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THE RIGHT TO PRIVACY AS RESPECT FOR PERSONS

Rice University

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THE RIGHT TO PRIVACY AS
RESPECT FOR PERSONS

by

MICHAEL W. KEGERREIS

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

DOCTOR OF PHILOSOPHY

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May, 1984
ABSTRACT

THE RIGHT TO PRIVACY AS RESPECT FOR PERSONS

by

MICHAEL W. KEGERREIS

The right to privacy is presented as a right to a state of non-intrusion in the control an individual has over personal information, and the means of access to such information. This account of the right helps to show that the Warren and Brandeis account of the right to privacy in torts is best seen as presenting the right as simply one of the cluster composing the right to be let alone, not as simply identifying the two. The state of non-intrusion account is shown to be justified by reference to the respect for, and recognition of, the nature of persons as separate moral entities. That the right is justified in this manner indicates the attempts in the legal literature to tie the legal right to privacy to already established concepts in the law, both tort and constitutional, is wrong-headed. Rather, many of the already established legal concepts can be shown to arise from concerns for privacy. Since the right to privacy as defined above draws its
justification from the feature of persons as separate moral entities, accounts of the right as a derivative right, where derivative is taken to mean either the rights in the cluster are not sui generis or that the right is only justified in reference to other goods or values, are seen to be in error. This justification also plays an important role in indicating accounts of this right as a property right suffer from a deficiency so severe such accounts must be rejected. A property right account simply cannot capture adequately the import of such a justification. Such an account also clearly precludes the possibility the right to privacy is an autonomy right. There is simply no reason to think invasions of privacy significantly restrict one's range of significant choice. These considerations lead to the proposed account of the right as specified above, an account which is a natural extension of exclusive access and selective disclosure accounts.
TO BETTY AND CHRISTOPHER
My most sincere thanks to Baruch Brody and Larry Temkin for their help and supervision of this dissertation. My thanks also to Jo Monaghan for aid above and beyond in my work for the Ph.D.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td><strong>CHAPTER</strong></td>
<td></td>
</tr>
<tr>
<td>I.  THE RIGHT TO PRIVACY IN THE LAW</td>
<td>11</td>
</tr>
<tr>
<td>Warren and Brandeis</td>
<td>13</td>
</tr>
<tr>
<td>The Tort Right to Privacy</td>
<td>27</td>
</tr>
<tr>
<td>The Constitutional Right to Privacy</td>
<td>43</td>
</tr>
<tr>
<td>II. THE DERIVATIVE ACCOUNTS</td>
<td>68</td>
</tr>
<tr>
<td>Thomson's Account</td>
<td>70</td>
</tr>
<tr>
<td>McCloskey's Account</td>
<td>107</td>
</tr>
<tr>
<td>III. THE NON-DERIVATIVE ACCOUNTS</td>
<td>134</td>
</tr>
<tr>
<td>The Non-Property Accounts</td>
<td>136</td>
</tr>
<tr>
<td>The Property Accounts</td>
<td>184</td>
</tr>
<tr>
<td>IV. THE RESPECT FOR PERSONS ACCOUNT</td>
<td>206</td>
</tr>
<tr>
<td>The Justification of the Right to Privacy</td>
<td>215</td>
</tr>
<tr>
<td>Objections to the Overall Account</td>
<td>223</td>
</tr>
<tr>
<td>Ramifications of Accepting Such an Account of Privacy</td>
<td>234</td>
</tr>
<tr>
<td>The Respect for &quot;Separateness&quot; Account</td>
<td>275</td>
</tr>
<tr>
<td>APPENDIX</td>
<td>282</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>314</td>
</tr>
</tbody>
</table>
INTRODUCTION

The right to privacy is a much discussed right today. This was not the case as recently as twenty years ago. Indeed, it was not even mentioned before 1890. Yet, as recent a "blossoming" as the right to privacy has undergone, the issue is seen now as having far-reaching implications for the type of lives people lead, in particular, those in the near future. There are accounts which envisage the dehumanization of the populace should a strong right to privacy not be recognized. Other accounts believe such a strong right to privacy will result in the downfall of liberal society. There is an even greater range of disagreement as to the nature of privacy and a right to privacy. This range begins with an account of the right to privacy as an unimportant, merely derivative, right wherein privacy rights do not even have anything in common, to accounts which take the right to be a basic one with a degree of importance roughly equivalent to that of the right to liberty. The independent justification of the right to privacy is presented in a range of ways going from claims no such justification exists to those wherein the right to privacy is linked to our very notion of being human.
The project I undertake in the following pages is essentially the task of determining the status of the right to privacy and the implications it gives rise to. This task breaks down into various subtasks. The examination of previous theories on the right to privacy provides a context for the overall project. A determination of the nature of privacy and the right to privacy is made, with particular emphasis on the independent justification of such a right. A discussion of the legal right to privacy is presented wherein an explanation of the relation between two distinct types of violations of the legal right, torts and constitutional, is given, and also an account of the relation of the legal right to privacy and the moral right to privacy. The last subtask consists of an explanation of the increasing interest in the right to privacy, and an explication of some of the implications the recognition, or conversely, the lack of recognition, of such a right has.

The right to privacy in American law can be traced to its beginning kernel in eighteenth-century English law. English common law protected against eavesdropping, trespassing, and other violations of property rights related to privacy. During this period, William Pitt enunciated the position that even the King of England could not cross the threshold of his lowliest subject.
The Fourth and Fifth Amendments to the Constitution arose from concern with individual integrity, sparked in part by various excesses of previous English officials. These amendments were the subject of a wide interpretation in a landmark decision in 1886 by the Supreme Court, in the case of Boyd v. United States, which widened privacy-related considerations in the context of criminal prosecutions. The right to privacy in the fullest sense did not make an appearance, however, until 1890 when Samuel Warren and Louis D. Brandeis, in a Harvard Law Review article, gave an account of it as a broad "right to be let alone" thus expanding it beyond its previous realm of propertied and criminal procedure. Despite further development in the legal literature, it was not until 75 years later that the Supreme Court put this right in constitutional terms in the case of Griswold v. Conn. Since this decision both the states and Congress have passed privacy acts including the Federal Privacy Act of 1974.¹

This century has also seen significant development in torts of a right to privacy. The main concern here being violations of privacy which involve the use of one's name or likeness by others for their own commercial gain. These types of violations differ radically from the violations of a right to privacy based on the constitution,
e.g., wiretapping. This has resulted in a bisection of articles on the right to privacy in the legal field which turns on the difference of emphasis between those articles which deal mainly with the torts area of law and the constitutional area. This has contributed to added confusion, in an already confused area of the legal field, in accounts in the legal literature which purport to be accounts of the overall right to privacy. The majority of efforts in the legal literature suffer mainly from specifying a right to privacy which is not general enough to account for "constitutional" violations of the right to privacy.

There have been many attempts in the last twenty years in the philosophical arena on the right to privacy. There has also been a great deal of confusion here. In particular, many of the accounts totally ignore well-recognized violations of the right to privacy in torts. A small number of the accounts do not suffer from this deficiency, but almost without exception these are the accounts least able to deal with violations of a constitutional rights to privacy. Thus in the following pages an account of how the two types of violation differ, how they are related, and what explication of the right to privacy is sufficient to account for both types is given a high degree of priority.
It has already been mentioned that there is an incredible diversity in the accounts of the right to privacy as to the nature of privacy and the right to it. To avoid confusion one who is interested in this subject should be careful, as some commentators have not, to distinguish between the following: privacy, the right to privacy, loss of privacy, invasion of privacy, and violation of the right to privacy. Definitions for all these terms appear either at the beginning of Chapter IV or in the Appendix of this work. That all accounts of the right to privacy do not include such a section is easily seen since some of them do not even have readily available ways of making sense of these terms at all.

Perhaps the least satisfactory results of the debate on the right to privacy concern the justification for such a right. There is general agreement that the protection of privacy can oft times protect other rights or goods. The agreement ends at this point, however. Some commentators claim this characteristic of privacy provides the only justification for such a right, others claim it does not. Some question whether such a justification shows that legal protection is warranted on these grounds, others claim that justification is sufficient not only for legal protection, but also for a far reaching moral right to privacy. The account presented in the following pages identifies four
different components of a justification for the right to privacy. A right to privacy which is a moral right which gives rise to a corresponding legal right.

Three of the components of the justification of the right to privacy are of secondary importance being used mainly as factors in determining what legal protection is called for, and also as factors in weighing considerations of privacy against conflicting rights or values. The first of these components is discussed in Chapter II in the examination of the account of the right to privacy presented by McCloskey. He makes reference to the role the protection of privacy plays in protecting or promoting other rights or goods. The second component consists of the role privacy plays as a necessary condition for the creation and maintenance of the variety of human relationships we now enjoy. The discussion of this component takes place in Chapter III where the Rachels and Fried accounts of privacy are examined. The third component consists of the claim that privacy can be viewed as a property right over personal information. This component is discussed primarily in Chapter III, including the section on the accounts of Van den Haag, and Hofstadter and Horowitz.

The primary component of the justification of the right to privacy, and the one that the other components
are simply appendages to, is taken up in Section 1 of Chapter IV. This component consists of the morally obligatory recognition of, and respect for, persons as individual moral entities of independent existence with their own goals and projects. In essence, this involves the recognition of persons as powers unto themselves subject to rightful constraint only insofar as they affect others. This component of the justification also plays a role, albeit secondary, in the justification of the right to autonomy and the right to liberty. It plays a secondary role relative to these two rights because it is less important than the role that is played by the fact that autonomy and liberty are necessary conditions for personhood. Still, the fact that privacy, autonomy, and liberty share a part of their justifications indicates that the three are connected, thus partially explaining why autonomy and liberty often appear in discussions of the right to privacy. This is only a partial explanation because there is another way that liberty and privacy are connected, the right to privacy being both a limit on, and a means of protecting, liberty. This is also true to a lesser extent of autonomy. There are accounts which attempt to draw a stronger connection between autonomy and privacy. Basically, they present the right to privacy as arising from autonomy and respect for autonomy. Stanley
I. Benn presents just such an account. The examination of this account is carried out in Chapter III, along with a related approach used by Elizabeth Beardsley. These accounts are deficient in several ways, the most important of which is that they tie the right to privacy to only persons as choosers instead of the broader spectrum of qualities of persons which make them moral entities.

It has been pointed out several times in various accounts that it is largely a matter of convention as to which type of things or activities are expected to be kept private. These vary from culture to culture. This can easily be explained by reference to the justification for the right to privacy. The respect for persons can be shown in several different ways and it need only be a matter of convention as to which way is chosen as long as some method is picked. But one must remember that the conventional portion of the right to privacy is almost entirely concerned with what are to be considered private affairs, e.g., sex in our culture, and that the right to privacy covers a much wider field. It is not a matter of convention that the right to privacy rules out the observation of a person in his home without his consent.

It is important to note the limited claim made about the justification of the right to privacy. It is only recognition and respect for personhood that is involved,
it is not to be taken as involving a necessary condition of personhood. To deny someone his privacy is to treat him as less than a person, it does not make him cease to be a person. This is an important point because there are accounts which claim a necessary connection between privacy and personhood, a connection which is empirically refuted. Prisoners of various kinds have been stripped of about as much privacy as is possible and yet have remained functioning persons, in some cases even exhibiting the most laudable of human characteristics in the worst conditions that can be inflicted on a human being.
CHAPTER I

THE RIGHT OF PRIVACY IN THE LAW

There are several different approaches in the legal field in presenting the right to privacy. The primary starting point in the literature on the subject is the Warren and Brandeis article, "The Right of Privacy," in which the right of privacy is explicated as the right to be let alone. While there are many problems with this account, revolving for the most part around challenges to defining the right to privacy in this manner, it serves as the touchstone for all subsequent treatments of the right to privacy in the law. The account does have a very significant advantage over almost every other attempt in the legal field in that it is general enough to cover almost all the cases which make reference to the right to privacy. Most of the legal attempts on the right to privacy are less general, breaking down into two distinct categories depending on which area of the law that the cases are taken from, either torts or constitutional.

The accounts which are mainly concerned with torts violations of a right to privacy basically fall into two groups. One group attempts to find a right to privacy arising from previously recognized concepts in tort law,
the other tries to find a connection with a previously existing right to privacy and related recognized concepts in the law of torts. The crucial overlap between the two approaches is the attempt to draw a connection between the right to privacy and some subset of well-established concepts in the law such as trespass, due process, libel, slander, defamation, search and seizure, etc. This feature dominates the issue in torts.

The bulk of the treatment of a constitutional right to privacy comes solely from the analysis of the decision rendered by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 511 (1965). This decision forms the primary basis for the current representation of the right in this branch of the law. There is still evident, as was the case in torts, an appeal to previously established rights, but the tension brought about by the use of this tactic is even greater in this case. The maneuvering evident in this decision is clearly attributable to this increased tension. It ranges from attempts to argue that certain rights specifically mentioned in the Constitution are obviously grounded on a right to privacy, to attempts which view the right to privacy as arising as an instrument of giving a "fleshing out" of rights which are so mentioned in the Constitution. These attempts are given against the backdrop of minority opinions which deny the existence of such
a right at all.

Section 1: Warren and Brandeis

The Warren and Brandeis article, "The Right of Privacy," serves as the primary basis for most all the subsequent discussion of the right to privacy. Most treatments of the article take pains to point out that the motivation for the article arose out of Warren's dismay at some newspaper publicity about his family. Yet this fact should not mislead one to undervalue this outstanding piece of work. In particular, the observations made about the increased importance for the legal protection of privacy given the increasing complexity of modern life, and the explosion of technology, are especially impressive since these trends were only in their infancy in the time of the article's publication. The article is even more timely today than it was in 1890.

Before considering the actual thrust of this treatment of the right to privacy one should note that almost all references to the article present its definition of the right to privacy as "the right to be let alone." This definition is easily attacked as being both too broad and too narrow. This criticism is most unfair, however, in light of the entire contents of this article. These contents certainly leave room for doubt as to whether "the
right to be let alone" is to be interpreted in the usual manner, or more importantly, as to if this was meant to be their definition of the right to privacy at all.

The determination of the authors' true intent as to the definition of the right to privacy is important both as leading to an acceptable understanding of the article itself and, even more importantly, for making an accurate estimate of the article's ability to handle the right to privacy as well as an estimate of the ability of subsequent articles. Many of these subsequent articles can be seen as attempts to severely narrow the right to be let alone "definition," thus hoping to retain the significant impact of Warren and Brandeis' effort without running afoul of what has traditionally been taken to be the gravest fault of that effort. But this tactic has, in my opinion, led to two very unfortunate results. One, most subsequent articles have narrowed the scope of their definitions to such an extent that they have trouble handling cases strictly confined to torts violations and ipso facto isolated the tort right to privacy to such an extent that it is difficult to imagine how it relates to a constitutional and/or moral right. Two, the scope has been so narrowed that the significant impact of the Warren and Brandeis effort has been lost. Thus, the following includes a more accurate portrayal of the actual intent of
the authors relative to their concept of a definition of the right to privacy as a starting point in the quest for an improved account of the right, one which does not share such deficiencies.

The first real attempt to characterize the right to privacy in the article presents it as, at least in part, a right of selective disclosure.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.²

The detailed discussion of this right lends plausibility to a claim that such a right is a property right, particularly in reference to certain modes of expression. The idea here being that the information about the one's thoughts, sentiments, and emotions, in the form of relating the contents thereof are the property of the particular individual who has them. This possibility is duly considered.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic
compositions. They certainly possess many of the ordinary attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the publication is found not in the right to take the profits arising from production, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term.3

The ensuing discussion takes up a very interesting example wherein a letter is sent by a man to his son containing the information that the man did not dine with his wife on a particular day. The claim is made that what is protected by the right at issue is this fact itself, rather than the intellectual act of recording the fact. This section of the article makes much of the protection of information. This facet of the discussion of the right relative to the issue of its being a property right is an interesting precursor of subsequent treatments of the right as a property right where the property protected is, at least implicitly claimed to be, information. Warren and Brandeis have anticipated the response made to such attempts in more recent times that there is some validity in doubting the treatment of information as property in the sense necessary for asserting a right protecting same is a property right.
They then present their oft-quoted claim as to the nature of the right.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.  

This is probably the most important paragraph in the article. This is true even though the point made in the middle of the paragraph about the possibility of taking rights as the property of individuals is at best trivial, and at worst a hopelessly inadequate attempt to discuss the right to privacy's being a property right. After all, a right is a property right in virtue of what it protects, not in virtue of whether or not it is the property of the individual having that right.
The rest of the paragraph is of the greatest import. The degree of said import varies with the particular interpretation given to the central notion presented in the paragraph, the connection between the right to privacy and the right to be let alone or the right to an inviolate personality. One possible interpretation that might be taken as that presented in the paragraph would be that of claiming the right to privacy is just the right to be let alone or the right to an inviolate personality. There is, of course, the valid question as to whether the right to be let alone is the same as a right to an inviolate personality. But whether it is or it is not, an identification of the right to privacy with the right to be let alone or the right to an inviolate personality results in a definition of the right to privacy which is far too broad.

A superior alternative interpretation suggested by the wording of this paragraph would be to take the right to privacy as composed of a cluster of rights which are a proper subset of the more general cluster of rights which belong to the right to be let alone or the right to an inviolate personality. It captures the very essence of the right to privacy, although there is admittedly severe problems in trying to adequately characterize exactly what it is to be "let alone," or what is meant by an "inviolate
This is not to say that Warren and Brandeis do not provide any guide as to the meaning of these terms, however. The rights enumerated in the paragraph as being instances of such a general right do provide a good intuitive guide as to the meaning of these terms. The rights which make up this general right all share a common feature. They are all rights whose core concept is almost totally concerned with a lack of intrusion by others on the life of the individual having these rights. The rights enumerated serve only as an intuitive guide because Warren and Brandeis fail to provide any explicit means for distinguishing these rights from other rights against intrusions such as theft, battery, murder, etc.

One might wonder if any plausible criteria of this nature might be advanced in order to augment the Warren and Brandeis account. One such candidate is advanced in Chapter IV of this work and can be previewed at this point. The group of rights at issue here differ from rights against other intrusions of the types outlined above in that they receive their sole primary justifications based strictly from the role they play in protecting against intrusions in one's life rather than the specific effects of those intrusions on those having these rights. This is to be contrasted against rights against
theft, murder, battery, etc., which have a dual primary justification based on this consideration and other considerations like the enjoyment of property, the sanctity of life, and freedom from fear, respectively. So, the rights at issue here are those which derive almost their total significance, in normal circumstances, strictly from protecting against just the intrusions by others on the lives of those individuals having these rights.

The basis of the justification of these rights comes from the recognition that while individuals are the components of a moral structure, i.e., a society, they are also separate moral entities. Such rights draw most of their importance from their emphasis on this latter facet of individuals, and serve as the primary line of demarcation between these two roles of individuals. The right to be let alone, in its guise as the right to an inviolate personality, is intricately connected with the very notion of the nature of persons as moral entities. Human beings control, to a greater or less degree, their actions. At least this assumption must be made for there to be truly meaningful moral discourse. Thus, this fact about persons gives rise to their moral nature. Intrusions by others circumvent this control and thereby interfere with this facet of persons. Such interference must be a prima facie evil since it serves to undermine the very basis for said
moral discourse. Hence the existence of a right to an inviolate personality in some form so as to protect against such interference.  

The comments above should not be construed as claiming such rights have their sole justification relative to this role they play in giving expression to the nature of persons as moral entities. There are more specific secondary justifications of such rights. One should also be aware of the difficulty of ascertaining much detail about a right as general as the right to an inviolate personality simply by examining its justification. Rather, one must examine its particular component rights in light of this general justification, along with the specific justifications offered for these rights. This is true because it is only at this level of analysis that one can hope to gain some appreciation for the complexity of the competing factors which must be balanced to accurately determine the extent of this right.

The picture of the right to privacy given in this paragraph is one wherein the right protects an individual's thoughts, sentiments, and emotions from appearing in publications, thus preventing intrusions on a person's exclusive access to same by others. The basis has been laid in those considerations for an even broader right to privacy protecting a wide range of "personal" facts from being
obtained by others. One might attribute the emphasis on protection against publication to two reasons. The first could make reference to the underlying motivation Warren had for writing the article. The second, of a very different nature, is that publication brings these protected facts to a vastly greater audience than other invasions of privacy do.

There is further support for taking Warren and Brandeis to take the right to privacy as merely a component of a type of more general right previously mentioned in the following quotation where this claim is explicitly stated.

(N)o basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person,—the right to one's personality. 7

This clearly indicates it is a mistake, one which is made in several subsequent references to this article, to take Warren and Brandeis as defining the right to privacy as "the right to be let alone."

Warren and Brandeis are almost strictly concerned just with the right of privacy in torts, but their presentation could also be taken as informative for a more general account of the right in both legal and moral contexts. Still, the rules which follow are presented by them as primarily a guide to the right as reflected in torts.
1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

5. The truth of the matter published does not afford a defence.

6. The absence of "malice" in the publisher does not afford a defence.  

These rules are given along with the following two rules as to the remedies to be granted for invasions of the right to privacy.

1. An action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.

So, Warren and Brandeis present in this article a remarkably lucid account of the right to privacy, one which has stood well the test of time. They are primarily concerned with the specifics of the right to privacy as it appears in tort law, but as previously mentioned, the
account is quite amenable to expansion to cover the overall moral and legal right to privacy, at least relative to the issue of what constitutes such a right and from where it derives its justification. It is very important not to underestimate the tremendous advantages to be gained by such a powerful approach. A significant defect of many subsequent accounts of the tort right to privacy becomes evident when any attempt is made to relate the tort right to the constitutional right and moral right. Obviously, an adequate explication of such a connection is invaluable in any attempt to analyze the tort right in at least two ways. One, an understanding of this connection is instrumental in such an attempt since it will provide criteria for incorporating any insights garnered by examinations of the constitutional or moral right to privacy. Two, since it is quite reasonable to assume that a significant part of the tort right is based on the moral right the connection between the two will place definite constraints on the form the tort right takes.

The Warren and Brandeis account is also worthy of close examination just in virtue of its having anticipated many later accounts which concentrate on exploring some portion of the list of candidates for relevant considerations mentioned in the account such as property considerations, the right to an inviolate personality, the
right of exclusive access, selective disclosure, etc. That many of these later accounts are somewhat less effective than this account, even given the benefit of the substantial discussion of this right since 1890, suggests an interesting possibility. Could it be the case that narrowing one's scope to just one or two of these considerations contribute significantly to the deficiencies exhibited by many of the later efforts? One might plausibly argue that this is the case even where one feels that the particular consideration or considerations chosen are the sole correct choice. This is true because one could very well argue that even those considerations which should ultimately be rejected as genuinely relevant to the right to privacy have such strong claims to consideration, i.e., are initially so compelling (witnessed by the existence of several serious accounts based on them), should be examined in any truly complete account of the right to privacy so that it can be determined why they are initially compelling but to be rejected in the final analysis.

There are several recent articles which build upon such a narrower range of considerations. One such group of these articles forms the bulk of the literature in torts law on the right to privacy. They pick up on several places in the article where reference is made to
comparisons of the right to privacy to already established legal concepts, namely the rights against slander and libel, and the law of literary and artistic property. An overview of these types of articles is presented in the next section. Another such group of articles forms the bulk of the literature in constitutional law on the right to privacy. They precede on the basis of references in the article to the more general considerations previously mentioned. They also use the technique of comparing the right to privacy to already established legal concepts, although in their case they concentrate on concepts such as the right against self-incrimination and the right against unreasonable searches. These accounts are considered in Section 3. There are a variety of other accounts which, like those in constitutional law, isolate out one or more of the general considerations identified in this article. This group takes up the consideration of the moral right to privacy. Various recent attempts in this vein are discussed in Chapters II and III. The entire range of accounts which might be said to have their starting point in this article are reviewed in Chapter IV as part of the presentation of my own account where the attempt to gauge the accuracy of this account, as well as properly place its contribution to the understanding of the right to privacy, is undertaken.
The accounts of the right to privacy which have been written since that of Warren and Brandeis which can be considered part of the legal literature usually follow a rather set pattern. They tend to follow the well-established legal technique of trying to expand the concepts in the field by relating new concepts to ones which are already in use. While this follows a well-represented school of thought as to how the law progresses (or simply changes), it must be suggested in light of the earlier point about how difficult a time an account built through use of such a technique can have in adequately tying the legal right to the foundational moral right, close scrutiny must be employed as to how well such accounts can interconnect the tort, constitutional, and moral rights to privacy. Another central theme of the following two sections centers around how successful these accounts have been within their avowed province of either tort or constitutional law. The first area to be considered is that of torts.

Section 2: The Tort Right to Privacy

William L. Prosser has proposed that privacy cases which have been decided can be grouped in the following four separate classes:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. ¹⁰

Those familiar with the law will note a great similarity between three of the classes above and already established areas of the law of torts. The first class brings to mind actions for trespass to land, actions of nuisance, and actions of intentional infliction of emotional distress. The third class brings to mind actions of defamation. The last class suggests a treatment of a plaintiff's name or likeness very similar to that accorded patents and copyrights. The second class is the least easily connected to other common law actions. While this class may be taken as an example of a new area of protection in the law, it has as yet only involved a very narrow range of cases. It is composed primarily of cases wherein a fact about a person's more or less distant past is published, one which is of an embarrassing nature.

There are three main alternative explanations of the right to privacy in torts that can be advanced, all of which admit of several variations. One alternative is that the right is actually composed of several rights which have little in common, i.e., a "shorthand" right
that is used to organize the treatment and discussion of several diverse rights. This approach is very similar to that of Judith Jarvis Thomson's account of the general right to privacy discussed in the next chapter. Another alternative explanation can be based on explicating a right to privacy as including some previously recognized rights in the law of torts as well as other rights which can be seen as expansions on such rights. This approach is very similar to one employed in constitutional law which is discussed in the last part of this chapter. The third basic way of treating the right to privacy in torts is to give an account of a general right to privacy which gives rise to various rights whose violations are most profitably treated as torts. This alternative can be seen as an extension of several of the accounts discussed in this work including my own account as set out in Chapter IV.

The first approach I will discuss is the one wherein the right to privacy is taken to arise from rights and concepts previously recognized in the law of torts. Given Prosser's classification scheme, a proponent of such a view would claim that the roots of the right to privacy can be traced to trespass, nuisance, infliction of emotional distress, defamation, and rights associated with intangible property like patents or copyrights. It was noted earlier that the first, third, and fourth classes mentioned can be
easily tied to one of the torts just listed. This leaves the second class unaccounted for so far. However, an examination of the connection between the third class and defamation suggests a way of accounting for the second class. Suppose that the guiding idea behind protecting persons against defamation is that acts of defamation are an unreasonable interference with a person's ability to establish and maintain his or her "good" reputation, or speaking less carefully, such acts violate a person's right to a good reputation. This, given standard views on when such protection is to be provided, implies that reputations should be protected. Problems arise though when one tries to set appropriate limits on how much protection should be given to reputations.

These problems can be basically solved by showing that there is an adequate justification for a right to a reputation that is somewhat an idealized portrayal of a person.¹¹ This portrayal will be an accurate guide for people to use in dealing with a person, and will ensure that a person will usually be able to accrue all the benefits from whatever reputation he deserves. A characterization of a right to privacy which includes such a right will provide a means for showing how the second and third classifications identified by Prosser can be seen to be extensions of a right against defamation. They can be seen to be extensions
because they are natural progressions based on the justification of a right against defamation. This right is justified because false statements made about a person which adversely affect his reputation can harm that person in his dealing with others. The second and third classifications are given protection in recognition of the fact that the same adverse effects can come about through the publication of embarrassing private facts, or true facts which place someone in a false light in the public eye.

The discussion above indicates how the second and third classifications proposed by Prosser can be shown to be extensions of areas of protection previously recognized in the law of torts under defamation. They are an extension of this protection in virtue of the way they share similar and related grounds of justification. They were shown to have a common nature in virtue of protecting a person's reputation. The first and fourth classifications are obviously related to the property considerations previously specified. The overall approach which is under consideration is that consisting of the claim the right to privacy in torts arises from these previously recognized tort protections either as special cases, or as natural extensions of these protections. It remains to establish that there is a common thread that runs through these protections that would justify grouping them together under
one heading, the right to privacy.

The task of justifying the grouping together under the heading of the right to privacy the protections outlined in the four classifications can be attempted in at least two ways: one being based on taking the right to privacy as being a special type of property right. After all, what areas are protected as privacy areas is very often associated with property considerations. It might be necessary to make reference to non-traditional types of property in order to account for the protection of such non-spatial privacy "areas" such as reputations or private affairs, but possibly taking personal information to be a kind of property will make such attempts viable.

The success of the task at hand then revolves around being able to show that the four classifications have enough in common to make them part of a right to privacy instead of just a group of unrelated property rights. A way to make this claim would be to treat the right to privacy as an extended right over the person. This begins with the assertion that our persons, composed of body, mind, etc., are a type of property we own. Then it is noted that associated with the person in society are things like a name, appearance, reputation, and various interactions with others. These are treated as the property of the person they are associated with.
What makes them all the objects of the protection of the right to privacy is the following characteristic. A person is manifested in the world in three basic ways. There is the foundation composed of a body, mind, etc. There is an immediate extension of the person composed of thoughts, tastes, name, reputation, intimate relationships, etc. Then there is the third manifestation composed of a person's place in a society, one's general obligations to others, i.e., the person qua citizen as opposed to the person qua person. The right to privacy is thus a right to protection of the property which makes up the second manifestation of the person, where such protection is effectively rendered by the law of torts.

A second, and perhaps more plausible, way of establishing that the property protections outlined by Prosser should be grouped together under a single heading of a tort right to privacy would depart from Prosser by way of omitting cases of the fourth class from under the privacy heading. The suggestion is to group them rather with similar cases of special property rights concerning use of another's property without permission for the purposes of commercial gain. Thus, cases in the fourth class would be treated just like patent or copyright cases. It is more appropriate, at least to proponents of this line, to treat cases of the fourth class separately because none
of the other three classifications necessarily involve any direct commercial factors, in this the fourth class is much more clearly related to more traditional property considerations.

The two alternative ways of arguing for grouping the protections of Prosser's classifications under a single heading of a tort right to privacy represent the alternatives that most closely follow the spirit of Prosser's presentation and thus have been presented first. This is not meant to suggest there are no other alternatives for arguing the protections should be grouped together as property rights having a common nature. There are such alternatives, although they depart rather significantly from Prosser's actual text. A good example of such an alternative consists of an account which ties all four classifications together under a single privacy heading by way of connecting each classification with a type of information and then treating that information as the property of the individual it is about. The information associated with the first classification is that garnered by anyone who intrudes on a plaintiff's seclusion or solitude, presupposing of course that any such intrusion must result in the acquisition by the intruder of some information about the plaintiff, no matter how minimal. The information in the second consists of the embarrassing
private facts. The third--information used to cast the plaintiff in a false light. The fourth--the plaintiff's name or description of his likeness.

All the alternatives given present the tort right to privacy as arising out of previously recognized tort actions. It presents the right as more than a "short-hand" right in that it adds new protections to tort law. Thus, these alternatives can be distinguished from accounts of the tort right which claim privacy does indeed arise from previously established rights in the law of torts, but also finds no convincing reasons to suppose they have anything in common that would serve to individuate them as a right to privacy. Thus, calling the group a right to privacy is just a labelling move which adds nothing to the contents of the law of torts. This account, if true, would require judgments on violations of the right to privacy be made by determining which previously recognized tort protection the particular privacy falls under, and making the judgment relative to this previously recognized protection.

The last major way of approaching the right of privacy in torts consists of trying to establish that rather than a right to privacy arising from various previously established protections in the law of torts, it is the other way around. The claim is advanced that various moral
considerations give rise to a right to privacy which is reflected in the law of torts. There are two main possible variations which can be identified. The more ambitious asserts that the tort actions previously identified as being related to the four classifications of privacy cases in reality are all derived from considerations of privacy. This variation lacks plausibility because of the difficulty of explaining how things like protection against defamation could be completely accounted for just by reference to considerations of privacy. The more plausible variation claims instead that the similarity between privacy cases and related cases such as defamation, trespass, etc., can be explained by reference to similarities between why a person's privacy should be protected and why a person should be protected against defamation, trespass, etc. The myriad ways of trying to account for why privacy should be protected in general are discussed throughout the remainder of this work.

It was stated at the beginning of this section that there are three main approaches to the explanation of the right to privacy in torts. One, it is a type of shorthand right whose existence adds nothing to the protections granted by other rights in tort law. Two, it does grant additional protection based on a moral right to privacy which gives rise to legal rights which are related to
previously recognized rights in torts but have force independent of such rights. Three, it does grant additional protection based on extensions of the protections of previously recognized rights in tort law. Which approach should be attributed to Prosser? The first can definitely be ruled out as being Prosser's. The categories of rights he identifies do provide protection beyond the related rights already recognized in tort law. This leaves a choice between the second and third options. I can find no conclusive evidence in Prosser's account for opting for one of these choices over the other, particularly since the third might collapse into the second if one felt the set of privacy rights and the rights they are related to are ultimately traceable back to the same moral groundings. A decision between these two choices might be obviated if one felt there was a sufficient overlap in the historical development of these legal rights. Another basis for deciding this issue might be based on one's theory as to how new protections are added to the law. One might claim that new law can be incorporated simply by the device of appeal to moral considerations. Or one might be committed to "new" law depending on its consistency with all previous law. There is some evidence that Prosser would opt for the third approach based on the particular formulation of the
categories he uses. This is because all the category descriptions are so readily identifiable as extensions of previously recognized rights in torts.

The examination of Prosser's account brings out many points that will apply not only to the determination of the status of the tort right to privacy, but to the constitutional and moral right as well. One such point is that of the common nature of the tort protections. This point is important for at least two reasons. One, it suggests, although it does not entail, that a general approach to the right to privacy which claims the protections granted by the right have nothing in common and that it is only a kind of "shorthand" right is very possibly in error. Whether this shorthand type account is in fact in error is a question which is directly pursued in the discussion of Thomson's account at the beginning of Chapter II. It is indirectly pursued in the discussions of most of the other accounts taken up in this work since almost all of them present privacy protections as having a common nature. Obviously, one who is concerned with establishing these protections have a common nature could use the previous discussion as a starting point and attempt to extend the account of the common nature of tort violations to include the protections of the constitutional and moral right to privacy. The second reason the common
nature of the tort protections is important is its implication for accounts of a privacy right other than that of torts. This implication is twofold. One, it hints that a plausible procedure to use as part of an investigation of the right beyond torts may very well be a similar examination of the protections of the right at issue to determine a common nature among them. Two, a plausible constraint on such a determination of the common nature of the protections of such a right would be that it be reconcilable with that suggested for the tort privacy right protections. While this point is applicable at several points in the rest of this work, it is particularly relevant in my discussion in Chapter IV where I present the explication of how my own theory accounts for the common nature of tort protections.

Another point brought out by the examination of Prosser's account is particularly important for the ensuing discussion in Section 3 of the constitutional right to privacy. It has previously been mentioned that a traditional legal approach to adding new protections to the law consists of tying new protections to others which are already established in the law. The constitutional right to privacy has been similarly treated. Thus, a part of said discussion can be seen as an extension of the tort discussion. A close examination of this extension is
particularly important to those who find the technique's results in the privacy tort discussion to be somewhat ineffective since the technique is more strained when applied to the constitutional right. A point, which has its infancy in the Prosser discussion just presented, is developed in this discussion that accounts which trace the origins of constitutional privacy protections back to a moral right, rather than simply appending the protections to already established ones, enjoys a significantly better fit between a constitutional right and the moral right to privacy. The implications of this are brought out in the third section.

A criticism of many of the more recent efforts on the tort right to privacy made in the first section of this chapter was that their narrow emphasis might very well lead to deficiencies in an account of the right to privacy, one which can be related to the Prosser account. Three alternatives were presented in the discussion for establishing the common nature of tort protections, of which only the first two could be said to closely follow the spirit of Prosser's account. It is difficult to see how to extend either alternative so as to arrive at an account of the overall right to privacy, something already shown to not be the case with the Warren and Brandeis account. This becomes important in the discussion in Chapter III wherein an
examination is carried out of accounts which attempt to base the right to privacy on property considerations. It is also relevant to the discussion at the end of this chapter concerning the status of the legal right vis-a-vis the moral right. Yet another point at which it comes into play is in Chapter IV wherein a discussion is undertaken highlighting the advantages of applying my own theory to the legal right to privacy.

Finally, the discussion of Prosser has a structure which is exhibited to a greater or lesser degree in all the subsequent discussions of the right to privacy. This structure begins with the determination, sometimes just assumed, that the protections granted by the right do, or do not, have anything in common. It continues with an examination of the extent, if any, that these protections break new ground over the protections granted by other rights. For example, the new protection granted relative to cases in the second classification, concerning publication of embarrassing private facts, is shown to arise simply from an extension of the protection granted by the right against defamation of a person's reputation.

Several common themes have emerged in the discussion of the tort right to privacy as represented by the Warren and Brandeis, and Prosser accounts. These themes are reflected very often in discussions of both the constitutional
and moral rights. There is a particularly great area of overlap with those concerning the constitutional right. This is true in two basic ways. One, does the right to privacy arise as an extension of previously recognized legal concepts, or do these related concepts simply share a common background in various moral considerations? Two, what constitutes the legal right to privacy in current legal usage, and what should constitute the legal right? There is also a similarity of concern in the two areas of the law as to whether there is a right to privacy which adds protection to that provided by previously recognized legal rights. I will concern myself with only the last two issues in this work.

Finally, an analysis of the constitutional right to privacy may shed light on the adequacy of the three main variations of approach taken on the tort right to privacy. We have seen that a quite plausible case can be made that the four classifications in torts do in fact have a common characteristic. As yet, no convincing case has been made though as to whether the right to privacy which gives rise to these classifications is derived from other rights or not. No definitive answer has been given as to whether or not the right to privacy adds protection not provided by other rights. So there remain several issues about the tort right which should be considered again after looking
at the constitutional right. The following discussion of this right is broken down into three main parts: the principal constitutional decision, an alternative partial basis for a constitutional privacy right, and an analysis of Robert Dixon's proposal for basing a constitutional right to privacy on previously recognized related rights.

Section 3: The Constitutional Right to Privacy

The primary basis for a right to privacy in constitutional law is found in Griswold v. Connecticut, 381 U.S. 479 (1965). Robert G. Dixon, Jr., in his article, "The Griswold Penumbra: Constitutional Charter For An Expanded Law Of Privacy?," summarizes the main thrust of the case by stating:

All that Griswold actually decided was that a statutory system which operated to make it a crime for married couples to use contraceptives (although there was not even a hint of direct enforcement), and for clinics to conduct examinations and prescribe contraceptives (which was the actual enforcement issue), was unconstitutional. The substantive statute merely prohibited contraceptive use; a general aiding and abetting statute furnished the grounds for suppression of the clinic. In order to reach (or create) a privacy issue, the Court allowed the sole dependents--Mrs. Griswold, the clinic director, and Dr. Buxton, the clinic medical director--to assert the rights of married clients of the clinic. The case was discussed judicially, therefore, as though the key issue was state scrutiny of the marital couch;
questions concerning the validity of regulations on the manufacture, distribution, and sale of contraceptives, and concerning the validity of the regulation of birth control clinics absent an anti-contraceptive use statute were left unresolved.12

Given the above description of the case, one might very well question where much of a basis for a right to privacy could be found, if any at all, arising out of this decision. Part of the evidence supporting such a sceptical position can be derived from observing that while Mr. Justice Douglas wrote the opinion of the Court, wherein the statute was found to be invalid because it invaded a constitutionally-protected right of marital privacy which was taken to arise from the emanations of specific portions of the Bill of Rights made applicable to the states by the Fourteenth Amendment, there were no less than three separate concurring opinions which employed different grounds for the decision. Also, both of the justices dissenting gave separate opinions. The separate concurring opinion by Mr. Justice Goldberg, joined by Mr. Chief Justice Warren and Mr. Justice Brennan, made reference to a fundamental right to privacy protected by the due process clause of the Fourteenth Amendment against deprivation by the state. Mr. Justice Goldberg's opinion also made important, and controversial, reference to the Ninth Amendment to support the position that such a right was an
independent fundamental right. Both the opinions of Justices White and Harlan were explicitly grounded only on the due process clause of the Fourteenth Amendment. The dissenting opinions were based on the position that the "right to privacy" notion on which the case turned is not adequately grounded on the Constitution since it is inadequately supported by the specific provisions of the Bill of Rights, and that the Court is not free to interpret the Fourteenth Amendment so broadly as to formulate a conception of fundamental rights which are not founded on the specific guarantees enumerated in the Constitution.

While a reading of the opinions given in this decision raises many interesting issues, there is almost no mention of what is taken to constitute the right to privacy. The dissenting opinions do challenge the contention that there is such a constitutional right on the grounds mentioned above. Even the concurring opinions grant there is no specific mention of such a right in the Constitution. So the discussion of the two issues under investigation which follows is necessarily brief. Indeed, this decision has little bearing on the existence issue beyond that already stated. The analysis of the two indications of what constitutes the right is particularly telling, however, because the main component of the right which is identified can be seen to really be part of another right altogether, rather
than the right to privacy.

The statute at issue in this decision was judged to be unconstitutional because it infringed on a fundamental right, namely the right to privacy. As stated above, the infringement is identified specifically in only two instances. Mr. Justice Goldberg identified one instance in giving the opinion of the Court. He asks,

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.\(^\text{13}\)

It should be noticed that it is not simply the right to privacy which is mentioned here, but rather a right to marital privacy. This complicates an already complex problem, that of specifying exactly what constitutes the right to privacy. Given the rigors of said problem, I will forego the philosophical challenge of distinguishing between the right to privacy and the right to marital privacy, and content myself with simply pointing out that subsequent legal references to this decision often claim it is applicable only within the marriage context.\(^\text{14}\) It is clear that searches of the type mentioned are taken to be violations of the right to marital privacy, so the constitution of the right includes protection against searches for such reasons and possibly for other reasons as well.

Mr. Justice Goldberg in a concurring opinion provides
the only other explicitly stated claim about the contents of the right to marital privacy as part of an attack on the line of reasoning employed in the dissenting opinions which deny the existence of such a right. The attack, while very telling against the line advanced in the dissenting opinions, suffers a fatal flaw as an enunciation of part of the contents of the marital right to privacy. He begins by claiming:

(s)urely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. 15

He goes on to claim that

... if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected. 16

So the right of marital privacy is taken to include protection against unjustified intrusion by the Government in a married couple's decision to voluntarily decide whether or not to practice birth control. While I am in complete agreement with Mr. Justice Goldberg that a married couple's
right to voluntarily decide whether or not to use birth control is protected by the Constitution, I must completely disagree that this right is part of the right of marital privacy. It is rather, part of the right of marital autonomy. The issue at hand is the right of a married couple to make a significant choice relative to their marital relationship. The right of marital autonomy is just the right to make such choices, within given boundaries. The right to marital privacy protects only against certain physical intrusions, e.g., electronic surveillance of one's home and person, and certain intrusions having to do with information acquisition and use. It does not include straightforward protection against intrusions against the making of significant choices.

Thus, the opinions given in this decision provide only one specific indication as to the makeup of the right of marital privacy. But the contents of these opinions do suggest alternative means for guiding the search for a statement of the contents of this right, particularly in its general form as the right to privacy (as opposed to just the right of marital privacy). There are two such alternatives to be suggested. Both these alternatives are based on materials in Mr. Justice Douglas' opinion.

Mr. Justice Douglas, in his opinion, makes reference to the First, Third, Fourth, and Fifth Amendments to the
Constitution. The rights which these amendments recognize as residing in the people are, in part, privacy rights. In other words, these amendments recognize a set of rights of which a subset can be accurately described as privacy rights. These privacy rights vary a great deal in degree of significance from very minimal, as concerns privacy, protections against abridgement of the free exercise of religion and peaceful assembly, to the very important protection against unreasonable searches. The middle ground of significance, relative to privacy, is occupied by rights against peacetime quartering of soldiers and the right against being required to testify against oneself. The claim that such rights is least controversial in the case of the right against unreasonable searches, and most controversial in the case of the right to not be forced to testify against oneself. In the case of the latter right the label of "privacy right" may be inappropriate given that it is primarily, or wholly, just a right against self-incrimination as opposed to a right against being required to divulge personal information simply in virtue of its personal nature. After all, all other witnesses must divulge personal information short of incriminating themselves.

One might also challenge the claim that a right against abridgement of the free expression of religion or peaceful assembly actually includes any privacy rights.
The aforementioned second alternative grants this challenge, but claims there is some connection which it uses as a foundation for further specifying a constitutional right to privacy. This second alternative finds its starting point in Mr. Justice Douglas' opinion where he claims that earlier decisions

... suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. **Various guarantees create zones of privacy.**

Privacy rights are seen as related to certain of the specific guarantees of the Bill of Rights in two ways. One, as mentioned above, various amendments have been construed to include privacy rights. Two, the central point of this alternative, various privacy rights are seen as arising from the emanations of certain of the specific guarantees, rights which give them life and substance.

Dixon speaks of the "emanations" proposal in terms of privacy rights arising out of the need to "effectuate" the more fundamental specific guarantees of the Bill of Rights. The idea being that various rights arise from more fundamental rights because they are necessary augmentations of such more fundamental rights. They are necessary in order that the protection actually granted by such rights is an accurate reflection of the significance of the justification they are based on. In the case of rights
enumerated in the Bill of Rights, this is roughly equivalent to saying that these privacy rights are needed to provide protection which augments that which directly arises from the specific guarantees so that the total amount of protection fulfills the original intent of the authors of the Bill of Rights.

It should be noted that there are limits as to what rights can be said to arise from a need to effectuate other rights. For example, Dixon sees the right of access to birth control information as arising out of the need to effectuate the right of marital privacy. But is this actually the case? It seems plausible to at least claim that a right that one not be denied access to birth control information could be said to arise from the right of marital privacy. But it is implausible to claim a right of access to such information so arises if it is construed as including a right to have such information provided without charge by the government. This latter right would extend the "life and substance" of the right of marital privacy beyond the limits of the justification of the right of marital privacy.

So the contents of the positive presentation of the constitutional right to privacy can be identified to the following extent. It includes protection against the actual physical intrusions of officers of the state in
marital bedrooms for certain reasons. Various rights mentioned in the Bill of Rights can be seen as privacy rights, particularly the right against unreasonable searches. Various other privacy rights can be seen to arise from the need to effectuate certain of the specific guarantees of the Bill of Rights. This obviously represents fertile ground for subsequent expansions of the constitutional right to privacy, although the actual subsequent decisions where appeals were made to the Griswold decision cannot be said to indicate any trend to so expand the right. This phenomenon is discussed below.

It was stated earlier that a confusion was made in this decision between the right of marital autonomy and the right of marital privacy. Since this confusion between autonomy rights and privacy rights is rather common, it is worth examining what lies at the basis of this confusion. The Court expressed a concern in this case with protecting the inviolability of the marital chamber, particularly in relation to the choice to use or not to use birth control. The confusion arises from the supposition that threats to the private portions of our lives are always threats to privacy, and therefore our right to privacy. Furthermore, and more importantly, their reasoning includes an implicit belief that threats to the private portions of our lives interfere more with our right to privacy than any other
right. This case, while possibly including a low-grade threat to privacy, is much more accurately described as involving a threat to the private portion of our lives, one which has a much greater effect on autonomy than privacy. One should remember that the actual threat to privacy was almost nil since there was no hint of enforcement relative to users of contraceptives, but the threat to autonomy was very great since implementation of marital choice concerning having offspring would have been drastically affected.

The reason the actual threat to autonomy was much greater arose from the intention of the state to enforce only the aiding and abetting statute of the two at issue in this case. One might think that the threat to autonomy was not all that great because persons would have recourse to their family doctors to obtain suitable birth control aids. This point does not go through however, even granting that birth control clinics would be easier targets for enforcement than family doctors. First, where the cost of services are much lower at the clinic rather than a family doctor, some persons would not have recourse to a family doctor for such purposes. Second, the emphasis of enforcement of the aiding and abetting statute would apply just as much to family doctors as birth control clinics. Since the original motivation of the law was to promote
marital fidelity, the pressure to undertake enforcement procedures would be just as great relative to family doctors as it was relative to the clinics.

The search for further evidence that the Griswold decision involved a significant error and confusion concerning privacy turns out to be an integral part of the examination of how the constitutional right to privacy has actually developed since that decision. The Court's most comprehensive attempt to define the right to privacy was rendered by Justice Stevens in the case of Whalen v. Roe (97 S.Ct. 869, 1977). He claimed that the right went beyond just being a type of lowest common denominator of the prior decisions with respect to child rearing, procreation, marital choice, and contraception, to being an expression of a general "individual interest in avoiding disclosure of personal matters" (97 S.Ct. at 876). He also claimed it gives expression to the "interest in independence in making certain kinds of important decisions" (876). The confusion between autonomy and privacy is thus made explicit in this decision. While it can certainly be granted that the right of autonomy and the right of privacy are related, they do not overlap, and so the constitutional right to privacy as currently presented in constitutional law is massively misleading, when viewed from the point of an examination of that presentation.
relative to a right to privacy. This does not mean there is any error in the actual protections granted individuals by such decisions, it may just mean the correct protection was assigned but the justification was merely mislabeled. One must respect, however, the potential for error, particularly when balancing several competing interests, that can result from such mislabeling.

There have been several cases after Griswold in which attempts were made to extend the right to privacy to concern such issues as abortions, sodomy, availability of contraceptives, and government intrusions in a person's body or mind. The Court extended Griswold to the case of abortion in Roe v. Wade (410 U.S. 113, 1973) and Doe v. Bolton (410 U.S. 179, 1973) holding that the previously recognized right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (Wade, 410 U.S. at 153). So the right to privacy in constitutional law is taken to include the right of a woman to get an abortion, but the grounds stated are obviously a part of a right of autonomy, not of privacy.

The applicability of the Griswold decision to state statutes against sodomy was decided in the case of Buchanan v. Batchelor, 308 F.Supp. 729 (D.C.Tex. 1970). The case involved two homosexuals and a married couple who wished to challenge the Texas sodomy statute. U.S. District
Judge Sarah Hughes held the statute unconstitutional on the challenge of the married couple alone, claiming the protection assigned in Griswold only applied in the marital context. The Supreme Court vacated the judgment on the grounds that they could not show they would suffer "immediate and irreparable injury" from a failure to gain the judicial relief sought. This indicates the restraint shown by the Court in moving from a marital right to privacy to a right to privacy. It also reflects the Court's concern with actual invasions of the marital chamber, although, paradoxically, there was probably no more hint of impending enforcement in the Griswold case than this case as concerns the actual marital chamber. One should also note the autonomy issue which is hovering over this case, although there is a stronger argument to be made in this case that privacy considerations might come into play than in cases concerning abortions. The autonomy case is more apparent when considered relative to the challenge by the homosexuals than with the married couple.

The Court in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31, took up the consideration of the constitutionality of a Massachusetts law which made it a felony to distribute contraceptive medicines or devices to unmarried persons. The Court found the law unconstitutional because it represented an unwarranted government intrusion
into an individual's decision whether or not to bear or beget a child. The move was made here recognizing the extension of the marital right to privacy to a general individual right to privacy. Yet the argument given is one which rests directly on simple autonomy issues.

The Court has considered numerous cases involving various types of intrusions by government in the body of a person. It has, in some cases, found constitutional such intrusions as compulsory vaccinations, compelled blood tests, extractions of contraband narcotics from the rectal cavity, and surgical removal of a bullet. It found the forcible pumping of a suspect's stomach, Rochin v. California 342 U.S. 165 (1952), a flagrant violation of Fourteenth Amendment due process. The Court has set general guidelines in this area calling for such intrusions to be of clear necessity, procedurally regular, minimally painful, not overly severe, not too novel, and not lacking a fair measure of reciprocity, in order to be constitutional. The importance of the aspect of personhood at stake in such cases has been taken as of sufficient degree that the government's burden is taken to include showing more than minimal justification for its action. These cases are connected directly, or indirectly, with the privacy protection concerning unreasonable searches. The primary point of this group of decisions relative to a right to privacy is
the recognition that when a search involves a person's body, rather than just his property, the protection granted by the right to privacy is greater.

Laurence H. Tribe, in his book *American Constitutional Law*, takes up the consideration of four different areas where a constitutional right to privacy might be seen as providing protection against government shaping of the mind. The first of these concerns mandatory incantation and liberty of conscience. The principal case relative to a right to privacy resulted in a decision denying the West Virginia Board of Education the right to condition public education upon a compulsory flag salute and the recitation of the pledge of allegiance. The privacy grounding of this decision is discussed below. The second area Tribe discusses consists of compulsory education and freedom of inquiry. Two representative cases in this area concerned the validity of state laws forbidding the teaching of any foreign language before the eighth grade, and that required all students to attend public school. In both cases the statutes were invalidated.

The particular privacy grounding of the previous two areas discussed concerns protection against majoritarian aspirations toward homogeneity of the beliefs and attitudes of the populace. There is a genuine privacy interest here notwithstanding the fact that such protection overlaps
similar protection granted by the right to liberty and the right of autonomy. This privacy grounding is supplemented by additional privacy groundings in the last two areas of protection against government shaping of the mind.

A third area of privacy protection granted by a constitutional right to privacy identified by Tribe is that against government screening of the sources of consciousness. The Court has mainly extended protection in this area based on the belief that government intervention relative to controlling the minds of citizens, and the moral content of their thoughts, is wholly inconsistent with the protection of the First Amendment (394 U.S. 565-566, 1964). This issue has mainly arisen in cases concerning private possession of obscene materials. The ownership of such materials receives the direct protection of the right to privacy based on the straightforward application of the grounds above. The ownership of such materials is also given indirect protection by the right to privacy since the government would have to search through all materials, including those uncontroversially legal, in order to sort out the obscene materials, and such a search violates privacy.

Tribe believes he has found an anomaly in the protection granted in this area of the law. He claims it is hard to understand why the Court has very often not extended such protection to the private possession of psychoactive
drugs, especially those which are relatively mild. He finds this particularly unusual since the Court allows possession of provenly harmful drugs such as alcohol, nicotine, and caffeine. He compares the situation with these drugs to that of the status of marijuana and finds the illegality of the latter puzzling when viewed against the backdrop of the legality of the former. This does indeed seem puzzling when viewed primarily on the grounds given for protection of private ownership of obscene materials. The main point he makes about why such a situation is anomalous is that it is the most logical candidate for explaining the difference in treatment for the two groups of drugs would be the amount of harm which results from use of the drugs. There would be no anomaly if drugs whose use resulted in significant harm were not granted the type protection at issue here. But he claims that marijuana use results in less harm than that of alcohol use, and thus finds current constitutional thought on this subject to be deficient.

The issue of privacy protection for the possession and use of obscene materials and psychoactive drugs is a very difficult one to say the least. To effectively investigate the issue is to isolate and move to one side the autonomy considerations. The principal autonomy consideration here concerns the individual's choice to be moral or not. This
leaves open the option that the government can intervene in certain ways in an individual's choice to do something illegal. The particular task relative to identifying the proper range of applicability of privacy considerations is a twofold one. First, a determination needs to be made of where an individual's right to privacy establishes a zone of privacy counting against government grounds of intervention. Second, a determination must be made as to the strength of the grounds needed to legitimately intrude to any given degree in any such zones created.

It was mentioned earlier that there is a tendency to identify anything having to do with the private portions of our lives as legitimate areas for investigation for protection by a right to privacy, at least by such persons as federal court judges. Such a tendency has been shown to lead to making significant errors concerning the right to privacy so one should keep this in mind when trying to identify areas protected by such a right. It is not difficult, however, to give a rough sketch of what such protected areas are. The principal areas so protected are one's mind and its contents, one's body, particularly the interior, and the regions bounded by one's property or the property of another when one has the consent to be within its confines.

The determination of how strong the grounds must be to
intrude in such areas is extremely difficult to accomplish in even a rough way. Perhaps the only safe thing to say on this point is that the strength required for the grounds of legitimate intrusions are roughly proportional to the degree of importance to the individual of the area intruded upon and the degree of intrusiveness upon that area which is carried out. This last factor might plausibly be taken to be at least partially a function of the amount of the control over information, or the means of access to information, which is usurped by said intrusion.

The fourth area Tribe discusses is government shaping of the mind through coercive conditioning. The main issue here revolving around governmental efforts to coerce mental conformity through the requirement that individuals in certain circumstances participate in behavioral, or electro-chemical, "therapies" of various types. This last type of governmental action should not be viewed as a violation of the right to privacy in any significant sense. Rather, it should be viewed as a violation of a right of autonomy or liberty.

Tribe does consider another area where a right to privacy is taken to provide protection, namely that concerned with controlling a life's informational traces. He speaks as if the basic concern relative to such information is the role it plays in how others view us, and is
significant mainly due to the fact that to a certain extent our pictures of ourselves are in part determined by what others think of us. The protection is supposed to extend to prohibitions against the government needlessly maintaining or releasing information about us no matter how accurate, and an obligation on the part of the government to make sure the information is as accurate as is reasonably possible.

The type of protection specified above does seem to fall legitimately under the heading of a right to privacy. The problem of course is to show that the constitutional right to privacy includes such protection. Any connection with actual statements in the Constitution might be very far removed because this type of intrusion in a person's life becomes possible pretty much only with the advent of complex technological devices like computers, at least where the population is large. (Granted that a few individuals might be intruded upon in this way even in a non-technical society) The particular account of the right to privacy generated in the last chapter of this work makes just such a connection.

It was noted at the end of the previous section that it had not as yet been determined whether or not the right to privacy was derived on the basis of other rights, and whether this right added anything to the protections granted
by other rights. After examining the constitutional right to privacy these questions still remain unanswered. It would certainly seem to be the case that the right to privacy in the law, both tort and constitutional, does not arise from previously recognized rights, at least not completely. The rights previously specified in the Constitution just do not provide an adequate basis for the decisions being made in constitutional law concerning privacy considerations. It is also clear that new protection is being granted relative to a right to privacy, protection not forthcoming relative to other previously recognized rights. So we must look to the accounts offered about the moral right to privacy in order to answer these questions. Indeed, several of the problems left unsolved so far about the legal right to privacy will be seen to be much less puzzling given the insights such accounts provide.

So this examination of the legal right to privacy has shown that to a large degree current treatments of the legal rights are incomplete. Ironically, the first attempt to deal with the legal right, that of Warren and Brandeis, was seen to be in many ways the most complete. One might view this account as identifying a very broad, strong right to privacy which is slowly coming to fruition in the law, at least the tendency is towards an ever increasingly strong
right more and more in the spirit of that account. Where will this trend come to a halt? The answer to this question depends upon determining the extent of the moral right to privacy, as well as the ways that this moral right is reflected in the law given the practical and theoretical constraints placed on the expression of any moral right as a legal right. While this latter consideration is beyond the scope of this work, the former is not. The next three chapters consider various alternative means for giving an account of the moral right to privacy. The determination of which account is correct is essential to any complete account of the legal right since it will indicate the limits within which the legal right must be placed. Of course, such a determination is also important strictly within the moral sphere.
FOOTNOTES -- CHAPTER I


2 Breckenridge, p. 137.

3 Breckenridge, p. 138.

4 Breckenridge, p. 141.

5 See the discussion of "negative rights" in Chapter IV.

6 See Chapter IV for further discussion of this issue.

7 Breckenridge, p. 143.

8 Breckenridge, pp. 141-151.

9 Breckenridge, p. 151.


11 A person's reputation is important because it serves as a guide to others in dealing with that person. A person clearly deserves whatever benefits he or she can accrue on the basis of his or her reputation. The reason one has a right to a somewhat idealized reputation comes from the fact that a complete scrupulously accurate portrayal may lead to unfair treatment of the person concerned. There are embarrassing private facts about most anyone which might lead to unfair treatment, facts which are not really a good guide in dealing with that person. Also portions of such a portrayal might be misleading.


14 Chase and Ducat, p. 1129.

15 Chase and Ducat, p. 1124.

16 Ibid.

17 Chase and Ducat, p. 1121.


CHAPTER II

THE DERIVATIVE ACCOUNTS

The discussion of the tort right to privacy in Chapter I included an examination of three different approaches to such a right. One approach envisioned a right to privacy as a type of "shorthand" right composed of several rights which had little or nothing in common. Another approach, one which was also shown to be utilized in several treatments of the constitutional right, presented the right as a right which arose from various other rights previously recognized in the law. Both these approaches also appear in the literature wherein treatments of the moral right to privacy are carried out. This chapter consists of an analysis of two of these treatments of the right to privacy as a "derivative" right. Indeed, this issue of whether the right is a derivative right or not is one of the fundamental issues taken up in the discussion of the right to privacy.

A preliminary examination of the presentations of the right which claim it is a derivative right indicates that there are significant points of disagreement even among the proponents of this position. Divergent answers are given by them to such important questions as to what the
definition of "derivative" is, whether or not such a right is significant,¹ and whether or not the cluster of rights which make up such a right have anything in common. An example of this divergence of views can be seen by comparing the position set out by Judith Jarvis Thomson, in her article "The Right to Privacy," with the one set out by H. J. McCloskey, in his article "Privacy and the Right to Privacy." They employ different definitions of "derivative," McCloskey believes the right is significant unlike Thomson, and Thomson claims the cluster of rights which make up the right have nothing in common, whereas McCloskey believes they do have something in common. It is especially important to note the radical difference between their definitions of "derivative," Thomson bases her definition on the type of definition the particular right is given, while McCloskey bases his definition on the kind of justification given for a particular right.

A close examination of both these articles is undertaken below in order that a determination of the merit of such views may be established concerning the issue of the "derivativeness" of the right to privacy. In the case of each article there are several general similarities to look for. The particular definitions of "derivative" which are employed dictate the structure of each article. Examples play a central role in both accounts, primarily
because an accurate definition of privacy that is widely agreed upon is sorely lacking. The explanation of why we have a right to privacy plays a central role in both accounts, although the nature of the role it plays differs greatly between the two accounts.

Section 1: Thomson's Account

Thomson states her claim that the right to privacy is derivative as follows:

The right to privacy is "derivative" in this sense: it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy.\(^2\)

In other words, this is to claim that each and every right which is a privacy right is also a different kind of a right. This means each and every privacy right also belongs to another cluster of rights, e.g., the cluster of property rights. Implicit in Thomson's account is the claim that each and every privacy right is also a member of some other cluster of rights such that it is not the case that all privacy rights are a subset of the same "other" cluster, nor is it the case that such another cluster is a subset of the privacy right cluster. It is also implicit in Thomson's account that this "other" cluster which the privacy right belongs to cannot just be an artificially defined one. Otherwise, any right which
belonged to a right which was a cluster of rights would also be a member of some other artificially defined cluster right. If this additional restriction was not made almost all rights would be derivative by such a definition.

The structure of Thomson's article revolves around this definition. She begins by presenting several examples which she feels outline various violations of the right to privacy and proposing that in each case there is a right violated besides the right to privacy. She moves on to claim on the basis of these examples that:

(i)t 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.

She concludes with a section outlining the role explanation plays in the definition of a derivative right. Thus, she claims that the right to privacy is a derivative right since each right in the cluster is a member of another cluster, by the simplifying hypothesis which is supported by her examples, and each right in the cluster is explained by reference to this other cluster which includes it, according to her version of explanation of rights.

One of the cases Thomson puts forward concerning a violation of the right to privacy consists of a situation
wherein a man owns a pornographic picture which he wants no one else to see. He attempts to keep anyone else from seeing it by locking it in a wall safe, and only taking it out to look at during the night or after pulling down the shades and closing the curtains. Thomson supposes that in this case it would be a violation of the right to privacy of this man if someone were to use an x-ray device to look at the picture in the wall safe. Thomson then considers how and why this is a violation of the man's right to privacy. She begins by pointing out that since the man owns the picture he has several rights in respect of it, rights which we normally associate together as property rights. She contends "the cluster includes, for example, the right to sell it to whomever you like, the right to give it away, the right to tear it, the right to look at it." She characterizes these rights as examples of the "positive rights" the man has relative to the picture. These positive rights, she also claims, give rise to a group of corresponding "negative rights" which the man has relative to the picture. These include such things as the right that others shall not sell it or give it away or tear it. Thomson also believes that this group of rights includes the right that others shall not look at it.

Thomson is especially careful to stress that there
are two components to these negative rights. Thus the man

has not merely the right to snatch the picture away in order that nobody shall tear it, he has not merely the right to do everything he can (within limits) to prevent people from tearing it, he has also the right that nobody shall tear it. 4

So, it would seem these negative rights engender an associated group of "positive rights" to protect them. She is particularly concerned to insist that the "pure" "negative right" does in fact exist. Thus, if the man were to claim all his "positive rights" to protect the picture from being seen by others, for example, he seals it in an envelope which he places in his wall-safe, it would still be a violation of his rights if someone were to use an X-ray device to view the picture from across the street. It would be a violation of his negative right that it shall not be seen by others. The fact that he was unable by reasonable means to prevent its being seen by others does not make this being seen all right.

Thomson correctly points out that to have a right is not always to claim it. She gives several examples where this is the case. The upshot of her discussion of this type of situation can be clearly summarized as the claim that such a negative right is claimed only when a "sufficient" number of the positive rights such a right
engenders are acted on or claimed.

Thomson thus concludes that this example of a violation of the right to privacy is also a violation of a property right the man has relative to his picture. Thomson then invites us to

compare, by contrast, a subway map. You have no right to take it off the wall or cover it up: you haven't a right to do whatever you can to prevent it from being looked at. And if you do cover it up, and if anyone looks through the covering with an X-ray device, he violates no right of yours: you do not have a right that nobody but you shall look at it--it's not yours, after all. 5

Both the example of the pornographic picture and the example of the subway map seem to be adequately accounted for by reference to property rights. However, the question of how adequate this account is in general arises clearly when we consider the following two examples.

A. Smith is currently undergoing psychiatric treatment with Dr. Jones for an emotional dysfunction that resulted from an incident of sexual abuse he suffered as a child. Dr. Jones keeps an extensive file on Smith in his wall-safe. The C.I.A. wishes to find out why Smith is seeing Dr. Jones because Smith is an influential columnist who is carrying on a campaign to bring the abuse of power by the agency to the public eye, and they hope to use this information to encourage Smith to stop. Pursuant with this desire they employ an X-ray device to scan Smith's
file in Dr. Jones' safe. They have violated Dr. Jones' right to privacy in looking at the file which Dr. Jones owns. The appeal to his right that the file he owns shall not be looked at by others is straightforward here, as it is in Thomson's case of the pornographic picture. However, I think there is also a violation of Smith's right to privacy evident in this example. Any appeal to some property right Smith has relative to the file cannot be as straightforward since it belongs after all to Dr. Jones.

There are two possible ways that Thomson might go relative to this example to try to give an account of a less straightforward property right which is violated. One would be that Smith and Jones have entered into a kind of "contractual" agreement when Smith gives information to Jones which he records in his file on Smith. Part of the agreement would be seen as granting part ownership of the file to both Smith and Jones. It might be viewed as even granting to Smith some of the property rights relative to Jones' filing cabinet so that someone using an X-ray device on the cabinet would violate one of the property rights relative to it that was assigned to Smith. This account fails, however, for the following reason. There is no assignment of property rights relative to either the file material itself, taken as the physical material the information is stored on, nor to the file cabinet. This can easily be seen when we consider that
someone who does anything to the file besides gain the information off of it does not violate any property right that Smith would have relative to it. One could look at the backs of the pages of the file, supposing that he could not read it from the back side, burn it, pour acid on it, etc., without violating any right of Smith's. This rejection assumes that there is no explicit contract which states that Smith owns in part the paper that constitutes the file, or rents the file cabinet, etc. But this is a harmless assumption relative to the force of this discussion since such an explicit contract, if it existed, would mean that contract rights were at issue here rather than privacy rights or property rights.

The fact that only the information on the file seems to fall under the rights that Smith might plausibly claim relative to the file points to the second way that Thomson might take in an account based on less straightforward property rights, namely the view that the information itself is the property of Smith. Thomson explicitly rules out such an approach, however. Rather, she claims, relative to information, that

where our rights in this area do lie is, I think, here: we have a right that certain steps shall not be taken to find out facts, and we have a right that certain uses shall not be made of facts.
So, this approach is voluntarily closed off by Thomson. Of course, one might still examine the effectiveness of such an approach. I undertake exactly this task later in this chapter as well as in the next two chapters. One might also question whether Thomson's overall claim that the right to privacy is a type of derivative or shorthand right might go through if she did make use of this approach. It turns out that she could not. If she allowed that individuals had a property right relative to personal information, then all privacy rights would have protection of personal information as a common characteristic. This violates Thomson's crucial claim that the rights in the privacy cluster do not have such a common characteristic.

There are other examples which are problematic for a straightforward property rights account. Consider the case where B. Doe has a wall-safe in his house. The local police have developed a device which can determine whether or not a certain pamphlet, one which is very damaging to the police although in no way illegal, is in a particular location. Suppose that Doe does not have the pamphlet. The police use the device and determine that there is no copy of the pamphlet in the safe. There is a violation of Doe's right to privacy, but once again there can be no straightforward appeal to Doe's property rights relative to his pamphlet since he does not even have such a thing.
Thomson might contend that there is a straightforward violation of a property right that Doe has relative to the safe. However, if we suppose that the device is a relatively passive one, e.g., all the pamphlets have been impregnated with a specific radioactive isotope which only the police have access to, and the device is a simple Geiger counter-dependent one which will only operate when it detects this isotope, it is hard to imagine what property right Doe has relative to his safe that is being violated. Even if we attribute some implausible property right relative to the safe to Doe, such as a right to exclude others from the safe that would be violated by even so passive an intrusion as that of this device, problems would arise when Thomson tried to account for the severity of this violation of Doe's privacy. The damage done to Doe would be the same if he owned no property at all. I believe that whether or not there is such a right, the superior account of this violation of Doe's right to privacy is outlined below.

Before presenting this account it is necessary to consider a possible objection to the example just given. One might claim that the example does not really involve a violation of the right to privacy. The most plausible way of making this type of objection would be one of two variations based on claiming the use of the device is so
"passive" that there is no intrusion sufficient for there being a violation of the right to privacy. The first variation utilizes the passive nature of the device to claim that its use falls under the classification of allowable means of gathering information for the police department. This variation is wrong, however, because it draws the line between allowable and non-allowable means of gathering information incorrectly. It implies the line is drawn strictly according to how intrusive various means are. The correct procedure is more complex. Granted, it is usually the case that very intrusive means of gathering information are not considered allowable, if for no other reason than they create a considerable nuisance. Indeed, when the intrusion reaches great enough degree most all the activities of the person "observed" might be curtailed or eliminated altogether. It does not follow, however, that the degree of intrusion is the sole determinant of allowability. When the information at issue is personal information about someone, which means can be used to gather said information is partially determined relative to the consent, given or implied (even if unintended), by that individual as to the availability of that information. Since Doe has not given even implied consent for the information at issue to be available to someone using such a device, its use constitutes a
violation of the right to privacy.

The second variation involves disputing the claim that consent plays the role assigned to it by the response to the first variation. This variation rejects completely any notion of implied consent, whether intended or not, playing a role in determining the allowability of various means of intrusion. Rather, it reserves a role only for explicit consent as far as making some means of gathering information allowable that would not otherwise be. For example, Doe could consent to his home being searched by the police even though they had no search warrant. This variation draws the line of demarcation relative to allowability primarily along considerations of interference with person or property. This way of proceeding has been made obsolete by modern technology. It harkens back to an era where the simplest precautionary steps, e.g., pulling down the shades, would protect information from others unless they actually trespassed, or interfered in some other obvious way with one's person or property. Modern scientific advances, e.g., highly sophisticated listening devices, etc., provide the means for gathering information without such brute interferences as trespass, etc. The science fiction device used in the example simply takes this trend to its logical conclusion. Such devices call into question whether there is any "interference" at all, let alone
"brute" interferences like trespass. Thus, a new criterion for allowability is necessary. That this new criterion includes an expanded role for consent is yet another reason to doubt the right to privacy is a straightforward property right. Consent is certainly less clearly connected with considerations of property than are restrictions against brute interference.  

The principal factor in both the examples above concerns personal information about an individual being obtained without that individual's permission. Therefore, Thomson's strongest response to these examples should adequately reflect this fact. The most natural course to follow along these lines, as pointed out earlier, would be to claim that A. Smith and B. Doe have property rights relative to this personal information about them, including the right that others shall not know it. It was stated earlier that Thomson rejects the notion that persons have such a right. Rather, she claims we have a right that certain steps not be taken to find out facts and that certain uses shall not be made of facts.

The outline Thomson gives of which steps are ruled out corresponds in a one-to-one fashion with her overall account of violations of the right to privacy. For example, in the case she presents concerning the man with the pornographic picture, his right to privacy is violated be-
cause he has a right that it shall not be seen. The corresponding right he has relative to the information that he owns a pornographic picture is the right that a certain step, the one whereby someone looks at it, shall not be taken to find out this fact. Given the right mentioned above, and the outline of which steps are ruled out in finding facts, the right that certain uses shall not be made of facts accounts for the violation hinted at in the first example concerning the use the C.I.A. intended for the information about Smith. One might think that the right that certain steps shall not be taken to find out facts would account for the violations set out in both the examples, but the appeal to this right clearly fails relative to the first example, and most likely fails relative to the second example. This is because the certain steps which are ruled out are only those which correspond to straightforward property rights. Since in the first example the file on Smith belongs to Dr. Jones, Smith does not have a straightforward property right that it shall not be looked at. So the violation of his privacy which results from the C.I.A.'s looking at it cannot be accounted for as a violation of his right that a certain step, the one whereby the file is looked at, shall not be taken.

Whether or not such an appeal will work in the second
example depends on the answer to the question posed earlier as to whether there is some property right Doe has relative to his safe that use of the police device violates. Since there is probably no such right, there is probably no corresponding right that a certain step, whichever step such a right would rule out, shall not be taken to find out that Doe does, or does not, have such a pamphlet.

One could also consider the case where the police train a device like the one described in the second example on L. Williams' safe after they discover Williams, unknown to Doe, has placed all of Doe's pamphlets in his safe which contains nothing of his own. This would be a violation of Doe's right to privacy but not any straightforward property right he might have. If we imagine that Doe does not even know that Williams had access to his pamphlets, then there could not even be any recourse to an explanation referring to property rights which arise from some sort of contract or implicit promise.

The only option remaining for a property rights explanation would be to treat the information that Doe does not own the pamphlet in question as Doe's property and go from there. Thomson, as stated earlier, rejects such an account. Still, such an account of the right to privacy as a property right over personal information is of
independent interest so a discussion of this possibility is included in the next chapter.

Thomson decides, after considering several examples of violations of the right to privacy and finding in each case another right which is violated, that it would be a good simplifying hypothesis to assume this was always the case. Indeed she states that these rights are members of a cluster of rights "which is not identical with or included in (though it overlaps) the right to privacy." It is difficult to try to determine the status of this simplifying hypothesis, when it is considered in isolation, for several different reasons. One reason would be the lack of restrictions as to the nature of the cluster of rights different from the right to privacy. This lack of restrictions results in Thomson's referring to some dubious rights like the right to be free of annoyance in my house. This right just seems to be an inferior description of the right of privacy in my home.

A more important reason such a task is difficult follows from an examination of the peculiar nature of "negative rights." It has already been determined that negative rights give rise to sets of "positive rights" to protect them. I believe these positive rights give rise to further negative rights that certain steps not be taken to circumvent the protection afforded by claiming the
positive rights.

An example may help clarify the situation just outlined. Suppose I own a pornographic picture. I therefore have the negative right that it shall not be seen by others. I also have a group of positive rights in virtue of the negative right just mentioned, to protect the picture from being seen by others. In order to claim the negative right I must claim some of the positive protective rights which include the right to place the picture in a sealed envelope. I place the picture in a sealed envelope. If someone were to take the picture out of the envelope and look at it, that person would violate both my right that it shall not be looked at and my right that certain steps not be taken to circumvent the protection of my positive right to place the picture in the envelope, in particular the step of removing the picture from the envelope.

Let us suppose for the moment that the right to privacy is a negative right, or that it can at least be expressed in the form of a negative right, or that it completely corresponds (is included in or is equivalent) to some negative right. Then any violation of the right to privacy would also be a violation of some other negative right. This would not make the simplifying hypothesis true however, since the other cluster of rights does not
overlap the privacy cluster. Later in this chapter I will consider the ramifications of this, as well as discussing the relation between the right to privacy and negative rights.

Thomson concludes her article with a section wherein she argues that the right to privacy is a derivative right. Before considering what sense of derivative right she employs, it is important to note that she believes the rights in the right to privacy cluster do not have any significant common characteristic. This belief, in conjunction with her belief the right is derivative, is at the basis of her willingness to dispense with any mention of the right to privacy other than as a convenient "shorthand" term for a loose aggregate of genuinely significant rights such as property rights or rights over the person. This view flows from her claim that

the right to privacy is "derivative" in this sense: it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy.11

The "derivative"-ness of the right to privacy obviously depends on the simplifying hypothesis being true. This is the case because the simplifying hypothesis guarantees each right in the privacy cluster is also a member of another cluster of rights. Thus having any one of these rights can be explained by reference to a cluster other than the right
to privacy cluster. This means that any sound argument to the effect that the simplifying hypothesis is false will prove that the right to privacy cannot be derivative in the sense employed by Thomson.

One might think that another way of showing that Thomson is mistaken about the right to privacy being a derivative right in the sense just specified would be to show that all the rights in the privacy cluster had a significant common characteristic. While finding such a characteristic would be damaging, it would not show the right was not derivative. Each right in the privacy cluster might share such a characteristic and still be explained in terms of membership in some other cluster. So an argument against the simplifying hypothesis is still needed. Such an argument is presented below.

Let the right to privacy be the right to control certain information and certain of the means of access to it. This is equivalent to the right that others shall not know this information and/or use this information in certain ways and others shall not use certain of the means of access to such information. This is a distinct cluster of rights from the cluster of property rights. Therefore, the simplifying hypothesis is false. There must of course be a defense of this definition of the right to privacy which includes a specification of which information is involved,
which means of access, and the extent of said control. The construction of such a defense is a difficult task and can only partly be presented here. I believe the most easily understood procedure for this undertaking involves consideration of some examples which support the use of such a definition along with a presentation of a discussion of the underlying basis of such a right.

Let us begin with a review of some previously discussed examples of violations of the right to privacy. Thomson claims that the man with the pornographic picture has his right to privacy violated when someone employs an X-ray device to view it while it is in his safe. She claims it is a violation of his right that the picture not be looked at by others. She further claims that this latter right is in both his property right cluster and his right to privacy cluster. This last claim, on my view, is false. There are several options here as to which rights of the man are being violated. Suppose the man does not care in the least if someone else knows he owns a pornographic picture but is merely concerned that no one else shall look at it and derive free satisfaction from something he spent a great deal of money for. So he places it in his safe. The use of an X-ray device to view it will thus be a violation of his negative property right that others shall not look at the picture, a right which he claimed by
claiming his positive protective right to place it in the safe. There is, however, no violation of his right to privacy, in particular his right that others shall not know he owns the picture, since he did not claim this negative right by claiming any of the protective positive rights this right engenders. It could be the case that rather than putting the picture in the safe for the reason stated above, he places it there so that no one will know that he owns a pornographic picture because he feels other people will respect him less if they were to discover such a fact. In this case there would be a violation of his right to privacy, in particular his right that others shall not know he owns the picture, if someone were to use the X-ray device. There would also be a violation of his right that certain steps not be taken to find out the fact he owns the picture, in particular that it not be looked at.

I believe we can now see why Thomson was misled into thinking the simplifying hypothesis was true. The right that others shall not know certain information is closely connected with the right that others shall not use certain steps to obtain this knowledge. I think we can see from the above that which steps are ruled out are very often determined to some degree by property rights, or analogously rights over the person, which may also be operative in the situation. Thus, the fact that we own the
picture and the safe gives rise to rights that they shall not be looked at which correspond to prohibitions against their being looked at as a step in determining the knowledge by others of the fact we own such a picture. So, contrary to Thomson's simplifying hypothesis, every privacy right is not also a member of another cluster but rather most, if not all, violations of a privacy right involve violations of other rights which belong to other clusters of rights. The fact that there are always, or almost always, violations of other rights involved in violations of the right to privacy should not be surprising since the right to privacy appears in the guise of a negative right which gives rise to other positive rights which are claimed in order to claim it, thereby engendering the group of negative rights that certain steps are not taken to circumvent the protection of the positive rights claimed. In other words, we claim a privacy right by claiming some positive rights; others come to know the fact by some means; the privacy right is violated because others know the fact; some other right is violated because it rules out the means which were used.

The earlier case of A. Smith can now be dealt with. His right to privacy is violated because others come to know by illegitimate means certain personal information about him. There is, however, no straightforward violation of any of his property rights. (It may be the case that
there is some type of property right violation here if one believes Smith is the owner of such information and that such ownership implies a property right that others shall not know it.) Whether or not there is some property right violated, the privacy right violated here takes precedence since it is obviously the most important consideration in ascertaining harm to Smith or in determining the wrongness of the C.I.A. action.

We can also now account for the violation of B. Doe's privacy right since the use of the police device to determine the information that he does not own the proscribed pamphlet brings about knowledge for the police which Doe has a right that they shall not know. There is no need to worry that Doe does not own such a pamphlet and therefore cannot have any property rights relative to it. Property rights can be seen to play a part here though in the contribution Doe's property rights relative to his safe make in the determination of which steps are ruled out in his right that certain steps shall not be taken to find out such information about him.

I have stated that I believe Thomson was led astray with the simplifying hypothesis because violations of the right to privacy are always, or almost always, accompanied by violations of property rights or rights which are closely connected to property rights (or analogously, rights over
the person). It is important to understand what the crucial element of this mistake is. An example will help clarify the situation. John Willis is a Vietnam veteran. He has always been known as a quiet, peaceful person since he was a small child. His parents placed special emphasis on non-violence throughout his childhood, including strong religious overtones. John's best friend served with him in Vietnam. His friend was of a similar background and they had many long talks about the violence and killing they witnessed, and participated in, during the war. His friend was killed in action and left John many photographs of the war which he had taken to capture the horror of it all. Several of these pictures show John standing over enemy soldiers he had obviously just killed, many of whom were very young. John, upon returning home, began working for a world peace organization because of his very real personal commitment that such a war not happen again. He keeps the photos, even though he is extremely ashamed of the killing, as a constant reminder of what he is working to prevent. He has a very strong desire that no one else ever see the pictures in which he appears because of his feelings of shame, and because of his belief that others would get a very erroneous picture of what kind of person he was if they saw them. He keeps these pictures in his safe. If someone were to train an X-ray device on his safe to view his
pictures, they would violate his privacy right that they shall not be seen by others. One might claim that such an action also violates his property right that they shall not be seen by others, but this would clearly be a far less important wrong. The key to understanding why the privacy right violation takes precedence is to examine the motive John had for placing the pictures in his safe thereby claiming his right that they shall not be seen by others. He did it to prevent the harm to himself which he anticipated if others came to know the facts the pictures illustrated. He had a right to pursue such a motive because he was a power unto himself, an entity separate from society in general. In essence, this is to say that as such a separate entity, he has a right to preserve the integrity of his individuality by setting up barriers against the intrusions of others. This is very different from the case where John would place pictures in a safe to keep others from seeing them in accordance with his property rights. He might do this as a result of a mere whim he has that others shall not look at them. Thomson has made a confusion between distinct rights which happen to be described in the same way. They are distinct because they arise from very different considerations and because they can differ considerably in the degree of wrongness their violation results in.
Thomson might claim that the argument above given to show that the privacy right takes precedence is really just an explanation of why the property right is so important in this case and why its violation would be so harmful to Willis. It is certainly the case that the above lays out why the act of using the X-ray device is so harmful to Willis. As to considering the above as merely an explanation of why the property right is so important, I must disagree. Since there is a possible ambiguity in interpreting what is to be explained here, I will take the point to be explained here as simply being whether or not the above is a property rights explanation as to why this act has the degree of wrongness that it does. It is necessary to distinguish between three separate things in the discussion of the wrongness of this action. In general, when considering the wrongness of an action we might examine the situation of the person doing the act, the wrongness of the action itself independent of the preceding, and the evil which results from the act. In the current case we can dismiss the first type of consideration because there is no data as to the situation of the person using the machine, i.e., no presentation of possible extenuating circumstances, etc. We can also dismiss the last type of consideration from this discussion although the reason we can do so is much more involved. What is at issue here is just the
degree of wrongness of the particular action under discussion. This is the usual way that we consider such cases. This is most easily seen by way of considering a straightforward example. Take the case of person X stealing a car. We can ignore the question of extenuating circumstances since we do not have any information about X. Suppose X has stolen the car from person Y for whom the car is his only means for getting to his job which is his sole means of support. Compare this with the case where X steals the car from person Z who is independently wealthy and owns ten cars. The evil that results from X stealing Y's car is greater than that of X stealing Z's car, but the degree of wrongness of the act itself is the same in both case. One might be tempted to claim that this is not true because if the act of X stealing Y's car was described as X stealing Y's only transportation to his sole means of support, then the degree of wrongness of this act would be greater than X stealing Z's car for the same reasons that are given for saying that the resulting evil is greater. The justification for claiming the two descriptions are equivalent in this case is based on the contingent identity of the two descriptions. However, it is not legitimate in this situation to claim that the two descriptions are equivalent. It is only legitimate to claim that they might be equivalent. This is because the second description is ambiguous between
X's simply stealing the car and X stealing the car as a means of removing Y's only means of transportation. To claim that the degree of wrongness of the act described in the second way is worse than X stealing Z's car one may resolve the ambiguity only in the second way possible. This is not permissible in this case because it makes an unjustified claim about the intentions of X. Notice also that the act described only in the first manner can be assigned a degree of wrongness solely on the basis of property rights considerations while this is not the case when the ambiguity of the second manner of describing the act is resolved by reading in particular intentions of X in the manner suggested.

Since it is now established that we are concerned with determining the degree of wrongness of the act of using the X-ray device itself, we can proceed to ascertain whether the argument in question that the primary wrong is done relative to Willis' privacy right or solely relative to his property right. The determination of the degree of wrongness of an act itself which is a violation of a property right depends on two factors. One is made up of a weighting developed relative to the potential harm done to an owner by possible violations of his property rights to the particular type of property in question. The other factor is a weighting of the amount of potential harm to an
owner that the particular type of interfering act might cause balanced against the degree of likelihood of each level of harm. The harm discussed in both factors refers only to harm against the owner's property rights. For example, in the case of X's stealing Y's car the degree of harm done Y relevant to deciding the degree of wrongness of the act itself is not the harm done Y by his loss of his sole means of transportation to his means of support. This latter degree of harm brings in nonproperty considerations.

The determination of the degree of wrongness of acts violating privacy rights is a more complicated procedure, but this procedure is also often heavily dependent on the amount of potential harm such violations might do the offended person. The Willis example is such a case. Notice that the amount of potential harm done Willis relative to the use of the X-ray device by both the violation of his property right that the pictures not be seen by others and the violation of his privacy right that the pictures not be seen by others is dependent to a certain degree on Willis' intentions when he put the pictures in the safe. If Willis had put the pictures in the safe solely to keep them from deteriorating as quickly as they would if left in the open the potential harm relative to both his property right and privacy right that they not be
seen by others would be much less than if he had placed them in the safe so that others could not see for some other reason. Perhaps he wanted to use them as part of an article he would be highly paid for. He wanted to do the article for the money and also to give many others access to valuable information contained in the pictures, and because the article would contain information that would clear him of very embarrassing interpretations of the pictures that other people would make if they only had access to the information contained in the pictures (his privacy interest in putting them in the safe). Thus we can conclude that in the Willis case as it is presented the argument which is given does in fact show that privacy rights considerations take precedence in establishing the degree of wrongness of the act of using the X-ray machine because the motivation Willis had for placing the pictures in the safe indicates that the potential harm to Willis relative to his right to privacy is greater than the potential harm to his property right that the pictures not be seen by others.

There is a possible objection that can be made against the preceding discussion. Someone might claim that what has been established is just that the act in question results in more harm, or promotes a higher expectation of harm, relative to privacy considerations than it does
relative to property rights considerations, rather than showing the intrinsic wrongness of the act is greatest relative to privacy considerations. The objection has both a strong point and a weak point. The weak point is that it fails to adequately take note of the necessary connection between the degree of potential harm of an act and its intrinsic wrongness. The more the potential degree of harm, the more the act is intrinsically wrong. The strong point of the objection is that it quite correctly suggests that there is more to the degree of intrinsic wrongness of an act than just the potential degree of harm which might result. There is more than just a quantitative element, the potential degree of harm, there is a qualitative element also. This latter element is determined by the type of harm that might arise from the act in question, or what is more likely, the interplay of various types of harm which might result from the act.

The above indicates that a calculus of the degree of wrongness of acts is very complex indeed. The components of such a calculus will be probabilities for the extent of the potential harms of each type along with a multiplicative factor assigned to each type of harm. The multiplicative factor providing a quantitative representation of the qualitative nature of each type of harm. Thus the earlier discussion at issue must be augmented with a comparison of
quality of harm relative to privacy and property considerations. The conclusion of the earlier discussion will obviously be reinforced if the quality of harm relative to privacy considerations is more, or equally, serious as that relative to property considerations.

The problem is that it is very hard to arrive at any determination of the comparative seriousness of these types of harms. Part of the difficulty arises from the close interconnection that can exist between these considerations and other considerations, including their mutual interconnection. For example, my life might depend on my control of some of my property. Thus to confiscate this property would interfere not only with my property rights, but also my right to life. These possible interconnections present a real dilemma as to how to proceed. Should these possible interconnections be included in the analysis of the seriousness of the harm that might result from an act relative to privacy or property considerations? I believe it is safest to assume that they should be included. This is because of the existence of derivative rights which only obtain because they protect such interconnecting considerations.

Still, despite the aforementioned complicating factors, I believe in the example at issue, the potential harm relative to the privacy considerations is more serious
than that relative to the property considerations. This is because privacy considerations are based ultimately on fundamental characteristics of being persons qua separate moral entities, whereas property considerations are not so connected. They are "further removed" from our natures as persons. This difference between privacy and property considerations contributes more to the "primacy" of privacy over property considerations in the determination of the degree of wrongness of an act than just the greater seriousness of potential harm relative to the violation of the right to privacy. It indicates that this primacy still obtains even in the absence of any harm at all.

There can be harmless violations of privacy which are intrinsically wrong in that they show a lack of an important type of respect for persons as independent moral entities. Not only is the type of disrespect exhibited by property rights violations less serious, or important, there is some valid doubt as to whether there can be harmless property rights violations at all. If one accepts, as some do, that there are harmless violations of the right to privacy with a nonzero degree of wrongness, while denying such violations to property rights, then this can stand as evidence for the greater degree of wrongness of acts which might be viewed as violating both privacy and property considerations, if these acts are sufficiently similar to the example at issue.
(This last proviso is included to restrict the discussion to relevant cases, obviously there are acts which principally violate property interests while only peripherally violating privacy interests.)

There may yet remain those who feel Thomson has a plausible response to my argument that the Willis example involves a privacy right which is not also a property right. The suggestion is made that rather than an explication of a nonproperty privacy right the above just concerns a property right violation which is made serious by the harm it causes. This objection basically rejects my presentation on how we normally determine the wrongness of an action. There is, however, a response to be made to this objection independent of my presentation of how we normally determine the degree of wrongness of an action. Imagine that Willis' friend had left the photos to his sister rather than Willis. Had someone trained an X-ray device on the friend's sister's safe the harm done to Willis would be substantially the same, yet how could Thomson account for this in terms of a property right violation of some right of Willis. That Willis has a legitimate right relative to the pictures he appears in is well recognized in the law, as was pointed out in the previous chapter in the discussion of the tort right to privacy. If the friend's sister had the pictures published for commercial gain, or the pictures placed
Willis in a false light, as Willis felt was sure to happen, Willis could sue the sister supposing he had not given his consent for such publication. Even if Thomson tried to use a property right argument wherein the information contained in the photos belonged to Willis the simplifying hypothesis would be shown to be false. This is because all privacy rights would be wholly subsumed under the property rights cluster.

Before leaving this extended discussion of the Willis case, it is useful to review what has been established. The project is to show via this example that Thomson has confused two distinct rights which happen to be described in the same way, one a privacy right, the other a property right. Also, the example is supposed to show that there are cases wherein the violation of the privacy right takes precedence over the violation of the property right. The objection is then considered that the argument purported to show that the privacy right takes precedence in this case is actually an argument which explains why the property right is so important in this case and why its violation would be so harmful to Willis. This objection is refuted by way of arguing that the degree of wrongness of an act violating Willis' privacy can only be accounted for by way of an account which refers to a distinct privacy right which takes precedence over his property right.
Thomson also makes the mistake of claiming that the right to privacy is a derivative right because having each right in the cluster can be explained by reference to another cluster of rights. Consider the right that I have that others shall not look at an old love letter I keep in my safe. One cannot explain my having this right, taken as a privacy right, by reference to the property rights I have relative to owning the letter. This can be seen when we note that it would still be a violation of my property right, that it shall not be looked at, of equal wrongness if all the ink had completely faded away. Yet it would cease to be a violation of my privacy right altogether. We could capture this difference by a more careful description of the particular rights involved. Taken as a property right, we would say the right that the letter shall not be looked at. Taken as a privacy right, we would say the right was the right that no one shall look at the letter and gain the information such looking would impart.

All the examples that Thomson presents can be treated in the same manner as those I have presented so far. There is a set of examples which she could have used which present a much greater challenge. These examples are a subset of those which are concerned with tort violations of a right to privacy. Such cases are the most persuasive examples of particular privacy rights which actually belong
to the cluster of property rights also. One such example would be the unauthorized use by person X of the name of person Y for X's commercial advantage. There seems to be little, or no, significant difference between such a privacy rights violation and a straightforward property rights violation such as X making a copy of a photograph that Y had taken of some newsworthy event and then selling it to Time magazine.

There are at least four different responses which can be made in light of this set of examples. One would be to try, as I have done relative to the examples actually given in her article, to show that such privacy rights only appear to be members of the property rights cluster and that a more careful inspection indicates that they are not. A second response would be that such privacy rights do in fact belong to the property rights cluster, but still give all the previously presented arguments that, contrary to Thomson, not all privacy rights are members of another cluster. The third response that could be made is that such violations are indeed property rights violations but deny that they are privacy rights violations. The fourth response would be that it is a property right, but that, contrary to Thomson, so are all the rest of the privacy rights.
The first response does not seem to be a plausible alternative to me. The right at issue does indeed appear to be a straightforward property right. Consideration of the fourth alternative can also be put aside but for a very different reason. While this alternative is certainly plausible, it is best considered as part of an overall account of the right to privacy as a property right. This possibility is considered in the following chapter.

The second alternative is certainly plausible, especially in light of the effort undertaken in the previous pages to show that many privacy rights are not also property rights, at least not straightforward property rights. However, pursuing this alternative raises what I consider to be a critical problem. How is it that such a right is a privacy right at all? A similar question to ask is how does the use of my name by someone else intrude on my privacy? There is simply no intrusion here, even if we are willing to take the obtaining of information as an intrusion. Names are just labels and do not have any information as content. While names may affect who we are, they are not part of who we are. They do not impart information to others about us the way that a picture might. They are our property however, at least enough that any financial benefits that can be derived from their use belongs to the person so named. Note that this only applies to the use of
someone else's name for commercial gain. Where the use of the name is involved in placing someone in a false light the tort right to privacy or against defamation can come into play. But in these cases our privacy is an issue because more than our name is involved, our reputation is at issue. The use of someone's name as part of the act of placing that person in a false light is an intrusion on privacy. Thus, we are led to the third alternative. Whether we adopt this alternative or not depends on the outcome of our investigation of the right to privacy as a property right.

Section 2: McCloskey's Account

H. J. McCloskey, in his article, "Privacy and the Right to Privacy," also puts forth the position that the right to privacy is a derivative right. The particular way he thinks the right is derivative is very similar to approaches previously presented in the first chapter. Indeed, his type approach has an analogue in both the literature on the tort right to privacy and the constitutional right to privacy. The basis of this similarity between these approaches revolves around their use of the central notion that the right to privacy is based on previously recognized rights in torts, constitutional law, and moral philosophy, respectively. Thus, the examination of
his article serves both as a useful expansion of the legal approaches previously discussed, and as an alternative to Thomson's approach which itself could be seen as an expansion of a legal approach.

McCloskey claims the right to privacy

. . . is a derivative right, derived from concern for other values and rights, a conditional right, one that not simply may be overridden but that ceases to be any sort of right at all, when respect for privacy is not dictated by concern for these other values and rights. This is to argue that it is not an intrinsic, prima facie right like the right to life, one which remains a real right even when it is legitimately overridden, and which may give rise to claims and duties when overridden.12

So he uses a different definition of a "derivative right" than does Thomson. Indeed, the definitions are so different that the two accounts may be seen as representatives of two diverging approaches to making the claim that the right to privacy is derivative. While Thomson claims that the definition of the right to privacy indicates that it is derivative, McCloskey claims it is derivative because it is justified on the basis of other rights and values.

Given two such widely different central themes, one correctly expects the articles are not mutually supportive to any great degree. Of course, if the right to privacy is derivative in Thomson's sense, it follows trivially that it must be derivative in McCloskey's sense. McCloskey also differs from Thomson in that he believes the rights in the
privacy cluster are sui generis. Unfortunately, this claim, along with his definitions of "derivative right" and "privacy," constitute almost his entire positive portion of his article. Most of the article, and in particular the section of greatest interest concerning the grounds of the right to privacy, consists of criticisms of attempts to find a single consideration which can serve as the basis of a right to privacy. However, an examination of these criticisms is valuable for at least two reasons. One is that several of these criticisms seem to present serious problems for their targeted views. The other reason is that such an examination reveals several potential arguments concerning the derivative nature of the right to privacy.

McCloskey begins with a discussion of the right to respect for privacy as based on the utility of such respect. He concedes that invasions of privacy may cause, permit, or lead on to great evils. This fact provides the basis for one of the arguments of the type in question. The claim is that we should acknowledge a moral and a legal right to privacy because the harm which results from invasions of privacy provides us with sufficient reason for respecting and protecting privacy. McCloskey implies in his discussion of this claim that the distinction drawn between rights which are both moral and legal, and rights
which are solely legal in nature, is based on the fact, if it is a fact, that rights which are solely legal are those which give protection where if there was no such protection some harm might be done.

The moral-legal right distinction is especially important in the second version of the argument in question. McCloskey argues against the claim that the right to respect for privacy is based on the utility of such respect on two counts. The first is that he claims that in each case the harm that results from the violation is one which ought to be borne for the greater good of liberty. The second is that for such a view to be correct the harm which results must be one involving feelings which are ineradicably innate, and not feelings which are merely socially inculcated since the latter could be changed by education and training. He claims that for these two reasons there is as yet no acceptable case for either a moral or legal right to privacy based on the utility of respect for privacy. His first objection will be discussed below. However, two observations can be made immediately about the second. One, McCloskey fails to realize that one might undermine his first point by using the second by way of applying it to the feelings of persons about having their liberty constrained. Two, his second point is not nearly as final as McCloskey would have us believe. One way this
can be seen is to recognize that even if the hurt was only caused by socially inculcated reasons, as long as they were still operative there would continue to be a need for a legal, and an extrinsic justification for a moral, right to respect for privacy. There would also be the somewhat more indirect chance that there was some utility to having the socially inculcated feelings themselves, and thus a case for both a moral and a legal right to respect for privacy.

McCloskey moves on to what he claims is the more basic utilitarian argument that invasions of privacy involve or lead on to other evils. He points out that

(t)he Peeping-Tom (but not the Peeping-Jane) may be a rapist and not simply a voyeur, the spy may be a blackmailer, the industrial spy a thief, the police and security agent may harass us, disrupt our private lives, ruin our careers, and the like. And all may significantly reduce our purely private enjoyment of our own.

McCloskey claims that such an argument can only apply to a legal right to privacy and not a moral right to privacy. This is because the protection granted privacy is done relative to other evils which might result from invasions of privacy which do not warrant protection on the merits of privacy alone. McCloskey must think that protection based in such a way is a sufficient, although not a necessary, condition for a right to be solely a legal right. If this condition was taken to also be a necessary condition, one
would have to reject McCloskey's argument out of hand. He claims that the evils which might result from invasions of privacy such a right would protect against would all be violations of non-privacy rights; the rights to bodily integrity, life, property, and liberty. He discusses the argument by way of weighing the goods that are secured against the goods lost and the evils brought into being. The brunt of his response revolves around the evils brought about and goods lost as a result of the constraint on liberty which would result from the protection of a legal right to privacy. While he does not reach any definite conclusion as to which side of these considerations is the most weighty, he does claim that in particular areas of conflict between privacy and liberty no legal protection is mandated unless the calculus is clearly in favor of privacy.

Thus, McCloskey takes a similar line in response to both the arguments from utility. His main concern is any constraint of liberty, the underlying message being that most probably any legal protection of privacy comes at too high a cost in such constraint. McCloskey does admit that any calculus to determine the utility of protecting privacy versus the disutility of the constraint on liberty would be a very complex one. Yet I feel the tone of his remarks may be misleading as to the nature of such a
calculus. The problem is that much of what McCloskey says about liberty is of the form that any constraint of liberty is an evil. So a legal right to privacy which constrains the liberty of Peeping-Toms to peep will be as evil as the constraint not counter-balanced by the harm it prevents. This can be interpreted in a too simplistic manner as to what role it plays in the calculus, a manner consistent with the tone of McCloskey's comments. What is at issue here is the overall utility of having, or not having, a legal right to privacy. This depends not merely on the fact that some activity is denied the Peeping-Tom, but also on the degree and frequency of such constraint. This will vary a great deal under different empirical conditions. There is very little constraint if everyone lives a hundred miles apart, more under very crowded conditions. This oversimplification in considering the bare fact of some general constraint of liberty as opposed to actual instances of constraint is evident in his response to the first argument that in each case the harm caused by invasions of privacy should be borne by the victim for the sake of the greater good of liberty. Suppose someone picks up a phone extension and overhears a conversation which obviously shows the owner of the house is a homosexual. The owner of the house hears the click as the extension is hung up and feels great shame and fear of publicity. Given
these particular conditions, it is not clear to me at all that the liberty to eavesdrop is the greater good here. This is not to say that in general liberty is not a greater good than privacy, but rather the picture (calculus) is more complicated than McCloskey treats it for the most part.

McCloskey also finds considerations of liberty playing a central role in the discussion of a right to privacy based on freedom. He identifies two such candidates in the following passage:

Arguments for privacy from freedom have been urged, even though to protect privacy is to restrict freedom. What is construed as an argument from freedom is that from the claim that the individual has a right to control of knowledge about himself. This is not an argument from freedom; not to have such exclusive control is not to lack freedom. To be granted such control is to be granted something distinct from and other than freedom. Another argument which relates privacy and liberty is to the effect that to invade privacy is to invade liberty—the person who is spied upon is unfree. He wishes to act under conditions free of observation and is unable to do so. A curious view of freedom is involved in this claim, it being suggested that any one doing what another person desires he not do is infringing his enjoyment of his liberty. 14

Despite his low opinion of such efforts to link privacy and freedom, McCloskey feels there is some potential for gain in considering invasions of privacy which are also invasions of liberty. His main interest here is the
problem which arises because we must restrict liberty in order to protect liberty. This situation can also be true of privacy, according to McCloskey. He believes that for this reason any case for the legal protection of liberty will extend to the same degree for the legal protection of privacy.

McCloskey brings up the calculus concerning privacy and liberty again at this point. He contends that "each restriction of privacy for the sake of liberty must be weighed against the loss of liberty involved in the legal protection of privacy and in the light of the liberty which is protected." He correctly concludes that such a calculus will not justify any blanket protection of the right to privacy. However, he makes the same mistake of oversimplification concerning the conclusions one should draw given the preeminence of liberty in general over privacy. He claims that

(m)uch liberty, more importantly, the liberty to inquire and to gain knowledge, more particularly about man and men, the liberty to engage in psychological, historical, biographical inquiries, and to publish and to share with other scientists, historians, thinkers, the world, what one has discovered, is a basic liberty, one that is the very core of the structure of our liberal society. So to protect privacy that this liberty, and similar kinds of liberties, are curtailed or lost, is to threaten the very life of our society as a liberal society.
His mistake is clearly seen in his claim that if these liberties "are curtailed or lost" the life of our society is threatened. This is entirely too strong a claim. The preeminence of liberty in general over privacy justifies only the use of "lost." Most, if not all, of the facts needed for the tasks above can be obtained by means which are not invasions of privacy. Despite the many problems McCloskey's treatment of privacy and liberty suffers from, there is a core consideration lurking here which is of great importance. This will be taken up in the last part of this chapter.

The crucial segment of McCloskey's article as concerns the right to privacy being a derivative right is the one where privacy is examined to determine if it is valuable for its own sake. McCloskey believes, as does Thomson, that there is no previously proposed theory of privacy which indicates that it has some intrinsic worth or value. He contrasts this with such things as the life of persons, justice, and the self-development of persons. He also mentions liberty, although he grants that the source of its value might be its role in being a person instead of something intrinsic. McCloskey argues that this lack of intrinsic value is a consequence of the nature of privacy. He claims privacy has to do with a lack of something and therefore its definition must be essentially
negative. He questions whether the absence of something can have intrinsic value since "any value it has must relate to the absence of evils or to this absence being a condition of goods, or the like." The clause about absence of evils is important to note since its use indicates rights against being harmed will be derivative rights; e.g., against slander, libel, assault, battery, extortion, etc. Indeed, many of the rights we have seem to be expressible as a negative right. Of course, McCloskey is only concerned with claiming those that are "essentially" negative are derivative. What he is looking for in basic rights is an intrinsic value similar to that which pleasure and happiness have.

The groundwork has now been laid for some conclusions to be drawn in reference to McCloskey's contention that the right to privacy is a derivative right. The obvious starting point for this task is the definition of "derivative right" that he uses. I believe there are several problems with this definition. If we make the assumption that there are two kinds of rights and that every right is one of these two types, then this definition draws an unlikely dividing line between basic rights and derivative rights. It suggests that the only rights which are basic rights are those which involve some intrinsic value and "which may give rise to claims and duties when overridden." Derivative
rights are only conditional, being based on other rights and values, and cease to be any sort of right at all when they are not dictated by concern for these other rights or values. This means that they cannot give rise to claims and duties when legitimately overridden. The problem here is that there seem to be at least two kinds of rights which do not fit either classification. One type would be rights which relate to the absence of evils, e.g., the right against slander. They are not conditional on other rights or values and may legitimately be overridden and yet still give rise to claims and duties, thus they are not "derivative." However, since they do not protect anything of intrinsic value, they are not "basic" rights. Another type of right which does not fit either category is made up of rights like the right to liberty, if one is a member of those who take the source of the value of liberty to be its role as an essential element and condition of being a person instead of something intrinsic. As such, it would not be conditional on other rights, therefore not derivative, but it would not be basic either since it would have no intrinsic value. Since it is clear from the text of McCloskey's article there are only two types of rights, the definition must be altered or rejected.

The definition of "derivative right" may be adequate though when it is stripped down to its essential condition
that any right is derivative when it is dictated solely by concern for other rights and their corresponding values. This suggests the main problem must lie with the definition of "basic right" employed. Is the right to privacy a right which is dictated solely by concern for other rights and their corresponding values? I believe the answer to this question is no. Rather, I think the right to privacy is like the right to liberty in that it does not have an intrinsic value but rather arises from the condition of being a person. Note that McCloskey claims it can be argued liberty has value because it plays an essential role, and serves as a condition, of being a person. I do not mean to claim privacy plays such an essential role, or that it is a condition for being a person. Instead, I believe both privacy and liberty receive value due to the very nature of personhood. I believe this is the only source of value in the case of privacy while liberty has an additional source of value.

Let us consider the right to liberty. A certain amount of liberty is often taken to be a necessary condition for being a person. This provides a strong justification for a right to liberty. Privacy does not play such a role in being a person so cannot have such a justification. However, this justification would seem to only extend to whatever degree was necessary to protect personhood. We
commonly feel that the right to liberty is a much more far-reaching right. Where does the justification for a right of such greater scope come from? Surely part of this justification is to be found in the fact that an increased scope of the right to liberty is necessary to secure other goods we commonly claim to have a right to, e.g., self-development. However, the preceding still falls far short of an explanation for the entire scope of a right which is commonly taken to be so vast that the only major justification for limiting liberty is to protect liberty. I believe this added justification is to be found in the recognition of the nature of being a person. Persons are "powers unto themselves." They are self-motivating, self-activating entities. It is the recognition of, and respect for, this feature of persons which completes the justification of the right to liberty. This latter part of the justification also serves as the justification for the right to privacy.

This account provides a ready explanation of the primacy of liberty over privacy. Liberty, in some minimal quantity, plays an essential role in being a person, while privacy is merely dictated by the respect and recognition of the nature of being a person. We also find that it is often the case that liberty must be restricted for the sake of protecting liberty. We need to restrict liberty
justified by reference to other goods and by way of respect and recognition of persons to protect liberty which has an essential role in being a person. We often restrict liberty justified by way of respect and recognition of persons in order to protect liberty justified by reference to other goods, etc. It is also apparent that we should restrict liberty justified by way of respect for, and recognition of, persons in order to protect privacy justified by the same means, when such protection best promotes such recognition and respect.

McCloskey does consider the possibility of privacy being dictated by respect for persons. The account he examines is that of C. Fried which relates respect for persons, respect, love, friendship and trust. Fried contends that these latter three are only possible if there are significant amounts of privacy available to persons. McCloskey rejects this argument because no such necessary connection has been proven. There are also several counter-examples to such a connection. McCloskey argues against the connection of respect for privacy and respect because he thinks

(r)espect for privacy would seem to be dictated by respect for persons only in that persons commonly wish their privacy to be respected, hence in so far as we ignore such wishes, without good reason, to that extent we show lack of respect. If we have good reason to ignore a person's
wishes, for example, if we suspect that he is concealing a tumour which is now operable but which will soon become inoperable and fatal, we are showing no lack of respect in intruding on his privacy in this matter. This suggests that it is not respect for privacy as such but respect for the wishes of persons that is dictated by respect for persons.17

I believe that McCloskey has confused two different senses of "respect for persons" in his counter-argument. One sense is best captured as the personal "respect for a person" that might be meant in a statement like, "I respect my father." The other sense is best captured as "respect, or recognition, of the nature of personhood." This sense is what gives rise to "respect for the wishes of other persons." "Respect" in the first sense is dependent on an individual's coming to know and admire various character traits of another individual, while the second is solely dependent on understanding what a "person" is. McCloskey's argument goes through only when "respect" has the first sense, but not when it has the second. Thus, I might intrude on the privacy of my father to determine if he has such a tumor without showing any lack of personal respect, but I have shown a lack of respect for, and failed to adequately recognize, the nature of his personhood.

One might object to the contention that McCloskey has confused the two types of respect in the example above. The objection is well taken in the sense that the argument
about the confusion made is overly simplistic. The true status of this example involves more than just "respect for a person," call it respect₁, and "respect for the person," call it respect₂. Actually, we might say there are several types of respect that might be said to be operative in this example. In essence, these types of respect can be seen as subtypes of respect₁. There might be respect₃, the respect for human life. Certainly, one might include respect₄, the respect for a person's wishes. Another candidate would be respect₅, the respect for a person's "silence." The list could be extended almost indefinitely, but is sufficient for our purposes approximately as is.

McCloskey states in the last sentence quoted above that the general respect for persons dictates more the respect for the wishes of persons than respect for privacy. Of course, McCloskey must only mean respect for some of the wishes of persons or his claim is obviously false. I have absolutely no obligation to respect someone's wish to be a helium atom. Which wishes am I to show respect for? The parameters for the range of wishes to be respected are limited first by the nature of being a person. For example, since persons are self-activating entities a set of candidates for inclusion within this range will be wishes concerning the undertaking of various projects or tasks. Another major consideration in determining the
appropriate parameters will be moral constraints. I am under no obligation to respect someone's wish to commit mass murder.

So, before determining if respect for persons gives rise to respect for a person's wish, we must determine if such a wish is within the range sketched above. Certainly there is no moral constraint against privacy in ordinary circumstances. Also privacy has a more than adequate connection with being a person. Indeed, privacy is one way we promote a very fundamental characteristic of being persons. That characteristic is persons are self-activating, separate moral entities. Showing respect for privacy is thus one means whereby everyone shows respect for this basic quality of being a person.

But the above clearly indicates that not intruding on another's privacy represents something more important than just assuming that the person has the relatively common wish that others not intrude on him. Rather, not intruding on another shows respect for the separateness of the other person, the fact that his projects are not one's own, etc. After all, suppose one got the impression that John Doe had no great wish for privacy and then read his diary. If Doe wanted to raise community outrage against such an act, the perpetrator's impression of him would be irrelevant (in the absence of Doe's having "entrapped" the offender). This
is why one always respects another's privacy, not because one guesses the person would, or would not, mind.

The weakness of the argument presented by McCloskey can further be seen here by noting that it seems highly likely that a similar line of argument could be given that the respect for autonomy does not arise from respect for persons so much as does respect for a person's wish for autonomy. Once again, this seems to put the cart before the horse.

The need for the more refined specification of different types of respect for an adequate treatment of the example in the quotation can be seen to arise as follows. McCloskey claims no lack of respect is shown by the envisioned invasion of privacy. The argument for this claim has two parts. The first is that there is no lack of respect shown because we have *good reason* to ignore the wishes of the person. This part of the argument is very incomplete. As it stands such an argument would support the most outrageous amounts of paternalistic actions. The basic protection against such abuses is provided to a very great extent by the auspices of respect for persons. In one fell swoop McCloskey removes this fundamental role of respect for persons. Of course, McCloskey probably only means to claim that one must have *sufficiently* strong good reasons to ignore the wishes of others. How strong will
vary with the nature of the wish to be overridden. The issue of what will be sufficient strength in given cases is a matter of great controversy.

McCloskey tries to make the specific claim about the particular case in question by downplaying the nature of the wish. He denigrates the wish for privacy as just something to be respected because it is something people commonly wish for, not out of a respect for privacy which arises from the respect for persons directly (he claims). He also hints at a powerful good reason to ignore the wish, bringing up the possibility of a life-threatening tumor. Note, however, that the good reason is only a suspicion of such a tumor. This is a less powerful good reason, than the certainty of a life-threatening condition, to a degree equal to the chance the condition does not exist.

The second part of his argument can be reconstructed as follows. Since respect for persons implies respect for their lives, no lack of "total" respect is shown by intruding against a wish for privacy when there is a good reason such as the possibility of a life-threatening condition. The problem with this part of the argument is that it presents a picture of this example which is too simplistic. The general idea presented here is that there is X amount of respect connected with the respect for the
person's privacy, Y amount of respect connected with taking steps to help a person who has a Z percent chance of having a life-threatening condition, and Y is greater than X so there is no lack of respect shown. Actually, it is unclear whether or not the amount of respect shown by such an action is to be taken to be Y - X, or just Y. Y - X would be the more plausible value of the two.

I believe the correct presentation is more complex. Instead of simply doing the entire "calculation" in terms of respect for persons, different types of respect which are subtypes of the general respect for persons are used. The two that are relevant here are respect, the respect for the separateness of moral entities such as persons, and respect, the respect for human life.

Respect, is a difficult concept to explicate. It has to do with the recognition that persons are self-activating unique entities. The fact that persons have this quality is at the foundation of their nature as moral entities. This recognition involves the notion that a person's projects are substantially his own. This is the core consideration for saying that interference, even for good reasons, with his projects has a moral disvalue prima facie, i.e., this is the core consideration against paternalistic actions.

There is evidence for the position that respect, can
indeed fulfill a role of the type that I am suggesting in this section. Note that respect for persons, particularly in the guise of respect\textsubscript{\text{h}}, is a partial basis for both the obligation not to harm others and the obligation not to allow harm to others. It has traditionally been a problem to account for the common feeling that the former obligation is the stronger of the two, rather than there being an equal degree of obligation in both cases. I believe that respect\textsubscript{i} plays a role in explaining why the obligation to prevent harm is weaker, at least in some cases. These are the cases where the prevention of harm necessitates interference with another person. Such interference acts against respect\textsubscript{i}. Of course, the greater the harm prevented, as well as the less the amount of interference with others, the smaller the role that respect\textsubscript{i} can play in the situation. However, there will always be a nonzero degree of significance whenever there is any interference with others.

Certainly, the case at issue could be viewed as an example of conflicting obligations, one to show respect\textsubscript{i}, the other to prevent harm as derived from respect\textsubscript{\text{h}}. Remember, the obligation to show respect\textsubscript{\text{h}} is weakened to the same degree as the probability that the person does not have a life-threatening tumor. On this account of the example in question, the amount of respect shown overall
by ignoring the person's wish for privacy will be less, although still a positive amount, than on McCloskey's account. This is because a connection exists between \( \text{respect}_h \) and respect for the wishes of others that does not hold between \( \text{respect}_h \) and \( \text{respect}_i \), at least not to the same degree. Actions which promote \( \text{respect}_h \) always promote respect for the wishes of others indirectly, and often promote it directly. They promote it indirectly by promoting the possibility of the person to continue to have wishes at all. They promote it directly by furthering the wish most people have to continue living. Note that since people often have inconsistent wishes the person in the example might indeed be concealing a life-threatening condition even though he wishes to continue living, all the while not intending to have it treated.

The connection between \( \text{respect}_h \) and \( \text{respect}_i \) is different in nature. \( \text{respect}_h \) might be said to promote \( \text{respect}_i \) indirectly, although to a lesser extent than respect for the wishes of others. \( \text{respect}_h \) does not, however, promote \( \text{respect}_i \) directly in cases like that set out in the example at issue. Therefore, the account just presented agrees with the general conclusion of McCloskey that there is respect exhibited by such a proposed invasion, although finding less overall respect to be shown. However, this account denies the more important claim made
by McCloskey that it is more respect for the wishes of persons which is dictated by respect for persons rather than respect for privacy. This is because respect for privacy is a component of respect, one which is logically prior to respect for the wishes of other persons. Thus, McCloskey has not shown that the connection between respect and respect for privacy does not exist.

So, McCloskey has failed to establish that the right to privacy is a derivative right. While part of the justification of the right does indeed come from other rights and values, there is still the independent justification on the basis of respect for personhood. However, the possibility remains that the right will be derivative according to an alternative definition which retains some of the flavor of McCloskey's. In particular, a definition that is built primarily around the characteristic that a derivative right is one which may in some cases be legitimately overridden and not give rise to any claims or duties. This possibility is pursued in the last chapter of this work.

The examinations herein of Thomson's and McCloskey's accounts have provided several valuable insights into the right to privacy. The connection between the right to privacy and rights over traditional types of property and the person is quite noteworthy, particularly because it
can lead to confusions between rights of one type and those of another. The discussion also anticipates accounts which try to present the right to privacy as a right over a non-traditional type of property like information. A great deal of evidence has been provided that indicates a secondary justification of the right to privacy is provided by its role in protecting other rights and values. Valuable progress was made concerning the identification of the role intentions play concerning the right to privacy, primarily in reference to their part in the determination of whether a privacy right takes precedence in a case or not. Finally, the crucial connection between privacy and respect for personhood has been highlighted throughout the discussion, thus indicating the central role that said connection must play in any adequate account of the right to privacy.
FOOTNOTES -- CHAPTER II

1"Significant" in the sense that on a given description of a set of rights, a significant right is one which assigns protection to an individual that is not directly assigned by any other right, although it may be loosely implied.


3Thomson, p. 306.

4Thomson, pp. 299-300.

5Thomson, p. 301.

6Thomson, p. 307.

7One might include provisions to handle different types of information.

8It is interesting to note the role the idea of implied consent might play in the debate over the allowability of a National Data Center. Objections to such an institution fall into three main categories, misuse of information stored, unauthorized access to information stored, and the possibility that vast amounts of "new" information might be extrapolated on the basis of information already stored. The idea of "implied consent" might be central to the discussion of objections in this last category. Proponents of a National Data Center might plausibly claim that one has given implied consent that certain information be stored by the government, and possibly even to the storage of various obvious implications of this information. Opponents of such an institution could make a very strong case that there would be no "implied consent" for there to be any extrapolations of such information, however. Modern computers are so powerful that such extrapolations might give alarmingly complete pictures of persons far beyond any legitimate government need. So alarming that the possibility of such should be ruled out by not having a N.D.C.
Traditionally, such rights come under the heading of rights against trespass and nuisance, traditionally treated as property rights in the law. In the last chapter of this work I show that while trespass is best handled in the traditional manner, the right against nuisance is both a privacy right and a right against harm.


McCloskey, p. 32.

McCloskey, p. 35.

McCloskey, p. 35.

McCloskey, p. 37.

McCloskey, p. 36.
CHAPTER III

THE NONDERIVATIVE ACCOUNTS

The majority of accounts of the right to privacy do not openly declare whether they consider the right to be a derivative right or not. I have grouped the discussions of these accounts together in this chapter as nonderivative accounts more in reference to their emphasis rather than some ironclad assurance that there is no legitimate definition of "derivative right" that their version of the right to privacy might fall under. The accounts which are presented in the following pages fall into two main groups. The first group is composed of accounts which do not make reference to the right to privacy as being a type of property right. The second group of accounts are those which do treat the right to privacy as a property right, or else as partially being a property right. While each individual account has its own strengths and weaknesses, there is a common element between the strengths and weaknesses of the members of the same group. This common element can be detected by examining which cases are best handled by accounts within a group as well as those which are most poorly accounted for. These common elements are particularly important in light of their relationship to
The discussion of the legal right to privacy in Chapter I. The way these common elements are related to that discussion is the property based accounts are strongest in handling tort violation cases and weakest in handling constitutional violations, and the non-property accounts are strongest in handling constitutional violation cases and weakest in handling tort violation cases. This point is developed in the particular discussions of each account.

This difference in the strengths and weaknesses between the property and non-property based accounts may be seen as indicating the right is derivative either in Thomson's sense or McCloskey's sense as presented in Chapter II. This is because such a difference suggests that a combination of property and non-property considerations as a basis of the right to privacy might provide the strongest account overall. Since these considerations are so diverse in nature this must be considered evidence, although not conclusive evidence, for the right to privacy to be derived from other rights and values in such a way as to qualify for being a derivative right. Whether or not such a conclusion is in the end the correct conclusion will be taken up in Chapter IV.
Section 1: The Non-property Accounts

McCloskey, in his article, "Privacy and the Right to Privacy," discusses an account of privacy as the absence of publicity, an account which he states has erroneously been ascribed to him. McCloskey rejects such a view because there is a large class of counterexamples to such an account. These counterexamples all involve cases where an individual improperly observes another individual, thereby intruding on his or her privacy, without publicizing anything which is seen or heard. Such cases serve as a perfectly adequate rejection of the account being considered.

While the account presented above is easily shown to be in error, it suggests an account of a far more interesting nature. This related account is arrived at by way of assigning "publicity" a technical definition as opposed to its normal definition. This special definition takes "publicity" to be "a being known by others." This definition differs from the ordinary use of the term in that "publicity" occurs when even just one person comes to have knowledge about another, instead of the usual requirement that a significant portion of the public must have such knowledge. This account does not fall prey to the class of counterexamples mentioned above.
There are potential problems for such a revised account. On this account there would be a loss of privacy for John Doe if his friend Ann Smith came to know she was a friend of John's. Of course, a defender of this account might be willing to accept such a result. It might be shrugged off as a trivial loss of privacy one need not worry about, but a loss all the same. This would be a particularly powerful response if it was combined with a presentation of a right to privacy which did not extend protection to such trivial losses of privacy.

There is another related account of the right to privacy based on "publicity" that would avoid the problem just mentioned. Such an account would fine-tune the definition of "publicity" to rule out such cases as genuine cases of publicity, or would restructure the account of privacy as the absence of certain kinds of publicity. Such an account will be discussed in detail in the last chapter of this work.

One might wish to push an account of privacy as the absence of publicity quite a bit beyond the short treatment McCloskey suggests. To see this one need only pursue either of the two lines suggested above to deal with the case of the friendship of John Doe and Ann Smith. The first method suggested was to grant there is a small loss of privacy for John Doe in Ann Smith knowing that she is a
friend of John's. The proponent of this account then points out that this fact is not problematic because such an example is not a case of an unjustified loss of privacy. The person proposing this case as a counterexample has, according to the proponent of this account, confused this account of what privacy is with accounts which attempt to provide a justification for a right to privacy.

The second method of dealing with the example involves changing the definition of "publicity" which is used so that there is no loss of privacy in cases like that in the example. "Publicity" on this view would be a "being known by others of facts to which they bear no relation." Since Ann Smith is directly related to the fact of her being friends with John Doe, there would be no loss of privacy which results from her knowing about the friendship.

Such an account of privacy must be rejected, however. There are many easily formulated examples where we would definitely claim there were losses of privacy which would not be so identified by this account. Suppose John Doe was in love with Ann Smith. Suppose, further, that he is aware of the fact that she despises him and would use the knowledge of his loving her to torment him. She looks in his office desk and discovers his diary in which he
has devoted an entire page to acclaiming his love for
her. Surely he has suffered a loss of privacy in such
circumstances even though Ann Smith is directly related
to the knowledge which she gains by reading his diary.
That such cases cause problems for this version of a
publicity account should come as no surprise. This is
because the crucial connection between the knowledge and
persons is the one between the contents of the knowledge
and the privacy of the person it is about, not its
connection with those who come to know it.

There are alternatives which employ similar
definitions to the one above. Most of these fail, however,
in light of the following example. Suppose that both
Ann Smith and John Doe love each other but fear to make
their love known to the other because of the possibility
of being rejected. Several promising accounts of a loss
of privacy along these lines founder on the rocks of this
example, yet they do so in an illuminating way. The
example concerning friendship initially causes problems
for this type account, barring the correctness of the
response of method one, because we feel that since Smith
and Doe are friends it must be the case that both know
the fact of the friendship all along and thus it is
difficult to determine where a loss of privacy occurred.
Unfortunately, this is a very difficult notion to adequately capture simply in the definition of publicity to be employed. It ends up looking something like "publicity" is a "being known by others of facts which might obtain without their knowledge."

There are general problems for attempting to give an account of privacy along these lines. The primary difficulty involves providing an acceptable account of invasions of the right to privacy which are based on such an account of privacy as the absence of publicity. This is true even where one has been careful to differentiate between an account of the right to privacy and the justification of such a right. The problem arises once one notices that violations of the right to privacy fall into two basic categories, an illegitimate spread of personal knowledge, or an illegitimate use of personal knowledge (personal knowledge being used here as knowledge about a person). This type of an account of privacy is well suited to cases which fall into the first category, but there is some question as to how well it deals with those which fall into the second category. It would seem that the proponent of this account would be in the position of claiming that each violation of the right to privacy which involves an illegitimate use of information about a person must also involve an illegitimate spread of that
information.

Publicity-based accounts even run into trouble sometimes with cases involving an illegitimate use of personal information that do depend on there being some spread of knowledge. Take the cases wherein personal information is used to place a person in a false light in the public eye. Of course, such cases involve a spread of knowledge, but the emphasis of the judgment about whether or not a case involves a violation turns more on the use issue. One might also think the publication of embarrassing personal information cases would pose a similar problem for these accounts. This would depend on whether the emphasis in such cases should be placed on the spread of such information exhibited in them, or the use of such information to embarrass a person. It is most plausible to assume the former is emphasized since most people feel they should be protected against such publication even if the primary purpose of the publisher is not to embarrass the person mentioned. So these last type of cases are not as problematic for such accounts as the false light cases.

None of the accounts previously discussed adequately account for both the justification of the right to privacy and what privacy is, indeed, they do not even attempt to do both things. One might suspect that an
account which did make such an attempt might have a better chance of success in dealing with the difficult issue of a right to privacy. The next two accounts which are discussed make such an attempt. This discussion is a particularly good test for the suspicion just mentioned because both accounts are based on an explication of privacy very similar to accounts of the right to privacy of the type just discussed.

James Rachels and Charles Fried present accounts of privacy which relate the importance of privacy to the role it plays in human relationships. Rachels claims one of the most important reasons we value privacy is that it "allows us to maintain the variety of relationships with other people that we want to have." Fried claims it is important because it serves as the necessary rational context for such things as love, trust, friendship, respect, and self-respect. Since these views are so similar, e.g., Rachels accepts almost completely Fried's account of friendship and its relationship to privacy, I will examine both accounts in one presentation.

Rachels and Fried define privacy as the control of who has access to us and information about us. They use this definition in setting out the role privacy plays in the formation and maintenance of many of our human relationships. It is important to determine the strength
of the role privacy plays so as to determine how strong a right to privacy could be justified on the basis of said role. But before the strength of this role can be examined, it is necessary to determine the adequacy of the definition they employ.

I believe their definition of privacy is problematic because of the prominent role assigned to "control," although I have no qualms over the use of this term in a definition of the right to privacy. The following example illustrates my concern. Suppose a person is monitored all the time by another individual by means of a vast array of electronic devices, and is unaware of this fact. These devices permit complete observation of every sight, sound, thought, etc., of the person observed. I believe that in this case there is a strong justification for claiming that the person observed has a seriously eroded amount of privacy relative to the situation he was in prior to the use of such devices. Yet, vis-a-vis anyone besides the operator of the devices, the person observed could still maintain control of access to himself and to information about him. Since the person observed retains such control relative to all others he retains a very high degree of such control, a degree which does not seem to be of an accurate proportion to the seriously-eroded amount of privacy which
I attributed to him above.

The situation is even more problematic if we imagine there are two hundred operators instead of just one. The person observed has lost an enormous amount of privacy, yet since he retains control of access by all others he retains a highly significant amount of such control. The main point is that relatively small losses in control of access in relation to all persons result in disproportionately large losses of privacy when the losses of control are in relation to a limited number of people. This is very difficult to explain on the proposed definition of privacy at issue. One option that is available to Rachels and Fried is to slightly revise the definition so as to avoid this result. For example, they might claim privacy is "a state of non-intrusion" in such control and try to account for the disproportion by way of working with degrees of intrusion.

There is another option that can be taken in answering my objection. They could claim I have given a grossly false label to the outlined circumstances. They could maintain the example is a case of a person who has very little privacy relative to the one person, the operator, and a great deal relative to everyone else. This seems, in some ways, to be a more accurate way of describing the situation in the example. It might be the
case that such a description is just successfully misleading. Imagine that there are a million device operators. To say the observed person still has a great deal of privacy relative to all non-device persons does not really justify saying the observed person retains most of their privacy even if there are far more than a million people. The dispute between these competing versions is a very complex one which has ramifications for all information-based accounts of privacy. Any more discussion of this issue is beyond the scope of this examination of Rachels and Fried, but said issue is taken up again in the last chapter of this work.

The major portions of both accounts are concerned more with the justification of the right to privacy. Fried begins his exploration of this justification by way of examining a theme that runs through many of the traditional arguments for a right to privacy. He observes that privacy, taken in the sense of control of information or over the context in which we act, is an aspect of personal liberty. He goes on to refer to the role that privacy plays in defending our liberty. It is this characteristic of privacy which gives rise to many of the traditional arguments for the right to privacy. He correctly points out that such arguments do not adequately justify a right to privacy of the strength commonly
attributed to it. They fall short mainly because of their vulnerability to arguments that most any particular invasion of privacy is justified because the other kinds of liberty which are secured more than make up for those which are lost. Thus, Fried rejects any account of a right to privacy as based solely on its role as an aspect of, or an aid to, general liberty since he thinks the value of our control over information about ourselves is more nearly absolute than such accounts credit to it. Such value is at least partially contributed on the basis of its role as the necessary context for relationships which are central to our being human—the relationships of love, friendship, and trust.

Rachels and Fried differ in minor ways as to their presentations of the relationship between privacy and those relationships central to our being human. Primarily they diverge more in terms of emphasis than any real disagreement on the fundamental role privacy plays in such relationships. Rachels focuses solely on privacy's role in the creation and maintenance of such relationships, while Fried gives the more detailed account as follows.

Fried claims that privacy is necessary for friendship in at least four different ways. The first is that friendship involves the voluntary relinquishment of
information about oneself, the title to which is conferred by privacy, between friend and friend. In other words, to be friends persons must necessarily be intimate to some degree with each other, and Fried claims that intimacy is defined as the sharing of such information about one's actions, beliefs, or emotions, which one does not share with all, and which one has the right not to share with anybody. The second is that men must respect in each other certain basic entitlements of which privacy rights are one; and such mutual respect is a necessary precondition for friendship. The third is that Fried, like Rachels, believes that privacy is necessary for the maintenance of relationships of various degrees of intimacy, and thus is necessary for maintaining friendships of different levels of closeness. The last way privacy and friendship are necessarily connected is of a somewhat different nature from the previous three. Instead of concerning some positive flow of information from one person to another, it involves a restraint of information from anyone at all. This information's content is made up of thoughts whose expression to a friend would be a hostile act even though entertaining them is perfectly consistent with friendship.

Several observations about these four ways privacy is a necessary condition, or rational context, of
friendship need to be made. One could certainly challenge the definition of intimacy that Fried employs. The definition does seem to run into trouble in that it would describe various relationships as intimate ones where the flow of information between two individuals is strictly one-way. It would be strange to say that two people were intimate friends where one of the two knew absolutely nothing personal about the other. The doctor-patient and lawyer-client relationships also come into mind. One might insist the definition is deficient in not requiring a more or less symmetric sharing of personal information. There are at least two possible responses Fried might make. One way would be to accept that relationships with a one-way flow of information were in fact intimate taking the stand the definition is not deficient. Fried could respond to such criticism in another way by claiming that persons making it have mistakenly taken what is merely intended as a specification of a necessary condition for intimacy as rather a specification of a necessary and sufficient condition or definition. Fried need only claim he has laid out a necessary condition for intimacy to make his point.

Fried's statement concerning mutual respect being a precondition of friendship is true, but there is little significance here concerning a justification of a right to privacy. Even granting that privacy rights are among the
basic entitlements that men must respect in each other, it is only one of many, and one might well claim there could be mutual respect based on the other basic entitlements which paid little heed to privacy. A more significant failing of this point concerning the connection between privacy and respect is that it ignores completely the fact that privacy is one of the most basic ways of demonstrating respect for the nature of personhood.

The connection between privacy and friendship that Fried presents last involves a restraint of information rather than some positive flow as in the other three connections. He claims this restrained information is made up of thoughts whose expression to a friend would be a hostile act even though entertaining them is perfectly consistent with friendship. This last connection may very well exist but it only involves the narrowest control over personal information and can thus contribute only a small amount to any justification of a right to privacy.

The connection between privacy and maintaining different degrees of friendship is examined in great detail by Rachels. He also claims that it is necessary for the creation of such relationships. He supports these claims on the basis of some observations about social relationships. The first such observation that he employs is that there are often relatively definite patterns of
behavior associated with social relationships. Another such observation is that social relationships are associated with different patterns of behavior. Rachels claims this latter characteristic of social relationships is not an accidental one because such differences in appropriate behavior are part of what defines such relationships. The close connection between privacy and social relationships becomes apparent if we are willing to grant that for at least some relationships there are associated behaviors which have to do with allowing specified amounts of access to ourselves and information about us. Rachels illustrates this type of connection by way of considering the social relationship of friendship.

The relationship of friendship, for example, involves bonds of affection and special obligations, such as the duty of loyalty, which friends owe to one another; but it is also an important part of what it means to have a friend that we welcome his company, that we confide in him, that we tell him things about ourselves, and that we show him sides of our personalities which we would not tell or show to just anyone. Suppose that I believe someone is my close friend, and then I discover that he is worried about his job and is afraid of being fired. But, while he has discussed this situation with several other people, he has not mentioned it at all to me. And then I learn that he writes poetry, and that this is an important part of his life; but while he has shown his poems to many other people, he has not shown them to me. Moreover, I learn that he behaves with his other friends in a much more informal way than he behaves with me, that he makes a point of
seeing them socially much more than he sees me, and so on. In the absence of some special explanation of his behavior, I would have to conclude that we are not as close as I had thought.3

I find the above example quite compelling concerning the establishment of some kind of connection between privacy and at least some social relationships. It is important to determine what kind of connection it is so that its role in a justification of a right to privacy can be identified. The connection in the example above has to do with maintaining different levels of friendship.

Rachels seeks to establish that this connection between privacy and the creation and maintenance of social relationships plays a large part in the justification of a right to privacy. Is Rachels claiming there is a necessary connection between social relationships and privacy? Such a claim can be made in several ways. The first major alternative would be that some relationships are dependent on privacy. This alternative has three branches: privacy is necessary only for the creation of such relationships; privacy is necessary only for the maintenance of such relationships; and privacy is necessary for both the creation and maintenance of such relationships. The second major alternative would be that all social relationships are dependent on privacy in some
way. This alternative admits of the same three variations as the first. Both the alternatives also are somewhat ambiguous as to whether the emphasis is to be placed on the simple maintenance and/or creation of social relationships or on the role privacy plays in determining the different levels we would attribute to particular relationships. Certainly, Rachels and Fried feel the latter reading is the correct one.

It is clear from the presentations of Rachels and Fried that the variation, of whichever major alternative is decided on, which they feel is correct is that claiming privacy is necessary both for the creation and maintenance of the targeted social relationships. Their presentations provide adequate support for saying that some control of access to oneself and personal information is needed for social relationships, and for the range of relationships we now enjoy since some of these are ones which are dependent on some amount of such control. There is, however, no such adequate justification for the claim that all social relationships are dependent on privacy in Rachels use of the term, so Rachels must only intend to make the former claim.

Another point that arises out of the consideration of the earlier example is that limited control of access to oneself and information about oneself will suffice in the
creation and maintenance of the variety of relationships we now enjoy. This bears directly on the question of how strong a portion of a justification this characteristic of the connection between privacy and social relationships provides for a right to privacy. Another consideration which is involved here is how important the social relationships in question are. It is uncontroversial to claim that at least some of these are very important since the best candidates for examples of such relationships are those of being close friends, lovers, etc.

Given the two considerations just mentioned, along with the likely possibility that such control usually, but not necessarily, plays a role in some relationships, it is possible to reach a decision as to the approximate strength of a justification for the right to privacy which can be based on Rachels account. Such a justification would fall short of being adequate, on its own, for any far-reaching right to privacy. Certainly, not for one as far-reaching as one which is commonly claimed to exist. However, Rachels also points out that the right to privacy often serves to protect other rights and values, and therefore rightfully augment such a justification to this extent. Even such an augmented justification falls short of being adequate for the right to privacy whose existence is commonly asserted. This is mainly the result of the
fact that such a limited amount of the control in question would suffice in the targeted social relationships. It must be noted that Rachels never claims that he provides more than a partial justification since his main purpose for his article is to refute Thomson's claim, as outlined in Chapter II, that privacy rights are not sui generis.

Fried's account has the same problem in that his four ways privacy and social relationships are related provide a justification only for a weak right to privacy. Since Fried places more emphasis than Rachels on providing a justification for a strong right to privacy he has fallen shorter than Rachels of his intended goal. Of course, Fried also claims that the connection between privacy and social relationships provides only a partial justification for a right to privacy. Before examining whether or not this partial justification together with other considerations can be used to provide some portion of the overall justification of a right to privacy of sufficient strength, one must determine how much of a contribution the connection at issue can provide.

The problem for Fried is that it seems even the acceptance of the specified connection commits one only to a very small degree of control over information to be necessary. This is true because such a small amount of control would suffice as the rational context for
friendship. Consider that one place a person has only the most minimal amount of privacy is a prison cell. Yet it is a well-documented fact that friendships are maintained under such conditions. P.O.W. camps, totalitarian states, crowded living conditions, etc., all provide similar situations in respect of lack of privacy, but we find in many cases various friendships flourishing.

Fried may challenge my criticism above by claiming that even in the situations I present as cases where friendships flourish where there is very little privacy compared to our normal lives, there is still a significant degree of control over personal information. Before I expand this line of possible response, notice that just the preceding statement commits Fried to one of two paths in explicating what kind of a strong right to privacy would adequately reflect the "nearly absolute value of our control over personal information." One way he could go would be to try to argue that people in the harsh conditions referred to retail all, or almost all, the control that a strong right to privacy would protect. Another way he could go would be to claim that the strength of the right to privacy refers not to the breadth of the information deemed personal and protected by the right, but rather it refers to the depth of protection granted a particular fundamental portion of information usually taken
to be personal. I will return to the discussion of these alternatives following the explication of the possible response to the problematic cases cited above.

The common thread of lack of privacy, or lack of control over personal information, in the harsh situations outlined above revolves around the susceptibility of persons in such situations to constant visual observation, and to a lesser extent observation via the other senses. This set of circumstances does vastly limit the amount of personal information which is under the strict control of people in these situations. However, Fried can argue that it is important to distinguish between the types of personal information which are beyond the control of such individuals with those which do remain under their control. The information which is beyond their control is almost the same set as that over which one sacrifices control by being out in public a great deal under more normal circumstances. The difference between the two sets consists primarily in the additional pieces of information in the former set concerning the contents of one's living quarters and possibly more information about one's physical description.

Fried might justifiably claim that a far more important group of facts, especially relative to relationships like friendship, remains under the control of the
individual. This would be the information about one's hopes, thoughts, opinions, memories, etc. His next move would be to claim that it is on the basis of sharing this information that intimate relationships such as friendship are created and maintained in such circumstances.

There is a glaring weakness in this response though as it stands. It turns on the fact that usually observation, even under such harsh circumstances, is not so complete as to include all verbal communications, sign language, written communications, etc. However, in many of these harsh situations not only is such complete observation possible, in some cases it has actually been carried out. Given such a possibility, it is hard to see what control such individuals have over this set of personal information other than the ability to not divulge such information to anyone, an ability which cannot by itself make friendship possible.

Fried could claim that intimacy would still be possible because one retains control over whom the information is shared with. Such an individual would share information initially only with the person he was communicating with, as well as any current observers. But since the observers could spread this information at will, the individual cannot really be said to control the information. Fried might also try the position that the
individual has control of personal information even when under constant total observation as outlined above in the sense of control over whom he "shares" the personal information with. This line depends on taking the "sharing" of information as depending not simply on a communication of information but also on the intent to communicate the information to a select individual or individuals, not to include potential "observers." This is not a very plausible explication, however, of what control over personal information entails. It is more properly just the control over intent.

The line suggested above as a possible mode of response for Fried based on an intent to share actually serves as the basis for the following argument against Fried. Fried has claimed that privacy is necessary for friendship in at least four different ways. Two of these ways are dependent on his definition of intimacy which can be challenged in the following way. Fried claims that intimacy is the sharing of such information about one's actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anybody. If one substitutes "share willingly with all" for "share with all" in the above statement it is a more accurate definition of intimacy. But on the revised definition of intimacy privacy is no longer a necessary
condition for either the creation of friendships or the maintenance of varying degrees of friendship. Note that this applies equally well to Rachels' account.

I mentioned earlier that Fried, in light of various problems which have been pointed out, needs to further explicate in what way he believes a strong right to privacy arises from the role privacy plays in personal relationships. Since it has been shown that privacy plays only an extremely small role as a necessary condition for personal relationships, the breadth of the protection of a right to privacy must be based primarily on the contributory (not necessary) role privacy plays in most personal relationships. The depth of such protection would have to be minimal in most cases, and therefore easily overridden, since privacy plays less than a necessary role in personal relationships. If we are to take the "strong" to refer to the depth of the protection, it can only refer to one small facet of privacy. This is the control an individual has over divulging his inner states to anyone else. This is because any communications about inner states to another individual can always be observed by someone else. One must conclude that Fried cannot provide a justification for a strong right to privacy in any traditional sense of "strong right," along the lines he has employed here.
A single case can clearly show that Fried's main error was the failure to notice that the key condition for intimacy is that there is a voluntary relinquishment of personal information rather than just any passing of information from one person to another. Let us imagine that unknown to us there is an observer who has complete access to observation of everyone via the five senses (one who is not necessarily a mind reader). It/She might be God, a god, or some super scientist, etc. Suppose, further, that such observation has been going on for the last twenty years. One could still, without change of meaning, say that people are involved in all kinds of personal relationships.\(^4\)

Fried also claims there is a necessary connection between privacy and trust, where "trust is the attitude of expectation that another will behave according to the constraints of morality."\(^5\) Fried argues that people value the relation of trust for its own sake partially by way of pointing out that we often decide to trust someone when it would be safer to take precautions such as watching them or requiring some type of bond. He argues for the necessary connection between the two in the following manner. He points out that where there is no possibility of error there can be no trust. Therefore,
a man cannot know that he is trusted unless he can act without constant surveillance so that he knows he can betray the trust. Privacy confers the right prohibiting such constant surveillance. So without the right to privacy and the possibility which it protects, trust, one of the aspects of his humanity, is denied him.

There is a mistaken assumption in this argument. This is the assumption that constant surveillance removes the possibility of error. For example, I might place my trust in a lover that she will take care not to blatantly hurt my feelings by ending the relationship in some horribly callous manner. She could be under constant surveillance and still betray the trust. Indeed, she might take advantage of the surveillance to do exactly that. For instance, she might arrange that a videotape I receive from the operator that has her under surveillance shows her with her new lover describing in detail my various shortcomings that led her to exchange me for him. I think this example clearly shows that privacy is only necessary for a portion of the relation of trust, and consequently there could still be trust without privacy. So the analysis of the connection between trust and privacy also falls short of providing a large portion of a justification for a strong right to privacy.
Since the cases Fried presents for the importance of privacy for the relations of friendship and trust are the strongest of those linking it with various aspects of our humanity, and together they fall far short of justifying any strong right to privacy of any significant width, it would seem Fried has failed to make his case. The problem with his account is best summarized as being that a very limited amount of control over personal information is sufficient to serve as the rational context for the various human relationships that Fried presents as being dependent on privacy. This is clearly the case when we try to apply Fried's approach to specific violations of privacy.

Suppose the government uses an X-ray device to examine the contents of someone's safe in order to find out there is a pornographic picture in it. There seems to be more of a loss or harm done than just reducing the amount of secure information that might be passed on as part of a friendship or a relationship of trust. Indeed, there are two possible ways that Fried might be committed to saying there was no harm done according to his account of privacy. The first way depends on making the observation that while there are varying degrees of personal relationships, there are only a limited number of such levels that it makes any sense to try to distinguish
between. The levels of friendship, for example, might be meaningfully separated into categories like casual friend, good friend, best friend, friend until death, companion, and possibly a few more. The point is there are a very limited number of useful categories. When the categories are identified relative to the level of intimacy, there is no real difference in level of intimacy between members of the same category. While there are counting problems for determining how many pieces of information about oneself that friends have, it is certainly the case that we can differentiate between members of the same "friendship" categories, even though we still claim that we share the same level of intimacy with each member of a particular category. Of course, a simple quantitative picture like this is somewhat misleading since individual pieces of personal information vary as to their significance, but a simple weighting procedure will correct the overall procedure. The point here is that as long as there remains a sufficient number of pieces of secure information of the appropriate degrees of significance, one can still create and maintain various levels of relationships after the loss of the information about the pornographic picture in the safe.
The types of intrusive observation which are similar to the X-ray and the safe example do not greatly threaten to reduce the class of secure information to too small a class to make possible the creation and maintenance of all the varying levels of relationships we now enjoy. This is made apparent by the observation that it is primarily personal information about inner states that is the main guide as to how close our relationships with other people are. Surely someone would feel he was less of a friend of mine if he found out that while I had told him I had seven pair of green socks, three pair of yellow, two red, and one blue, I had told someone else I hated blue socks and would not be caught dead in purple socks.

Fried might reply that there still remain two harms done by the government's use of the X-ray machine. One would be the harm done by the reduction of choice over the number of pieces of secure information the individual could pass on. This is a very small harm, if any at all. Also, it might be the case that the individual who owns the safe has already told everyone he intends to about the picture which he plans on destroying the next day, in such a case even his range of choice has not been restricted as long as he does not change his mind. Another harm Fried might claim
results from the use of the X-ray machine would be that it would "cheapen" the significance of the picture's owner having divulged said ownership to his friends. Of course, this would not be an operative consideration if the owner had not told anyone, and had no intention of telling anyone. Taking such a line might also have peculiar results for Fried. If the use of the X-ray machine did so cheapen the significance of the passing of the information than the more that already knew about it the less harm that the machine's use would cause since that piece of information would be less significant.

Fried has a possible response to the objection just made by way of accounting for the harm done as follows. He can claim that a certain level of information which is only selectively shared is necessary for a particular level of intimacy to exist. Thus, the use of the machine would remove the information gathered from this category. So the harm that results from using the machine to the person observed is the cost to him of the resulting decrease in his "fund" of information available for creating and maintaining relationships.

Both the previously-outlined ways of assigning the harm done are overly simplistic. Both suggest that the loss of significance of information currently in the possession of the owner's friends raises the possibility
that if enough information is obtained by the government
by such means, his friends might have to be "reassigned"
to categories of less intimacy despite the lack of any
deterioration whatsoever of the feelings between the
owner and these persons. Is it the case after all, that
the creation of a government file on me means that my
best friend is now only a good friend?

Fried has provided an account which gives a partial
explanation of why privacy is important. He properly
points out that there is some connection between private
information and the creation and maintenance of social
relationships. The need has been shown for Fried to
give a revised account of exactly what the connection
is. The primary component of such an account must be
the "selectivity" of the sharing of information. A
possible related component might be dispositions to
share such information. Any complete account should also
give an adequate characterization of which information
is at issue.

The primary difficulty which remains for Fried is
an accurate characterization of what effect unauthorized
gathering of such information has on already established
relationships as well as on the ability to form and
maintain new relationships. It seems clear that massive
intrusions of privacy which promote a spread of private
information to great numbers of people significantly affect personal relationships, but it remains unclear what kind of effects are to be taken to arise from less massive, although still significant, intrusions.

Whatever the outcome of the revisions suggested above, the account must be supplemented in some way if it is to adequately handle many of the cases which arise in the law of torts. This is because cases like the unauthorized use of name or likeness do not readily fit the personal information format of Fried. Thus, this account, along with that of Rachels, shares a difficulty with all the accounts previously discussed in this chapter as far as handling such cases goes. This deficiency suggests the possibility that Fried may have discovered only a part of what makes privacy important. A plausible task to undertake in order to achieve a more complete account would be to see if the selectivity of information disclosure associated with relationships is part of a more general consideration supporting the importance of privacy.

Before leaving the accounts of Rachels and Fried, a few final words need to be said as to how these accounts enable us to come closer to an adequate theory of the right to privacy. They provide a definition that, at least with some revisions, comes quite close
to being acceptable. Indeed, this definition may suffice if some way can be found to account for tort violations by reference to it. While it has been argued that the two accounts fall far short of justifying a strong right to privacy, they have identified a partial justification that had not been presented in any previous account. But the definition they employ might be used to suggest a way to argue for such a stronger justification. It certainly lays an important groundwork in the sense of providing strong evidence the rights in the cluster are sui generis. It also provides a starting point in such an undertaking since we can now try to see if privacy defined in such a way is important for reasons other than those explicitly detailed in the two accounts.

A good place to start in the task of trying to find a justification sufficient for a strong right to privacy is with the notion of Fried's that privacy is related to choosing who will be considered one's intimates. This brings us to an account relating privacy and autonomy in other areas.

Stanley I. Benn, in his article, "Privacy, Freedom, and Respect for Persons," presents an account of privacy as based on respect for persons. He mentions several interests that are protected or
promoted by protection of privacy, but his main contribution, and the one I will concentrate my discussion on, concerns the establishment of a \textit{prima facie} right to privacy arising from respect for personhood. The particular aspect of personhood that Benn takes to be primary in giving rise to privacy's relation to being a person is that of persons as choosers. Thus, the relation cashes out as that of privacy being a method for showing respect for persons as choosers. So, intrusions of privacy are taken as showing a lack of respect for persons as choosers. The central consideration for determining the soundness of Benn's approach revolves around the issue of the status of the link he claims exists between intrusions of privacy and interferences with persons as choosers. The first step Benn takes in the attempt of establishing this link is that of outlining the use of several key terms as follows:

(b)y a person I understand a subject with a consciousness of himself as agent, one who is capable of having projects, and assessing his achievements in relation to them. To conceive someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of
enterprise like one's own, not merely a succession of more or less fortunate happenings, but a record of achievements and failures; and just as one cannot describe one's life in these terms without claiming that what happens is important, so to see another's in the same light is to see for him at least this must be important.... To respect someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons, then, I mean the principle that every human being, insofar as he is qualified as a person, is entitled to this minimal degree of consideration.6

Benn then presents examples which are supposed to illustrate how intrusions of privacy interfere with persons as choosers. One such takes up the case of a person, say A, who openly intrudes on a conversation between B and C by listening in. Benn claims that the mere presence of A may change C's perception of himself as well as his immediate enterprise, the conversation with B. "A's uninvited intrusion is an impertinence because he treats it as of no consequence that he may have effected an alteration in C's perception of himself and of the nature of his performance."7 Benn also considers a similar case where C is unaware of A's intrusion and concludes that such cases of covert observation also interfere with persons as choosers. He claims they do so because they deliberately deceive a
person about his world in such a way as to thwart his attempts to make a rational choice, for reasons that cannot be his reasons. Such deceptive alteration of another's conditions of action is inconsistent with respect for him/her as engaged in an enterprise worthy of consideration. The wrong done here takes one or more forms according to Benn. The covert observer deliberately falsifies the significance of another's enterprise which he/she had assumed was unobserved. In some cases, those in which there is no reason why a person should not choose to act privately, disrespect is shown in two different ways if one should watch without the person's knowledge. This is the disrespect for the privacy the person might have chosen, and by implication the disrespect for him/her as chooser since such watching negates any possibility of that person choosing whether or not to be observed. Note that the point just made specifies an actual choice which is removed from an individual's range of possible choices which he has a right to make. This observation stands against the comments of those, e.g., McCloskey, who claim there is only the circumventing of an individual's wish to be unobserved as opposed to any diminuation of the range of one's choices.

There are several problems with Benn's account. He
claims covert observation wrongs a person by way of the deception of that person as to his world which thwarts his rational choice. Yet I might, unbeknownst to my neighbor, build a high fence along the border of our property which will thwart his ability to make a rational choice about walking across my back yard to visit the neighbor on the far side of my property. I have "deceived" him about his world since he thinks there is no such obstruction, but I have done him no wrong. So the explanation of the wrong must be more complex than given in that portion of Benn's account.

The objection just made is actually just an instance of a global problem of Benn's account. This problem concerns the inadequacy of explicating the degree of disrespect for persons shown by intrusions of privacy solely by way of the degree of interference with their choices. This mistake appears in several guises in the account. The example of the fence argues against the one of taking deception of someone about his world which is the context of his rational choice, to have a degree of wrongness proportional to the degree of deception. This is the case because the example illustrates a deception with zero degree of wrongness. The wrong done C by A's open intrusion into his conversation with B goes beyond the change in C's view of himself and the enterprise of that
conversation. After all, neither C's view of himself or the conversation need change in any significant way at all, yet there is still a complete lack of respect on the part of A for C. The lack of dependence of the degree of lack of respect, and therefore the degree of the wrong, is also shown in the following circumstances. Imagine that a group of twelve people are having a conversation which A intrudes upon. This intrusion results in very significant changes in how the twelve view themselves, the conversation, and in particular, the various ways they view themselves in relation to each of the other people. Still the degree of wrong, and lack of respect, relative to A and each of the others may be the same.

This brings us to Benn's peculiar claim that covert observation falsifies the significance of the observed enterprise for the person observed. This is absurd under any obvious interpretation of "falsification of significance." Suppose I have written a book, and during this enterprise I was covertly observed. It remains a highly significant enterprise for me in spite of this observation. At best, there is only a limited class of enterprises whose significance is changed by covert observation. In essence, these would be enterprises whose character change given the addition
of observation by others, e.g., the enterprise of sex.

While there is only a limited class of enterprises whose character is changed by observation by others, Benn has provided a good argument for the special protection of such enterprises by a right to privacy. This protection is special among the protections afforded by the right to privacy because it helps to protect not only the significance of this class of enterprises, but also helps ensure that these enterprises are of the intended character for the person(s) carrying them out.

The correction of the inadequacy of Benn's account involves a significant change of emphasis to the effects of intrusions of privacy on the overall enterprise of our lives as opposed to the particular enterprises that make it up. The enterprise of my life is my own. The intrusion of others into this enterprise without my consent removes part of it from my control, a part over which I formerly had control. For example, part of the enterprise of my life involves the effect I desire to have on others. Intrusions of my privacy bring about changes in others over which I have no control, or at least very little control, and thus changes the nature of this particular type of enterprise for me. Another way of putting this is that
intrusions of privacy appropriate parts of my enterprise of life to the enterprises of others without my consent.

Thus, intrusions of privacy show lack of respect for me as a person because they fail to take into account that I have a certain control over the enterprise of my life, and since said enterprise is important to me, such control deserves respect. The particular portion of this control which is ignored by intrusions of privacy is that of control over information about me and the means of access to such information.

There is a hidden difficulty in the discussion just presented which must be dealt with if the discussion is to meaningfully establish its point. To this stage of the discussion there has been no mention of possible conflicting claims as to the "ownership" of the portions of a person's enterprise of life made up of information about that person. Could someone else not claim that such information played a significant role in his/her plans for an enterprise of life? This may of course happen, but there is an obvious line of response that can be made that indicates any such conflict of claims of entitlement to said information will be decided in favor of the person whom the information is about. This line consists of treating personal information as the property of the individual it is
about. So conflicting claims will win through only in cases where they are strong enough to override property considerations. The problem with this line of response (one which appears in any property treatment of personal information as will be seen in later discussions) is that it gets a great deal of mileage out of a confusion in our normal way of talking about property. In essence, this confusion is between traditional types of property which are acquired or created by material means and things we deem the property of an individual simply because we believe he/she can truthfully and meaningfully say, "My ________ . . . " when speaking about it. Thus ideas, hopes, emotions, etc., are seen as the property of the person entertaining them. So whenever a claim is made about these nontraditional types of "property," the validity of the claim rests on how much the treatment of traditional types of property carries over to this type of property. The strength of the discussion at issue depends on the validity of claiming that information belongs to the person it is about rather than to persons who it is important to. In this case, I believe there is a close enough resemblance to ordinary property cases for the information ownership claim to go through. To see this one need only consider
conflicting claims over a traditional example of property like a chair I own. Should someone else claim control over my chair because it was important to his planned enterprise of life, the claim would not be recognized. The situation where it is control of the information that I own the chair is similar enough that the same considerations lead to my retaining control over the information for the purposes of my own enterprise of life.

While this kind of property argument is weakened to whatever extent the "property" at issue diverges from traditional types, it is strengthened to the extent that such control of these more esoteric bits of property is necessary to more fully bind the enterprise of my life to me in the moral sense. If one is to be morally blameworthy or praiseworthy for facets of her enterprise of life then at least a certain minimal amount of control over sufficiently significant portions of that enterprise must be recognized. It is this control that intrusions of privacy show lack of respect for.

All the accounts discussed previous to Benn's have exhibited a deficiency relative to various privacy cases from the law of torts. One might claim that Benn's account also suffers a similar problem. But the
claim is less convincing if Benn is taken to present the alternative line where information is taken to be the property of the person which it is about. This is because a property rights view of private information deals very well with most, if not all, of such cases. That taking privacy rights to be a special class of property rights results in a more effective account of cases in the law of torts, suggests two points. One, the possibility is raised that the accounts discussed earlier could be reformulated to present the right to privacy as a special type of property right so they can more effectively account for such cases. For example, both Fried's and Rachels' accounts are quite consistent with taking the right to privacy as a property right over personal information. Two, it indicates the need to examine accounts which are more explicitly presented as property rights accounts of the right to privacy in order to ascertain whether or not they are superior to other approaches. The discussion which follows is the logical starting point for this task because it serves as a sort of "missing link" between property rights accounts and nonproperty rights accounts of the right to privacy. This is because it has two major components, one from each class.
Elizabeth L. Beardsley, in her article, "Privacy: Autonomy and Selective Disclosure," claims that violations of the right to privacy are violations of the right(s) of autonomy and/or selective disclosure. The basic claim she bases her views on is that all violations of privacy are violations of autonomy with a subset which are also violations of selective disclosure. This idea that some violations are violations both of the right to autonomy and selective disclosure follows necessarily from her claim that the right of selective disclosure is just one of the rights in the autonomy cluster.

Beardsley claims the norm of selective disclosure takes the form of a moral rule that one should not seek or disseminate information about a person which that person does not want to have known or disseminated. This would suggest that the right to privacy involves protection against both acquisition of information and use of information, at least to the extent of rights against publication and oral dissemination. This is evidence for my earlier claim that Beardsley's account is something of a cross between an autonomy, and therefore nonproperty, account, and a property rights account based on information as the property of the person it is about. Beardsley never explicitly states that she
intends to present such an account, however. But if information is taken to be the property of the person it is about, a right to selective disclosure drops right out. Indeed, the right to selective disclosure would seem to be one of the few, and most important, property rights one could have in relation to information. Of course, for Beardsley to use this approach to privacy she must drop the position that selective disclosure is simply a subspecies of autonomy, although she could still maintain there is a close connection between them.

The definition of privacy that Beardsley has in mind is very close to that of Rachels and Fried, and thus it has the same advantages. One might view Beardsley's account of the justification of the right to privacy as bolstering their own attempts to provide a justification of sufficient strength for the strong right to privacy they think exists. Indeed, if one feels Rachels and Fried are at least on the right track, an idea supported by the detailed discussion of their accounts, the course charted by Beardsley is a more natural one, than that of Benn, to follow in search of the additional justification they need. This is because the importance Beardsley ascribes privacy can more easily be related to that identified by them: both approaches use a heavy reliance on information in their
definitions of the right to privacy.

Beardsley's account has several severe problems, however. Take her claim that the moral rule that is the norm of selective disclosure is just a special case of the principle of autonomy. This rule cannot be a special case of this principle because it has a wider scope. This is the case because violations can turn on seeking or disseminating information about X which X merely wishes was not known. Yet to violate someone's wishes is not always to violate his autonomy, even when the wish in question only concerns the individual's own status. Consider the case where an official is voted out of office in spite of his wish to continue to serve. (see McCloskey) This is no violation of his autonomy. Therefore, selective disclosure, in the form Beardsley presents it, cannot be a special case of the principle of autonomy.

The particular form of the moral rule Beardsley employs is problematic in other ways. It is too broad in its application. This results from the unqualified nature of "information about X" as it appears in the statement of the moral rule. What is actually the case in such a rule is that it should only apply to the subset of all information about X which is composed of information whose dissemination is directly connected
with effects on autonomy. The statement of the moral rule is also erroneous in its unqualified use of "do not seek." What is needed is some specification of which means are not permissible relative to seeking information in the previously mentioned subset of information about \( X \). An obvious condition to be added here would be one making reference to various circumstances which might also be relevant, e.g., a juror might have been instructed to not answer reporters' questions about a case in progress until it was over.

It is important to note exactly what has been established above. The moral rule of selective disclosure, as stated, cannot be a special case of the principle of autonomy. This is not to say that it is not based on various considerations of autonomy. Also, the moral rule, as stated, does not appear to be correct as a statement of the norm of selective disclosure. The question arises on the basis of these facts as to whether or not a corrected version of the moral rule is actually a special case of the principle of autonomy.

The waters muddy rather quickly at this point. This situation arises primarily because of cases which involve undiscovered covert observation. There is a clear violation of selective disclosure in such cases.
Yet there is a real question as to whether or not there is any violation of autonomy. It would appear that the person observed has lost the option of choosing whether or not to be observed. Taken strictly from the point of view of a loss of autonomy, this seems to be a very small loss. But this stands against the feeling of great wrong that we have relative to the observed individual in many such cases. The relevant puzzling cases being ones wherein the wrong is not explicable in terms of various other rights that the right to privacy protects. These cases are ones where the wrong is attached simply to the intrusion itself, rather than various consequences such as shame, etc. The operative intuitive feeling here is more a lack of respect for autonomy, or personhood, accounting for the degree of wrong rather than some direct proportion between the degree of wrong done and the degree of diminishment of autonomy.

The above indicates that selective disclosure is best seen as arising from various considerations of autonomy, or what the right to autonomy arises from, than as simply a special case of the principle of autonomy. This raises the interesting possibility of a connection being drawn between an account of selective
disclosure based on taking personal information as the property of an individual, and an account which makes reference to considerations of autonomy, or on the basis of the right to autonomy. This possibility is explored in the next chapter.

Section 2: The Property Accounts

The advantages of an account of the right to privacy as a property right have been partially presented in the previous pages. There are also disadvantages, however, for such accounts. The first account to be discussed in this section is the first account presented in this work which might be termed a "pure" property rights approach to the right to privacy. Such labels are offered only tentatively in the absence of firm criteria for which rights are property rights. However, both this account and the one following it clearly differ from earlier accounts in that they explicitly mention property.

Ernest Van Den Haag, in his article, "On Privacy," gives an account of the right to privacy as a property right arising from taking personal information as the property of the individual it is about. He uses the following definitions in this account:
Privacy is the exclusive access of a person (or other legal entity) to a realm of his own. The right to privacy entitles one to exclude others from (a) watching, (b) utilizing, (c) invading (intruding upon, or in other ways affecting) his private realm.

So, strictly speaking, privacy concerns not only the exclusive access to that extension of a person composed of information about him, but also the extension of a person which constitutes his private realm. It is important to note that violations of this exclusive access, and therefore violations of privacy, can be broken down into two main subgroups. These are the subgroup composed of violations which involve observing or utilizing the private realm, and the subgroup of those violations which involve the invasion of the private realm by another's sounds, images, etc. This distinction is important because, prima facie at least, it seems the first subgroup is more clearly associated with property rights than the second. This point will be discussed further below.

The first question which arises about such an account is what property the right to privacy is a right over. Van Den Haag claims it is one's psychic area which has "such dimensions as living space, image, expression, mentation, communication." In general, it is the property that one owns by virtue of it being
an extended part of the person. This is obviously a very different type of property from my car, furniture, etc. Van Den Haag points out the more typical examples of property such as those just mentioned are obtained by specific transactions, thus providing an easy means of differentiating them from the above mentioned components of the private realm.

There are several important implications of taking privacy as a property right. McCloskey claims that such an account is deficient because there are cases where we feel a person has improperly given up too much of his own privacy. His point is that there is no way to express this in terms of exclusive access. After all, there seems to be no cases where we think someone has improperly given up too much of his more typical kinds of property. A related criticism he makes is that someone might buy the right of access to a person and still show scant respect for privacy. Van Den Haag has at least two possible responses against these criticisms. For one, he might just bite the bullet and say that persons do sometimes permit such unlimited access to themselves that we look askance at them. However, this also happens in respect of people's disposition of more normal kinds of property. The heir to a large fortune some years ago began distributing large amounts of money
to strangers, including in many cases people who just happened by, yet no one challenged his right to do this, merely his rationality. He could also claim that the person in question is merely acting in an unconventional manner which draws such attention to himself, and conventions might change so that he was permitting an amount of access to himself which would not be noticed, e.g., someone who leaves his entire fortune to his cat would not be a newsworthy item in a society where everyone left their fortunes to their pets. Another line that Van Den Haag might take would be that the right to dispose of owned property is subject to some constraints in the case of the private realm whereas this is not the case with more typical kinds of property. It has already been pointed out that the latter are acquired as the results of specific transactions, so a lack of constraints on pursuing further transactions which involve them seems only natural. The private realm comes under ownership in a very different way, however, and so it seems an open question as to whether one's ability to dispose of it should mirror that of the more typical kinds of property. For instance, I own my heart, but I hardly have the same freedom to sell it to others as I would my car, even granted some way to survive the sale.
Whether or not the above suggested responses are adequate, there remain problems for such an account. There is a whole spectrum of violations of the right to privacy from the illegal use of a photograph of a person to constant electronic surveillance of a person in his home. An account of the right to privacy as a property right has its most straightforward successes in the torts arena of a legal right to privacy. This is because names and photographs of one's image are most easily related to the class of typical kinds of property. This similarity in character makes it easy to accept that we have very similar property rights relative to both types, in particular, that no one else will use our property for their own commercial advantage without our consent. We lose our feelings of confidence, however, as we move "deeper" into the private realm, as to what property rights we would have in relation to such things as our mentation. Indeed, it may well stretch our notion of "property" to the breaking point to try to include such things under it.

The situation described above is most apparent in the case of violations of privacy which consist of the invasion of our private realm by others by way of their sounds, images, etc. What property and property right are involved here? Consider the following example. I
am in my home and my neighbor has his stereo on so loud that I can hardly think. He has certainly violated my privacy, but which property has been invaded? It must be internal to me, at least in part, since everything external to me would still be there if I was not, and there would be no violation of privacy if I were not home. The best candidate would seem to be something like my peace of mind. But people can affect my peace of mind in a negative manner in countless different ways yet we do not think there is any property right that they violate. My hopes, fears, experiences, etc., are all my own, but are they my property in the sense which gives rise to the usual set of property rights, or even a significant subset of these?

One might propose that instead of some right to peace of mind being the property right at issue in such cases, it is rather a property right which is a right to peaceful use of my property. If this right is to be taken to be the right which is at issue in all such cases, the property referred to must be something like my hand, home, etc., i.e., the place where I reside. This is the case because I might simply be sitting in my house thinking about something that happened that day and not using any property besides that property I find myself in and/or on, i.e., my
house or land. Do we have such a property right, and if so, why? To answer this question, we need some idea as to why we have property rights at all. Surely property is, in general, important to us because of the benefits that accrue to us through its use. Property rights are, therefore, justified so that protection of said benefits to us that we accrue through the use of property is secured. A property right to the peaceful use of one's property should, therefore, emphasize the use, and benefits of such use, of the property in question. Thus, such a right would provide protection against someone's cutting the tires on my car, or taking other steps which limit or make impossible some use of my property. But cases like the one in the example about reviewing an event of the day do not emphasize the use of my house for some purpose. Rather, they emphasize the interference with me as a person, my peace of mind, instead of my use of the house. This emphasis on the nonproperty aspect of such a right provides good reason that such a right is not a property right which is violated by such cases. This is not to say there is no property right that is so labelled, just that such a property right would be applicable to cases more in the nature of direct interference with the use of property than the example at issue, and cases
like it, where there is only a very indirect interference with the use of property in repose.

The discussion above is much the same as the earlier discussion in Chapter II on Thomson's contention that each right in the privacy cluster is also a member of some other cluster like the property right cluster. That discussion included the observation that it is quite plausible to take the position that there could be two rights, one a privacy right and the other a property right, which were both described in nearly the same way but could be distinguished on the basis of the different emphasis that was made between the two. That the difference in emphasis is genuinely significant between the two can be shown here just as it was in the discussion of Thomson's position. I would have a right to ask the neighbors to turn down their very loud stereo even if those neighbors were my father's neighbors, supposing I was at my father's house. So the right to peaceful use of one's property, which might be a real right that I have, is not the primary right that is at issue in the cases under discussion. The right which is at issue primarily in such cases cannot be a property right because I have that right even in some places I do not own.
The preceding discussion does not rule out an account of the right to privacy as a property right, but it does suggest either one of two things. An account which has more in common with ordinary kinds of property as giving rise to the property rights which constitute the right to privacy will be preferable. It also hints that an account which is not solely based on property rights might better explain why violations of privacy cause the degree of concern which they do. After all, someone spying on me in my home seems to do a wrong which is far greater in degree than simply that of observing something, my body, which I own.

S. H. Hofstadter and G. Horowitz, in their book, *The Right to Privacy*, also present an account of privacy as a special kind of property right. Their account differs in significant ways from Van Den Haag's, primarily because of the lack of a definition for privacy. They do give the following definition of the right to privacy:

> It may be described broadly as the right against unwarranted appropriation or exploitation of one's personality; or the publicizing of one's private affairs with which the public has no legitimate concern; or the wrongful intrusion into one's private activities in such a manner as to outrage a person of ordinary sensibilities or cause him mental suffering, shame or humiliation.
This implies that the property that gives rise to the right to privacy is one's personality, one's private affairs, and one's private activities. The right over this last piece of property is interesting. It has been previously suggested that the kinds of property which give rise to a right to privacy, if indeed they do, are of a different nature than the traditional types. The right against unwarranted appropriation or exploitation of one's property, one's personality in this case, is a straightforward property right. So, too, is the right against publicizing the content of one's private affairs, if one considers this as exploitation of private property, where the property in question is information belonging to an individual.

But there is no case for saying that the right against intrusions of the type specified above which result in outrage, mental suffering, shame, or humiliation, is a property right. This right, if there is such a right, is only a right against harm. A right against intrusion into one's private activities irrespective of the consequences might be a property right, but not one dependent on consequences as the one above. This is true even granted that these types of property give rise to different types of property rights, in some cases, than do more traditional types of property.
McCloskey believes this account suffers from the same type of problem as all property rights based accounts do in that there may be no real financial compensation for lack of respect for privacy, as is the case with loss of sight or limbs. The same replies are available to this criticism as pointed out in the previous section of the chapter on Van Den Haag. It should be noted that replies which try to answer this criticism by way of pointing out that the types of property in question are different than the traditional types, characteristics of which form the basis of the criticisms, weaken the positive account, that these special types of property give rise to similar property rights as do the more traditional types, to the same degree as the wedge they place between the two types.

There is a peculiar overlap, and ironically somewhat of a gap, between the second and third rights that Hofstadter and Horowitz break the right of privacy down into. This can be seen by way of examples which show there can be a kind of "delayed" violation of the right to privacy as characterized in the above manner. Consider the following case. Susan Doe is taking a shower. Jill Jones walks in the bathroom without knocking and sees Susan, thus invading her privacy but not her right to privacy since the presence of another
woman does not outrage her, or cause her mental suffering, shame, or humiliation, at least not yet. Jill goes back to the living room and relates to John Smith in a most unflattering manner a most detailed description of Susan. After Susan dresses and goes into the living room, Jill and John engage in long fits of laughter and make several pointed observations, the result of which is that Susan is outraged, hurt, ashamed, and humiliated. Now there has been a violation of the right to privacy by the above stated criterion. This example falls short of being a case of publicizing one's private affairs, yet is dependent upon there being a spread of knowledge as a result of an invasion of privacy. This indicates the gap between the second and third violations specified in the right to privacy breakdown. It also hints at the overlap between the two where the shame, humiliation, etc., are evident only after there has been publicity. The peculiar nature of the third type of violation has reared its ugly head again. There is just no adequate account for why this right should be a property right. The overall account must be changed to recognize this fact or cease to be considered as an account of the right to privacy solely in terms of it being a special kind of property.
The discussion of the accounts in this chapter can now be placed in perspective with those of the previous chapters. The two main trends that have been identified so far are one, attempts to decide if the right to privacy is derivative or not, and two, attempts to found the right to privacy on property considerations or considerations of personhood. There are several combinations between the two trends which have been taken up. The accounts of Rachels and Fried are based on the role privacy plays in social relationships and thus on an aspect of our personhood, yet they can also be seen as accounts based on a property consideration, concerning personal information as property, which is important in light of the nature of persons. Whether these accounts should ultimately be taken as based on an aspect of personhood or not, they both fail to provide an adequate justification for the strong right to privacy they envision. They may still be seen as having great value in that they use a definition of privacy with several merits, and they provide strong evidence for at least a partial justification of the right to privacy even though this may ultimately be shown to be only a secondary one. The option is certainly available that this justification, along with additional support,
might very well justify the strong right to privacy they champion. They also lay all the groundwork necessary to refute Thomson's claim that the right to privacy cluster is not composed of sui generis rights. Their accounts are also useful in that they can be applied to the legal right to privacy as they explain in part why it is that privacy should be protected in the law.

The accounts of Benn and Beardsley provide valuable insight to the relation between privacy and autonomy even though they were shown to overstate the nature of that relation. Privacy is not a subspecies of autonomy but rather it arises from the same general considerations, at least in the case of rights. This observation is particularly useful when applied to the constitutional right to privacy in that it can help explain why various rights in the Bill of Rights can be seen as privacy rights or rights related to privacy rights. An examination of this connection may even yield valuable evidence relevant to the issue as to whether the right to privacy arises from rights in the Bill of Rights or whether some of these rights arise from a right to privacy antedating the constitution.

The accounts of Van den Haag and Hofstadter and Horowitz give full reign to a trend beginning in the
discussion of the tort right to privacy. It seems there is a close connection of some type between privacy considerations and property, at least in many cases, particularly those in tort law. While it may be the case that they overstate, in much the same manner as Benn and Beardsley, the strength of this connection, the need for trying to establish the exact nature of this connection is clear.

The "publicity" type accounts discussed in the first part of this chapter might be seen as falling in either section of the chapter since they are only pursued on the level of providing a definition of "privacy" to be used to delineate a right to privacy. There are ways to give either a property or nonproperty justification for a right to privacy based on this definition. The appeal of a definition at least along similar lines to a "publicity" definition is very strong. After all, it does seem to be the case that much of what is disturbing about invasions of privacy turns on others coming to have some personal information about us against our wishes. This notion is pursued in the next chapter.

The specific comments rendered above concerning the individual accounts can be used as a basis for a general overview of where the discussions of this chapter
have led us. The property rights presentations are strongest in regard to violations of the tort right to privacy since the type of property involved is very similar to traditional types of property. They are weaker relative to violations relative to less traditional types of property. The reverse is the case for the nonproperty accounts. In general, they are weakest in cases where it seems a traditional type of property, such as a name, is involved, and strongest where personality, trust, respect, etc., are involved. Several of the nonproperty accounts suffer from a similar problem as they do not provide a sufficient justification for a right to privacy of the strength normally claimed to be the case. The property rights accounts have all been shown, a la McCloskey, to invariably suffer from the problem of financial compensation not applying to the extent that it does in the case of more traditional types of property. Of course, most of the criticisms mentioned in the section are not necessarily the last word in each case, but they do serve to suggest areas of improvement, general problems with particular related approaches, and, in many cases, a general direction for further attempts to go.
The examination of the weak points of the various accounts presented in this chapter is a valuable step in the task of searching for the correct account of the right to privacy, but as valuable as it is, it must take second place to the role played by an examination of the trends apparent in detailing the positive aspects of the accounts so presented. There are two main arenas to be considered here, the attempts to define privacy and the attempts to provide at least a partial justification for the right to privacy. The attempts to define what privacy is can be profitably viewed as trying to explicate it as being a lack of "publicity," where the key move revolves around establishing a wider meaning for publicity than its traditional one which necessarily involves large numbers of people. The new meaning must apply to numbers as small as just one other person. This is not to say that this is the stated, or even the intended, method each writer is pursuing, just that this is an enlightening way to view the attempts while analyzing the worth of such contributions to this project.

There are several key trends visible in this chapter in the various approaches to the question of the justification of the right to privacy. Basically, these trends are the ones consisting of the personhood
approach, the property approach, and approaches which mix personhood and property approaches. It is not surprising that these trends appear in the form that they do because any preliminary thinking on the subject of privacy channels itself rapidly towards privacy being related to personhood or towards privacy being related to property considerations. The particular direction one takes initially in the preliminary thinking is primarily dependent on which examples one tends to consider first. Deeper analysis though begins to suggest a more complicated picture, a fact which is reflected in two ways in the accounts presented herein. First, while the accounts are easily identifiable as belonging to one of the three basic trends, there is an increasing sophistication displayed in the accounts as the depth of analysis increases. This increased sophistication is reflected in the "personhood" accounts in the particular ways they find privacy relating to personhood, various facets of personhood, etc. The range of difference between these accounts is very broad. The increased sophistication is reflected in the "property" accounts in the ways that "ownership" of privacy, or private information, is established, and also in the ways such accounts try to indicate how the property in privacy cases is like more traditional types of property. The second way that the
complicated nature of the right to privacy issue is reflected in the accounts of this chapter can be seen in accounts which exhibit both "personhood" and "property" considerations. I have stated earlier that the strengths and weaknesses of the personhood and property accounts are mirror images of one another. This, too, provides an impetus to try to combine considerations of the two kinds in a single approach. The connection point between the two different types of considerations in accounts of this type varies in nature. There is more of a consensus of opinion on where the connecting point is among accounts which more heavily emphasize property considerations. In such accounts considerations of various factors about personhood are brought in to account for ownership claims and, in some cases, to clarify to some extent how the "property" of privacy is to be treated. While there is less of a consensus about the connecting point in accounts which emphasize personhood, there are some regularities of treatment. Accounts which assign an important role to autonomy claim that control over privacy arises from the fact that the enterprise of a life belongs to the person who is living that life. This may cash out as control over information about myself is exercised by me because that information is mine. The notion of control of information about a person belonging to that
person whom it is about also serves as a connecting point in Fried's account concerning the role privacy plays in friendship.

The fact that almost all, or possibly all, accounts of privacy either explicitly, implicitly, or tempt one to, mention both personhood and property considerations is certainly highly significant. So this fact indicates a definite line of analysis that must be pursued in any truly rigorous discussion of the right to privacy. This line is an important part of the next chapter wherein I present my own theory on the right to privacy. None of the above definitely establishes that the best account of the right to privacy must be a combined personhood-property account, however. This is because of the fact that up until this point there has been no real challenge to claiming that information can validly be taken to be a kind of property, or more generally, that anything which can be substituted in the phrase "One's ______. . ." truthfully qualifies as a kind of property.
FOOTNOTES -- CHAPTER III

1McCloskey, p. 24.


3Rachels, p. 328.

4This suggests the crucial notion needed is one which concerns the control of the flow of information from oneself to non-intimates, and which discounts gods and similar observers.


7Benn, p. 10.


9van den Haag, p. 151.

10"extended part of the person" cashes out as the portion of the person which "fleshes out" the individuality of a person and is composed of anything that can be truthfully and meaningfully substituted in the phrase, "One's . . ." which is not obtained by a specific transaction.

11"Many, if not most, people would handle this case strictly as a violation of a right against annoyance
or nuisance, but I argue in Chapter IV this is a mistake in this case as privacy considerations are the primary issue here.

CHAPTER IV

THE RESPECT FOR PERSONS ACCOUNT

The examinations of the previous theories on the right to privacy on the preceding pages can now be used as the basis for an improved account of the right. The presentation of this account is composed of five parts. The first part begins with the two central definitions of the theory, and proceeds with a discussion that clarifies the contents of this theory. The second part of the chapter takes up a discussion of the justification of the right to privacy. The third part is concerned with possible objections to this theory. The fourth part deals with the ramifications of accepting this theory. The last part takes up the question of how this theory compares with those previously presented.

The first central definition needed for this account of the right to privacy is that of "privacy." "Privacy," as it will be taken in this theory, is a state of non-intrusion in the control an individual has over information about himself and those things he stands in direct relation to, or access to such information. The second central definition needed is that of a "right to privacy." The "right to privacy" is taken
to be a right to such a state of non-intrusion.\textsuperscript{1} It is not immediately obvious as to what account of privacy arises from these definitions. An examination is undertaken below of several of the most difficult cases arising relative to the right to privacy in which the account in question is employed in order to deal with these cases. An analysis of how several related accounts would deal with these cases is also undertaken. The end result of this examination is intended to be both a clarification of the account in question, as well as a clarification as to how my account differs from its most closely-related competitors.

One area of major concern relative to the right to privacy has to do with the establishment of a National Data Center where the government would store in a central location the information it has about its citizens. The question that arises here is whether or not such a center should be established at all. This issue is very complex and no attempt will be made in this work to arrive at a final solution to this problem. However, a great deal of progress toward a solution can be made by reference to my account. This issue turns on a balancing of the right to privacy against the benefits to be gained by establishing such a center. Progress toward a solution can be achieved by properly
identifying the weight of the privacy interests have here so this can be balanced against benefits.

The first point to be considered in this task is whether or not the weight of the privacy interests here is greater than zero, i.e., does the right to privacy have any bearing on this issue. It is quite obvious that most people feel, quite correctly, that the right to privacy does have a bearing on this issue. So, one test of the adequacy of an account of the right will be whether that account does in fact show how the right is relevant here. My account very clearly indicates the right is relevant to this issue. A great deal of the information that would be stored at such a center would be of a personal nature. Since my account takes the right to privacy to include control over such information, the weight assigned the privacy interests would be greater than zero.

It is not at all clear whether the two accounts most closely related to my account would be able to assign a non-zero weighting here. These two accounts are based on selective disclosure and exclusive access, respectively. Since most of the information that would be stored in such a center is supposed to be information voluntarily collected from individuals, or at least collected in accordance with legal requirements, these
accounts cannot directly assign a non-zero weighting to the privacy interests here. There is a possible way that these accounts might be said to assign a non-zero value indirectly. It is possible to generate new information from information which is voluntarily submitted. For example, information might be deduced from the combination of an IRS file of tax returns and an Army file containing someone's service record that is not deducible from either file alone. Would the generation of this new information violate either selective or exclusive access? Also, does the protection of selective disclosure and/or exclusive access extend to protection against the passing on of information from a person or agency to which it is freely given to some third party? It is at least plausible to assume that accounts of selective disclosure or exclusive access could be given that provided such protections. But these accounts will only provide such protection indirectly. This is particularly true of selective disclosure accounts. Exclusive access accounts suffer less from this problem because the third party has gained indirect access to the original party, while there is no straightforward way of describing this situation by means of selective disclosure.
The real test of a comparison between my account and these related accounts comes with an examination of the positive weighting assigned the privacy considerations in this case. It was mentioned earlier that my account directly assigns a non-zero weighting here while the competing accounts do so only indirectly. The heavy weighting my account assigns the privacy considerations here reflects this direct characteristic. My account assigns a significant and equal weighting to the need to justify requiring persons to divulge personal information to the government, the control a person has over any new information generated by analysis of information that would be stored in the center, and the control over making any of this information available to anyone outside the particular individuals or agencies originally possessing such information. Thus, the justification for the establishment of such a center needs to be proportionately weighty. Accounts based on selective disclosure would assign the heaviest weighting to the original collection of information, possibly little or no weighting for protection of new information generated on the basis of this information, and possibly little or no protection for the spread of such information. Even if such an account is bolstered in some fashion, such an account cannot as
straightforwardly delineate why such weighting is provided.

An account based on exclusive access suffers from similar problems as does a selective disclosure account. It may suffer such problems to a lesser degree since it is possible a less ad hoc explanation of the weightings assigned is possible since persons gaining such new information gain access to the original individual. But even given this fact, such an account cannot as straightforwardly delineate such protections as does my own account.

The reason my account is superior in handling this case is that my account clearly captures an important fact that is central here, or indeed in any privacy situation concerning personal information. Violations of the right to privacy are equally abhorrent whether the person obtaining the information in a proscribed fashion does so by direct means involving the person such information is about, or at a more removed level not directly involving that person, all other things being equal. It also recognizes the fact that new information generated from information freely provided is subject to the same amount of control as any other personal information within certain obvious limits, i.e., information which is new yet is obviously deducible
from the information provided should be considered part of the information freely provided. The related accounts in question do not adequately, if at all, recognize these facts.

Another area of much discussion relative to the right to privacy concerns court cases wherein the right to privacy is claimed to provide protection from prosecution for various illegal sex acts done in private between consenting adults. Here my account, along with both the related accounts, clearly indicates the right to privacy does not provide any significant protection that is directly associated with the particular situations at issue. If there is any right which provides protection for homosexual, or other illegal sex, acts it is that of autonomy, not privacy. The right to privacy only provides the usual protection against police intrusion normally associated with any search for evidence related to illegal acts. As regards the right to privacy these situations are no different than searches for evidence of drugs, illegal weapons, stolen goods, etc.

It was noted in the paragraph above that all three accounts agree on the illegal sex acts issue. This circumstance is usually the case, at least where the obtaining of information without permission is taken
to provide access to a person which is not allowed by a right to privacy based on a notion of exclusive access which takes one form of access to a person to be information about that person. Such an account, as well as one based on selective disclosure, will overlap my account significantly as regards what is an intrusion on privacy in cases where the intruder has direct access to information about the person whose privacy is intruded upon. This overlap changes significantly when it is the use made of personal information that constitutes the intrusion on someone's privacy, or when such information is obtained by a third party. Also such accounts are entirely dependent on the importance of such information for assigning the degree of significance of privacy violations although it was pointed out earlier such a method has serious flaws.

The difference between my account and such accounts can easily be seen in considering a straightforward case of a violation of the right to privacy. Let us imagine that Sam Smith picks the lock on Bill White's locker at his club. Mr. Smith searches through the personal effects of Mr. White. There is no particularly significant information about Mr. White which can be obtained by this procedure so the related accounts under consideration are hard pressed to assign any significant
degree to the violation here. My account, on the other hand, can and does assign a significant degree of violation here as well it should. The control Mr. White had over such information and the means of access to this information was completely circumvented here. His ability to remain a separate entity unto himself was impaired to the same degree. If one were to also imagine in this case that Mr. Smith were to use this unimportant, although possibly embarrassing, information to harm Mr. White somehow, one would surely want to say a more significant violation of privacy had occurred, yet the related accounts in question would not be able to as straightforwardly account for this in an adequate manner. My account would be able to do so. This is because my account concerns the control one has over such information, and such control would extend to this information not being used for the purpose Mr. Smith uses it for. So, Mr. Smith, using the information in this way, is directly proscribed by my account of the right to privacy.

Another way in which my account is superior to the two related accounts mentioned can be seen by examining how this account is justified. If the justification presented is correct, then the particular specification of the right to privacy defended to this
point is clearly superior to that of these related accounts. The presentation of this justification is undertaken in the section immediately following.

Section I: The Justification of the Right to Privacy

Various comments in both Chapters II and II indicate that a complete account of the right to privacy must include not only definitions of privacy and the right to privacy, but also a discussion of the justification of such a right. One should not be surprised that the particular definition chosen for these terms will greatly influence what is said about the justification of such a right. This connection will be discussed in some detail in the following pages, but first an initial discussion is needed concerning the roots of the right to privacy.

There are two primary components that are necessary for something to be said to be a moral agent in a context suitable for meaningful moral discourse. First, to be a moral agent a thing must be able to make meaningful, conscious choices between genuine alternative courses of action. Two, moral discourse is essentially prescriptions about behavior of moral agents concerning the interaction of such agents. Thus, there must be
more than one agent for there to be meaningful moral discourse. Human beings are moral agents due to their nature as separate, self-activating entities who are choosers between genuine alternative courses of action. All moral rights are ultimately grounded in these characteristics of human beings. They delineate the sphere of behavior which is most in keeping with this characterization of the nature of human beings. Any other specification of accepted behavior between persons would not be an adequate reflection of this crucial feature of persons as moral agents of the kind they are.

The right to privacy is grounded primarily on the notion that human beings are separate moral entities. Since moral discourse is essentially other-related, to ignore or downplay this characteristic of persons as distinct entities is to blur an essential element of moral discourse. To intrude on another person is illegitimate prima facie, because one is interfering in a realm one is literally no part of. One's life is completely one's own. To intrude on another's life is to appropriate part of that life as one's own, and to do so is to blur the distinction between oneself and another. If such intrusion were to reach the stage of knowing the total experience of another and to completely control the other's every act, any justification of
talking of there being "another" person would vanish. There would simply be an extension of oneself to include another body.

Does the right to privacy, therefore, rule out any intrusion whatsoever by one person on another? Obviously not. Members of a society cannot help but intrude on one another. The right to privacy does not arise as some total protection against intrusion by one person on another. Rather, the right to privacy is justified on the basis of respect and recognition of the nature of persons as distinct moral entities. The move away from intrusion simpliciter, to the more complex recognition and respect for the distinct nature of moral entities is fueled partially by the recognition that some choices a person can make involves significant effects on other persons. Thus, the right to privacy is based on respect and recognition of this nature of persons provides a means of preserving the distinct nature of persons while taking into account that some limits must be placed as to acceptable choices of behavior towards other distinct moral entities.

Many rights can be seen as primarily based on the need to limit the actions of persons so as to minimize their effect on others. Other rights, like the right
to privacy and the right of autonomy, can be seen as reinforcing the notion that each person is a distinct entity, a power unto himself.

So, the right of privacy embodies the expression of the respect and recognition of this facet of human beings. The question arises, of course, as to how the right to privacy does this. Many of the intrusions in another's life are specifically ruled out by various other rights. Are such violations also violations of the right to privacy? In many cases they are not, e.g., killing someone. In other cases they are also violations of the right to privacy, but only in a way less important than they are violations of the other right, e.g., a burglar who breaks into my house and steals my T.V. primarily violates a property right I have relative to my T.V. So, which cases involve intrusions which are primarily privacy violations? The cases which are primarily privacy violations are those which involve "pure" intrusions. Such intrusions are ones which carry the bulk of the wrong just in being an intrusion rather than some consequence of the intrusion. These are the intrusions which are most clearly illegitimate because of the distinct nature of moral entities, rather than the nature of persons as choosers.
The preceding indicates why the definition of privacy mentions non-intrusion in the control of personal information and the means of access to such information. Such mention is made because the purest intrusions, and in some ways the most disturbing intrusions, in a person's life have to do with the acquisition or use of information. After all, how is it we have access to the lives of others? Certainly, we can kill, rob, hurt, imprison, intimidate others, etc., but have we actually intruded on who they are in some way other than the gross physical level. Yet, to have access to personal information about someone else is to "get into" that person's life in an especially frightening way. This is because about the only way one genuinely shares one's life with someone else is by giving that person special access to knowledge about one's personal self.

The notion that personal information is the way we share ourselves with others, in social relationships, is the basis for the powerful secondary justification of the right to privacy Rachels and Fried present in their accounts. The protection of privacy is necessary if we are going to be able to create and maintain social relationships of various levels of intimacy. But this is only a secondary justification of the right
because it is much more important that we are protected from others forcing intimacy upon us, rather than merely being able to be friends with those whom we choose.

One might object to the mention of control of information and the means of access to information in the definition of the right to privacy. This is because the lack of respect and recognition of persons as independent moral entities is shown in violations of the right to privacy by the mere act of intentional observation, by whatever means of sensing, rather than the bare fact of information acquisition. This is true since intentional observation is a type of "pure intrusion." However, each such act does involve such acquisition necessarily. Thus to rule out such acquisition serves to rule out such acts. Normally, it would be better to specify a condition which explicitly ruled out a logically prior condition, e.g., the act of intentional observation, rather than the consideration it gives rise to. But the means of such observation are so diverse, and in some cases as yet not discovered, the only prudent thing to do is to opt for the more clearly stated version available which makes only implicit use of the logically prior component. Such a definition is even more strongly called for in the case of privacy. This is because there are examples
of a demonstration of lack of recognition and respect for moral entities of sufficient degree as to be violations of the right to privacy, wherein said demonstration is carried out solely in reference to information which was obtained in some legitimate fashion. For example, one might voluntarily fill out an employment application so that an employer could come to know one’s past salary history, but it would be a demonstration of lack of respect for one as an independent moral entity if the employer sold this information to a mailing list merchandiser.

The definitions proposed for use in this account of the right to privacy together with the justification for the right set forth in this section suggest an interesting example, particularly in light of the discussion above. Let us imagine that on some faraway planet there is a group of creatures, the Pasteurs, who are observing an Earthling, John Doe, through a "viewing" device. Whether or not this group violates Doe's right to privacy depends on the answers to the following questions. Are these creatures sufficiently similar to human beings that they can be considered as fellow moral entities? Notice that they could be that similar while having a very different set of senses than we do, e.g., they might rely on a sense organ which is highly
heat sensitive. The primary concern here is whether or not the Pasteurs qualify as rational entities. Are there any reasons to claim John Doe has relinquished control of the means of access to himself? Certainly the Pasteurs cannot violate his right to privacy if he has freely chosen to grant any and all entities access to himself. It should be mentioned that beyond qualifying simply as rational entities the Pasteurs and Doe must be sufficiently well-developed rational entities, as there can be no violations of a right to privacy of small infants or animals.

Since it is quite possible that these questions can be answered affirmatively in an appropriate combination, that would be a violation of the right to privacy even in cases where it is practically physically impossible that the violators could affect Doe. The objection mentioned above takes the form of challenging that a violation can occur in such cases (ones where there is no other detrimental effect on Doe). The response is that the disrespect shown Doe is alone sufficient for a violation.
Section 2: Objections to the Overall Account

There are several possible objections to the account of the right to privacy which is presented herein. One such objection would be that the right to privacy taken as the right to control information and the means of access to information is actually just part of the right to autonomy. While it is clear the two rights are closely connected in that they share to a certain degree the same justification, it is equally clear the right to privacy is not just a member of the cluster of rights which make up the right to autonomy. There are two reasons that this is not the case. First, the right to autonomy is concerned with major choices remaining within the control of an individual given the appropriate circumstances. The right to privacy is often concerned with much less significant "choices" and therefore has a wider field of application than the right to autonomy. Second, there are violations of the right to privacy, for example cases of undiscovered covert observation, where there is no significant loss of available choices, and therefore no loss of autonomy.

Another objection which might be raised against my account is one which has also been raised against accounts which present the right to privacy in terms of
selective disclosure or exclusive access, accounts which are quite similar to mine. The objection is that such accounts provide no means for distinguishing between losses of privacy and invasions of privacy, nor do they provide a means for capturing cases wherein a person excessively makes information available to everyone else. A simple rejection of the first part of this objection is available just by recounting the definitions of "loss of privacy" and "invasion of privacy" from the appendix after this chapter.

The response to the second part of the objection above is a bit more complex. We do have intuitions that there are cases wherein a person does not properly respect his own privacy. The objection being considered claims that accounts of the type in question, which includes my own account, cannot classify such examples as either losses of privacy or invasions of privacy, and therefore points to the possibility that by conditioning the public to consent to vast inroads into their privacy would thus negate protection of privacy. This would raise the problem that such inroads could not be classified as invasions of privacy, or, more properly, as violations of the right to privacy. On my account, there would be a loss of privacy in such cases, so it is free of this objection to that extent at least.
This point is inadequate to deal with the spirit of this objection, however. An additional portion of an adequate response is provided by noting that an invasion of privacy, as defined herein, might be taken in a very broad sense so that such conditioning would be considered an intrusion in the control over information which is supposed to belong to individuals. A more plausible line can be suggested by making reference to a discussion in which it is established that it is not morally permissible to establish such a "false consciousness," i.e., the "consent" is not considered as counting in such cases.²

This leaves only the part of the objection relative to genuine consent to too great a loss of privacy to be dealt with. The response to this portion of the objection is to concede the fact that there is no violation of the right to privacy in such cases but deny the conclusion drawn from this fact by the objection. Our unease at such an improper consent is not to be accounted for as some type of self-violation of the right to privacy. Rather, the unease we feel is the result of the lack of respect the person has shown for his own privacy and, more importantly, for himself as a person.
The situation just described is an unfortunate one, but a person making the objection at issue would clearly be mistaken in making the claim that an account of the right to privacy should rule out such a circumstance as a violation of the right. Actually, this is just a special case of a general problem of rights. A person can improperly give up any or all of the rights which he has, at least in one manner of speaking. For example, a person might sell himself into slavery and grant his master total control of his life, even unto the point of ending it. There is certainly an evil here, but it is not an evil which is the combined total of wrongs the person has done himself in the form of self-violations of his rights. Rather, the evil is the total lack of recognition of, and respect for, his personhood the individual has shown. Whatever way one tries to account for why this should be prohibited, if it should, it cannot be by way of the particular rights in question since this is the wrong level to deal with. The correct level of concern is at least that of the general justification of rights, if not more general yet.

A related objection to that just given is based on envisioning a society in which the gains in the general welfare accomplished by consenting to losses of privacy are so great that everyone consents to them.
In such a society there would be no violations of the right to privacy. The response to such an objection is simply to concede the point, but then note that in such a case there is no force to the objection that there would be no violations of the right to privacy. This is because there would be no improper consent, and therefore no evil, in such a case. One might duly respect one's personhood and still correctly decide that the resultant good from consenting to the loss in privacy is so great that no self-disrespect is shown by such consent.

Another possible objection to my account is that it is too broad because it would include as violations of the right to privacy cases of gossip about another individual, or observation of a person by some civilization hundreds of light years away where there is no possibility of any effect on the person observed. The underlying intuition behind such an objection is that where there is no potential harm to an individual as the result of some type of observation there can be no violation of the right to privacy. There are many variations on this theme which take different cutoff points concerning the probability of potential harm to the observed individual. I will take up only the version where the probability of potential harm is for
all practical purposes zero, since if this version is incorrect all its variations are incorrect.

The point of contention between this objection and my account is based on a conflict of opinion as to the justification of the right to privacy. The objection is based on the view that the justification of the right to privacy is found solely in the role it plays in protecting other rights and goods, and since there is no potential harm there is no such protection provided. The objection employs an uncontroversial definition of harm wherein showing disrespect for an individual is not necessarily to do him harm.

I have claimed there is a different justification for the right to privacy in that it is connected with the respect for, and recognition of, the nature of persons as individual moral entities. Such observation does not so recognize, nor show respect for, this nature and is thus a violation of the right to privacy. Of course, it is no refutation of the objection to merely claim it is based on an incorrect account of the justification of the right to privacy. While I have argued that such a justification is incorrect, as well as arguing for my own justification, I have not as yet proved this and I see no obvious way that this could be done. The only possible response, in lieu of a refutation
of the opposing claim about the justification of the right to privacy, must therefore be one of persuasion. Such a claim concerning the justification of the right to privacy is onerous because it places too little moral constraint on the actions of others towards the individual. It is part of an overall view that an individual is constrained in his actions relative to another individual only insofar as such constraint protects some good or prevents some harm to that individual. But harm here is taken in the usual sense of some direct effect on the individual through however an extended chain of causation. This is too narrow a constraint because it allows an unwarranted primacy of one individual over another, an unwarranted primacy even withstanding the fact that it is mutual. The primacy involved is that of the permissibility of the observer to observe over the constraint that the person observed not be observed. It is unwarranted because that which is observed is the person in question or an extension of that person, and that person is morally entitled to the whole of himself and the relevant extension of himself, whereas the observer is morally entitled only to his action of observation up to the point where it encroaches on the other.
Another objection which might be made to my account of the right to privacy, especially in light of the proposed justification of the right, concerns cases where some intentionally intrudes on another for his own good. An example of such a case would be a doctor who has inadvertently looked in someone's window and stops and closely observes the person inside because he notices that person has a skin condition which might indicate a potentially fatal disease should the person not receive treatment. The objection is in the form of a multi-level attack on how my account seems to handle this case, at the very least involving the observation that it is as yet unclear what my account would suggest here. Simple reference to the definitions in my account provides a prima facie claim that there is a violation of the right to privacy here. Does my account indeed claim this case involves a violation? To answer this question, one should first note that this is an extremely complicated case. There are four main responses to this question. One, there is an unjustified violation of the right. Two, there is a justified violation of the right on the basis of paternalistic considerations and no special obligations arise from the violation. Three, there is a justified violation of the right to privacy and special obligations
might arise. Four, there is no violation of the right to privacy. There are a number of relevant factors in determining which responses can be ruled out. These include the probability someone with the skin condition has the disease, the probability the disease will prove fatal, etc. Where these probabilities are very low, there would be an unjustified violation of the right to privacy. Where these probabilities are very high, the first response can be ruled out. The last three responses are only possibilities when the probabilities are sufficiently high. Which of the three apply to this case when the probabilities are high. In cases like this one, where there is a possible conflict between paternalistic considerations and privacy, the fourth response is appropriate only when there is a paternalistic consideration which promotes more privacy than is sacrificed. This leaves responses two and three in cases where the main paternalistic concern is other than privacy. This means the case at hand involves a justified violation of the right to privacy. The question of whether the violation might give rise to additional obligations is left for discussion in the last part of this chapter. The central notion which underlies the outlining of the various responses consists of the "separateness" justification. The root of the
objection that this case seems problematic for my account comes from a confusion which arises because of the mention of recognition and respect for persons in this justification. This is because it seems the doctor's primary motivation for the observation at issue here is simply respect for persons. This confusion is unnecessary if one correctly ascertains the emphasis of the "separateness" justification. The proper emphasis is on the respect and recognition of the separateness of moral entities. This is the basis of the right to privacy. The respect which the doctor exhibits by observing another person in the case at hand is that of respect for the life of persons. Such respect for another person can provide a powerful justification for observing another person, even to the extent of justifying a violation of his/her right to privacy, but it does not rule out the possibility of there being a violation of the right to privacy as would be the case if someone observed someone else where the motivation was the respect for the separateness of moral entities (other than oneself).  

The possibility, or lack thereof, of a case wherein there is a violation of the right to privacy, yet one which was overridden by other moral considerations, suggests a need for a decision as to what type of right
the right to privacy is. The right to privacy has already been identified as a negative right, it remains to determine if it is a prima facie right or not. Prima facie rights are taken to be those rights which in certain particular circumstances cease to obtain at all, and thus their "violation" does not give rise to any duties or obligations. Non-prima facie rights are those whose violation always give rise to duties and obligations even though such violation is the appropriate moral action in the particular circumstances of that violation. There are two types of prima facie rights, those which may cease to obtain given any sufficient set of conditions, and those which may cease to obtain only where the set of justifying conditions includes specific reference to the underlying justification of the right being "violated." Indeed, the underlying justification must not only appear in the justification set of the action, it must play a significant role in the justification for the act in question. It is this latter type that we find exemplified by the right to privacy. So in the case of the doctor looking in one might determine the right to privacy did not obtain in this set of circumstances, and therefore there could be no violation of the right to privacy by this act. The relevant point of this decision would be that there was
a sufficient set of justifying conditions which included a significant role for the condition which consists of the doctor's showing particular respect for the nature of the individual as a separate moral entity.

Section 3: Ramifications of Accepting Such an Account of Privacy

There are several ramifications that arise from accepting the account of the right to privacy presented in this work. There are five major areas these ramifications fall into. The first is that of the positive-negative distinction of rights. The second involves the defense of the somewhat controversial assignment of certain traditionally labeled "private" information as part of the public domain. The third area is composed of an application of my account to the right of privacy in the law. The fourth area of discussion consists of an explication of the similarities and differences between my account and accounts which base the right on notions of selective disclosure and/or exclusive access, those being the accounts which are most similar to my own. The last, and most difficult, area of discussion concerns the tie-in between violations of the right to privacy, and the lack of proper respect and recognition of the status of other persons as distinct
moral entities, powers unto themselves, etc.

The right of privacy has been discussed in earlier chapters in the context of a discussion of positive and negative rights, for example in the discussion of the accounts of Thomson and McCloskey. Thomson identifies positive rights as those rights which grant a person the right to do something, and negative rights as those which grant protection against others doing something. One should note that she does not indicate that any critical conclusions follow from finding that some right is a negative right. McCloskey bases the distinction between positive and negative rights on a different criterion. He identifies positive rights as those which protect or promote something positive in nature, and negative rights as those associated essentially with a lack of something. McCloskey, unlike Thomson, explicitly states the distinction is highly significant. Before deciding whether or not the right to privacy is a positive right, it is necessary to more adequately analyze the positive-negative distinction, if there really is one, along with the possible consequences of a particular right falling in either classification.

The most plausible way of defining negative rights involves taking such rights as essentially being rights which have to do with a lack of something. This
"something" ranges from certain actions of others, to simply intrusions, harms, etc. There are two types of negative rights relative to this kind of definition, one trivial, the other significant. The two types of negative rights are distinguished on the basis of what way they are taken to essentially involve the lack of something. The trivial type of negative right is the type which *only* involves the lack of something which would interfere with the protection of some positive right in some very straightforward manner and derives its primary, or total, justification from this role that it plays. For example, take the case of a property right I have to a particular picture that I own. I have a positive property right to enjoy this picture. I also have a negative right that no one shall destroy this picture. The primary justification for claiming such a right is that someone's destroying the picture would vastly interfere with my exercising my positive rights relative to the picture. This right is a negative right because it essentially revolves around the lack of something, namely the destroying acts of others. It is trivial because what is really of importance is the set of positive things I can do with the picture. This clearly suggests how the significant negative rights differ. Significant negative rights are
those wherein whatever is supposed to be lacking is what is of primary importance.

One must be very careful in discussing the positive-negative distinction in rights because of the possibility of giving alternative descriptions of the same right in both a "positive" and a "negative" form. For example, one might erroneously think the right not to be harmed could also be described as a right to well-being. So one must be careful to describe a right in the way which most adequately captures the core concept of the right. Of course, the analysis of the core concept will also indicate whether or not the right is a negative right, as well as the type of negative right it is, if it is one. The right just mentioned is a very good case where the analysis of the core concept shows the right to be a significant negative right, and so the right is most adequately described as the right not to be harmed. The presentation of part of this analysis will be helpful in illuminating what such a process involves, and why the particular result given is reached. The first thing to notice is that the two descriptions offered cannot describe the same right. A right to well-being would give rise to a right not to be harmed, in the same manner as the property right of owning a picture gives rise to a trivial negative right ("trivial" in the sense
of what type of negative right it is, not in the sense that violations of this right are not significant evils). But such a right would also place a moral obligation, although of possibly less degree than the obligation to not harm someone, to promote the well-being of other people. The right not to be harmed does not give rise to any such obligation. The deeper analysis of these rights, if there is a right to well-being, continues at the level of the possible justification of these rights. The right to not be harmed has at least a dual justification. One, acts wherein someone harms someone else are intrinsically evil. Two, harmful acts interfere with a wide range of the positive projects of the person harmed. A right to well-being would have a different justification. One of the most important factors in determining the range of possible positive projects a person could undertake is the extent of well-being the person enjoys. Thus, it is important not only that others not interfere with someone else in a way which diminishes his well-being, but there is also a moral obligation to promote the well-being of others. Admittedly, there is some overlap of concerns between the two justifications presented for the rights being discussed, but the difference in emphasis is not only obvious, it is genuinely significant. Note that both rights serve as
constraints on the choice of actions of others. The right not to be harmed restricts others from certain actions. The right to well-being also restricts others from certain actions as well as dictating other actions which will promote another's well-being. These constraints on the actions of others have a disvalue which serves to weaken to a more or less degree the force of the attendant obligations. This is important because it can be used as an indicator of the emphasis of the justifications of the two rights. It has already been pointed out that a right to well-being would give rise to both a right not to be harmed and a moral obligation to promote the well-being of others. Part of this latter obligation would be an obligation to prevent harm to others. This is one good indicator of the difference of emphasis between the two justifications. The obligation to prevent harm can be tied to the justification of the right to well-being via the observation that respect for the nature of persons as project undertakers is the central notion of this justification. This obligation cannot be as easily tied, if at all, to the justification of the right not to be harmed because the intrinsic evil of harm is emphasized as much, or more, than the respect for the nature of persons. Herein may lie the explanation for the difference of force
commonly attributed between the obligations to not do harm to someone, and the obligation to prevent harm. There are two factors to be considered. The justification of the right to not be harmed is stronger than the justification for the right to well-being because it includes both the intrinsic disvalue component along with the notion of the nature of persons, while only the latter notion is emphasized in the justification of the right to well-being. The second factor is that the obligation to promote the well-being of others, and thus to prevent harm to others, places more constraints on the actions of others which counts against the prima facie degree of obligation the justification of the right to well-being would entail. The obligation not to harm someone else places less constraint on the actions of others and therefore retains more of the prima facie degree of obligation the justification of the right not to be harmed entails. A prima facie degree of obligation which is already greater than that entailed by the justification of the right to well-being.

So one can break down rights into at least three categories, positive rights, negative rights which are trivial in the sense of merely being adjuncts to positive rights, and negative rights which are significant and not mere adjuncts to positive rights. What kind of
right is the proposed right to privacy? It has been suggested that the right to privacy is a negative right, one which is essentially connected with a lack of something. It is true that privacy as defined in this work does refer to a lack of something, namely intrusion. Yet there is also the positive character of the definition which makes reference to the control of information and the means of access to information. The question of whether the right is a negative one turns on whether the lack of intrusion receives the emphasis or if the control aspect of privacy receives the emphasis. Since violations of the right to privacy are taken to be intrusions, one might claim they receive the emphasis and that the right is a negative right. Yet these intrusions are intrusions in the control of information or the means of access to it, so neither the intrusion nor the control elements seem to receive emphasis. Also, it is possible to view the violations of many rights as being intrusions in control over one thing or another, even those which are traditionally accepted as positive rights. For example, we might view violations of the right to liberty as intrusions on the control an individual has over his actions. If, instead of looking at what violations of the right to privacy involve, we examine the value of the control over personal
information an individual has by virtue of his right to privacy, we discover that it is of little or no value in and of itself. It has value solely in that others are denied access to this personal information. Thus, the element of intrusion can be seen to be given emphasis and so the right to privacy is basically a negative right. It is a significant negative right since it is not merely an adjunct to a positive right, but rather takes this form from the core concept arising from the justification for this right.

One might wonder what conclusions follow from the fact that the right to privacy is a negative right. There are several possibilities. McCloskey, for example, claims that negative rights cannot be basic rights since they refer to the lack of something, and the lack of something does not have any intrinsic value. I question, however, whether such a characterization of basic rights as only rights which protect something of intrinsic value is wise. It clearly is the case that some things, for instance harm, have an intrinsic dis-value. A more plausible characterization of basic rights would be those rights which protect things of intrinsic value or which rule out things of intrinsic disvalue. There is, however, the following important conclusion to be drawn about the right to privacy as a
negative right. Negative rights have value solely by way of the constraint they place on others. This constraint serves to preserve the integrity of an individual moral entity as separate from the community at large. In this they differ fundamentally from positive rights. Positive rights have value principally from a different source. Positive rights receive most of their value through the agency of the promotion of their associated goods. They do serve as a constraint on the actions of others, in the sense of giving rise to associated negative rights, but in a narrow manner of speaking this is only a secondary function that they have. Thus, negative rights, both those which are adjuncts of positive rights and those which are not, function to constrain the community at large, to a certain extent even overriding considerations of the general welfare. The peculiar characteristic of the significant negative rights, ones which are not adjuncts to positive rights, is that they function solely as a buffer between the individual moral entity and the community at large. In other words, these negative rights are the moral instrument responsible for assuring the independence of the separate moral entities known as persons both from other individuals and especially from the demands of the group at large, to the degree
that there is such independence. This is why such negative rights serve as a counterbalance to considerations of the general welfare as well as such things as paternalistic considerations.

Since the right to privacy is just such a negative right, it has this characteristic of being a buffer between the individual and the community at large. So the right to control information and the means of access to it, where the information is of a "personal" nature, stands against considerations of the general welfare, up to a certain degree, even though it is not directly associated with a positive right which protects some good of intrinsic value. If the promotion of the general welfare is great enough, and the other necessary conditions are met, the information becomes part of the public domain and is thus removed from the realm of private control. There are also cases wherein the increase in the public welfare is so great, even though the other conditions for membership in the public domain do not obtain, where the information might be wrested away from individual control. But these cases will still involve a loss of privacy as well as a violation of the right to privacy, only such cases are justified violations of the right to privacy. So, in essence, the right to privacy is one of the negative rights which
serve to balance the considerations of the individual with the considerations of the community at large, or the general welfare. The line which is drawn relative to information, and the means of access to it, is the threshold point where information becomes part of the public domain, given the additional restrictions previously stated.

The preceding discussion clearly indicates that the identification of some right as being a negative right has significant implications, although not the implications that McCloskey claimed. The fact that negative rights fulfill the role of a "buffer" between oneself and others gives rise to several important such implications. McCloskey, quite correctly, thought it was important to know if the "violation" of some specific right always gave rise to some duties or obligations if such violation was justified, or if said right simply "disappeared" in such circumstances. It is clearly the case that when a negative right is "violated," even if justified, it will give rise to various duties or obligations unless the justification involves the promotion of the "buffer" function of the negative right to an equal or greater degree. For example, the infliction of harm on an individual will not give rise to any duties or obligations only if it will promote the security of
moral entities from intrusion to a degree equal or greater than the degree of the intrusion of the harm inflicted.

The implication that arises from a right being a negative right just discussed points to a second important implication that arises in such a way. The correct identification of a right as a negative or positive right can play a vital role in determining what should be said in the case of conflicting obligations arising from two or more rights. This is particularly important in the case of the right to privacy because many violations of this right involve "pure" intrusions on another, intrusions which do not involve some harm to the individual whose right is violated.

The particular way that the right to privacy is characterized in this account as a negative right, a right against intrusion in the control of information of a personal nature and the means of access to such information is admittedly controversial. One reason that it is controversial is that there is one group of pieces of information usually viewed as being of a "personal" nature, as well as the means of access to it, which is taken in this account to be part of the public domain, rather than part of the private sphere. This information has a special connection to the general welfare which is at the basis of the characterization of
it as being in the public domain instead of the private sphere. Why is it not just taken that it is a part of the private sphere which is justifiably intruded upon when the increase in the general welfare is sufficient? The main reason such an alternative is inferior is that even justified violations can still give rise to duties, e.g., claims to at least partial reparations. Yet there is no reason to claim that the legitimate accumulation of "personal data" by such institutions as the I.R.S. gives rise to any such duties in and of itself. Rather, this information, in the role played in such a case, has more emphasis placed on its "public" character, and therefore does not exhibit the characteristics of personal information which lead one to assign it the protection of the right to privacy in light of that right's justification.

The complexity of this issue runs very deep as well as involving a great number of factors. These factors include the justification of the right to privacy, the balancing of the individual against the community at large, the balancing of the individual qua individual and the individual qua component of the state, the emphasis on the "personal" nature of information versus the emphasis on its "public" nature. The interaction of these components give rise to the problem outlined
in the previous paragraph as well as a group of related problems which are central to the question of the adequacy and understanding of the account presented in this chapter. The discussion of a representative member of this class of problems is useful in obtaining a handle on the interaction of these factors, in particular how the account resolves such problems.

A clear case wherein the claim of "personal" information belonging to the public domain seems to cause problems for the account being presented concerns one possible way that information previously considered as protected by a right to privacy could come to be considered, according to this account, as part of the public domain. This would mean that the range of protection by the right to privacy would constrict, but supposedly retain the complete spirit of the justification of the right to privacy. Could the right to privacy change with the passage of time with its attendant changes of circumstances and still reflect the justification of this right to the same degree? The claim is that the answer to this question is yes, a claim which must be defended. The example to be considered is composed of a nation taken at different times in its existence, one before the advent of highly sophisticated computers, the other after. Let us take the nation to be the U.S., and the
times 1815 and 1990. The central factor in the example revolves around whether or not the accumulation of data for a National Data Center would violate the right to privacy in the societies of these times. For the purposes of this discussion, it will be assumed that the establishment of an institution such as a National Data Center would make the information to be gathered meet all the criteria for membership in the public domain in 1990, but not in 1815. This would mean, on my account, there would be less information protected by a right to privacy in 1990 than in 1815.

The problem posed for my account by this example is the claim that the account must be in error because the same justification for a right to privacy can be said to exist both in 1815 and 1990, and yet give rise to radically different rights at the two times. The essence of the objection has to do more with the vast degree of the difference, not simply that there is a difference. After all, it is widely recognized that ideas of what is private do change over time and from culture to culture. However, such a radical shift does seem problematic. Before embarking on a solution to this dilemma, one should be careful to note the true nature of the issue at hand. The difference which is of interest here is the difference of scope, in the form
of information that is protected by the right, between the right of privacy in 1815 and that of the right postulated in 1990. This is to be differentiated from any difference between the protection actually claimed under a right to privacy in different times. It is certainly possible that the scope would be the same in two different times yet it be the case that the protection relatively to a specific body of information is often voluntarily relinquished in one time and vigorously pursued in another. For example, the right to privacy in the U.S. in 1946 and 1966 might include protection of the information that a citizen belongs to a Japanese patriotic organization. Given the ill feeling toward the Japanese at the end of World War II, one might well imagine numerous instances of such protection being claimed, while the calmer atmosphere of 1966 might find the protection falling into complete disuse. Having clarified the issue it is now possible to consider the solution to the previously stated concern.

The solution to this difficulty arises from an examination of the justification of the right to privacy. The right to privacy is morally dictated out of respect for the separate individual nature of persons as self-activating project undertakers. It is this nature that identifies persons as moral entities. The
protection of the right to privacy gives expression to this respect, and the obligation to express such respect. This fact about the right to privacy serves to explain why the right to privacy differs across time and culture. The explanation is that what is to count as the expression of this type of respect differs across time and culture. There are two basic ways such a difference can come about. One, circumstances can change in such a way that justifications for intruding on another become possible that were not possible before, or old justifications may become inoperative. The relevant justifications here are only those which have a major component concerned with the separate nature of individuals. The National Data Center might be one such example, depending of course on how useful it would be to have such an institution. Another way this difference can be said to exist is based on different concepts in the cultures in question. In our culture the concept of "property" is a central one, including the land we claim to own. The land is closely associated with our concept of ourselves, especially the land on which we live. So much so in fact, that intrusions on this land are taken to be violations of our right to privacy. There are possible cultures, however, where the concept of property plays little or
no role. In a culture where the land is viewed as not belonging to anyone, traversing the land on which someone lives might be viewed as having nothing to do with privacy even on our notion of privacy. If the land is not viewed as some kind of extension of the individual who lives on it, the scope of the right to privacy would not include it.

The next point in the discussion of the ramifications of my account of the right to privacy concerns its application to the legal right to privacy. Given my account of the right to privacy as the right to annex a portion of the public domain to one's control over the means of access to personal information given certain conditions and/or to control personal information, and the means of access to it, which is in the non-public domain that is not, relative to reasonable means, unavoidably enmeshed with the public domain, there are several conclusions that can be drawn about the right to privacy relative to the law. The legal right to privacy has arisen from both legislative and judicial actions. Most of the right has been grounded on judicial actions in constitutional law. The legislative underpinnings are most evident in torts. The judicial decisions, despite the complex, convoluted attempts to base them on constitutional amendments, are
clearly based on a view there is a moral right which such decisions are giving expression to in the law. The legislative attempts are also correctly seen in many cases as giving legal expression to a moral right to privacy. There are exceptions to this general trend in legislative attempts in the area of torts. These exceptions result from legislative attempts to identify various tort actions as violations of the right to privacy when in reality the right to privacy is not involved. This is particularly true in cases concerning publicity which places a person in a false light. The appropriate connection here is with slander or libel, not the right to privacy. Keeping these exceptions in mind, one can properly view the legal right to privacy as being an expression in the law of a part of the moral right to privacy. It is a reflection of only a part of the moral right both because it has been incorporated in the law in a piecemeal fashion which is still going on, and because only a part of the moral right is amenable to the devices of legal protection.

The torts violations of the right to privacy clearly fall, in the vast majority of cases, into two main categories. One category is that of control of information, the other category is control of the means of access to information. These categories represent a
bisection of the definition of privacy used in this work. Thus, public disclosure of embarrassing facts about the plaintiff and use of the plaintiff's name or likeness, two of the four currently recognized types of tort violations, fall under the category of control of information. And intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, falls under the category of control over the means of access to information. The fourth recognized type of tort violation, publicity which places the plaintiff in a false light in the public eye, would appear in the category of control of information, but I have already indicated that such cases would be better handled as connected to slander or libel. The specification of these two categories leads directly to the following observations about the treatment of violations of the right to privacy in torts. The category of control over information is basically being treated in a manner appropriate for legal considerations of property, the information itself being seen as the property of the plaintiff. The category of control over the means of access to information is basically being treated in a manner appropriate for legal considerations of trespass, the trespass occurring on the means of access to information. So, the legal right of privacy, and the
moral right to privacy, is reflected in the law of torts in three basic ways: considerations of property, considerations of trespass, and considerations of libel, slander, and defamation. The latter way of treatment is incorrect because the basis of the action concerns false information about the plaintiff, either explicit or implicit, and the right to privacy only covers true information.

One might wonder why it is that the moral right to privacy which is of such a broad nature is reflected in torts as such a relatively narrow legal right. The explanation for this is simple. The legislative actions that brought about the expression of the legal right were the result of a piecemeal procedure tying privacy considerations to the law by associating them with previously well-recognized legal considerations, property and trespass. While the connection of privacy to these considerations is obvious, the particular ramifications of such an identification are not. There are two reasons that this is the case. The first is that the moral right to privacy is not essentially a property right and to so treat it involves a basic distortion. The second reason is that information, and the means of access to it, are not traditional types of property and thus are only partially amenable to
traditional legal treatment as such. Thus, the right to privacy in torts is a limited expression of the moral right to privacy composed of those specific privacy rights which are most fruitfully presented as property rights of a more or less traditional type. That this is the case can be seen by examining the various tort violations which have been identified in the law. Most of these violations concern the control of information since information is more easily associated with more traditional forms of property than trespass over the means of access to information can be associated with more traditional forms of trespass. This is because information is more readily associated with traditional types of property than is the means of access to information.

The bulk of the legal right to privacy has been formed as the result of judicial actions which usually can be profitably viewed as attempts to give expression to a moral right to privacy in the law. The major movement here has been in the area of constitutional law. The attempts to "find" a constitutional right to privacy differ significantly from the efforts in tort law in that the legal right to privacy is envisaged as having a much wider area of application. Thus, the constitutional right to privacy comes closer to
reflecting the broad nature of the moral right to privacy. A similar move has been made in the area of constitutional law to that of the move in torts, namely the attempt to tie the right to privacy to already well-established legal concepts. Instead of property and trespass though, a substitution of various constitutional amendments have been the vehicles of association. The attempt at association has been far less successful in this area of the law. Despite the lack of credibility of the association that has been made so far, the constitutional right to privacy in the form it now has is in many ways a more adequate representation of the moral right to privacy. The judicial actions which served to give expression to this right have primarily been based, as stated in the first chapter, on finding a right to privacy arising from the penumbra of one or more constitutional amendments. The problem with these attempts is that many of these amendments are most plausibly viewed as arising from the right to privacy, and other considerations, than the other way around. This was hinted at in the statement of one Supreme Court justice who referred to a moral right to privacy which antedated the Constitution. Prohibitions against the quartering of troops in private
homes during peacetime and the right of association are examples of constitutional concerns which are profitably viewed as arising, at least in part, from considerations of a moral right to privacy instead of vice versa.

An examination of the particular cases which have been decided based on a constitutional right to "privacy" made by reference to my account of the right to privacy indicates that the current treatment of this right in the law is woefully inadequate. First, as was previously pointed out, many decisions based on reference to the constitutional right to "privacy" are not actually cases primarily involving the right to privacy. Griswold v. Connecticut clearly involves the right to marital autonomy rather than the right to privacy. Most of the twenty-one rights that Tribe discusses in his fifteenth chapter, "Rights of Privacy and Personhood," have very little to do with the right to privacy other than the fact that they share a substantial amount of their justifications with that right. Indeed, of this long list of rights only two are primarily privacy rights, the right against government intrusion on the body, and the right to control a life's informational traces. The right to privacy does play a central role in cases involving one
other right he lists—the right against government shaping of the mind through screening the sources of consciousness. This is because the right is clearly violated when government agents search through all of one's reading materials in the hunt for obscene materials.

The preceding point, that almost all of the rights presented in that chapter do not directly involve a right to privacy, does not mean one should take this as meaning that privacy violations might not occur when violations of these rights occur. The point is rather that they need not occur when violations of these other rights occur. Indeed, in the case of most of the violations of these other rights there is no violation of the right to privacy.

One might wonder at this point if it is not the case that a certain tension has arisen in my account of the constitutional right to privacy. The point has repeatedly been made that the moral right to privacy is a very broad, strong right which should be given a proportionately broad, strong expression as a legal right. Yet, the claim has also been made that there is as of now no such expression in the law. This may make the previous discussion puzzling since I now claim that most of the insufficient expression given in the law
should be recharacterized as rights other than the right to privacy. This tension is only apparent, however. There are basically two important types of intrusion that the government can bring about on a person—gross intrusions that violate such rights as liberty, autonomy, and the right not to be harmed, and "pure" intrusions that provide access for the government to the innermost core of what and who a person is. These latter type intrusions are in many ways more diabolical than the former type, even though the former often involve more drastic physical and mental results. Perhaps the most vivid way of capturing this feature of "pure" intrusions is utilized by Orwell in 1984. Torture is surely one of the most grievous intrusions a government can inflict on one of its citizens. Yet the true horror of "Room 101" is the use by the government of the knowledge of a person's innermost fear to transform them into a "model" citizen. The torture was made "personal" in an unendurable way. The "pure" intrusions involved in right to privacy violations reflect this distressing personal element often missing from gross intrusions.

The discussion above indicates how the tension mentioned therein is only apparent. The expansion needed of the constitutional right to privacy as it
currently exists needs to be done by greatly expanding the notion that it involves control over a life's informational traces. This control is currently seen as extending solely to the gathering of information in files and to constraints on the government concerning the accuracy of any information which is disseminated about a person. The needed extension of this control would include the government attainment of any information in the private sphere and the means of access to it, rather than just protection against the government assembling large amounts of personal information unnecessarily. Thus, the violation of the right to privacy brought about relative to government shaping of the mind through the screening of the sources of consciousness by way of searches through a person's reading materials is seen not as some special subtype of privacy right, but rather just as an instance of the overall privacy right to control information in the private sphere.

This brings us back to the moral right to privacy presented in this work as based on the respect for the nature of persons as separate moral entities. In essence, it is a right which serves to separate individuals from all other moral entities by acting as a restraint on their observation of, and access to,
the individual. This is a very broad function and right. While the diversity of violations recognized in constitutional law is indicative of the broad nature of this right, there has as yet been no really broad legal right established which gives full expression to the full intent of the moral right. The trend, however, especially in the legal literature, is towards an ever-increasing application of the right.

The trend towards such ever-increasing application of the right to privacy is easily explained. Modern life is such that the individual is increasingly subject to observation by very sophisticated means, ones which are hard, if not impossible, to circumvent relative to the average individual. These sophisticated means range from electronic hardware to various advances in psychology. The increase in the sophistication of the means of observation and intrusion has been accompanied by a staggering increase in information handling and storage capabilities due to the advent of modern computers. Information which is obtained from a myriad of sources can now be processed almost instantly and transferred immediately to an almost unlimited number of points near and far where it can be stored indefinitely. Thus, the control of information, and the means of access to it, has become a
much more pressing concern than ever before. This increasing concern is behind the trend towards the ever-increasing legal protection, and discussion of legal protection, one finds in the law.

The trend in the law towards a more and more far-reaching scope of a legal right to privacy has been paralleled by a similar trend in philosophy. The trend in philosophy has been a general trend towards increased sophistication of the accounts, in particular their ability to handle more situations adequately. Many of the accounts can be viewed as concentrating on a central notion connected with privacy where progress is made over previous accounts by employing new formulations of previously identified central notions which are more amenable to extension in order to cover cases nearer the boundary of the protection of the right to privacy. My account is a good example of this trend. It was stated earlier that my account is very similar to previous accounts which are built around the central notions of selective disclosure or exclusive access. To see this consider the likely form of accounts based on narrow interpretations of selective disclosure and exclusive access, beginning with selective disclosure. One preliminary approach takes privacy as primarily involving secrecy. When
narrowly interpreted secrecy provides a very inadequate base notion for an account of privacy. Many obvious examples of violations of privacy are only tenuously connected, if at all, to the notion of secrecy. Naturally, one obvious move to make to alleviate this deficiency is to attempt to identify a natural extension of this notion that fares better in handling such cases. The natural line to take in this search very rapidly arrives at the notion of selective disclosure as a promising substitution for secrecy, even when it is narrowly interpreted. This is because privacy has less to do with information being kept to oneself than it does with one sharing certain information with some and withholding it from others by choice. This characteristic also suggests that extensions of this notion are likely to be more successful. One finds a similar evolution with the notion of exclusive access. Another basic notion connected with privacy is seclusion. But, as is the case with secrecy, seclusion omits the notion of sharing something of oneself with others by choice. Exclusive access better captures this notion while retaining the core concept of seclusion, the exclusion of others. Once again this is true even on the narrow interpretation of the term. But the increased adequacy of using selective disclosure and
exclusive access over secrecy and seclusion, respectively, is still insufficient for the task of defining the right to privacy, at least when these terms are narrowly interpreted. This can be seen for selective disclosure in the following example. John Doe, a salesman, sees Bill Houseperson doing his spring cleaning through his open front door. He knocks on the door and enters without waiting and launches into a sales pitch about the Wonderwitch vacuum cleaner he is selling. This is a violation of Bill Houseperson's right to privacy, and possibly a violation of some other rights. It is a type of simple brute intrusion violation of the right to privacy. It is difficult to really handle this type case in terms of selective disclosure. This type of case is easily handled in terms of exclusive access. But there are cases where exclusive access accounts fare little better. The following is an example of this type of case. Sally D. gives an employment application to Venus Sales Inc. personnel manager Janet G. which contains her current salary information. Janet G., without Sally's permission, sells this information to a mailing list firm. This violates Sally's right to privacy. Exclusive access based explanations of why this is a violation are not very convincing. Such cases
are easily handled in terms of selective disclosure.

The discussion above brings out several key points. Straightforward interpretation of selective disclosure leads to accounts which are strong in information violations and weak in brute intrusion cases. The reverse is true for exclusive access accounts. This is not surprising when these two approaches are seen as arising from secrecy and seclusion, respectively. There are two obvious courses to proceed on: one, find an extension of one or the other type account which has the strengths of both; two, find an account which employs an acceptable combination of the two approaches. It turns out that option one collapses into option two. Selective disclosure can be extended to cover brute intrusions even where information exchange does not play a significant role simply through the device provided by the observation that there is at least some secondary acquisition of knowledge in such cases. But this is simply bringing in protection against invasions of seclusion, half of the two-sided coin of exclusive access, by the roundabout device of minimal information acquisition. This extension is not a happy one, however. It stretches selective disclosure accounts too far from their basis of secrecy, or the importance of information control. This is reflected in the difficulty
of explaining the severity of various brute intrusion violations since the information acquired may have little or no significance. Exclusive access extensions fare somewhat better in this regard. Here the extension is via expanding exclusive access to include exclusive access to personal information. There is less strain in this extension than in that proposed for selective disclosure because there is a natural extension from talking about exclusive access to a person to exclusive access to an "extended" person which includes that person's possessions and information about that person. This is a form of extending the notion of seclusion, the physical separation of a person from others, to the much more complex notion of "moral entity separation," the laying of both physical and non-physical "boundaries" between a unique moral entity and all others. Information acquisition or exchange violations can be handled on this account because such violations involve another gaining access to a separate moral entity by coming to have personal knowledge of him or her. My account can now be seen to be a type of exclusive access extension account. The crucial move being the abandonment of the simple physical notion of seclusion for the more complex notion of moral entity separation.
One might object that the heavy reliance on the use of "information" in my basic definitions shows my account is more a selective access extension, one having the problems I mentioned above. Once again this is a misleading situation. The genuine foundation of my account is an exclusive access extension. The explanation of the severity of violations is to be carried out on this basis. It is the incredible complexity and variety of intrusions that necessitates reference to information acquisition as a relatively straightforward means of identifying intrusions. This is the primary role of "information" in my account, not explanation of severity. This in no way rules out that the importance of the information, or its nature, might not play a significant role in explaining the severity of various information-oriented violations, just that said explanation will ultimately be founded on the separation notion.

This "moral entity separation" notion taken to be the foundation of my account of the right to privacy has been alluded to many times in my presentation to this point. Since it is the central notion behind this work, some additional comments are in order. Persons have been variously characterized in this work as
self-activating entities, project undertakers, pursuers of goals, moral entities, etc. But what is it that makes persons moral entities? Part of the answer to this question comes from the examination of the free-will vs. determinism debate. If persons have no free will it negates the meaningfulness of ascribing moral blame-worthiness or praise-worthiness to them, or at the very least it negates the traditional contents of those terms. This is because it seems pointless to assign responsibility to someone who had no choice in acting as he did. Thus, a key condition for being a moral entity is that an entity can exhibit real choice in acting. An entity must also be at least minimally aware of what it is doing. We might say that an entity must be capable of conscious choice to be a moral entity. This condition can serve as an approximation of a necessary and sufficient condition for an entity to be a moral entity. A more exact condition would require fine tuning as to what would constitute a conscious free choice, and possibly provisions for including entities which are only potentially responsible agents, i.e., children, etc. A more exact condition might also include provision for "group" moral entities such as tribes or nations. But the primary concern here is just what makes persons moral entities, and for this
purpose the condition as stated is sufficient. It should be noted in passing that if persons do not meet this condition the chances are that moral talk would be dropped, or that some reconstruction would be undertaken in which persons and moral entities were discussed as if persons did meet the condition. Be that as it may, the central point of discussion is the characteristic of persons as free choosers. It is this characteristic that gives moral force to the characterizations of persons as self-activating entities, project undertakers, goal pursuers, etc. The ultimate arena for this moral force being the various interactions among persons. Tremendous emphasis in the discussion of persons as moral entities must be placed on the nature of persons as distinct entities, separated from each other physically, mentally, and possibly spiritually. This separate nature makes itself felt in many issues in moral discussions, issues ranging from the possibility of altruism to the rationality of complete self-interest action guidance. A system of morals must adequately assign a place of recognition and respect for this basic characteristic of persons as moral entities. This is particular true in moral systems which include rights. Rights can be seen as having two basic purposes—one, rights outline a set of
duties, obligations, etc., that a moral entity must use to guide his actions with the special set of entities composed of fellow moral entities. It is true that a system of morals might also dictate certain guidelines for actions relative to entities which are not moral entities, but rights are one reflection of the special status granted by most, if not all, moral systems to moral entities. The second purpose of rights, a secondary justification for positive rights and primary justification in negative rights, is to prevent interferences with other moral entities. Such interferences are bad prima facie because they weigh against the free will choice capacity of persons, the very basis of their status as moral entities. More specifically, rights systems are set up to minimize interferences within the realm of free choice which is within the boundaries laid out by the practical and logical constraints on such choice. That I have a fervent desire to attempt to jump to the moon is irrelevant to rights discussion. (One might choose to disagree here and say the right to liberty would protect my option to attempt this impossible feat, a stand I have no violent disagreement with although would not personally avow.) "Choice" is being used in a broad sense here not to be taken to allow the inference that every
violation of a right involves an interference with a specific narrow choice of another individual. Rather, it has more to do with the notion that one's life is one's own project which one chooses more or less freely, within said practical limitations, and as much as possible should be left to the control of that individual subject mainly to the demands of morality in its effects on other life projects. Herein lies the justification for the right to privacy. Unlike positive rights which primarily protect positive "capabilities" through which one shapes one's basic life project, negative rights protect against interferences which tend to weigh against this project. In the case of most negative rights, there are identifiable subsidiary components of this overall project which are adversely affected. Components of sufficient importance on their own merits that such rights can be said to have a dual justification, the recognition and respect for separate moral entities and a justification relative to the subsidiary component. The right to privacy differs in that it has only the single primary justification based on recognition and respect for separate moral entities. So the primary role of the right to privacy is to help maintain the status of a person as his own separate moral entity. It assists a person to keep his life project as close to
the shape he wishes for it within the constraints of morality and practicality that apply. Numerous articles have linked the right to privacy to various roles other than this. I grant that this right does indeed have such secondary roles, many of which I have previously listed. One is particularly illuminating as to the nature of the primary role I ascribe to the right. Some scholars correctly point out that the right to privacy helps protect a person from pressure to conform. This is just a specific example of the right providing protection which promotes a person's ability to shape his life as he chooses rather than in accordance with the wishes of others.

The discussion above should make clear two principal points in my account. Both points concern the nature of violations of the right to privacy. First, the technical device of tying all intrusions of privacy to information acquisition and the means of such acquisition is a useful one even in cases where the information acquired has little or no significance on its own merits. Such intrusions are seen as the uninvited participation by others in a life project which is in no way their own. Second, a related and more important point, such intrusions are contra the most singular
feature of persons as moral entities, they are separate wholly contained moral entities. It is for this reason that violations of the right to privacy fail to show recognition and respect for persons as separate moral entities. Violators of the right to privacy appropriate part of another's life project, negating that portion's contribution of the separateness of the two moral entities. The wrong here is not that of threatening to completely eradicate the moral distinction between the violator and victim, nor does it threaten the victim's status as a separate moral entity. Something on the order of the complete mental control of one individual over another is necessary for these results. Rather, the wrong done in such cases is more along the lines of the violator participating in another's life project which is morally, literally none of his business. There is certainly the suggestion here of a property-like consideration, which should hardly be surprising given earlier suggestions as to the plausibility of property, or property-like, accounts of the right to privacy. But if it is a type of property at issue here it is the unique brand of property which would have to be called moral property. Given the tremendous importance of the person as moral entity, any loss of such property is a grievous loss indeed. The suggestion here is, of course,
that the right to privacy by virtue of its protection of such property serves a very important need, one which calls for great care when deciding such issues as the desirability of granting great inroads into privacy for the sake of less constraint on liberty, etc. The gain in liberty may have little effect on who I am, but what is sacrificed is to a certain extent what makes me "me" instead of you.

Section 4: The Respect for "Separateness" Account

This last section takes up the consideration of the status of my account of the right to privacy relative to the weaknesses and strengths of previous theories. This account takes "privacy" to be a "state of non-intrusion in the control an individual has over information about himself and those things he stands in direct relation to, and the means of access to such information." The right to privacy is the right to such a state of non-intrusion. The right is justified on the basis of respect for, and recognition of, the nature of persons as distinct moral entities. The right is taken to be a negative right which is a cluster of sui generis rights. The right is a prima facie right which can be legitimately overridden.
without giving rise to further obligations or duties only in cases where the justification for said action is based to a large extent on the same justification as the right itself. Lastly, the right is not a property right although it is closely connected to property considerations in that such considerations often play a vital role in determining the extent of the protection granted by such a right in particular circumstances.

The right to privacy characterized above captures the strengths of Thomson's account while not suffering the weaknesses of that account. Her account takes the right to privacy cluster to be made up of a number of rights which are not sui generis. This has clearly been shown to be false. She also claims the right is at least partially a property right. This has been shown to be false. The account presented in this chapter not only is free of such problems, it can be used as a basis for accounting for how these mistakes came about. Thomson quite correctly felt that property rights and rights over the body played important roles in the discussion of the right to privacy. Her mistake was to assume that the connection between these rights and the right to privacy was an identity relation. Rather, these rights are important in this regard because considerations of them provide insights into the extent of the protection
provided by the right to privacy. She also correctly noted there was an important distinction to be made between property rights and rights over the body (or person), but failed to note, as is implicit in my own account, that this distinction has important ramifications for the right to privacy in many cases in that violations of privacy rights which are associated with rights over the body are often more significant than violations which are associated with property rights.

The major weakness of the McCloskey account is that it presents the right to privacy as a derivative right (as did Thomson) which is justified solely in virtue of protecting other rights or goods, one which never gives rise to duties or obligations when it is legitimately overridden. The account at issue corrects this deficiency in two ways. One, a primary justification for the right to privacy is identified which is not presented in terms of the protection of other rights or goods, yet one which is supplemented by secondary justifications of this nature. Two, the right to privacy is seen as a prima facie right which does give rise to duties and obligations even if legitimately overridden, unless the justification for such an intrusion is drawn primarily from the same basic justification of the right
itself. The account at issue captures the strength of his account, the specification of the right to privacy as a negative right, without falling prey to the problem his account does of drawing unjustified conclusions strictly on the basis of this discovery. Rather, the account at issue draws the appropriate conclusion that the right to privacy is a "buffer" right.

The respect for separateness approach to the right to privacy, in the version presented herein, is a much improved version of the publicity account. It, like the publicity account, properly highlights the advantages of an account of the right to privacy which assigns a prominent role to information. It does so in a way that does not leave open problems such as accounting for our usual notions that property considerations are often vital in right to privacy violations, and problems with cases which involve misuse of information rather than simple transmittal.

The account at issue correctly captures the importance of privacy for the creation and maintenance of many of the interpersonal relationships that human beings enjoy, and notes that this is an important part of the justification of the right to privacy, albeit a secondary one. It does not make the mistake, however, of over-emphasizing this role since a very weak right to privacy
would insure the creation and maintenance of such relationships. This is because the account presented in this chapter correctly notes that the principal evil done by an intrusion on someone's privacy is the access to that individual by the observer, rather than the effects of such observation on current or future relationships with persons besides the observer.

This account of the right does not make the mistake of Benn's account of claiming the right to privacy is an autonomy right. This was clearly seen to be a mistake since many invasions of privacy have no effect on autonomy. This account most assuredly follows the important claim in the Benn account that the two rights are closely related. But this is accounted for in terms of a significant overlap in the justification of the two rights, rather than erroneously claiming one is a subspecies of the other.

The respect for separateness account also has the advantage of clearly delineating the important role that property plays in privacy considerations while still being able to deal with the more personhood-oriented examples of right to privacy violations. Since it has this feature it can adequately deal with the cases of violations of the tort right, the strength of the property right approaches, as well as the cases of violations of the
constitutional right to privacy, the weak point of such approaches. This is because information, and the means of access to information, are often plausibly treated very much like property, but the control over such is very much grounded in being a person.

The most important point in favor of accepting the account over all the others is that it is the only account which clearly indicates the "buffer" function of the right to privacy, and which clearly explains why there is ever-increasing concern expressed that this right be given its proper status as a very broad, strong right which is not easily overridden. A right which still gives rise to duties and obligations even when legitimately overridden unless the justification for such action involves to a significant degree the same justification as the right itself.
FOOTNOTES - CHAPTER IV

1These, as well as other key-related definitions, are discussed in detail in the Appendix.

2There are several ways of presenting such a discussion, one of which is presented on the next page. The main thrust of most, if not all, the alternatives for so arguing, make at least some implicit use of the idea that in order for someone to establish such a "false consciousness" several steps would need to be taken that are not morally permissible. For example, such a consciousness might evolve because for several generations the slightest outcry against violations of the right to privacy were met with such stern punishments that a current generation never realized that they could opt for having privacy since they had never seen anyone do so. The creation of the consciousness would thus not be morally permissible primarily because of the flagrant violations of the right not to be harmed by others.

3This refers only to cases wherein the person observed gains in net privacy. A related set of problematic cases would be ones wherein someone violated another's privacy in order to secure vastly increased privacy for a large number of other persons. For example, on the basis of good evidence, J. Jones breaks into S. Smith's room and finds Smith has extensive files on many people, files which Jones destroys preventing publication. What is to be said of such cases depends to a great extent on how Smith got the information, whether he would publish, and what was in the files.
APPENDIX

The adequacy of any theory of the right to privacy depends in part on the adequacy of the definitions used in that account. There are several key definitions which should be included in the presentation of such a theory. These include definitions for "privacy," the "right to privacy," "loss of privacy," "invasion of privacy," and "violation of the right to privacy." These terms are difficult to define, particularly because of the need to provide definitions for various terms used in these definitions. This difficulty is easily seen when one notes that objections have been raised against various theories of the right to privacy to the effect that they cannot provide adequate definitions for these terms. The pages immediately following contain the discussion of the definitions for these terms envisioned for the account of the right to privacy presented in this work.

The first key definition which is needed is that of "privacy." "Privacy," on this account, is taken to be a state of non-intrusion in the control an individual has over information about himself and those things he stands in direct relation to, or access to such information. There are several terms in this definition which stand
in need of definition themselves. The first such term is "control over information or access to information." The most significant portion of such control consists of the ability to selectively deny information from coming to be possessed by others. A related component of such control is the ability to selectively pass such information on to others, selective both in the sense of who receives information of this type and, within the bounds of logical and physical possibility, what information is passed. The proviso above about possibility is included merely in recognition of the fact that exchanges of information very often involve much more information than the consciously intended contents of the exchange. For example, if I say to my good friend, "Yesterday I jogged five miles," I inform him not only about one of my activities, I also make vast amounts of information available to him about myself, although not necessarily all new information. This information includes such facts as I speak at least some English, my state of health is above certain minimal standards, I did not spend the entire previous day in bed, etc. The last major component of such control over information and the means of access to information consists of control over some uses of personal information or the means of access to information. The bulk of such control concerns the uses that
another can make of information about one that the other has, in particular spreading such information to others. Thus, an intrusion of one's control of information or the means of access to information by person A might not only be a case of A's gaining possession of a piece of information about one, rather it might be a case of A's making a piece of information available to someone else. Another possibility for an intrusion in control over information is outlined in the following example. Person B makes available to A a piece of information about herself as a part of a job application. At a later date A uses this information, the name and address of B's ex-husband C, to contact C to gather information about B which is of no legitimate concern of A's, when it is clear from the context of the job application that there is no implied, or explicit, consent on the part of B for such a use of that information by B's including it in the application. A's use of the information for this purpose is an intrusion on B's control of that information.

Another key term in the definition of privacy is "in direct relation to." While the term is necessarily vague, the following comments should enable one to attain an intuitive grasp on the central concept intended. The first point to establish is why the term is necessarily vague. To see this one must first look at the most obvious
candidate for a definition which is suggested by the ordinary use of "x is directly related to y." This would be, loosely speaking, x is directly related to y if and only if there exists a relation R such that Rxy. The trouble with this definition is that the lack of any restriction on what type of relation R must be suggests that it is highly likely that even when X is restricted to being a person, there will always be some R so that given any y, Rxy will be true. The definition, to be adequate, requires more of a restriction on what is information about oneself and those things which stand in direct relation to oneself. This increased restriction can be obtained by placing restrictions on what relations can be R and/or what can be y. What are these added restrictions? The answer to this question is not as simple as it may appear on first glance. For example, it might seem reasonable to place some restrictions on what y can be so that y could not be something like the star Sigma Draconis. But suppose Sigma Draconis is my favorite star, or that I was observing Sigma Draconis last night. Then, Sigma Draconis could play a significant role in private information about me. However, there does seem to be some validity to assuming that ordinarily such objects will not play much of a role in private information about a person. Perhaps a clue to what
restrictions should be added can be garnered from examining the nature of the relations which do connect such objects with persons. The two which are mentioned above concern what one of my favorite things is and what one of my activities was the night before. This suggests which added restrictions might be placed on what relations R may represent might do the job. It is certainly not unreasonable to expect that restrictions on R will result on a limiting of which y's can appear in Rxy. The intuitive idea here is that the only y's which are normally expected to appear in Rxy, where x is a person directly related to y, are those which appear most often in relations with x which are subjectively important to x. This is expanded below as the concept of "connectedness with x."

The restriction which is to be placed on relations as to which ones attribute a direct relation between x and y is the restriction that R must (non trivially) imply that y is "connected with x." For y to be connected with x, y must be subjectively significant to x. Let us review an earlier example. Normally, one would not expect a person to be overly concerned with a star other than the sun, i.e., it is usually not the case that a star other than the sun has a very high degree of connectedness with a person x. What exactly does this
mean? It does not mean that there are no relations which hold between a person and a given star. To see this take the relations of is hotter than, is bigger than, is in the same galaxy as, etc. All of these relations can hold between a person and a star. The point is that most of the relations which can hold between a person and a star other than the sun are usually not subjectively important to a person. There can be some degree of connectedness between a person x and a star y other than the sun, however. This is true because there are some relations which can hold between a person x and a star y which are subjectively significant for x such as y is the favorite star of x, y is the star x observed the night before, y is the subject of the dissertation of x, etc. The degree of connectedness between x and y is determined by how many, if any, of these relations actually obtain, and how subjectively significant such a relation, or relations, is(are) to person x. So, for example, one would expect degrees of connectedness of diminishing quantities at each step in the following list of ordered pairs: (myself, my wife), (myself, my cat), (myself, my brother's cat), (myself, a fish in the Amazon River). Thus, information about myself and those things I stand in direct relation to is information about myself and something which is subjectively significant to me.
I stated earlier that the term "in direct relation to" was necessarily vague as it is used here. This can now be seen to be the case because of the problem with what is to be counted as subjectively significant as well as the problem which arises because while it is usually the case that many things are not subjectively significant to people, there are many special cases in which such relations hold in individual instances.

The next definition to be considered is that of an "invasion of privacy." This definition is very straightforward given the previous definition given of "privacy." An "invasion of privacy" is any intrusion by others in the control an individual has over information about herself and those things which she stands in direct relation to, and the means of access to such information.

It is important to draw a distinction between the term just defined and the term "loss of privacy." A "loss of privacy: is a decrease in the amount of said control of an individual. The two terms are not equivalent. It is true that every invasion of privacy involves a loss of privacy. It is not true, however, that every loss of privacy involves an invasion of privacy. It is easy to see that every invasion of privacy must involve a loss of privacy. An invasion of privacy occurs whenever there is an intrusion by others
in one's control over private information. This intrusion in one's control is a lessening of that control and therefore a loss of privacy. But a loss of privacy can come about even where there is no intrusion in one's control. For example, I might publish an autobiography which includes a large amount of private information. There is certainly a decrease in the amount of control I have over this information once it is published, and therefore a considerable loss of privacy. Yet, no one has intruded in my control over it. I freely chose to make it available to those who wish to read my autobiography. Any adequate account of the right to privacy must make a provision for distinguishing between these two terms in light of this possibility that persons might choose to freely divulge private information or permit access to such information.

The "right to privacy" is taken to be the right to a state of non-intrusion in the control an individual has over information about himself and those things which he stands in direct relation to, and the means of access to such information. The particular problem that arises in using this definition of the right is the specification of what information and means of access are to be considered as protected by such a right. The information
which is so protected is that in the non-public sphere which is not, relative to reasonable means, unavoidably enmeshed with the public sphere. The means of access so protected are those which are not usually part of the public domain.

The notion of the "public sphere" is most important since it is used to delineate what the right to privacy covers. The public sphere is made up of two basic components—the public domain and the sphere of "publicity." The specification of what the public domain consists of, as it is to be understood in this work, is built on a basis provided by the meaning ordinarily associated with this term. The specification of what the sphere of "publicity" consists of comes from a technical definition of "publicity," similar to that discussed in Chapter III, which is only loosely based on the ordinary use of the term. There is an overlap between the public domain and the sphere of publicity, but this is not problematic in any way because the public sphere is defined as the union of the public domain and the sphere of publicity.

Normally, "publicity" suggests the spread of information among a relatively large number of people. As it is used in this chapter, it can refer to the acquisition of information by any number of people from one on up.
Usually, but not always, it will indicate the acquisition by one or more people of information formerly known only to an individual or some group of individuals bound together in some readily identifiable way, e.g., a family or group of roommates. There are exceptional cases wherein the information was not previously known.

Traditionally, the public domain has been taken to be composed of various components which differ significantly in nature. These components range from public institutions to batches of information, from public properties to the environment, and so on. The intuitive basis for this term appears in several different guises which receive varying amounts of emphasis in the use of the term. There is the public domain relative to property of a traditional form such as land, natural resources, buildings, etc., which is seen as the property of the people at large removed from the control of the people to a greater or lesser extent through the agency of the state. Thus, one guise takes the form of general public ownership. There is the public domain relative to property of a similar nature to that just mentioned above which is under private ownership, in the sense of ownership by less than all the citizens of the relevant political entity, which is used in commercial enterprise and subject to regulation by relevant political entities.
Thus, one guise takes the form of regulation of private enterprise operating relative to the people at large. There is the public domain relative to information of various types which is viewed as the property of the people at large removed from the control of the people to a greater or lesser extent through the agency of the state. Thus, one guise takes the form of general public ownership of a less traditional type of property. This guise is distinguished from the closely related one concerning traditional types of property mentioned above in that it is connected across the board directly to the notion of the public interest. There is the public domain relative to institutions which mediate the interactions of the people at large, for example, the judicial branches of various political entities. Thus, one guise takes the form of general access by the people at large to these various mediating agencies.

The common element shared by all the guises the intuitive basis takes, as outlined above, could roughly be stated as taking the public domain to consist of all things which are "owned" to the same degree by all the members of the relevant political entity. This common element can be used as the basis for a partial listing of the components of the public domain. Such a listing would include examples of public institutions, such as the
judicial system; examples of traditional types of property owned by the people at large, such as court buildings; examples of less traditional types of property owned by the people at large, the information that there were 2,563 convictions in homicide cases in 1973; examples of regulations over private enterprise, such as anti-trust laws, and so on.

The criterion of general ownership is insufficient on its own to provide a complete specification of the components of the public domain. Such a complete specification requires the addition of criteria based on considerations of the public interest and general welfare. Something is said to be in the public interest by virtue of having a significant relation to the general welfare. The requirement that the relation be a significant one is important to note. A minute increase in the general welfare does not justify claiming that whatever gave rise to the increase is in the public interest. So, those things which serve to significantly increase the general welfare are said to be in the public interest. The same type of connection exists between the public interest and the public domain. Something is in the public domain if it serves to significantly increase the public interest, or conversely, if its absence from the public domain would have a significant adverse
effect on the public interest. Thus, at a certain threshold level and above advancement of the general welfare places the responsible factors in the public interest, and at a certain threshold level and above, the advancement of the public interest places, given certain additional considerations, the responsible factors in the public domain. It necessarily follows that something which advances the general welfare to a great enough extent belongs in the public domain. It is no surprise to find a rough correlation between the number of persons affected by an institution, batch of information, natural resource, etc., and that something's being a part of the public domain. The fact that the general welfare advanced by a candidate for membership in the public domain must be of a degree equal to or greater than the second level threshold, the first threshold indicating membership in the set of things in the public interest, is reflected in the long term nature of the components in the public domain. Thus, institutions, natural resources, and certain means of access to some types of information, along with their artificial support facilities such as buildings, provide the bulwark of the public domain.

The latter characteristic of the public domain suggests another criterion's operation in determination
of membership in the public domain, especially as opposed to membership solely in the public interest. The particular candidate for membership in the public domain must promote, or be perceived to promote, the general welfare over a significant period of time. It must also be perceived as being supported by this justification for a significant duration of time. There may be examples wherein an institution or other candidate does not exist for a significant duration because it is superseded by another candidate, or because it ceases to promote the general welfare to a sufficient degree because of changing circumstances, an inherent inefficiency in the institution, etc. Still, at least these perceptions must be evident.

This temporal criterion's operation is most easily understood against a backdrop of examples where the temporal criterion is not met. These examples are usually associated with special circumstances that give added significance to various factors which contribute to the general welfare. The most typical examples of such special circumstances include war and natural disasters. Thus, in cases of extreme flooding formerly privately-owned boats may be appropriated to public use in rescue operations. A wartime situation might arise wherein a farmer might be required to allow a radar
station to be set up on his land as a part of the overall defense effort. In both these cases the property rights in question revert back to the individual with the passing of the emergency.

There is yet another requirement for something to belong to the public domain. The anticipated gain in the public welfare must include a gain in individual welfare for a significant number of citizens, or at least an anticipation that a significant number of individuals will have a significant probability of a gain in individual welfare. There is a need to be very careful to properly describe the candidate for membership in the public domain when applying this criterion (as well as the other criteria). For example, an institution which is proposed for inclusion in the public domain which deals primarily only with a rare disease might not be deemed to meet this criterion. But when the institution is described as an important part of an overall institution to provide health care to the public, one could build a plausible case for its inclusion in the public domain.

The determination of the constitution of the public domain basically revolves around considerations of general welfare, the public interest, individual interest, and the requisite balancing of the general welfare and
individual interest. Whether or not one finds the attempts above as adequate for providing the basis for a criterion to determine membership in the public domain, at least the following should be clear. Privacy, since it is concerned with information and the means of access to information remaining under the control of the relevant individual, is often in conflict with the public interest. In cases where the general welfare is sufficiently advanced by group access to some information, or the means of access to it, and the other criteria set out before are met, then such information is considered part of the public domain and therefore not subject to the constraints associated with privacy with the following proviso. The constraints of the right to privacy concerning a particular piece of information are removed, or do not obtain, only relative to the role, or roles, played by that piece of information in furthering the general welfare to the degree required to be in the public domain. For example, there would be no violation if the I.R.S. obtained my financial records in some legitimate way, but there might be a violation of my right to privacy if they passed this information on to a newspaper publisher who published it. It would be a violation if this was done if such publication did not sufficiently advance the public welfare to warrant this
use of the information being considered part of the public domain, as well as meet the other criteria of public domain membership. Remember that in this regard the correct description of the situation is vital. It might turn out that the use of the information here, being published in a newspaper, might be part of the public domain as an instance of a general practice, or institution, which is a member of the public domain because the general practice furthers the general welfare to a sufficient degree, even though the particular instance does not.

In cases wherein the general welfare is advanced to a degree less than that required for membership in the public domain, or where the particular use of the information or means of access to the information does not meet the other criteria of membership in the public domain, the relevant control resides in the individual even though such a use would be in the public interest. In cases where it is not clear that the general welfare is advanced to a sufficient degree to warrant the placing of such control in the public domain then the control still resides in the private sphere.

One might question why borderline cases are to be handled in the manner just laid out. The reason they are to be handled in this fashion can be seen by examining
the consequences of erroneous assignments of control of information or access to information. If the information is erroneously assigned to the public domain, there is a loss to individuals which can be determined in a more or less accurate manner. If the information is erroneously assigned to the private sphere, there is a loss in general welfare which is much harder to gauge. By assigning questionable cases to the private sphere, we minimize a more or less definite loss to individuals overall, at the cost of a much more indefinite loss in general welfare overall. The point being made here is that it is preferable to make a decision based on factors we can more adequately determine than the general welfare, rather than flip a coin to decide, or take the risk that the general welfare will be advanced even more than the amount we've guessed at, an amount which could very easily be overestimated already.

The information that is protected by a right to privacy is not just that in the private sphere, given the private-public distinction made in the previous pages. Rather, it is, in general, the information and means of access to information which are portions of the private sphere which are not unavoidably, relative to reasonable means, enmeshed in the public sphere. These are the portions of the private sphere which are not subject to
a great deal of unintentional observation once we enter the public sphere unless special precautions are taken. An example of such a portion of the sphere unavoidably enmeshed with the public sphere would be one's face when one entered a public building without some covering over the face. The stipulation that this portion is unavoidably enmeshed relative to reasonable means is in recognition of the fact that it would be possible to require everyone to close their eyes while in public so that one's face, even when uncovered, would not be subject to unintentional observation while in a public place.

There are times when a portion of the public sphere can be "annexed" to the private sphere and protection by the right to privacy. The most important annexation condition consists of the requirement that one have a reasonable expectation there will not be any unintentional intrusions, or in some special cases where one is in a special "privacy" group, e.g., with one's family, unintentional intrusions by "outsiders." A closely related condition is that one must either be alone, with only other members of a special "privacy" group, or with someone who for some reason, e.g., blindness, cannot reasonably be expected to observe one.

Before moving on to the last definition which is necessary for the presentation of my account of the right
to privacy, one further point needs to be made about the definition of the right to privacy which is given. One might wonder why the right to privacy is taken to include a provision which asserts part of the right to privacy is composed of a right to annex portions of the public domain to the control of an individual. The provision is included on account of the following situation. There is a tension between the private domain and the public domain, particularly when a person is in public. This has been previously recognized in the earlier discussion of the private sphere which is, relative to reasonable means, unavoidably enmeshed in the public domain. The tension results in roughly the following way. Intuitively, the bulk of the private domain is taken to be an individual's body and his immediate surroundings, where "immediate surroundings" is only used analogously to a spatial term. Intuitively, the bulk of the public domain is taken to be that which is owned by all, or not owned at all (e.g., outer space). The tension between the two arises when a person moves into the "public domain." The tension takes the form of a conflict as to how much of one's body and immediate surroundings is taken to be under his control and how much is taken to be the public domain. The "unavoidably
emmeshed" proviso recognizes that in many cases the conflict is resolved in favor of the public domain, e.g., one's control over who sees one's uncovered face is diminished when one is in public places. The "annexation" proviso indicates that the conflict is sometimes decided in favor of the private domain. Under certain conditions it is more reasonable to claim that the control of "surroundings" that are part of the public domain in most circumstances temporarily becomes part of the private domain. For instance, usually a public park would be considered wholly a part of the public domain. Yet, if I am setting on a park bench with a friend with no one else in sight it makes good sense to claim that my private domain should include a sufficient amount of my immediate surroundings so that someone's using an electronic device from two miles away to listen in to my conversation would be taken to be an intrusion in my private domain in these circumstances. So the annexation proviso is included in explicit recognition of the fact that it is often the case that portions of the public domain become part of the private domain in certain circumstances, just as the "unavoidably emmeshed" proviso explicitly recognizes that parts of the private domain can become part of the public domain.

The last major definition necessary for my account
of the right to privacy is that of a "violation of the right to privacy." A "violation of the right to privacy" is the failure to acquiesce to an individual's control over personal information and the means of access to such information. Since a failure to acquiesce to said control can only be brought about by an intrusion by others in this control, and any intrusion by others in this control is a failure to acquiesce to such control, "invasion of privacy" and "violation of the right to privacy" are equivalent terms. This implies the following. One, a person cannot violate his own right to privacy. He can fail to properly respect his own privacy but he can never violate his own right to it. Two, not all losses of privacy are violations of the right to privacy. When a person brings about a loss of his own privacy willingly, it is not a violation of his right to privacy.

There is a significant additional point to be made to supplement the various definitions presented so far, so as to better clarify discussions of particular cases which arise in the consideration of the right to privacy. The notion of intrusion plays a central role in said definitions, at least in their application to specific circumstances. It will be necessary to establish at least some rough criteria as to how significant a degree
particular intrusions affect privacy. A discussion of various examples will shed some light as to the nature of at least some of these criteria.

Take the case wherein a comparison is needed about the difference in degree of intrusion between a situation wherein one person has access to 1,000 pieces of information about person X and a situation wherein 1,000 people have one piece of information about person X. The comparison to be carried out concerns which situation is best described as the worst loss of privacy. A plausible answer to this question would be to claim that the case where one person has access to 1,000 pieces of information about X would involve the greatest loss of privacy. This is a plausible answer because the person who has access to the 1,000 pieces of information about X is very likely able to infer many other facts about X, whereas the 1,000 people with access to only one piece of information would probably only be able to infer a few additional facts about X, given the restriction that they cannot pool their knowledge. The example includes the assumption that all the facts have the same significance, for the sake of simplicity. Thus, there is a straightforward answer to the original comparison issue strictly on the basis of a simple counting procedure.
Suppose, however, the situation above was different in the following way. Instead of 1,000 pieces of information about X being obtained by Y or distributed among a thousand people one to a person, imagine the case where the 1,000 pieces of information plus the 500 pieces of information that can be inferred from the 1,000 are obtained by Y or distributed among 1,500 people one to a person. I would claim that the situation where Y obtains the 1,500 pieces of information involves the worst violation of privacy, but obviously this answer cannot be based on any simple counting procedure since 1,500 pieces of information are involved in either violation.

One should note, however, that simple counting type considerations might come into play again when discussing the potential of further damage to X. This is easily seen since if Y were to come into possession of more information about X he would probably be able to infer much more about X than could some person among the 1,500 who would have so much less information to draw on about X in making any further inferences.

The justification for claiming the violation relative to Y would be the more serious violation comes from the observation that there is something, which I will call a "significance threshold," which comes into play once a certain level of access to a person is
obtained. This significance threshold involves a magnification of the degree of violation of privacy beyond what it would be if it was just the result of adding the degrees of each of the violations relative to the individual pieces of information considered in isolation. There is evidence such a threshold exists. When an individual goes about his business in public many people have a limited access to him which diminishes his privacy. Usually this is not considered a significant loss of privacy. However, if a person is under surveillance by another for a long enough period of time, even though in public, the significance threshold is reached and the loss of privacy is deemed significant.

There is also a point of diminishing returns that is associated with the significance threshold that argues against determining the degree of violation of privacy in a direct additive procedure based on access to each piece of information taken in isolation. Once a person has our home under electronic surveillance for months his coming to know that the homeowner has a hole in his orange socks is less important than if that fact were the only thing he had come to know. This indicates one of the ways the comparison between the two different distributions of access to the 1,500 pieces of information is
so complex. The significance threshold is reached in Y's case multiplying the degree of violation of the set of pieces of information necessary to reach the threshold to a great extent, but the degree of violation with each additional piece of information is less past this point of diminishing returns. This indicates the nature of the general method one should employ for making comparisons between one person having access to M pieces of information about person X and M persons having access to one piece of information about person X (for M greater than 1).

The general method is given below. Let S be the number of pieces of information required to reach the significance threshold, which is also the point of diminishing returns. Let D be the number of pieces of information where the diminishing degree of violation relative to pieces of information "beyond" S cancels out the multiplicative effect of reaching the significance threshold (therefore D is greater than S). So, for M less than S there is no difference in degree of violation, for M greater than or equal to S and less than D it is worse for one person to have access to the information, for M=D there is no difference, and for M greater than D it is worse to distribute the access among M people. One should note that in the section above the only
assignment of a point of diminishing returns was made relative to the number of pieces of information. One might claim that there is also a point of diminishing returns relative to the number of people having one piece of information, e.g., that there is more difference between 10 or 11 people having one piece of information about X than there is between 1,000,000,000 and 1,000,000,001 people having one piece of information about X. I will leave this as an open question as to whether or not there is a point of diminishing returns of this type although I have a very slight inclination to claim there is not such a point.

An analogy may help to visualize how the method just outlined would work. Instead of comparing distributions of pieces of information to people, compare distributions of mosquitoes in your home to time. Take the comparison between two mosquitoes for one hour and one mosquito for one hour replaced by another mosquito for the next hour. The method would indicate we would be indifferent between the proposed distributions. Then take three mosquitoes for one hour or one mosquito for an hour, replaced by another for the next, replaced by another for the next. Again, the method would indicate indifference. Let M, the number of mosquitoes, keep incrementing by ones, however, and eventually a new situation arises. Take
M=1,076, with 1,076 mosquitoes in your home for one hour it would be very difficult to get anything done, therefore one would not be indifferent between this distribution and having one mosquito for 1,076 hours. So S will be the significance threshold which is equal to the lowest number of mosquitoes which significantly interfere with your activities, a number dependent on factors such as the size of your home, your aversion to flying insects, etc. Let us take S=1,076 for this example. Once this level is reached each additional mosquito causes less and less additional trouble since one's activities have already been severely restricted. Thus, we find S to also be the point of diminishing returns. If we keep incrementing M long enough a new factor gains precedence. Imagine M has reached 24,000, one is now faced with choosing between one hour of inactivity or having a mosquito in the house constantly for almost three years. The method would indicate that in this situation we would choose to sacrifice the one hour rather than have an infested house for such a long period of time. We have passed the point D where the sacrifice of the one hour counterbalances having a mosquito-infested home for D hours (or vice versa).

The analogy above can be modified to illustrate the effect of dealing with pieces of information that are
more, or less, significant than those aped above. We might substitute mice for mosquitoes to capture the situation for more significant pieces of information. Note that in such a case both S and D would be smaller numbers, as would be the case for distributions of more significant pieces of information. We could also change the analogy by substituting gnats for mosquitoes to capture cases where less important pieces of information are at issue. In such a case, both S and D would be greater.

Examination of the analogy also provides another valid insight into the comparison decision method. Both S and D have been presented as single numbers whereas the truth of the matter is that they each stand for a range of numbers.
FOOTNOTES -- APPENDIX

1 There is, of course, the spectre of counting problems concerning pieces of information being raised here. Since I could infer from "X owns a car" that "X owns a car or X is a snowmobile." The guiding idea here must be that the new information inferred is "genuinely" informative in some significant sense of the word.

2 There is a plausible alternative to the treatment above for cases where M is less than S. Such an alternative would take the form of a different account of the role of the significance threshold. Instead of the significance threshold representing the level at which a multiplicative factor would first come into play, it would represent the point at which the multiplicative factor would become less than one (thus serving the role of capturing the notion of diminishing returns). Such an account would take the multiplicative factor to be 1 when M=1, greater than 1 when M is greater than 1 and less than S, and less than 1 when M is greater than S. This multiplicative factor would be used whenever one individual has access to M pieces of information. Of course, when M=1, there is no change with the application of multiplicative factor. On this alternative, it would be a violation of greater degree for one person to have access to two pieces of information than if access to these two pieces were distributed to two people, one to a person. This alternative is particularly appealing if one imagines that the multiplicative factor would increase in value slowly as M approached S/2, peaked at S/2, and then gradually began decreasing towards a limit of 0 as M approached infinity with the multiplicative factor=1 when M=S. It is difficult to determine whether this alternative is indeed superior to that outlined in the text. This is especially true if one imagines that the multiplicative factor is not much over 1 at M=S/2. This would mean that the multiplicative factor at M=2 might be something like 1.00000000001. Thus, the degree of violation of two people each having access to one piece of information would be virtually indistinguishable from one person having access to both
pieces of information. The primary reason for accepting this alternative is that it does not have the problem of trying to explain why it is that suddenly a multiplicative factor comes into play when M=S. It also has the advantage of the multiplicative factor changing value slowly both before and after the point where M=S instead of it only changing when M is greater than S.
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