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Privacy, Intimacy, and Personhood

The Summer 1975 issue of *Philosophy & Public Affairs* featured three articles on privacy, one by Judith Jarvis Thomson, one by Thomas Scanlon in response to Thomson, and one by James Rachels in response to them both.¹ Thomson starts from the observation that “the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is” (p. 295) and goes on to argue that nobody should have one—a very clear idea, that is. Her argument is essentially that all the various protections to which we feel the right to privacy entitles us are already included under other rights, such as “the cluster of rights which the right over the person consists in and also . . . the cluster of rights which owning property consists in” (p. 306). After a romp through some exquisitely fanciful examples, she poses and answers some questions about some of the kinds of “invasions” we would likely think of as violations of the right to privacy:

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. Someone uses an

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1. Judith Jarvis Thomson, “The Right to Privacy,” Thomas Scanlon, “Thomson on Privacy,” and James Rachels, “Why Privacy is Important,” *Philosophy & Public Affairs* 4, no. 4 (Summer 1975): 295–333. Unless otherwise indicated, page numbers in the text refer to this issue.

X-ray device to look at you through the walls of your house? He violates your right not to be looked at, and you have that right because you have rights over your person analogous to the rights you have over your property—and it is because you have these rights that what he does is wrong [p. 313].

From this she concludes that the right to privacy is “derivative,” and therefore that “there is no need to find the that-which-is-in-common to all rights in the right to privacy cluster and no need to settle disputes about its boundaries” (p. 313). In other words, we are right not to have any very clear idea about what the right is, and we ought not spin our wheels trying to locate some unique “something” that is protected by the right to privacy. Now I think Thomson is wrong about this—and, incidentally, so do Scanlon and Rachels, although I am inclined to believe they think so for the wrong reasons.

Thomson’s argument is a large non sequitur balanced on a small one. She holds that the right to privacy is “derivative” in the sense that each right in the cluster of rights to privacy can be explained by reference to another right and thus without recourse to the right to privacy. This is the little non sequitur. The easiest way to see this is to recognize that it is quite consistent with the notion that the other rights (that is, the rights over one’s person and one’s property) are—in whole or in part—expressions of the right to privacy, and thus *they* are “derivative” from *it*. If all the protections we include under the right to privacy were specified in the Fourth and Fifth Amendments, this would hardly prove that the right to privacy is “derivative” from the right to be secure against unreasonable search or seizure and the privilege against self-incrimination. It would be just as plausible to assert that this is evidence that the Fourth and Fifth Amendment protections are “derivative” from the right to privacy.²

2. This reversibility of “derivative”-ness is to be found in Justice Douglas’ historic opinion on the right to privacy in *Griswold v. State of Connecticut*. He states there that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” The right of privacy, he goes on to say, is contained in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendment guarantees. Surely the imagery of penumbral emanations suggests that the right to privacy is “derivative” from the rights protected in these amendments. But later Douglas states that the Court is dealing “with a right of privacy older than the Bill of Rights,”

Now all of this would amount to mere semantics, and Professor Thomson could define “derivative” however she pleased, if she didn’t use this as an argument against finding (indeed, against even looking for) the “that-which-is-in-common” to the cluster of rights in the right to privacy. This is the large non sequitur. Even if the right were derivative in the sense urged by Thomson, it would not follow that there is nothing in common to all the protections in the right-to-privacy cluster, or that it would be silly to try to find what they have in common. Criminology is probably derivative from sociology and psychology and law and political science in just the way that Thomson holds privacy rights to be derivative from rights to person and property. This hardly amounts to a reason for not trying to define the unifying theme of criminological studies—at least a large number of criminologists do not think so.³ In other words, even if privacy rights were a grab-bag of property and personal rights, it might still be revealing, as well as helpful, in the resolution of difficult moral conflicts to determine whether there is anything unique that this grab-bag protects that makes it worthy of distinction from the full field of property and personal rights.

I shall argue that there is indeed something unique protected by the right to privacy. And we are likely to miss it if we suppose that what is protected is just a subspecies of the things generally safeguarded by property rights and personal rights. And if we miss it, there may come a time when we think we are merely limiting some personal or property right in favor of some greater good, when in fact we are really sacrificing something of much greater value.

At this point, I shall leave behind all comments on Thomson’s paper, since if I am able to prove that there is something unique and uniquely valuable protected by the right to privacy, I shall take this as refutation of her view. It will serve to clarify my own position, however, to indicate briefly what I take to be the shortcomings of the responses of Scanlon and Rachels to Thomson.

which along with other language he uses, suggests that the rights in the Bill of Rights are meant to give reality to an even more fundamental right, the right to privacy. 381 U.S. 479, 85 S. Ct. 1678 (1965).

3. See for instance, Herman and Julia Schwendinger, “Defenders of Order or Guardians of Human Rights?” *Issues in Criminology* 5, no. 2 (Summer 1970): 123–157, especially the section entitled “The Thirty-Year-Old Controversy,” pp. 123–129.

Scanlon feels he has refuted Thomson by finding the “special interests” which are the “common foundation” for the right(s) to privacy. He says:

I agree with Thomson that the rights whose violation strikes us as invasion of privacy are many and diverse, and that these rights do not derive from any single overarching right to privacy. I hold, however, that these rights have a common foundation in the special interests that we have in being able to be free from certain kinds of intrusions. The most obvious examples of such offensive intrusions involve observation of our bodies, our behavior or our interactions with other people (or overhearings of the last two), but while these are central they do not exhaust the field [p. 315].

Now on first glance, it is certainly hard to dispute this claim. But it is nonetheless misleading. Scanlon’s position is arresting and appears true because it rests on a tautology, not unlike the classic “explanation” of the capacity of sedatives to induce sleep by virtue of their “dormative powers.” The right to privacy is the right “to be free from certain kinds of (offensive) intrusions.” Scanlon’s position is equivalent to holding that the common foundation of our right to privacy lies in our “privatistic interests.”

In sum, Scanlon announces that he has found the common element in rights to privacy: rights to privacy protect our special interest in privacy! Thomson could hardly deny this, although I doubt she would find it adequate to answer the questions she raised in her essay. What Scanlon has not told us is *why* we have a special interest in privacy, that is, a special interest in being free from certain kinds of intrusions; and *why* it is a legitimate interest, that is, an interest of sufficient importance to warrant protection by our fellow citizens.⁴ I suspect that this is the least that would be necessary to convince Thomson that there is a common foundation to privacy rights.

James Rachels tries to provide it. He tries to answer precisely the questions Scanlon leaves unanswered. He asks, “Why, exactly, is privacy important to us?” (p. 323). He starts his answer by categorizing some of the interests we might have in privacy and finds that they

4. I think it is fair to say that Scanlon makes no claim to answer these questions in his essay.

basically have to do with protecting our reputations or the secrecy of our plans or the like. Rachels recognizes, however, that

reflection on these cases gives us little help in understanding the value which privacy has in *normal* or *ordinary* situations. By this I mean situations in which there is nothing embarrassing or shameful or unpopular in what we are doing, and nothing ominous or threatening connected with its possible disclosure. For example, even married couples whose sex-lives are normal (whatever that is), and so who have nothing to be ashamed of, by even the most conventional standards, and certainly nothing to be blackmailed about, do not want their bedrooms bugged [p. 325].

In other words, Rachels recognizes that if there is a unique interest to be protected by the right(s) to privacy, it must be an interest simply in being able to limit other people's observation of us or access to information about us—even if we have certain knowledge that the observation or information would not be used to our detriment or used at all. Rachels tries to identify such an interest and to point out why it is important.

His argument is this. Different human relationships are marked—indeed, in part, constituted—by different degrees of sharing personal information. One shares more of himself with a friend than with an employer, more with a life-long friend than with a casual friend, more with a lover than an acquaintance. He writes that “*however* one conceives one's relations with other people, there is inseparable from that conception an idea of how it is appropriate to behave with and around them, and what information about oneself it is appropriate for them to have” (pp. 328–329). It is “an important part of what it means to have a friend that we welcome his company, that we confide in him, that we tell him things about ourselves, and that we show him sides of our personalities which we would not tell or show to just anyone” (pp. 327–328, my emphasis). And therefore, Rachels concludes, “because our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have, it is, I think, one of the most important reasons why we value privacy” (p. 329).

Rachels acknowledges that his view is similar to that put forth by

Charles Fried in *An Anatomy of Values*. Since, for our purposes, we can regard these views as substantially the same, and since they amount to an extremely compelling argument about the basis of our interest in privacy, it will serve us well to sample Fried's version of the doctrine. He writes that

privacy is the necessary context for relationships which we would hardly be human if we had to do without—the relationships of love, friendship, and trust.

Love and friendship . . . involve the voluntary and spontaneous relinquishment of something between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. Intimacy is the sharing of information about one's actions, beliefs or emotions, which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.⁵

The Rachels-Fried theory is this. Only because we are able to withhold personal information about—and forbid intimate observation of—ourselves from the rest of the world, can we give out the personal information—and allow the intimate observations—to friends and/or lovers, that constitute intimate relationships. On this view, intimacy is both signaled and constituted by the sharing of information and allowing of observation *not shared with or allowed to the rest of the*

5. Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge, Mass., 1970), p. 142. It might be thought that in lifting Fried's analysis of privacy out of his book, I have lifted it out of context and thus done violence to his theory. Extra weight is added to this objection by the recognition that when Fried speaks about love in his book (though not in the chapter relating privacy to love), he speaks of something very like the caring that I present as a basis for refuting his view. For instance Fried writes that, "There is rather a creation of love, a middle term, which is a new pattern or system of interests which both share and both value, in part at least just because it is shared" (*ibid.*, p. 79). What is in conflict between us then is not recognition of this or something like this as an essential component of the love relationship. The conflict rather lies in the fact that I argue that recognition of this factor undermines Fried's claim that *privacy is necessary* for the very existence of love relationships.

world. If there were nothing about myself that the rest of the world did not have access to, I simply would not have anything to give that would mark off a relationship as intimate. As Fried says,

The man who is generous with his possessions, but not with himself, can hardly be a friend, nor—and this more clearly shows the necessity of privacy for love—can the man who, voluntarily or involuntarily, shares everything about himself with the world indiscriminately.⁶

Presumably such a person cannot enter into a friendship or a love because he has literally squandered the “moral capital” which is necessary for intimate emotional investment in another.

Now I find this analysis both compelling and hauntingly distasteful. It is compelling first of all because it fits much that we ordinarily experience. For example, it makes jealousy understandable. If the value—indeed, the very reality—of my intimate relation with you lies in your sharing with me what you don’t share with others, then if you do share it with another, what I have is literally decreased in value and adulterated in substance. This view is also compelling because it meets the basic requirement for identifying a compelling interest at the heart of privacy. That basic requirement is, as I have already stated, an important interest in simply being able to restrict information about, and observation of, myself regardless of what may be done with that information or the results of that observation.

The view is distasteful, however, because it suggests a market conception of personal intimacy. The value and substance of intimacy—like the value and substance of my income—lies not merely in what I have but essentially in what others do *not* have. The reality of my intimacy with you is constituted not simply by the quality and intensity of what we share, but by its unavailability to others—in other words, by its scarcity. It may be that our personal relations are valuable to us because of their exclusiveness rather than because of their own depth or breadth or beauty. But it is not clear that this is necessary. It may be a function of the historical limits of our capacity for empathy and feeling for others. It may be a function of centuries of acculturation

6. *Ibid.*, p. 142.

to the nuclear family with its narrow intensities. The Rachels-Fried thesis, however, makes it into a logical necessity by asserting that friendship and love *logically* imply exclusiveness and narrowness of focus.

As compelling as the Rachels-Fried view is then, there is reason to believe it is an example of the high art of ideology: the rendering of aspects of our present possessive market-oriented world into the eternal forms of logical necessity. Perhaps the tip-off lies precisely in the fact that, on their theory, jealousy—the most possessive of emotions—is rendered rational. All of this is not itself an argument against the Rachels-Fried view, but rather an argument for suspicion. However, it does suggest an argument against that view.

I think the fallacy in the Rachels-Fried view of intimacy is that it overlooks the fact that what constitutes intimacy is not merely the sharing of otherwise withheld information, but the context of caring which makes the sharing of personal information significant. One ordinarily reveals information to one's psychoanalyst that one might hesitate to reveal to a friend or lover. That hardly means one has an intimate relationship with the analyst. And this is not simply because of the asymmetry. If two analysts decided to psychoanalyze one another alternately—the evident unwisdom of this arrangement aside—there is no reason to believe that their relationship would necessarily be the most intimate one in their lives, even if they revealed to each other information they withheld from everyone else, lifelong friends and lovers included. And this wouldn't be changed if they cared about each other's well-being. What is missing is that particular kind of caring that makes a relationship not just personal but intimate.

The kind of caring I have in mind is not easily put in words, and so I shall claim no more than to offer an approximation. Necessary to an intimate relationship such as friendship or love is a reciprocal desire to share present and future intense and important experiences together, not merely to swap information. Mutual psychoanalysis is not love or even friendship so long as it is not animated by this kind of caring. This is why it remains localized in the office rather than tending to spread into other shared activities, as do love and friendship. Were mutual psychoanalysis animated by such caring it might indeed be part of a love or friendship—but then the "prime mover" of

the relationship would not be the exchange of personal information. It would be the caring itself.

In the context of a reciprocal desire to share present and future intense and important experiences, the revealing of personal information takes on significance. The more one knows about the other, the more one is able to understand how the other experiences things, what they mean to him, how they feel to him. In other words the more each knows about the other, the more they are able to really share an intense experience instead of merely having an intense experience alongside one another. The revealing of personal information then is not what constitutes or powers the intimacy. Rather it deepens and fills out, invites and nurtures, the caring that powers the intimacy.

On this view—in contrast to the Rachels-Fried view—it is of little importance who has access to personal information about me. What matters is who cares about it and to whom I care to reveal it. Even if all those to whom I am indifferent and who return the compliment were to know the intimate details of my personal history, my capacity to enter into an intimate relationship would remain unhindered. So long as I could find someone who did not just want to collect data about me, but who cared to know about me in order to share my experience with me and to whom I cared to reveal information about myself so that person could share my experience with me, and vice versa, I could enter into a meaningful friendship or love relationship.

On the Rachels-Fried view, it follows that the significance of sexual intimacy lies in the fact that we signal the uniqueness of our love relationships by allowing our bodies to be seen and touched by the loved one in ways that are forbidden to others. But here too, the context of caring that turns physical contact into intimacy is overlooked. A pair of urologists who examine each other are no more lovers than our reciprocating psychoanalysts. What is missing is the desire to share intense and important experiences. And to say this is to see immediately the appropriateness of sexual intimacy to love: in sexual intimacy one is literally and symbolically stripped of the ordinary masks that obstruct true sharing of experience. This happens not merely in the nakedness of lovers but even more so in the giving of themselves over to the physical forces in their bodies. In surrendering the ordinary restraints, lovers allow themselves to be what they truly

are—at least as bodies—intensely and together. (Recall Sartre’s marvelous description of the *caress*.)⁷ If this takes place in the context of caring—in other words if people are making love and not just fucking—their physical intimacy is an expression and a consummation of that caring. It is one form of the authentic speech of loving.

Finally, on this view—in contrast to the Rachels-Fried view—the unsavory market notion of intimacy is avoided. Since the content of intimacy is caring, rather than the revealing of information or the granting of access to the body usually withheld from others, there is no necessary limit to the number of persons one can be intimate with, no logical necessity that friendship or love be exclusive. The limits rather lie in the limits of our capacity to care deeply for others, and of course in the limits of time and energy. In other words it may be a fact—for us at this point in history, or even for all people at all points in history—that we can only enter into a few true friendships and loves in a lifetime. But this is not an inescapable logical necessity. It is only an empirical fact of our capacity, one that might change and might be worth trying to change. It might be a fact that we are unable to disentangle love from jealousy. But this, too, is not an a priori truth. It is rather an empirical fact, one that might change if fortune brought us into a less possessive, less exclusive, less invidious society.

This much is enough, I think, to cast doubt on the relationship between privacy and friendship or love asserted by Rachels and Fried. It should also be enough to refute their theory of the grounds on which the right to privacy rests. For if intimacy *may* be a function of caring and not of the yielding of otherwise withheld information, their claim to have established the *necessity* of privacy for important human relationships must fall. I think, however, that there is another equally

7. “The Other’s flesh did not exist explicitly for me since I grasped the Other’s body in situation; neither did it exist for her since she transcended it toward her possibilities and toward the object. The caress causes the Other to be born as flesh for me and for herself . . . , the caress reveals the flesh by stripping the body of its action, by cutting it off from the possibilities which surround it; the caress is designed to uncover the web of inertia beneath the action—i.e., the pure ‘being-there’—which sustains it. . . . The caress is designed to cause the Other’s body to be born, through pleasure, for the Other—and for myself. . . .” Jean-Paul Sartre, *Being and Nothingness*, trans. Hazel E. Barnes (New York, 1956), p. 390.

fundamental ground for rejecting their position: it makes the right to individual privacy “derivative” from the right to social (that is, interpersonal) relationships. And I mean “derivative” in a much more irreversible way than Thomson does.

On the Rachels-Fried view, my right to parade around naked alone in my house free from observation by human or electronic peeping toms, is not a fundamental right. It is derived from the fact that without this right, I could not meaningfully reveal my body to the loved one in that exclusive way that is necessary to intimacy on the Rachels-Fried view. This strikes me as bizarre. It would imply that a person who had no chance of entering into social relations with others, say a catatonic or a perfectly normal person legitimately sentenced to life imprisonment in solitary confinement, would thereby have no ground for a right to privacy. This must be false, because it seems that if there is a right to privacy it belongs to individuals regardless of whether they are likely to have friends or lovers, regardless of whether they have reason to amass “the moral capital which we spend in friendship and love.” What this suggests is that even if the Rachels-Fried theory of the relationship of privacy and intimacy were true, it would not give us a fundamental interest that can provide the foundation for a right to privacy for all human individuals. I believe, however, that such a fundamental interest can be unearthed. Stanley I. Benn’s theory of the foundation of privacy comes closer to the view which I think is ultimately defensible.

Benn attempts to base the right to privacy on the principle of respect for persons. He too is aware that utilitarian considerations—for example, prevention of harm that may result from misuse of personal information—while important, are not adequate to ground the right to privacy.

The underpinning of a claim not to be watched without leave will be more general if it can be grounded in this way on the principle of respect for persons than on a utilitarian duty to avoid inflicting suffering. That duty may, of course, reinforce the claim in particular instances. But respect for persons will sustain an objection even to secret watching, which may do no actual harm at all. Covert observation—spying—is objectionable because it deliberately

deceives a person about his world [that is, it transforms the situation he thinks is unobserved into one which is observed], thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man as engaged on an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him. The offense is different in this instance, of course, from A's open intrusion on C's conversation. In that case, A's attentions were liable to affect C's enterprise by changing C's perception of it; he may have felt differently about his conversation with D, even to the extent of not being able to see it as any longer the same activity, knowing that A was now listening.⁸

Benn's view is that the right to privacy rests on the principle of respect for persons as choosers. Covert observation or unwanted overt observation deny this respect because they transform the actual conditions in which the person chooses and acts, and thus make it impossible for him to act in the way he set out to act, or to choose in the way he thinks he is choosing.

This too is a compelling analysis. I shall myself argue that the right to privacy is fundamentally connected to personhood. However, as it stands, Benn's theory gives us too much—and though he appears to know it, his way of trimming the theory to manageable scale is not very helpful. Benn's theory gives us too much because it appears to establish a person's right never to be observed when he thought he wasn't being observed, and never to be overtly observed when he didn't wish it. This would give us a right not to have people look at us from their front windows as we absent-mindedly stroll along, as well as a right not to be stared in the face. To deal with this, Benn writes,

it cannot be sufficient that I do not *want* you to observe something; for the principle of respect to be relevant, it must be something about my own person that is in question, otherwise the principle would be so wide that a mere wish of mine would be a *prima facie* reason for everyone to refrain from observing and reporting on anything at all. I do not make something a part of me merely by having feel-

8. Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," in Richard Wasserstrom, ed., *Today's Moral Problems* (New York, 1975), p. 8.

ings about it. The principle of privacy proposed here is, rather, that any man who desires that he *himself* should not be an object of scrutiny has a reasonable claim to immunity.⁹

Benn goes on to say that what is rightly covered by this immunity are one's body and those things, like possessions, which the conventions of a culture may cause one to think of as part of one's identity.

But this begs the question. Benn has moved from the principle that respect for me as a person dictates that I am entitled not to have the conditions in which I choose altered by unknown or unwanted observation, to the principle that I am entitled to have those things (conventionally) bound up with my identity exempt from unknown or unwanted observation. But the first principle does not entail the second, because the second principle is not merely a practical limitation on the first; it is a moral limitation. It asserts that it is wrong (or at least, significantly worse) to have the conditions in which I choose altered, when things closely bound up with my identity are concerned. But this follows only if the first principle is conjoined with another that holds that the closer something is to my identity, the worse it is for others to tamper with it. But this is after all just an abstract version of the right to privacy itself. And since Benn has not shown that it follows from the principle of respect for persons as choosers, his argument presupposes what he seeks to establish. It is quite strictly a *petitio principii*.

In sum then, though we have moved quite a bit further in the direction of the foundation of privacy, we have still not reached our destination. What we are looking for is a fundamental interest, connected to personhood, which provides a basis for a right to privacy to which all human beings are entitled (even those in solitary confinement) and which does not go so far as to claim a right never to be observed (even on crowded streets). I proceed now to the consideration of a candidate for such a fundamental interest.

Privacy is a social practice. It involves a complex of behaviors that stretches from refraining from asking questions about what is none of one's business to refraining from looking into open windows one passes on the street, from refraining from entering a closed door with-

9. Ibid., p. 10.

out knocking to refraining from knocking down a locked door without a warrant.

Privacy can in this sense be looked at as a very complicated social ritual. But what is its point? In response I want to defend the following thesis. *Privacy is a social ritual by means of which an individual's moral title to his existence is conferred.* Privacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own. And this is a precondition of personhood. To be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny. And this in turn presupposes that he believes that the concrete reality which he is, and through which his destiny is realized, belongs to him in a moral sense.

And if one takes—as I am inclined to—the symbolic interactionist perspective which teaches that “selves” are created in social interaction rather than flowering innately from inborn seeds, to this claim is added an even stronger one: privacy is necessary to the creation of *selves*¹⁰ out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*.

Thus the relationship between privacy and personhood is a twofold one. First, the social ritual of privacy seems to be an essential ingredient in the process by which “persons” are created out of prepersonal infants. It conveys to the developing child the recognition that this body to which he is uniquely “connected” is a body over which he has some exclusive moral rights. Secondly, the social ritual of privacy confirms, and demonstrates respect for, the personhood of already developed persons. I take the notion of “conferring title to one’s existence” to cover both dimensions of the relationship of privacy to personhood: the original bestowal of title and the ongoing confirmation. And of course, to the extent that we believe that the creation of “selves” or “persons” is an ongoing social process—not just something which

10. For purposes of this discussion, we can take “self” and “person” as equivalent. I use them both insofar as they refer to an individual who recognizes that he *owns* his physical and mental reality in the sense that he is morally entitled to realize his destiny through it, and thus that he has at least a strong presumptive moral right not to have others interfere with his self-determination.

occurs once and for all during childhood—the two dimensions become one: privacy is a condition of the original and continuing creation of “selves” or “persons.”

To understand the meaning of this claim, it will be helpful to turn to Erving Goffman's classic study, “On the Characteristics of Total Institutions.”¹¹ Goffman says of total institutions that “each is a natural experiment on what can be done to the self.”¹² The goal of these experiments is *mortification of the self*, and in each case total deprivation of privacy is an essential ingredient in the regimen. I have taken the liberty of quoting Goffman at length, since I think his analysis provides poignant testimony to the role that elimination of privacy plays in destruction of the self. And thus conversely, he shows the degree to which the self *requires* the social rituals of privacy to exist.

There is another form of mortification in total institutions; beginning with admission a kind of contaminative exposure occurs. On the outside, the individual can hold objects of self-feeling—such as his body, his immediate actions, his thoughts, and some of his possessions—clear of contact with alien and contaminating things. But in total institutions *these territories of the self are violated*. . . .

There is, first, a violation of one's informational preserve regarding self. During admission, facts about the inmate's social statuses and past behavior—especially discreditable facts—are collected and recorded in a dossier available to staff. . . .

New audiences not only learn discreditable facts about oneself that are ordinarily concealed but are also in a position to perceive some of these facts directly. Prisoners and mental patients cannot prevent their visitors from seeing them in humiliating circumstances. Another example is the shoulder-patch of ethnic identification worn by concentration-camp inmates. Medical and security examinations often expose the inmate physically, sometimes to persons of both sexes; a similar exposure follows from collective sleeping arrangements and doorless toilets. . . . In general, of course, the inmate is never fully alone; he is always within sight and often earshot of someone, if only his fellow inmates. Prison cages with bars for walls fully realize such exposure.¹³

11. Erving Goffman, *Asylums* (New York, 1961), pp. 1–124.

12. *Ibid.*, p. 12.

13. *Ibid.*, pp. 23–25; my emphasis.

That social practices which penetrate “the private reserve of the individual”¹⁴ are effective means to mortify the inmate’s self—that is, literally, to kill it off—suggests (though it doesn’t prove) that privacy is essential to the creation and maintenance of selves. My argument for this will admittedly be speculative. However, in view of the fact that it escapes the shortcomings of the views we have already analyzed, fits Goffman’s evidence on the effects of deprivation of privacy, fulfills the requirement that it be a fundamental human interest worthy of protection, provides the basis for a right to privacy to which all human beings are entitled, and yet does not claim a right never to be observed, I think it is convincing.

If I am sitting with other people, how do I know this body which is connected to the thoughts I am having is *mine* in the moral sense? That is, how do I know that I have a unique moral right to this body? It is not enough to say that it is connected to my consciousness, since that simply repeats the question or begs the question of what makes these thoughts *my* consciousness. In any event, connection to my consciousness is a factual link, not a moral one. In itself it accounts for why I am not likely to confuse the events in this body (mine) with events in that body (yours). It does not account for the moral title which gives me a unique right to control the events in this body which I don’t have in respect to the events in that body.

Ownership in the moral sense presupposes a social institution. It is based upon a complex social practice. A social order in which bodies were held to belong to others or to the collectivity, and in which individuals grew up believing that their bodies were not theirs from a moral point of view, is conceivable. To imagine such an order does not require that we deny that for each body only one individual is able to feel or move it. Such a social order is precisely what Goffman portrays in his description of total institutions and it might be thought of as displaying the ultimate logic of totalitarianism. Totalitarianism is the political condition that obtains when a state takes on the characteristics of a total institution. For a society to exist in which individuals do not own their bodies, what is necessary is that people not be treated as if entitled to control what the bodies they can feel and move do, or what is done to those bodies—in particular that they not be treated as if

14. *Ibid.*, p. 29.

entitled to determine when and by whom that body is experienced.¹⁵

This suggests that there are two essential conditions of moral ownership of one's body. The right to do with my body what I wish, and the right to control when and by whom my body is experienced. This in turn reflects the fact that things can be appropriated in two ways: roughly speaking, actively and cognitively. That is, something is "mine" to the extent that I have the power to use it, to dispose of it as I see fit. But additionally there is a way in which something becomes "mine" to the extent that I know it. What I know is "my" knowledge; what I experience is "my" experience. Thus, it follows that if an individual were granted the right to control his bodily movements although always under observation, he might develop some sense of moral ownership of his physical existence.¹⁶ However, that ownership would surely be an impoverished and partial one compared to what we take to be contained in an individual's title to his existence. This is because it would be ownership only in one of the two dimensions of appropriation, the active. Ownership, in the sense we know it, requires control over cognitive appropriation as well. It requires that the individual have control over whether or not his physical existence becomes part of someone else's experience. That is, it requires that the individual be treated as entitled to determine when and by whom his concrete reality is experienced. Moral ownership in the full sense requires the social ritual of privacy.

As I sit among my friends, I know this body is mine because first of all, unlike any other body present, I believe—and my friends have acted and continue to act as if they believe—that I am entitled to do with this body what I wish. Secondly, but also essential, I know this body is mine because unlike any other body present, I have in the past taken it outside of the range of anyone's experience but my own, I can do so now, and I expect to be able to do so in the future. What's more, I believe—and my friends have acted and continue to act as if they

15. Macabre as it may sound, a world in which the body that I can feel and move is *distinct from* the body that I own is conceivable. Imagine, for example, a world of 365 people each born on a different day of the year, in which each person has complete access to the body of the person whose birthday is the day after his.

16. I am indebted to Professor Phillip H. Scribner for pointing this out to me.

believe—that it would be wrong for anyone to interfere with my capacity to do this. In other words, they have and continue to treat me according to the social ritual of privacy. And since my view of myself is, in important ways, a reflection of how others treat me, I come to view myself as the kind of entity that is entitled to the social ritual of privacy. That is, I come to believe that this body is mine in the moral sense.

I think the same thing can be said about the thoughts of which I am aware. That there are thoughts, images, reveries and memories of which only I am conscious does not make them mine in the moral sense—any more than the cylinders in a car belong to it just because they are in it. This is why ascribing ownership of my body to the mere connection with my consciousness begs the question. Ownership of my thoughts requires a social practice as well. It has to do with learning that I can control when, and by whom, the thoughts in my head will be experienced by someone other than myself and learning that I am entitled to such control—that I will not be forced to reveal the contents of my consciousness, even when I put those contents on paper. The contents of my consciousness become mine because they are treated according to the ritual of privacy.

It may seem that this is to return full circle to Thomson's view that the right to privacy is just a species of the rights over person and property. I would argue that it is more fundamental. The right to privacy is the right to the existence of a social practice which makes it possible for me to think of this existence as *mine*. This means that it is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights. It should also be clear that the ownership of which I am speaking is surely more fundamental than property rights. Indeed, it is only when I can call this physical existence mine that I can call objects somehow connected to this physical existence mine. That is, the transformation of physical possession into ownership presupposes ownership of the physical being I am. Thus the right to privacy protects something that is presupposed by both personal and property rights. Thomson's recognition that there is overlap should come as no surprise. The conclusion she draws from the existence of this overlap is, however, unwarranted. Personal and property rights

presuppose an individual with title to his existence—and privacy is the social ritual by which that title is conferred.

The right to privacy, then, protects the individual's interest in becoming, being, and remaining a person. It is thus a right which *all* human individuals possess—even those in solitary confinement. It does not assert a right never to be seen even on a crowded street. It is sufficient that I can control whether and by whom my body is experienced in some significant places and that I have the real possibility of repairing to those places. It is a right which protects my capacity to enter into intimate relations, not because it protects my reserve of generally withheld information, but because it enables me to make the commitment that underlies caring as *my* commitment uniquely conveyed by *my* thoughts and witnessed by *my* actions.