

# Privacy and the Right to ‘Get Away With it’

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## **Abstract**

One reason people value privacy is that it gives them the option of doing or thinking bad things – things that, if made public, would warrant blame, censure or punishment. Privacy protects several types of freedom – and one of these is the freedom to be bad. This paper will argue that this is a good thing.

“I have nothing to hide” is a common refrain of those who support (or at least do not resist) the increasing practice of governments and security agencies accessing personal information, social interactions, activities and locations via internet surveillance, CCTV and communications tapping.

A reply commonly levelled against this claim is that with information comes the power to persecute. Information can be unjustly used against us: to curtail rights and remove freedoms. The abolition of privacy makes it easier to discriminate on the basis of sexual preference, to persecute on the basis of political affiliation, to murder on the basis of religion.

These may be legitimate reasons to insist on a right to privacy – but there is another weak point with the “nothing to hide” argument. Is it true that any one of us really has *nothing* to hide? Indeed, would we want to have nothing to hide?

Consider the possibility of a ‘badness detector’. This detector reveals all, and only, wrongs. In the world of the badness detector no bad deed ever performed, no bad sentence ever uttered, no bad thought ever thought, would go undetected or unpublished. Would we want to live in such a world? For many, the answer to this question is no. I will argue here that our interest in being able to be bad and ‘get away with it’ is genuinely valuable as it contributes to happiness, autonomy, and the pursuit of non-moral goods. In contrast, giving an individual no choice but to be good or face public condemnation can harm that person.

Here I will present the reasons why being able to get away with certain wrongdoings is valuable, and give a series of cases which illustrate this point. I will further argue that these cases do not provide grounds for a ‘right to do wrong’, which fails to preserve the balance between the benefits of being able to do wrong and the nature of wrongdoings as being worthy of condemnation. I argue instead that the reasons that have been presented by others in favour of a ‘right to do wrong’ could be better understood as supporting the conclusion that there is an important value in individuals feeling free to sometimes commit wrongdoings. This value would, I argue, be best protected by allowing individuals to maintain privacy.

## **I. Privacy And Warranted Punishment**

There are many reasons why privacy is important to us. Here are three of the most significant:

- 1) To protect us from the wrongdoing of others.
- 2) To protect us from blameless shame.
- 3) To protect us from having our wrongdoings discovered.

Having done nothing wrong is no defence against the wrongdoing of others. Reason 1) covers cases of error based on prejudice, for example where knowledge of a blameless action (an individual having joined an activist group) may lead to an *incorrect* belief about a blameworthy action (that individual being part of a terrorist plot). It covers cases where acts such as religious worship or political party membership are, though morally blameless, outlawed or used as a basis for persecution. Other varieties of this reason to protect privacy include the increased risk of being the victim of a crime: identity theft, violence from an abusive ex-partner who knows your location, robbery if it is known when you will be away from your home. These concerns address a legitimate fear that other people could be bad. Even an individual who has done nothing morally or legally wrong should fear their information falling into the hands of those who desire to do them harm.<sup>1</sup>

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<sup>1</sup>Note that the fear of others using your information for bad purposes needn't even relate to blameless information. Fear of blackmail based on information about your own wrongdoings is still

Reason 2) can, but needn't, involve any wrongdoing. People often feel shame or upset if they are seen naked or engaged in a sexual act. This is true even if they were seen by accident, with no wrongdoing on the part of the person who viewed them. Protection from blameless shame would also cover an interest in not having medical information revealed.<sup>2</sup> The shame or upset associated with reason 2) can explain why revealing such information is wrong.

Reasons 1) and 2) capture legitimate concerns – they are uncontroversial reasons why privacy should be protected. It is easy to explain why this is so, as the invasion of privacy leads to an individual's unwarranted suffering. Then there is reason 3). Consider the following case:

Ellen wishes to do something that she knows or believes to be wrong. She believes that if others knew of this act, they would rightly blame and admonish her. She values her privacy because it is likely to protect her from this blame, allowing her to perform the wrong act. Ellen's privacy is important to her because of reason 3).

Of course, when you have done something wrong you rarely want other people to find out about it. No one likes punishment or condemnation. This, if it is a reason at all for protecting privacy, is hardly a *good* reason. Indeed, reason 3) is often understood as a reason *against* the case for protecting privacy. I agree that in many cases this is true. Nevertheless, I will argue, sometimes 3) is a legitimate reason to

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concerned with the wrongdoing of others: Blackmail is immoral and illegal.

<sup>2</sup>Of course, sometimes reason 1) will also apply to these cases. One can be blackmailed on the basis of naked photographs, or unfairly discriminated against on the basis of medical information. However, this is not to rule out 2) being an additional reason on its own.

protect privacy.

In making a case for reason 3) it will be important to establish conditions under which it is legitimate. I will do so in more detail below, but it is worth specifying the most important condition here. Reason 3) is not legitimate in cases of *serious* moral or legal infringements where the desire for privacy is merely a desire to avoid prosecution or prison. When tracking down a dangerous criminal, we believe the ability to violate their privacy can be valuable if it facilitates their capture. In fact, enabling the prevention of serious crime is the primary argument for giving government agencies broad powers to invade privacy.

Before mounting my defence of reason 3) it is also worth noting that it is not meant to capture cases where the response to discovering a wrongdoing will be disproportionate to the act (for example, where the death penalty applies for drug possession). Nor is reason 3) about fear of blackmail (for example, where a threat to tell one's partner about an affair is used to extort money). These cases are better captured under reason 1) as they involve wrongdoing on the part of others.

Here I will explore the prospect of an individual having engaged in activities that they should be ashamed of, where, if others found out about these activities, it would be appropriate for them to react negatively, and yet it would be wrong for someone to reveal this information – and not wrong for reasons that could be subsumed under 1) or 2).

## 2. Why ‘Getting Away With It’ is Important

There are several reasons why privacy is important insofar as it protects our ability to ‘get away with it’. The first is autonomy. In his 1981 paper “A Right to do Wrong”, Jeremy Waldron argues that, in some instances, we have a ‘right to do wrong’. Waldron’s argument focuses on the value of autonomy which, he argues, would be undermined if we were only able to choose between morally good and morally ‘indifferent’ acts.<sup>3</sup> According to Waldron (1981:36), if one is only free to choose actions when they are not morally required to do otherwise, then the only choices left will be “the banalities and trivia of human life”, such as where to start shaving your face, or what to have for dessert. Without being able to make meaningful choices, argues Waldron, we are denied personal integrity and self-constitution.

There have been objections to this to this line of argument. According to Raz (1988:381) “[a]utonomy is valuable only if exercised in pursuit of the good.” Overland (2007) argues that even if allowing people to do wrong was necessary for protecting autonomy, that this autonomy is not more important than the burden placed on anyone who was harmed by the associated wrongdoing: “[W]rongdoers have no autonomy-based claim against being prevented when violating a general duty because autonomy does not count for more than the wrong.” (Overland, 2007:391)<sup>4</sup>

However, few of the objections to a ‘right to do wrong’ argue that we should have *no opportunities* to do wrong. Indeed, the fact that opportunities to do wrong remain, even when not protected by a right, has been used to support the argument

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<sup>3</sup>For replies see Galston (1983), George (1995), Overland (2007) and Bolinger (2017). For further defences of the ‘right to do wrong’ see Waldron (1983), Enoch (2002) and Herstein (2012).

<sup>4</sup>Overland maintains that only actions that harm others are genuine wrongdoings.

that such a right would be unnecessary. Raz (1988:380-381) points out that we have plenty of opportunities to do wrong that follow from pragmatic constraints on possible measures to prevent them (he uses the rather dated example of being unable to stop someone from copying music from a cassette tape which is under copyright). George (1995) similarly argues that we have opportunities to develop autonomy by being bad, without needing a right to protect them.<sup>5</sup> Such arguments suggest that Raz and George resist the world of the ‘badness detector’ where there are *no* barriers to the detection and publication of any wrongdoings. If they agree that such a world is undesirable because it goes too far in limiting autonomy, then it follows that they accept the point that protecting our ability to choose to do some wrongs is important.<sup>6</sup>

The second reason privacy is important insofar as it protects our ability to do wrong is welfare. There are three aspects to this:

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<sup>5</sup>George (1995:128): “We can, I think, concede that certain important opportunities for integrity and self-constitution would be lost in a situation in which, despite the availability of a range of significant choices among morally permissible options, one had no opportunity ever to make an immoral choice. This concession does not, however, entail that there must be strong moral rights to perform immoral actions. Opportunities for immoral choice inhere in the human condition. They are, in a certain sense, ineradicable.”

Note that Herstein (2012:359-360) rejects the suggestion that we have enough opportunities to choose to do wrong without protection in law. He argues that it is not sufficient for autonomy for one to be able to do wrongs by default (due, for example, to the difficulty or cost of enforcement), but that these must be rights protected by law for individuals to genuinely believe that they are (and, by extension, *be*) autonomous. Herstein’s arguments will be discussed in greater detail in section 4.

<sup>6</sup>See section 4 for a further discussion of the ‘right to do wrong’.

i. Doing certain wrongs makes us happy. They contribute to a rich and enjoyable life.

ii. Not being able to do certain wrongs can make us unhappy and decrease the quality of our lives.

iii. The feeling that, if you do wrong, it will be discovered, by itself contributes to anxiety, unhappiness and an overall reduction in welfare.

The first two of these will be dealt with in detail in the next section. On the third, it is important to point out that almost everyone does have *something* to hide. Consider again the ‘badness detector’. Knowing that any wrong performed would immediately be known (even if accompanied by the assurance that any reaction to this knowledge would be appropriate and proportional) would be sufficient to fear being exposed for past transgressions, and to feel that one should pause to scrutinise *every single* course of action before deciding what to do, to make sure one was acting in the best way possible. A ‘badness detector’ would contribute to a general feeling of anxiety, *even for those people whose actions were entirely good*. Such a detector would contribute to a feeling of not being free to choose, which would have a negative psychological impact independent of the affect it had on autonomy.

There are further reasons why the ability to ‘get away with it’ is genuinely valuable. One, which I find potentially convincing, but will not pursue here, is that there may be an intrinsic value in some moral wrongs. In “Moral Saints”, Susan Wolf (1982) discusses non-moral traits that are valued and that individuals have good reasons to pursue even if they come at the expense of being the morally best person. Wolf also



touches on character traits that are not just a-moral, but could be seen as immoral, and yet we often value in others, such as having a cynical or sarcastic wit. These kinds of traits may only be fully pursued or enjoyed if there is the possibility of privacy.

### **3. The Good, The Bad, And The Permissibly Bad**

I have suggested that certain wrongs can and often do contribute to a rich and enjoyable life, and that not being able to do certain wrongs can make one's life worse. I am about to provide some examples in support of this position. All these cases include the following components:

a) The individual,  $X$ , believes that it would be wrong to  $\Phi$ .

b)  $X$  believes that, given a), if their  $\Phi$ -ing were known, a negative response would be appropriate.<sup>7</sup>

c) Being able to  $\Phi$  is valuable for  $X$ .

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<sup>7</sup>I will assume here that, if an action is wrong, it is blameworthy. If someone believes that  $\Phi$ -ing is blameworthy, then it follows that they believe that blame is an appropriate response to finding out about  $\Phi$ -ing. Therefore, b) follows from a). This does not mean *any* kind or degree of negative response to a wrongdoing is appropriate. You can believe that an action is blameworthy and yet recognise that the actor should be protected from a disproportionate negative response. Such cases would be covered by reason 1), so it may be appropriate to keep in mind the fact that, if discovered, the wrongdoer would only expect an appropriate (proportionate) negative response.

d) Due to b), the value of  $\Phi$ -ing captured in c) would be lost if it was definitely going to become known.<sup>8</sup>

If all of these conditions hold, then having the *possibility* of keeping our wrong actions unknown – being able to ‘get away with it’ – is sometimes valuable in contributing to the good life of an individual.

A quick note on a) and b): these are intentionally phrased in terms of the agent judging their own actions as being bad and blameworthy, not in terms of their actions being *objectively bad* or blameworthy. As far as possible, I want to avoid a discussion of which actions are wrong, and in giving many examples, I hope that even if the reader does not think that they are *all* genuinely wrong, it is enough for my argument that the reader agrees at least some of them are wrong. I am also trying, in part, to capture a first-person perspective individuals have about their own interests, which is better covered by leaving the question of correct normative accounts to one side.

Consider again reason 3) that privacy is important: “To protect us from having our wrongdoings discovered.” The following represent some categories of wrongdoings where we may recognise 3) as a good reason for valuing privacy:

*Aesthetic Violations:* In 2015 Spotify, a music streaming service, had its data hacked

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<sup>8</sup>In the cases I present, the prospect of having their  $\Phi$ -ing discovered is sufficiently bad that the individuals involved would not  $\Phi$  if they knew it was unlikely to remain hidden, thereby removing its value entirely. However, as pointed out to me by XXX, it could be that in many similar cases someone might still  $\Phi$ , but would enjoy it less (or otherwise get less value from it), meaning that the high likelihood of discovery would reduce, but not eliminate, its value.

and the playlists of some of its members were leaked. It was revealed that some people – those who were classical music reviewers for well-respected newspapers, for example – had been listening to some embarrassingly terrible music in their spare time. Assume, for the sake of argument, that some aesthetic choices are blameworthy, and that it is appropriate to negatively judge people who make such choices. It still feels like those people shouldn't have had their data leaked – they were wronged by such a leak. One reason for this is that there was a value in their listening to terrible music: they got pleasure from listening to it. If they knew that their 'most played' lists were going to be made public (or even just revealed to their friends) they would be much less likely to listen to bad music. But this would mean that their life would lack something of value to them.

This category would also include certain choices in food or eating behaviours (such as gorging on junk food), and may also extend to certain social violations (picking your nose, sleeping in filthy bedding).

*(Legally) Permissible Moral Infringements:* Petra hates her colleagues and says nasty things about them when she gets home from work. She can be very funny when making jokes about her colleagues, though her jokes often pick on features about which they are sensitive – their weight, age, personal circumstances etc. If her colleagues ever found out that she was making such jokes, or overheard her, they would be (justifiably) very angry and upset. Petra knows that she is being bad when she makes such jokes, but she also takes pleasure in doing so (her family enjoy hearing them too), and it allows her to let off steam. If she knew that other people (particularly her colleagues) were going to find out about them, she would not feel comfortable making these jokes any more.

Most activities that are widely believed to be morally wrong, but which we do not believe should be illegal, would fall into this category: adultery,<sup>9</sup> drug-taking, watching certain kinds of pornography (possibly also falling under *Aesthetic Violations*). Waldron's (1981) primary example of a wrong which we have a right to do, voting for a racist political party, would probably also fit here.

*Minor Crimes:* Angus has recently moved into a new house and he didn't realise that he had to put his bins on the street on rubbish collection day. His bins weren't collected, and they are particularly full and smelly because he has a small baby. Nearby streets have a different rubbish collection day, and some businesses on them have large open bins. One night Angus sneaks over and places several large bags full of rubbish in these shop bins. What he has done is bad – it is possible he has caused problems for the shops by filling up their bins, and he is making the street look and smell worse. He would not want other people to do what he did, and he thinks it would be right to blame him (even give him a fine) if what he did was discovered. However, Angus and his family would have suffered if they had had to wait another fortnight for their rubbish to be collected, and his action is a one-off. If he knew that he would be caught then Angus wouldn't have done what he did, because of this, there is a value in his having a good possibility of not being caught.

Many people feel this way about traffic violations (it might be wrong to park in front of a fire hydrant, but where you were not parked there for long, you had good

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<sup>9</sup>The "Ashley Madison" data breach in 2015 leaked the information of millions who used a dating website aimed at people looking to have an affair. If we feel that there was something wrong with such a data leak then this would be captured by reason 3).

reason to park there, and no one was hurt, you want at least the possibility to get away with it). We may also feel this way about sometimes calling in sick to work so we can have a day off, watching the occasional cat video rather than working, and abusing privileges (e.g. letting a friend use your ID to get into a museum for free).

The important distinguishing feature of these cases is that we would not want it to be a general rule that these things were allowed – we feel it is appropriate in general that people are punished for traffic violations and not working when they should, and so in an all-or-nothing choice we would rather that no one could ever get away with such things than that everyone could do them all the time. But why should this be the choice? Having the possibility of being able to get away with some of these things, sometimes, is genuinely valuable.

*Not Being Good Enough:* To borrow a case originally presented by Driver (1992): Roger and Bob are brothers. Bob has a failing kidney and needs a transplant immediately. Roger is the only available match – if Roger does not donate his kidney to his brother, Bob will die. Driver uses this example as an illustration of a suberogatory act, one which Roger is not *required* to perform, but he would be bad if he didn't perform.<sup>10</sup> Departing from Driver's original example, imagine that Roger *really does not want to donate his kidney*. He is not close to his brother, does not think Bob is a nice person, and he is terrified of hospitals and operations. When Roger is tested to see if he is a match, his medical records remain private – it is up to him to reveal that his kidney

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<sup>10</sup>Driver, (1992:287) sets this up as an example where the only options available are either suberogatory or supererogatory. If Roger did donate his kidney he would be going beyond what is morally required of him.

could save Bob's life. Roger knows that if Bob and pretty much anyone else knew that he was a match they would (rightly) place a lot of pressure on him to donate and (once again rightly) deeply condemn him if he chose not to do so. Many of Roger's closest friend and family members would never speak to him again if they knew that he had let Bob die where he could have saved his brother. Roger would only feel free to choose not to donate his kidney (even if he is morally conflicted about it) if no one else is likely to find out that he is a match.

Suberogatory acts – those not morally *required* of us, but which we would be bad not to do – and supererogatory acts – those not morally *required* of us, but which we would be good to do – both fall under the category of *Not Being Good Enough*. Waldron's (1981) example of someone who spends their lottery winnings on champagne and racehorses, giving none of it to charity would be included here.<sup>11</sup> As many of these examples relate to how we spend our money, this may be one reason why people have an interest in keeping their salaries private, and no doubt why people do not want others finding out about legal, though morally questionable, tax-minimisation. Many potentially immoral actions that have indirectly bad consequences, cumulatively bad consequences, or distal bad consequences, also fall into this category. For example, individual practices that do not mitigate harm to the environment (e.g. not recycling), eating meat, supporting unethical companies, buying clothing made in sweat shops etc. We may do these things and believe that it is our right to do so, but also know that we should not be doing them and believe that if others knew of our actions it would be appropriate for them to blame us.

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<sup>11</sup>See also Overland (2007).

*Bad Things Out of Your Control:* We also have an interest in keeping hidden a category of wrongdoings which does not involve c) or d). Certain thoughts might be wrong, or an indication (or indeed the manifestation) of the bad character of the thinker. This could be true even if they were not acted upon. For example, if someone wishes for the death of a hated colleague; has an explicit sexual fantasy about a child or a family member; or takes pleasure in hearing of a terrible act of war because it benefited their interests. In each of these cases the individual may know that they are a bad person for having such thoughts, and yet find it impossible to stop them. The discovery of these bad thoughts would make the individual's life worse because of something they had little to no control over. These too are cases where an individual may have a justifiable interest in 'getting away with' being bad.

Morality can be demanding, and while moral values do and should play a significant part in our lives, they are certainly not the only values we have. Privacy can be important in protecting our freedom to choose non-moral values over moral ones, even where they lead to immoral actions. The examples above show that the value of at least some wrongdoings outweighs the dis-value of these wrongdoings being prevented in all instances.

#### **4. Why not just a Right To Do Wrong?**

Some of the arguments in favour of being free to sometimes 'get away with' doing wrong have been traditionally used to support a 'right to do wrong'. The idea of such a right was most prominently proposed by Waldron (1981) who argued that

rights to do wrong follow from more general rights. The right to vote for a racist political party, for example, follows from the right to vote freely. The right to spend lottery winnings on champagne and racehorses rather than giving it to those in need, follows from a right to private property. Assuming that we believe that voting for a racist political party and not giving any lottery winnings to those in need are moral wrongs then, according to Waldron, we have a ‘right to do wrong’. The idea of a ‘right to do wrong’, while being motivated by many of the concerns that I have highlighted above, faces a number of serious problems. Several of these follow from the fact that a ‘right to do wrong’ has too much brute force: it appears to entail that individuals cannot object to wrongdoings (see below); it risks the conclusion that there are specific rights that are indefensible (for example a ‘right to cheat on your husband’); and it is too narrow in the cases it is able to cover. However, the arguments against having a ‘right to do wrong’ also risk being too blunt – it is true that *always* letting people get away with being bad is undesirable, but so is *never* giving people the opportunity to be bad and get away with it. In response to this tension, I will argue that instead of having a ‘right to do wrong’, we have a legitimate interest in ‘getting away with it’ which, all else being equal, is best protected by protecting privacy.

According to Waldron (1981:29), what it means to have a right to  $\Phi$  is that it is wrong for another person to ‘interfere with your performance of’  $\Phi$ -ing.<sup>12</sup> The focus of the discussion of a ‘right to do wrong’ has largely been the possibility of physical

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<sup>12</sup>“The cutting edge of the claim that P has a right to do A is the correlative claim that other people are morally required to refrain from interfering with P’s performance of A. If P has a right to do A, then it follows that it is wrong for anyone to try to stop P from doing A.” (Waldron,1981:29)



intervention on the part of governments or private individuals to prevent someone from exercising their right. However, ‘interference’ needn’t be so narrowly defined.<sup>13</sup> Waldron (1981:30) acknowledges that “[d]epending on the circumstances... merely telling someone that he should not do A may be a highly effective way of getting him to stop A-ing.” However, Waldron’s account is limited by the fact that he is unable to pull apart the distinction between someone being prevented by law from exercising a right and someone being prevented from exercising a right due to pressure or disapproval from others. The challenge for Waldron lies in the fact that we are so swayed by the opinions of our peers, that even an expression of mild disapproval could influence our choice whether to perform an action. If we have a right to be bad, and this right entails that others should not act in a way that would discourage us from being bad, worryingly, this implies that there is a duty not to express condemnation of (certain) blameworthy acts.

If Waldron is right then voting for certain political parties is morally wrong – it is blameworthy. Blame is an appropriate response to blameworthy acts. It should follow, then, that it is not wrong to judge someone harshly for voting for a racist party. However, this is exactly what appears to follow from a ‘right to do wrong’. Waldron (1981:30) argues that, even when correct, it is not always appropriate to *express* a moral opinion.<sup>14</sup> But this observation is not sufficient to conclude that the

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<sup>13</sup>Overland (2007:308): “[T]o prevent something simply means to cause something not to happen or not to be done, or to be the reason why somebody does not or cannot do a particular thing.” It is worth noting that many cases of prevention are going to be through the threat of punishment. ‘Prevention’ needn’t be understood in this case as just that which happens before the event.

<sup>14</sup>Expressing moral anger loudly in a library, for example, would be inappropriate, even if the anger

existence of a 'right to do wrong' requires others never announce their legitimate condemnation of wrong acts. It is not wrong for an individual to not want to associate with someone they believe to be morally bad, or to be angry with such a person, or to not like them. These are all reasonable responses to wrongdoing.

In arguing that we have a 'right to do wrong', and that no one should interfere with our doing that wrong, Waldron appears bound to accept at least one of the following two undesirable conclusions:

i. That, at least sometimes, it is wrong to judge someone or express condemnation when that person performs a morally wrong action.

ii. That condemnation, judgement, ostracisation and so on are not enough to prevent a normal person from freely performing an action of their choice.

Both i. and ii. are highly counter-intuitive (ii. may just be empirically false), and yet at least one must be true for Waldron's account to work. Waldron (1981:30) recognises this problem, but does not have much to say on solving it:

The line at which mere prescription and admonition stop and coercion begins is a fine one. Even the mere expression of disapproval – the raised eyebrow or the icy stare – may be felt as a positive show of force. Also, inasmuch as a morality forms part of a way of life, and inasmuch as a person's way of life is defined in part by the persons with whom he chooses to associate, the prescriptivity of a personal moral judgment may lead an

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were warranted.

agent to impose social sanctions of the most far-reaching kind on those around him. There are, then, considerable difficulties in distinguishing interference from mere condemnation...

This is the first point at which my account has an advantage over a 'right to do wrong'. Insofar as we have a legitimate interest in being able to do wrong, and this is threatened by the legitimate condemnation that is expressed in the face of wrongdoings, I believe that we have already devised a solution: privacy. Take the case of voting. In a democratic society one is free to vote for the party of their choice. This freedom is secured not only through the absence of coercion, but also because voting for political parties is secret. Reason 1), "to protect us from the wrongdoings of others", is going to be a good reason in favour of secret ballots – perhaps you would be persecuted, attacked or illegally discriminated against, if others discovered who you voted for, or forced, physically or through threats or blackmail, to vote a particular way. Secrecy protects you from the wrongdoings of others. For this reason, secret ballots may be important for maintaining our rights to vote freely. However, secrecy also serves another important function. Insofar as we would be put off voting for a morally bad party through fear of the bad opinion of others, secret ballots protect us not just from other people being bad, but other people being reasonable – and in doing so they allow us to be bad.<sup>15</sup>

If one's voting decision remains secret (unless we consent for it to be public), then

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<sup>15</sup>Note that this could be the case even if we ourselves acknowledge that our own actions are morally wrong. I could know that I am voting for a party that will make the lives of many people worse, and that this would be a bad thing, and still want that party to win for selfish reasons – I believe it will make me richer etc.

i) and ii) could both be false, and yet our ability to vote freely could be protected. Privacy enables a choice to do wrong meaning that the case for a secret ballot can be made not just on the grounds of 1), but on the grounds of 3).<sup>16</sup>

Understanding the value of protecting the freedom to do wrong, without committing to a 'right to do wrong', also helps avoid the question of whether we have specific 'wrong'-rights – a right to cheat on our partner, for example, or a right to vote for a racist party – while allowing us to account for our interest in being free to choose such actions. There is, Waldron acknowledges, something about saying that we have a 'right to vote for a racist party' that doesn't sound quite right.<sup>17</sup> If we understand that the right in question is not a 'right to do wrong', but rather a right to be able to keep secrets which is valuable in part because it allows us to do wrong, then the problem of having specific rights to do wrongs fades away. We have a legitimate interest in being bad in certain ways that, all else being equal, would be best protected by a more general right – a right to privacy.

Instead of introducing a 'right to do wrong', making a commitment to protecting privacy can help preserve choice, even though it allows punishment (not necessarily legal punishment) for specific violations. This would largely preserve what is ap-

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<sup>16</sup>Believing that a secret ballot is good because it protects an individual's right to vote for whosoever they choose does require understanding voting as a right tied to individual autonomy. Mill (1861: Chapter X) rejects the idea of a secret ballot because he sees voting as a duty, not a right, and one that requires people to be accountable to others. For Mill, only under exceptional circumstances should voting remain secret.

<sup>17</sup>A problem Galston (1983: 321-2) argues that Waldron doesn't solve. According to Galston, Waldron gets stuck trying to explain how we could simultaneously have a right to  $\Phi$  and a duty not to  $\Phi$ .

pealing about the autonomy argument without requiring too strong a protection of wrongdoings. This would also allow for a wider range of wrongs which we have a legitimate interest in sometimes being able to get away with. If it is never permissible to prevent someone from exercising their rights, then we could never have a 'right to do wrong' that covered the cases in the *Minor Crimes* category above as these are of a kind where they are only permissible if very few people do them very rarely, something which is unlikely to happen if there was no law against them. In these ways protection of privacy is able to do things that a 'right to do wrong' is not.

Herstein (2012: 360) argues that nothing other than a right will do for protecting choices to do wrong as the psychological component of feeling free is crucial to autonomy: "Autonomy has a subjective component to it, by which I mean to point out that in order to be autonomous people must believe and, in some sense, feel that they are autonomous." Anything other than a right, he argues, is too weak to achieve the feeling of genuine freedom to choose. According to Herstein (2012:360), rights have a liberating effect as evidenced by the fact that people often bring up the fact that they have a right to  $\Phi$  against allegations of their being wrong to  $\Phi$ . Indeed, as Herstein himself points out, individuals will often use the fact that they have a right to  $\Phi$  as a *justification* for  $\Phi$ -ing. This is a troubling conclusion. Keeping in mind that to  $\Phi$  is to do something morally wrong in this instance, using the fact that you have a right to  $\Phi$  as a justification for  $\Phi$ -ing is getting something wrong – whatever reason we have for arguing that there is a 'right to do wrong', we don't want it to be that we are in fact providing a reason to commit wrongdoings. Waldron (1981, 1983) explicitly rejects the connection between having rights to  $\Phi$  and having a *reason* to

Φ.<sup>18</sup> To argue otherwise would be to give support to the arguments against there being a ‘right to do wrong’ (it is precisely one of the arguments used by Galston (1983)). Understanding the importance of protecting a feeling of being free in terms of privacy gets around this problem with Herstein’s argument. Where privacy is protected it will in turn protect you in doing (some) wrongs while neither being a reason in favour of doing such wrongs, nor being a tool to justify wrongdoings in the face of legitimate criticism.

All this said, I am not suggesting that we merely replace rights to do wrong with a right to privacy. There are certain rights that some see as possible instances of a ‘right to do wrong’, such as a right to have a late-term abortion (George (1995:Ch 4); Herstein (2012)), which require legal protection, not just a protection of privacy.<sup>19</sup> As Herstein (2012:344-5) points out, some rights to do wrong require positive duties on the part of others, not just protection from intervention: a right to seek a late-term abortion may be understood as a ‘right to do wrong’ which requires that society provides access to safe abortion providers; even a right to vote for a racist political party requires a duty to provide the racist voter with a voting ballot. In such cases, however, the ability to keep information about one’s decision to have an abortion

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<sup>18</sup>Waldron, (1983: 325): “To have a right to do X is not to have a reason, or (to use Galston’s term) a “warrant”, for doing X... if someone has a right to do an action that is wrong, it follows that it is wrong tout court for him to exercise his right in this respect. He cannot appeal to his right as a warrant or excuse for his wrongdoing.”

<sup>19</sup>One can object that this is not a case of doing something wrong. However, it is interesting to note, as pointed out by George (1995:112), that this right has often been defended by those who *do* believe it is a moral wrong. Driver (1992:292) similarly argues that “obtaining an abortion for no compelling reason” could consistently be thought of as bad and yet permissible.

private will also be crucial in allowing many women to freely choose to abort.

## **5. Privacy, Probability, and The Responsibility To Keep Things Hidden**

So far I have avoided arguing that our interest in ‘getting away with it’ translates into a right. However, the arguments in favour of being able to ‘get away with it’ do offer some grounds for a corresponding right, even if a somewhat unusual one. For the sake of brevity, I will use a ‘right to keep wrongdoings private’ to mean the right to privacy that non-accidentally covers cases which fall under reason 3) and is justified by reason 3). In considering the case for such a right, there are three components that need to be highlighted. The first is the conditions under which an individual can possess such a right. These will include certain responsibilities which are required for one to have a legitimate claim to a right to privacy on the grounds of protecting an ability to do wrong (and get away with it). The second is the duties that others have which accompany such a right. The third is the nature of this right – it is a probable right, not an absolute one.

A right to keep wrongdoings private is not a simple right to get away with wrongdoings. To start, as we have seen, it only applies to relatively minor transgressions. We do not have a morally legitimate interest in getting away with murder. It is important to acknowledge that a right to privacy has been systematically used in the past to protect particular kinds of wrongdoings – harms perpetrated against women in the domestic sphere (MacKinnon, 1983). Where privacy has historically and legally been understood as fundamental to the separation of the public (polit-

ical) and private spheres, this divide has been used to “trivialise women’s struggles against abuse of power by men” (Richardson 2011:518). It is important, therefore, to highlight that this is not a defence of such practices. Aside from the very serious nature of many of the wrongdoings previously protected under the guise of privacy, making them ineligible for the kind of legitimacy that I am arguing for (a ‘right to keep wrongdoings private’ would only protect minor offences), my argument here neither rests on, nor does it support a traditional distinction between public and private spheres. Lever (2001, 2005) argues that while the right to privacy has been historically misused to perpetuate gender inequality, this does not mean the right itself is at odds with equality. If there is a right to privacy, then where it conflicts with the principles of equality, it may be important to give preference to equality, but this does not mean that privacy itself is fundamentally contrary to inequality. This right must also be weighed against the reasons for wanting to limit privacy – many of them relating to people’s safety and wellbeing.

A general right to privacy is often accompanied by the responsibility to make a reasonable effort to keep things private (Thomson (1975)). If you fulfil this responsibility then you should be able to have a reasonable belief that your private information will remain secret. In the case of the right to keep wrongdoings private, this responsibility is not merely required to protect the right-holder. In many of the instances of wrongdoings discussed in the last section, the wrongdoing is actually made worse by discovery. If you make mean jokes about colleagues within earshot of them, you are doing something worse than if you say it in private, away from your workplace, where it is reasonable to believe that you will not be heard. Making a derogatory joke about someone in the knowledge that they are likely to hear you is callous and cruel – this is one reason that people who make such jokes



do not want them to be discovered. Talking about bad thoughts such as those described above can upset people, or make them feel uncomfortable. Being careless in aesthetic violations, such as picking your nose in public, will lead others to feel annoyance or disgust. Similarly, where an individual commits a minor crime that is not very harmful because it is an isolated incident, but which would be harmful if it became common practice, secrecy is important in preventing the practice from being widely adopted. Many wrongdoings that may be covered by a right to keep them private will only be suitably minor wrongdoings if the agent is trying to keep them private.

If you make a reasonable effort to conceal a (relatively minor) wrongdoing, others have a duty not to seek out or reveal this wrongdoing. However, the duty that accompanies a right to keep wrongdoings private is not identical to a general duty relating to a right to privacy. The duty that corresponds to a right to keep wrongdoings private is not necessarily the duty to *protect* private information. Rather it is the duty to not undermine the reasonable efforts that have been made to protect it. Fitting a hidden microphone on someone to monitor what they say, or hacking into someone's private e-mail account, would both be violations of a duty not to interfere with someone's privacy. However, it is not as clear that, if an individual has not made sufficient efforts to hide an action or information *in the case where they are wrongdoings*, it is always a violation of the duty to maintain their privacy if you share this with others. If I discover a friend has been cheating on their partner, or I overhear someone saying mean things about their colleagues, one could make the case that I am not bound by their right to keep wrongdoings private not to tell the relevant parties. This is arguable, and different attitudes to 'snitches' may reveal a divide between those who believe that it is wrong to reveal a wrongdoing of others

and those who believe that, if you have found it out through no fault of your own, then it is not wrong for you to tell others, indeed it may be morally required in some cases. Note that this is true only in the case of *wrongdoings* being protected by privacy – it would be a wrongful violation of privacy to share poorly hidden information if doing so were to lead that individual to feel blameless shame, or be at higher risk from the wrongdoings of others.

Even where an individual has taken reasonable measures to keep their wrongdoing hidden, they cannot expect that this will mean that their wrongdoing will definitely not be discovered. Even where privacy is not intentionally violated, information can still get out. Privacy is not a guarantee. If you want to be certain to avoid the punishment or condemnation that comes with a wrongdoing being revealed, then you should not perform the wrongdoing. This is why the right to keep wrongdoings private is more like a right to have a reasonable chance of getting away with it. Individuals may need to judge whether their chances of being caught are too high for their liking or not. In fact, knowing that it is possible (even if unlikely) that your action will be discovered is part of what makes it still bad to perform actions which appear not to harm anyone *unless* they are discovered. You know that what you are doing has the potential to cause harm – this is part of what it is to know that what you are doing is wrong.

This probabilistic component of the right to keep wrongdoings private distinguishes it from a right to do any specific wrongdoing, or a right to *always* be able to get away with minor wrongdoings. You do not have the right to keep all minor wrongdoings hidden under all circumstances. Such a right would be too strict, running counter to the interests of society both in being able to generally find and condemn wrongdoings (which can be important for prevention, fairness and social

cohesion) and to the interests we have in being able to know the people with whom we interact. It is not necessary to know of *every* minor wrongdoing of a friend or romantic partner in order to know them well enough that you can form and maintain a genuine relationship. However, if your friend or partner commits many, many minor wrongs all of which are hidden from you, then you have been robbed of the opportunity to form a genuine relationship with that person, as opposed to a relationship based on the misleading public face they presented. Furthermore, in the case of minor crimes, for example, the occasional wrongdoing is only justifiable if the vast majority of such wrongdoings are detected and appropriately censured or punished. The right to keep wrongdoings private doesn't provide immunity, though it does offer a level of protection.

The right to keep wrongdoings private, therefore, if it exists, is a reasonably weak right, but it is necessarily weak. The right to 'get away with it' behind a shield of privacy, while important, must also be fragile. Overly robust and it would encourage wrongdoing. Absent entirely and it would lead to the harms outlined above. But in between there is a 'wobble room' that strikes a useful balance between personal happiness and moral order.

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