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The Right to Privacy

I

Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is. Consider, for example, the familiar proposal that the right to privacy is the right "to be let alone." On the one hand, this doesn't seem to take in enough. The police might say, "We grant we used a special X-ray device on Smith, so as to be able to watch him through the walls of his house; we grant we trained an amplifying device on him so as to be able to hear everything he said; but we let him strictly alone: we didn't touch him, we didn't even go near him—our devices operate at a distance." Anyone who believes there is a right to privacy would presumably believe that it has been violated in Smith's case; yet he would be hard put to explain precisely how, if the right to privacy is the right to be let alone. And on the other hand, this account of the right to privacy lets in far too much. If I hit Jones on the head with a brick I have not let him alone. Yet, while hitting Jones on the head with a brick is surely violating some right of Jones', doing it should surely not turn out to violate his right to privacy. Else, where is this to end? Is *every* violation of a right a violation of the right to privacy?

It seems best to be less ambitious, to begin with at least. I suggest,

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then, that we look at some specific, imaginary cases in which people would say, "There, in that case, the right to privacy has been violated," and ask ourselves precisely why this would be said, and what, if anything, would justify saying it.

II

But there is a difficulty to be taken note of first. What I have in mind is that there may not be so much agreement on the cases as I implied. Suppose that my husband and I are having a fight, shouting at each other as loud as we can; and suppose that we have not thought to close the windows, so that we can easily be heard from the street outside. It seems to me that anyone who stops to listen violates no right of ours; stopping to listen is at worst bad, Not Nice, not done by the best people. But now suppose, by contrast, that we are having a quiet fight, behind closed windows, and cannot be heard by the normal person who passes by; and suppose that someone across the street trains an amplifier on our house, by means of which he can hear what we say; and suppose that he does this in order to hear what we say. It seems to me that anyone who does this does violate a right of ours, the right to privacy, I should have thought.

But there is room for disagreement. It might be said that in neither case is there a violation of a right, that both are cases of mere bad behavior—though no doubt worse behavior in the second case than in the first, it being very much naughtier to train amplifiers on people's houses than merely to stop in the street to listen.

Or, alternatively, it might be said that in both cases there is a violation of a right, the right to privacy in fact, but that the violation is less serious in the first case than in the second.

I think that these would both be wrong. I think that we have in these two cases, not merely a difference in degree, but a difference in quality: that the passerby who stops to listen in the first case may act badly, but violates no one's rights, whereas the neighbor who uses an amplifier in the second case does not merely act badly but violates a right, the right to privacy. But I have no argument for this. I take it rather as a datum in this sense: it seems to me there would be a mark against an account of the right to privacy if it did not yield the

conclusion that these two cases do differ in the way I say they do, and moreover explain why they do.

But there is one thing perhaps worth drawing attention to here: doing so may perhaps diminish the inclination to think that a right is violated in both cases. What I mean is this. There is a familiar account of rights—I speak now of rights generally, and not just of the right to privacy—according to which a man's having a right that something shall not be done to him just itself consists in its being the case that anyone who does it to him acts badly or wrongly or does what he ought not do. Thus, for example, it is said that to have a right that you shall not be killed or imprisoned just itself consists in its being the case that if anyone does kill or imprison you, he acts badly, wrongly, does what he ought not do. If this account of rights were correct, then my husband and I would have a right that nobody shall stop in the street and listen to our loud fight, since anyone who does stop in the street and listen acts badly, wrongly, does what he ought not do. Just as we have a right that people shall not train amplifiers on the house to listen to our quiet fights.

But this account of rights is just plain wrong. There are many, many things we ought not do to people, things such that if we do them to a person, we act badly, but which are not such that to do them is to violate a right of his. It is bad behavior, for example to be ungenerous and unkind. Suppose that you dearly love chocolate ice cream but that, for my part, I find that a little of it goes a long way. I have been given some and have eaten a little, enough really, since I don't care for it very much. You then, looking on, ask, "May I have the rest of your ice cream?" It would be bad indeed if I were to reply, "No, I've decided to bury the rest of it in the garden." I ought not do that; I ought to give it to you. But you have no right that I give it to you, and I violate no right of yours if I do bury the stuff.

Indeed, it is possible that an act which is not a violation of a right should be a far worse act than an act which is. If you did not merely want that ice cream but needed it, for your health perhaps, then my burying it would be monstrous, indecent, though still, of course, no violation of a right. By contrast, if you snatch it away, steal it, before I can bury it, then while you violate a right (the ice cream is mine,

after all), your act is neither monstrous nor indecent–if it's bad at all, it's anyway not very bad.

From the point of view of conduct, of course, this doesn't really matter: bad behavior is bad behavior, whether it is a violation of a right or not. But if we want to be clear about *why* this or that bit of bad behavior is bad, then these distinctions do have to get made and looked into.

III

To return, then, to the two cases I drew attention to, and which I suggest we take to differ in this way: in one of them a right is violated, in the other not. It isn't, I think, the fact that an amplifying device is used in the one case, and not in the other, that is responsible for this difference. On the one hand, consider someone who is deaf: if he passes by while my husband and I are having a loud fight at an open window and turns up his hearing-aid so as to be able to hear us, it seems to me he no more violates our right to privacy than does one who stops to listen and can hear well enough without a hearing-aid. And on the other hand, suppose that you and I have to talk over some personal matters. It is most convenient to meet in the park, and we do so, taking a bench far from the path since we don't want to be overheard. It strikes a man to want to know what we are saying to each other in that heated fashion, so he creeps around in the bushes behind us and crouches back of the bench to listen. He thereby violates the right to privacy–fully as much as if he had stayed a hundred yards away and used an amplifying device to listen to us.

IV

The cases I drew attention to are actually rather difficult to deal with, and I suggest we back away from them for a while and look at something simpler.

Consider a man who owns a pornographic picture. He wants that nobody but him shall ever see that picture–perhaps because he wants that nobody shall know that he owns it, perhaps because he feels that someone else's seeing it would drain it of power to please. So he keeps it locked in his wall-safe, and takes it out to look at only at night or after pulling down the shades and closing the curtains. We have

heard about his picture, and we want to see it, so we train our X-ray device on the wall-safe and look in. To do this is, I think, to violate a right of his—the right to privacy, I should think.

No doubt people who worry about violations of the right to privacy are not worried about the possibility that others will look at their *possessions*. At any rate, this doesn't worry them very much. That it is not nothing, however, comes out when one thinks on the special source of discomfort there is if a burglar doesn't go straight for the TV set and the silver, and then leave, but if he stops for a while just to look at things—e.g. at your love letters or at the mound of torn socks on the floor of your closet. The trespass and the theft *might* swamp everything else; but they might not: the burglar's merely looking around in that way might make the episode feel worse than it otherwise would have done.

So I shall suppose that we do violate this man's right to privacy if we use an X-ray device to look at the picture in his wall-safe. And now let us ask how and why.

To own a picture is to have a cluster of rights in respect of it. 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. These rights are all "positive rights": rights to do certain things to or in respect of the picture. To own a picture is also to have certain "negative rights" in respect of it, that is, rights that others shall not do certain things to it—thus, for example, the right that others shall not sell it or give it away or tear it.

Does owning a picture also include having the negative right that others shall not look at it? I think it does. If our man's picture is good pornography, it would be pretty mingy of him to keep it permanently hidden so that nobody but him shall ever see it—a nicer person would let his friends have a look at it too. But he is within his rights to hide it. If someone is about to tear his picture, he can snatch it away: it's his, so he has a right that nobody but him shall tear it. If someone is about to look at his picture, he can snatch it away or cover it up: it's his, so he has a right that nobody but him shall look at it.

It is important to stress that he 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. What I have in mind is this. Suppose we desperately want to tear his picture. He locks it in his wall-safe to prevent us from doing so. And suppose we are so eager that we buy a penetrating long-distance picture-tearer: we sit quietly in our apartment across the street, train the device on the picture in the wall-safe, press the button—and lo! we have torn the picture. The fact that he couldn't protect his picture against the action of the device doesn't make it all right that we use it.

Again, suppose that there was a way in which he could have protected his picture against the action of the device: the rays won't pass through platinum, and he could have encased the picture in platinum. But he would have had to sell everything else he owns in order to pay for the platinum. The fact he didn't do this does not make it all right for us to have used the device.

We all have a right to do what we can (within limits) to secure our belongings against theft. I gather, however, that it's practically impossible to secure them against a determined burglar. Perhaps only hiring armed guards or sealing the house in solid steel will guarantee that our possessions cannot be stolen; and perhaps even these things won't work. The fact (if it's a fact) that we can't guarantee our belongings against theft; the fact (if it's a fact) that though we can, the cost of doing so is wildly out of proportion to the value of the things, and therefore we don't; neither of these makes it all right for the determined burglar to walk off with them.

Now I said that if a man owns a picture he can snatch it away or he can cover it up to prevent anyone else from *looking* at it. He can also hide it in his wall-safe. But I think he has a right, not merely to do what he can (within limits) to prevent it from being looked at: he has a right that it shall not be looked at—just as he has a right that it shall not be torn or taken away from him. That he has a right that it shall not be looked at comes out, I think, in this way: if he hides it in his wall-safe, and we train our X-ray device on the wall-safe and look in, we have violated a right of his in respect of it, and the right is surely the right that it shall not be looked at. The fact that he couldn't protect his picture against the action of an X-ray device which enables us to look at it doesn't make it all right that we use the X-ray

device to look at it—just as the fact that he can't protect his picture against the action of a long-distance picture-tearing device which enables us to tear his picture doesn't make it all right that we use the device to tear it.

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.

Looking at a picture doesn't harm it, of course, whereas tearing a picture does. But this doesn't matter. If I use your toothbrush I don't harm it; but you, all the same, have a right that I shall not use it.

However, to have a right isn't always to claim it. Thus, on any view to own a picture is to have (among other rights) the right that others shall not tear it. Yet you might want someone else to do this and therefore (1) invite him to, or (2) get him to whether he wants to or not—e.g. by carefully placing it where he'll put his foot through it when he gets out of bed in the morning. Or again, while not positively wanting anyone else to tear the picture, you might not care whether or not it is torn, and therefore you might simply (3) let someone tear it—e.g. when, out of laziness, you leave it where it fell amongst the things the children are in process of wrecking. Or again still, you might positively want that nobody shall tear the picture and yet in a fit of absent-mindedness (4) leave it in some place such that another person would have to go to some trouble if he is to avoid tearing it, or (5) leave it in some place such that another person could not reasonably be expected to know that it still belonged to anybody.

Similarly, you might want someone else to look at your picture and therefore (1) invite him to, or (2) get him to whether he wants to or not. Or again, while not positively wanting anyone else to look at the picture, you might not care whether or not it is looked at, and therefore you might simply (3) let it be looked at. Or again still, you might positively want that nobody shall look at the picture, and yet in a fit of absent-mindedness (4) leave it in some place such that another person would have to go to some trouble if he is to avoid looking at it (at least, avert his eyes) or (5) leave it in some place

such that another person could not reasonably be expected to know that it still belonged to anybody.

In all of these cases, it is permissible for another person on the one hand to tear the picture, on the other to look at it: no right of the owner's is violated. I think it fair to describe them as cases in which, though the owner had a right that the things not be done, he *waived* the right: in cases (1), (2), and (3) intentionally, in cases (4) and (5) unintentionally. It is not at all easy to say under what conditions a man has waived a right—by what acts of commission or omission and in what circumstances. The conditions vary, according as the right is more or less important; and while custom and convention, on the one hand, and the cost of securing the right, on the other hand, play very important roles, it is not clear precisely what roles. Nevertheless there plainly is such a thing as waiving a right; and given a man has waived his right to a thing, we violate no right of his if we do not accord it to him.

There are other things which may bring about that although a man had a right to a thing, we violate no right of his if we do not accord it to him: he may have transferred the right to another or he may have forfeited the right or he may still have the right, though it is overridden by some other, more stringent right. (This is not meant to be an exhaustive list.) And there are also some circumstances in which it is not clear what should be said. Suppose someone steals your picture and invites some third party (who doesn't know it's yours) to tear it or look at it; or suppose someone takes your picture by mistake, thinking it's his, and invites some third party (who doesn't know it's yours) to tear it or look at it; does the *third* party violate a right of yours if he accepts the invitation? A general theory of rights should provide an account of all of these things.

It suffices here, however, to stress one thing about rights: a man may have had a right that we shall not do a thing, he may even still have a right that we shall not do it, consistently with its being the case that we violate no right of his if we go ahead.

If this is correct, we are on the way to what we want. I said earlier that when we trained our X-ray device on that man's wall-safe in order to have a look at his pornographic picture, we violated a right

of his, the right to privacy, in fact. It now turns out (if I am right) that we violated a property right of his, specifically the negative right that others shall not look at the picture, this being one of the (many) rights which his owning the picture consists of. I shall come back a little later to the way in which these rights interconnect.

V

We do not, of course, care nearly as much about our possessions as we care about ourselves. We do not want people looking at our torn socks; but it would be much worse to have people watch us make faces at ourselves in the mirror when we thought no one was looking or listen to us while we fight with our families. So you might think I have spent far too much time on that pornographic picture.

But in fact, if what I said about pornographic pictures was correct, then the point about ourselves comes through easily enough. For if we have fairly stringent rights over our property, we have very much more stringent rights over our own persons. None of you came to possess your knee in exactly the way in which you came to possess your shoes or your pornographic pictures: I take it you neither bought nor inherited your left knee. And I suppose you could not very well sell your left knee. But that isn't because it isn't yours to sell—some women used to sell their hair, and some people nowadays sell their blood—but only because who'd buy a used left knee? For if anyone wanted to, you are the only one with a right to sell yours. Again, it's a nasty business to damage a knee; but you've a right to damage yours, and certainly nobody else has—its being your left knee includes your having the right that nobody else but you shall damage it. And, as I think, it also includes your having the right that nobody else shall touch it or look at it. Of course you might invite somebody to touch or look at your left knee; or you might let someone touch or look at it; or again still, you might in a fit of absent-mindedness leave it in some place such that another person would have to go to some trouble if he is to avoid touching or looking at it. In short, you might waive your right that your left knee not be touched or looked at. But that is what doing these things would be: waiving a right.

I suppose there are people who would be deeply distressed to learn

that they had absent-mindedly left a knee uncovered, and that somebody was looking at it. Fewer people would be deeply distressed to learn that they had absent-mindedly left their faces uncovered. Most of us wouldn't, but Moslem women would; and so might a man whose face had been badly disfigured, in a fire, say. Suppose you woke up one morning and found that you had grown fangs or that you no longer had a nose; you might well want to claim a right which most of us so contentedly waive: the right that your face not be looked at. That we have such a right comes out when we notice that if a man comes for some reason or another to want his face not to be looked at, and if he therefore keeps it covered, and if we then use an X-ray device in order to be able to look at it through the covering, we violate a right of his in respect of it, and the right we violate is surely the right that his face shall not be looked at. Compare again, by contrast, a subway map. No matter how much you may want a subway map to not be looked at, if we use an X-ray device in order to be able to look at it through the covering you place over it, we violate no right of yours: you do not have a right that nobody but you shall look at it—it is not *yours*, after all.

Listening, I think, works in the same way as looking. Suppose you are an opera singer, a great one, so that lots of people want to listen to you. You might sell them the right to listen. Or you might invite them to listen or let them listen or absent-mindedly sing where they cannot help but listen. But if you have decided you are no longer willing to be listened to; if you now sing only quietly, behind closed windows and carefully sound-proofed walls; and if somebody trains an amplifier on your house so as to be able to listen, he violates a right, the right to not be listened to.

These rights—the right to not be looked at and the right to not be listened to[1]—are analogous to rights we have over our property. It

1. In "A Definition of Privacy," *Rutgers Law Review*, 1974, p. 281, Richard B. Parker writes:

> The definition of privacy defended in this article is that *privacy is control over when and by whom the various parts of us can be sensed by others*. By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the parts of our bodies, our voices, and the products of our bodies. "Parts of us" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The ob-

sounds funny to say we have such rights. They are not mentioned when we give lists of rights. When we talk of rights, those that come to mind are the grand ones: the right to life, the right to liberty, the right to not be hurt or harmed, and property rights. Looking at and listening to a man do not harm him, but neither does stroking his left knee harm him, and yet he has a right that it shall not be stroked without permission. Cutting off all a man's hair while he's asleep will not harm him, nor will painting his elbows green; yet he plainly has a right that these things too shall not be done to him. These un-grand rights seem to be closely enough akin to be worth grouping together under one heading. For lack of a better term, I shall simply speak of "the right over the person," a right which I shall take to consist of the un-grand rights I mentioned, and others as well.

When I began, I said that if my husband and I are having a quiet fight behind closed windows and cannot be heard by the normal person who passes by, then if anyone trains an amplifier on us in order to listen he violates a right, the right to privacy, in fact. It now turns out (if I am right) that he violates our right to not be listened to, which is one of the rights included in the right over the person.

I had said earlier that if we use an X-ray device to look at the pornographic picture in a man's wall-safe, we violate his right to privacy. And it then turned out (if I was right) that we violated the

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jects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us.

The right to privacy, then, is presumably the right to this control. But I find this puzzling, on a number of counts. First, why *control*? If my neighbor invents an X-ray device which enables him to look through walls, then I should imagine I thereby lose control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated until my neighbor actually does train the device on the wall of my house. It is the actual looking that violates it, not the acquisition of power to look. Second, there *are* other cases. Suppose a more efficient bugging device is invented: instead of tapes, it produces neatly typed transcripts (thereby eliminating the middlemen). One who reads those transcripts does not *hear* you, but your right to privacy is violated just as if he does.

On the other hand, this article is the first I have seen which may be taken to imply (correctly, as I think) that there are such rights as the right to not be looked at and the right to not be listened to. And in any case, Professor Parker's interest is legal rather than moral: he is concerned to find a definition which will be useful in legal contexts. (I am incompetent to estimate how successful he is in doing this.)

I am grateful to Charles Fried for drawing my attention to this article.

right that others shall not look at the picture, which is one of the rights which his owning the picture consists in.

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

Some small confirmation for this hypothesis comes from the other listening case. I had said that if my husband and I are having a loud fight, behind open windows, so that we can easily be heard by the normal person who passes by, then if a passerby stops to listen, he violates no right of ours, and so in particular does not violate our right to privacy. Why doesn't he? I think it is because, though he listens to us, we have *let* him listen (whether intentionally or not), we have waived our right to not be listened to—for we took none of the conventional and easily available steps (such as closing the windows and lowering our voices) to prevent listening. But this would only be an explanation if waiving the right to not be listened to were waiving the right to privacy, or if it were at least waiving the only one among the rights which the right to privacy consists in which might plausibly be taken to have been violated by the passerby.

But for further confirmation, we shall have to examine some further violations of the right to privacy.

VI

The following cases are similar to the ones we have just been looking at. (a) A deaf spy trains on your house a bugging device which produces, not sounds on tape, but a typed transcript, which he then reads. (Cf. footnote 1.) (b) A blind spy trains on your house an X-ray device

which produces, not views of you, but a series of bas-relief panels, which he then feels. The deaf spy doesn't listen to you, the blind spy doesn't look at you, but both violate your right to privacy just as if they did.

It seems to me that in both these cases there is a violation of that same right over the person which is violated by looking at or listening to a person. You have a right, not merely that you not be looked at or listened to but also that you not have your words transcribed, and that you not be modeled in bas-relief. These are rights that the spies violate, and it is these rights in virtue of the violation of which they violate your right to privacy. Of course, one may waive these rights: a teacher presumably waives the former when he enters the classroom, and a model waives the latter when he enters the studio. So these cases seem to present no new problem.

VII

A great many cases turn up in connection with information.

I should say straightaway that it seems to me none of us has a right over any fact to the effect that that fact shall not be known by others. You may violate a man's right to privacy by looking at him or listening to him; there is no such thing as violating a man's right to privacy by simply knowing something about him.

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. I shall briefly say a word about each of these.

If we use an X-ray device to look at a man in order to get personal information about him, then we violate his right to privacy. Indeed, we violate his right to privacy whether the information we want is personal or impersonal. We might be spying on him in order to find out what he does all alone in his kitchen at midnight; or we might be spying on him in order to find out how to make puff pastry, which we already know he does in the kitchen all alone at midnight; either way his right to privacy is violated. But in both cases, the simplifying hypothesis seems to hold: in both cases we violate a right (the right to not be looked at) which is both one of the rights which the right

to privacy consists in and one of the rights which the right over the person consists in.

What about torturing a man in order to get information? I suppose that if we torture a man in order to find out how to make puff pastry, then though we violate his right to not be hurt or harmed, we do not violate his right to privacy. But what if we torture him to find out what he does in the kitchen all alone at midnight? Presumably in that case we violate both his right to not be hurt or harmed and his right to privacy—the latter, presumably, because it was personal information we tortured him to get. But here too we can maintain the simplifying hypothesis: we can take it that to torture a man in order to find out personal information is to violate a right (the right to not be tortured to get personal information) which is both one of the rights which the right to privacy consists in and one of the rights which the right to not be hurt or harmed consists in.

And so also for extorting information by threat: if the information is not personal, we violate only the victim's right to not be coerced by threat; if it is personal, we presumably also violate his right to privacy —in that we violate his right to not be coerced by threat to give personal information, which is both one of the rights which the right to privacy consists in and one of the rights which the right to not be coerced by threat consists in.

I think it a plausible idea, in fact, that doing something to a man to get personal information from him is violating his right to privacy only if doing that to him is violating some right of his not identical with or included in the right to privacy. Thus writing a man a letter asking him where he was born is no violation of his right to privacy: writing a man a letter is no violation of any right of his. By contrast, spying on a man to get personal information is a violation of the right to privacy, and spying on a man for any reason is a violation of the right over the person, which is not identical with or included in (though it overlaps) the right to privacy. Again, torturing a man to get personal information is presumably a violation of the right to privacy, and torturing a man for any reason is a violation of the right to not be hurt or harmed, which is not identical with or included in (though it overlaps) the right to privacy. If the idea is right, the sim-

plifying hypothesis is trivially true for this range of cases. If a man has a right that we shall not do such and such to him, then he has a right that we shall not do it to him in order to get personal information from him. And his right that we shall not do it to him in order to get personal information from him is included in both his right that we shall not do it to him, and (if doing it to him for this reason is violating his right to privacy) his right to privacy.

I suspect the situation is the same in respect of uses of information. If a man gives us information on the condition we shall not spread it, and we then spread it, we violate his right to confidentiality, whether the information is personal or impersonal. If the information is personal, I suppose we also violate his right to privacy—by virtue of violating a right (the right to confidentiality in respect of personal information) which is both one of the rights which the right to privacy consists in and one of the rights which the right to confidentiality consists in. The point holds whether our motive for spreading the information is malice or profit or anything else.

Again, suppose I find out by entirely legitimate means (e.g. from a third party who breaks no confidence in telling me) that you keep a pornographic picture in your wall-safe; and suppose that, though I know it will cause you distress, I print the information in a box on the front page of my newspaper, thinking it newsworthy: Professor Jones of State U. Keeps Pornographic Picture in Wall-Safe! Do I violate your right to privacy? I am, myself, inclined to think not. But if anyone thinks I do, he can still have the simplifying hypothesis: he need only take a stand on our having a right that others shall not cause us distress, and then add that what is violated here is the right to not be caused distress by the publication of personal information, which is one of the rights which the right to privacy consists in, and one of the rights which the right to not be caused distress consists in. Distress, after all, is the heart of the wrong (if there is a wrong in such a case): a man who positively wants personal information about himself printed in newspapers, and therefore makes plain he wants it printed, is plainly not wronged when newspapers cater to his want.

(My reluctance to go along with this is not due to a feeling that we have no such right as the right to not be caused distress: that we have

such a right seems to me a plausible idea. So far as I can see, there is nothing special about physical hurts and harms; mental hurts and harms are hurts and harms too. Indeed, they may be more grave and long-lasting than the physical ones, and it is hard to see why we should be thought to have rights against the one and not against the other. My objection is, rather, that even if there is a right to not be caused distress by the publication of personal information, it is mostly, if not always, overridden by what seems to me a more stringent right, namely the public's right to a press which prints any and all information, personal or impersonal, which it deems newsworthy; and thus that in the case I mentioned no right is violated, and hence, a fortiori, the right to privacy is not violated.[2]

VIII

The question arises, then, whether or not there are *any* rights in the right to privacy cluster which aren't also in some other right cluster. I suspect there aren't any, and that the right to privacy is everywhere overlapped by other rights. But it's a difficult question. Part of the difficulty is due to its being (to put the best face on it) unclear just what is in this right to privacy cluster. I mentioned at the outset that there is disagreement on cases; and the disagreement becomes even more stark as we move away from the kinds of cases I've so far been drawing attention to which seem to me to be the central, core cases.

What should be said, for example, of the following?

(a) The neighbors make a terrible racket every night. Or they cook foul-smelling stews. Do they violate my right to privacy? Some think yes, I think not. But even if they do violate my right to privacy, perhaps all would be well for the simplifying hypothesis since their doing this is presumably a violation of another right of mine, roughly, the right to be free of annoyance in my house.

(b) The city, after a city-wide referendum favoring it, installs

2. It was Warren and Brandeis, in their now classic article, "The Right to Privacy," *Harvard Law Review*, 1890, who first argued that the law ought to recognize wrongs that are (they thought) committed in cases such as these. For a superb discussion of this article, see Harry Kalven, Jr., "Privacy in Tort Law—Were Warren and Brandeis Wrong?" *Law and Contemporary Problems*, Spring 1966.

loudspeakers to play music in all the buses and subways. Do they violate my right to privacy? Some think yes, I think not. But again perhaps all is well: it is if those of us in the minority have a right to be free of what we (though not the majority) regard as an annoyance in public places.

(c) You are famous, and photographers follow you around, everywhere you go, taking pictures of you. Crowds collect and stare at you. Do they violate your right to privacy? Some think yes, I think not: it seems to me that if you do go out in public, you waive your right to not be photographed and looked at. But of course you, like the rest of us, have a right to be free of (what anyone would grant was) annoyance in public places; so in particular, you have a right that the photographers and crowds not press in too closely.

(d) A stranger stops you on the street and asks, "How much do you weigh?" Or an acquaintance, who has heard of the tragedy, says, "How terrible you must have felt when your child was run over by that delivery truck!"[3] Or a cab driver turns around and announces, "My wife is having an affair with my psychoanalyst." Some think that your right to privacy is violated here; I think not. There is an element of coercion in such cases: the speaker is trying to force you into a relationship you do not want, the threat being your own embarrassment at having been impolite if you refuse. But I find it hard to see how we can be thought to have a right against such attempts. Of course the attempt may be an annoyance. Or a sustained series of such attempts may become an annoyance. (Consider, for example, an acquaintance who takes to stopping at your office *every morning* to ask if you slept well.) If so, I suppose a right *is* violated, namely, the right against annoyances.

(e) Some acquaintances of yours indulge in some very personal gossip about you.[4] Let us imagine that all of the information they share was arrived at without violation of any right of yours, and that none of the participants violates a confidence in telling what he tells. Do they violate a right of yours in sharing the information? If they do, there is trouble for the simplifying hypothesis, for it seems to me there is no right not identical with, or included in, the right to privacy

3. Example from Thomas Nagel.

4. Example from Gilbert Harman.

cluster which they could be thought to violate. On the other hand, it seems to me they *don't* violate any right of yours. It seems to me we simply do not have rights against others that they shall not gossip about us.

(f) A state legislature makes it illegal to use contraceptives. Do they violate the right to privacy of the citizens of that state? No doubt certain techniques for enforcing the statute (e.g., peering into bedroom windows) would be obvious violations of the right to privacy; but is there a violation of the right to privacy in the mere enacting of the statute–in addition to the violations which may be involved in enforcing it? I think not. But it doesn't matter for the simplifying hypothesis if it is: making a kind of conduct illegal is infringing on a liberty, and we all of us have a right that our liberties not be infringed in the absence of compelling need to do so.

IX

The fact, supposing it a fact, that every right in the right to privacy cluster is also in some other right cluster does not by itself show that the right to privacy is in any plausible sense a "derivative" right. A more important point seems to me to be this: the fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster. What I have in mind is this. We have a right to not be tortured. Why? Because we have a right to not be hurt or harmed. I have a right that my pornographic picture shall not be torn. Why? Because it's mine, because I own it. I have a right to do a somersault now. Why? Because I have a right to liberty. I have a right to try to preserve my life. Why? Because I have a right to life. In these cases we explain the having of one right by appeal to the having of another which includes it. But I don't have a right to not be looked at because I have a right to privacy; I don't have a right that no one shall torture me in order to get personal information about me because I have a right to privacy; one is inclined, rather, to say that it is because I have *these* rights that I have a right to privacy.

This point, supposing it correct, connects with what I mentioned at the outset: that nobody seems to have any very clear idea what the right to privacy is. We are confronted with a cluster of rights–a cluster

with disputed boundaries—such that most people think that to violate at least any of the rights in the core of the cluster is to violate the right to privacy; but what have they in common other than their being rights such that to violate them is to violate the right to privacy? To violate these rights is to not let someone alone? To violate these rights is to visit indignity on someone? There are too many acts in the course of which we do not let someone alone, in the course of which we give affront to dignity, but in the performing of which we do not violate anyone's right to privacy. That we feel the need to find something in common to all of the rights in the cluster and, moreover, feel we haven't yet got it in the very fact that they *are* all in the cluster, is a consequence of our feeling that one cannot explain our having any of the rights in the cluster in the words: "Because we have a right to privacy."

But then if, as I take it, every right in the right to privacy cluster is also in some other right cluster, there is no need to find the that-which-is-in-common to all rights in the right to privacy cluster and no need to settle disputes about its boundaries. For if I am right, 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. Indeed, the wrongness of every violation of the right to privacy can be explained without ever once mentioning it. Someone tortures you to get personal information from you? He violates your right to not be tortured to get personal information from you, and you have that right because you have the right to not be hurt or harmed—and it is because you have this right that what he does is wrong. Someone looks at your pornographic picture in your wall-safe? He violates your right that your belongings not be looked at, and you have that right because you have ownership rights—and it is because you have them that what he does is wrong. Someone uses an X-ray device to look at you through the walls of your house? He violates your right to not be looked at, and you have that right because you have rights over your person analogous to the rights you have over your property—and it is because you have these rights that what he does is wrong.

In any case, I suggest it is a useful heuristic device in the case of

any purported violation of the right to privacy to ask whether or not the act is a violation of any other right, and if not whether the act *really* violates a right at all. We are still in such deep dark in respect of rights that any simplification at all would be well worth having.[5]

5. Frederick Davis' article, "What Do We Mean by 'Right to Privacy'?" *South Dakota Law Review*, Spring 1959, concludes, in respect of tort law, that

> If truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights [p. 20]. . . . Indeed, one can logically argue that the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard [p. 230].

I am incompetent to assess this article's claims about the law, but I take the liberty of warmly recommending it to philosophers who have an interest in looking further into the status and nature of the right to privacy.