



HAL
open science

Privacy and Democracy

Annabelle Lever

► **To cite this version:**

Annabelle Lever. Privacy and Democracy: What the Secret Ballot Reveals. Law, Culture and the Humanities, 2015, 11 (2), pp.164 - 183. hal-02506497

HAL Id: hal-02506497

<https://sciencespo.hal.science/hal-02506497>

Submitted on 12 Mar 2020

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Privacy and Democracy: What the Secret Ballot Reveals¹

Annabelle Lever

Law, Culture and Humanities, (11.2. June 2015)

The online version of this paper can be found at
<http://lch.sagepub.com/content/early/2012/10/12/1743872112458745>

This is the author's personal version of the article

Associate Professor of Normative Political Theory

University of Geneva

Annabelle.lever@unige.ch

July, 2012

Abstract: Does the rejection of pure proceduralism show that we should adopt Brettschneider's value theory of democracy? The answer, this paper suggests, is 'no'. There are a potentially infinite number of incompatible ways to understand democracy, of which the value theory is, at best, only one. The paper illustrates and substantiates its claims by looking at what the secret ballot shows us about the importance of privacy and democracy. Drawing on the reasons to reject Mill's arguments for open voting, in a previous paper by the paper explains that people's claims to privacy have a constitutive, as well as an instrumental, importance to democratic

government, which is best seen by attending to democracy as a practice, and not merely as a distinctive set of values.

Privacy is an important democratic value, and the justification for protecting a right to privacy is not reducible to the way legal protections for privacy might promote political participation. This is the central claim about privacy in Corey Brettschneider's *Democratic Rights: The Substance of Self-Government*.² According to Brettschneider, privacy is intrinsically valuable if we care about democracy, and that value is connected to the importance that a democratic society will attach to people's abilities to develop and exercise their capacities for personal reflection, judgement and action.

I wholeheartedly accept these claims, and have defended them myself, most recently in a little book, *On Privacy*.³ However, while I share Brettschneider's belief that it is important to distinguish democratic from undemocratic conceptions of privacy, I believe that his value theory of democracy unduly constrains what can count as an example of the former, in part because it arbitrarily circumscribes the values which might justify democratic practices and institutions. So while I agree with Brettschneider that there is no purely procedural conception of democracy, for the reasons described by Joshua Cohen,⁴ democratic politics and experimentation can themselves expand and change our conceptions of democracy. This means that our ideas about the values which underpin and justify democratic government cannot be ordered and neatly boxed in the ways that the 'value theory' suggests. This has implications for the ways that we think about the democratic aspects of privacy, and of the relations between the personal and political on democratic principles.

In order to make these arguments, I will start by presenting and evaluating Brettschneider's value theory of democracy, and its relationship to his critique of pure proceduralism. I will then examine the implications that he believes this has for the value of privacy, before using the secret

ballot to illustrate and substantiate my concerns with Brettschneider's conceptions of privacy and democracy. However, a word about terminology may be helpful before proceeding.

There are many different ways to think about privacy, and the best way to define a right to privacy for moral and legal purposes has dominated discussions about the value of privacy for many years.⁵ For our purposes, I think we can avoid these by thinking of people's claims to privacy as an amalgam of claims to seclusion and solitude, intimacy, domestic and familial association, confidentiality and control of personal information. Although Brettschneider is primarily concerned with the justification of what Americans call 'decisional privacy' in matters of sex and reproduction,⁶ I think it is helpful to try to connect people's interests in intimate choice with their interests in seclusion and solitude, even if we may sometimes choose to disaggregate the composite conception of privacy for various purposes.⁷

I will also be assuming that democracies can take a variety of different forms, whether we think of them in more idealistic or realistic terms. We will therefore want to avoid assuming that democracies have to fit some favoured institutional model and that there is therefore some uniquely correct answer to the question whether democracies should be presidential or parliamentary, majoritarian or consociational,⁸ or how far they need to have the formalised legislative procedures and bodies of law with which most of us are familiar. Taking seriously the idea that many different types of association and relationship can be democratic, suggests that we are likely to have a rather impoverished idea of the variety of forms that democracy can take, of which the ones we know are, at best, a subset. And taking seriously the fact that our societies are imperfectly democratic, commends modesty in taking our societies as models of democracy.

That said, we have to start our thinking from somewhere, and the place I suggest we start is with the familiar assumption that democracies are countries whose governments are elected by universal suffrage, and where people have an equally weighted vote and are entitled to participate in collective decisions, no matter their wealth, knowledge, virtue, or pedigree. However, it is

important to remember that lotteries, not elections, were considered the quintessentially democratic form of political appointment in the classical and renaissance republics.⁹ 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 entitle people to form a variety of associations through which to advance 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.

A. The Critique of Pure Proceduralism and the Value Theory of Democracy.

A proceduralist view of democracy is one which sees democratic government as a way to make, justify and execute collectively binding decisions. Democracy can therefore be compared to other ways of making, justifying and executing collectively binding decisions – whether these are theocratic, autocratic, monarchic, despotic or plutocratic or, as is often the case, some combination of them all. Because democracy is, indeed, a distinctive way of organising social life, based on distinctive ways of taking and justifying collective decisions, any credible

conception of democracy is likely to have a procedural aspect. What differentiates purely procedural views of democracy from the alternatives, however, is the idea that the only way adequately to distinguish democratic from undemocratic government is by reference to the procedures used for taking and justifying collective decisions. By implication, a purely proceduralist view of democracy implies that we cannot distinguish democratic from undemocratic governments based on the policies they uphold, or the results of those policies, nor by the ideals and values that they use to justify collective policies.

This is not simply because democracies and undemocratic forms of government may look rather similar in the ends they seek and in the way that they justify those ends – though that is certainly true. Rather – at least for contemporary proponents of purely procedural views of democracy, such as John Hart Ely,¹⁰ the problem with these other, more substantive, views of democratic government (and, therefore, of the differences between it and other forms of government), is that there are a potentially infinite variety of values, ends and ideals which informed, thoughtful, morally sensitive and democracy-supporting people might endorse, and many of these are mutually inconsistent. So, some democratic citizens think that the pursuit of truth is the most important thing in life; for others it is the pursuit of liberty; for others it is justice, and so on. The people who hold these views are not necessarily mistaken morally; nor need they be wilfully indifferent to facts. They may be quite aware that other decent, informed, thoughtful people disagree with them, and may be perfectly happy to negotiate those differences in matters of collective importance. But what they cannot do – or so the pure proceduralist believes – is negotiate with other democrats based on an allegiance to some shared ideal or set of moral values, because these are likely to be too contested to be useful.

So, the pure proceduralist believes, democracies can only justify collective decisions procedurally – by reference to the fact that they were taken in ways that are democratic – and not by reference to substantive ends desired or achieved, or by reference to certain virtues or opportunities

created and sustained. Whatever the case with other forms of government, the pure proceduralist believes, the freedom to form and debate our differences, essential to democratic politics, means that there is no extra-procedural way to negotiate the conflicts of interest, belief and value amongst democratic citizens and, therefore, no way to distinguish democratic from undemocratic policies, values, beliefs, results. Standardly, a democratic political procedure is described in terms of constitutional government plus universal suffrage and majority rule – but there is no reason why a pure proceduralist must describe the central democratic decision mechanisms this way. The key point, for our purposes, is that a pure proceduralist thinks that all descriptive, evaluative and justificatory claims about democracy are really claims about the way to make collectively binding decisions, and so can only be understood by reference to the different ways that collective decisions might be made, or to the outcomes and consequences of these decisions.

As Joshua Cohen has shown, while democratic government indeed has an important procedural element, the pure proceduralist is wrong to think that we can identify a set of democratic procedures without appealing to assumptions about what is valuable, desirable, useful and right.¹¹ Decision-procedures don't come with a label neatly attached to them that says 'this is democratic' or 'this is monarchic'. Not all forms of universal suffrage are democratic so, to know which ones are and which ones are not, we need to make reference to the purposes of democratic government, understood as a form of government which seeks to treat people in certain distinctive ways – as sovereigns, as free and equal citizens, as the locus of political authority, or however else one wishes to think of it. And as long as we think that democratic governments have claims to legitimacy that alternatives lack, we will need to identify those distinctive democratic purposes in a way that reflects our belief that democracy is valuable. So the first reason why a purely procedural view of democracy is untenable is that we cannot identify democratic procedures without making background assumptions about the nature and

value of democratic government, assumptions that we need in order to resolve controversy over which procedures are democratic, or which forms of procedure are democratic under which conditions.

However, once it is clear that we need values, however contested or controversial, to identify what is to count as a democratic procedure, it becomes clear that people who hold different, even incompatible values, may still be willing and able to reason about these, and to modify their theoretical and practical conclusions about what is collectively required in light of their deliberations. So if people with conflicting views are capable of accepting democratic political procedures as a way of arbitrating their differences and legitimising binding outcomes, this is at least partly because they hold sufficient shared values and objectives to make such procedures an acceptable way of proceeding. But, in that case, they may seek to resolve their differences, and to legitimise collective outcomes, by appealing directly to the substantive values and objectives that they share in common, or by arguing about what these might be, and how best to describe and pursue them.

Now, according to Brettschneider, rejecting a purely proceduralist conception of democracy means that we should embrace what he calls ‘a value theory’ of democracy. And, he believes, the best way to understand a value theory of democracy is to treat three values as essential to any democratic conception of government. Those three values are, he claims, political autonomy, equality of interests and reciprocity,¹² and it is in light of these three values that he seeks to illuminate and resolve a variety of controversies about the rights and duties of democratic citizens. These three values are core democratic values, he argues, because they protect the rights of citizens as political participants, and also guarantee them certain substantive protections from state coercion.¹³ They, ‘support the notion of democratic citizens as free, equal and reasonable rulers’,¹⁴ although there is nothing inherently democratic about them.¹⁵

According to Brettschneider, privacy is necessary for citizens to develop their capacities for autonomy, because it is implicit in the capacity for independent judgement.¹⁶ So, while ‘nothing in my claim relies on the suggestion that privacy is an empirically necessary conditions for these capacities to develop...a presumption of privacy respects citizens’ capacities for a sense of good and for judgement even if they could be developed in regimes that offer no such respect’.¹⁷

More simply, Brettschneider argues that it would be morally inconsistent ‘to allow citizens’ rights to rule others but not to rule themselves’.¹⁸ So, he implies, a commitment to democratic government implies a commitment to protecting individual privacy, because ‘if citizens are granted the right to make decisions for others by virtue of their participation in the political process, it should follow that they have the right to make decisions for themselves in the most important matters of personal life’.

I have great sympathy for the idea that there is something morally and politically illogical about espousing democratic government and rejecting the idea that people are entitled to privacy. So far as I can see, the empirical and normative ideas about how the world works and what people and politics actually look like and how *should* look like, which underpin any democratic conception of government, imply that people are entitled to keep some things to themselves, if they so wish; that they are entitled to form families and have and care for the resulting children, if they so wish; and are entitled to certain forms of seclusion if they so wish. And I believe, as does Brettschneider, that the best way to work out what these are is by reflecting on what we know about democratic values. However, unlike Brettschneider, I am sceptical that we can rely on democratic values alone to clarify the nature and value of privacy, and my scepticism is connected to my doubts about the value theory of democracy as it stands. So, let me first explain my concerns with the latter, before clarifying my worries about the former.

B. Democracy: Procedural and Substantive.

My worries about Brettschneider's views can be summarised as follows: first, I do not think that the value theory follows from the rejection of pure proceduralism, as there are a potentially infinite number of conceptions of democracy which will combine substantive and procedural ideas in some plausible and helpful way. Put simply, the fact that it is wrong to identify democracy in procedural terms *alone* does not show that the best way to characterise it is in terms of a supposedly distinctive set of *values*, or that there is a single best way to characterise democratic government. Absent reasons to think there is only one way to be democratic, we might expect that there might be many contrasting ways to distinguish democratic from undemocratic governments, some of which will place more emphasis on values, others more emphasis on the practice of self-government and still others which may be more procedural in emphasis.

Second, even if we wish to formulate a value theory of democracy, as opposed, say, to a pragmatic or institutional one, I do not believe that the three values that Brettschneider picks out have the iconic status which he attributes to them. The difficulties are particularly evident with the choice of reciprocity as the third member of the trio, since this isn't a value normally identified with what is most distinctive about democracy. However, the real difficulty is that how one describes a value, and distinguishes core from periphery, obviously depends on the map of the moral world with which one starts. If one takes seriously, as we should, the idea that there are many reasonable, but mutually inconsistent, ways to describe and evaluate moral experience, then it seems most unlikely that there are only three core democratic values. Although for the sake of convenience we may want to focus on a few values that we take to be especially important to democratic government, understood historically, or in some other way, it is wrong to think that talk of equality, autonomy and reciprocity is automatically more democratic or evocative than talk of participation, representation and accountability, let alone more familiar trios such as life, liberty and happiness. As Brettschneider notes, there is nothing automatically

democratic about his trio – so they require careful definition in order to be democratic.¹⁹ What is to count as the standard for success in that venture, therefore, needs careful articulation. If, as he claims, the justification of his set is that these ‘support the notion of democratic citizens as free, equal and reasonable rulers’,²⁰ it is natural to wonder whether that is not true of any number of different values- or, indeed, whether a value theory of democracy is not just an effort to work out an *ideal* of self-government under an assumed name.

Third, even if we wish to use Brettschneider’s trio of autonomy, equality and reciprocity instead of the more usual liberty, equality and fraternity,(or life, liberty and happiness), it is unclear why we should interpret the three values in the way that he suggests. For example, why is equality of *interests* a more important form of equality, from a democratic perspective, than equality of welfare, or equality of rights and opportunities? Why should we understand the democratic value of reciprocity to lie in ‘mutual reason giving’²¹ rather than in a less Habermasian, but more pragmatic concern to ensure that those who lose on the swings gain on the roundabouts, or that there are no permanent winners or losers in democratic competitions for scarce resources? In short, Brettschneider’s conception of democracy strikes me as unreasonably narrow, and I see nothing about the rejection of pure proceduralism which requires us to suppose that there is only one form of democracy (majoritarian, constitutional, and a rather idealised form of American government), and one set of values which is sufficient and necessary to characterise the differences between democratic and undemocratic government.

In light of my concerns about the gap between the scope for diverse understandings of democracy, which the abandonment of pure proceduralism invites, and the restrictive conclusions about democracy which Brettschneider appears to draw, it may be helpful to spell out the problems with a purely proceduralist conception of privacy, and the way in which Brettschneider seeks to respond to them. I will then say something about the problems that I see with his response.

Impure Proceduralism and Privacy.

On a purely proceduralist view of democracy, we cannot say that privacy is valuable, let alone that it deserves protection as a moral or legal right, because of its intrinsic importance – at least, not unless we can show that there is no democratic procedure that can be described without valuing privacy. That, obviously, is a tall order – although it should be noted that elections based on universal suffrage are not an inherent part of the democratic ideal, given the importance of lotteries, rather than elections, to classical and renaissance understandings of the ideal. Pure proceduralism, therefore, lends itself to the idea that privacy can only be justified instrumentally, because of its contribution to democratic elections, rather than as an essential part of an ideal of self-government by free, equal and reasonable people. So, we might think, if privacy is to be a democratic value, that value must be subordinate, and is likely to be characterised in terms of the ways that protections for solitude, confidentiality and intimacy (to take my earlier trio) are either necessary for or - less strongly - contribute to, democratic decision procedures.

The standard justification of the secret ballot – to which Brettschneider appears to appeal,²² would be an example of such a conception of privacy. On this picture, privacy is not justified because of its own importance or value, but simply as a way of protecting other things that are important- democratic elections. By implication, were privacy no good at doing this, or were other things better at doing so, there would be no case for thinking privacy valuable. Hence if, as Patricia Boling and Wendy Brown appear to believe, privacy inevitably depoliticises things that should be open to public contestation, or if, as is sometimes suggested, privacy is fundamentally at odds with freedom of (political) information, then there would be no way to justify it on

democratic grounds, unless its deficiencies from a procedural perspective are outweighed by some rather considerable procedural advantages.²³

But that is the problem with pure proceduralism, not with privacy: for it treats everything as instrumental to the goal of democratic procedures, and ignores the need to clarify what these are, or why they are valuable. Rejecting a purely proceduralist view of democracy, therefore, means that we can expand the range of ways in which we might distinguish democratic from undemocratic forms of privacy – or, conversely, the range of reasons we might have to reject privacy as irrelevant, or even inimical, to democratic government.

Put simply, the claim that privacy is intrinsically desirable, not just instrumentally valuable, becomes open for discussion once we reject a purely procedural view of democracy, and this appears to be the reason why Brettschneider attaches so much importance to showing that the value theory of democracy supports the claim that privacy is intrinsically valuable. However, there is nothing about rejecting pure proceduralism that commits us to the idea that privacy is intrinsically valuable, rather than desirable because of its contribution to democratic values such as freedom or equality, or to democratic institutions or habits. Indeed, there is nothing about rejecting pure proceduralism that commits us to the view that privacy is valuable to begin with.

A great deal of work in Brettschneider's account of privacy is, therefore, done by the Rawlsian assumption that people are entitled to pursue their own conception of the good, and that there is therefore something odd, even illogical, in supposing that people are entitled to share in governing each other, but are not entitled to make important personal decisions for themselves. Unfortunately, though, if we do not start with such an assumption – and it is unclear why we should think of it as a *starting point*, rather than a possible *corollary*, of democratic government – the sense of contradiction and bizarreness that Brettschneider feels when thinking of democracy without privacy, may be altogether absent. Hence, there would be no reason to think it contradictory to value democracy, but not privacy.

That leaves us with Brettschneider's claim that privacy is intrinsically valuable because of its links to autonomy.²⁴ But how this argument goes is never really spelled out, and the example of the secret ballot which is used to illustrate the point does not help. This is partly because the secret ballot seems to be concerned with privacy as solitude, anonymity and confidentiality – and therefore unrelated to the decisional privacy that Brettschneider seeks to defend; partly because it is unclear what the secret ballot tells us about the intrinsic, as opposed to the instrumental, value of privacy; and partly because there is no reason to suppose that the most important aspects of privacy must be intrinsic, rather than instrumental, if we care about democratic government.

So, let us turn to the example of the secret ballot and see what it might tell us about the value of privacy, bearing in mind that privacy may not be valuable at all, if we care about democracy, or that its value may depend on the particular form of democracy we care about. Moreover, in light of the different ways we might carve up the moral world, it may be a mistake to attach too much importance to the differences between instrumental and intrinsic values, as the examples can often be reformulated in terms of the other, and because it is often their shared factual or counterfactual premises which are critical to the success or weakness of value claims.²⁵

D. The Standard Justification of the Secret Ballot

According to Brettschneider, the Secret Ballot illustrates the importance of privacy to democratic politics. 'In deciding how to vote, citizens are entitled to freedom from coercion and to a "private space" in which to make up their own minds through the exercise of political judgment. The privacy of the voting booth serves to enhance this sense that we are free to make our own decisions without external coercion. This rationale also extends beyond procedural protections in the paradigmatic case of voting to the general role privacy rights play in a citizen's capacity to think of themselves as rulers'.²⁶

This is a perfect statement of the standard justification of the secret ballot, and of its importance to democratic government. This standard justification for the secret ballot is that it is necessary in order to prevent corruption, coercion and intimidation 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 is 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.

This justification for the secret ballot is instrumental, however, and tells us less about the importance of privacy *per se*, than about the importance of preventing bribery and intimidation from wrecking democratic elections. Brettschneider is surely right to note that ‘Citizens do not think about politics at a particular moment or in a particular space that can be limited politically... Since our capacity for political thought is intertwined... with our capacity for thought in general, a society concerned to respect either of these capacities should value citizens’ ability to be free from coercion’.²⁷ However, this still does not look like a reason to think that privacy is intrinsically valuable if we care about democracy. So it is worth considering the limitations of the standard justification of the secret ballot, before trying to draw some positive conclusions about the value of privacy, and what it tells us about the nature and justification of democratic government.

E. The Limitations of the Standard Justification of the Secret Ballot

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.²⁸ More recently, Geoffrey Brennan and Phillip Pettit have argued that the secret ballot is undesirable, although sometimes necessary.²⁹ 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.

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.³⁰ 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 *constitutive* 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 because of factors such as fear, greed, carelessness, confusion or ignorance.

Secret voting for citizens, then, reflects an important democratic idea: that citizens' rights to vote do 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.³¹

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, although here the case for privacy is more instrumental in nature although, as we will see, it also has important constitutive aspects too.

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.³²

If these arguments are right, the justification of the secret ballot is more complicated than it first seems, both because 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.³³

Privacy has intrinsic value, then, reflecting the importance that democracies attach to our ability to see and treat each other as equals. We can think of this value as *constitutive*, not merely *intrinsic*, because it institutionalises the meaning of democratic citizenship - that citizens do not have to ask permission, or to defer to the opinions of others, in order to participate in politics. So while it is important that the secret ballot helps to protect citizens from coercion and intimidation, as instrumental arguments for the secret ballot maintain, from a democratic perspective there is, in addition, a constitutive dimension to the secret ballot, reflecting the ways in which the secret ballot can be valuable for what it *is*, not just what it *does*.

F. Democracy and the Constitutive Justification of the Secret Ballot

The constitutive justification of the secret ballot, if I may call it that, helps to define the status of democratic citizenship, both in contrast to other conceptions of citizenship and in comparison

to the other types of relationship, rights and duties which people can have in a democratic society.³⁴ It shares with republican conceptions of citizenship the idea that people's right to vote reflects their legitimate interests in participating in collective decisions, and therefore in making decisions that can fundamentally affect the lives and wellbeing of others. However, it denies that ordinary people can legitimately be required to defend their political beliefs to others, nor does it assume that democratic citizens must be capable of understanding and appreciating other people's perspectives, even when they earnestly try to do so.

In that sense, a democratic perspective on politics, as illustrated by the constitutive justification of the secret ballot, is more sensitive than the republican one to the possibility that 'reasonable pluralism' means that citizens may have little more in common than their shared citizenship.³⁵ Hence what is required of citizens, in order to participate in politics, is necessarily different from, and less demanding than, what is required of those who seek to hold positions of special trust and responsibility for the lives of others.

This point is particularly important because, as Anne Phillips has shown, republican concerns with dependency and domination may come at the price of insensitivity to inequalities once the threshold for 'determining one's own will' has been reached.³⁶ This appears to be one reason why Mill's defence of open voting is hard to reconcile with democratic principles: because it is unclear why, as Mill assumes, citizens and legislators should face the same demands for scrutiny and justification, given the differences of power and responsibility between them.³⁷

Moreover, as the US Supreme Court recognised in *NAACP v. Alabama*,³⁸ the ability to distinguish the privacy claims of leaders and ordinary members in a civil association can be critical to the ability to reconcile the responsibilities of associations to outsiders – and, we might add, to their members- with freedom of association. Granted that the context in which the Court reached its judgement was marked by Alabama's effort to beat back, quite literally, demands for racial equality pressed by the civil rights movement, its point was not limited to the

civil rights context.³⁹ Hence it provides, I believe, a helpful tool for thinking more generally about the claims of freedom of association, equality, security and privacy from a democratic perspective.

However, if the secret ballot suggests that a democratic perspective on politics is different from a republican one, it also appears to be different from a liberal one. Both share the belief that citizens have legitimate personal interests, which justify their claims to participate in politics, and which explain why people's political rights cannot simply be interpreted as an emanation of their duties to others. However, democratic claims to privacy – or so the secret ballot suggests – are concerned with affirming and protecting the *status* of citizens, not simply with protecting their *interests*. So, the democratic case for the secret ballot does not depend, as does the liberal one, on the importance of protecting people from coercion and intimidation. Instead, it is concerned also with the threat posed by public shaming and humiliation, even when this falls well short of coercion or intimidation. The democratic concern, in this case, is less with the public bases of *self-respect*, though Rawls was surely right to be concerned with this, than with the public bases of *collective* respect, given the difficulty and importance of the core democratic duty *to see each other as people who are equally entitled to participate in government, and equally eligible to rule over others*.⁴⁰ In short, while there are important instrumental aspects to the case for the secret ballot, there are no less important reasons to value privacy for what it *is*, not simply for what it *does*, if we care about democratic government.

G. The Secret Ballot and Democratic Privacy

What conclusions, if any, can we extract from this discussion of the secret ballot for a democratic conception of privacy? The answers, roughly, are these:

- 1) People are entitled to privacy even though this limits our ability to prevent and punish immorality, and even when what is at issue are true facts about a person's beliefs, desires,

interests and actions. Consequently, we should be wary of assuming that the truth and utility of information *in and of itself* makes it less private than it otherwise would be. Whatever the relevance of truth to the protection of freedom of expression in cases such as libel, the secret ballot suggests that people are entitled to keep at least some true facts about themselves to themselves, if they so wish, however interesting or useful such knowledge might be for others.⁴¹

2) People's claims to privacy depend on their responsibilities,⁴² and the baseline for determining the weight and consequences of these for privacy is citizenship. By contrast, Mill's argument for open voting equates citizen voting for legislators with legislative voting on collectively binding decisions, thereby implying that people are exercising a special responsibility when they choose their representatives, rather than exercising a basic right of citizenship. A democratic conception of privacy, therefore, has no problem with the idea that the state is entitled to mandate equal parental guardianship for children, as with the UK's Guardianship Act of 1973,⁴³ or to hold parents legally responsible for the mistreatment of their children, because special powers entail special responsibility and, self-evidently, citizens do not need to be parents. Thus, in contrast to ideas about privacy which locate its content and justification in extra-political rights or values, the case for the secret ballot, presented here, exemplifies an approach to privacy from *within* a democratic conception of morality.

I therefore agree with Brettschneider that 'the right of privacy is not about a lifestyle, it is about the conditions necessary to treat citizens as free and equal'.⁴⁴ However, I do not think that this requires us sharply to distinguish instrumental and intrinsic justifications of privacy, as the former can be as important for our freedom and equality as the latter; nor to favour a 'value' theory of democracy, as compared to other alternatives to a purely procedural conception of democracy. Indeed, it is partly by attending to political procedures that we can best understand the *personal* value of privacy: for once we have personal interests which set us apart from, and

even place us in conflict with others, the assurance of our *public* standing and rights can be reassuring and liberating.

3) Privacy marks our status as citizens, with legitimate interests not only in protecting our own interests, but in acting on behalf of others. There is therefore no need to assume that people's interests in privacy are self-interested, because the secret ballot suggests that a concern for the interests and feelings of others is a sufficient justification for claims to confidentiality, anonymity and even secrecy in many circumstances.

This is particularly important when thinking about the relationship between privacy and freedom of the press, because while privacy inevitably limits what we know about others, such limitations can be necessary for people to express themselves freely. Unwanted publicity can alter the nature and significance of an expressive act in ways that make it morally wrong. Hence the importance, from a democratic perspective, of distinguishing freedom of expression from freedom of the press: for anonymity, confidentiality and even secrecy can be necessary to much legitimate expression, and duties of sensitivity, tact, respect and discretion, rather than self-interest, may lie behind many of our needs for privacy.⁴⁵

4) A complex structure of rights, duties, opportunities and resources is necessary for privacy to be democratic, rather than the prerogative of a privileged few,⁴⁶ and for the negative consequences of privacy to be acceptable from a democratic perspective. Too often the fact that legal rights to privacy have disadvantages have been thought reasons to deem privacy undemocratic, or to assume that the value of privacy means we have no duties to try to minimise the disadvantages its protection creates, or to compensate people, where those disadvantages are serious.⁴⁷

Although the costs of protecting privacy cannot be as readily identified with de-politicisation as critics suppose, they can be nonetheless real for that, and can include selfishness, loneliness, irrationality, conflict and even coercion. So democracies cannot be indifferent to the ways that the costs of privacy are distributed, nor to the possibility of lessening those costs, where this is consistent with the rights of others. For example, subsidies for the exercise of privacy rights might be justified in order to facilitate the formation of private associations by those who might otherwise face real obstacles in associating together – for example, the old, the sick, the young, the poor. These need not take the form of subsidies for privacy rights specifically. Such things as decent public transport, well-lit and safe streets, cheap use of rooms in the town hall, library, church, school or YMCA, for example, might facilitate the exercise of political as well as privacy rights, as might affordable and decent childcare and other familiar items, such as safe and effective contraception, which feminists habitually seek.

Moreover, while a democratic justification of privacy provides no license for coercion and exploitation, whether we are concerned with the members of an association or outsiders, it provides no clear guidance in the case where an organization or association is avowedly undemocratic in its aims, but seeks to realise these through democratic means.⁴⁸ Because an organisation can be democratic on some dimensions and not on others it is, I think, a genuinely contentious matter whether or not privacy rights will extend to the internal organization and communication of racist, sexist and religiously intolerant organizations that do not engage in violence, deception or exploitation.

The problem is familiar from debates on freedom of expression. In the privacy case, the problem is that a group may be entitled to protection of its privacy, given some of the reasons for protecting privacy in a democracy, whereas on others the state would be justified in limiting its activities, scrutinizing its internal records and memos and monitoring its conversations.

Absent evidence that democracy is an all –or–nothing affair, rather than a matter of the degree to which different requirements, values and goals are met, there is no reason to assume that the protection of privacy should be free of this sort of problem. After all, unless there is a simple test for democracy, there can be no simple way of determining the legitimate claims of individuals in a democracy. The former, unfortunately, is ruled out by the idea of reasonable pluralism.

It therefore looks as though the ability to draw a sharp public/private distinction is undermined by the multiple dimensions of democracy, and by the difficulty of deciding a priori which of these are the most important.⁴⁹ This means, I believe, that Brettschneider is wrong to think that we can, or need, sharply to distinguish perfectionist from egalitarian values, or the ways we think about the boundaries of privacy- which need to be publicly justifiable- from what happens within those boundaries, which need not. Sometimes the differences between the personal and the political will be clear because, say, our desire for an abortion, or to teach our children about their grandparents' lives, will have no significance for anyone's political standing and opportunities. But it is a mistake to suppose that this must always be the case and that, therefore, considerations and values which citizens may espouse in regulating their affairs must be sharply distinguished, and distinguishable, from those which we use in the process of collectively justifying our rights and duties.⁵⁰

H. Conclusion: Politics, Values and Democratic Method

This article has tried to show that we can use the example of the secret ballot to illuminate the nature and value of privacy, on a democratic conception of politics. It has argued that there are a potentially infinite number of ways of describing and evaluating democracy of which, at best,

Brettschneider's 'value theory' is but one. Moreover, it has shown, attention to democratic practices and institutions, such as the secret ballot, can improve our understanding and interpretation of democratic values, and of what is distinctive about a democratic perspective on politics, even when compared to intellectual traditions which have heavily influenced the theory and practice of democracy.

Finally, this article has shown that the differences between intrinsic and instrumental values should not be exaggerated in general, nor in the case of privacy. As we have seen, privacy is valuable from a democratic perspective even though it means that we cannot detect or punish all forms of immorality. But whether we attach more importance to the instrumental or intrinsic aspects of privacy depends on what *other* values we hold, and what threats to democracy we fear. Even the importance of legislative elections to democracy is a matter of dispute. So, this paper concludes, while privacy is, in principle, as central to democratic government as Brettschneider's favoured trio of autonomy, equality and reciprocity there may be other, better, ways to understand our interests in confidentiality, seclusion and intimacy and other, better, ways to understand the ideal of democratic government.

¹ Many thanks to Corey Brettschneider for inviting me to contribute to this volume. Addressing his ideas on judicial review, and the reasons for our different opinions, immeasurably improved my article, 'Democracy and Judicial Review' in *Perspectives on Politics*, 7.4 (2009), pp. 805-822. Here, I try to clarify the differences between our ideas about privacy, and the way these reflect our different ideas about democracy. I would also like to thank Austen Sarat and the anonymous reviewer whose suggestions were so helpful in preparing this article for publication. Routledge has given permission for me to reuse parts of *On Privacy*, (New York,

Routledge, 2011), and Cambridge University Press have let me reuse parts of 'Mill and the Secret Ballot: Beyond Coercion and Corruption', *Utilitas* 19.3. (2007), pp. 354-378. I am grateful to them both.

² Corey Brettschneider, *Democratic Rights: the Substance of Self-Government*, (Princeton, Princeton University Press, 2007).

³I use feminist criticisms of privacy to reinterpret the nature and value of privacy from a democratic perspective in A. Lever, 'A Democratic Conception of Privacy', (unpublished) MIT thesis, 1997, available at www.alever.net. I also examine women's political and personal interests in abortion, and show why any democratic justification of abortion rights needs also to look at women's personal and political interests in childbearing. I examine Catherine MacKinnon's critique of privacy in 'Must Privacy and Equality Conflict? A Philosophical Examination of Some Legal Evidence', *Social Research* 67.4, (2000) pp. 1137-1171. I develop the distinction between our personal and political interests in privacy, and their significance for a democratic justification of privacy in 'Feminism, Democracy and the Right to Privacy' *Minerva*, 9. (2005) pp. 1—31 and 'Privacy Rights and Democracy: A Contradiction in Terms?' *Contemporary Political Theory*, 5. (2006) pp. 142-162. I also try to clarify the ways in which a democratic perspective will draw on, but cannot be identified with, republican and liberal views of privacy. That line of argument is developed more extensively in 'Mill and the Secret Ballot'. *On Privacy* examines issues of privacy and press freedom, property rights, and of workplace as well as familial privacy, albeit briefly.

⁴ Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', originally published in Seyla Benhabib ed., *Democracy and Difference: Changing Boundaries of the Political* (Princeton, Princeton University Press, 1996), and reprinted in Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays*, (Cambridge, Harvard University Press, 2009), pp. 154-180.

⁵ See, *On Privacy*, 3-8.

⁶ Brettschneider, P.71, where he refers to 'decisional autonomy', which is another way of describing the issues associated most clearly with the *Constitutional* right to privacy, in America, as opposed to *Common Law*, conceptions of privacy. The distinction between the two and the way that these figure in American philosophical critiques of privacy is well discussed by Anita Allen and Judith deCew. See Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, (New York, Rowman and Littlefield, 1988), ch. 1 and Judith DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology*, (Cornell, Cornell University Press, 1997), Helpful though this debate can be, it can also restrict and mislead philosophical inquiry, in ways that parallel

the constraining aspects of the First Amendment on philosophical thinking about freedom of expression and freedom of the press.

⁷ For a fuller discussion of the difficulties in characterizing privacy see the introduction to *On Privacy*. For the different ways we might disaggregate the concept of privacy, and their significance for Judith Thomson's critique of a moral right to privacy, see *On Privacy*, ch.4. For the implications of these arguments for the idea of a property owning democracy see A. Lever, 'Privacy, Private Property and Collective Property' in *Good Society* 21.1 (2012), pp. 47-60

⁸ Arend Lipjhart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice*, (New York, Routledge, 2007); for a wonderfully helpful book, which has much influenced my thinking about democratic elections see also George Bingham Powell, *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*, (New Haven, Yale University Press, 2000).

⁹ Bernard Manin, *Principles of Representative Democracy*, (Cambridge, Cambridge University Press, 1997).

¹⁰ John Hart Ely's *Democracy and Distrust: a Theory of Judicial Review* Cambridge, Harvard University Press, 1980) is a particularly nice example of pure proceduralism, and of its appeal, as well as its weaknesses. Famously, he criticised *Roe v. Wade's* claim - 410 US 113 (1975) - that there is a constitutional right to privacy which protects women's legal right to abortion, on the grounds that such a right has nothing to do with the procedures necessary for democracy, and therefore is an example of a substantive interpretation of the US constitution's 14th Amendment's due process clause, in just the same way as the oft-decried decision in *Lochner v. New York*, 198 U.S. 45 (1905). See his 'The Wages of Crying Wolf: A Comment on *Roe v. Wade*', *Yale Law Journal*, 82.5. (1973), pp. 920 -949. In ch. 4 of 'A Democratic Conception of Privacy', I try to show that women's interests in political freedom and equality are sufficient to justify legal rights to abortion, although they have important personal interests in abortion as well, which are just as important from a democratic point of view.

¹¹ Joshua Cohen, 'Pluralism and Proceduralism', *Chicago-Kent law Review*, 69.3 (1994), pp. 589-618.

Personally, I think this is a clearer account of the problems of pure proceduralism, developed in response to Stuart Hampshire's critique of Rawls, then his earlier, 'Procedure and Substance in Deliberative Democracy'.

¹² Brettschneider, p. 3.

¹³ Brettschneider, p. 4

¹⁴ Brettschneider, p. 9

¹⁵ Brettschneider, p. 23

¹⁶ Brettschneider, p. 75

¹⁷ Brettschneider, p. 76

¹⁸ Brettschneider, p. 77.

¹⁹ Brettschneider, p. 23

²⁰ Brettschneider, p. 9

²¹ Brettschneider, p. 25

²² Brettschneider, p. 75.

²³ Patricia Boling, *Privacy and the Politics of Intimate Life*, (Ithaca, Cornell University Press, 1996), eg. P. 159. and Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), eg. P. 126. I try to respond to these concerns about the right to privacy in A. Lever, 'Privacy Rights and Democracy:', especially pp. 152-155.

²⁴ Brettschneider, p. 76.

²⁵ See *On Privacy*, ch1, where I use the characteristic strengths and weaknesses of intrinsic and instrumental claims about value to illustrate the strengths and weaknesses of competing conceptions of privacy. As I try to show, difficulties that occur in the one type of argument often appear in the other. Something similar can also be seen in arguments about the justification of intellectual property. Though the literature commonly treats the intrinsic value/instrumental value distinction as analytically crucial, the central problem in the philosophy of IP is how to explain why the creators of good ideas should be able to profit financially from their creations. However, this problem arises whether one adopts an instrumental or an intrinsic account of the value of IP. See A. Lever, (ed)., *New Frontiers in the Philosophy of Intellectual Property*, (Cambridge, Cambridge University Press, 2012), pp. 1-32, especially pp. 27-28.

²⁶ Brettschneider, p. 75.

²⁷ Brettschneider, p. 75

²⁸ 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*, (Chicago, University of Chicago Press, 2002). Mill's views on the secret ballot can be found in ch. 10 of his *Considerations*

on *Representative Government* in H. B. Acton's collection of Mill's *Considerations, Utilitarianism and On Liberty*, (London, Everyman, 1984).

²⁹ Geoffrey Brennan and Philip Pettit, 'Unveiling the Vote', *British Journal of Political Science* 20.32 (July 1990), pp. 311-33

³⁰ For a discussion of Mill's distinction between secret voting in private clubs, which he accepts, and in legislative elections, which he condemns, see A. Lever, 'Mill and the Secret Ballot', pp. 364-365. The implicit class assumptions in this argument are quite striking.

³¹ A. Lever, *On Privacy*, pp. 26-28

³² For the problems of 'shameful acknowledgements' and of public shaming from a democratic perspective see Jonathan Wolff, 'Fairness, Respect and the Egalitarian Ethos', in *Philosophy and Public Affairs* 27, (1998), pp. 97-122. I am assuming that what Wolff says about equality here is relevant to the forms of equality required by a commitment to democratic government.

³³ A. Lever, 'Mill and the Secret Ballot', pp. 371-373, and *On Privacy*, pp. 26-28.

³⁴ By contrast, Mill appears to take non-voting as the baseline against which the rights and duties of citizens are judged, and therefore sees the demand for publicity in citizen voting as appropriate to the exercise of *special* powers and responsibilities. This is largely a reflection of his belief that the vote should be thought of as a trust, rather than a right. I discuss the difficulties with this view, and the ways we can separate Mill's arguments against secrecy from this claim, at pp. 358-9 and 361-3 of 'Mill and the Secret Ballot'.

³⁵ For a fuller discussion of this point see A. Lever, 'Mill and the Secret Ballot', p. 373-4. For 'reasonable pluralism' see Joshua Cohen, 'Moral Pluralism and Political Consensus', originally published in *The Idea of Democracy*, ed. David Copp, Jean Hampton and John Roemer, and republished in Joshua Cohen, *Philosophy, Politics and Democracy*, pp. 38-60.

³⁶ Anne Phillips, 'Feminism and Republicanism: Is This A Plausible Alliance?', *Journal of Political Philosophy*, 8.2, (2000).

³⁷ See 'Mill and the Secret Ballot', pp. 359-361.

³⁸ *NAACP v. Alabama*, 357 US. (1958): As Justice Harlan held, for a unanimous Court, 'Inviolability of privacy in group association may, in many circumstances, be indispensable to freedom of association, particularly where a group espouses dissident beliefs'. I use the case as a tool for thinking about the importance of privacy to

security in A. Lever, 'Democracy and Terrorism', originally presented to a discussion on 'Terrorism, Democracy and the Rule of Law' at the House of Lords, London UK, in July 2009, and published as *Thinkpiece* no. 56 by *Compass: Direction for the Democratic Left*. In 2009, available online at <http://www.compassonline.org.uk/publications/thinkpieces/>

³⁹ In 'Feminism, Democracy and the Right to Privacy' pp. 14-18, I discuss the importance of the Court's decision in the case, and link its perception of the importance of privacy to Virginia Woolf's discussion of female solitude and friendship in *A Room of One's Own*, (Harcourt, Brace and Company, London, 1929).

⁴⁰ I think of this as a distinctively democratic duty, and one that can usefully be contrasted with two duties which we would have irrespective of the government of which we are members. These duties are suggested by Utilitarian and Kantian perspectives on morality: to avoid causing pain to beings capable of pain and suffering; and to treat others as beings with lives of their own to lead, rather than just as means to our own ends. For the significance of this point for the way we think about democratic duties to participate in electoral politics, see A. Lever, 'Democracy and Compulsory Voting: A Critical Perspective' *British Journal of Political Science*, 40.4, (2010) 897-915 and in 'Democracy and Voting: A Reply to Lisa Hill', *British Journal of Political Science*, 40.4, (2010) 925-929.

⁴¹ I explore the significance of these claims for privacy, freedom of expression and the media more fully in *On Privacy*, ch. 2, as well as its implications for the ethics of outing. On the latter, see also, 'Privacy Rights and Democracy', pp. 145-6 for a discussion of Patricia Boling's ambivalent attitude to privacy, and the difficulty of reconciling this with her forthright condemnation of outing. See also Jean Cohen's, 'Redescribing Privacy: Identity, Difference and the Abortion Controversy', *Columbia Journal of Gender and Law*, 3.1, pp. 48-118, who was one of the first to treat the limits privacy sets to public accountability as a strength, not merely a weakness, if we care about democracy.

⁴² One of the most helpful attempts to work out the implications of this claim for the privacy of politicians remains Dennis F. Thompson's, *Political Ethics and Public Office*, (Cambridge, Harvard University Press, 1987)

⁴³ For details of the act see Stephen Cretney's *Law, law Reform and the Family*, (Oxford, Oxford University Press, 1998), pp. 180-183. Until the passage of the Act, married and divorced women were forced to defer to the children's father as sole legal guardian. In *Democracy and Judicial Review*, I use the injustice of this situation, and the difficulty of overturning it, to illustrate the difficulties of objections to judicial review – such as those by Jeremy Waldron and Richard Bellamy - which suppose that the sole means for revising unjust laws

in a democracy should be legislative decision. I discuss the inadequacy of relying on Private Members Bills to remove injustices of this sort in 'Is Judicial Review Undemocratic?', *Public Law*, (2007), 280-298.

⁴⁴ Brettschneider, p. 90

⁴⁵ A classic example of this would seem to be Oliver Sipple, who in deference to his family's feelings and sincere religious beliefs, kept his homosexuality a secret from them, though he was clearly not ashamed of it, and was otherwise willing to campaign for gay causes, as a grown man living in San Francisco. See *On Privacy*, pp. 31-34.

⁴⁶ *On Privacy*, ch. 3 explores some of these issues through an examination of Coke's famous dictum that 'An Englishman's home is his castle', which I use to illuminate the differences between democratic and undemocratic families, workplaces and armies, albeit briefly.

⁴⁷ I make this point at greater length with reference to Patricia Boling's worries that privacy depoliticises injustice in A. Lever, 'Privacy Rights and Democracy: A Contradiction in Terms?' *Contemporary Political Theory* 5. (2006) 142-162, particularly pp. 152-155. But see Patricia Boling, *Privacy and the Politics of Intimate Life*, (Ithaca, Cornell University Press, 1996), pp.159

⁴⁸ See the discussion in 'Privacy Rights and Democracy', pp. 154- 155, and the ways in which *NAACP v. Alabama* may help to defuse some, though not all, of that tension.

⁴⁹ Brettschneider, p. 89, although at p. 91 he acknowledges the difficulty of drawing the distinction in practice.

⁵⁰ In 'Mill and the Secret Ballot', pp. 363-4, 367-371, 373-376, and 377-8, I bring out the significance of this point for the ethics of voting, questioning the standard assumption, which motivates Mill's critique of the secret ballot, that the only legitimate way to vote is to vote for what will promote the common good or public interest. As I show, self-protection, personal duties and collective duties of justice may all legitimately shape our political choices, and in some cases may take precedence over concerns for the common good, even in legislative elections.