


PRIVACY INTIMACY AND ISOLATION



Julie C. Inness

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For my parents

PREFACE

Robert Bork's ultimately unsuccessful Supreme Court confirmation hearings presented me with a dilemma about privacy. Those opposed to his nomination argued that Bork would undermine legal protection for one of our most cherished interests: privacy. By doing so, Bork would leave a wide range of privacy claims without legal support, claims covering such diverse issues as abortion, contraceptives, and access to the home. In response to this criticism, I initially expected Bork's supporters to deny that he would endanger the constitutionally protected right to privacy. Curiously enough, many of them failed to do this; in fact, they argued that Bork ought to attack the notion, stripping it of constitutional sanction. To support this contention, they pointed out that a right to privacy is not stated in the Constitution; furthermore, they argued that privacy is neither conceptually nor morally separable from other legally protected interests, such as liberty from undue state intervention. The conflicting stances of Bork's supporters and opponents constituted the core of my dilemma. On the one hand, I wished to retain privacy, since it seemed to protect so many vital areas of life. On the other hand, I realized that I was unclear about what I meant by "privacy." I could neither define it nor explain its value. My book emerged in response to this dilemma. It embodies my concern that our vital privacy claims might diminish under skeptical attacks, perhaps even vanish, unless supported by a strong theoretical foundation.

Faced with this threat, I originally turned to the legal and philosophical literature on privacy, seeking to understand its conceptual and normative underpinnings. However, I discovered that both are marked by an unusual amount of heated disagreement, a fact publicized during Bork's confirmation hearings. These disagreements cover considerable ground, ranging from privacy's conceptual independence from other interests to its definition and the source of its value. To resolve such numerous, crucial conflicts, I decided to explore privacy for myself. It seemed to me that the following three questions needed answers before privacy could

possess a sound theoretical foundation: Is privacy conceptually and morally separable from other interests? How should it be defined? What value should it be accorded? These questions are at the core of this work.

The Bork hearings did not totally undermine my privacy intuitions; I was left with the sense that our interest in privacy cannot be collapsed into other interests. I was also left with the feeling that any satisfactory definition of the term would have to be capable of linking together the apparently divergent issues collected together under the rubric “privacy,” issues involving information, access, and intimate decisions. Finally, I still believed that privacy was correctly accorded a positive normative value. The conclusions I reach in this work support these initial intuitions. After disposing of skepticism about privacy, I argue that privacy provides the agent with control over intimate decisions, including decisions about intimate access, the dissemination of intimate information, and intimate actions. I understand intimacy to be a product of the agent’s motivation. To claim that something is intimate is to claim that it draws its meaning and value for the agent from the emotions of love, liking, or care. Hence, I conclude that privacy is the state of possessing control over decisions concerning matters that draw their meaning and value from an agent’s love, liking, or care. We value the control privacy provides because it embodies our respect for persons as emotional choosers. To respect others in this fashion, we must acknowledge their autonomous capacity for love, liking, and care: we must accord them privacy. Understanding the ties between privacy and intimacy allows us to understand the paramount importance of protecting privacy: a person without privacy is a person who cannot live by her own plans with respect to intimacy, a person who has been denied control over her emotional destiny.

While ideas may flourish in privacy, they do not develop in isolation; my thoughts about privacy are no exception. I wish to extend my sincere thanks to my colleagues, without whom I could not have undertaken this project. I am grateful for the support provided by my fellow philosophers at Stanford University, where I started this work, especially those members of the Philosophy Department who commented on it. The Humanities Center at Stanford provided me with congenial, interdisciplinary support; I cannot imagine a better place to spend a year writing. My deep gratitude is also extended to the members of the Department of Philosophy at Mount Holyoke College, especially Tom Wartenberg. Teaching has always stimulated my thoughts, so I must

thank all my fine students at Mount Holyoke for continually reminding me of the pleasures of philosophy. Finally, an earlier version of Chapter 5 was published as “Information, Access, or Intimate Decisions About One’s Actions? The Content of Privacy” in *Public Affairs Quarterly* 5 (1991): 227–242; my thanks goes to the editor for allowing me to use this work.

My especial thanks, along with my deepest appreciation, belongs to those who have been there for me every step of the way. Without my friends, I would have taken myself far too seriously to ever have placed a word on paper. Many of my students have also been supportive, many more than I could list; you are the best possible students and friends. A special thanks goes to Beth for persistently nudging me closer to my computer and the possibility of writing. Finally, without my family, I would have never been in the position to commence this work in the first place. Their support will always be invaluable.

South Hadley, Mass.
August 1991

J. C. I.

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Privacy, Intimacy, and Isolation

1

Introduction: The Chaotic World of Privacy

Exploring the concept of privacy resembles exploring an unknown swamp. We start on firm ground, noting the common usage of “privacy” in everyday conversation and legal argument; it seems it will be a simple task to locate the conceptual and moral core of such an often-used term. But then the ground softens as we discover the confusion underlying our privacy intuitions. We find intense disagreement about both trivial and crucial issues; for example, one person contends that the state would violate her privacy if it compelled her to wear a seat belt, yet the state argues that privacy has nothing to do with the wearing of seat belts,¹ and another argues that the state would violate his privacy if it interfered with his homosexual sexual activities, while the government contends that privacy’s scope covers only heterosexual sexual activities.² At this point, we turn to the legal and philosophical literature on privacy in the hope of gaining a foothold. Instead, we find chaos; the literature lacks an accepted account of privacy’s definition and value. Given our muddled state, we might initially try to escape by withdrawing—do we truly need an unified account of privacy? Although retreat may be appealing, I believe we cannot abandon the concept of privacy to confusion without significant loss. If we wish to avoid extending this elusive notion to cover too much of our lives or, perhaps worse, shrinking it to cover too little, we must come to understand it. Because of this conviction, I seek to construct an escape route from the quagmire: a definition of privacy and an explanation of its value that will clarify and resolve our conflicts.

Before discussing how an acceptable account of privacy might be constructed, we must answer a preliminary question: why is the concept

important enough to merit theoretical concern in the first place? I could respond with an appeal to the value of conceptual tidiness, but this response does not adequately explain its importance. Privacy demands attention because it is both an immensely powerful and hotly contested interest. The power of privacy is seen in the variety of issues that legal courts have placed under its protection, issues that range from who should have access to an agent's home or bank account number to decisions about contraceptives, sexuality, and abortion.³ Despite the pervasive legal reach of privacy, privacy claims are often challenged in the realm of the law and everyday life.⁴ Disagreements about privacy cover considerable ground. On the one hand, many people accept the existence of privacy, but disagree about the matters belonging within its purview; for example, some contend that abortion should be protected by the constitutional right to privacy, while others reject this contention. Similarly, some suggest that privacy protects consenting sexual activity, while others deny this. On the other hand, the existence of privacy itself is contested; although many accept its importance, there are those who wish to see claims to privacy banished entirely on the grounds that an independent moral interest in privacy does not exist.

Of course, the fact we disagree about many important privacy-related issues does not mean privacy needs philosophical attention. Its widely contested nature might be attributed to either ideological differences about unrelated matters or disagreements about facts. Accordingly, we would expect liberals and libertarians to argue about privacy claims due to their conflicting views of state power. Similarly, the state's refusal to extend the protection of privacy over homosexual activity might be due to its prejudiced views concerning the supposedly harmful nature of such conduct. However, such disagreements cannot be explained away by appealing to extraneous considerations. Although certain debates on privacy may be resolvable without directly addressing questions about the concept, the majority of these conflicts are intimately related to the disorder of the implied privacy theories underlying the conflicting positions. Claims about privacy and their counterclaims are often based on conflicting definitions of privacy and accounts of its function and its value. Some people believe that decisions about abortion fall within the scope of privacy since they assume that privacy protects intimate decisions; others deny this, arguing that privacy only regulates the dissemination of information. Some see privacy as often equivalent to unwanted isolation because they do not view it as intrinsically desirable; others

disagree, assuming that privacy possesses a normatively positive value, one incompatible with the normatively negative state of undesired isolation. If we are to resolve the wide range of applied privacy issues, we must start by disentangling the conflicting theories that support the opposing positions, then move on to privacy's correct definition and the true nature of its function and value.

Four questions need to be answered if we are to develop a satisfactory theory of privacy: first, can we extract an adequate account of privacy from the legal and philosophical literature? A critical literature survey might limit our privacy disagreements; however, our confusion might prove intractable if no clearly acceptable account of privacy emerged. We would then have to develop a new definition, extracting its components from everyday experience, privacy law, and privacy theory. In examining this melange, we must try to understand the mechanism by which privacy works. Thus, our second question concerns the nature of the relation privacy establishes between the agent and the external world: what is the function of privacy? But, since privacy clearly establishes a relation between *part* of the agent's life and the world at large, we must address a third question about the realm being protected: what is the content of privacy? An account of how privacy functions combined with an explanation of its content will produce a complete definition of privacy. This definition will enable us to see the common conceptual threads of our everyday and legal privacy claims, but it will not provide us with an explanation of the moral significance of those claims, which leads us to the fourth question: what is the nature and source of the value we accord to privacy? Although it is clear how to set about answering the first question, this is not self-evident for the others. Some additional explanation is required.

When I experience privacy with respect to something such as my room or diary, I stand in a particular relation to my room or diary, a relation I do not stand in with respect to the entire external world. More formally, I have privacy with respect to *X* if and only if I stand in relation *R* to *X*. However, the nature of this relation, which I will term the "function of privacy," is not clear. Two plausible accounts capture our intuitions, yet they have radically different implications as far as the nature of privacy is concerned. On the one hand, privacy might be antithetical to publicity: it might function by separating the individual from others, restricting the access others have to particular areas of her life.⁵ Accordingly, a claim to privacy becomes a claim to have these areas of life separated from the

world. When I make a privacy assertion about my diary or room, I am asserting that they are not to be accessed by others. Even an individual trapped in the unwanted isolation of an uninhabited island experiences privacy—her life is not accessed by others. On the other hand, privacy might not necessarily be opposed to publicity: its function might be to provide the individual with control over certain aspects of her life. Accordingly, a claim to privacy becomes a claim to control these areas of life. I experience privacy with respect to my diary or room when I am capable of controlling access to them. An individual experiences privacy on an uninhabited island if she is capable of controlling access to it. As these examples reveal, separation and control-based accounts delineate sharply different realms of privacy; the conditions under which privacy is, or is not, experienced will affect what counts as a justified claim. Given these differing implications, clearly an initial step toward a definition of privacy is to determine whether privacy separates areas of the agent's life from the public sphere or provides her with control over them. The next step is to explore the content of these privacy-protected areas.

Abortion decisions, computer accounts, sex, love letters, contraceptive decisions, the body, the home, bank balances—this is only the start of a list of the heterogeneous matters claimed under the rubric, "privacy." Despite its diversity, this collection reveals the nature of the three central debates about the content of privacy. The first may be termed the information/access versus decisional privacy debate. On the one hand, privacy is claimed to involve the agent regulating information about or access to herself, access to love letters, computer accounts, and the body all being quintessential privacy matters. On the other hand, privacy is claimed to involve the agent's freedom to make certain decisions about her own actions in matters involving contraceptives, sexuality, abortion, and child rearing. The second debate concerns the nature of the information, access, or decisions about actions contained within the scope of privacy. Privacy might protect *all* information about an agent, access to the agent, or decisions about her own actions; by this account, privacy protects grocery lists as well as love letters and decisions about wearing a seat belt as well as those about abortion. But we need not accept this broad scope; privacy might involve only *intimate* information, access, or decisions, such as the contents of love letters, personal areas of the body, and decisions about sexuality. If so, we are faced with a third debate, which focuses on different attempts to characterize intimacy, either in

terms of behavior or in terms of its underlying motivations; for example, is sexual behavior intimate simply *qua* sexual behavior, or does its intimacy lie in the love it often conveys? These three debates must be resolved because their resolution fundamentally changes not only the scope of justified privacy claims, but also our account of privacy's value; for example, we will likely accord a different value to protecting a realm of intimate decisions than to protecting a realm of nonintimate decisions. With this, we can take our final step toward a satisfactory account of privacy: developing an explanation of its normative force.

Privacy is usually considered a moral interest of paramount importance. Its loss provokes talk of violation, harm, and loss of agency. Paradoxically privacy is also described as a condition from which we should flee, promoting isolation, deprivation, and separation. It possesses the potential to entrap the powerless, eliminating their recourse to the public sphere. To illustrate, consider how battered women might suffer from respecting the privacy of the home, which might be incompatible with acknowledging the needs of these women. This tension between those who praise privacy and those who condemn it leads to our fourth and final question: what is the nature and source of the value we accord to privacy as a moral interest or right? Before we can answer, we must respond to a skeptical challenge, that privacy possesses no peculiar value since its value can be explained in terms of the value we accord to other interests. According to this, conceptual clarity is served by "dissolving" privacy claims into their true components, such as property claims and claims to liberty from undue state regulation; the value of privacy can be fully explained through analyzing these components. If this challenge cannot be met, we are left with no reason to discuss the value of privacy itself. However if it can be met, we are faced with the problem of characterizing the nature of privacy's distinctive value. In particular, is privacy inherently morally undesirable, morally mixed, or desirable? Should we always flee to privacy, sometimes flee to it, or always flee from it? If we discover, as seems plausible, that privacy is correctly accorded at least a partially positive moral value, our final problem is to determine the source of this value. Do we, for example, value a woman having privacy with respect to an abortion decision because we acknowledge the dire life consequences of having an unwanted child? Or do we value privacy in such a situation because we believe that individual autonomy demands that an agent have control over a decision concerning having a child, even if it would not produce dire

consequences? As these questions reveal, it is unclear whether we value privacy because it promotes desired ends, such as intimate relationships, self-respect, and freedom from the scrutiny of others, or because respecting others as autonomous agents entails according them privacy. Given the differing implications of consequentialist and deontological accounts, we must select between them in order to complete our description of privacy's normative status.

It should no longer be surprising that our everyday and legal appeals to privacy are in a state of chaos, given the multitude and diversity of responses to questions about the content, function, and value of privacy. These questions can be answered, but several steps will be necessary. We must determine whether these privacy questions are truly unresolved—have they been answered in the literature? If it provides disparate definitions, some concerned with protecting property, others with protecting personhood, should we be discussing privacy or should we reduce it to nonprivacy components? These questions constitute the focus of the first part of this book. Chapter 2 surveys the legal and philosophical literature on privacy with both a destructive and a constructive purpose; I wish to not only reveal the lack of an acceptable account of privacy, but also to introduce the key privacy debates. Chapter 3 takes on the challenge of skepticism about privacy's independent existence. I criticize the arguments of Judith Jarvis Thomson, a representative privacy skeptic, focusing on her paper "The Right to Privacy,"⁶ in which she suggests that talk about the right to privacy should be abandoned since the right to privacy is merely a composite of more basic property rights and rights over the person. I believe that her claim stumbles on two points. First, assuming that the right to privacy consists of such a composite, there remains the question of which shared feature identifies these rights; a shared feature would reveal that privacy claims are at least conceptually separable from property and personhood claims as a whole. Of course, privacy claims might be conceptually separable without being normatively separable; we might accord the same value to privacy claims as we accord to property rights and rights over the person. My second point is that the value we accord to privacy does not derive necessarily from the value we accord other rights. Hence Thomson fails to establish that talk about privacy can be reduced to talk about the nature and value of other concepts without conceptual or moral loss.

Lacking a unified definition of privacy, while rejecting Thomson's contention that such a definition would serve no useful purpose, the next