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On Privacy ¹

Introduction

Annabelle Lever

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Privacy is a Janus-faced value. It enables us to shut the world out, but the forms it takes and the extent to which it is protected are fundamentally public matters. Not surprisingly, then, privacy and its protection are the object of some of our most intractable conflicts over the proper role of the state and the rights and duties of individuals.

This book explores the Janus-faced features of privacy, and looks at their implications for the control of personal information, for sexual and reproductive freedom, and for democratic politics. It asks what, if anything, is wrong with asking women to get licenses in order to get pregnant and have children, given that pregnancy and childbirth can seriously damage your health. It considers whether employers should be able to monitor the friendships and financial affairs of employees, and whether we are entitled to know whenever someone rich, famous or powerful has cancer, or has had an adulterous affair. It considers whether we are entitled to privacy in public and, if so, what this might mean for the use of CCTV cameras, the treatment of the homeless, and the provision of public facilities such as parks, libraries and lavatories.

Above all, the book seeks to understand whether and, if so, why privacy is valuable in a democratic society, and what implications privacy has for the ways we see and treat each other. 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 government as well. Hence, this book argues, although privacy is an important democratic value, we can only realise that value if we use democratic ideas about the freedom, equality, security and rights of individuals to guide our understanding of privacy.

¹ ACKNOWLEDGEMENTS: Sarah Richmond, Matt Finkin, Jeffrey Reiman, Nicolas Vrousalis, Axel Gosseries and Jonathan Wolff, all read parts of this book in manuscript and used their expertise to improve it. Joshua Cohen and Melissa Williams have provided much-needed advice over the many years since I first started writing on privacy as a graduate student. I am very grateful to them all, as I am to my kind editors at Routledge, and especially to Andrew Beck, who have been models of patience and understanding and a fount of good advice. I would also like to thank John Harris and the members of the Institute of Science, Ethics and Innovation, the University of Manchester, for a fellowship that enabled me to write most of this book in a lively and supportive setting, and Philippe Van Parijs and the members of the Chaire Hoover at the Catholic University of Louvain, who invited me for a three month visit. An invitation to join the Political Science Department, at the University of Geneva came as I was finishing the last part of this book, and has made finishing it so much easier. In a book on privacy it is fitting, as well as pleasure, publicly to thank my parents, siblings, partner and children for their support and forbearance. DEDICATION: To Dan

This book is a political theorists' approach to privacy. It places privacy in the spotlight set by familiar ideas about politics and morality the better to understand and assess the contradictory claims about its nature, content and importance which can be found in the ever-growing number of books and articles on the subject. Ranging from the highly abstract and speculative to the detailed analysis of particular laws and regulations, the ordinary reader (or philosopher) is likely to be bewildered by their variety, and the seeming impossibility of fitting them together into a coherent picture.

I cannot promise to provide this coherent picture, but I hope to supply a sketch of the subject so that readers can extend and fill it in for themselves. I have tried to keep the scholarly apparatus of footnotes to a minimum, so references at the bottom of the page provide links to on-line information, and to books and articles that might interest non-specialists. My hope is that readers who are not academics will be able to enjoy the book without much difficulty, but that its ideas and method will be sufficiently novel to please those who are already have some expertise on the subject.

Section 1 looks at the reasons why intelligent, well-meaning and thoughtful people disagree about the nature and value of privacy, and considers how the secret ballot – once condemned as inimical to political freedom, now a staple of democratic government – might help us to approach these disagreements. Section 2 looks at the ethics of outing – or the publication without consent of true personal information - and shows that privacy protections for confidentiality, anonymity and seclusion can enhance, rather than undermine, freedom of expression and democratic politics. Section 3 looks at the implications of privacy for sex, reproduction, and the family and shows why the right to live with, and to look after, those we love is central to a democratic perspective on privacy. Finally, Section 4 examines the relationship between privacy and property ownership, and its consequences for social cooperation.

However, first, we need some philosophical scene-setting. Dramatists start their plays with a little preface such as this: 'It is the 1950s. Annie, who is 5 ft. 2 and sitting, knitting by the window...' For philosophers, scene-setting principally consists in comments on terminology and working assumptions – but the general purpose is the same: to prepare the mind's eye for

the action that follows, and to make it easier to understand the plot as it unfolds. I hope that the following remarks will serve both purposes.

Defining and Describing Privacy

A great deal of philosophical and legal debate about privacy concerns the best way to define it. Indeed, the difficulty of defining a right to privacy is, allegedly, a stumbling block to the statutory recognition and protection for a right to privacy in the United Kingdom.² This is surprising, because it is doubtful that privacy really is any harder to define than any other complex right or value. In fact, the main reason why it is hard to define privacy – the absence of a set of necessary and sufficient conditions which would enable us to identify privacy and to distinguish it from allied concepts – suggests that the fuzziness of our concepts of liberty, equality, and rights may, themselves, explain why the boundaries of privacy are hard to fix.

For example, we lack a sufficiently clear concept of liberty to decide whether your claim to prevent me from reading your diary is really a claim to liberty *rather than* to privacy.

Similarly, uncertainty about what it means to treat people as equals makes it difficult to know whether Joyce Maynard was morally entitled to publish her account of life with the famously reclusive author, John Salinger. Publication undermined Salinger's privacy, while enabling Maynard to describe aspects of her experience as a talented 18 year old writer, pursued by a distinguished, and much older, novelist.³ If the boundaries of privacy are obscure, then, this

² See, for example, this oft-quoted line from the Younger Report on privacy: 'One of the obstacles to the development of a satisfactory law of privacy has been the difficulty of definition'. Para 37, p. 10. The report notes that some people giving evidence before the Committee favoured the legal recognition of a general right to privacy, (para 34, pp. 9 – 10). However, 'this has not been the way in which English law in recent centuries has sought to protect the main democratic rights of citizens. Neither the right of free speech nor the right of assembly is embodied in statute law. Reliance has been placed on the principle that what is not prohibited is permitted and the main emphasis in the field of civil rights has been placed therefore on keeping within acceptable limits, and providing precise definitions of, the restrictions imposed by the civil and criminal law on the individual's freed of action'. The incorporation into British Law of the European Convention on Human Rights and Fundamental Freedoms by the Human Rights Act of 1998 has changed this legal situation somewhat, although in practice incorporation had been going on for a while.

³ Daphne Joyce Maynard published *At Home in the World* in 1998, which described the 10 months, in 1972, when she had lived with Salinger. In 1998 she also sold the letters which Salinger had sent her. A court case held that Maynard was entitled to sell them, but nobody was entitled to publish their content without Salinger's permission.

is partly because we are unsure how best to think about people's claims to freedom of thought, association and expression, and what it means to treat people as equals.

So, privacy is difficult to define because our ideas about allied values, such as liberty and equality, are less clear than we sometimes think. No definition of privacy will remove that problem. Still, we will need to get behind the word 'privacy', and give it more shape and definition if we are to make progress in thinking about it. So, for the purposes of this book, I suggest that we 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. Hence, thinking of privacy as some combination of these different things should help us to understand *what* people are arguing about when they argue about the value of privacy, and to understand *why* they are unable to resolve their disagreements by pointing to facts about the world or the established meaning of words.

The Different Meanings of Privacy

Privacy is associated with a variety of rather different things, typically polarised around control of personal space, personal information, and personal relationships, because privacy sets limits to the way that outsiders can interfere in our lives. Thus, some synonyms for privacy refer to seclusion, to selective access to an area such as a garden, or a house or apartment, and also to its exclusive or selective, rather than inclusive, character. When associated with control of information, synonyms for privacy centre on ideas of confidentiality, anonymity, secrecy, limited disclosure and control of access to information – whether factual, artistic, scientific, legal, religious or metaphysical. Finally, when referring to relationships, privacy is associated with the intimate, the sexual, the familial and the domestic.

These are rather different things, and though it is fairly easy to see certain practical, historical and psychological associations amongst them, the things 'privacy' refers to are not tightly related from a logical or a normative perspective. For example, private space can foster the ability to tell people we know and trust things that we would not want to share with other

people, and to share jokes, confidences and practical information in ways that enhance our ability to define and shape our relationships. But it can also prevent us from discovering who knows what about us, who has been saying what about us, and who plans to do what to us. So, privacy can foster hypocrisy, deceit and mistrust rather than frankness, mutual confidence or love; and can threaten, rather than promote, our sense of security, autonomy and tranquillity.

Nor is that all. Within each category, the things to which privacy refers seem only loosely connected to each other, which makes it hard to tell whether there is any logical or conceptual connection between the different elements of privacy, as commonly understood, or if they are just connected by happenstance, custom and convention.

For example, exclusivity can foster seclusion, whether we are thinking of exclusive clubs and dining societies, gated housing associations for the rich, or very up-market jewellery and clothing stores, with their sentries on the door and deliberately intimidating personnel.. Still, if seclusion is an attribute of exclusivity, exclusive use, access and ownership are not intrinsic to seclusion. In fact, how necessary they are probably depends on our access to public spaces like parks, gardens, roads and countryside, as well as to cinemas, museums and other public buildings which can be quite deserted and peaceful, although they are supposed to be open to all-comers.

So the different aspects of privacy, as used to refer to control of information, are not intimately connected. Nor can anyone who has much experience of the sexual, the domestic or the familial suppose that these all refer to the same thing, even if the one often leads to, and is associated with, the other. Indeed, many aspects of our supposedly intimate relationships are so bound up with complex social conventions and legal requirements that they say less about us and our desires, interests, needs and feelings than about the society we live in, and the needs or desires of others.

It is scarcely surprising, then, that some people agree with the moral philosopher, Judith Thomson, that talk of 'a right to privacy' is so confused and confusing, referring to so many seemingly unrelated things, that it would be best, instead, to refer to people's rights over their property and over their person.⁴ Nor is it surprising that the many philosophers and legal

⁴ Judith Jarvis Thomson, 'The Right to Privacy' in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand D. Schoeman, (Cambridge University Press, 1984), 272-290.

scholars who think Thomson quite mistaken nonetheless disagree about which aspects of privacy really are central to understand it as a value, or as a right.⁵

In due course, we will want to look at some of the controversy surrounding Thomson's claim that privacy is a confused and confusing way of talking about things that matter. The point of bringing it up now is not to try to resolve such debate at the outset, in so far as it is resolvable, but to explain why we should avoid committing ourselves to any particular definition of privacy at this point.

As we have seen, the term 'privacy' seems to refer to a cluster of rather heterogeneous things. It is also clear that the term can be used with linguistic propriety and effectiveness in all these different ways. So, while it would be wrong to assume that this one word really refers to one concept, rather than to a cluster of somewhat contradictory ideas, it also seems wrong to assume that what we've got is an unintelligible mish-mash that needs to be replaced entirely, or that can only be rendered coherent by radical surgery. Thus, with apologies to those who prefer philosophical investigations to be prefaced by myriad definitions, this book will not advocate or defend a particular definition of privacy, on the grounds that this task – if necessary or useful – may be easiest to accomplish once we have a better sense of the philosophical terrain involved.

Still, we are not going to get far in understanding privacy without trying to clarify our assumptions about liberty, equality, rights and democracy. As will be evident by now, none of these terms is self-explanatory and all are likely to be the object of considerable conceptual and normative disagreement.

My suggestion for dealing with this disagreement is to try to stick to fairly agreed and uncontroversial understandings of each of these terms and, where this is not possible, to explain and justify my particular assumptions about what it is to treat people as free and

⁵ The effort to 'refute' Thomson shapes most of the philosophical literature on privacy. Apart from the essays by contemporary philosophers in Schoeman's wonderful collection, the following two books are written by philosophers who think Thomson quite mistaken, although Allen identifies the critical features of privacy with seclusion and limited access to ourselves and our thoughts, whereas Inness identifies them with the protection of relationships of love and care. See Anita Allen's *Uneasy Access: Privacy for Women in a Free Society* (Rowman and Littlefield, New Jersey, 1988); Julie C. Inness' *Privacy, Intimacy and Isolation*, (Oxford University Press, 1992). Judith Wagener DeCew provides a helpful guide to these debates in *In Pursuit of Privacy: Law, Ethics and the Rise of Technology*, (Cornell University Press, 1997) and in her entry on privacy for the Stanford Encyclopedia of Philosophy, which is free and can be found on-line at <http://plato.stanford.edu>.

equal, or what it is to protect, rather than undermine, people's rights. What we need is enough clarity to understand disputes over the relationship of privacy to liberty, equality, security and solidarity without engaging all the exciting, complex, frustrating and perhaps irresolvable disputes which preoccupy specialists. So, before wrapping up this introduction, I will say something briefly about the way I will be approaching the terms democracy, liberty, equality and rights – as these are essential tools for our investigation of privacy.

Democracy

Just as privacy has many meanings, whose merits are controversial, so with most of the other concepts with which we will be concerned in this book. Democracy, for example, has been used to describe the government of Athens, when it was a slave-owning city-state which excluded women from citizenship. Alexis de Tocqueville used the word to describe modern societies that had broken down feudal social distinctions - between nobles, free-men and serfs, for example - and were increasingly breaking down distinctions of sex, race and class, even if, as in nineteenth century Britain, they still lacked universal suffrage or 'one person, one vote'.⁶ However, I will 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 – although the extent to which democracies must have formal systems of law, and distinctive legal institutions, is by no means settled. Still, whether democracies have the clear separation of powers that Americans aim for, and whether or not they make room for customary law of various sorts, I assume that democracies must have well-known and generally effective protections for political, civil and personal freedoms of association, expression and choice. Democracies on this picture can take many forms – some will look more like Brazil or India, others more like Sweden, Switzerland, Italy or America. However, allowing for the familiar gaps between ideals and reality, they will all entitle people to form a variety of associations through which to advance

⁶ Alexis de Tocqueville's wonderful *Democracy in America*, published between 1835 and 1840, is an extended meditation on the 'equality of social conditions' he saw in America, and its consequences for social life and culture, as much as politics. It is readily available, in many different editions, and can be found free on the internet at <http://www.gutenberg.org/files/815/815-h/815-h.htm>

their interests, express their ideas and beliefs, and fulfil their duties as they see them. Democracies, therefore are characterised by protection not just for political parties, unions, interest groups and churches but also by the protections they secure for soccer-clubs, scientific societies, families, charities, and associations of the like-minded.

As we will see, controversy over privacy importantly turns on the implications of protecting privacy for family life, the regulation of the economy and the security of the state. So we will be unable adequately to understand the nature and justification of that conflict, or the extent to which it might be resolvable, unless we recognise the variety of forms of association, expression, identification and choice which characterise modern democracies. Later, we will need to think a bit more about which political, civil and personal liberties we think people should have, in order to decide whether or not the consequences of valuing privacy are acceptable, unacceptable or positively desirable. At that point, I will suggest that we refine our picture of democracy, using familiar assumptions about the distinctive features of democratic government, and familiar assumptions about the different liberties, opportunities and rights that democracies require, permit or might come to espouse.

For example, I will suggest that we use the secret ballot - or the freedom to cast our votes in private - as an example of a democratic liberty, both because it is now almost as uncontroversial a feature of democratic government as universal suffrage itself, and because it reflects two ideas critical to contemporary democratic theory and practice. The first is that citizens with no special virtues, knowledge or resources are entitled to an equal share in government. The second, is that democracy is a competitive as well as a cooperative business; so while we all share interests in being governed democratically - at least, as compared to the alternatives - we may have rather different ideas about which of the competing candidates for political office deserve our allegiance or support and may stand to gain or lose a good deal depending on which party or set of individuals comes to power as a result of a democratic election. So, using this familiar and pretty uncontroversial example of a democratic right, and familiar assumptions about democratic government should make it easier to investigate the value of privacy, and the controversy surrounding it.

Freedom/liberty and equality

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. Thus, Aristotle thought that slavery was consistent with equality, because he assumed that there were natural slaves and natural masters.⁷ Some people, like Robert Nozick, have wanted to define freedom in such a way that people could freely engage themselves to be the slaves of others. Nozick’s understanding of freedom, in other words, included being a slave, on condition that one had voluntarily given up one’s freedom under suitable conditions.⁸ This claim strikes many people as unreasonable, because slavery seems like the antithesis of freedom, not an instance of it. Those of us who think that way will, therefore, need to find some other way of understanding freedom.

The trouble is that rejecting Aristotle’s account of equality and Nozick’s account of freedom still leaves us with a myriad plausible, but mutually inconsistent, ways of thinking about what it is to be free, and whether or why freedom matters. If we are to make progress in understanding *privacy*, however, we are going to have to make some simplifying assumptions here, too. The ones I suggest that we make are these: 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.

We will, in due course, have to decide what these are - but, for now, I think we can assume that if the right to choose your government and the right to stand as a member of that government are examples of democratic freedoms, they are also examples of democratic equality, because these are freedoms to which people are equally entitled, or which belong as much to the poor and the newly-naturalised citizen as they do to the rich and to those with a revered national pedigree. 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.

Rights: moral and/or legal

⁷ Aristotle’s *Politics* Book I, Sections 3 – 7.

⁸ Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974) p.331. For an excellent explanation and evaluation of Nozick’s views on liberty, and their connection to his ideas about property ownership, taxation and equality, see Jonathan Wolff’s *Robert Nozick: Property, Justice and the Minimal State* (Polity Press, London, 1991).

We are now in a position to clarify the last of our critical terms, 'rights'. The word is ambiguous, because it does not tell us whether we are concerned with legal rights or moral rights. Legal rights, unsurprisingly, are those rights which are recognised and protected by law. This is more complex than it first seems because not all rights on the statute books are enforced or will ever be enforced - some of them are there simply because it would be too much trouble to take them off the books. Nor are all legal rights statutory rights - some are constitutional and, in common law countries, such as Britain, some rights are declared by judges, reflecting on legal traditions as evidenced by custom and past judicial decisions and writings. So, what actually counts as a legal right can be a tricky business - which is why being a lawyer is a relatively well-paid profession!

However, what we need to remember is that the term 'rights' is ambiguous, because not all talk of rights refers to legal rights. Instead, some of our claims about rights refer to what we might call our 'moral rights', the rights to which we are entitled, whether or not the law actually respects and protects those entitlements. Sometimes we want to talk about moral rights to indicate what we think the law should be - or to highlight the fact that we think existing laws or governments are wrong or unjust. Thus, we may insist that people have a right to freedom of religion, even though the country that they are in recognises no such legal right and has just imprisoned a bunch of people for practising their religion. At other times, we are simply expressing the belief that people are morally entitled to something - to be treated kindly, to have their promises kept and so on - either leaving it open what the law should do about this, or assuming that the situation we are concerned with is not a legal matter at all.

The relationship of moral and legal rights, then, can be quite complicated, because the former is sometimes used as the grounds for an argument or critique of the latter. Though intuitively we might suppose that you need to establish that something is a moral right in order to show that it is a legal right, a moment's thought about speed limits and tax laws makes it clear that this is mistaken. Moral rights may set the range within which considerations of convenience, efficacy, noise-abatement, pollution, and so on determine the choice of speed limit in town and on the highway. Likewise, moral rights may set the range within which governments are entitled to choose which taxes to raise, how to raise them and at what rate to set them. Nonetheless, it would be a mistake to suppose that the reason why UK highway laws are

justified (in so far as they are justified) is because people have a moral right to drive at thirty, rather than forty, miles an hour in town, and at seventy, rather than eighty, miles on highways. On the contrary, in so far as people are morally entitled to drive at these speeds in the UK, it is because this is the legally accepted speed, recognised by law, and by the ways in which people generally behave when they are driving in the UK.

In short, one of the difficulties about the term ‘rights’ is that it can refer to both moral and legal rights, although these can be quite different things, with a rather indeterminate relationship to each other. I will, therefore, try to use the words ‘moral right’ and ‘legal right’ where necessary to avoid ambiguity. However, I will be supposing that talk of moral rights is a permissible and useful way to talk about what people are morally entitled to; and I will be assuming that at least some laws are justified. So, I assume that Bentham was wrong to think that talk of moral rights is ‘nonsense upon stilts’,⁹ even though some claims about moral rights are nonsensical or absurd; and will assume that those anarchists who think all laws are unjust are wrong, even though many laws are, unquestionably, unjust. I doubt that these assumptions will be particularly controversial for people who are interested in the nature and value of privacy - both because utilitarians can, if they wish, parse talk of moral rights as claims about what utility permits or requires; and because anarchists who are interested in privacy will be interested in many of the questions about individual, as opposed, to collective choice that will concern us here.

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. So, we can 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. We can, therefore, ask - as we will soon ask - what conclusions, if any, we can draw about people’s moral claims to privacy from the fact that democracies grant citizens a legal right to vote secretly rather than openly? At all events, problems clarifying the idea of a

⁹ For a helpful discussion of Bentham’s critique of the idea of moral rights, and extracts from Bentham’s *Anarchical Fallacies* see Jeremy Waldron’s *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 2009).

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.

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.¹⁰ 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.

¹⁰ 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.