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Response to James B. Rule

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James Rule is puzzled by the ‘idiosyncratic’ approach that I take to the philosophical study of privacy. As evidence for this idiosyncrasy, he cites my relative indifference to the distinction between consequentialist and deontological perspectives on privacy although these differences are proof of ‘intricate, yet enormously consequential intellectual tensions’. My choice of philosophical topics is ‘unsystematic’ and more a reflection of my own ‘intellectual hobby-horses’ than a ‘well-worked-out view of what students most need to know’. Finally, Rule concludes, because ‘the most important privacy questions are excruciating’, we need ‘more systematic guidance than is provided here’. I am grateful to the editors for the chance to respond to these complaints.

The first thing to note is that the book is aimed primarily not at students but at the general public: it is part of a series called ‘Thinking in Action’, which consists of *very* short paperback books of philosophy on topics such as immigration and education, which are meant to appeal to interested lay readers, though they may also appeal to students. They are not, then, meant to enter deeply into academic debates on topics but to engage readers with philosophical arguments that they can pursue through more systematic and scholarly works later, if they so wish. They are also not aimed at a uniquely American audience, and are therefore free of the obligation to take American debates and interests as seriously as Americans take them.

That said, the plan of the book, and the choice of examples and debates was not meant to be idiosyncratic, but to reflect a thesis laid out at the beginning of the book. The thesis is this: that the ideas about privacy which we (author and readers) have inherited, and which most countries’ laws embody, are not obviously consonant with democratic commitments to the freedom, equality and happiness of individuals. It is therefore important to ask ourselves ‘what is the value of privacy if we value democratic government?’ given that privacy has often been thought to be a cloak for sexual coercion and subordination, and for the power of the rich over the poor? My choice of topics was designed to make the force of this question apparent, and therefore to introduce interested lay readers (and students) to feminist concerns with privacy, to worries that privacy threatens forms of freedom of expression and of the press necessary to democratic government; that it supports the subordination of women to men in the family, and the justification of gross differences in the ownership and control of private property. These are all central debates in the political philosophy of privacy, and my hope was that these would be natural and interesting questions for lay people (and students) to think about, whether or not they know much philosophy.

Now, one implication of my approach is that the Kantian/Utilitarian distinction – and the more general deontological/consequentialist distinction – may be less illuminating of the specifically *democratic* values of privacy than people like Rule suppose. There are two main reasons for this. The first is that democratic arguments for and against privacy likely involve claims about what is necessary to respect people’s status and dignity *and* what is necessary to promote good collective

outcomes. So it is implausible that the distinction is going to illuminate anything very important about the reasons to value or repudiate privacy if you care about democratic government. Secondly, and importantly, there is no reason to think that deontological or consequentialist approaches are intrinsically democratic, however defined. On the contrary, we know very well that only a subset of them, at best, meet these conditions. So why, then, should we treat this distinction as fundamental to our approaches to ethics and politics if we think that people are entitled to govern themselves whether or not this maximises collective happiness, or constitutes an expression of 'respect' for us as 'moral persons'?

Thus, in my discussion of Sipple, in ch. 2, I show that while there may be good reasons to condemn 'outing' for promoting bad consequences, or for treating people simply as means, rather than also as ends, these moral objections are hardly conclusive: the consequences of an act or a rule are frequently hard to identify and evaluate, and as Sipple cared passionately about gay rights, his 'ends' were not obviously being ignored by Harvey Milk. Moreover, even if compelling, these objections to outing would tell us precious little about the value of privacy if we care about democratic government. By contrast, if you care about democracy what should strike you about 'outing', I suggest, is the lack of accountability, transparency and fairness in the selection of those to be 'outed', and in the (self) selection of those doing the 'outing'. We might also note the impossibility, very often, of having any meaningful compensation for the harms done to victims, including innocent third-parties. So the point of discussing Sipple was to take a fairly well-known and interesting case to illustrate the importance of a distinctively political approach to privacy, and to show how, in generalising from that case, we can illuminate the relevant features of conflicts of privacy and media freedom from a democratic point of view.

Likewise, the point of my brief discussion of MacKinnon and Woolf, in the first chapter, wasn't to endorse the latter and to reject the former. Instead, it was to introduce readers briefly to two contrasting feminist views about privacy, while showing that the difficulties philosophers face in demonstrating that privacy is valuable are also faced by those, such as MacKinnon, who believe that it is harmful. Using the difference between intrinsic and instrumental arguments about the value of privacy, (or its lack thereof), I try to show that it is hard to assess plausible, but mutually incompatible claims about privacy not because there is something peculiarly obscure about the concept of privacy (as some have thought), but because we lack a common framework for describing and evaluating matters of fact and value. I then suggest that we take some fairly uncontroversial assumptions about democratic values and rights as our starting point, or shared background for analysis. I use the example of the secret ballot to illustrate how such a political starting point might help us to evaluate competing claims about privacy. While we now tend to think that the secret ballot is essential to democratic government, it was once condemned as a threat to our ability to see and treat each other as equals. So, attending to the reasons why the secret ballot is consistent with democratic government looks like a helpful starting point for thinking about the nature and value of privacy – not least because it helps us to avoid the problem of assuming, before we start, that there is a sharp distinction between things that are private and things that are public, or between the personal and the political.

Of course, there is a sense in which this all seems idiosyncratic. This is not how philosophers tend to approach privacy. Moreover, most of us are used to the differences between consequentialism and deontology being treated as fundamental to political morality and applied ethics, although they are

merely two approaches to ethics (compare virtue ethics or critical theory), and although it is unclear *what* practical differences, if any, follow from the more sophisticated and plausible versions of each.

However, novelty isn't idiosyncrasy. Nor is it idiosyncratic, though it may be novel, to take Judith Thomson's famous critique of privacy,¹ and discuss it at the *end* of a book on privacy, rather than at the beginning. The inherent interest of her arguments in that article, I believe, are often lost because the article is treated merely as an introduction to debates on the best way to define privacy – a debate that strikes me as of dubious interest philosophically, as I explain in the introduction. Most of the philosophical literature on privacy is an attempt to respond to Thomson's charge that talk of a moral right to privacy is just a confused and confusing way of talking about people's moral claims to self-ownership and to the ownership of private property in the world. If you want to show that privacy is valuable, then, you have to address her arguments. If you want to show that protections for privacy are not simply a mask for the power of the powerful and the rich, you need to address her assumption that privacy is really just *private* property-ownership in disguise.

And so, in my last chapter, this is what I try to do. Helped by the fact that Thomson is an entertaining writer, and that the issues are pretty easy to understand and of obvious importance, I set out to show that there is no closer connection conceptually or normatively between privacy and private property than there is between privacy and equality, or privacy and collective property. Indeed, I argue, if we care about privacy, and want this to be available to everyone, not just to a wealthy few, we will oppose the privatisation of public spaces and facilities which, often, provide the best chances for seclusion, solitude, confidentiality and intimacy that many of get. I use Jeremy Waldron's powerful essay on homelessness, in his collection *Liberal Rights*,² to illustrate my arguments, as well as the results of interviews that Avner de-Shalit and his students did for the philosophical book he co-wrote with Jonathan Wolff, called *Disadvantage*.³

I also illustrate my claims by examining Salinger's efforts to stop Joyce Maynard from selling the letters that he had written to her. Salinger was able to persuade a judge that he had copyright in those letters, which meant that they could not be published, though they could be sold, without his consent. If, following Thomson, we suppose that claims to privacy are just claims to own and control personal property, we are likely to suppose that Salinger's efforts to stop the sale of his letters to Maynard was that he wanted a share of the profits, or wanted to be able to choose the best publisher for his letters. But that, of course, would be to misunderstand Salinger's motives, as well as to obscure the distinctive nature of our interests in privacy. What Salinger evidently wanted was that no one else should see the letters: what motivated him was the quest for privacy, even though it was through a legal right to (intellectual) property that he sought to protect his privacy. Consequently, a discussion of this particular example, along with Thomson's article, helps to illustrate

¹ Judith Jarvis Thomson, 'The Right to Privacy', originally published in *Philosophy and Public Affairs* 4 (1975), 295-314, it has been reprinted in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand d Schoeman, (CUP, 1984), 272-289.

² Jeremy Waldron, 'Homelessness and the Issue of Freedom', ch. 13 of *Liberal Rights: Collected Papers*, 1981-1991, (CUP, 1993), 309-338.

³ Jonathan wolff and Avner de-Shalit, *Disadvantage*, (OUP, 2007), esp. pages 45-46.

the distinctive nature of our interests in property and privacy, and to illustrate the reasons why, as Brandeis famously argued,⁴ it is a mistake to confuse the latter with the former.

The conclusion of the book, therefore, reflects what I believe I have shown: that we cannot describe the nature and value of privacy without making complex, often implicit, assumptions about the ways of the world and our place within it. If those assumptions are at odds with the claims of ordinary people to govern themselves, then our ideas about privacy are very likely to elevate the interests of a favoured few over those of everyone else, and to treat the trivial failings of the latter with great severity while leaving the vices and crimes of the former unchecked and unpunished. By contrast, if we try to resolve disputes about privacy in light of our best assumptions about the nature and value of self-government and the rights, duties and institutions which it requires, we stand some chance of describing privacy in a way that reflects people's interests in freedom, equality and happiness. Realising that chance, however, depends on what we do, as well as what we think. It cannot, therefore, be adequately captured by the differences between deontological and consequentialist moral theories.

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⁴ Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy (the Implicit Made Explicit)', originally published in the *Harvard Law Review*, and republished in ed. Sechoeman, pp. 75-103.