

THE RIGHT TO PRIVACY AND THE SECURITY OF THE PERSON

David Matheson

Carleton University

All violations of essential privacy are brutalizing. – Katherine Fullerton Gerould, *Modes and Morals*

I

Among the rights¹ of individuals, some are derivative – possessed in virtue of the possession of other rights – and others fundamental. As derivative rights, for example, the right against enslavement and the right to freedom of expression flow from the more general and comprehensive right to liberty. And since it is difficult to imagine what further right the latter could be thought to derive from, we quite properly regard it as a fundamental right, possessed by an individual simply in virtue of the fact that she is a person.

On the assumption that the right to privacy is, like the rights against enslavement and to freedom of expression, a derivative right, we find ourselves faced with an interesting location project: Where are we to locate the right to privacy within a framework of fundamental rights? Which fundamental right or rights, that is, does the right to privacy derive from, and hence count as a (sub)species of?

This location project is my concern in what follows. The framework of fundamental rights I will adopt consists of three whose legal entrenchment, in one

¹My talk of rights throughout should be understood as talk of the *moral* rights of individuals, i.e. individual rights whose violation is a moral, but not necessarily legal, transgression.

form or another, has a widespread and longstanding history: the right to the security of the person, the right to liberty, and the right to property. In the next section, I will provide some background comments on the framework by indicating at a general level what is involved in each of these three rights and how they are to be distinguished from each other. I will then lay out three arguments in Sections III-V that jointly preclude us from locating the right to privacy as a (sub)species of either the right to property, the right to liberty, or a physical variant of the right to the security of the person, before going on in Sections VI and VII to provide an account according to which violations of the individual's right to privacy are necessarily and without exception violations of her right not to be psychologically battered in a particular sort of way. On this account, the right to privacy is ultimately to be located as a (sub)species of a psychological variant of the right to the security of the person. Finally, in Section VIII, I will draw attention to two significant implications of the account I defend: it undermines a wide swath of theories that posit a tight connection between privacy and autonomy (or free choice), and calls into question a well-known deflationary hypothesis about the right to privacy first articulated by Judith Jarvis Thomson.

Generally speaking, a right entitles² its bearer to a good – to something of value³ – whether it be an action or state. (Compare the putative right to express one’s view that capitalism maximizes expected social utility, on the one hand, with the putative right to own capital on the other: the first entitles one to perform a specific action – express one’s view on the benefits of a socio-economic arrangement – whereas the second entitles one to be in a specific state – the state of ownership with respect to a particular good.) The fundamental rights to the security of the person, liberty, and property include both physical and psychological variants, and they may be distinguished in terms of the distinct goods to which they entitle their bearer.⁴ Thus, consider first the right to the security of the person – the right to personal integrity, or not to suffer personal harm. This includes two general species corresponding respectively to the physical and psychological domains. The physical right to the security of the person is aimed at the protection of the person’s bodily integrity, while the psychological right to the security of the person amounts to the right to emotional, sensory, and intellectual integrity.

The right to liberty – the right to personal freedom, or not to suffer personal restraint – likewise comprehends both physical and psychological variants. The physical right to liberty consists of the right not to be imprisoned or otherwise bodily restrained – the right to one’s bodily freedom – and finds its psychological

²Whether the entitlements entailed by rights can be reduced to obligations or duties on the part of others can be left as an open question for present purposes. For arguments that they cannot, however, see White (1987).

³The good need not be valuable to any particular right-bearer. To borrow an example from Steven Davis (in personal communication), I might have a right to swim in a public pool, but seeing that I loathe the whole business of swimming, the good to which this right entitles me – swimming in a public pool – may have no value whatsoever to me.

⁴It goes without saying that all of the rights here discussed are defeasible (or conditional) in nature.

complement in the right not to be emotionally, sensorially, or intellectually restrained – the right to one’s psychological freedom – as, for example, in the case of restrictions on the generation, absorption, transmission and expression of thought, and the undue censorship of artistic works designed to evoke certain kinds of sensory and emotional response.

And then there is the right to property – the right to exclusive ownership of entities – in both its physical and psychological manifestations. The physical right to property consists of the right to exclusive ownership of tangible entities. The psychological right to property, by contrast, consists of the right to exclusive ownership of emotional, sensory, and intellectual entities, such as the abstract, multiply-instantiable design of a mechanical device, an abstract, multiply-instantiable literary composition, or the emotionally and sensorially evocative nature of a piece of art. The intangible nature of such things does not diminish their ability to be appropriated by others, and hence to be removed from one’s exclusive ownership in a very real way (e.g. by unauthorized instantiation).⁵

Table 1 perspicuously captures this threefold list of fundamental rights in their central physical and psychological manifestations:

⁵Undoubtedly, the violation of any of these rights might, depending on the circumstances, lead the right-bearer to be deprived of the good to which another of the rights entitles her. To violate an individual’s physical right to liberty, for example, might in many cases cause her to suffer psychological harm in the form of anxiety; to violate her psychological right to the security of the person might be disabling enough to make her lose exclusive ownership of tangible entities. But this does not blur the distinctions to be drawn between the various rights, for that the privation of one good might in the right sort of circumstances cause the privation of another does not suffice to show

TABLE 1

<i>Right to the security of the person</i> : right to personal integrity		<i>Right to liberty</i> : right to personal freedom		<i>Right to property</i> : right to exclusive ownership of entities	
<i>Physical right to the security of the person</i> : right to bodily integrity	<i>Psychological right to the security of the person</i> : right to emotional, sensory, and intellectual integrity	<i>Physical right to liberty</i> : right to bodily freedom	<i>Psychological right to liberty</i> : right to emotional, sensory, and intellectual freedom	<i>Physical right to property</i> : right to exclusive ownership of tangible entities	<i>Psychological right to property</i> : right to exclusive ownership of emotional, sensory, and intellectual entities

The task now is to determine where, among the bottom six cells of Table 1, the right to privacy should be placed.

III

In their classic (1890) article, Warren and Brandeis provide a persuasive argument to the effect that the right to privacy is not to be understood as falling under either of Table 1's lower, rightmost two cells.⁶ The first step of this "Publicity Argument" (as

that the two are really one and the same, and it is in terms of the distinctness of the goods that the various rights are to be distinguished.

⁶Although Warren and Brandeis were centrally concerned with locating the legal right to privacy within a framework of fundamental legal rights, they provide significant insight into how to locate the moral right to privacy within a framework of fundamental moral rights. The fundamental legal rights

I will call it for reasons that will soon become apparent) is a claim to the effect that any (sub)species of either the physical or psychological right to property entitles the right-bearer to a good whose value consists at least in part of her ability to take profits from that good. (Warren and Brandeis 1890: 200) To be entitled to a good whose value fails intimately to be tied to taking profits from the good is not to have a right to *property* in any ordinary sense of the term.⁷

But now consider: to take profits from a good requires transferring that good to others in exchange for other goods. Moreover, to transfer a good to others in exchange for other goods requires publication of that good to others (at least where the transfer is licit). In which case it follows from the first step of the Publicity Argument that any (sub)species of either the physical or psychological right to property is subject to a publicity condition: the (sub)species must entitle the right-bearer to a good whose value requires that she be able to publicize that good to others. (Warren and Brandeis 1890: 200-1) For example, my right to exclusive ownership of a plot of land is a (sub)species of the physical right to property. The general value of this exclusive ownership consists partly of my ability to reap monetary reward by (say) selling my ownership of the plot to others. But I can't sell

that Warren and Brandeis discussed are, ideally, reflective of fundamental moral rights. So if things are proceeding as they ought, when Warren and Brandeis point to a quantification over the right to the security of the person (alternatively labeled by Warren and Brandeis the right "to life," the right "to be let alone" (1890: 193, 195, 205), the right "to the immunity of the person" (1890: 207) and the right "to inviolate personality" (1890: 205); cf. Gavison (1980: 437, n. 48) and Glancy (1979: 2-3)), the right to liberty, and the right to property in the constitutional or common law arenas, we may infer a similar quantification over moral rights – be the quantification universal or existential in nature. Few, of course, would be so naive as to assume that the reflective device is flawless in every respect: things are not always ideal and proceeding as they ought. Nevertheless, reflective reliability (not infallibility) will be my default assumption. Unless there is a clear reason to think otherwise, then, I will take the central legal-right lessons to be learned from a consideration Warren and Brandeis's piece as moral-right lessons as well.

⁷Cf. Warren and Brandeis's concession that in an *extraordinary, very broad* sense of 'property', anything that one exclusively owns in some way or other might be said to be one's property. (1890: 205).

my ownership unless it is publicized: unless others know that I exclusively own the plot, they can't agree to give me the money in exchange for taking over its exclusive ownership. Similarly, an automobile manufacturer's exclusive ownership of an engine's abstract design is a (sub)species of the psychological right to property. The value of this exclusive ownership is at least partly a function of the manufacturer's ability to take profits by (for example) selling ownership of the design to other manufacturers. But the sale requires that those other manufacturers know of –have publicized to them– the original manufacturer's ownership of the engine's design.

The next step in the argument points out that the right to an individual's privacy does not satisfy this publicity condition on physical or psychological rights to property. (Warren and Brandeis 1890: 201-3) To see this, we need to be clear about what the good is to which the right to privacy entitles the right-bearer. Warren and Brandeis describe it as personal "facts" about the right-bearer (1890: 201), but that seems to be shorthand for a kind of epistemic state, *viz. exclusive knowledge* of certain kinds of personal facts about the right-bearer – knowledge of these personal facts that is only her own.

Recent philosophical literature on the nature of privacy lends support to this conception of the good to which the right to privacy entitles its right-bearer. The most successfully defended theory of privacy on the contemporary scene construes it as "the condition not having undocumented [i.e. unknowable through consultation of public records] personal facts about oneself known by others." (Parent 1983a, 1983b) On the assumption that the personal facts in question are typically known by

the individual herself, this account implies that the right to privacy entitles its right-bearer to exclusive knowledge of personal facts of a certain kind about her.⁸

But now: does the entitlement to such exclusive knowledge count as an entitlement to a good whose value requires the ability to publicize it to others? Even if one thinks of knowledge as a kind of ownership – an *epistemic ownership* of facts – and hence of exclusive knowledge of personal facts about oneself as a kind of exclusive ownership of those facts, the right to knowledge so possessed will clearly not satisfy the publicity condition. Exclusive knowledge of personal facts about oneself has value (to most normal humans, at any rate). But this value cannot require that one be able to publicize the exclusive knowledge to others, because *exclusive* knowledge of its very nature cannot be publicized. Publication of an item to others involves their coming to know about the item, and for others to know of your knowledge of such-and-such personal facts about yourself is for them to know those facts as well, which means in turn that your knowledge of those facts is not exclusive. (It is a general epistemic principle that if one subject *S1* knows that another subject *S2* knows a fact, then *S1* knows that fact as well. If I know, for example, that you know that George W. Bush is currently the president of the United States, it follows that I know that he is the president as well.) Hence *exclusive* knowledge of personal facts about oneself is not the sort of thing that can be publicized, unlike various forms of exclusive ownership of tangible or intangible property. Simply put, you can trade your property for profit because the property (with its value) remains upon

⁸The main competitor to such an exclusive knowledge account – the Control Theory, defended by Westin (1967) and Fried (1968, 1970) – holds that an individual's privacy consists of her being able to control whether others know the relevant personal facts about her. But Parent and others have effectively demolished the Control Theory. See, e.g., Thomson (1975: 304-5, n. 1) and Parent (1983a: 273ff, 1979). Recent criticisms of the exclusive knowledge account (e.g. DeCew 1997: 300ff) seem strained at best, and in my judgment take away very little of the force of that account.

others' knowledge of it; but you can't trade your privacy for profit because it (along with its value) disappears upon others' knowledge of it.

To illustrate, suppose that I alone presently know what I do on a plot of land that I exclusively own. Unlike my exclusive (non-epistemic) ownership of the plot, this exclusive knowledge of my behavior on the plot cannot be publicized to others, for the knowledge would cease to be exclusive: to make others aware that I know that I do such-and-such on the plot is to give them the knowledge that I do that as well. To the extent that they know of my knowledge of my behavior, then, my knowledge itself is not exclusive.

So: the first step in the Publicity Argument is that any species of either the physical or psychological right to property entitles the right-bearer to a good whose value consists at least in part of her ability to take profits from that good. This, we have seen, leads to a publicity condition on physical and psychological rights to property: any (sub)species of these rights entitles the right-bearer to a good whose value requires that she be able to publicize that good to others. Together with the next step in the argument, viz. that the right to privacy does not meet this condition, it follows that the right to privacy is not to be located under the bottom, rightmost two cells of Table 1. On the plausible assumption that the more specific rights highlighted in those cells –the physical and psychological rights to property– are exhaustive of the fundamental right to property, it further follows that the right to privacy is not a (sub)species of the right to property.

If this Publicity Argument is sound – and I think it is – the right to privacy is not to be located within the fundamental right to property in either its physical or psychological manifestations, and must be sought somewhere within the rights to the security of the person or liberty. But where, exactly? The only hint of an answer provided by Warren and Brandeis comes from their analogies to other more specific rights. The right to privacy, they insisted, is most similar to such rights as the right not to be battered, the right not to be assaulted (Warren and Brandeis 1890: 193-4), the right not to have one's consciousness impinged upon by offensive noise and odor (Warren and Brandeis 1890: 194), the right not to be imprisoned (Warren and Brandeis 1890: 205), and the right to express one's thoughts and experiences as one sees fit (Warren and Brandeis 1890: 198). Unfortunately, however, the hint as it stands is not a very helpful one, for the rights pointed to by way of analogy cover the gamut of physical and psychological rights to liberty and the security of the person. The right not to be battered is comprehended under the physical right to the security of the person, and the right not to be assaulted counts as a species of the psychological right to the security of the person. That's because battery, in the legal sense employed by Warren and Brandeis, consists of bodily harm, whereas assault – *fear* caused by the threat of bodily harm – consists of a psychological one. (Warren and Brandeis 1890: 193-4) The right not to have one's consciousness impinged upon by offensive noise and odor also counts as a species of the psychological right to the security of the person, because it too entitles the right-bearer to a form of psychological integrity. The right not to be imprisoned protects against the restriction of the right-bearer's bodily movement, and so falls under the physical right to liberty. The right to express one's thoughts and experiences as one sees fit

entitles the right-bearer to protection against restriction of her intellectual, emotional, and sensory activity, and thus qualifies as a form of the psychological right to the security of the person.

I think there is good reason, however, to restrict the location space for the right to privacy to the psychological domain, and I'll call it the "Psychological Good Argument." As we have already seen in our discussion of the Publicity Argument, the right to privacy is best thought of as an entitlement to a psychological good, viz. exclusive knowledge of personal facts about the right-bearer. But, says the Psychological Good Argument, only psychological manifestations of the rights to liberty and the security of the person include entitlements to psychological goods; the physical varieties of those rights entitle the right-bearer simply to physical goods – to various forms of *bodily* integrity and *bodily* freedom. The right to privacy, therefore, cannot be considered a (sub)species of either the physical right to the security of the person or the physical right to liberty.⁹

V

Combined with Publicity Argument, the Psychological Good Argument restricts the location space for the right to privacy to a psychological variant either of the right to the security of the person or of the right to liberty. Can we restrict the space further?

A crucial difference in general between the right to the security of the person and the right to liberty is that the one entitles the right-bearer to certain conditions of

⁹A fact that might help to explain why, from the very outset of an article devoted to the right to privacy, Warren and Brandeis were so concerned with emphasizing the common law's recognitional evolution from the realm of physical rights to that of psychological rights.

existence whereas the other entitles her to certain conditions of behavior.

Alternatively put, the right to the security of the person in its various manifestations is a right with respect to *states* of an individual – *to be* bodily, emotionally, sensorially, and intellectually well or integrated, or *not to be* bodily, emotionally, sensorially, or intellectually harmed; the right to liberty, by contrast, is a right with respect to the individual's *actions* – *to move about* bodily, *to absorb, generate, transmit, and express* emotions, sensations, and thoughts without restraint, or *not to do* so. It would thus seem that any *active* right –right with respect to the right-bearer's actions– will not be comprehended under the right to the security of the person in either its physical or psychological manifestations; and any *stative* right –right with respect to the right-bearer's states– will likewise not be comprehended under the right to liberty in either its physical or psychological manifestations.¹⁰

Which is the right to privacy as characterized thus far – an active or a stative right? The answer seems clearly to be “stative.” The right to privacy does not itself entitle the right-bearer to act so as to protect her exclusive knowledge of personal facts about herself, or to acquire or transmit (and hence lose) that knowledge; it

¹⁰The distinction between active and stative rights is closely aligned with the distinction between positive rights –rights of the right-bearer to do certain things– and negative rights –rights that others shall not do certain things to the right-bearer. (See Thomson 1975: 299 and Fried 1978: 110ff) But even if the alignment amounts to identity, the active-stative terminology is less confusing. We can easily contrast rights not to act in certain ways (e.g. the right not to aid those in dire financial circumstances due to their own foolishness) with rights to act in certain ways (e.g. the right to express one's view that capitalism maximizes expected social utility) by talking about *negative active rights* on the one hand and *positive active rights* on the other. Restricted to talk of positive rights as the general category, however, we would be left to make the contrast by talking, confusingly, of *negative positive rights* as opposed to *positive negative rights*. Similarly, we can capture the distinction between rights not to be in certain states (e.g. the right not to have one's consciousness impinged upon by certain offensive sensory impressions) and rights to be in certain states (e.g. the right to be emotionally integrated) respectively by talking about *negative stative rights* and *positive stative rights*. But how do we draw the distinction using the antecedently given general category of negative rights? *Negative negative rights* and *positive negative rights* seems bound to perplex.

rather entitles her simply to the exclusive knowledge, i.e. to be in an overall psychological state that includes such knowledge.

There may be some temptation to overlook the stative nature of the right to privacy for two reasons. First, one may be tempted to view the right as active because, together with a consideration of what is necessary for maintaining the good to which it entitles the right-bearer, it would seem to entail the existence of certain active rights: that one has the right to exclusive knowledge of certain personal facts about oneself implies that one has the right to act to so as to ensure that this knowledge remains exclusive, given that so acting is a necessary condition on maintaining the exclusive knowledge. Thus, suppose that you have the right to exclusive knowledge of facts about your breakfast habits, and that another has surreptitiously set up a device in your kitchen to record those habits. You happen to stumble across the device. Without destroying it, your knowledge is bound to lose its exclusivity. You therefore have the right to destroy the device. But the right to privacy and those it so jointly entails ought not to be confused, for the entailment does not suffice to show that the entailing right is of the same species as those entailed. To suppose it does requires accepting something like the following general principle: If (i) a subject *S* has right to some good *G1* and (ii) having another good *G2* is necessary for maintaining *G1*, then (iii) *S* has a right to *G2* and (iv) *S*'s right to *G1* is a (sub)species of whatever more general right her right to *G2* is a (sub)species of. Condition (iv), however, is one condition too many. This perhaps most clearly seen when one considers the bare right to exist as a person (the "right to life" in its strictest sense, the possession of which might be thought of as a condition on the possession of any right whatsoever). For example, it may be true that if you have the

right to exclusive ownership of your kitchen toaster, then you must also have the right to bare existence, because your bare existence is a necessary condition on your exclusively owning the toaster. But it obviously does not follow that your right to bare existence is a (sub)species of the general right to property.

Another reason one might be tempted to overlook the stative nature of the right to privacy is that one might confuse the right-bearer's exclusive knowledge of personal facts about herself with such things as her acquisition or transmission of knowledge of these facts. Perhaps one wouldn't have had knowledge of many personal facts about oneself, and hence wouldn't have had exclusive knowledge of many personal facts about oneself, unless one had done something to acquire it; and one can, once possessed of it, do things to transmit the knowledge to others. But the right to privacy itself is silent about such cognitive activity: it does not entitle the right-bearer to the acquisition or transmission of knowledge, whether exclusive or not, any more than the right to property itself entitles the right-bearer to the acquisition or transmission of property.¹¹

It seems now that we have a compelling "Stative Right Argument" to exclude the right to privacy from location under the psychological right to liberty. To be included there would require the right to privacy to be an active right; it is not an active right; therefore it is not a (sub)species of the psychological right to liberty.

¹¹So construed, the right to property in its various forms is also a stative right: it is the right to exclusive ownership of tangible or intangible entities, not to any action involving the acquisition or transmission of such ownership, such as taking profits from the property. It may be objected that no meaning can be attached to talk of a right to exclusive ownership of property if this is not understood as talk of a right to act in various ways, but the objection would be misguided. Exclusive ownership of property is an ability – an ability to act in various ways like trading ownership of the property for profit – and talk of abilities (or their absence) is very meaningful despite the fact that it cannot in general be reduced to talk of actions. Hence talk of the right to exclusive ownership of property, understood statively as talk of the right to an ability to act, is meaningful despite not being understood as talk of a right to act. And this is as it should be, seeing that the right to property, though meaningful, is clearly not a variant of the right to liberty.

VI

Thus far, we've employed Warren and Brandeis's Publicity Argument, the Psychological Good Argument, and the Stative Right Argument to narrow the location space for the right to privacy to that of the psychological right to the security of the person. Presumably, however, the right to privacy is not the sole occupant of that space. A clear view of what other occupants there are, and how they differ from it promises to provide us with a robust picture of the nature of the right to privacy.

To begin with, it will be helpful to draw a distinction analogous to, but more general than, the legal distinction between battery and assault. Battery may now be taken to mean personal harm *simpliciter* (as opposed to *bodily* harm to the person) that is unmediated –not caused– by the threat of personal harm, and assault to mean fear caused by the threat of personal harm *simpliciter* (as opposed to fear caused by the threat of *bodily* harm to the person). We may then recast the legal distinction by talking about physical battery and assault on the one hand, while leaving room for the distinction between psychological battery and assault on the other. So we get Table 2:

TABLE 2

<i>Battery</i> : personal harm not caused by the threat of personal harm		<i>Assault</i> : fear caused by threat of personal harm	
<i>Physical battery</i> : bodily harm not caused by the threat of personal harm	<i>Psychological battery</i> : emotional, sensory, or intellectual harm not caused by the threat of personal harm	<i>Physical assault</i> : fear caused by threat of bodily harm	<i>Psychological assault</i> : fear caused by threat of emotional, sensory, or intellectual harm

Notice now that there will be at least three broad rights comprehended under the psychological right to the security of the person, none of which is identical to the right to privacy. There will first be the right not to be physically assaulted. This counts as species of the psychological right to the security of the person because fear caused by the threat of bodily harm is a psychological harm. There will also be the right not to be psychologically assaulted, which counts no less as a species of the psychological right to the security of the person for it too protects against psychological harm, viz. fear caused by the threat of emotional, sensory, or intellectual harm (e.g. the treat of mental torture tactics). And, finally, there will be the right not to be psychologically battered – the right not to be harmed emotionally, sensorially, or intellectually, in ways unmediated by the threat of personal harm.

The right to privacy now turns out to be a species of the last of the foregoing three rights, i.e. a form of the right not to be psychologically battered. Here's why.

As we have already seen, the right to privacy entitles the right-bearer to exclusive knowledge of personal facts about her – knowledge of these personal facts that is only her own. For another to violate this right by appropriating the knowledge or transmitting it to others is for the other to harm the right-bearer by taking what was once exclusively an intimate element of her psychological person and spreading it to others. But that means that violations of the right to privacy count as violations of the right not to be psychologically battered, for it is against such harm that the right not to be psychologically battered protects.

There are three points to keep in mind about the right to privacy, so understood. The first is that violations of the right are collectively only one way of violating the right not to be psychologically battered: one can be psychologically battered without having intimate elements of one's psychological person spread to others. That's why the right to privacy cannot be identified with the right not to be psychologically battered. To see this, consider the following two cases. In Case 1, it's 11:30 p.m. on a week night, and you've just retired to bed, intending to get a full night's sleep in preparation for another long day of hard work. An inconsiderate neighbor in the next apartment begins to celebrate the fact that he doesn't have to work in the morning by playing electronic dance music at unreasonable decibel levels. In Case 2, it's 11:30 p.m. on a week night, and you've just retired to bed, intending to get a full night's sleep in preparation for another long day of hard work. Naturally, you consider it none of your neighbor's business to know things about your sleeping habits. Nevertheless, prying soul that he is, your neighbor successfully attempts to determine whether you're in the habit of going to bed before midnight during the week by playing electronic dance music at unreasonable decibel levels,

eliciting from you the sort of wall-thumping behavior that (we may suppose) only one who is trying to sleep manifests.

In both of these cases, you have been battered in what we might call an *intra-psychological* manner. By imposing on you all sorts of unwanted, intrusive sensory impressions, your neighbor unduly alters relations and elements *within your psyche*. But in Case 2, you have been battered in what might be called an *inter-psychological* manner as well. By appropriating the knowledge of your own sleeping habits to himself, your neighbor unduly alters relations *between your psyche and his own*: you once quite properly had one up on him when it came to knowledge of your own sleeping habits, but now you're unfairly even. And that explains why it makes sense to say of Case 2, but not of Case 1, that your neighbor has violated your right to privacy. In Case 2, but not in Case 1, you suffer two forms psychological battery, only one of which amounts to a violation of your right to privacy.¹²

The second point to bear in mind about this construal of the right to privacy is that not every form of taking what was once exclusively an element of one's psychological person and spreading it to others counts as psychological harm. Some intra-psychological alterations that destroy exclusivity amount to psychological harm, others do not; and invasions of privacy fall in the former category. I alone at a given time, we may suppose, intend to engage in romantic relations with a stranger. You later hear me speak of the stranger and, before I have acted on my intention,

¹²It might be suggested that your right to privacy in Case 2 has not been violated, because it has been waived by your very act of pounding on the wall. But this doesn't seem right, because you have in effect been forced (on pain of not getting a good night's sleep) so to act by the actions of your nosy neighbor. Compare: You're walking to work in the morning, and, in order to avoid being hit by a car whose driver bears an unreasonable but overpowering grudge against you, you're forced to lunge into a nearby brick wall, injuring your shoulder as a result. You have surely not waived your physical right to the security of the person by lunging.

consequently form the same intention. You have then taken what was once exclusively an element of my psychological person – the intention for romantic relations with the stranger – and made it part of yours as well. But it would be a stretch to say that you have just by forming the intention caused me any undue psychological harm. By contrast, if I alone intend to (continue to) engage in romantic relations with my spouse, and you later (while our marriage consensually remains) form the same intention, you have not only taken what was once exclusively an element of my psyche and appropriated it to your own; you have also (quite plausibly) caused me undue psychological harm just by forming the intention.

Thirdly, on the proffered account violations of the right to privacy need not involve a recognition of the violation on the part of the right-bearer. You can render my once exclusive knowledge of my own breakfast habits non-exclusive by the right sort of placement of a recording device in my kitchen, and I might never know about it. The psychological harm I suffer, therefore, is not to be equated with any sort of negative emotional response to discovery of the inter-psychological alteration you effect; it is that alteration itself. And this, I think, is a happy consequence of the account. Upon discovering that another had been secretly learning about my breakfast habits for months by means of such a recording device, it would be very natural to say that my right to privacy had been violated *for months*, not just from the time that I discovered the device and, quite understandably, became upset.

The plausibility of this last point can be obscured by an erroneous assumption about the nature of psychological harm. Violations of the right to privacy, I have argued, amount to undue psychological harm to the right-bearer; and I have just said that such violations need not be known by the right-bearer, and

hence that the psychological harm they effect need not involve any pain or negative emotional response on the part of the right-bearer. But, one might object, don't all forms of psychological harm involve such pain or negative emotions?

The answer, I think, is clearly "no." Consider the following case drawn from Nagel (1979): By the appropriate application of a surgical device, you swiftly and painlessly cut my brain in such a way as to reduce my mental life to that of a contented infant. You have obviously done me great psychological harm, but I have experienced neither pain nor negative emotional experiences as a result. Similarly (to borrow an example suggested to me by Rob Stainton), I might alter the world in such a way that I significantly increase the objective likelihood that you will suffer some pain or negative emotions at a future time (where the likelihood remains, however, less than 1). I seem to have wronged, hence harmed you in a psychological manner, regardless of whether you know about the increased probability, and regardless of whether you actually end up suffering the pain or negative emotions as a result of my alteration of the world.

VII

The psychological right to the security of the person can thus be said to comprehend three subspecies of the general right to the security of the person – the right not to be physically assaulted, the right not to be psychologically assaulted, and the right not to be psychologically battered – and the right to privacy turns out to be a species of the last. The right to privacy is importantly similar to such rights as the right not to be physically assaulted and the right not to have one's consciousness impinged upon

by offensive noise and odor, because they all ultimately entitle the right-bearer to psychological integrity. But they are distinct in that, respectively, they entitle the right-bearer to distinct types of psychological integrity. The right not to be physically assaulted entitles the right-bearer to the absence of fear caused by threat of bodily harm. The right not to be psychologically assaulted entitles the right-bearer to the absence of fear caused by threat of intellectual, emotional, or sensory harm. The right to privacy, as a species of the right not to be psychologically battered, entitles the right-bearer to exclusive knowledge of personal facts about herself – a form of inter-psychological integrity. Other species of the right not to be psychologically battered, such as the right not to have one's consciousness impinged upon by offensive noise and odor, entitle the right-bearer to forms of intra-psychological integrity.

We now have a fairly robust understanding of where the right to privacy is to be located within the framework of the fundamental rights to the security of the person, liberty, and property, as Table 3 illustrates:

TABLE 3

<i>Right to the security of the person:</i> right to personal integrity				<i>Right to liberty:</i> right to personal freedom		<i>Right to property:</i> right to exclusive ownership of entities	
<i>Physical right to the security of the person:</i> right to bodily integrity	<i>Psychological right to the security of the person:</i> right to emotional, sensory, and intellectual integrity			<i>Physical right to liberty:</i> right to bodily freedom	<i>Psychological right to liberty:</i> right to emotional, sensory, and intellectual freedom	<i>Physical right to property:</i> right to exclusive ownership of tangible entities	<i>Psychological right to property:</i> right to exclusive ownership of emotional, sensory, and intellectual entities
Right not to be physically battered	Right not to be physically assaulted	Right not to be psychologically assaulted	Right not to be psychologically battered				
			Right not to be intrapsychologically battered	Right not to be interpsychologically battered			
			<i>Right to privacy:</i> right to exclusive knowledge of personal facts				

The central conclusion to be derived from the foregoing efforts at locating the right to privacy is that the right to privacy is a (sub)species of the right to the security of the person – in particular, of the right not to be psychologically battered – and not of any other fundamental individual right. I want close by indicating something of the significance of that conclusion. First of all, it dooms any attempt to locate the right to privacy within the right to liberty in either its physical or psychological manifestations. And there is no shortage of theorists who have in effect attempted to do just that,¹³ though their efforts are sometimes billed as efforts to tie privacy to individual autonomy or freedom of choice. Take, for example, Benn's (1971) account of the right to privacy. The right might be violated, he tells us, by either unwanted overt or unwanted covert observation of the right-bearer's behavior. (Benn 1971: 10; cf. Hudson & Husak 1979). The latter typically counts as a violation in virtue of the fact that it "deceives a person about his world," thereby

thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man engaged in an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him. (Benn 1971: 10-11)

Unwanted overt observation, similarly, amounts to a violation because it

chang[es the right-bearer's] perception of [his activity]; he may have felt extremely differently about his conversation with [another, for example],

¹³See Hallborg (1986), Rachels (1975) and Benn (1971).

even to the extent of not being able to see it as any longer the same activity, knowing that [the observer was] listening. (Benn 1971: 11)

On Benn's account, then, violations of the right to privacy count as such because they transgress an entitlement that the right-bearer has to actions of various sorts – rationally choosing certain kinds options, acting with certain kinds of significance and under conditions of due respect, etc. But that in turn implies that the right to privacy in its various manifestations amounts to an active right.

Or consider Rachels (1975) account: the good to which the right to privacy entitles us is distinct from our interests of person (statively understood) and property (Rachels 1975: 333), and typically to be found in our interest in socially adaptive behavior – to “maintain the variety of social relationships with other people that we want to have.” (Rachels 1975: 326) The right that protects that good is therefore one that entitles the right-bearer to a kind of adaptive behavior. But again, this incorrectly renders the right to privacy an active, not stative right.

It's important to be clear that the objection here raised is not to the idea that the primary *value* of the good to which the right to privacy entitles its right-bearer is something that consists of its conduciveness to free, self-directed action or choice. The objection is rather to the extension of this idea to the further claim that the primary good to which the right to privacy entitles its right-bearer *itself* consists of a certain kind of free, self-directed action or choice (and hence that the right to privacy ultimately counts as a species of the right to liberty). I think there is a lot truth to the first idea, and for that reason alone a lot of insight to be gleaned from the work of

theorists like Rachels and Benn.¹⁴ The error enters with endorsement of the further claim. Rachels insists that a theory of the right to privacy be intimately wed to an account of why privacy is important to us (1975: 332), that privacy is an aspect of liberty (1975: 331), and that the special interest in socially adaptive behavior makes the right to privacy distinct from rights to the person and property (1975: 333); and Benn similarly maintains that it is “certain basic features” of our concept of persons as agents that “require” a minimal right to privacy (Benn 1971: 3). This, say I in light of the overall conclusion of the previous sections, indicates a mistaken move from a thesis about the value of the good to which the right to privacy entitles its right-bearer to a claim about that good itself.

Consider now a second major implication of our central conclusion: the falsity of Thomson’s celebrated *cluster hypothesis*. Thomson writes:

It begins to suggest itself, then, as a simplifying hypothesis, that the right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in. [For example,] to use an X-ray device to look at [a picture that another wishes to remain private] is to violate a right (the right that others shall not look at the picture) which is both one of the rights which the right to privacy consists in and also one of the rights which property-ownership consists in. Again, to use an amplifying device to listen to [the conversation of others

¹⁴More extended treatments of the idea can be found in Nagel (1998), Gavison (1980) and Westin (1967).

that they wish to remain private] is to violate a right (the right not to be listened to) which is both one of the rights which the right to privacy consists in and also one of the rights which the right over the person consists in.

(1975: 306)

On the cluster hypothesis, the right to privacy turns out to be a (sub)species of *all* of an individual's fundamental rights, which are the "clusters" of the rights "to person and property"; and the cluster of which the right to privacy is supposed to consist is just its appearance as a (sub)species under each of those fundamental rights.

But the right to privacy cannot make such a manifold appearance in the light of our central conclusion. The right makes no appearance under the physical right to the security of the person, because the good to which it entitles the right-bearer is a psychological good; it makes no appearance under the right not to be physically assaulted because physical assault *per se* does not remove the good to which the right to privacy entitles the right-bearer; it makes no appearance under the right not to be psychologically assaulted because psychological assault *per se* fails in the same way; it makes no appearance under either the physical or psychological varieties of the right to liberty because it is a stative, not active right; and its appearance under physical or psychological variants of the right to property has been ruled out by Warren and Brandeis's Publicity Argument. If we're looking for the right to privacy, we'll locate it

only under the right not to be psychologically battered, and hence ultimately under the right to the security of the person.¹⁵

REFERENCES

Benn, S. (1971). "Privacy, Freedom, and Respect for Persons." J. Pennock & J. Chapman (eds.), *Privacy: Nomos XIII*. New York: Atherton Press. Pp. 1-26.

DeCew, J. (1997). *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*. Ithaca: Cornell University Press.

Fried, C. (1978). *Right and Wrong*. Cambridge, Mass.: Harvard University Press.

Fried, C. (1970). *An Anatomy of Values: Problems of Personal and Social Choice*. Cambridge, MA.: Harvard University Press.

Fried, C. (1968). "Privacy." *Yale Law Journal* 77: 475-493.

Gavison, R. (1980). "Privacy and the Limits of Law." *Yale Law Journal* 89: 421-471.

¹⁵ I would like to express special thanks to Steven Davis, Travis Dumsday, Joe Shieber, Rob Stainton, and an audience at 2004 Toronto *On the Identity Trail* team meeting, for their helpful comments and criticisms on an earlier draft of this paper.

- Glancy, D. (1979). "The Invention of the Right to Privacy." *Arizona Law Review* 21: 1-39.
- Hallborg Jr., R. (1986). "Principles of Liberty and the Right to Privacy." *Law and Philosophy* 5: 175-218.
- Hudson, S. & D. Husak (1979). "Benn on Privacy and Respect for Persons." *Australasian Journal of Philosophy* 57: 324-29.
- Nagel, T. (1998). "Concealment and Exposure." *Philosophy and Public Affairs* 27: 3-30.
- Nagel, T. (1979). *Mortal Questions*. Cambridge: Cambridge University Press.
- Parent, W. (1983a). "A New Definition of Privacy for the Law." *Law and Philosophy* 2: 305-38.
- Parent, W. (1983b). "Privacy, Morality, and the Law." *Philosophy and Public Affairs* 12: 269-88.
- Parent, W. (1979). "Fried on Rights and Moral Personality." *Ethics* 90: 141-56.
- Rachels, J. (1975). "Why Privacy is Important." *Philosophy and Public Affairs* 4: 323-333.

Thomson, J. (1975). "The Right to Privacy." *Philosophy and Public Affairs* 4: 295-314.

Warren, S. & L. Brandeis (1890). "The Right to Privacy." *Harvard Law Review* 4: 193-220.

Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

White, A. (1987). *Rights*. Oxford: Clarendon Press.