On Privacy

Chapter 4
Privacy, Property and Solidarity

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We have seen that the value of privacy is both personal and political, a reflection of the importance of personal, as well as collective responsibility, choice and conviction. In so doing, we have shown that privacy can usefully be disaggregated into its component parts, as Judith Thomson claimed in her famous essay on the right to privacy.[1] However, we have described those parts in terms of claims to solitude and seclusion, anonymity and confidentiality, intimacy and family formation, rather than in terms of property ownership and property-like rights over the person – which Thomson favours. We have also seen that our assumptions about the nature and importance of equality profoundly affect the ways we conceptualise people's claims to privacy, and the importance that we attach to those claims. So, on the face of it, privacy seems as closely bound up with our claims to equality and political participation as with property ownership and the rights we have over our body. It is time, then, to look more closely at Thomson's views, and to see what practical, analytical and normative conclusions we can draw from them. Doing so will enable us to draw together some of the different threads in our examination of privacy, and to bring this short book to its conclusion.

Thomson's Critique of Privacy

Judith Thomson's objections to the idea that privacy is valuable arise not because she believes that solitude, confidentiality and anonymity are over-rated, or that family life is inseparable from sexual inequality, or a threat to proper patriotism. Rather, her worry is that talk of a moral right to privacy lumps together too many things which, however valuable or important, are best described and justified separately. In particular, she thinks, once we realise how heterogenous people's claims to privacy are, and reflect on the best way to describe and justify them, we will find that they are really best understood as examples of more basic rights, such as rights to own property, and property-like rights over our bodies, which make it wrong for others to look, listen and touch us without our permission.

Thus, Thomson argues, if she's done something wrong by sneaking into your house and painting your elbows green, what's wrong is that she's invading your *property* and invading your property-like *rights over your body*, which include the right not to have your body looked at, touched, or painted without permission.[2] Similarly, she thinks,

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[1] Judith Jarvis Thomson, 'The Right to Privacy' in *Philosophical Dimensions of Privacy*, ed. F. Schoeman, 272-289. This article was originally published in the journal *Philosophy and Public Affairs* (vol. 4, 1975, pp. 295-314) and has been anthologised many times since, including in a wonderful collection of Thomson's essays called *Rights, Restitution and Risk: Essays in Moral Theory*, edited by William Parent, (Harvard University Press, 1986).

[2] See p. 279: '...it's a nasty business to damage a knee; but you've a right to damage yours, and certainly nobody else has – its being your left kneed includes your having the right that nobody else but you shall damage it. And, as I think, it also includes your having the right that nobody else shall touch it or look at it'. Summarising her view, Thomson says, (p. 280) 'These rights – the right not to be looked at and the right to not be listened to – are analogous to rights we have over our property. It sounds funny to say we have such rights. They are not mentioned when we give lists of rights...These un-grand rights seem to be closely

deliberate efforts to listen in on arguments with her husband behind closed doors violate her right not to be listened to, although it is not a violation of her rights to stop and get a good earful of the argument if her window is wide open. [3] Leaving the window open, she thinks, can be construed as 'waiving', or giving up, the right not to be overheard; by contrast, she thinks, if she has firmly shut her windows, it should be apparent that she does not want other people to listen to the argument, even if they can catch snatches of it as they walk by.

Likewise, she believes that it is wrong for us to try to get a peep of your wonderful pornographic picture without your permission, because the picture is *yours* – you own it, and one of the rights in which ownership consists is the right to withhold what you own from view.[4] However, if you had been careless enough to leave your picture lying around where anyone can see it, we do not violate your property rights by getting a good look at it, although we may not take it home with us or try to sell it.

So, Thomson supposes, we can describe what is wrong in cases that look like invasions of privacy by reference to other wrongs – wrongful invasions of our rights over our bodies and property. Moreover, she claims, the problem with talk of a right to privacy is not just that all the cases that strike us as violations of a right to privacy can be described at least as well in some other way, but that in none of the cases of privacy violations does it look as though the reason why the violation is wrong is best described by the thought '*because we have a right to privacy'*. [5] However, while Thomson is right that we can sometimes replace talk of privacy with talk of property, or with talk of property-like rights over our bodies, her claim that this is always true rests on fairly controversial assumptions about the nature and content of our moral rights, and there seems no particular reason to accept these.

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enough akin to be worth grouping together under one heading. For lack of a better term, I shall simply speak of "the right over the person", a right which I shall take to consist of the un-grand rights I mentioned, and others as well'.

[3] Thomson p. 273 for the contrast between the loud fight and the quiet fight behind closed doors.

[4] Thomson, p. 287: Someone looks at your pornographic picture in your wall-safe? He violates your right that your belongings not be looked at, and you have that right because you have ownership rights – and it is because you have them that what he does is wrong'.

[5] Thomson, p. 286-7: 'The fact, supposing it is a fact, that every right in the right to privacy cluster is also in some other right cluster does not by itself show that the right to privacy is in any plausible sense a "derivative" right. A more important point seems to me to be this: the fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster....That we feel the need to find something in common to all of the rights in the cluster and, moreover, feel we haven't yet got it in the very fact that they *are* all in the cluster, is a consequence of our feeling that one cannot explain our having any of the rights in the cluster in the words: "Because we have a right to privacy". (emphasis in the original). But while I agree with Thomson that we have a right against torture, I do not see that this shows we do not have a right to privacy *too*, which would *also* be violated if we were tortured to extract personal information. The same act can be wrong for a variety of reasons, and violate a variety of rights. It is therefore possible that being tortured to extract personal information is worse than being tortured to affirm or negate some statement of scientific or political fact, because in some cases of torture the violation of privacy would constitute an *additional* and very significant part of the wrong, as it would not if the personal information were of no particular significance to you or to your torturers.

For example, Thomson assumes that we have a right not to be looked at, which we always waive when we go out in public.[6] Hence, for Thomson, there is no need to invoke a right to privacy in order to explain why you have a right not to be looked at by intruders peeping through your windows, although you have no right not to be looked at as you go strolling down the street. Yet Stanley Benn seems correct to distinguish a casual glance by a passer-by – which, he agrees with Thomson, does not violate our privacy – and a fixed or pervasive stare which might do so. As Benn says, 'there is a difference between happening to be seen and having someone closely observe, and perhaps record, what one is doing, even in a public place'.[7] Nor does it seem right that the minute celebrities go out in public they should be considered fair game for photographers, as though going out for a bottle of milk, or for lunch with friends, means that one has relinquished the right not to be photographed.[8]

In assessing Thomson's thesis, then, a great deal turns on how we understand the precise contours of our moral rights, and what we assume counts as waiving, or relinquishing those rights.[9] The difficulty, however, is that our conceptions of property ownership and of rights over our bodies do not seem to have the sharpness which Thomson assumes- their precise extent, weight and justification, for instance, seem much less clear than she supposes. Thus, many of us would agree with Thomson that it is bad manners, but not a rights-violation to listen to her argument with her husband, if she forgot to shut the window. Nonetheless, we may still believe that we would violate her *rights* if we treated that wide-open French window as an invitation to step inside and help ourselves to her philosophy library – or just to sit in a chair for a quick read of one of her books.

We presume that open French windows do not constitute waived rights against uninvited visitors, or over-enthusiastic philosophers, because the right to prevent others from entering our homes is of so much greater importance than the right not to be overheard. People therefore need to be able to air their rooms without worrying that they will be thought to have given up these rights if they forget to shut their windows or doors. Hence, our ideas about what counts as waiving a right depend, in part, on the importance

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[6] P. 285: '...it seems to me that if you do go out in public, you waive your right to not be photographed and looked at. But of course you...have a right to be free of ...annoyance in public places; so in particular, you have a right that the photographers and crowds not press in too closely' just because they are desperate to get a look, or a 'shot' of you. For the application of these ideas to debates on the use of CCTV, see Annabelle Lever, Mrs. Aremac and the Camera: A Response to Ryberg' *Res Publica*: *A Journal of Legal and Social Philosophy,* 14.1. (March 2008) 35-42 as well as the piece by Benjamin Goold in the same issue.

[7] Benn, 'Privacy, freedom and respect for person', p. 225

[8] The issue of whether celebrities can legally be photographed without their consent while going about their daily life is one of the most controversial issues in UK and EU law. Since *von Hannover v. Germany* – where Princess Caroline of Monaco won a case of this sort – it looks as though European law will follow the stricter French perspective in these matters than the laxer German and UK ones. See *Privacy and the Press*, Joshua Rozenberg, (Oxford University Press, 2004). Rozenberg laments the decision in the Princess Caroline case, xiii-iv. See also www.rozenberg.net

[9] Thomson, 'the right to privacy' p. 278, for example. It should be noted that this article is very old – it was written in 1975. For those interested in the more developed versions of Thomson's theory of rights, see the following collections of her essays: *Rights, Restitution and Risk: Essays* (Harvard University Press, 1986) and *The Realm of Rights* (Harvard University Press, 1990)

of the right we are considering as well, most likely, on the typical harms which it seeks to avert, and the circumstances in which it is typically claimed.

Once we take these points on board, it becomes much less clear that we will illuminate, rather than complicate, life by replacing talk of privacy rights with talk of property ownership and property-like rights over our bodies. More troubling, however, is the possibility that replacing talk of privacy with talk of liberty, property and bodily integrity actually *confuses* us about what people are claiming, and with what justification.

Compare, for example, the two different bones of contention between Joyce Maynard and John Salinger. The first one concerned Maynard's desire to publish an account of their life together in her autobiographical work, *At Home In The World*. Publication clearly entailed a loss of privacy for Salinger, but he was scarcely claiming that his property rights were at stake: nor could he, as there are no property rights in a shared history as a couple, or in ordinary experience. Maynard, of course, was claiming that she had a right to publish her own experience, to publicise her privacy, even though doing so inevitably meant publicising some of Salinger's as well. Books are objects of property and, like any writer, Maynard must have hoped that her book would sell well and bring her wealth, as well as fame. But it does not follow that her interests in publishing were primarily financial, rather than expressive, or that to treat her claims to publicise her privacy as claims to profit from her property would adequately capture *her* interests, either.

By contrast, Maynard's interests in selling the letters Salinger wrote to her were financial: and her interests in the letters were as a form of property, rather than as a record of a shared experience, or of insight into Salinger's feelings, activities and character. Salinger was unable to prevent the sale of the letters, but he succeeded in persuading a court that, as their author, no one should have the right to publish their contents without his permission. The interests that Salinger sought to protect, then, were interests in confidentiality rather than in financial gain, and his aim in asserting his property rights over the letters was to prevent their publication, rather than to ensure himself a share of the profits that publication would generate.

It is helpful, then, rather than obfuscatory, to say that the interests Salinger sought to vindicate were interests in *privacy*, rather than *ownership*, although the right to prevent publication without consent can be financially desirable. Indeed, it is more helpful to note that his interests were in *privacy* rather than *liberty*, as it was only the freedom to prevent publication of the letters that interested him, rather than other freedoms, such as freedoms of expression, association or participation. The point for Salinger, in other words, was not that he wanted to be *consulted*, or to *participate* in choosing publishers, formats, editors and the like, but that he wanted to *prevent any publication at all*. Referring to Salinger's interests as interests in privacy conveys that idea fairly readily, because interests in confidentiality are so central to most understandings of privacy. By contrast, they are very much less central to ideas of liberty, which is why replacing talk of privacy with talk of liberty in this case is likely to be confusing, if not actually misleading.

Privacy and Collective Property

Claims to privacy, then, are not reducible to claims to personal property, and this has implications for the way we approach public policy, not just philosophical analysis
We have seen that one difficulty with trying to translate people's claims to privacy into claims to property ownership is that ownership consists in a bundle of rights which can be disaggregated and parcelled out in different ways. So, if I own a car or a house it is typically not the case that I can let them disintegrate if it suits me to do so, because there are a variety of state regulations which will come into force should I leave my car to rust on the street, or let my house fall into disrepair. This is not because someone else owns my house and car, merely that in these cases (and others like them), my ownership does not include the right to destroy my property through neglect. On the other hand, if I rent a house or a car I will not have the right to sell them or to give them away, but I will have the right to use them and, for the duration of my lease, to exclude their owner from using them. So while it is true that my property rights (whether or not they constitute full ownership) may well protect my privacy, replacing talk of privacy with talk of property rights is unlikely to improve the clarity or precision of our ideas, because there are so many different, sometimes incompatible, types of property. [10]

Some forms of property are held on behalf of a group of people, such as a family or a group of investors, or even a nation. Such property is often called 'collective property' to highlight the fact that ownership rights are supposed to be used on behalf of a group of people, rather than a single individual, and to be exercised either by some representative of the group of owners, or by the members of that group acting jointly. Other forms of property are called 'private property', meaning that they are held by a person, or on behalf of a person, who is free to exercise his or her rights of ownership without consulting others.

It seems natural to suppose we should prefer private to collective property if we value privacy, but such an assumption is mistaken. True, some forms of collective property, can be quite invasive of privacy, as these typically mean that all owners are entitled to a say in its disposition. This is notoriously the case with those New York apartment blocks which are cooperatively owned (even though the individual apartments are owned privately), because fellow owners are entitled to a good deal of information about would-be-buyers in order to decide whether to approve or veto any sales.

However, not all forms of collective property are like that. State owned and run housing, for example, may be less privacy-invasive than private housing, because the information required in order to obtain a lease is typically held by people with whom one has less contact than with private landlords. So, even if the quantity of information one has to divulge is no smaller or less intimate, the different ways that this information is typically

[10] Those interested in recent debates in the philosophy of property may want to look at Stephen R Munzer's *A Theory of Property*, (Cambridge University Press, 1990), John P. Christman's *The Myth of Property: Toward an Egalitarian Theory of Ownership*, (Oxford University Press, 1994) and G. A. Cohen's *Self-Ownership, Freedom and Equality (*Cambridge University Press, 1995), which are efforts to understand, evaluate and then revise from an egalitarian perspective, traditional views of property.

held, and the different people who typically hold it, mean that one may actually have more, rather than less, privacy as a renter of state- owned, rather than privately- owned property.

Because private property ownership is not synonymous with privacy, the privatisation of public space and of public property can threaten, rather than promote, privacy. For many of us, living in cramped and crowded conditions – or with noisy neighbours and families – public gardens, squares, parks, libraries and museums are places where we can go for a bit of peace and quiet, or for a 'private chat' or heart-to-heart with our friends. When such places are free of charge, as well as open to the public, they provide much-needed opportunities for solitude, anonymity and time together with friends and lovers, as well as fresh-air, culture and entertainment. Hence, the creation of public facilities such as libraries, sports-centres, youth-centres, parks and gardens can create opportunities for privacy where, previously, these were few and far between.

The importance of public space for privacy is highlighted by a poignant essay on homelessness by the philosopher and legal scholar, Jeremy Waldron. [11] One way of describing the plight of a homeless person is to say that 'there is no place governed by a private property rule where he is allowed to be whenever *he* chooses, no place governed by a private property rule from which he may not at any time be exclude as a result of someone else's say-so…For the most part, the homeless are excluded from *all* places governed by private property rules, whereas the rest of us are, in the same sense, excluded from *all but one* (or maybe all but a few) of those places'. Hence, in a world where all collective property was privatised, or where no collective property – such as streets, parks, subways, shelters – was available for the homeless to attend to their most basic needs, the freedom of the homeless 'would depend utterly on the forbearance of those who owned the places that made up the territory of the society in question'.

It matters fundamentally to the privacy of the homeless, therefore, that there be forms of collective property – such as the generous provision of public lavatories, and public baths - which are available for them to conduct activities such as sleeping, eating and urinating. These activities are 'both urgent and quotidian', as Waldron puts it, because a person simply cannot wait to perform them until s/he has acquired a home or some private property. So, whatever else it is that we owe to those who are homeless, Waldron argues, we owe them places where they may legally fulfil their needs discretely in public.[12]

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[11] 'Homelessness and the Issue of Freedom', ch. 13, in his book *Liberal Rights: Collected Papers 1981-1991*, (Cambridge University Press, 1993), 309-338. This a fantastic collection of essays for anyone interested in understanding the nature and structure of rights, as used in moral and legal contexts, and provides a helpful introduction to contemporary debates over human rights, welfare rights and rights and duties of toleration.

[12] To those who say that the streets and subway are not places for sleeping; that parks are not places for urinating or cooking, Waldron's response is this: perhaps they ought not to be; just as there ought not to be people who are without any place to call home. But it is only because those of us who are not homeless have somewhere else to eat, sleep and urinate that parks, streets and subways do not fulfil these purposes for us. 'The subway is a place where those who have some other place to sleep may do things besides sleeping'. For those who lack anywhere of their own, public space provides their only chances of meeting their basic needs legally and with some modicum of privacy.

Privacy and Private Property

We have seen that claims to privacy cannot be reduced to claims to property ownership. But this does not meant that the nature and value of privacy are irrelevant to what we are entitled to own, and what we are entitled to do with our property. If, on the one hand, it means that public property may be used for private purposes such as conversations, education, fitness, cleanliness and shelter, on the other hand our interests in confidentiality, in anonymity, intimacy and domesticity help to explain why people should be entitled to some forms of private property, even if they are able to meet their needs for food, clothing and shelter through the use of property that is held in common.

If privacy is valuable it seems desirable, and perhaps even necessary, that people should have some forms of property which they can treat as seems good to them. For example, the idea of making a personal sacrifice not only of one's time but also of one's comfort and possessions means that we must be able to hand over – even destroy ceremonially – something that one would otherwise be entitled to use for oneself. Likewise, if gifts are to be capable of expressing an appreciation of the particularity of another – whether that involves recognition of their needs as a student, a newly-wed, a parent, or of their talents, hobbies and tastes- it is important that our gifts are capable of expressing something about the giver, as well as the receiver. They may be mass-produced or handmade, cheap or expensive, but if they are successfully to serve the communicative purposes of the giver, people must have a fair bit of scope in their selection, and in the timing of their presentation.

The importance of these social, rather than financial, interests in private property is well brought out by Wolff and de-Shalit's study of disadvantage.[13] As they say, 'Being able to care for others is part of being a person, at least under normal conditions, and therefore part of one's well-being', and an important expression of this ability to care is the desire to reciprocate kindness, and to show gratitude for the kindness of others. As Wolff and de-Shalit explain, 'Showing gratitude to others, "paying one's respects", and showing joy at other people's joy all form part of a flourishing human life'.

However, people may find themselves unable adequately to undertake the socially accepted acts that express their gratitude and joy because they are too poor, as well as because they suffer from physical disabilities. "Doing good to others allows one self-esteem. Being human means not only to receive; one wants to give', the authors were told by one of their interviewees; and the sense of humiliation and loss of honour that comes with the inability to express one's respect or love is so powerful, and so

[13] Jonathan Wolff and Avner de-Shalit, *Disadvantage*, (Oxford University Press, 2007). This philosophical analysis of the different forms that disadvantage can take, the difficulties of evaluating it, and the different means that might be used to mitigate or remove it, is partly based on interviews carried out by Shalit and his graduate students. The discussion of gratitude and reciprocity and care can be found at pp. 45-6.

widespread across individuals and cultures, that Wolff and de-Shalit conclude that it constitutes a morally significant form of disadvantage.

Strictly speaking none of this requires a set of private property rights of the sort with which we are familiar. We could instead imagine some sort of store house (or set of store houses, spread around like cinemas and pubs) to which people could go and, in exchange for the promise of a certain number of hours of work (either there or elsewhere) could choose an object which they could then use as a gift or keep for themselves. This would still require people to have considerable discretion in when, how and why they use their time, as well as assuming that they are entitled to exchange their time for objects which they can use as they please.

However, this sort of arrangement would not enable us to give gifts which are personal in the sense of being objects which had belonged to us, been used by us, or been made by us. Nor would it mean that we would access, ourselves, to objects whose use may be functional, but which also have emotional and symbolic significance for us. So, thinking about this example illuminates the significance of forms of ownership that enable us to keep, use, lend and give away things that are ours, in the sense of having been a part of our lives, as an expression of our particular beliefs, attachments and ideals.

Private ownership is not just about the right to use objects such as clothes, beds and furniture, or to feed ourselves and our loved ones. Rather, it is about the ability to find forms of these that suit us, and respond to our particular beliefs and needs, tastes and temperaments. As Iris Marion Young says, 'an important aspect of the value if privacy is the ability to have a dwelling space of one's own…in which one lives among the things that help support the narrative of one's life'. [14] So, while it would require a whole book to explore what forms of private property are justified by people's claims to privacy, it looks as though the value of privacy justifies some forms of private, as well as collective, property.

[14] Iris Marion Young, *A Room of One's Own: Old Age, Extended Care, and Privacy*, in Beate Rossler, ed., *Privacies: Philosophical Evaluations*, (Stanford University Press, 2004), 168-9. The quotation is from p. 168.