

Secret Ballot

The question of the greatest moment in regard to modes of voting, is that of secrecy or publicity....

J.S. Mill, *Considerations on Representative Government*¹

The question of the secret ballot - to which John Stuart Mill devoted a chapter of his *Considerations on Representative Government* - has been long settled in modern democracies. For Mill, however, writing before use of the secret ballot became widespread, the question was alive with controversy. Use of the secret ballot was the topic of earnest debate in contemporary Britain; meanwhile, parts of Australia had already begun implementing it. Despite Mill's opposition, it would be British law within twelve years of the publication of *Considerations on Representative Government* and by the end of the century was widely adopted in the United States and a number of countries in Europe. Today the practice is nearly universal in mature democracies and so accepted that it is scarcely mentioned in political theory literature.

Mill argued on principle against the secret ballot, but pragmatic concerns drove its spread. In many countries, electors were victim to influence, bribery, and other corruption by parties or persons who sought to guarantee an electoral outcome. Proponents saw the secret ballot as a way to excise corruption from elections, and in this it proved a success. It does not follow, however, that the secret ballot's pragmatic success overwhelmed the principles of Mill's opposition to it. In

¹ Mill, John Stuart. *Considerations on Representative Government* [1861]. In *On Liberty and Other Essays*. Oxford: Oxford University, 1991. pp. 203-467. The discussion of secret ballots is mostly in Chapter X, "On the Mode of Voting", pp. 353-369. The epigraph is quoted from p. 353.

this paper, I revisit the tension between Mill's philosophical arguments for open voting - and others' practical arguments against - in light of a hundred years of social and political change. Although the secret ballot was once an apt solution, a return to open voting might address many of the present and looming problems of democracy. Certainly, any serious attempt to address those problems requires that we reconsider our attachment to the secret ballot.

I begin with the secret ballot debate in Britain prior to Mill, then in the second section move to Mill's opposition and the responses it received. In the third section, I recap the history of the modern secret ballot system, and the practical issues that drove its adoption. In the fourth section I revisit the debate, stripped of 19th century context, to ask whether Mill was right on principle if wrong in practice. In the fifth section, I explore the corruption that persists in modern elections – specifically the U.S. – despite widespread acceptance of the secret ballot, and ask whether a return to the open ballot might address that corruption and alleviate concerns about modern representative government. The final section reviews the argument against the secret ballot, and proposes ways to re-introduce open voting.

A note: inconsistent and dynamic usage requires the definition of 'ballot' for my purposes. Where originally the word referred to a ball, bean, or other physical means of casting a vote - as opposed to, say, *viva voce* (voice) voting - it now refers to a printed list of candidates from which the voter chooses by means of a mark or punch tab. Secrecy is almost always a part of any ballot system in modern practice, but this was not always the case. As later discussion will show, non-secret paper ballots were an instrumental part of corruption in many U.S. elections during the 19th

century. For this reason, I use the phrase 'secret ballot' throughout this paper to emphasize the focus on secrecy, rather than the physical ballot.

I. The Argument for the Secret Ballot

Proposals for the secret ballot in Britain had been forwarded occasionally for at least two centuries before Mill wrote *Considerations on Representative Government*.² Mill was a latecomer to the debate, which began in earnest as early as 1819, when Jeremy Bentham called for “secret, universal, and equal suffrage” as part of his general efforts to reform Parliament.³ In 1830, James Mill - father of John Stuart Mill - published “The Ballot” anonymously; this is one of the first extant arguments in favor of the secret ballot. James Mill, like Bentham, was in favor of the secret ballot; he argued that a “large majority of all those who vote for county members... cannot vote contrary to what they know to be the inclination of such and such men, without the prospect of serious, often ruinous, consequences to themselves”.⁴ He was referring to the practice of landlords demanding that their tenants vote for a specific candidate; tenants who voted otherwise faced eviction from their farms and homes, and thus penury.⁵ This imbalance was peculiar to British society, although it co-existed with bribery and other forms of corruption. James Mill saw the secret ballot as a necessary remedy to such corruption, and thus vital to the

² Asquith, H.H. "The Ballot in England". *Political Science Quarterly*, 3:4 (December, 1888). pp. 654-55.

³ Park, Joseph. "England and the Secret Ballot". *Political Science Quarterly*, 46:1 (March 1931). p. 51.

⁴ Mill, James. "The Ballot" [1830]. in Ball, Terence, ed. *Political Writings*. Cambridge; Cambridge U. Press, 1992. p 231.

⁵ Wigmore, John. *The Australian Ballot System*. Boston; Boston Book Company, 1889. p. 12.

British democracy. He argued that the "theory... is that the people choose. The practice is, they do not choose. The [secret] ballot, and that alone, can enable them to choose, and render the British Constitution in reality what it now is in only pretence".⁶

Bentham, James Mill, and their cohort brought the secret ballot into serious consideration; in 1832 the British Parliament considered but denied a bill including provision for the secret ballot, a vote that was repeated variously and sporadically for the next several decades.⁷ Among the reformers was George Grote, who not only worked in Parliament for the reform but offered demonstrations of a mock-up ballot box across Britain. These demonstrations earned the ire of Rev. Sydney Smith, who sneered at "Mr. Grote and his box" in an 1839 essay.⁸ Smith opposed the secret ballot, dismissing advocates' claims on several grounds: that landlords had the right to dismiss their tenants; that if "a man is sheltered from intimidation, ...[it is] not at all clear that he would vote from any better motive than intimidation";⁹ and that "it must always be remembered and repeated, and said and sung to Mr. Grote, that it is to the degraded liar only that the box will be useful".¹⁰ Smith's arguments proved influential, despite or perhaps because of the mockery heaped on Grote.¹¹

In the 1840s impetus for the secret ballot in Britain ebbed; its most active promoter, George Grote, retired from Parliament in 1841, having spent the previous

⁶ Mill, James. "The Ballot" [1830]. p. 244.

⁷ Park, Joseph. "England and the Secret Ballot". pp. 57-64.

⁸ Smith, Rev. Sydney. "Ballot". in Smith, Rev. Sydney. *Modern British Essayists*, Vol. III. Philadelphia: A. Hart, late Carey & Hart, 1854.

⁹ p. 384

¹⁰ Smith, Rev. Sydney. "Ballot". p. 384

¹¹ Park, Joseph. "England and the Secret Ballot". pp. 61.

decade advocating unsuccessfully for the reform.¹² But by the 1850s the question had re-emerged, and among its new advocates in Parliament was John Bright, a Radical member who frequently mentioned the reform in his correspondence and speeches. In 1852, he wrote to Lord John Russell - recently Prime Minister and still a leading Whig – in favor of the secret ballot; he noted correspondence from a brother in Massachusetts on the "tranquillity [sic] and order with which the elections are conducted".¹³ Massachusetts had implemented in 1851 a law requiring the deposit of written ballots in official envelopes; while not secret and certainly not foolproof, the law did apparently reduce the chaos on election day. In contrast, Bright described the British system of open polls and *vive voce* voting as "perfectly hideous. It disgraces candidates and depraves electors; and the scenes which take place at every general, and almost at every particular, election are a frightful price to pay for Parliamentary government".¹⁴ Russell was unmoved, replying that the problems with British elections "could be more easily cured without the ballot than with, if there were a will".¹⁵ Bright continued with his advocacy for the secret ballot, however, which he saw as a necessary adjunct to universal suffrage. In 1857, Bright wrote to a constituent on the subject of Parliamentary reform that "to give a large increase of votes without the security of the ballot will subject increasing numbers of our countrymen to the degrading influences which wealth and power now exercise so

¹² Park, Joseph. "England and the Secret Ballot". pp. 64.

¹³ Bright, John. "From John Bright" [December 12, 1852]. in Gooch, G.P., ed. The Later Correspondence of Lord John Russell, 1840-1878, Vol. II. Longmans, Green, and Co.; London, 1925. p 113.

¹⁴ Bright, John. "From John Bright" [December 12, 1852]. p. 113.

¹⁵ Russell, Lord John, "To John Bright" [December 12, 1852]. in Gooch, G.P. The Later Correspondence of Lord John Russell, 1840-1878, Vol. II. Longmans, Green, and Co.; London, 1925. p 113

unscrupulously upon the existing electoral body".¹⁶ Incidentally, Mill was also an advocate for universal suffrage, albeit in what he termed a "graduated" form.¹⁷

II. Mill's argument

Bright was still active in Parliament when Mill wrote *Representative Government*, and even earned a mention by name in the discussion of secret ballot. Like his father, John Stuart was an ardent proponent of many progressive ideas and reforms - in fact, he implies (and a contemporary reference confirms) that he was an early supporter of the secret ballot.¹⁸ Given his views on other topics, it is telling that Mill came instead to oppose the secret ballot. He clearly had little sympathy for the reflexive conservatism of many, like Sydney Smith, who also opposed it, but was also unmoved by arguments in favor, which were largely based on pragmatic grounds. Indeed, Mill's argument against the secret ballot depended on a fundamental principle - that voting is a trust, and not a right.

In *Representative Government*, Mill briefly addressed the practical concerns of reformers briefly, particularly the corruption of British elections. He wrote:

Secrecy is justifiable in many cases, imperative in some, and it is not cowardice to seek protection against evils which are honestly avoidable. ...

¹⁶ Bright, John. "Parliamentary Reform" [May 17, 1857]. in Leech, H.J, ed. *The Public Letters of The Right Honorable John Bright*, 2nd ed. New York; Kraus Reprint Co, 1969.

¹⁷ Mill, John Stuart. *Considerations on Representative Government*. pp. 326-45. The descriptor "graduated" appears on page 341. Mill's view of universal suffrage excluded illiterates and allowed for "plural voting" – that is, extra votes for more cultured or refined persons – but also extended to women.

¹⁸ For Mill's implication, see *Considerations on Representative Government*. p. 359: "This argument [for the secret ballot] is specious, and I once thought it conclusive." For contemporary confirmation, see "Ballot". *Westminster Review*, October 1870. The article describes Mill's change-of-mind as a serious blow to advocates of the secret ballot.

But I must contend that these cases, in affairs of a political character, are the exceptions, not the rule.¹⁹

Mill did not claim that open elections were free of corruption; such a claim for Britain was readily contradicted by those advocating for the secret ballot,²⁰ and it was certainly not the case in Australia or the United States. Rather, Mill argued that corruption represented a certain amount of evil, and that cases in which the evils of corruption were less than the evils of the secret ballot were increasingly rare. He further argued that:

...in the more advanced states of modern Europe, and especially in this country, the power of coercing voters has declined and is declining; and bad voting is now less to be apprehended from the influences of others, than from the sinister interests and discreditable feelings which belong to himself, either individually or as a member of a class.²¹

His concern – the evil greater than corruption – is that the secret ballot would encourage selfish and private voting, and this would be a great harm. Mill did not believe that governance was best determined by the lowest common denominator of individual, independent interests. Instead, he believed that the "exercise of any political function, either as an elector or representative, is power over others",²² and as such democracy incurred obligations upon its participants towards their fellow citizens. For this reason, argued Mill, voting could not be considered a right:

¹⁹ Mill, John Stuart. *Considerations on Representative Government*. p. 353.

²⁰ See, for example, "Ballot". *Westminster Review*, October 1870. p. 463: [Mr. Mill] "... thinks that at the present day, in this country, the voters generally are able to defend themselves without its [i.e. the secret ballot] aid. One would almost imagine from this that Mr. Mill was not aware of what is going on at the present day in every part of the United Kingdom. In many places voters come with tears in their eyes, and beg to be released from the promises they have given." This may be a misrepresentation of Mill's claim; he specifically admits that corruption exists but argues that it is not the greater evil.

²¹ Mill, John Stuart. *Considerations on Representative Government*. p. 356.

²² Mill, John Stuart. *Considerations on Representative Government*. p. 354.

In whatever way we define or understand the idea of a right, no person can have a right (except in the purely legal sense) to power over others: every such power, which he is allowed to possess, is morally, in the fullest force of the term, a trust.²³

This word – "trust" – was the crux of Mill's argument. Despite his support for "gradual" universal suffrage, Mill believed voting to be a privilege and responsibility to be exercised conscientiously, as though the office of elector was itself a kind of civil service. The spirit of the secret ballot, by contrast, was "that suffrage is given to him for himself; for his particular use and benefit, and not as a trust for the public".²⁴

Publicity was for Mill a critical check on selfishness and irresponsibility. He described "public opinion" as "the ruling power of last resort",²⁵ and wrote that one of the advantages of representative government was "the utmost possible publicity and liberty of discussion, whereby ... the whole public, are made, to a certain extent, participants in the government".²⁶ His views on the value of open discussion are well known from *On Liberty*, and the benefits of public discourse expounded therein extend to governance as well. Publicity in respect to governance thus served the same purpose against bad votes that it did against bad ideas – to expose and filter. The problem with the secret ballot was first that it would hide those votes, but also that it would encourage electors to view voting as something that should be secret. Mill must have possessed a vivid imagination to have seen beyond the immediate and pernicious effects of corruption in elections to what he called "spirit of an

²³ Mill, John Stuart. *Considerations on Representative Government*. p. 353-54.

²⁴ Mill, John Stuart. *Considerations on Representative Government*. p. 354.

²⁵ Mill, John Stuart. *Considerations on Representative Government*. p. 361.

²⁶ Mill, John Stuart. *Considerations on Representative Government*. p. 286.

institution, the impression that it makes on the mind of a citizen",²⁷ but this was the basis for his objection to the secret ballot.

Mill's views did not go unnoticed or unanswered. In an 1868 speech to the Edinburgh Chamber of Commerce, John Bright allowed that "no man is more fair in argument than Mr. Mill," but that Mill was nonetheless wrong in his opposition to the secret ballot. Bright did not accept Mill's view, as he paraphrased "that public duties should be performed publicly; that by and by there will be morality and power enough to put an end not only to corruption, but to compulsion"; he further attacked Mill's comparison – not present in *Representative Government* - of the voter to a judge, arguing that the metaphor was inept and that judges made their decisions in private.²⁸ A similar critique was offered by George Holyoake, in an eight-page pamphlet published in 1868, titled "A New Defence of the Ballot In Consequence of Mr. Mill's Objections To It". Ignoring the limitations on suffrage at the time, Holyoake wrote that it "is no affair of my neighbour *how* I vote... since I exercise no power or freedom which he does not equally possess, and which I do not equally concede to him".²⁹ In a play on Mill's use of the word 'trust' to describe the vote, Holyoake argued "then let me be *trusted* with it! I am not trusted so long as my use of it is watched".³⁰ Clever as this was, it did not address the underlying principle of Mill's argument.

²⁷ Mill, John Stuart. *Considerations on Representative Government*. p. 353.

²⁸ Bright, John. "General Politics" [Edinburgh; November 5, 1868]. in Rhys, Ernest, ed. *Oratory: Selected Speeches of Right Hon. John Bright, M.P.* London; Dent & Co, 1907. pp. 110-111.

²⁹ Holyoake, George. "A New Defence of the Ballot in Consequence of Mr. Mill's Objections To It". London; Book Store, Strand, 1868. p. 4.

³⁰ Holyoake, George. "A New Defence of the Ballot". p. 5.

Neither Bright nor Holyoake mounted a convincing denial of the vote as trust, nor against the role of publicity in encouraging responsible votes. Surely someone made such an argument, but the only extant criticism in that vein comes from an anonymous article in *The Westminster Review*, a journal founded by Jeremy Bentham and James Mill and owned for many years by John Stuart Mill himself. Inverting Smith's argument that electors would vote no better than from intimidation, the *Review* article argued:

We cannot see that the giving of these base and mischievous votes, or the operation of these mean and selfish feelings, are checked by publicity, more than by secrecy of voting. These feelings operate and these votes are given at present; what reason is there to suppose that they would be more prevalent under the opposite system?³¹

Although compelling, this argument is still more pragmatic than principled, and it was on pragmatic rather than principled grounds that the secret ballot was adopted. Mill's principle – the vote as trust – was never adequately answered.

III. The Australian Ballot

At the same time John Bright was writing letters on the subject, territorial governments in Australia were developing a form of the secret ballot that would soon be known as the “Australian ballot” when it was introduced in Britain, the United States, and elsewhere.³² The Australian ballot was not the first secret ballot system,³³

³¹ "Ballot". *Westminster Review*, October 1870. p. 464.

³² Fredman, L.E. *The Australian Ballot: The Story of an American Reform*. Michigan State, 1968. pp. ix-xi.

³³ Forms of the ballot, some secret, had been used in Britain and elsewhere for centuries. see Gross, Charles. ""The Early History of the Ballot in England". *American Historical Review*, 3:3 (April, 1898), 456-463. The Hartington Report mentions testimony regarding the ballot systems used in France, Italy, and Greece; whether these systems were entirely secret is not clear.

but it is the forerunner of most modern voting systems. The Australian system's chief innovation was that the government printed the actual ballots, whereas existing paper ballot systems had relied on political parties to print the ballot and were open to all manner of corruption.³⁴ The new ballots were to be filled out in private at the polling stations and deposited immediately, away from the prying eyes of party agents and other sources of corruption. The territory of Victoria first implemented this procedure in 1856, although the ballots were not entirely secret because they were endorsed with the elector's registration number; it was, however, "an offense to compare a number on the ballot with a number and name on the roll when the boxes were opened so secrecy was no endangered".³⁵ Just after Victoria's legislation, the territory of South Australia enacted a similar system, but with the provision for secrecy – in fact, anonymity - of the ballots.³⁶ These two laws mark the beginning of the modern secret ballot system.

The history of the Australian ballot and its spread in the Anglophone world is well documented and needs not be belabored here, except to recount some key milestones. That some of the Australian territories had successfully implemented the secret ballot was not lost on reformers in Britain, and colonists who returned to England were able to attest to the ease and efficacy of the secret ballot in their elections. This led Parliament to convene an official committee in 1869 – John Bright was a member – to hear testimony on balloting systems, secret or otherwise.³⁷ In the committee's report, it notes that in other countries "under a system of ballot, the poll

Neither is their specific operation. Asquith, H.H. "The Ballot in England". p. 662.

³⁴ Fredman, L.E. The Australian Ballot: The Story of an American Reform. p. ix.

³⁵ Fredman, L.E. The Australian Ballot: The Story of an American Reform. pp. 9-10

³⁶ Fredman, L.E. The Australian Ballot: The Story of an American Reform. p. 9

³⁷ Park, Joseph. "England and the Secret Ballot". pp. 74-75.

is taken without intimidation, riot, or disorder, while in Australia bribery and treating have been greatly reduced...". The commission acknowledged arguments against the ballot, including "that the act of voting is a public duty and should involve a public responsibility", but stated that:

...the weight of evidence leads to the conclusion that this change in the mode of voting would not only promote the tranquility both of municipal and parliamentary elections, but will also protect the voter from undue intimidation and introduce into elections a greater degree of freedom and purity than is secured under the present system.³⁸

The commission recommended adoption of an "inviolable" secret ballot, which passed through Parliament in 1872.³⁹

Shortly after its adoption in Britain, reformers in the United States took up the cause as well. The paper ballot had been in use since colonial days in some states, and by the mid-1800s was standard.⁴⁰ These ballots were not secret, however, and were typically printed by the political parties themselves; this system was rife with corruption, including ballot-stuffing, bribery, false registration, and so-called "knifing".⁴¹ The secret ballot was an obvious cure for these problems, and was first implemented in the U.S. by the city of Louisville, Kentucky, in 1888.

Massachusetts adopted a statewide law the same year, followed in short order by Rhode Island, Wisconsin, and others.⁴² Laws were promulgated by state legislatures; unlike in Britain, there was never a Congressional bill to adopt the secret ballot

³⁸ Asquith, H.H. "The Ballot in England". p. 662.

³⁹ Asquith, H.H. "The Ballot in England". p. 663.

⁴⁰ Schouler, James. "Evolution of the American Voter". *American Historical Review*, 2:4 (July, 1897). p 666, 671.

⁴¹ Fredman, L.E. *The Australian Ballot: The Story of an American Reform*. pp. 20-21. "Knifing" described the practice of replacing a candidate's name on the party list with that of the opposing candidates; parties traded these favors as to secure seats for specific candidates.

⁴² Wigmore, John. *The Australian Ballot System*. pp. 1-57.

nationwide. Not all states adopted the secret ballot from pure motives; in Louisiana, the secret ballot was lauded as a further way to disenfranchise illiterate voters, most of whom were black, in that it required some degree of reading ability – one of many ways Southern states sought to evade the requirements of the 15th Amendment.⁴³ Generally, however, the secret ballot had the effect of reducing corruption in U.S. elections, as it had in Britain.

That the secret ballot had such an effect is often taken as evidence of the superiority of secret voting. As described, the focus on practical issues largely ignored Mill's belief in the importance of publicity to democracy, and his concerns that secrecy would condition voters towards selfishness. Such concerns may have been minimal in a sparsely populated place like South Australia, which in 1850 had a population of something like 65,000 people.⁴⁴ By comparison, there were 517,500 living in New York City the same year,⁴⁵ and 2.5 million living in London.⁴⁶ In such large and anonymous societies, Mill's concerns must have been fully realized; today those concerns approach crisis.

IV. The debate in present terms

There is no debate today on the appropriateness or efficacy of the secret ballot, at least not in the United States.⁴⁷ However, there has been so much change

⁴³ Fredman, L.E. *The Australian Ballot: The Story of an American Reform*. pp. 72-73.

⁴⁴ <<<http://www.adhills.com.au/tourism/sausthistory.html>>> (December 5, 2005)

⁴⁵ <<http://newman.baruch.cuny.edu/digital/2001/history/exhibit/chap_01/census_1850.htm>> (December 5, 2005)

⁴⁶ <<<http://srufaculty.sru.edu/james.hughes/100/100-6/d-6-34.htm>>> (December 5, 2005)

⁴⁷ One exception I have come across is Richard Posner's argument that electors "hide behind the secret ballot, which though essential to prevent intimidation and fraud is a recipe for

in politics, society, and technology that many of the concerns of the 19th century are no longer present, and new questions have arisen which demand re-evaluation of the U.S. electoral system. The balance of this paper focuses on that country, its electoral practices, and their relation to theoretical and pragmatic aspects of the secret ballot.

The most significant problem for Mill's views is that nearly everyone now views voting as a right, not a trust. This view has been codified in U.S. law, beginning with the 15th Amendment in 1870, which states that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".⁴⁸ This was affirmed in 1920 through ratification of the 19th Amendment - "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex" -⁴⁹ and again in the 1965 Voting Rights Act. The notion of vote as right is so firmly established in the U.S. as to be irreversible.

This does not mean that the right to vote demands no responsibility from the voter, however; the sharp dichotomy between right and trust is Mill's. Few would argue that rights in general are unlimited; there are limits to the right to freedom of speech – the infamous example of yelling 'fire' in a crowded theater. To some extent, these limits may be seen as demands for responsibility in their exercise, so that while they are not a 'trust' as Mill would understand the term, they nonetheless

irresponsibility, as deliberative democrats such as John Stuart Mill argued". Law, Pragmatism, and Democracy. Cambridge, MA: Harvard U, 2003. pp. 152-153. However, Posner does not seriously contemplate a return to open voting, and shows little other sympathy for Mill's views.

⁴⁸ *U.S. Constitution*, Amendment XV, Section 1. < http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html>

⁴⁹ *U.S. Constitution*, Amendment XIX. < http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html>

require an understanding of others' rights and interests as well. If this is true for the basic rights of speech, religion, association, and so forth, it is especially true for the explicitly political rights – such as voting. Voting is a right, but it also incurs trust-like responsibility. This is implicit in laws which outlaw vote-selling; as Mill argues, if the vote is truly a right of the individual citizen, why not let him do whatever he wishes with it, including selling it?⁵⁰ Our laws reject that argument by making vote selling and vote buying illegal, reflecting our understanding that voting is more than a right in the bare sense caricatured in Mill's question.

Mill errs in assuming that 'trust' and 'right' are mutually exclusive. Voting is first a right, in the sense that is basic guarantee of citizens in a free democracy that they have the ability to elect their representatives, but also a right that incurs a certain degree of responsibility on the bearer. Voting is the right of the citizen, but it is only the bare minimum exercise of her capacity as citizen. Democracy, especially in the United States, depends on a large number of citizens taking overt political stances – as candidates, as party workers, as contributors, as volunteers for issue and interest groups, and in any number of capacities. Democracy, as Mill and many others suggest, would grind to a halt without such engagement. Any institution that claims to be democratic must make broad participation a key goal, a problem Australia now solves by making voting mandatory.

But if voting is a right, it includes the right not to vote. Given that only 58.4 percent of those in the U.S. who are eligible do vote,⁵¹ this may be a right whose

⁵⁰ Mill, John Stuart. *Considerations on Representative Government*. p. 354.

⁵¹ "Report II. Voter Registration", p 14. in National Commission on Electoral Reform. "To Assure Pride and Confidence in the Electoral Process; Task Force Reports to Accompany the Report of the National Commission on Election Reform". August 2001.

exercise is perhaps too free, if not libertine. Apart from an "I voted" sticker, few people know for certain which of their fellow citizens bothered to vote, much less for whom they voted. Of course, it is not difficult to guess. One criticism has been raised so often in discussions of this paper that it requires address here, namely that U.S. voters still have a strong interest in preventing government (or anyone else) from learning for whom or what they voted. This is little different from the argument, which originated the secret ballot debate; the difference is that where the original was based in actual practice of the day, this is based mostly on speculation. Those who voice this criticism are hard-pressed to explain precisely what harm will come should the government know their votes, when it already knows when they sign petitions, contribute to a candidate, or register a party affiliation.

In a way, the secret ballot may provide a false sense of security; it takes very little study of most electors to discern their political leanings and predict for whom they will vote. It is much more difficult to discern what injury they might suffer from having that vote made public. There may be a legitimate concern, especially for those whose employment is sensitive to political concerns, in which case an opt-out mechanism may be appropriate.⁵² Opting out is discussed in the next section. Equally likely is that a hundred years of the secret ballot has imbued the voter with a prejudice against openness that defies rational argument. Indeed, one of the principle and indefensible arguments against the secret ballot in 19th century England was, "The ballot is not English".⁵³

⁵² In a related vein, H.R. 4343 was proposed in the 108th Congress to protect the right of employees to use the secret ballot in union elections. This strikes me as a wholly appropriate application of the secret ballot. <<http://thomas.loc.gov/cgi-bin/bdquery/D?d108:1:./temp/~bd0YmN:@@@L&summ2=m&/bss/108search.html>>

⁵³ Mill, James. "The Ballot" [1830]. p. 246.

If voting were truly a right in Mill's bare sense, nobody would care whether anybody voted, much less for whom they voted. Yet many political theorists and elected officials lament the decline in electoral participation, an observation that has spawned a number of proposals to encourage deeper engagement. One of the most elaborate, forwarded by Bruce Ackerman and James S. Fishkin, is called "Deliberation Day". Their article begins with a discussion of Mill's views on publicity:

Mill's insight was that the very process of public discussion would encourage sensitivity to the public interest. The secret ballot, however admirable on other grounds, sacrificed something important – a social context (public voting) that encouraged public discussion on the part of every voter.⁵⁴

To remedy this problem, they offer a system in which electors would be paid \$150 to join discussions with random fellow citizens to create the public context lacking from modern society. Their proposal is wonderfully creative and innovative, but when they argue that it would be "a big mistake to view the annualized cost of \$15 billion through the narrow lens of cost-benefit analysis",⁵⁵ the reader is left to wonder why they ignore the essentially costless alternative: ending the secret ballot. Despite acknowledging that the secret ballot led to the loss of "public context", Ackerman and Fishkin never consider a return to open voting. This is likely due in part to their view of the economic realities of the 19th century – the power the wealthy wielded over the poor – that made the secret ballot an imperative, which they seem to believe still exist.⁵⁶ They do not consider whether the typical U.S. voter might be economically self-sufficient, and thus resistant to the influence that pervaded landlord-tenant relations in Britain some 150 years ago. Nonetheless, their proposal is designed to

⁵⁴ Ackerman, Bruce and James Fishkin. "Deliberation Day". p. 129.

⁵⁵ Ackerman, Bruce and James Fishkin. "Deliberation Day". p. 148.

⁵⁶ Ackerman, Bruce and James Fishkin. "Deliberation Day". p. 130.

encourage an artificial intimacy, such that participants will be able to discuss potentially sensitive political matters with strangers in hopes of contriving the very dialogue that Mill viewed as essential to democracy. But Mill would likely have been appalled at the suggestion that electors get paid for what he viewed as a basic duty, given that he did not even believe that legislators should be paid for their service.⁵⁷

V. 21st Century Problems

If the problems of 19th century voting were still pervasive, then the practical defenses might yet overwhelm the philosophical arguments against the secret ballot; this is not the case. Although the secret ballot has solved many problems, modern elections are not problem-free – as the United States learned during, or after, the 2000 Presidential election. That debacle spawned the official National Commission on Election Reform in 2001 to review the errors and inadequacies of the electoral system, and the similar, independent Commission on Federal Election Reform in 2005.⁵⁸ Both involved Jimmy Carter, and both offered reports full of earnest suggestions for improving elections in the U.S., yet neither discusses the secret ballot except as a given. The National Commission on Election Reform went so far as to assert a "hard won right to the secret ballot".⁵⁹ This mistake - conflation of the secret ballot with the vote itself – is the inverse of Mill's view of vote as strictly a trust.

⁵⁷ Mill, John Stuart. *Considerations on Representative Government*. p. 368.

⁵⁸ see National Commission on Electoral Reform. "To Assure Pride and Confidence in the Electoral System". August 2001. See also, Commission on Federal Election Reform. "Building Confidence in U.S. Elections". September 2005.

⁵⁹ National Commission on Electoral Reform. "To Assure Pride and Confidence in the Electoral System". August 2001. p. 44.

The ballot, meaning vote, may well be a hard-won right, especially for blacks and women, but anonymity is not intrinsic to that right, helpful though it may be. The secret ballot is a tool, a device to solve a certain problem – namely, corruption in elections - and to reify it as a right denies the possibility that it no longer adequately solves that problem.

In fact, the secret ballot did not eliminate corruption entirely, and modern electors face an increasing array of threats to the integrity of their vote. Some of this is due to societal differences; where corruption in Britain was a product of that country's peculiar landlord-tenant system, secrecy was an effective check. In the United States, however, intimidation has focused on racial rather than economic groups, and particularly black voters. This has been the case since the Civil War - e.g. Louisiana - and allegations of intimidation against black voters were an outstanding problem of the 2000 Presidential elections. The Commission on Civil Rights found evidence of just such intimidation in Florida during that election, despite conceding that there was no proof of "intentional discrimination".⁶⁰ Similar allegations arose in the 2002 gubernatorial race in Maryland.⁶¹ Unfortunately, the secret ballot provides black and other obvious minority voters with no protection against intimidation; only well-enforced laws directly addressing the problem suffice.

Other forms of corruption persist as well. Many states are encouraging the use of absentee ballots to increase voter turnout,⁶² yet these ballots allow for the

⁶⁰ Washington, Wayne; "U.S. Rights Panel Says Blacks Faced Discrimination At Polls In Florida"; *Boston Globe*, March 10, 2001. p. A1.

⁶¹ Montgomery, Lori. "Allegations of Fraud, Intimidation in Md. Race; Townsend, Ehrlich Get Ready for Tight Finish". *Washington Post*, November 5, 2002. p. B01.

⁶² "Report V; Early Voting, Unrestricted Absentee Voting, and Voting by Mail", pp. 1-4. in National Commission on Electoral Reform. "To Assure Pride and Confidence in the Electoral Process; Task Force Reports to Accompany the Report of the National Commission on Election Reform". August

kinds of verification that makes bribery feasible; Mill noted the potential for abuse of such a system in *Representative Government*, writing that "allowing the voting papers to be filled up at the voter's own residence, and sent by post... I should regard as fatal".⁶³ One of the most notorious cases of absentee ballot fraud occurred in the 1998 mayoral election in Miami, Florida, which led to the arrests of dozens of people and annulment of the election results.⁶⁴ In the wake of the Miami scandal, Florida's legislature did pass legislation regulating absentee ballots, but these restrictions were minor and election officers still encourage the practice. Neither has the secret ballot eliminated bribery from regular voting. In 2005, federal investigators conducted a "vote-buying sting" in West Virginia in which they went so far as to put an informant on the ballot as candidate for State legislature; the ruse netted a single indictment and some 2,000 apparently legitimate votes for the faux candidate, who had withdrawn from the race a month before the election. According to the judge who presided over the case, that part of West Virginia had suffered corruption "for longer than living memory"; clearly, the secret ballot is not a perfect foil to such activity.⁶⁵

The unreliability and insecurity of voting machines is fast becoming the principle threat to the integrity of elections. One of the problems with the secret ballot, as Rev. Smith pointed out in 1839, "If there is secret ballot there can be no scrutiny".⁶⁶ Indeed, as implemented today nobody – not even the voter – knows

2001.

⁶³ Mill, John Stuart. *Considerations on Representative Government*. p. 363.

⁶⁴ De Pommereau. Isabelle. "Miami's Ballot Fraud Trial May Affect How America Can Vote". *Christian Science Monitor*, March 4, 1998 (90:67). p. 3.

⁶⁵ Ruane, Michael E. "FBI's Sham Candidate Crawled Under W.Va.'s Political Rock". *Washington Post*, December 2, 2005. p. A01.

⁶⁶ Smith, Rev. Sydney. "Ballot". p. 382.

whether his or her ballot has been correctly tabulated.⁶⁷ The problem is corruption post-ballot, where the tabulation of the votes might be fraudulent without anybody knowing. This possibility is what concerns so many critics of computerized voting; the data is stored in aggregates, with no way to confirm that electors' votes were properly interpreted. This is not a new problem, and concerns about voting machines have existed since their introduction.⁶⁸

After the 2000 Presidential elections, the federal government passed the Help America Vote Act, requiring the modernization of voting machines across the country.⁶⁹ In many cases, this means computerized voting systems, but experts have criticized these machines as being insecure and unreliable, and demonstrated the ease with which potential malefactors could affect electoral results. In 2004, the State of California banned certain computerized systems from its elections, partly because of concerns about the machines but also because of concerns about the integrity of the company that manufactures and maintains them.⁷⁰ A particular problem is the "lack of a paper trail", which makes post-election auditing difficult and hand recounts impossible.⁷¹ Manufacturers contend that a technical fix would be too expensive and that allowing access to raw data would compromise proprietary

⁶⁷ This may not be true everywhere, but a call to the office of the Orange County (Fla.) Supervisor of Elections - where I am registered to vote - confirmed that they could not track a vote back to a specific elector. I assume but cannot demonstrate that this is generally the case in the United States. Orange County uses paper optical-scan ballots, and has not yet adopted paperless computerized voting.

⁶⁸ Fredman, L.E. *The Australian Ballot: The Story of an American Reform*. pp. 125-27.

⁶⁹ Lewellen-Biddle, Mark. "Voting Machines Gone Wild!" *In These Times*, January 5, 2004. (Institute for Public Affairs). p. 20.

⁷⁰ Schwartz, John. "High-Tech Voting System is Banned in California". *New York Times*, May 1, 2004. p. 9.

⁷¹ Reich, Eugene Samuel and Celeste Beaver. "The great American voting experiment; E-voting is supposed to be more accurate, but what if votes can just as easily go missing or be miscounted?" *The New Scientist*, October 16, 2004. <from Lexis-Nexis>

information, but without means of verification, auditors and watchdog groups can only rely on aggregate data and broad statistical patterns to analyze results. In 2002, watchdog groups faced precisely this problem in Georgia, which used computerized voting systems exclusively in a statewide election. Although the results showed significant anomalies in statistical patterns of voting, especially in the Senate and gubernatorial races, observers had nothing to demonstrate or disprove fraudulent activity aside from the say-so of the private company that tallied the votes.⁷²

Although a paper trail might help prevent fraud in computerized voting systems, it is not foolproof. There is little technical challenge in devising a system which permits an accurate printout of the voter's intent while allowing for fraud in the electronic record, tabulation, or reporting of that same vote – unless the voter is permitted to check her printout against the voting records. However, if she is limited to verifying only her own vote, there is nothing to guarantee that her vote is reported as recorded; a significant potential for fraud remains. The only way that a paper trail can definitively prevent fraud is if auditors and independent watchdogs are allowed to check the printed receipts against the raw vote data, to ensure that independent votes are accurately aggregated. That, in effect, requires a return to the open ballot.

VI. Possible solutions

Mill argued against the secret ballot from a belief that the vote carried with it an obligation to fellow citizens, and that secrecy would encourage people to abuse

⁷² "US voting system vulnerable to fraud". *New Zealand Herald*, October 19, 2003.

that trust. His argument was overwhelmed by practical concerns of corruption, and for much of the world the use of the secret ballot became standard. The problems that secrecy solved, however, have largely disappeared and new threats to the integrity of elections have emerged in their place. Worse, mature democracies – especially the U.S. – are seeing apathy and disengagement in their electorate, spurring elaborate proposals to encourage dialogue and discourse. Almost no one questions the secret ballot's role in these changes, but a return to open voting might well solve the practical problems of modern corruption and reinvest the electoral process with the publicity and responsibility Mill believed so crucial to healthy democracy.

If the prospect of a completely open ballot is too daunting, there is a range of possible compromise solutions. Most obvious would be a system of open ballots allowing an opt-out if the elector wishes his vote to remain anonymous. Such a system would benefit those for who feel unduly pressured to vote in a particular way; for example, the civil servant who might suffer retaliation for voting against her elected boss. Indeed, under some circumstances it is possible to opt-out of the secret ballot used today; the Defense Department's Federal Voting Assistance Project offers a facsimile transmittal form for ballots, which includes a statement to the effect that the elector waives her right to the secret ballot by using such means.⁷³ If opt-out was widely exercised in an otherwise open election, concerns about the legitimacy might not be entirely resolved, but one expert suggests that only three percent of the vote might need to be validated to ensure the integrity of the

⁷³ <<http://www.fvap.gov/services/faxtransheet.pdf>> (December 11, 2005)

machines.⁷⁴ Another possible compromise might employ a trigger mechanism, in which ballots remain secret unless electors suspected fraud. This would be very similar to the original system in Victoria, with ballots connected to voters via a specific number, but the comparison of that number made a criminal offense unless required to discern fraud. Through a petition or judicial process, electors could request that the ballots be opened to verify that their votes were correctly processed. This would not, however, do much to encourage public engagement.

A third system, which answers both the practical concerns of modern voting and the principled concerns of John Stuart Mill, would be to publish voting records some time after the actual election but before the result is certified. This would give voters a chance to challenge the results before they became official, should they suspect fraud or error. Bribery would be minimized by the fact that all votes became known at once; candidates would be unwilling to pay bribes before the votes were known, and electors unlikely to vote on an unenforceable promise. Electors, however, would be encouraged to view voting as a public activity, as both their right and our trust. It would require a vast change in the attitude of U.S. electors towards their ballot box, but that is indeed one of the goals of such reform.

Open voting is not the only meaningful reform available to the modern U.S. electoral system. The two commission reports produced in the wake of the 2000 election were bursting with suggestions, some of which address the same issues that open voting would remedy. But neither was the secret ballot the only reform available in the 19th century; it simply proved to be the most efficacious under the

⁷⁴ Reich and Beaver. "The Great American Voting Experiment". <from Lexis-Nexis>

DRAFT: DO NOT QUOTE, CITE, OR CIRCULATE WITHOUT AUTHOR'S PERMISSION
Miles Townes mdtownes@gwmail.gwu.edu

circumstances. Any discussion of the available reforms and refinements should include the full range of those available and is incomplete unless it weighs the question of open voting – both on principled and practical concerns. Mill may well have been wrong then, but there is the insistent possibility that he is correct now.