



Thomson on Privacy

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Source: *Philosophy and Public Affairs*, Vol. 4, No. 4 (Summer, 1975), pp. 315-322

Published by: Blackwell Publishing

Stable URL: <http://www.jstor.org/stable/2265076>

Accessed: 09/01/2009 08:43

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Judith Thomson's paper presents a strong challenge to what I take to be the common-sense view of privacy. I have been moved by her trenchant arguments on a number of points, but basic differences between us remain.

I want to set out here my reasons for finding her account of privacy unsatisfactory, and to indicate the form that I think a more adequate theory would take. Thomson denies that there is such a thing as *the* right to privacy. In her view there is a cluster of diverse rights which may be called rights of privacy, but these rights lack a common foundation. Each of them is in fact a right of some other kind, e.g. a right of ownership, and its basis as a right is therefore to be found elsewhere than in a unified account of the notion of privacy.

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. The first element in an adequate account of privacy would be a general account of these interests. The second element would be an account of the structure and foundation of those conventional norms that are erected to secure and protect these interests, norms specifying when, where, and in what ways we may and may not be observed, listened to, questioned, and in other ways kept track of.

These norms vary considerably in explicitness and force. At one extreme are vague and informal understandings, such as those governing the scrutiny of others in public places and the degree to which it is permissible to listen to, watch, and follow them. Such understandings are rarely formulated as explicit rules. In making the judgment that a person who follows us and stares at us as we sit on a park bench "behaves badly" we appeal not to set formulae but to direct reasoning about what the most reasonable way would be to accommodate the interests of people involved in situations of this type. Other norms of privacy, however, take the form of quite explicit social rules, e.g. rules against walking uninvited into other people's rooms, going through other people's drawers or suitcases, etc. Some of these rules come to be expressed as laws (or perhaps have their origin in law), such as the laws against tampering with people's mail or tapping their telephones.

In what follows I shall refer to these laws and conventions as defining a "zone" or "territory." Obviously these terms cannot be understood merely in a spatial sense. For one thing, as Thomson's example of the quarreling couple shows, whether a given observation or attempt to observe intrudes into my zone may depend not only on the locations of observer and observed but also on the means used. Furthermore, in other cases there may be no physical boundary involved at all. Consider, for example, the conventional limitations on the questions it is polite to ask in a social situation in which it would be awkward for a person to refuse to answer, or the restrictions, usually more explicit, on the questions which an official may use his special authority to coerce people into answering. In the latter case a right is involved, in the former probably not, but in both cases we have a conventional or legal boundary whose crossing invades privacy.

The clearest cases of acts which are wrong because they are invasions of privacy involve both a violation of some norm of privacy and interference with one of the central interests in not being seen, overheard, etc., which underlie these norms. Both these elements are present, for example, in the case described at the beginning of Thomson's article. When the police train their looking and listening devices on Smith's house they breach a convention (probably a law) for-

bidding such observations (I assume they lack special authority to do what they are doing). They also interfere with Smith's interest in being able to assume that while he is in his house with the shades drawn he is unobserved. Given that this is so, it is false to say, as Thomson's police do, that he has been let alone. But in order to explain why a right of Smith's has been violated we needn't invoke some general "right to be let alone"; we have the fact that his conventionally defined zone of privacy has been invaded. We are most likely to say that such invasions violate rights when, as in this case, the norm in question is a law, or at least an explicit and serious social rule. (Perhaps we would also say this when we think that the interest infringed is so important that it ought to be protected by such a law or rule even though it is not.) But where the norm breached is only a relatively vague customary understanding, and the interest in question is relatively trivial, we are more likely to say with Thomson that the agent "behaved badly" but that no right was infringed.

An act which transgresses a clear rule or law can be an invasion of privacy (and sometimes a violation of a right) even if no observation or overhearing actually results. If you press personal questions on me in a situation in which this is conventionally forbidden, I can always refuse to answer. But the fact that no information is revealed does not remove the violation, which remains just as does the analogous violation when you peek through my bathroom window but fail to see me because I have taken some mildly inconvenient evasive action. The purpose of the relevant conventions in both cases is to enable us to have our privacy without these inconveniences. The interests to which an account of privacy must refer thus include, in addition to specific interests in not being seen, overheard, etc., broader interests in having a zone of privacy in which we can carry out our activities without the necessity of being continually alert for possible observers, listeners, etc. Social rules defining such a zone by specifying when and where certain forms of observation are ruled out are thus an obvious efficiency; they decrease the need for watchfulness and restraint both on the part of those who wish not to be observed and on the part of those who want to respect these wishes. These rules are conventional in one important sense: our zone of privacy could be

defined in many different ways; what matters most is that *some* system of limits to observation should be generally understood and observed.

I believe that this outline of a theory of privacy provides a basis for handling many of Thomson's examples, e.g. that of the quarreling couple. It also enables us to explain why ownership, while sometimes relevant to questions of privacy, does not have the importance Thomson claims for it. Suppose someone used Thomson's X-ray device to examine an object in my safe. It seems to me clear that the right which is violated in such a case does not depend on my owning the object examined. Suppose it is your object which you have left in my care; suppose that it is someone else's which I have picked up by mistake thinking it mine; suppose there is no object in the safe at all, and the person looking just wanted to see whether I had anything there or not. None of these possibilities removes the wrongfulness of the intrusion; there is a right which is violated in all these cases, and it is my right whether or not the object is mine. Now it may be said that ownership is still relevant here because it matters that the safe is *my* safe. This is partly right; our system of conventions is such that the fact that I own the safe normally means that it is part of my zone of privacy. (But not always. If I loan the safe to you and while it is in your house someone uses a Thomson device to look into it, it is likely that no right of mine will have been violated.) What is crucial here is the conventional boundary and not the fact of ownership itself. We could have conventions in which ownership was even less relevant than it is now. Suppose, for example, that each person was assigned a plot in the common field to use as a place to bury valuables. Then anyone who used a Thomson device on my plot without my consent and without special authority would violate a right of mine, and would do so even if all he discovered was that I didn't have anything buried there. But I don't *own* the plot. I can't sell it; I can't build on it; perhaps I can't even use it for any other purpose. All that is crucial to the example is that it is part of my conventional zone of privacy. Our present conventions are not like this limiting case. For us, ownership is relevant in determining the boundaries of our zone of privacy, but its relevance is determined by norms whose basis lies in our interest in privacy, not in the notion of ownership.

A similar analysis applies to Thomson's somewhat odd subway-map case. Clearly, if I obscure the map on the wall of the subway by holding my coat in front of it, then no right of mine is violated if you use an X-ray device to look through my coat to see how to get where you want to go. The reason here is that I do not turn the wall of the subway into "my territory" by putting my coat in front of it. If, however, I steal the map and put it in my pocket or in my briefcase, or if I wrap my coat around it and clutch it on my lap, then it becomes much more plausible to say that in using your device to look into my pocket or briefcase or bundle you invade my privacy and perhaps violate a right of mine. This is not to say that I have a right to have the map or a right not to have you see it. Nor is it to deny that you have a right to see the map, a right which I am wrongfully interfering with. But this does not entitle you (without special authority) to look into my pocket, my briefcase, or my bundle. Nor, to carry things one step further, would it entitle you, if I took the map home with me, to use your device to look through the walls of my house in order to discover the way to your destination. The ownership of or the right to see and use the object in question is not determinative here anymore than in cases of simple theft. If I take your purse, that does not entitle you to enter my house in order to recover it or even, I would say, to use your device on my house in order to see whether it is there. (But this last case is harder, and I will return to it below.)

The claims made in the preceding paragraph represent my judgments about what our current conventions are, or perhaps in some cases what I think they should be. My thesis is that these conventions take the form of a system of prohibitions defining a zone of privacy immune from specified interventions, and that rights of ownership over objects do not play the primary role that Thomson assigns to them. Nonetheless, some of the considerations that Thomson discusses under the heading of "waiver" will still be applicable under my view. Thus, if I invite someone to cross a conventional boundary or "get him to do so whether he wants to or not" then the result is not an invasion of privacy. "Waiver" seems an appropriate description for what happens in these cases, but not all of the examples Thomson cites can be brought under this heading. She is right in saying that if I do not take care to close my windows or draw my shades, I then can-

not complain if I am heard or seen by passers-by. Nor can I complain if an object of mine, which I do not want to be seen, is viewed because I have inadvertently left it in a public place. But in these cases it seems wrong to say, as Thomson does, that I have waived a right—the right not to be looked at or the right not to have my object looked at. As far as I can see I have no such general rights to begin with. I have an *interest* in not being looked at when I wish not to be, and I may have a similar interest with respect to certain objects. But rights directly corresponding to these interests would be too broad to form part of a workable system. The rights we do have are more limited, and what has happened in the examples just considered is that I have failed to take advantage of these rights: I have the right to close the windows of my house and not be eavesdropped on, and if an object is mine then I may have the right to put it into my safe or move it behind some other conventional boundary.

I have mentioned above that our conventions of privacy are motivated by our interests in being free from specific offensive observations and, more generally, in having a well-defined zone within which we need not be on the alert against possible observations. Suppose I have brought within my zone, e.g. into my house, some object of yours which I had no right to have taken. If it were the case that in looking into my house you would see *only* this object and be blind to everything else, then the judgment that it would be wrong for you to take such a look into my house would be thrown into some doubt. This is what happened in the last of the cases mentioned two paragraphs back. It is important here that the second supposition—that in looking into my house you would see only your object, and nothing of my life, my possessions, my guests, etc.—is wildly contrary to fact. If things really were like that then your glancing into my house would not disturb any of the (legitimate) interests which motivate our conventions of privacy. Since allowing you such a glance would advance another interest—yours, in finding your lost property—it would seem irrational not to allow this kind of investigative peeping. If our conventions were so modified then Thomson's view would be more nearly correct in that a lot would depend on ownership of the observed objects. It seems to me that where Thomson's view is most persuasive a good deal of its persuasiveness derives from the fact that in her

examples we are invited to think of the owned object (the subway map or the pornographic picture) as the only thing that is observed, or at least as the only thing whose observation is of concern to the parties. But things are not generally like this. Since vision is not selective in the way just supposed, looking into my house does infringe my central interests in privacy. Consequently, we have had to find a more complicated way of reconciling these interests with our interest in the recovery of stolen property, namely the system of search warrants and so on. Of course there may be cases in which a very superficial entry into my zone, e.g. picking up my coat off the subway seat to look under it, can reliably be foreseen to lead to your seeing, if anything at all other than the seat, only something of yours which I have wrongfully appropriated. In such a case something like the contrary-to-fact situation described above may seem to obtain, and Thomson's view may begin to seem plausible. But it would surely be wrong to infer from such cases that *in general* ownership is central to privacy as we now understand it.

I do not draw a sharp distinction, as Thomson does, between those invasions of privacy that strike us as violations of rights and those that strike us merely as "bad behavior." On the contrary, my account stresses the continuity between these two kinds of invasions, and treats rights violations merely as a limiting case. In this way I am able to preserve a kind of unity in the theory of privacy. An alternative approach might be motivated by the idea that rights and interests are fundamentally different things, and that rights claims must be either self-evident or grounded in some further right. Perhaps it is something like this which makes Thomson feel she is faced with the alternatives of either appealing to some fundamental "right to privacy" or else showing how what appear to be rights of privacy actually derive from rights of other kinds. At any rate, faced with this choice she opts for the latter alternative and winds up with an account of privacy that is made up of bits and pieces borrowed from other domains.

This question of the unity of the theory of privacy is not a purely theoretical issue. The foundations of privacy become a matter of practical concern when we are faced with open questions that are not resolved by our existing conventions. Such questions may be posed, for example, by the development of new technology, or by changes in

social habits or relative values which present new conflicts or make our present conventions no longer seem reasonable. We then need to decide how to extend our old conventions to cover these new cases or whether to change our conventions in the face of the new situation. To make these decisions we need to know what we are changing, what its justification is, and what the relevant grounds are for judging alternatives. In such situations, Thomson's simplifying hypothesis that every privacy right is really some other kind of right suggests, first, that to settle questions about privacy we should consult these other rights, e.g. to resolve unclarities about what our rights to privacy are we should consider what the rights of owners are. Beyond this, if we want to challenge existing rights and consider possible changes, the suggestion seems to be that questions about the basis and justification of rights of privacy are to be answered by inquiry into the foundations of these other rights.

It seems to me that the first of these suggestions is unlikely to be very helpful. I doubt that much insight into the problems raised by electronic surveillance or by conflicts between considerations of privacy and the requirements of a free press is to be gained by consulting rights of ownership or even rights of the person in the form in which Thomson presents them. How helpful the second suggestion is will depend upon our account of these other rights. If these rights were to turn out to be truly *other*, i.e. if an account of the bases of rights in the "ownership cluster" and the "rights-of-the-person cluster" turned out not to involve the central interests with which privacy is concerned, then one would not expect an investigation of these bases to shed much light on questions of privacy. It seems more likely, of course, that rights of ownership and rights of the person as Thomson understands them will turn out to be based in part on those same interests which, I have contended, underlie norms of privacy. In this case an inquiry following Thomson's path might end up at the same place I do, only via a more circuitous route. But if this is so then her "simplifying hypothesis" seems more to obscure than to simplify the arguments with which we should be concerned.