy as one of the elements, or constituent parts, of this valuable thing.<sup>15</sup>

This is a subtle and appealing account of privacy and its importance, and helps to explain why we can value privacy even if we have nothing to hide – when we’re not preoccupied with keeping secret some nefarious or shameful past, some mortifying experience or embarrassing beliefs or conduct. However, the special importance of *privacy* to the process by which human infants are turned into moral agents is not wholly clear, because most of our rights convey, to some degree, the idea that there are certain things which people may not do to us, even for our own good. So, it is hard to know whether it is *privacy*, rather than freedom of

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<sup>15</sup> Jeffrey H. Reiman, ‘Privacy, Intimacy and Personhood’ in ed. Schoeman, p. 310

expression, or John Stuart Mill's freedom of tastes and pursuits,<sup>16</sup> which makes it apparent that our bodies, minds and tastes are our own. Hence, even if we grant Reiman's assumption that it is desirable for people self-consciously to see themselves as moral agents, rather than to act morally without self-consciousness, we may wonder whether he has adequately described and explained the reasons to value privacy.

It can be remarkably difficult to show that privacy is valuable, then, whether we try to explicate that value in terms of the good consequences which we associate with privacy, or with a value that we identify with its peculiar features, or properties. However, critics of privacy face comparable problems in substantiating their arguments. Thus, in a famous article, Catherine MacKinnon claimed that

'It is probably not coincidence that the very things feminism regards as central to the subjection of women – the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate – form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identify, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced'.<sup>17</sup>

But while MacKinnon is right that legal protections of privacy have often had these effects, it is less clear that this makes privacy inherently, and irremediably sexist, as she implies. On the contrary, many feminists have been moved by Virginia Woolf's claim, in *A Room of One's Own*, that women's lack of privacy has been a major obstacle to their self-development and self-expression and a potent sign of their second-class status.<sup>18</sup> So, one could think that MacKinnon is largely right about the way that established philosophical and legal views of privacy have disadvantaged women compared to men – in part, by denying them privacy

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<sup>16</sup> For Mill's passionate defence of the importance of 'freedom of tastes and pursuits' see ch. 3 on individuality in his wonderful short book, *On Liberty*. This can be found in different scholarly editions, and is available for free on-line at <http://www.bartleby.com/130/>

<sup>17</sup> Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, MA) p.101.

<sup>18</sup> First published in 1928, Virginia Woolf's little book is readily available, as is her essay *Three Guineas*, published in 1938, mocking the institutions of higher education, church and army from which women were excluded, but which still eagerly solicited women's support.

within their marital and sexual relationships – without supposing that this is unalterable or an inescapable feature of claims about privacy.<sup>19</sup>

We therefore seem to be faced with the question whether it is possible to draw any conclusions about the value of privacy, or will we just find that any claims we make about its value – however tentative and provisional- are doomed to failure? The answer to the first question, I think, is ‘yes’, and to the second question, is ‘no’. Specifically, I will suggest that we can construct a democratic perspective on privacy out of fairly familiar ideas about what makes governments democratic rather than undemocratic, and some widely shared assumptions about the reasons to favour the former over the latter. This will give us some much needed points of agreement with which to examine competing claims about the nature and value of privacy, and can help us to see which disagreements about privacy we might be able to resolve, and what types of information, reflection or action we would need to resolve them.

So, let’s start by looking at the different reasons to value privacy implicit in democratic protections for secrecy in voting. Although the secret ballot was once deeply controversial, it is now generally assumed to be an essential feature of democratic government – in fact, as essential as the right to vote itself. So, reflecting on why people ought to be entitled to seclusion, anonymity and secrecy when voting, rather than having to ‘stand up and be counted’, can help us to understand why privacy might be valuable, and what that value has to do with democratic ideas about freedom, equality and happiness.<sup>20</sup>

### *The Secret Ballot*

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<sup>19</sup> I develop this argument in more detail in ‘Must Privacy and Equality Conflict? A Philosophical Examination of Some Legal Evidence’ *Social Research: An International Quarterly of the Social Sciences*, 67.4. (Winter 2000) 1137-1171; ‘Feminism, Democracy and the Right to Privacy’, *Minerva* 9. (Nov. 2005) available at <http://www.mic.ul.ie/stephen/vol9/Feminism.pdf>; and ‘Privacy Rights and Democracy: A Contradiction in Terms?’ *Contemporary Political Theory* 5. 2. (May 2006) 142-162.

<sup>20</sup> For an alternative way of approaching the role of privacy in a democratic society see Corey Brettschneider’s *Democratic Rights: The Substance of Self-Government*, (Princeton University Press, 2007), ch. 4. My main difficulty with this interesting and important book is that its view of democracy seems excessively American and liberal, with its emphasis on the values of political autonomy, equality of interests and reciprocity, and American debates on the constitutional right to privacy.

The standard justification for the secret ballot is that it is necessary in order to prevent corruption and coercion from undermining the fairness of elections. The secret ballot enables people who want to discuss their vote to do so – they are free to tell anyone they want how they voted, and to urge others to vote likewise. Hence the secret ballot compatible with freedom of expression, including the freedom to ask other people how they intend to vote, or how they have voted. However, the secret ballot means that people are free to refuse to answer such questions, and cannot be legally required to do so. Prior to its introduction, voters were often faced with efforts to bribe, coerce or intimidate them into voting one way rather than another. The secret ballot does not wholly preclude such efforts, but makes them much less likely to succeed and, therefore, much less likely to occur. So, the standard justification for the secret ballot reflects the important point that there is an instrumental justification for the secret ballot, one which has nothing much to do with the value of privacy per se, and everything to do with the importance of preventing bribery and intimidation from wrecking democratic elections.

Still, the obvious advantages of the secret ballot in combating bribery and intimidation should not blind us to the difficulties of treating the secret ballot as justified *only* for this reason. Were the secret ballot justified only because it protects us from bribery and intimidation, we would have to suppose that, in their absence, there would be nothing wrong with forcing people to discuss their voting intentions and acts with anyone who asks. In fact, it was precisely because he believed this that, after much agonising, Mill voted against the secret ballot, on the grounds that by the 1860s voters should have no serious fear of bribery or intimidation, and could be expected to stand up to pressure from others.<sup>21</sup> More recently, Geoffrey Brennan and Phillip Pettit have argued that the secret ballot is undesirable, although sometimes necessary.<sup>22</sup> So, if the standard justification for the secret ballot is correct, we would have to concede, with Mill, Brennan and Pettit that there would be no objection to getting rid of it were it not that we were worried for the safety of voters and the fairness of elections.

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<sup>21</sup> Those interested in Mill's ideas on the secret ballot, and on politics more generally, may want to look at Nadia Urbinati's *Mill on Democracy: From the Athenian Polis to Representative Government*, (University of Chicago Press, 2002). Mill's views on the secret ballot can be found in ch. 10 of his *Considerations on Representative Government*.

<sup>22</sup> Geoffrey Brennan and Philip Pettit, 'Unveiling the Vote', *British Journal of Political Science* 20.32 (July 1990) 311-33



This seems unlikely. Arguments for open voting suppose that because we can harm others by our vote, and vote on mistaken or immoral considerations, we should be forced to vote openly. That way, others can correct our mistakes and the prospect of being exposed as selfish, insensitive or stupid will promote morally sensitive and considered voting. However, open voting will only improve the quality of voting if there are enough other people willing and able to correct, rather than to ignore or approve, our defects. And, of course, we must assume that people who are immune to information and arguments when they are free not to listen to them will prove willing and able to accept them when forced to do so. So the case for open voting is problematic even if we abstract from problems of coercion and intimidation.

But the most serious problems with open voting lie elsewhere, and highlight the importance of privacy to democratic citizenship. Democratic citizens are *entitled* to vote whether or not others approve of this, or of their likely voting patterns. They are entitled to a say in the way that they are governed whether they are rich or poor, well educated or not. By contrast, no one has a right to represent others politically unless they have been selected for the task. While democratic legislators may be more vulnerable to intimidation than citizens – as they are relatively few in number, and hold special power and authority *qua* legislators - it is the former, not the latter, who must vote openly, not secretly. Legislators have duties of accountability that citizens lack. That is why the former have a duty to vote openly, although citizens, like legislators, can vote wrongly whether through fear, greed, carelessness, confusion or ignorance.

Secret voting for citizens, then, reflects an important democratic idea: that citizens' rights to vote does not depend on the approval of others, or on the demonstration of special virtues, attributes or possessions. While democratic rights to freedom of expression and association mean that citizens are free to consult anyone they want, the secret ballot means that they can share in collectively binding decisions without having to bare their souls to anyone who asks.

This, I think, is the core reason why the secret ballot is justified, and is justified even if secrecy comes at some cost to the wisdom, transparency and morality of decisions. However, there is a second reason why the secret ballot is so important from a democratic perspective which, like the first, connects the value of privacy to membership in a democratic society.

Advocates of open voting assume that public shaming can be used to prevent and punish careless, selfish or ignorant voting. But while it is possible that open voting might, on balance, improve the quality of voting, both public shaming and the threat of public shaming are hard to justify for wrongful voting. The problem is this: that public shaming is likely to be out of proportion to the harm committed, and out of proportion to the punishments, if any, deemed appropriate in similar cases.

Public shaming is a blunt instrument, and likely to fall hardest on those who are unpopular, poor, shy and inarticulate, rather than on those who have committed the worst offences. Nor do its punishments usually bear any relationship to the concerns for fairness, rehabilitation and prevention that constrain legal forms of punishment. So, even if it were possible that open voting really would cure careless, prejudiced or ignorant voting, it would fall foul of concerns for fairness and equality. Hence, modern democracies tend to be wary of public shaming as a way to prevent or to punish immorality: for its weight is likely to fall in ways that are morally arbitrary and that make it harder for us to see and treat each other as equals.

If these arguments are right, the justification of the secret ballot is more complicated than it first seems, both because the secret voting for citizens, as opposed to legislators, helps to distinguish their respective power and duties, and because it reflects democratic concerns for the equality, public standing and fair treatment of citizens. In a society with freedom of expression, we do not need to be forced into mini-tutorials in order to consider contrasting approaches to voting, and to our duties as citizens. Nor will we lack opportunities to discuss our doubts, raise our questions, or advocate our beliefs about politics. However, the secret ballot means that we are not forced to try to defend our view of the world to others who may be unable to understand or sympathise with it. Nor are we at risk of being turned into a public example for the edification, or merely the entertainment, of others.

### *Privacy and/or democracy?*

The example of the secret ballot shows us that privacy can be important to people's freedom and equality even though protection for privacy means that we cannot prevent or punish all thoughtless, selfish, ignorant or exploitative behaviour. It shows us that privacy can be particularly important if the shy, unpopular, eccentric and vulnerable are to be able to

participate in events of national importance, even though it is hard to know how far, in its absence, most citizens of representative democracies would suffer from threats of coercion or corruption. Finally, we have seen that the secret ballot reflects, and publicly embodies, the belief that most citizens, most of the time, can be trusted to exercise their rights and duties without being subjected to enforced tutorials, or intrusive public scrutiny of their intentions, beliefs and interests.

But can we really value privacy *and* democratic government? Does not the example of the secret ballot provides a misleading, rather than helpful, guide to the value of privacy, suggesting that privacy is more important to democratic government than it really is? After all, even in the case of the secret ballot, it seems that privacy places fairly severe constraints on the information we can demand of others, and of our ability to publish true facts about them. Yet freedom of expression, and of the press are, by common consent, essential ingredients of democratic government, enabling us to hold the powerful to account for their actions, to publicise our beliefs and opinions about the proper conduct of public affairs, and to inform and freely debate matters that shape our lives as a society, and as individuals. While much of the information we need to discuss such matters is likely to take the form of statistical generalisations, in which people's particular characteristics and peculiarities have no salience or relevance, social scientists and historians know that the detailed study of a particular case or individual can illuminate the precise working of causal mechanisms which statistical correlations alone will not reveal, and may provide a vivid sense of events or problems which we might otherwise dismiss as bland, boring or trite.

What, then, can we learn about the value of privacy by considering the constraints that it places on freedom of expression? Is privacy worthless whenever it makes it difficult or impossible to publish true facts about people? If the answer we give to that question is 'yes', it looks as though we will have to kiss privacy goodbye, and conclude that the secret ballot is no guide at all to the value of privacy. If, on the other hand, we decide that the answer is 'no' – that privacy can be valuable even if it sometimes conflicts with the discovery and dissemination of true information – what conclusions, if any, can we draw about the importance of privacy, and of the best way to protect it in democratic societies?

In order to answer these questions I suggest we start by exploring the ethics of 'outing' – or the publication, without consent, of true facts about a person's sexual orientation. We can

then generalise the example to consider the publication, without consent, of true information about people's health or conduct more generally and, from there, try to draw some conclusions about the nature of people's interests in privacy, and their implications for freedom of expression and freedom of the press.