

Some Limits of Transparency in Promoting Intellectual Freedom

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Intellectual freedom and freedom of conscience are often associated with strong commitments to transparency and avoidance of secrecy. Through the main European Enlightenment tradition of intellectual freedom, marked by wars of religion and the subsequent emergence of toleration as a principle of classical liberalism, we have come to value free and open discussion intrinsically, as the expression of natural rights, and extrinsically, as the pattern of behavior most likely to allow reason to guide human progress. In J.S. Mill's classic statement of intellectual freedom, *On Liberty*, we find a celebration of transparency in thought and discussion, of individuality, and of the value of "experiments in living".

Societies characterized by Millian liberty and intellectual freedom are guided, to some extent, by a logic of toleration, which suggests that I since I ought to be able to count on the toleration by my fellow citizens of my expression and lifestyle (provided it does not infringe on others), I should not have to conceal my beliefs and lifestyle. Arguably, a part of Mill's aspiration for liberty has come true, while other aspects seem hopelessly idealistic. Many individuals in liberal and open societies have been able to exercise rights of expression, association, and protest to remedy conditions of discrimination and, in other cases, to claim space for lifestyles that challenged mainstream mores.

For these reasons, it makes sense to say that intellectual freedom advocates should generally favor transparency, toleration, and secrecy avoidance, especially in government. Privacy, especially the sort that allows people to keep their views from discussion and scrutiny, would seem to be at odds with intellectual freedom. But we also have a strong intuition, supported increasingly by research in the

cognitive psychology of deliberation, that there are psychological limits to tolerance in human groups and many aspects of the development of human autonomy and decision making require privacy and protection from scrutiny. In light of this conflict of intuitions and evidence, how should we theorize privacy and secrecy in relation to intellectual freedom?

One premise of my investigation of this question in this paper is that we are not on our way to becoming a society of happy free speech absolutists who live in complete transparency with respect to thoughts and habits and in disinterested excitement about the collision of truth and error in the public sphere. The logical extension of social toleration and commitment to truth as a product of open discussion could lead to such an ideal. While this is an extreme, it is useful exercise to think about intellectual freedom as a practice of complete transparency, even if only to be reminded of its unnaturalness.

The simplest way to represent this tension of intuitions theoretically is by the distinction, within thought on intellectual freedom, between freedom of conscience and freedom of expression. Freedom of conscience protects a private sphere of individual thought, while expression necessarily involves the externalization of thought. To resolve this tension we should look for a theory of privacy which is focused on those aspects of privacy relevant to deliberation and formation of conscience and then use that theory of privacy to negotiate the tension between intellectual freedom as freedom of thought and conscience and intellectual freedom as expression and exchange of ideas in the public sphere. In the next section of the paper, I will present such a theory of privacy and then, in the last section of the paper, I suggest how this theory of privacy helps us see the limits of transparency in intellectual freedom and suggests some social behaviors and approaches to “intemperate discussion” and offence that might promote intellectual freedom.

A Theory of Privacy for Intellectual Freedom

There are many different ways to value privacy, which is perhaps the reason why theories of privacy sometimes have the character of collections of diverse rights and obligations. For example, we can value the privacy of personal information because we fear that access to it can make us subject to harms by others. We have obvious concerns about the conditions under which a government can use surveillance of groups and individuals for the purpose of manipulation and oppression. Privacy of the body and the felt need to control one's own body and processes related to it may have yet a different basis than other forms of privacy.

Crises can challenge us to prioritize our values in different ways as well. Following the attacks by *al Qaeda* in the U.S. on September 11, 2001, there was a scramble at many levels of society to understand the appropriate response to this threat as well as its implications for an open society. My friend and fellow philosopher, Randy Mayes, and I started to get interested in theories of privacy, in part because we had a hunch that the attack would lead people to willingly give up some of their intuitions about the importance of privacy. (Arguably the lack of widespread outrage at government surveillance by the NSA proved us correct.) That raised the question of which sorts of privacy are most fundamental (which intuitions about privacy should we be least willing to give up?) and how such "basic" privacy might allow or disallow surveillance. What are the most morally important aspects of privacy? The theory we developed over several publications and conferences was motivated more by a concern with this question than with the theoretical understanding of intellectual freedom, but with a few modifications I think this theory can help us with the tension between the privacy of conscience and the need for transparency in expression.

In our theory, privacy is not so much about the right to be let alone or to control personal physical space or effects. Nor were we focused on constitutional and statutory conceptions of privacy,

which nonetheless pick out a wide range of important values to protect, from basic rights of association and expression to the privacy of medical and financial records. Rather, we wanted to ask what forms of privacy underlie moral deliberation and how the privacy of “moral space” is protected or violated. Laws and social practices will come into play in such a theory, but the level of description we were focused on was the privacy requirements for developing capacities for moral autonomy, to be a self-legislating rational agent. At bottom, these are the functions of privacy we ought to resist losing the most, so a careful description of them seemed worthwhile.

The kind of privacy we need to deliberate is determined, by degrees, by both psychological and environmental conditions. Psychological conditions include the normal development of cognitive capacities during maturation, the ability to concentrate, and a mind relatively free from distraction and illness. Environmental conditions include information inputs (from texts and persons) and the absence of threat and disturbance.

Basic privacy, moral privacy, turned out in our theory to be something that could be comprised by the failure of personal and environmental conditions needed for individual moral deliberation to obtain. Most of the time, we willingly give up these conditions to accomplish other goals. But if someone interferes with your otherwise justified efforts to deliberate, then your basic privacy is being violated. As I have indicated, this is a narrow focus for a theory of privacy. But we felt it was justified by our interest in locating the sorts of privacy that are most important or fundamental to humans. This drew us not only toward deliberative capacities and the freedom of conscience, but toward the topic of moral life, which form the basis of one kind of autonomy.

The theory had a couple of peculiarities, which probably kept it from becoming a household word. First, on our view your privacy can be violated in public. If you went to a public event and became aware of someone staring at you continuously, your capacity for deliberation would likely be impaired. Of course, if you do not notice that someone is staring at you, then there is no impairment.

But that led to the second strange consequence for the theory: An undiscovered “peeping tom” does not compromise your privacy on our theory. As we tried to make clear, there are likely other forms of privacy and certainly additional reasons why looking into people’s windows is a bad thing to do. Even an unnoticed voyeur might make use of information discovered in this way to compromise your privacy or other interests. But for us, the theory was useful for showing that the morally worst thing about some intrusions is that they make it impossible or very difficult to think about the most basic questions in your moral life.

Before using the theory to think about the limits of transparency in intellectual freedom, we need to make two alterations to it. First, as complex as moral autonomy is, intellectual freedom implicates a much broader range of topics. With intellectual freedom we should be asking about the privacy needed to deliberate on and experience one’s identity, lifestyle, and culture, not only one’s moral autonomy and moral commitments. A much wider range of informational inputs and relationships are needed to deliberate on these questions and life topics.

Second, our theory modelled moral autonomy at the individual level, which was a reasonable simplifying assumption for that project, especially since we do model moral autonomy in relationship to *individual* responsibility. But intellectual freedom is a fundamentally social phenomenon, so starting with individual moral autonomy seems theoretically wrong-headed. Moreover, recent work in moral psychology and theories of socially embodied consciousness suggest that social and emotional experience are not separate systems from cognition and that cognition is not accurately described as happening exclusively in the “head,” or even in the individual. At the time of the original theory, we passed up resources like Ferdinand Schoeman’s intriguing *Privacy and Social Freedom*, which regards privacy as important “largely because of how it facilitates associations and relational ties with other, not

independence from people”¹ A theory of privacy for intellectual freedom will need to have this social orientation. The freedom to think about our lives is not disconnected from the freedom to shape a life (or lifestyle) experientially and to enjoy associational privacy, a kind of privacy in public. We will return to this theme in our discussion of the theory.

A focus on the privacy needed to deliberate upon and experience one’s identity, lifestyle, and culture models privacy both in relation to the development of reflective capacities and the need to have social and affective experience to guide one’s life. Often discussions of privacy focus on justification for controlling or withholding information or limiting others’ access to me without consideration of the larger goals that such claims may serve. But with this theory, because it is focused on the goal of achieving and exercising autonomy, we can ask about privacy in relation to goals such as the living of a life “freely chosen.” This connects our theory with Mill’s concern for individuality and the need for “experiments in living”, which he took to be a sign of progress in the realization of freedom of thought and discussion.

How does the expanded theory help us see the limits of transparency in intellectual freedom?

Seeing privacy developmentally and purposefully should help us see how, at different stages of a life and in diverse circumstances, privacy might work for or against intellectual freedom. The pursuit of individuality, for example, requires both the engagement with one’s society over the course of a life and the capacity to resist social influence for the purpose of making an authentic appropriation of it. Clearly, too much and too little privacy at different stages of one’s experience can both hinder individuality.

At a more concrete level, “engagement” with one’s society in an open society must include knowing something about the diversity of lifestyles and choices people make, yet not compromising the basic privacy of those one learns about. Complete privacy about lifestyles would not only be unnatural

¹ Quoted in Alfino, Mark and Randy Mayes, “Reconstructing the Right To Privacy,” *Social Theory and Practice*, v 29, no. 1, 2003, p. 5.

for humans, but it would frustrate the development of autonomy, which cannot exist in a vacuum of information. Yet having a particular kind of life necessarily involves living it principally with those one can actually abide and who do not fundamentally disapprove of us, and this requires associational privacy.

We can see this quite clearly in the way counter-cultural and historically discriminated groups have experienced their intellectual freedom. For example, Jim Carmichael writes about the emergence of intellectual freedom in the gay rights movement in the US.² People who lived through the social processes which led to the construction of thought and identity about sexual orientation in the US have a direct and often personal understanding of the dynamic between disclosure and expression and its effect on identity. The gay rights movement illustrates how people had to claim an initially very private intellectual space to articulate a suppressed identity and then to progressively experience and revise these identities as they claimed room in the public sphere. This process, as Carmichael points out (383ff) includes not just claiming a space for the construction of identity, but determining who one actually shares that space with. Over the history of the gay right movement in the US, this is illustrated in the ongoing discussion of nomenclature, such as the various acronyms LGBT, LGBTQ, and etc. All of this requires very complex forms of social privacy, and in the context of a social rights movement one can literally study both the internal process of discerning ones' associates allies and the external process of education and self-understanding through public expression. Not all cases of intellectual freedom involve social and political movements connected so fundamentally to personal identity and lifestyle, but within this kind of case, we can clearly see how privacy plays dynamic role in the cultivation of intellectual freedom leading to increased transparency and representation in the public sphere.

² Carmichael, Jim. "Sexual Orientation and Gender Expression," in Alfino, Mark and Laura Koltutsky, eds. *The Library Juice Press Handbook of Intellectual Freedom: Concepts, Cases, and Theories*, Litwin Press, 2013, 380-405.

Another way to test our theory is to ask if it makes sense of recent difficult cases. What Mill called “intemperate discussion,” might sometimes show us the limits of transparency in intellectual freedom. The practice of the Westboro Baptist Church provides an example. This religiously-based hate group uses emotional and offensive epithets and a practice of protesting at the funerals of service men and women to express, among other things, their belief that God condemns homosexuals. Legislation at the federal, state, and local levels has emerged to counter their practices. For free speech absolutists this might be seen as a loss of intellectual freedom, but from within the theoretical perspective we have been developing it seems quite plausible to suggest that the intellectual freedom of grieving parties actually requires privacy from protests. Rather than see this as a conflict between intellectual freedom and privacy, it makes more sense, within the current theory, to see it as a protection of one groups’ intellectual freedom (a group vulnerable because of the grief they are experiencing) over another’s.

To protect the privacy of families and attendees at funerals, Congress passed in 2009 the “Respect for Fallen Heroes Act” which limits protests from occurring within 300 feet from a cemetery entrance or one hour before or after a military funeral. Along with many state and local ordinances, these restrictions protect the privacy and intellectual freedom of mourners. By contrast, last year’s US Supreme Court struck down a Massachusetts law limiting abortion clinic protests closer than 35 feet from the entrance of a clinic. If we think we are curtailing free speech to limit offense, then both laws are a compromise of intellectual freedom, but if we theorize privacy as supporting intellectual freedom at particular stages of ones’ experience, then we might regard some restrictions of time, place and manner of protest as supportive of intellectual freedom.

Likewise, this theory can help us see how the vulnerability of groups to stigma, stereotype threat, and hate might lead to diminished capacity to deliberate upon and experience one’s identity, lifestyle, and culture. We tend to theorize hate expression and behavior as a conflict between rights related to intellectual freedom as opposed to rights of personal security and fair treatment, but on our

theory the intellectual freedom of people targeted by hate campaigns is also in peril. Seeing privacy as partly constitutive of intellectual freedom helps us avoid missing the parallel.

Finally, we can look at some practices of toleration as confirming our theory that privacy plays a crucial role in developing intellectual freedom. One of the simplest and clearest representations of the complex relationship between privacy and intellectual freedom comes from the meaning and usage of the Dutch term “gedogen,” which translates as “to tolerate” but includes additional connotations. It conveys, for example, an attitude of toleration toward some phenomenon, such as drug use or prostitution, which is left “not legal, but not illegal”. A Dutch woman once explained the concept to me by holding her hand to her face and looking through the partially opened fingers. It includes the concept, I think, of a distinction between tolerance and approval which is partly based on awareness of the activity. While we could look at the concept of “gedogen” as another example of Dutch permissiveness, we could also say that it recognizes ambiguous cases in which private activity occurs in public without being publically approved.

Seeing privacy as sometimes constitutive of intellectual freedom rather than always as a limit to intellectual freedom itself may allow us to see intellectual freedom not only as a set of legal and political rights, but also as a personal and social developmental process. We certainly behave this way in many cases in which we give people the personal “space” to discern their identities and life plans without undue pressure from others. Demands for privacy can be veiled efforts to avoid the kind of openness and scrutiny that Mill advocated, but they can also show us some of the limits of transparency in promoting intellectual freedom.

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