

## PRIVACY RIGHTS FORFEITURE

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CONSIDER THREE SCENARIOS: (i) a couple absentmindedly leaves its windows open during a loud fight, making it easy for neighbors or passersby to overhear the couple; (ii) a person repeatedly fires off sensitive emails despite mistyping the recipients' addresses and never taking time to double check them; (iii) an actress voluntarily places her DNA and name online while wanting to keep private a rare genetic disorder that she knows about.<sup>1</sup> Do the agents in these scenarios retain a moral right to privacy in their fight, emails, and disorder, respectively?

Suppose you think not. That is, presumably, because some or all of those agents have *forfeited* a right to privacy—no matter their intentions or protestations to the contrary. While *waiver* is a relatively straightforward notion that involves giving up a moral or legal entitlement in some voluntary way, *forfeiture* is a murkier concept that operates in spite of an agent's intentions. What are its normative foundations? And is it possible to specify conditions under which privacy rights can be forfeited?

I take up these questions here and propose a novel theory of privacy rights forfeiture. The theory takes its inspiration from Judith Thomson's canonical paper "The Right to Privacy." Thomson argues that privacy rights can be waived both intentionally and "unintentionally."<sup>2</sup> Regrettably, however, Thomson sows confusion by failing to distinguish clearly between waiver and forfeiture and by repeatedly speaking of "unintentional waiver" when it seems clear that *forfeiture* is really at issue. Still, taking a cue from Thomson's work, I will develop an account of privacy-rights forfeiture in the bulk of the paper.

The account, in brief, is as follows. Agents may forfeit a right to privacy in two main ways rooted in negligent or reckless conduct as it concerns their privacy interests. Yet forfeiture is not merely a normative consequence of acting in detriment solely to one's *own* interests. A doctrine along those lines would

1 For the first scenario, see Thomson, "The Right to Privacy," 306. For the third, see Rumbold and Wilson, "Privacy Rights and Public Information," 14–15.

2 Thomson, "The Right to Privacy," 302.

be too punitive. Rather, I will argue that considerations about unfairness to putative duty-bearers come into play, as well. Thus, I will defend a hybrid model of necessary and sufficient conditions for privacy forfeiture that includes both self-directed and other-directed considerations.

Toward the end of the paper, I will address some contrary views articulated in a recent article by Benedict Rumbold and James Wilson (“RW” for short). RW engage at length with Thomson’s work and reject her idea that agents can be divested of privacy rights “unintentionally” (though RW, like Thomson, rarely speak of forfeiture itself).<sup>3</sup> I will respond to some of RW’s criticisms and argue that RW’s forfeiture-free model of privacy rights is unconvincing on moral grounds.

There is one issue that I should flag and set aside. RW’s article is motivated by a narrower topic—privacy rights over *inferences*. For example, in the digital context, may someone who posts photos on Instagram legitimately assert a moral privacy right in certain inferences that can be drawn from those photos? Such inferences, after all, can yield highly sensitive information about one’s health and personality, with one study showing that the choice of filter for Instagram photos can predict indicators of depression.<sup>4</sup> RW explore foundational issues about privacy in order to vindicate the reality and importance of what I will call *inferential privacy rights*.

I agree with RW that inferential privacy is an urgent and under-theorized subject. More important, I agree that such rights exist and can impose genuine moral constraints on what may be done with agents’ information. In a nutshell, I believe that waiving or forfeiting privacy rights to certain facts—for example, one’s public social media posts—does not *entail* waiving or forfeiting privacy rights over all possible inferences that can be drawn from that information, especially unpredictable and sensitive inferences.<sup>5</sup> The account of forfeiture I will develop in this paper offers new normative resources to assess when agents may assert inferential privacy rights and when those rights have been waived or forfeited. This paper, however, mostly focuses on privacy forfeiture in general rather than on the narrower subject of inferential privacy.

With respect to the normative foundations of privacy, I will aim to be ecu-

3 See Rumbold and Wilson, “Privacy Rights and Public Information,” 6, 12–13. Rumbold and Wilson refer to forfeiture in a footnote (“Privacy Rights and Public Information,” 15n32), and Thomson mentions it once in passing (“The Right to Privacy,” 302).

4 See Reece and Danforth, “Instagram Photos Reveal Predictive Markers of Depression”; see also Wachter and Mittelstadt, “A Right to Reasonable Inferences,” 505–14; cf. Barocas and Nissenbaum, “Big Data’s End Run around Anonymity and Consent.”

5 So, for example, I broadly agree with RW’s criticism (though not their reasoning) of the Radar app that sought to infer facts about Twitter users’ mental health from public posts without users’ permission. See Rumbold and Wilson, “Privacy Rights and Public Information,” 3–6, 24–25.

menical for purposes of this paper. I disagree with Thomson that privacy rights lack a unifying justification, and I am broadly sympathetic (as are RW) to Andrei Marmor’s notion that privacy rights give us a reasonable degree of control over how we present ourselves to others.<sup>6</sup> But, with modifications, my account of forfeiture can be made consistent with theories of privacy that privilege control, intimacy, or contextual integrity.

I first develop a novel taxonomy of how moral and legal entitlements can be divested in general, focusing on waiver and forfeiture (section 1). I then define two species of forfeiture rooted in negligent and reckless conduct (section 2). Since those definitions are formulated at high levels of abstraction, I set out five application criteria for applying those definitions to specific cases (section 3). In particular, I will explore a puzzle about how different sensitivity levels of private information influence forfeiture (section 4). I will then engage with RW’s account. I first consider an objection to my view having to do with distinct normative thresholds for forfeiting privacy rights and property rights in tangible goods (section 5). I will then argue that RW’s forfeiture-free model of privacy *overprotects* privacy rights by leaving out forfeiture and *underprotects* privacy rights, particularly those of minorities and idiosyncratic agents (section 6). A brief conclusion follows (section 7).

# 1. DIVESTMENT OF ENTITLEMENTS: A TAXONOMY

Agents can be divested of entitlements in a variety of ways. This section offers a novel approach to mapping this conceptual terrain with a focus on waiver and forfeiture.

|                                                                   |               |         |              |
|-------------------------------------------------------------------|---------------|---------|--------------|
| 1. Entitlement extinguished in ways besides waiver/forfeiture     | 3. Waiver     |         |              |
|                                                                   | Express       | Implied | Constructive |
| 2. Entitlement cannot be waived/forfeited (Hohfeldian disability) | 4. Forfeiture |         |              |
|                                                                   | Negligent     |         | Reckless     |

FIGURE 1 Divestment of Moral or Legal Entitlements: Four Modalities

Consider four modalities by which agents can be divested of moral or legal entitlements generally (figure 1), including first-order Hohfeldian entitlements (e.g., claim-rights and liberties) as well as higher-order entitlements (e.g., powers and

6 See Marmor, “What Is the Right to Privacy?” Marmor’s theory, it seems to me, has trouble accounting for privacy violations in digital contexts that do not involve any human beings coming to know relevant private information, only machines. I will not develop this point here.

immunities). I will briefly address modalities 1 and 2 and set them aside. Agents can be divested of entitlements in ways other than via waiver and forfeiture (modality 1). That is, *P* may exercise a Hohfeldian power to modify *Q*'s entitlements in ways that need not depend in any direct way on *Q*'s acts or omissions. For example, the government may weaken or rescind a benefit-conferring law involving unemployment benefits or social insurance. Or parents can modify household rules by eliminating entitlements that their children had previously enjoyed. At the other extreme, so to speak, some entitlements cannot be waived or forfeited at all, so that agents have a Hohfeldian disability with respect to alienating them (modality 2). Under US law, for example, a litigant's right to contest subject-matter jurisdiction "can never be waived or forfeited."<sup>7</sup> Likewise, a criminal defendant's right to invoke certain constitutional defenses in post-trial proceedings cannot be waived or forfeited even following a guilty plea.<sup>8</sup> As to the moral realm, think of foundational human rights or rights that are correlative with self-directed duties of a Kantian sort, e.g., a duty of self-respect or a duty to protect one's own privacy.<sup>9</sup> Such rights, if they exist, cannot be alienated.

In the remainder of this section I will focus on waiver and forfeiture (modalities 3 and 4). In a case of *waiver*, an agent is divested of some Hohfeldian entitlement(s) in virtue of that agent's actual intentions, underlying attitudes or dispositions, or imputed intentions. I will distinguish below among three species of waiver—express, implied, and constructive—and consider how they manifest in both law and morality. While the terms I use appear in US law, I am defining them independently despite certain overlaps.<sup>10</sup>

*Express waiver*: When an agent indicates orally or in writing an intent to give up an entitlement, the agent expressly waives that entitlement. A defendant might tell a judge that she declines to assert her Fifth Amendment privilege against self-incrimination and agrees to testify at trial. Or a defendant may renounce a right to government counsel, to challenge extradition, to object to the introduction of certain evidence, and so forth. These and like cases are straightforward instances of express waiver.

*Implied waiver*: Waiver can also occur short of such express statements. Implied waiver may simply describe a situation in which an agent forms a clear intent to waive but does not articulate it openly. As a prosaic illustration, if I walk away from a self-checkout stand without taking my receipt, anticipating that it will shortly be thrown out by store staff, I may impliedly be waiving my right to

7 Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).

8 See, e.g., Blackledge v. Perry, 417 U.S. 21 (1974); see also Westen, "Away from Waiver."

9 See Allen, "Protecting One's Own Privacy in a Big Data Economy."

10 See, e.g., Berg, "Understanding Waiver."

the receipt. Now consider two legal examples, keeping in mind that the law generally favors robust awareness and voluntariness conditions for waiver. If, after being given a lawful *Miranda* warning, a suspect voluntarily opts to talk with the police, the suspect may impliedly waive certain rights by initiating the conversation. Likewise, a party may impliedly waive the right to contest personal jurisdiction by omitting that objection from its initial answer to a complaint.

Implied waiver can also occur in a subtler way, which would be disfavored in law. I have in mind cases in which an agent (i) *has not* formed a clear intent at time *t* to waive an entitlement, but (ii) were she asked (at *t* or some later time) about her wishes at *t*, she would express an intent to waive. To illustrate, imagine that *P* is hanging up pictures in her new office or home without thinking much of it. When asked by *Q*, “So, you’re giving up your privacy interest in these photos in relation to all your visitors?” *P* replies, “Yes, I suppose I am.”

*Constructive waiver*: Finally, constructive waiver *imputes* to agents an intent to waive an entitlement irrespective of their mental states and modes of conduct. In law, agents are sometimes “deemed to have consented” to certain consequences if they  $\phi$ .<sup>11</sup> The assumption, I take it, is that rational agents will  $\phi$  only if they believe that doing so will advance their interests. In that case, they can be assumed to consent to relinquishing the specified entitlements by  $\phi$ -ing. So whereas in implied waiver an agent actually intends (or would intend on reflection) to waive a right, but without expressly saying so, constructive waiver can occur even if an agent has no intention either way (for example, because she is unaware of the legal consequences of  $\phi$ -ing) or intends *not* to relinquish her entitlement(s) (for example, if she wrongly believes that the legal provision is *ultra vires*).

The conditions outlined above are necessary but *insufficient* for each form of waiver to occur. That is because we must also account for potential defeating conditions.<sup>12</sup> An agent who tries to waive an entitlement could fail because, for example, (i) she does not actually have the entitlement, (ii) the entitlement is not alienable, or (iii) she has not evinced the right set of mental states and/or communicative acts. As for constructive waiver, which can occur without an agent’s awareness, a defeating condition would arise if the provision at issue were unlawful.

How do the three types of waiver introduced above apply to the moral sphere? Express waiver is, again, straightforward. If *P* makes a promise to *Q* and *Q* later says that *P* does not need to abide by it, *Q* expressly waives the right to performance. The same will be true of any overt relinquishment of an entitlement,

11 See, e.g., 18 U.S.C. § 2334(e)(1); 25 C.F.R. § 162.458(b)(2); see also *Parden v. Terminal R. Co.*, 377 U.S. 184, 192 (1964).

12 I am grateful to Laura K. Donohue for bringing this point to my attention.

assuming no defeating conditions. Agents can also impliedly waive moral rights. The pragmatics of the situation can convey waiver without requiring overt articulation. When *A* tells *B* a secret in ordinary circumstances, *A* impliedly waives her privacy right in that secret vis-à-vis *B* without having to say so directly. Or, as noted earlier, if *P* hangs photos in an office or home, *P* may impliedly waive privacy rights to those photos vis-à-vis *P*'s visitors. As to constructive waiver, I do not see this concept playing a major role in moral life. It is relevant, however, in social contract theories of political morality. On such views, actual agents may be said constructively to waive certain rights in virtue of choices made by hypothetical representative persons in something like an Original Position.

Finally, let us consider forfeiture. In a case of *forfeiture*, an agent is divested of some Hohfeldian entitlement(s) in a way that typically, though not invariably, fails to align with that agent's actual intentions or relevant attitudes or dispositions. Forfeiture typically damages, rather than advances, an agent's interests. And it usually manifests in some form of negligent or reckless conduct, a point I develop below in relation to privacy. (The preceding caveats—"not invariably," "typically," "usually"—are needed to leave room for cases of *intentional forfeiture*. For example, in a case of "suicide by cop," an agent may take deliberate steps to forfeit a legal right not to be intentionally killed.<sup>13</sup> Since that legal right is non-waivable, waiver cannot account for its divestment.)<sup>14</sup> As a final point, while the justificatory grounds of forfeiture will vary based on the circumstances, they will often (though not always) involve fairness to third parties.

In law, forfeiture comes in many stripes. Litigants can forfeit their right to rely on certain claims or defenses by failing to assert them in a timely manner—for example, by failing to plead an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure or by leaving out an argument from an opening appellate brief.<sup>15</sup> And under Federal Rule of Evidence 804(b)(6), which used to be called "forfeiture by wrongdoing," a defendant can forfeit an immunity against the use of hearsay evidence if that defendant had played a role in the "declarant's

13 I am grateful to Matthew H. Kramer for flagging this sort of case.

14 So the difference between waiver and forfeiture does not lie in the fact that the former involves voluntary divestment of an entitlement, whereas the latter does not. That distinction is overly simplistic. There are cases of forfeiture in which an agent intentionally seeks to forfeit an entitlement (e.g., "suicide by cop"), and there are instances of waiver in which an agent does not intend to give up an entitlement (e.g., certain cases of constructive waiver).

15 See, e.g., *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1107 (DC Cir. 2019); *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (DC Cir. 2019).

unavailability as a witness, and did so intending that result.”<sup>16</sup> In each of these cases, forfeiture serves to ensure fair treatment of opposing parties.

In morality, forfeiture is also commonplace. A parent who abuses a child can forfeit moral liberty-rights and claim-rights to care for that child. A business partner who makes reckless and self-serving decisions can forfeit moral entitlements to run the business. An athlete who dopes may forfeit the moral privilege to compete (even if no one finds out). A craven politician can forfeit moral rights to govern. In these examples, forfeiture is, again, justified in part based on unfairness or disrespect toward others. But forfeiture can also come about just by violating rules imposed with legitimate authority. For example, a teenager who negligently or recklessly comes home late—despite her parents’ warning that this may expose her to added chores next week—will forfeit her typical immunity against added housework over and above her weekly allotment.

Paying attention to mental states will often be crucial to classifying cases accurately. For, the same conduct can be consistent *either* with forfeiture *or* implied waiver. To illustrate, imagine that Javier invites friends over to watch a sports game. Walking toward the TV room in his house, they notice a large open wall safe with baseball memorabilia and an old watch. Assuming that Javier himself left the safe ajar, at least two interpretations are possible. Either Javier could not care less that his friends will see what is inside, suggesting implied waiver of his right to privacy in the safe’s contents, or Javier forgot to shut the door, suggesting that he negligently forfeited his right to privacy. To choose between these readings, we need to know about Javier’s mental states. And the same will be true in countless other cases where mental states will be decisive in distinguishing between forfeiture and implied waiver.

With the preceding taxonomy in mind, I will narrow my focus to forfeiture and, more particularly, to forfeiture of privacy rights.

## 2. PRIVACY RIGHTS FORFEITURE

Here and in the following two sections I introduce my account of privacy rights forfeiture. In doing so, I heed Massimo Renzo’s insightful criticism of forfeiture theories of punishment. Renzo argues that merely adverting to forfeiture cannot itself explain *why* that upshot is justified. Other normative concepts must step in.<sup>17</sup> With that admonition in mind, I suggest two main ways in which a claim-right to privacy can be forfeited:

<sup>16</sup> See US Federal Rule of Evidence 804(b)(6), advisory committee’s notes (1997 amendment).

<sup>17</sup> Renzo, “Rights Forfeiture and Liability to Harm,” 326.

*Negligent Forfeiture:* *P* negligently forfeits a privacy right if each of the following conditions obtains: (1) *P* should have been aware of a somewhat substantial risk\* to *P*'s privacy interest(s) that will result from *P*'s act(s) or omission(s); (2) *P* fails to take reasonable precautions to safeguard *P*'s privacy interest(s) in circumstances that satisfy condition 1; and (3) by failing to take reasonable precautions, *P* would unduly impinge on *D*'s interests if *D* were required to act as if *P* had a right to privacy.

*Reckless Forfeiture:* *P* recklessly forfeits a privacy right if each of the following conditions obtains: (1) *P* is aware of, but disregards, a somewhat substantial risk\* to *P*'s privacy interest(s) that will result from *P*'s act(s) or omission(s); (2) *P* fails to take reasonable precautions to safeguard *P*'s privacy interest(s) in circumstances that satisfy condition 1; and (3) by failing to take reasonable precautions, *P* would unduly impinge on *D*'s interests if *D* were required to act as if *P* had a right to privacy.

*Risk\*:* A heightened probability that a putative duty-bearer will become privy to what *P* wishes, or would have wished on reflection at the time, to keep private.

I will clarify these definitions below and outline more fine-grained criteria for applying them in sections 3 and 4.

Clause 1 in each definition echoes the US Model Penal Code's definitions of negligence and recklessness.<sup>18</sup> In keeping with the code's approach, I prefer a relatively clean distinction along the lines set out by Peter Cane: "The difference between recklessness (in its core sense) and negligence resides in the fact that the former has a mental element (deliberation and knowledge of risk) that the latter lacks."<sup>19</sup> Those who classify negligent and reckless mental states somewhat differently can, with suitable modifications, still accept my account of forfeiture. I have, however, replaced the code's language of "substantial risk" with "somewhat substantial risk\*." The code sets quite a high bar for liability in part for evidentiary and other pragmatic reasons. As far as the moral realm is concerned, one can run less than a substantial risk of harm and still be negligent or reckless. At the same time, not every uptick in risk seems salient. Thus, I opt for the admittedly imprecise phrase "somewhat substantial risk\*."

Note that I did not define risk\* in terms of a pure probability that *D* will learn certain information about *P*. Doing so would be overbroad. The information

18 See US Model Penal Code §§ 2.02(2)(c) and (d).

19 Cane, *Responsibility in Law and Morality*, 80. I would, however, set the bar for what counts as "deliberation" quite low, particularly in the moral context.



must be such that “*P* wishes, or would have wished on reflection at the time, [for it] to be private.” This proviso reflects the point made in section 1—namely, that mental states must be accounted for to distinguish accurately between cases of forfeiture and mere implied waiver.

Next, I should clarify the phrase “should have been aware of a somewhat substantial risk\*” in the definition of negligent forfeiture. That standard can be construed in more or less stringent terms. Imagine that there is some norm *N* prevalent in a given community. Acting in accordance with *N* ordinarily signifies that one aims to relinquish a right to privacy. If *P* acts in accordance with *N* while being *reasonably unaware* of *N*’s existence and implications, will clause 1 be satisfied? I suggest not. If *P* merits no epistemic blame for being unaware of *N*, it would not be fair to hold it against *P* under a negligence standard because *P* has not been careless in any respect. Hence, the “should have been aware” standard would not be met and clause 1 would not be satisfied.<sup>20</sup>

I now want to address perhaps the thorniest dimension of forfeiture—how self-directed aspects and other-directed aspects interrelate. Whereas clauses 1 and 2 in each definition refer to negligent and reckless conduct vis-à-vis one’s own interests, clause 3 focuses on “undu[e]” limitations on putative duty-bearers’ interests. How do these facets interact? There is a tempting but ultimately spurious way of thinking about forfeiture as a kind of *comeuppance* in which an agent gets what she deserves.<sup>21</sup> But deserves for what? Perhaps for imprudently risking one’s own privacy. The trouble with that account is that it makes forfeiture too punitive. Why should agents be stripped of normative protections afforded by a right to privacy for taking *self-directed* risks? Agents are generally free to risk their own interests without moral (as opposed to ethical/axiological) repercussions.

There is, however, a different and more compelling rationale for forfeiture rooted in *interpersonal* considerations. Roughly stated, when *P* is well placed to take reasonably available precautions to secure *P*’s own privacy interests, it is not fair to subject *D* to epistemic risks, moral risks, and liberty-constraining compliance burdens that accompany deontic duties. By “epistemic risk” I mean the risk of making an error about the existence or nonexistence of *P*’s right to privacy in a given case. By “moral risk” I mean the risk of committing a moral wrong and becoming a fitting object of blame, experiencing guilt, and owing remedial duties. And by “compliance burdens” I mean normative limitations on

20 In section 6, I will argue for a less forgiving stance toward duty-bearers, who may sometimes legitimately be held to a standard of strict liability in relation to faultless errors about right-holders’ entitlements.

21 RW note, without endorsing, a view along these lines. See “Privacy Rights and Public Information,” 15n32.

one's conduct, given that "protecting privacy for one person inevitably leads to restraints on the freedom of another or others."<sup>22</sup>

Suppose that, at  $t_1$ , private fact  $F$  about person  $P$  is not available to  $D$ . Then, in virtue of  $P$ 's negligent or reckless conduct,  $F$  becomes readily accessible to  $D$  at  $t_2$ . At that point, the normative situation changes, introducing epistemic risk, moral risk, and potential compliance costs.  $D$  will need to consider whether or not  $P$  has a right to privacy in  $F$ . Someone who thinks that privacy rights cannot be forfeited will, of course, maintain that a privacy right persists. Even if so,  $D$  may make a reasonable mistake. If  $D$  then ascertains  $F$ ,  $D$  may become a fitting object for reactive attitudes and owe  $P$  a remedial obligation.<sup>23</sup> And if  $D$  accurately concludes that  $P$  retains a privacy right (again, from the perspective of someone who denies that privacy forfeiture can occur),  $D$  may be encumbered with compliance duties to ensure that  $D$  refrains from ascertaining  $F$ . In my view, it is generally unfair to saddle  $D$  with such risks and compliance burdens when  $P$  was reasonably well positioned to secure  $P$ 's own interests, yet failed to do so. The most challenging type of case for my account is one in which  $D$  (i) *knows for sure* that  $P$  wishes to keep fact  $F$  private (in spite of  $P$ 's negligent or reckless conduct) and (ii) faces *de minimis* or nonexistent compliance burdens. If there is no meaningful interpersonal detriment to  $D$ , forfeiture will lose much of its normative appeal, since we would otherwise need to fall back on a "comeuppance" rationale.

Finally, note that even if forfeiture does occur, normative constraints can *still* govern  $D$ 's conduct. There may be confidentiality-type limits on what  $D$  may do with acquired information. There can also be duties not to inflict gratuitous embarrassment, emotional distress, offense, and so on, in disseminating certain information. Not only that, but we may even criticize an agent for *acquiring* information over which  $P$  has forfeited a right to privacy. Such criticism will be ethical/axiological rather than moral. The moral realm, as I construe it here, covers what is deontically required, prohibited, and permissible. The ethical sphere is broader, encompassing virtues and excellences, including supererogatory norms.<sup>24</sup> Thus,

22 Nissenbaum, "Protecting Privacy in an Information Age," 571. In her prescient account of "privacy in public," Nissenbaum criticizes various extant theories of privacy for overvaluing duty-bearers' freedoms and undervaluing privacy interests in light of big-data aggregation and inferential analyses (570–75). I agree with those concerns and that "privacy in public" is a genuine phenomenon (e.g., in the form of inferential privacy rights). But Nissenbaum does not deny that duty-bearers' liberties deserve *some* normative weight, so the issue will be a matter of degree.

23 As we will see in section 6, RW adopt a view according to which, if  $D$  cannot reasonably conclude that  $P$  has a privacy right in a given context,  $D$  has no duty to respect it. I will disagree with RW's approach on moral grounds.

24 For this distinction, see Kramer, *Moral Realism as a Moral Doctrine*, 2–3.

even if *D* does not violate *P*'s right to privacy (or, put otherwise, does not wrong *P*) in virtue of forfeiture, *D*'s conduct may still be unseemly, "bad, Not Nice, not done by the best people."<sup>25</sup> Thomson adds: "From the point of view of conduct ... bad behavior is bad behavior, whether it is a violation of a right or not."<sup>26</sup>

What, then, is the *point* of forfeiture if an agent's conduct remains open to normative (albeit ethical) critique? The answer lies in what is distinctive about violating moral rights as opposed to falling short of ethical ideals: only the former gives rise to remedial requirements. Consider the Remedy Principle set out by Matthew Kramer:

*Remedy Principle:* If and only if *P* holds vis-à-vis *D* a moral right against *D*'s  $\phi$ -ing, *D*'s  $\phi$ -ing will place *D* under a moral obligation to *P* to remedy the resultant situation in some way.<sup>27</sup>

When a person fails to embody various virtues—e.g., temperance, modesty, bravery—that shortcoming does not itself trigger remedial duties. But failure to comply with deontic duties does. So the difference between a theory of privacy that makes room for forfeiture, and one that does not, has real-world consequences. On a forfeiture-friendly view, when *P* forfeits a privacy right, *D* will not wrong *P*—and thus will not incur a remedial duty—by acquiring relevant information about *P*, even though *D* will remain open to ethical criticism.

### 3. FIVE APPLICATION CRITERIA

I will now consider how the definitions introduced above apply in some specific circumstances. Thomson observes:

It is not at all easy to say under what conditions [an agent] has waived [or forfeited] 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.<sup>28</sup>

25 Thomson, "The Right to Privacy," 296. RW repeatedly invoke the infringing/violating distinction (which Thomson herself popularized). Because nothing in the paper turns on that distinction, so far as I can see, I will continue to speak of "violating" rights.

26 Thomson, "The Right to Privacy," 298.

27 Kramer, "Moral Rights and the Limits of the Ought-Implies-Can Principle," 313 (minor modifications added).

28 Thomson, "The Right to Privacy," 302.

To build on this terse but incisive sketch, I will suggest five factors to help determine an agent’s degree of negligence or recklessness and the reasonableness of available safeguards. I will address factors 1–4 here and leave the fifth factor for the next section.

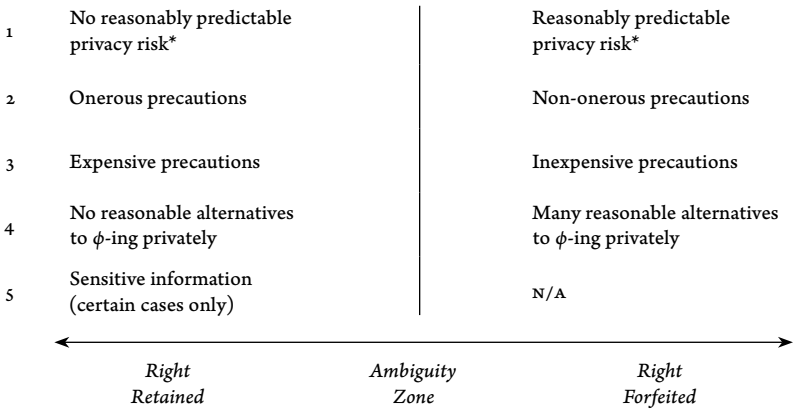


FIGURE 2 Factors Relevant to Forfeiture Analysis

Judgments will no doubt vary about how to interpret and apply these factors, how much weight they deserve in particular cases, and how they interconnect. Below, I will illustrate how the schema works with simple examples and flag issues for further discussion.

As to the first factor, some nuances are worth noting. To begin with, a privacy risk\* can be spelled out at various levels of abstraction. For example, is it a risk\* that one’s personal data may be misused by (i) some entity in some way or (ii) misused by entity *E* in context *C*? The appropriate level of generality will depend on the circumstances. Next, recognizing *that* there is a privacy risk\* to begin with can involve epistemic costs and effort that need to be accounted for. By the same token, if an agent is negligently unaware of salient privacy risks\* in a given situation, this may count against that agent in a forfeiture analysis.<sup>29</sup> The various considerations adduced in this paragraph can be folded into the reasonableness qualifier within the first factor.

Consider, now, two of Thomson’s scenarios in slightly modified form.

*Open Windows:* A couple has a loud fight in a low-floor apartment overlooking a street with pedestrian traffic. The couple has not “thought to

29 If an agent is negligently unaware of a certain privacy risk\*, but it turns out that no reasonable precautions could be taken in any event in that situation, the agent’s oversight would not increase the likelihood of forfeiture.

close the windows,” so it can easily be heard. A passerby hears the argument and stops to listen.<sup>30</sup>

*Closed Windows:* A couple is having a quiet fight in their apartment with windows closed. Unbeknownst to them, a neighbor across the street trains an amplifying device onto their windows that captures sound waves inaudible to the human ear that migrate beyond the closed window. The neighbor gleans the conversation.<sup>31</sup>

I agree with Thomson that the two cases showcase “not merely a difference in degree, but a difference in quality.”<sup>32</sup> A privacy right is divested in the first case, but not the second. Thomson elaborates as follows (notably failing to distinguish forfeiture and implied waiver):

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 [or forfeited] 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.<sup>33</sup>

I will assume that the couple *did not* want to relinquish its privacy right, making the scenario a candidate for forfeiture. The privacy risks\* here are obvious, per the first factor. Next, Thomson’s phrase “conventional and easily available steps” gestures at the second and third factors. The epistemic costs of identifying precautions are in effect nil, since the steps are apparent as well as simple and costless. Finally, the couple has a reasonable alternative to fighting with its windows open: doing so with windows closed. The couple, in other words, negligently risked its privacy interests despite reasonably available precautions and, hence, forfeited its right to privacy. In *Closed Windows*, all the factors point the other way. The neighbor’s use of an amplifying device is hardly predictable. Even if it were, there are no widely known, feasible steps to protect against it. If so, the couple’s only alternative would be to argue some place other than its home, depriving it of reasonable alternatives. The couple, in other words, has

30 Thomson, “The Right to Privacy,” 296; see also 306.

31 Thomson, “The Right to Privacy,” 296.

32 Thomson, “The Right to Privacy,” 296.

33 Thomson, “The Right to Privacy,” 306.

not been negligent or reckless vis-à-vis its privacy interests and retains its claim-right to privacy.

As in *Closed Windows*, in another one of Thomson's examples—a park-bench scenario—there is no negligent or reckless conduct, and hence no forfeiture. Where a pair hoping to “talk over some personal matters” chooses a “bench far from the path,” it retains its right to privacy against an eavesdropper who “creeps around in the bushes ... and crouches [at the] back of the bench to listen.”<sup>34</sup> To be clear, I think the explanation here does not turn on the eavesdropper's bad motives. Imagine that Sari enjoys sitting nestled in those bushes each afternoon and reading for pleasure. If, one day, Sari happens innocently to overhear the pair's exchange, the pair would *still* retain its right to privacy despite Sari's impeccable motives. The real explanation here, I believe, has to do with the *unpredictability* of risk\* where agents have taken due precautions.

But even incurring predictable privacy risks\* does not *entail* forfeiture. That is true, for example, when third parties constrain one's choice situation in morally untenable ways. Suppose that *A* and *B*'s house is far from their property line. *C* trespasses and positions himself by an open window. Assume, as well, that *A* and *B* know of *C*'s presence. Here, unlike in *Open Windows*, there would be no forfeiture. The difference lies in *C*'s independent moral wrong of trespass that illegitimately constrains *A* and *B*'s choice situation. Though it would be highly imprudent for *A* and *B* to keep the windows open if they know of *C*'s presence, forfeiture does not occur because the phrase “unduly impinged” in clause 3 of the reckless forfeiture definition is not met in virtue of *C*'s trespass.

The same point—that incurring predictable privacy risks\* does not ineluctably result in forfeiture—applies when activities are integral to carrying out one's life plans and there are no reasonable alternatives to pursue them in privacy-preserving ways. Suppose that you live in an area with a sole utility provider. The provider informs you that it sells granular electricity usage data to marketers that could reveal various personal or intimate details, and there is no opt-out mechanism. Despite predictable risks\*, you would not forfeit a moral right to privacy in that data by signing up, since electricity provision is an essential service and you are faced with a monopolistic provider.<sup>35</sup> In contrast, if you had a choice between two otherwise identical providers, only one of which sells granular data, you may forfeit (or waive) your moral right to privacy in relevant data by knowingly selecting the data-monetizing utility. (If the overall deal offered by

34 Thomson, “The Right to Privacy,” 298.

35 A similar analysis would apply to Andrei Marmor's hypothetical in which the government openly announces its plans to record all telephone calls. See Marmor, “What Is the Right to Privacy?” 14–15.

the non-monetizing utility is materially worse than the monetizing utility, perhaps there still would not be a reasonable alternative.)

Finally, I would like to say a word about factors relevant to the *duty-bearer's* situation, focusing on considerations introduced in section 2, albeit in reverse order: (1) compliance burdens and (2) epistemic and moral risks. As to 1, *D* may face new compliance burdens in virtue of *P's* negligent or reckless conduct. For example, in Open Windows, passersby may have to modify their route or stopper their ears to avoid overhearing the couple. In *rw's* related hypothetical, a neighbor would need to "adopt a kind of wilful deafness"<sup>36</sup> to avoid overhearing neighbors having an altercation.<sup>37</sup> Or, as in some of Thomson's examples, *D* "would have to go to some trouble" to avoid acquiring relevant information or, more strongly, "cannot help but" acquire it due to *P's* acts or omissions.<sup>38</sup>

In evaluating these compliance burdens, what might we say about assessing the importance of *D's* liberty interests? Trying to assign them comparative weight is not at all straightforward. How would we decide whether *D's* liberty interest in looking at *X* or listening to *Y* or walking near *Z* is more or less weighty in a particular case or in general? Matters are further complicated by asking such questions both about the interests of natural persons and corporations (commercial giants, startups, nonprofits, etc.) and trying to gauge whether the liberty interests of persons or corporate entities deserve more or less normative weight either as a general matter or in specific cases of putative privacy forfeiture. These issues deserve further reflection beyond this paper's scope. In any event, the bar for normative significance of liberty interests in relation to compliance burdens should be set relatively low, in my view, to satisfy clause 3 in both definitions of forfeiture. That is because we are already focused on the subset of cases in which clauses 1 and 2 have been met. That is—but for *P's* reckless or negligent conduct in the face of somewhat substantial risks\* and the presence of reasonable precautions—*D* would not be facing any added compliance burdens at all.

Now let us assume that compliance costs are *de minimis* or nonexistent. In that case, the existence of epistemic and moral risks can satisfy clause 3. In real-world scenarios such risks will typically exist. That is, *D* will not know *P's* actual intentions and may thus make a (reasonable) mistake and violate a putative moral duty. To underscore this point, consider two contrived scenarios in which those risks are deliberately taken off the table. Suppose that *P* negligently misdirects a personal email to *D's* inbox. Before *D* sees it, *P* calls *D* to say that the email was sent in error and asks *D* to refrain from opening it. What result? Given that

36 Rumbold and Wilson, "Privacy Rights and Public Information," 11.

37 See section 6 for further discussion of this case.

38 Thomson, "The Right to Privacy," 301, 303, 304.

*D* is apprised of *P*'s intent and compliance is not hard, no forfeiture would likely result.<sup>39</sup> Or consider a case based on RW's hypothetical to which I will return in section 5.<sup>40</sup> Imagine that *P* voluntarily uploads her name and DNA onto a public website but appends the following note: "I hereby assert a right to privacy in relation to any genetic disorder(s) that may be inferable from my DNA." Ignoring the folly of *P*'s conduct, with that note in place, putative duty-bearers would be fully apprised of *P*'s intent. Assuming that the compliance burden is *de minimis*, forfeiture again may be unjustified. After all, *D*s are left no worse off than if *P* had not uploaded the DNA in the first place. Unlike in these contrived cases, however, in the real world, *D*s typically will *not* be privy to *P*'s actual intentions. The epistemic and moral risks that will exist in those contexts can be sufficient to satisfy clause 3 in each definition of privacy forfeiture, even if compliance burdens with a putative right to privacy are not especially onerous or even nonexistent.

#### 4. SENSITIVITY OF PRIVATE INFORMATION

I will now address the fifth and final factor introduced in the previous section. How should varying sensitivity levels of private information affect forfeiture?

To set up a puzzle, imagine two variants on Open Windows. In one, a couple argues about its dinner plans. In the other, it fights about whether the infidelity of one spouse should lead to divorce, airing salacious details. Factors 1 through 4—predictability, onerousness, costs, and reasonable alternatives—are identical in both cases. If that were the full story, both couples would be equally likely to forfeit their rights to privacy. But the second couple seems far more negligent, given its sensitive topic. Yet that fact may seem to count *against* forfeiture, precisely because passersby would then be morally free to listen in (while remaining open to ethical criticism). Conversely, the couple bickering about dinner plans appears less negligent, given its mundane topic. This fact may seem to make forfeiture *less* objectionable as compared to the previous case.

Which way does sensitivity cut, then? Does forfeiture become more likely as sensitivity rises, since it bespeaks greater negligence or recklessness? Or does forfeiture become less likely, since it would erode normative protections for sensitive facts?<sup>41</sup>

39 Should we take into account the fact that *D* may be *tempted* to open the email (or, more generally, access now-available information about *P*), and must exercise self-restraint to avoid doing so, as a factor that cuts in favor of forfeiture? I think not, since that would not be fair to *P*. But see note 42.

40 See Rumbold and Wilson, "Privacy Rights and Public Information," 14–15.

41 I ignore trickier cases relevant to inferential privacy where the underlying facts may be mun-



To begin with, various complications will arise in determining the true sensitivity level at issue. Does it depend solely on an agent's subjective judgments and attitudes? If not, what sort of reasonableness constraints are warranted? I set aside these issues and simply assume that we are dealing with sensitive facts. If so, one option is to contend that higher sensitivity always increases chances of forfeiture, at least to some extent. But that view strikes me as too punitive, much like the comeuppance rationale discussed in section 2. Granted, failing to take precautions with respect to very sensitive facts is more negligent or reckless than failing to do so vis-à-vis mundane facts. But that tells us nothing about the *duty-bearer's* situation. For example, no matter what the couple fights about—dinner or marital trouble—passersby would need to take the identical steps to respect a right to privacy. If higher sensitivity could *in itself* be decisive for a forfeiture verdict, holding other factors fixed, the account would be overly harsh toward right-bearers.<sup>42</sup>

With these remarks in mind, my proposal to handle different sensitivity levels is reflected in figure 3 below. (In order not to beg any questions, sensitivity is excluded altogether from judgments about degrees of negligence and recklessness in the two columns.)

|                                     | <i>Low/Moderate<br/>Negligence</i>      | <i>Gross Negligence and<br/>All Recklessness</i> |
|-------------------------------------|-----------------------------------------|--------------------------------------------------|
| <i>Low/Moderate<br/>Sensitivity</i> | 1. Neutral                              | 2. Neutral                                       |
| <i>High Sensitivity</i>             | 3. Tells somewhat<br>against forfeiture | 4. Neutral                                       |

FIGURE 3 Sensitivity Levels of Private Information and Forfeiture

Let us first consider box 3—cases where sensitivity is high but agents are no more than moderately negligent. Here, a somewhat forgiving attitude toward right-holders is justified because the right to privacy protects important interests whose normative weight increases with heightened sensitivity and forfei-

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dane, but when coupled with other available data and processed by powerful analytics tools can yield sensitive inferences.

- 42 There is one set of circumstances in which quasi-punitive considerations could play a role when tethered to interpersonal harms: *serial* negligence or recklessness. Suppose that an agent negligently, and repeatedly, sends misdirected email messages. Even if she retains a privacy right at the *first* such transmittal, she could arguably forfeit her privacy right in an identical misdirected email by the *tenth* such erroneous transmittal.

ture is clearly detrimental to those interests. These considerations tell somewhat against forfeiture in box 3–type cases. But extending the same approach to cases of gross negligence or recklessness (boxes 2 and 4) is not justified given the higher level of risk that agents run, especially when they do so knowingly in cases of recklessness. But to avoid an excessively punitive verdict even in those cases, sensitivity can be treated as a neural factor that tilts the scales neither for nor against forfeiture. The same approach can be extended to cases where sensitivity is low to moderate (boxes 1 and 2), since it would make little sense to treat those circumstances either more or less favorably than cases with high sensitivity (boxes 3 and 4). With this rubric in mind, we can briefly reconsider the puzzle with which I started. The first variant of Open Windows (dinner dispute) can be slotted in box 2 and the second variant (infidelity dispute) in box 4. I have located both cases in the second column because, as in Thomson's original scenario, the privacy risks\* are obvious and the safeguards are equally clear and costless. Sensitivity thus ends up playing a neutral role in both scenarios.

Assigning a role to the sensitivity of private information in forfeiture analysis raises a host of complications, some of which I have noted above. Most important, to steer clear of overly punitive results, high sensitivity need not work against right-bearers (boxes 1, 2, and 4) and, in one type of case, can favor them by counting somewhat against forfeiture (box 3).

##### 5. FORFEITING PRIVACY RIGHTS VERSUS PROPERTY RIGHTS

Having outlined my account of privacy forfeiture, in the remainder of the paper I will engage with RW's criticisms of Thomson and their own take on privacy.

One way to test a philosophical thesis is to consider how it fits with one's other commitments. If the fit is incongruous, that is a defeasible strike against the thesis. I take up such an inquiry here by asking how the idea of privacy-rights forfeiture relates to forfeiture of a different kind of entitlement—property claim-rights in tangible goods. This comparison, which RW briefly invoke to impugn privacy rights forfeiture, raises broader issues of interest to philosophers and social scientists. The topic is especially apt because Thomson herself compares privacy rights and property rights, though she does not broach the issues that I will address here.<sup>43</sup>

RW imagine a famous actress, Annabel, who volunteers to support an initiative to promote genetic research. She agrees to donate her DNA to research and put it online with her name. Annabel has a rare, hard-to-diagnose genetic disorder.

43 See Thomson, "The Right to Privacy," 304–6, 312–14.

der that she wants to keep private. After the DNA is put online, a geneticist downloads it, analyzes it, and finds the disorder. Would he violate Annabel's right to privacy by publicizing it?<sup>44</sup> (Note that this case involves inferential privacy, since the disorder is inferred from the DNA.)

RW think so, even though "Annabel intended to publicize the contents of her DNA."<sup>45</sup> They then raise the possibility that Annabel forfeited her right to privacy given the obvious risks of making her DNA public: "Although we might chastise Annabel for her naivety in this situation, it is far from clear that, simply by virtue of that naivety, we should also think she has somehow forfeited her right to privacy."<sup>46</sup> RW continue:

After all, one does not forfeit one's right to private property simply by absent-mindedly leaving one's car keys in one's car. Failing to act in a way that ensures, as far as possible, that the car will not be stolen does not somehow mean that the car is no longer *ours*, or that we cannot make reasonable demands on others by virtue of our rights over it.<sup>47</sup>

RW's first sentence is undoubtedly right. But it is not enough to clinch RW's point as to Annabel's retention of her right to privacy. For the passage appears to depend on an unstated assumption: forfeiture thresholds for tangible property rights are not very different from those for privacy rights. But, as I will now suggest, there may be good reasons to doubt that assumption.

If Annabel forfeits a right to privacy in her genetic disorder—as my account suggests she does, assuming duty-bearers face relevant epistemic risks, moral risks, or compliance burdens—why does a person who absentmindedly leaves a wallet or laptop at a coffee shop *not* forfeit a right to those things, even if the level of negligence or recklessness exhibited is the same or greater than in Annabel's case?<sup>48</sup> Put another way, why do property rights seem stickier—harder to forfeit—than privacy rights? In taking up this question, I will contrast "pure" privacy cases with "pure" property cases. I bracket cases implicating both types of rights—for example, appropriation of a hard drive containing sensitive personal data—where I believe that the stricter property-rights standard should control.

As an initial matter, it is possible to forfeit property rights (paradigmatically, land rights) under the legal doctrine of "adverse possession." But that doctrine sets such a high bar—often requiring ten years of actual, exclusive, hostile, and

44 Rumbold and Wilson, "Privacy Rights and Public Information," 14.

45 Rumbold and Wilson, "Privacy Rights and Public Information," 14.

46 Rumbold and Wilson, "Privacy Rights and Public Information," 15n32.

47 Rumbold and Wilson, "Privacy Rights and Public Information," 15n32.

48 I grant that there may be ethical/axiological objections to publicizing the disorder.

“open and notorious” occupancy—that it is largely an exception that proves the rule that property rights are hard to forfeit.<sup>49</sup> Next, distinct forfeiture thresholds cannot simply be explained by distinct degrees of harm resulting from forfeiture of privacy rights and property rights, respectively. After all, losing ownership rights to a wallet or laptop can be much *less* harmful than forfeiting a privacy right to sensitive medical information, for example. Hence, I will now consider two other potential explanations, though I concede that these issues are not clear-cut and may resist any neat generalizations.

First, I suspect that—at least in some cases—distinct forfeiture thresholds may have to do with varying levels of intrusiveness of the correlative duties. While obligations to respect tangible property rights center on outward conduct, duties of privacy can involve intimate psychological processes, requiring agents not to look, scrutinize, read, listen, and so forth. RW, for their part, even contemplate a duty to refrain from certain private *thought processes* that may yield sensitive inferences about other people.<sup>50</sup> While I believe that such a duty goes too far, it underscores the point that duties of privacy can be psychologically intrusive in ways that property-related duties are not and, for that reason, may justify a somewhat lower forfeiture bar. Granted, complying with some privacy obligations may not be very invasive psychologically; meanwhile, duties to respect property rights can be onerous in their own ways and impinge considerably on our liberties.<sup>51</sup> Thus, the contrast drawn in this paragraph is hardly decisive.

Second, forfeiture of property rights and privacy rights has different upshots for social order and coordination, which typically require clear and predictable rules about who owns what and how scarce resources are appropriated, apportioned, and transferred. Tangible goods such as land, houses, cars, wallets, and computers are rival and excludable. If the forfeiture threshold for such goods were set too low, property rights may become less stable and predictable because many more disputes over property will arise; perverse incentives may materialize to cause others to forfeit their property rights; and more resources may be needed to secure property interests, likely to the disadvantage of those who are worst off in society. Granted, these are empirical conjectures.<sup>52</sup> Still, it seems plausible that a relatively high threshold for property-rights forfeiture can help avert those destabilizing social outcomes.

49 See, e.g., *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990).

50 See Rumbold and Wilson, “Privacy Rights and Public Information,” 15.

51 I am grateful to an anonymous referee for pressing these points.

52 There does not appear to be a meaningful empirical literature on comparative property forfeiture rules.

A comparatively lower threshold for privacy-rights forfeiture does not pose analogous risks for social stability. For one thing, privacy rights usually do not involve rivalrous goods that can be fought over like scarce resources. If  $D_1$  learns  $P$ 's secret or sees  $P$ 's picture, that does not leave any less of anything for  $D_2$ ,  $D_3$ , etc. While privacy rights can surely involve market commodities—for example, information bought and sold by data brokers—they are also often untethered from market prices, so that agents do not suffer direct economic losses from forfeiture. Crudely stated, if I forfeit title to my laptop, I am out \$1,500; if someone overhears me in Open Windows, it does not leave me any poorer to pay the bills (even if the harm that I suffer in losing title to my laptop is *less serious* than the harm that would be caused by a major privacy violation). In short, the threat to core prerequisites for civic order that arises if agents can readily forfeit tangible property rights does not apply with the same force to privacy rights.

Relatedly, low forfeiture thresholds for property rights may intensify worries about intrusive involvement of legal-governmental officials in people's lives. Low thresholds of that sort would almost certainly multiply disputes about whether forfeiture has occurred and who is the new rightful owner of forfeited goods. Those conflicts, in turn, may intensify involvement of law enforcement and the legal system in people's lives (at least in regimes with robust rule of law where property rights are well enforced). Privacy, again, is different. The state should not be in the business of resolving many privacy disputes in the first place, as in Open Windows or who overheard what at the office watercooler. And while common-law privacy torts vindicate important interests, the law is also ill equipped to protect privacy in various respects.<sup>53</sup> So a comparatively lower threshold for privacy-rights forfeiture likely will not supercharge state intervention in people's affairs as much as low forfeiture thresholds for property rights would.

Clearly, more must be said on this score. But explanations along the lines canvassed above can, I suspect, make sense of disparate forfeiture thresholds for privacy rights and tangible property rights. While RW helpfully allude to this contrast, its sheer existence, without further argumentation, does not cast doubt on privacy-rights forfeiture.

## 6. RW OVERPROTECT AND UNDERPROTECT PRIVACY RIGHTS

In this final substantive section, I turn to RW's positive model of privacy. Their account has many dimensions, so I will focus on just two. First, RW make no

53 See Gavison, "Privacy and the Limits of Law," 370–72.

explicit provision for forfeiture in their model, resulting in a theory that appears too solicitous toward right-holders. Second, to balance out that normative picture, RW enter two key caveats. Those caveats, I will argue, veer too far in the other direction, *underprotecting* privacy interests of faultless right-holders and biasing outcomes against minority preferences in morally problematic ways.

I first want to rule out a purely terminological dispute. Objecting to Thomson's idea of "unintentional waiver," RW say that "if one is to waive a right, one would seem to need actually to waive it." In one sense, I agree.<sup>54</sup> Thomson invites needless confusion by speaking of "unintentional wavier" instead of "forfeiture" even when it is clear that agents *do not* wish to relinquish an entitlement.<sup>55</sup> If that were the whole dispute, RW could accept the bottom line in Thomson's examples but redescribe relevant cases in terms of forfeiture, as I have done. But RW appear to press a deeper objection. They seem to contest the very idea that agents can be divested of privacy rights involuntarily. They say that agents can expressly waive a privacy right and that rights can become "defunct" (a topic I address below).<sup>56</sup> But what agents "may not do is *unintentionally* waive their rights, which is to say, accidentally absolve duty-bearers of their rights [*sic*]."<sup>57</sup> To the extent that this remark is meant to go beyond terminological quibbles, I interpret it—together with the absence of any acknowledgement of forfeiture in their article—as ruling out privacy forfeiture.

On that view, the right to privacy becomes an outlier, a fundamentally different sort of right from other moral and legal entitlements. If one can forfeit a right to a friend's trust by deceiving her, or to raise a child by mistreating him, or to rely on certain legal claims or defenses by failing to assert them in a timely way, why can one not forfeit a right to privacy by failing to take readily available safeguards when privacy risks\* are predictable? On RW's picture, the lodestar is a right-holder's *intention* as to which facts to keep private (bracketing RW's caveats that I discuss below).<sup>58</sup> It appears that, no matter how negligent or reckless an agent may be, if she *unintentionally* discloses private information that she does

54 If by "actually . . . waive," RW mean "expressly waive," they may be overstating matters, given my account of implied waiver in section 1.

55 See, e.g., Thomson, "The Right to Privacy," 301–2 (an agent who "positively want[s] that nobody shall look at the[ir] picture" "unintentionally waives" a right to privacy by leaving the picture in a public place).

56 Rumbold and Wilson, "Privacy Rights and Public Information," 12–13.

57 Rumbold and Wilson, "Privacy Rights and Public Information," 13. RW presumably intended to write "obligations" or "duties" rather than "rights."

58 Rumbold and Wilson, "Privacy Rights and Public Information," 13–14.

not wish to make public, the costs of securing her privacy could, in principle, be imposed on others.

As one illustration, consider RW's variant on Thomson's Open Windows. RW imagine neighbors having a "highly personal, but also very loud, argument that you cannot help but overhear," while knowing that they "have absolutely no intention of broadcasting their discussion."<sup>59</sup> According to RW, one has a moral duty "to adopt a kind of wilful deafness" in order not to "pay too close attention to precisely *what* they are saying."<sup>60</sup> But that strikes me as a lopsided, unfair result. The idea that others must stopper their ears to accommodate *me* if *I* am speaking loudly when I have neighbors—and perhaps apologize to me if they hear me too distinctly—is too solicitous toward me, since I have been negligent or reckless by failing to take basic safeguards. While adopting "willful deafness" may be *virtuous* in that context, doing so is fully consistent with endorsing a forfeiture verdict as to the privacy right(s) at issue.

The same misallocation of moral benefits and burdens will characterize countless other cases on a theory of privacy that makes no room for forfeiture. Whether it is the negligent couple in Open Windows or a person who serially misdirects sensitive emails, or Annabel intentionally posting her DNA online (without wishing to make public her genetic disorder), the onus to protect privacy—and the attendant moral risks, including the possibility of being subject to reactive attitudes and remedial obligations—can, in principle, fall onto others on RW's model.

Recognizing that their account may seem too onerous for duty-bearers, RW adjust it in two main ways. One centers on physical/psychological constraints faced by putative duty-bearers and the other focuses on epistemic constraints. These caveats, I will now suggest, are morally problematic in their own right.

First, RW say that privacy rights become "defunct" if a duty-bearer cannot, in some physical and/or psychological sense, help but learn a private fact (or a slightly weaker condition is met).<sup>61</sup> Say *P* leaves a picture in a public place or has a loud fight with the windows open. *D* comes along and simply *sees* the picture or *hears* the fight. In such cases, privacy rights become "defunct" and duty-bearers do nothing wrong in acquiring private information.

How does the notion of "defunct" rights intersect with my account of privacy forfeiture? Figure 4 below captures areas of functional convergence and divergence.<sup>62</sup>

59 Rumbold and Wilson, "Privacy Rights and Public Information," 11.

60 Rumbold and Wilson, "Privacy Rights and Public Information," 11.

61 Rumbold and Wilson, "Privacy Rights and Public Information," 10–11, 20–21.

62 I am assuming in this chart that RW's second caveat (discussed below) is not relevant.

|                     | Right “Defunct”            | Right Not “Defunct”       |
|---------------------|----------------------------|---------------------------|
| Right Forfeited     | 1. Functional convergence  | 2. RW overprotect privacy |
| Right Not Forfeited | 3. RW underprotect privacy | 4. Functional convergence |

FIGURE 4 “Defunct” Rights and Forfeiture

Our verdicts coincide in two scenarios: when a right is “defunct” *and* forfeited (box 1) and when a right is *neither* “defunct” *nor* forfeited (box 4). I will focus instead on the points of disagreement—boxes 2 and 3. In box 2, where a right that is not “defunct” is arguably forfeited on my account—e.g., Open Windows, RW’s loud neighbors case, Annabel’s case—RW are, again, being overly solicitous toward negligent or reckless right-holders. Since I addressed this problem earlier, I will focus here on box 3, where rights are “defunct” but *not* forfeited. Here, RW err in the other direction. They give unduly short shrift to full-fledged privacy interests by stripping them of normative force through no fault of a right-holder’s own. In such cases, the better view is to say that, while duty-bearers may be acting non-culpably, they could *still* violate a right to privacy and owe innocent right-holders a remedial duty, even if a modest one.<sup>63</sup> I will return to this idea below, since it tallies with my response to RW’s second strategy for cabining the burdens that fall on duty-bearers.

RW’s second approach centers on epistemic constraints that arise in deliberating about one’s obligations: “Whether or not Q’s actions infringe or even violate P’s privacy rights depends in part on what Q could *reasonably have expected* P’s concerns were with regard to once-private information that now finds itself in the public domain.”<sup>64</sup> So RW accept:

*Conscientious Non-Violation:* If “a conscientious agent, taking the utmost care to respect an individual’s right to privacy, will still get it wrong about what that individual intended or did not intend when they made a certain

63 See Kramer, “Moral Rights and the Limits of the Ought-Implies-Can Principle,” 317–22, 328–31. RW may hold other philosophical commitments that would lead them to contest the possibility of non-culpable rights violations, a point of disagreement that would go beyond issues of privacy.

64 Rumbold and Wilson, “Privacy Rights and Public Information,” 19, emphasis added.



piece of information public,” that is “a cause for regret in the harm they do to *P*,” without constituting a violation of *P*’s rights.<sup>65</sup>

Note that, earlier on, RW say that the “right to privacy ... track[s] the extent to which an individual *intended* to make a piece of information public.”<sup>66</sup> Conscientious Non-Violation waters down this key commitment by making the normative bite of privacy rights turn in part on duty-bearers’ myriad epistemic circumstances. Even if *P* has not waived a right, that right becomes inert whenever duty-bearers deliberate blamelessly but mistakenly about *P*’s interests. *P* is then out of luck, merely a “cause for regret.”<sup>67</sup> So Conscientious Non-Violation succeeds at cabining the burdens on duty-bearers. But it does so at the unfair expense of innocent right-bearers.

Conscientious Non-Violation has a more serious moral strike against it—one that RW acknowledge and strive to deflect, albeit unsuccessfully in my view. The disadvantages that Conscientious Non-Violation places on right-holders are not distributed equally or randomly. Rather, they disproportionately disadvantage preferences, dispositions, and norms that are in the minority in a given group or community. When a putative duty-bearer does not know *P*’s actual intentions, she will need to rely on certain heuristics, simplifying assumptions, generalizations, and so forth. Those, in turn, will usually track majoritarian views to maximize the chances of getting it right, which is an epistemically sensible strategy. So Conscientious Non-Violation will systematically discriminate against the privacy interests of minorities and idiosyncratic parties. That itself is a good reason to reject the thesis, RW’s efforts to reply notwithstanding.

Take RW’s own example of an Orthodox Jewish woman’s right to privacy in a photograph depicting her hair, which religious custom forbids her from doing in public if she is married. RW imagine that the photo falls into the hands of “a British citizen living in a close-knit rural village in England.”<sup>68</sup> The villager decides whether to disseminate it based on “social norms prevalent in her society.”<sup>69</sup> Since the villager “could not be reasonably expected to think that [the woman] would have wanted such a photograph to be kept private,” the villager would not

65 Rumbold and Wilson, “Privacy Rights and Public Information,” 19–20.

66 Rumbold and Wilson, “Privacy Rights and Public Information,” 14.

67 Rumbold and Wilson, “Privacy Rights and Public Information,” 20.

68 Rumbold and Wilson, “Privacy Rights and Public Information,” 22.

69 Rumbold and Wilson, “Privacy Rights and Public Information,” 22.

violate the woman's privacy right.<sup>70</sup> Hence, on RW's view, the woman has "no justifiable complaint" against the villager.<sup>71</sup>

We can substitute the Orthodox woman's preferences for the practices of any minority group or community or any agent's eccentric predilections. RW's verdict in such cases will render non-waived, non-forfeited privacy rights a dead letter, unlike in the case of agents who happen to harbor mainstream preferences that duty-bearers are better positioned, epistemically speaking, to discern. No matter how faultless the villager's deliberation may be, in my view she could *still* violate the Orthodox woman's right to privacy (again, assuming it has not been forfeited), and owe her a remedial duty.

RW concede that their account "appears to discriminate against minorities."<sup>72</sup> But their strategy to neutralize the criticism is not convincing. They clarify that "what constitutes a reasonable expectation . . . cannot be defined simply by the most prevalent norms within a given society," and they advise duty-bearers to "consider the likelihood of P being a member of [a] minority group and the norms held by such groups."<sup>73</sup> That is fair enough. But it hardly guarantees that *D* will reach the right conclusion. *D* may lack certain information or may reasonably misinterpret available facts. The normative force of privacy rights, particularly those of agents whose preferences are atypical in a given group or community, will remain hostage to duty-bearers' various epistemic blind spots and limitations.

My alternative view allows us to avoid the lopsided upshots of Conscientious Non-Violation. Granted, one implication of my account is that duty-bearers can incur remedial obligations for violating rights in non-culpable ways. To preempt potential objections to this upshot, I will make four points. These points extend, *mutatis mutandis*, to the way that I propose to handle cases of non-forfeited but "defunct" rights in RW's sense.

First, there will be fewer privacy rights on my model to begin with, since rights can be both waived and forfeited. In cases of genuine forfeiture, deliberative errors on the part of putative duty-bearers will be immaterial, since the entitlement in question will not exist.

Second, remedial duties resulting from erroneous but faultless deliberation will be attenuated, often significantly, compared to the remedial duties resulting from culpable violations.<sup>74</sup> In the villager's case, it may amount to an apology, an

70 Rumbold and Wilson, "Privacy Rights and Public Information," 22.

71 Rumbold and Wilson, "Privacy Rights and Public Information," 22.

72 Rumbold and Wilson, "Privacy Rights and Public Information," 22.

73 Rumbold and Wilson, "Privacy Rights and Public Information," 22.

74 For a related point, see Kramer, "Moral Rights and the Limits of the Ought-Implies-Can Principle," 328–31.

explanation, and perhaps a sincere expression of intent to make amends in some way. Nothing more would be needed, especially because the reputational and emotional harms that could result from disseminating the picture in the woman's community would not arise in the villager's social context.

Third, a choice between two alternatives seems inevitable. Either a duty-bearer's faultless but mistaken deliberations will leave innocent right-holders without normative recourse (RW's position) or epistemically faultless but mistaken duty-bearers can sometimes incur remedial duties, even if minimal ones (my position). The latter approach is preferable on moral grounds, including non-biased treatment of minorities and idiosyncratic agents. There is a further point, as well. While Hohfeldian rights and duties are correlative, a *justificatory* asymmetry is nevertheless at work. Privacy rights and duties exist to protect *right-holders'* interests. My position respects this asymmetry by extending slightly greater protections to innocent right-holders and placing slightly greater burdens on non-culpable violators.

Fourth, it may be objected that I am poorly placed to criticize RW for overemphasizing majoritarian preferences because my definition of negligent forfeiture may tacitly privilege such preferences. But that is not so, given my remarks in section 2 about the phrase "should have been aware of a somewhat substantial risk.\*" I said that if *P* acts in line with social norm *N* that ordinarily signals an intent to relinquish a privacy right, yet *P* is *reasonably unaware* of *N* (perhaps because *P* is part of a minority group or community), the "should have been aware" standard will not be satisfied. So I am treating epistemically innocent right-holders in a more forgiving way than epistemically innocent duty-bearers. This asymmetric treatment is justified. As I noted in the third response, above, *some* tradeoff must be made between the interests of right-holders and duty-bearers. And given the important values secured by the right to privacy, privileging non-culpable right-holders who would otherwise forfeit a right to privacy under a negligence standard is the better tack, particularly because remedial obligations for non-culpable duty-bearers will typically be substantially attenuated.

In sum, RW's account overprotects and underprotects privacy. By seemingly leaving out forfeiture, RW extend normative protections to reckless or negligent right-holders at the unfair expense of duty-bearers. Then, overcorrecting the other way, RW let duty-bearers off the hook too readily in cases of "defunct" rights and cases of faultless but mistaken deliberation by duty-bearers in which *right-holders* have done nothing culpable. On my view, agents can waive a right to privacy or forfeit it in the ways that I have specified. Short of this, privacy rights will usually retain their normative bite. Nonculpable right-holders should not be at the mercy of duty-bearers' epistemic blind spots, and the rights of minori-

ties and idiosyncratic individuals should not be systematically shortchanged. One implication of my account is that duty-bearers can incur remedial duties for non-culpable rights violations. This upshot, for the reasons given above, is preferable on moral grounds to RW's approach.

## 7. CONCLUSION

Though much work remains to make sense of how privacy rights (and other rights) can be forfeited, I have made three contributions in this paper toward these efforts. First, I proposed a novel taxonomy of how Hohfeldian entitlements can be divested generally and distinguished among varying species of waiver and forfeiture. Second, I developed a theory of privacy rights forfeiture according to which privacy rights can be forfeited in one of two main ways rooted in negligent and reckless conduct. In making that case, I reconstructed and amplified key ideas in Thomson's canonical work on privacy, clarified how distinct sensitivity levels of private information affect forfeiture, and suggested that there may be legitimate reasons why forfeiture thresholds for property rights in tangible goods are more stringent than forfeiture thresholds for privacy rights. Finally, I advanced a moral critique of RW's forfeiture-free model of privacy by arguing that it at once underprotects and overprotects privacy rights.

My account also offers new normative resources to make progress on the subject of inferential privacy. The definitions of privacy forfeiture that I proposed, along with the five application criteria, can help draw principled distinctions between cases where inferential privacy rights may be asserted and where they have been forfeited. The key point to flag here is that one need not choose between a Thomson-inspired theory of privacy-rights forfeiture and inferential privacy rights. One can, and should, endorse both.<sup>75</sup>

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