

THE RIGHT TO PRIVACY UNVEILED

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The vast majority of philosophers and legal theorists who have thought about the issue agree that there is such a thing as a moral right to privacy. However, there is little or no theoretical consensus about the nature of this right. According to reductionists, the right to privacy amounts to nothing more than a cluster of property rights and rights over the person, and therefore plays no autonomous explanatory role in moral theory (Thomson 1975, Davis 1959). Among non-reductionists, there are almost as many accounts of the right to privacy as there are synagogues in the old town of Jerusalem. For one group of non-reductionists (perhaps the majority), the right to privacy is properly understood as a right of *control*, a form of autonomy. Within this group, some think that the right to privacy is the right to control *information* about oneself (Westin 1967, Beardsley 1971, Gerstein 1978, Fried 1970, Moore 2003), while others insist that it is the right to control *access* to oneself (Parker 1974, Scanlon 1975, Rachels 1975, Reiman 1976, Van den Haag 1971). For another group of non-reductionists, the right to privacy is the right to cognitive and/or physical *inaccessibility* (Gavison 1980, Garrett 1974, Allen 1988). Though these are by far the most widely adopted non-reductionist accounts of the relevant right, they are by no means the only ones currently on offer. There are hybrid accounts according to which the right to privacy is a cluster of various rights of control (Inness 1992) or a cluster of various rights of control and restricted access (DeCew 1997). And according to an influential “information-based” account, the right to privacy

is defined as the right that others not possess undocumented personal information about the right-holder (Parent 1983a; 1983b).

The purpose of this paper is to bring some order to this theoretical chaos. On my view, *none* of these accounts of the right to privacy is accurate. As I will argue, we are better served by a completely different theoretical description of the relevant right. It is my hope that greater philosophical clarity in this area of ethics will lead to a more careful appreciation of the *value* of the right to privacy, as well as legislation and judicial reasoning that is more carefully crafted to protect against violations of the right.

The paper is organized as follows. In section 1, I place the controversy over the nature of the right to privacy within the context of the Hohfeldian theory of rights developed by Thomson. In section 2, I describe some well-known paradigm cases in which the right to privacy is infringed, and explain how standard theories accommodate these examples. In section 3, I consider counterexamples to the standard theories. In section 4, I return to Thomson's seminal article, "The Right to Privacy," for clues to the nature of the right to privacy. As I will argue, the examples Thomson uses in defense of reductionism (ironically) provide the inspiration for a novel non-reductionist account that is theoretically superior to the standard views. I call this account the "Barrier Theory." I then conclude with a summary of the main points of the paper and a brief discussion of the possible ways in which the Barrier Theory might contribute to answering some pressing legal questions.

1. *Rights*

According to Thomson, whose theory of rights is heavy indebted to Hohfeld, rights are either simple or complex. Complex rights, which Thomson calls “cluster-rights,” are combinations of simple rights. Simple rights, which are not themselves combinations of other rights, come in four varieties: claims, privileges, powers, and immunities. For X to have a claim against Y that P is for Y to be under a duty toward X, namely the duty that Y discharges if and only if P. For example, I have a claim against you that you not smash my computer inasmuch as you have a duty toward me of not smashing my computer (Thomson 1990, 41). For X to have a privilege as regards Y of letting it be the case that P is for X not to be under the duty towards Y that X discharges if and only if not-P. For example, I have a privilege as regards you of parking behind your car inasmuch as I do not have a duty toward you of not parking behind your car (Thomson 1990, 44-45). For X to have a power as regards Y is for X to have “an ability to cause, by an act of [X’s] own, an alteration in [Y’s] rights.” For example, “by virtue of owning [a certain] typewriter, A is able to make it the case, by an act of his own, that A himself loses a claim against B that B not use it: A does this if he gives B permission to use it” (Thomson 1990, 57). Finally, “for X to have an immunity against Y just is for Y to lack a power as regards X.” For example, “you...have an immunity against me if I lack the ability to make you cease to own your typewriter” (Thomson 1990, 59).

Among the more important cluster-rights are what Thomson calls “liberties.” For X to be at liberty to do A (or to have the liberty to do A) is (i) for X to have a privilege as regards everyone of doing A and (ii) for X to have a claim against all others that they not interfere (in certain sorts of ways) with X’s doing A. Thus, I am at liberty to (or have the

liberty to) read *Middlemarch* in my living room inasmuch as (i) I am not under a duty toward anyone of not reading *Middlemarch* in my living room and (ii) everyone else is a under a duty toward me of not interfering (say, by removing my glasses) with my reading *Middlemarch* in my living room.

Claims are the most important of the simple rights. (Hohfeld calls them “rights in the strictest sense.”) Importantly, Thomson distinguishes between claim-infringements and claim-violations. For Y to infringe X’s claim against Y that P is for Y to make it the case that not-P. For example, you infringe my claim against you that you not smash my computer if you do indeed smash my computer. To violate a claim is to infringe it *impermissibly* (Thomson 1990, 122). So all claim-violations are *ipso facto* claim-infringements. It is a substantive thesis in moral theory, one that Thomson (in my view, rightly) defends, that not all claim-infringements are also claim-violations: it is possible to infringe a claim without violating it. Suppose, for example, that a master terrorist has hidden the only key that could disable a nuclear device that is about to go off in Manhattan *in my computer*. In smashing my computer (which is the only way to get at the key in time to prevent the nuclear explosion), you definitely *infringe* the claim I have against you that you not smash my computer. But your infringement of this claim of mine is morally *permissible* or *justifiable* (perhaps even morally *required*).

Thomson also says (again, in my view, rightly) that claims vary in strictness or stringency. In general, the more stringent the claim, the greater the required increment of good needed to justify infringing it. For example, my right against you that you not kill me is more stringent than my right against you that you not smash my computer: the good of saving an innocent person’s life is great enough to justify infringing the latter, but not

great enough to justify infringing the former (Thomson 1990, 153). Thomson goes further in endorsing what she calls the “Aggravation Principle”:

If X has a claim against Y that Y do alpha, then the worse Y makes things for X if Y fails to do alpha, the more stringent X’s claim against Y that Y do alpha.

Thus, it is not merely that the stringency of a claim varies with the amount of good needed to justify infringing it: a claim’s stringency also varies “with how bad its infringement would be for the claim holder” (Thomson 1990, 154). Thus, it is in large part because infringing my claim to not be killed would make things worse for me than would infringing my claim to not have my computer smashed that the former claim is more stringent than the latter.

Finally, it is an important part of the Hohfeld-Thomson theory of rights that there are different ways in which a person can cease to have a right (Thomson 1990, 361). One way to divest oneself of a right is by waiving it. For example, I might waive my claim against you that you not eat my salad by explicitly granting you permission to eat it, or I might waive my claim against Officer Smith that she not search my house by explicitly consenting to the search. Another way to lose a right is by forfeiting it. For example, a villainous aggressor who attempts to kill you forfeits her claim against you that you not kill her (as the only means of preventing her from killing you).

It is in the overall context of the Hohfeld-Thomson theory of rights that I wish to discuss the question of the nature of the right to privacy. Is the right to privacy a claim, privilege, power, or immunity? If it is a claim, what conditions are individually

necessary and jointly sufficient for its infringement? If it isn't a claim, is it a cluster-right, such as a liberty, that results from the combination of simple rights? If it is a cluster-right, what exactly are its components?

2. *Cases*

In order to make progress in answering these questions, it helps, I think, to consider paradigm cases in which the right to privacy is (at least) infringed (or violated) and paradigm cases in which it is not. And, in respect of cases, there is no better source than Thomson's "The Right to Privacy."

To begin, consider the following pair of cases adapted from Thomson (1975, 117-118):

The Loud Fight

A married couple, X and Y, are having a fight in their house, shouting at each other as loud as they can; unfortunately, they have not thought to close the windows, so that they can easily be heard from the street outside. As it happens, Smith, while watering his flowers across the street, hears what X and Y say.

The Quiet Fight

The same married couple, X and Y, are having a quiet fight, behind closed windows, and cannot be heard by the normal person who passes by; however, Jones across the street trains an amplifier on their house, by means of which he can hear what they say; and he does this in order to hear what they say.

As Thomson sees it, Jones, but not Smith, infringes the right to privacy possessed by the married couple.

And consider also the famous cases of the pornographic picture and the subway map (Thomson 1975, 120):

The Pornographic Picture

Consider a man (say, Hugh) who owns a pornographic picture. [Hugh] wants that nobody but him shall ever see that picture...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. Another man (say, Black) has heard about this picture, and wants to see it, so trains his X-ray device on the wall-safe and looks in.

The Subway Map

There is a subway map on the wall at the Harvard Square T-stop. Larry doesn't want White to see the map, and so covers it up with his raincoat. White trains his (portable) X-ray device on the raincoat and manages to look at the subway map.

Again, as seems clear, in training his X-ray device to look at the picture in Hugh's wall-safe, Black infringes Hugh's right to privacy; but in training *his* X-ray device to look at the subway map, White does not infringe Larry's right to privacy.

Now what, in these cases, accounts for the fact that there is (or is not) an infringement of the right to privacy? One of Thomson's insights is that answering this question will help us identify what the right to privacy is.

Consider the most popular non-reductionist theories and what they tell us about these cases. Within the Hohfeld-Thomson theory of rights, "control-based" accounts of the right to privacy classify it as a liberty, that is, as a cluster-right that includes (i) a privilege as regards everyone of deciding (and carrying out the decision) to hide personal matters (whether in the form of one's body or mind, one's corporeal or mental acts, or facts about oneself) from others, and (ii) a claim against all others that they not interfere (in certain sorts of ways) with this decision (and its implementation). On this sort of view, the problem in *The Quiet Fight* is that Jones has infringed the married couple's right to privacy by infringing their claim of non-interference (in the way of preventing them from carrying out their decision that others shall not access the sounds they emit during their conversation or acquire the information contained in those sounds). Similarly, on this sort of view, the problem in *The Pornographic Picture* is that Black has infringed Hugh's claim of non-interference with the implementation of his decision that others shall not look at, and thereby gain information about, the contents of his wall-safe.

By contrast, "accessibility-based" theories classify the right to privacy as no more than a claim against others that they not have the ability to experience (or obtain information about) such personal facts or states of affairs. On such views, the problem in *The Quiet Fight* is that, because he can train an effective amplifying device on the married couple's home, Jones has infringed their claim that others not have the ability to experience, and thereby gain information about, their conversation; and the problem in

The Pornographic Picture is that, because he can train an effective X-ray device on Hugh's wall-safe, Black has infringed Hugh's claim that others not have the ability to experience, and thereby gain information about, the contents of his wall-safe.

According to accessibility-based theories, it is possible to explain the fact that Smith does not infringe the married couple's right to privacy in *The Loud Fight* by appealing to the concept of claim-waiving. By raising their voices above a certain decibel level and omitting to close their windows, the married couple have voluntarily divested themselves of the claim that passers-by not possess the ability to hear what they are saying to each other. Control-based theories offer a somewhat different explanation for the fact that Smith does not infringe the married couple's right to privacy. They can say that, by stepping outside his house and watering his flowers, Smith interferes neither with the married couple's decisions nor with the implementation of those decisions. Given that Smith does not infringe the married couple's claim of decisional non-interference, and given that privileges are not the sorts of rights that can be infringed, it follows that Smith infringes no right that is part of the cluster-right that is the married couple's right to privacy.

Control- and accessibility-based theories treat *The Subway Map* in yet another way. The issue here concerns the *zone* over which the relevant agents have the right of control. According to both sorts of theories, the right to privacy covers access to, or decisional control over, a zone that includes personal or intimate matters, but not items in the public domain. The fact that White does not infringe Larry's right to privacy in *The Subway Map* is to be explained, not by adverting to Larry's waiving of a claim or to the fact that White's X-ray device does not interfere with Larry's decision to keep others

from looking at the map, but rather by advertizing to the fact that the map does not fall within Larry's zone of privacy.

According to a somewhat different, but influential, "information-based" view defended by Parent (1983a; 1983b), the right to privacy is the claim that others not possess undocumented personal information about the claim-holder. Parent understands personal information to consist of "facts which most persons in a given society choose not to reveal about themselves (except to close friends, family...) or of facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself" (Parent 1983a, 270; 1983b, 346-347). And he defines documented information as "information that is a part of the public record" ("i.e., in court proceedings, newspapers, or other documents available for public inspection") (Parent 1983a, 270; 1983b, 347). Thus, for Parent, Jones infringes the married couple's right to privacy in *The Quiet Fight* inasmuch as, thanks to his amplifier, he now possesses information about the couple that is not part of the public record and that they have chosen not to reveal to anyone. And Black infringes Hugh's right to privacy in *The Pornographic Picture* inasmuch as, thanks to his X-ray device, he now possesses undocumented personal information about Hugh (concerning Hugh's possessions and viewing habits). By contrast, since the contents of the married couple's conversation are "available for public inspection" in *The Loud Fight*, Smith does not infringe the couple's right to privacy when he acquires personal information about the couple as a result of walking outside to water his flowers. And since the information contained in the subway map is part of the public record, White does not infringe Larry's right to privacy in the course of using his X-ray device to look at the map through Larry's raincoat.

Thomson (following the lead of Davis 1959) defends a reductionist account of the right to privacy. She begins by distinguishing (non-exhaustively) between two kinds of rights from which the right to privacy derives and to which it may be reduced: property rights and rights over the person. Property rights in respect of X are cluster-rights that include both positive rights (or privileges), such as “the right to sell [X] to whomever you like, the right to give [X] away, the right to tear [X], the right to look at [X],” and negative rights (or claims), such as “the right that others shall not sell [X] or give it away or tear it” (Thomson 1975, 120-121). Rights over the person include such “un-grand” rights as the claim that others shall not stroke one’s knee, the claim that others shall not cut off one’s hair while one is asleep, and the claim that others shall not paint one’s elbows green (Thomson 1975, 126).

Thomson hypothesizes that one’s property right with respect to X includes not only the privilege of hiding X from others and the claim that others not interfere with one’s hiding X from others, but also the claim that others not look at, listen to, or otherwise experience X. It is, she contends, the fact that Black manages to look at the contents of Hugh’s wall-safe in *The Pornographic Picture* that explains why Black infringes Hugh’s right to privacy: for Hugh’s right includes the claim against Black that Black not look at Hugh’s picture. By contrast, the fact that White does not infringe Larry’s right to privacy in *The Subway Map* is to be explained by the fact that Larry does not have a claim that White not look at the map, a fact itself explained by the fact that Larry does not *own* the map (which is a piece of public or government property).

Thomson also hypothesizes that one’s right over the person includes among its un-grand claims the claim that others not look at one’s body (or its parts) and the claim

that others not listen to the sounds emitted by one's body (or its parts). It is, she argues, the fact that Jones actually listens in on the married couple's animated conversation in *The Quiet Fight* that explains why Jones infringes the couple's right to privacy: for the couple's right includes the claim against Jones that Jones not listen to the sound of their voices. By contrast, the fact that Smith does not infringe the married couple's right to privacy in *The Loud Fight* is to be explained by the fact that, by raising their voices and not closing their doors, the couple waived their claim that Smith not listen to them.

Thomson then defends a "simplifying hypothesis" according to which "the right to privacy is itself a cluster of rights [that] 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" (Thomson 1975, 126-127). On her view, there is no autonomous right to privacy distinct from other rights. Thus, in *The Pornographic Picture*, it isn't because Black infringes Hugh's right to privacy that Black infringes Hugh's property-claim that Black not look at Hugh's picture; rather, it is because Black infringes Hugh's property-claim that he infringes Hugh's right to privacy. Similarly, in *The Quiet Fight*, it isn't because Jones infringes the married couple's right to privacy that Jones infringes the couple's claim that he not listen to them; rather, it is because Jones infringes the couple's claim that he not listen to them that he infringes their right to privacy (Thomson 1975, 132-133).

3. Counterexamples to the Standard Accounts

Standard non-reductionist accounts of the right to privacy enjoy a measure of success with regard to the task of explaining why there is (or is not) an infringement of the right

in some central paradigm cases. However, there are other paradigm cases that point up significant weaknesses in the standard non-reductionist theories.

Parent, following Thomson, points out (in my view, rightly) that control-based theories of the right to privacy stumble over what he calls “the threatened loss counterexample.” Parent puts the point this way (1983b, 344):

The Threatened Loss Counterexample

Suppose A invents a fantastic X-ray device that enables him to look right through walls. A then focuses the device on my home but refuses to use it. Since he certainly has the power to find out everything that I am doing in my home it cannot be said that I any longer enjoy control over personal information about myself *vis-à-vis* A – at least I don’t in regard to activities done at [my] home. Still A has not invaded by privacy. He doesn’t do that until he actually looks through his device.¹

The Threatened Loss Counterexample points up the fact that the mere *existence* of an effective X-ray device in the hands of someone else is sufficient to deprive me of the power to determine who shall (and who shall not) acquire personal information about me and who shall (and who shall not) experience personal facts about me. By virtue of possessing such a powerful X-ray device, A interferes with the implementation of my decision that no-one outside my house shall learn or experience what it is that I do behind closed doors, and thereby infringes a claim to decisional non-interference that control-based theories identify as one of the rights that combine to form the cluster-right that is

the right to privacy. Control-based theories therefore predict that A infringes my right to privacy even when he does not look through his X-ray device and so neither experiences nor acquires information about what I do behind closed doors. But this is a counterintuitive result: A does not infringe my right to privacy unless he actually sees me (or gains information about me) with the help of his X-ray device.

As Parent (also, in my view, rightly) points out, the same counterexample works against accessibility-based theories as well. According to these theories, the right to privacy is a claim against others that they not have the ability to experience (or obtain information about) personal facts or states of affairs involving the claim-holder. It is the *possibility of accessing* (not the actual accessing) of personal information by others that accessibility-based theorists find disturbing. Consequently, on such views, it is again sufficient for infringement of my right to privacy that A possess the *capacity* (in the form of his X-ray device) to access personal information about me that I have chosen to keep from him. Hence, accessibility-based theories also predict the independently counterintuitive result that A infringes my right to privacy even as his powerful X-ray device remains idle.

Not surprisingly, Parent's own information-based account of the right to privacy is not vulnerable to *The Threatened Loss Counterexample*. For Parent, my right to privacy is not infringed in the case unless A actually possesses undocumented personal information about me. Since A has not looked through his X-ray device, he possesses no such information, and hence has not infringed my right to privacy. But Parent's own theory is hardly immune to counterexample. In fact, there are strong reasons to think that

the possession of undocumented personal information about a person is neither necessary nor sufficient to constitute an infringement of her right to privacy.

Here is a counterexample to the necessity claim, one that focuses on whether personal information must be *undocumented* in order for possession of it to count as an infringement of the right to privacy:

The Ex-Nazi

Goldberg trains his powerful X-ray device on Rudolf's wall-safe and learns from reading the papers therein that Rudolf was once a member of the Nazi party. As it happens, Goldberg *could* have learned the very same information about Rudolf by reading old issues of *Der Völkischer Beobachter* in the public library, but did not do so.

In *The Ex-Nazi*, Goldberg clearly infringes Rudolf's right to privacy despite the fact that he learns no information that is not already a part of the public record. It follows that the possession of *undocumented* information about X is not *necessary* for infringing X's right to privacy.

A different counterexample brings out the fact that the possession of undocumented personal information about X is not *sufficient* for infringing X's right to privacy:

The Innocent Gossip

Sally has trained her powerful X-ray device on Rudolf, and has learned a piece of undocumented personal information about him, namely, that he likes to solve Sudoku puzzles. As it happens, James and Sally love to gossip and share information. Sally tells James that Rudolf is addicted to Sudoku puzzles. When James asks Sally how she knows this, she replies (falsely) that Rudolf admitted it to her.

In *The Innocent Gossip*, it is clear that James now has undocumented personal information about Rudolf. And yet, as is also clear, it is not the case that James has infringed (or is infringing) Rudolf's right to privacy by virtue of the fact that he now knows that Rudolf likes to solve Sudoku puzzles. It follows that the possession of undocumented personal information about X is not *sufficient* for infringing X's right to privacy.

Given the problems faced by standard *non-reductionist* accounts of the right to privacy, it is well worth asking whether Thomson's *reductionist* account of the right fares any better. The answer, I believe, is no. The central thesis of Thomson's account is that persons have such rights as the claim to not be looked at or listened to and the claim that one's property not be looked at or listened to. Though this thesis promises to explain why Hugh's and the married couple's right to privacy is infringed in *The Pornographic Picture* and *The Quiet Fight*, and though it does so without succumbing to any of the counterexamples to standard non-reductionist theories, it is vulnerable to a different class of counterexamples. Consider the following case:

The Pornographic Tornado

A tornado demolishes Hugh's mansion, picks up the wall-safe, and drops it onto the ground in such a way that the pornographic picture pops out and lands face up in the middle of the Walk of Fame on Hollywood Boulevard. Thomas, a tourist who is searching for the Star of Igor Stravinsky, spots the picture and looks at it.

It is clear, I think, that Thomas does not infringe Hugh's right to privacy by looking at Hugh's pornographic picture on Hollywood Boulevard. There's the picture, on the ground, face up, in plain sight. There is no one else around. The picture seemingly materializes out of nowhere. It seems as plain as plain can be that Thomas commits no wrong (not even *pro tanto*) in looking at the picture. But if Hugh's right to privacy includes the claim that others not look at his picture, then Thomas has indeed infringed that right. (Hugh certainly hasn't either waived or forfeited the relevant claim.) I conclude that Thomson's reductionist theory delivers the wrong result in *The Pornographic Tornado*.

And it isn't just with respect to cases involving private property that Thomson's theory fails: it also fails in cases involving what she thinks of as rights over the person. Consider, for example, a variant on the case of *The Quiet Fight*:

The Accidentally Amplified Quiet Fight

Our married couple, X and Y, are having another quiet fight behind closed doors. But this time an unanticipated gust of wind sweeps through the house, knocking

down the front door, carrying and amplifying the couple's voices so that Stuart, who is washing his car in his driveway across the street, hears at least some of what X and Y have been saying.

Again, it is clear, I think, that Stuart does not infringe the married couple's right to privacy by hearing, and listening to, part of their conversation. But if the couple's right to privacy includes the claim that others not listen to them, then Stuart has indeed infringed that right. (The couple certainly haven't waived or forfeited the relevant claim.) So Thomson's theory delivers the wrong result in *The Accidentally Amplified Quiet Fight* as well.

4. *The Barrier Theory*

What do *The Quiet Fight* and *The Pornographic Picture* have in common that distinguishes them both from *The Accidentally Amplified Quiet Fight* and *The Pornographic Tornado*? Ironically enough, Thomson herself provides us with a valuable clue. She puts the point thus (Thomson 1975, 128):

Where our rights in this area do lie is, I think, here: (i) we have a right that certain steps shall not be taken to find out facts, and (ii) we have a right that certain uses shall not be made of facts.

Leaving aside part (ii) of this statement (a part to which I shall return), Thomson's point in part (i) is that the right to privacy is a claim against others that they not use certain

sorts of *means* to experience or discover personal facts about the claim-holder. I propose to turn this insight into a more precise non-reductionist account of the right to privacy, one that promises to avoid all the problematic counterexamples discussed thus far.

Let's go back to Thomson's initial examples. In *The Quiet Fight* the married couple has retreated behind the walls, closed windows, and closed doors of their house to have a private conversation. The walls, as well as the closed windows and doors, represent a barrier, an obstacle (used by the couple) in the way of those (such as passers-by) who might otherwise be in a position to hear what X and Y are saying to each other. By training his amplifier on the couple's house, Jones learns or experiences personal facts about them by virtue of the fact that he has breached this barrier. In *The Pornographic Picture*, Hugh has placed the picture in his wall-safe in order to keep others from seeing it. The fact that the wall-safe is locked and cannot be opened by someone who is ignorant of the relevant combination represents a barrier, an obstacle (used by Hugh) in the way of those (such as friends, plumbers, and electricians) who might otherwise be in a position to look at the picture when Hugh has invited them into his house. By training his X-ray machine on Hugh's wall-safe, Black learns or experiences a personal fact about Hugh (namely, that Hugh has a pornographic picture in his safe) by virtue of the fact that he (Black) has breached this barrier. Contrast both of these cases with *The Loud Fight* and *The Subway Map*. In *The Loud Fight*, Smith breaches no barrier when the sound waves emitted by the couple reach his ears as he is watering the flowers in his front yard. And in *The Subway Map*, although White does breach a barrier by using his X-ray device to look through Larry's raincoat at the map, he does not thereby learn or experience any personal fact about Larry.

This description of Thomson's examples suggests the following *non-reductionist* hypothesis:

The Barrier Theory

For X to have a right to privacy against Y is for X to have a claim against Y that Y not learn or experience some personal fact about X by breaching a barrier used by X to keep others from learning or experiencing some personal fact about X.

As should be clear, the Barrier Theory is immune to the counterexamples that bedevil the standard reductionist and non-reductionist theories. For example, the Threatened Loss Counterexample poses no difficulty whatever for the Barrier Theorist. The reason for this is that the *mere existence* of an effective X-ray device that is trained on my home does not constitute an infringement of the claim that the Barrier Theory takes to be definitive of my right to privacy. In order to infringe this claim, A would actually have to *use* the device to see me through the walls of my house. The Barrier Theory can also explain why Thomas does not infringe Hugh's right to privacy in *The Pornographic Tornado* and why Stuart does not infringe the married couple's right to privacy in *The Accidentally Amplified Quiet Fight*. For, in looking at Hugh's pornographic picture on the Walk of Fame, Thomas breaches no barrier being used by Hugh to prevent others from experiencing the picture; and in hearing part of the married couple's conversation, Stuart breaches no barrier that the couple are using to prevent others from experiencing their altercation.

There are various questions that might be pressed on a proponent of the Barrier Theory. One question is whether it is required that the barrier that must be breached as a condition of the infringement of someone's right to privacy be *solid*. Although the right-to-privacy infringement cases considered thus far involve the breaching of a *solid* barrier, it is easy to see that this is an irrelevant feature of the cases. For consider the following case (adapted from Thomson 1975):

The Man in the Bushes

A married couple, X and Y, have to talk over some personal matters. It is most convenient from them to meet in the park, and they do so, taking a bench far from the path since they don't want to be overheard. It strikes a man [say, Brown] to want to know what they are saying to each other in that heated fashion, so he creeps around in the bushes behind them and crouches back of the bench to listen.

As seems clear, by creeping through the bushes and finding his way to a position ideally suited to the purpose of eavesdropping on their conversation, Brown infringes the couple's right to privacy. Yet the relevant barrier in *The Man in the Bushes* is not solid: it is the air occupying the distance between the bench and the path. This air represents a sound barrier through which the sounds emitted by the couple cannot travel. In general, there seems no limit to the variety of kinds of barriers that can be relied on by those who seek to use them to protect their privacy. Such barriers include (among many others) wall-safes, window blinds, (non-transparent) clothing, desk drawers, masking agents

(say, to cover the smell of alcohol or tobacco), air (as a sound barrier), and the encryption of email messages.

Another question is whether the barrier that must be breached as a condition of the infringement of someone's right to privacy must have been *erected* by, in addition to being *used* by, the relevant right-holder. The answer, I take it, is no. For consider the following case:

My Wall

Michael doesn't want Mary to see him. So he hides behind my wall. Mary trains her X-ray machine on my wall and thereby discovers Michael hiding behind it.

I take it that in *My Wall* Mary infringes Michael's right to privacy, even though Michael himself did not erect the barrier he is using to hide from her.

A further question is whether Y's breaching of a barrier being used by X to keep others from experiencing or learning personal facts about X cannot count as an infringement of X's right to privacy unless X's use of the barrier is itself morally permissible. The answer, I take it, is no. For consider the following case:

The Towel Snatcher

Michael doesn't want Mary to see him in his new bathing suit. But there is no ready means to hide from Mary, so Michael impermissibly snatches Jeff's towel without Jeff's permission and hides behind it. Mary trains her X-ray machine on Jeff's towel and discovers Michael hiding behind it is his new bathing suit.

I take it that, in *The Towel Snatcher*, Mary yet again infringes Michael's right to privacy (this time by looking through Jeff's towel), even though Michael's use of the towel without Jeff's permission is morally impermissible.

A further question is whether the *mere* breaching of the relevant kind of barrier, i.e., a breaching that does not in fact result in the experiencing or discovery of any personal facts, is sufficient *on its own* to count as an infringement of the right to privacy. The answer, I believe, is that it is not. For consider the following variant on *The Man in the Bushes*:

The Loud Woodpecker

The story is just as in *The Man in the Bushes*. The married couple have repaired to an out-of-the-way park bench, and Brown has hidden in the bushes behind the bench to listen in. Unfortunately, just as the couple start to converse, a woodpecker begins to peck loudly at a tree very close to Brown's ears, and the sound of the pecking drowns out the couple's conversation.

In *The Loud Woodpecker*, Brown has clearly breached the sound barrier on which the married couple are relying as a means to keep their conversation from being overheard. Yet Brown has not infringed the couple's right to privacy, reason being that the woodpecker's loud pecking has prevented him from experiencing (or learning anything about) the couple's conversation. So Brown's breaching of the relevant sound barrier is not sufficient on its own to count as an infringement of the couple's right to privacy.

Some theorists have proposed cases resembling *The Loud Woodpecker* to establish the opposite result. Here is Julie Inness (1992, 34):

The Stranger on the Bus

If I were seated on a bus, indulging in an innocent (though quiet) conversation with a friend, and a stranger on the bus suddenly stuck her head between our heads in a blatant attempt to hear the conversation, my privacy would be violated even if the stranger heard nothing because of the abrupt cessation of the conversation due to the intrusion.

Inness's point in *The Stranger on the Bus* is that the stranger has (at the very least) infringed her (and her friend's) right to privacy by attempting to eavesdrop on the conversation, even if unsuccessfully. It may therefore seem as if the infringement of the right to privacy does not require the actual acquisition of information or experience of a personal nature. But, on reflection, *The Stranger on the Bus* establishes no such thing. As I see it, the stranger has indeed infringed *one* of Inness's rights; but the right she has infringed is not the right to privacy, but the claim to personal space. If I bring my face inches from yours (without your permission), I have impermissibly "invaded your space." The best way to account for this is to suppose that you have a claim that I keep my body at a reasonable distance from yours. This sort of claim is theoretically distinct from the right to privacy. The moral here is that we should be careful not to interpret every sort of wrong to a person that involves bringing one's body in close proximity to hers as an infringement of her right to privacy.

However, Inness also offers us a case that does not suffer from this sort of problem:

The Stranger on the Train

If I were on a train with closed compartments, and I noticed someone sneaking up to take a look at me, my privacy would be violated even if I managed to hide under the bed before the person actually saw me.

Inness's point is that the stranger infringes her right to privacy even though he does not see her (and even though he does not bring his body in close proximity to hers). And with this I agree. But I deny that the case establishes that the experiencing or learning of personal facts is not a necessary condition of every infringement of the right to privacy. For I take it that when the stranger nears the relevant train compartment, he is able to see into it (perhaps by looking through the blinds) even if he does not spy Inness herself. And when he sees into Inness's compartment, he experiences her compartment and acquires information about it. The stranger therefore learns certain personal facts about Inness, and this is sufficient for his breaching of the relevant barrier (in this case, the blinds) to count as an infringement of Inness's right to privacy. The moral here is that a person need not actually experience (or acquire information about) one's *body* in order to infringe one's right to privacy.

Some argue that the acquisition of personal information or experience that is not also *intimate* does not rise to the level of an infringement of the right to privacy. For example, Inness claims that "if a friend examines my pen sitting on my desk, she usually

does not violate my privacy..., but if she examines my open diary on the desk, a privacy violation occurs” (Inness 1992, 33-34). Similarly, argues Inness, “if my friend came to the door of my house and, in pausing to think for a moment before ringing the doorbell, heard me say ‘the,’ I would not have grounds on which to claim a privacy violation; [b]ut if that same friend stood in front of my door for hours, straining to hear my quiet conversation inside, my privacy would be violated (assuming I had not given her permission to listen)” (Inness 1992, 34-35).

Now, as I see it, both pairs of cases are tricky, in part because they are underdescribed. Consider the first pair (involving the pen and the diary). Suppose that I have invited my friend Lauren in to discuss some personal matters and that we are now talking in my study. The phone rings and I leave the room to answer it, inviting Lauren to look around and make herself comfortable. Under these circumstances, if she walks around my desk and examines either my pen or my open diary, she does not infringe my right to privacy. For I have *waived* this right by inviting her to look around the room. Now suppose that there is a thick velvet curtain separating the seating area in my study (where Lauren and I are now located) from the desk area. It is plain to Lauren that the purpose of the curtain is to guard my privacy. The phone rings and I leave the room, inviting Lauren to look around and make herself comfortable. This time, however, Lauren pushes the thick velvet curtain aside, walks around my desk, and examines both my pen and my open diary. Under *these* circumstances, it seems to me that Lauren infringes my right to privacy in respect of the pen as well as in respect of the diary. But my right to privacy in respect of the pen (assuming that it is an ordinary pen with no special properties) is so lacking in stringency as to be virtually trivial, at least by

comparison to my right to privacy in respect of the diary. For, by the Aggravation Principle (see p. 5 above), a claim's stringency varies with how bad its infringement would be for the claim holder. And here, we may assume, it would be far worse for me to have Lauren become familiar with the contents of my diary than it would be for her to become familiar with the appearance, construction, or function of my perfectly ordinary pen.

Consider now the second pair (involving 'the' and longer stretches of intimate conversation). Suppose, to fill the case in a bit, that my friend (say, Caroline), while at the door of my house and having paused momentarily to gather her thoughts before ringing the doorbell, happens to hear something far more intimate than "the." (Suppose she hears me say that I'm impotent.) Has Caroline infringed my right to privacy? I think not. I am aware that people (such as mail carriers, candidates for public office, and lots and lots of Seventh Day Adventists) often (and quite permissibly) come to the door of my house and sometimes pause on the doorstep to gather their thoughts (their mailbags, their campaign fliers, or their Bibles) before ringing the bell. I am also aware of the fact that, if I am speaking to someone in normal tones in the living room, even the least curious visitor on my doorstep can hear what I say without effort. Under these conditions, I have waived my right to privacy in respect of my living room conversations. Thus, whether Caroline hears me say "the" or "I'm impotent" matters not in the slightest: the fact that Caroline does not infringe my right to privacy derives not from the fact that the information she acquires while on my doorstep is lacking in intimacy, but rather from the fact that I have waived my right to privacy in respect of conversations conducted within easy earshot of visitors on my doorstep.

However, to fill in the case a bit differently, suppose that Caroline presses her ear (or, worse, an amplifying device) to the front door of my house, and hears me say “the.” Under *these* conditions, it seems clear that Caroline does indeed infringe my right to privacy, even if by doing so she acquires no intimate information whatever. The reason why Caroline’s behavior gives the appearance of falling below the infringement threshold is that it leads to the acquisition of information that is completely inconsequential. As in the second case of Lauren and the pen, though Caroline infringes my right to privacy, the right she infringes is so lacking in stringency as to be virtually trivial. So, when the cases of Lauren and Caroline are filled in, we see that they do not establish that information that is acquired by breaching the relevant sort of barrier must be *intimate* if the breach is to count as an infringement of the right to privacy.

With these various questions and worries about the Barrier Theory out of the way, we may now return to the second part of Thomson’s interestingly suggestive statement about the nature of the right to privacy. Thomson’s claim is that “we have a right that certain uses shall not be made of facts” (Thomson 1975, 128). The “uses” Thomson has in mind here, as she later makes plain, concern not the *acquisition* of experience or information of a personal nature, but rather its *dissemination*. Which brings up the following question: Under what sorts of circumstances, if any, does the dissemination of personal information about a person to others constitute an infringement of her right to privacy?

Thomson herself provides an interesting (if ultimately, as I will argue, unsuccessful) answer to this question. She considers two sorts of cases. Here is the first (adapted from Thomson 1975, 129-130):

The Picture in the News

Matt finds out by entirely legitimate means (e.g. from a third party who breaks no confidence in telling him) that Professor Jones keeps a pornographic picture in his wall-safe;...though he know it will cause Professor Jones distress, Matt prints the information in a box on the front page of his newspaper, thinking it newsworthy: Professor Jones of State U. Keeps Pornographic Picture in Wall-Safe!

Thomson argues that it is reasonable to suppose, in accordance with her “simplifying hypothesis,” that Professor Jones has “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” (Thomson 1975, 130). It follows from this hypothesis that in *The Picture in the News* Matt infringes Professor Jones’s right to privacy by disseminating legitimately acquired personal information about Jones.²

Here is the second sort of case (adapted from Thomson 1975, 129):

The Inveterate Gossip

Sally gives George information on the condition that he shall not spread it. However, George spreads the information about Sally anyway.

Commenting on *The Inveterate Gossip*, Thomson writes that, in spreading the information about Sally, George violates her “right to confidentiality, whether the information is personal or impersonal.” However, she writes, “if the information is

personal, I suppose [George] also violate[s] [Sally's] right to privacy—by virtue of violating a right (the right to confidentiality in respect of personal information) which is...one of the rights which the right to privacy consists in" (Thomson 1975, 129).

Suggestive as these cases are, I do not believe that they need be analyzed as involving any infringement or violation of the right to privacy. Consider *The Picture in the News*. It is true, I think, that Professor Jones has "the right to not be caused distress by the publication of personal information," but I see no reason to suppose that this right is itself a component of Jones's right to privacy. Every moral fact about the case that requires explanation can be explained on the hypothesis that Matt infringes Professor Jones's right to not be caused distress. As Thomson herself points out: "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" (Thomson 1975, 130). Now consider *The Inveterate Gossip*. It is true, I think, that Sally possesses "the right to confidentiality in respect of personal information," but again I see no reason to suppose that this right is itself a component of Sally's right to privacy. Every moral fact about the case that requires explanation can be explained on the hypothesis that George infringes Sally's right to confidentiality. He has broken his promise, and may therefore be responsible for any harm that comes to Sally as a result. That's it.

Now I don't think I can *prove* that Thomson's analysis of these cases is mistaken. The proper classification of wrongs is, to some extent, a matter of theoretical choice. But I see Thomson's own classification as insufficiently motivated, especially in light of the

possibility of accounting for acquisition cases (as opposed to dissemination cases) by means of a non-reductionist theory that is on balance superior to Thomson's reductionist account. Thomson's analysis of the two dissemination cases fits in well with her reductionist claim that the right to privacy is a cluster-right consisting of a wide variety of different sorts of rights, including property rights and rights over the person. But if, as I have argued, her reductionist analysis of acquisition cases succumbs to counterexamples, then it makes more sense to use Occam's razor and refuse to multiply rights beyond necessity. If every moral fact about the dissemination cases can be explained without adverting to a right to privacy, then let us simplify our moral theory by hypothesizing that the right to privacy concerns the acquisition, but not the dissemination, of personal information.

5. Conclusion

I have been arguing that anti-reductionists are right to insist that the right to privacy plays an autonomous explanatory role in moral theory. Sometimes the infringement of a person's right to privacy is not also the infringement of a property right or right over the person, and provides the rock bottom explanation of certain kinds of wrongs. But standard anti-reductionist accounts of the right to privacy succumb to counterexamples and miss what lies at the heart of the right. The right to privacy is a claim, a claim that concerns not control over access to (or information about) oneself, not accessibility, not the acquisition or dissemination of undocumented personal information, but rather the experiencing or discovery of personal facts about the right-holder via the breaching of

barriers used to keep others from experiencing or discovering these sorts of facts. This is the core of the Barrier Theory I have defended as an alternative to the standard accounts.

I want now to briefly consider what impact, if any, the Barrier Theory might have on the classification of *legal* wrongs (especially under U.S. law). I shall take it as a background assumption (unargued for here) that the law should protect persons from at least the more serious sorts of violations of the moral right to privacy *precisely because* they are violations of this moral right. That is, the law should indeed recognize a *legal* right to privacy.

There are two kinds of violations of the legal right to privacy: (i) violations committed by private persons, and (ii) violations committed by the government. Under current U. S. law, violations of the first sort fall under the law of torts. But, at least as currently understood, tort law in the area of privacy sweeps more broadly than it ought. Under the Restatement (Second) of Torts, 652B-E, there are four separate ways in which a person's right to privacy may be "invaded" (i.e., violated): (i) by intentionally intruding, physically or otherwise, in a manner that would be highly offensive to a reasonable person, upon the solitude or seclusion of another or his private affairs or concerns (652B), (ii) by appropriating to one's own use or benefit the name or likeness of another (652C), (iii) by giving publicity to a matter concerning the private life of another, where the matter would be highly offensive to a reasonable person and is not of legitimate concern to the public (652D), and (iv) by knowingly or recklessly giving publicity to a matter concerning another that places the other before the public in a false light, where the false light would be highly offensive to a reasonable person (652E). As should be plain, it follows from the Barrier Theory that privacy torts 652C-E do not in

fact involve infringements of the moral right to privacy, for they do not involve the breaching of any barrier to the experiencing or learning of any personal facts about the right-holder. Torts of type 652C are best understood as violations of the right to property, while torts of type 652D-E are best understood as violations of the right to not be caused distress. Moreover, there are even “intrusion on seclusion” torts of type 652B that should not be thought of as infringements of the right to privacy. For section 652B treats *any* highly offensive intentional intrusion on a person’s solitude or seclusion, *whether or not it results in the experiencing or discovery of any personal fact about her*, as a privacy tort. And yet, as I argued above (see pp. 23-26), there are cases, such as *The Loud Woodpecker*, in which a highly offensive barrier breach does not constitute an infringement of anyone’s right to privacy.³ I conclude that, viewed from the standpoint of moral theory, it is artificial and theoretically unmotivated to treat all four Section 652 torts under the rubric of *privacy*. At best, the Barrier Theory only countenances certain versions of the *first* (intrusion on seclusion) kind of privacy tort as true infringements of the right to privacy.

What of violations of the second sort, that is, wrongs committed by government agents acting in that capacity? Here, too, privacy law sweeps far more broadly than it ought. As should be clear, I agree with those who argue that the “constitutional” right to privacy that plays an important role in U. S. Supreme Court decisions in the areas of contraception, abortion, sex, child-rearing, and marriage is, in the Hohfeld-Thomson framework, a liberty distinct from the claim that is the right to privacy.⁴ As I have argued, there is nothing to be gained, and much in the way of theoretical clarity to be lost, by thinking of the right to privacy as a right to make and carry out decisions with respect

to activities of a private nature. As I see it, the only constitutional provision that protects a person against the government's violation of his right to privacy is the Fourth Amendment's proscription of unreasonable searches. When government agents open my mail, break down my door, tap my telephone, or train thermal imaging equipment on my property, they implicate the Fourth Amendment by virtue of the fact that they are breaching barriers that I am using to prevent others from experiencing or discovering personal facts about me. Yet even here the Fourth Amendment protects against *more* than just the violation of a person's right to privacy, for the protection it offers against government intrusions does not depend on *whether such intrusions yield experience or discovery of personal facts about the right-holder*. And, on the other side, there are government violations of a person's right to privacy against which the Fourth Amendment offers little or no protection, inasmuch as the Exclusionary Rule (banning the introduction at trial of evidence acquired by means of an unreasonable search) does not apply to civil cases and cannot, even in criminal matters, deter the government from violating a person's right to privacy if it doesn't plan to introduce the evidence acquired thereby in a criminal case.

Privacy law is therefore best understood as having two basic components: (i) a sub-class of "intrusion on seclusion" torts concerning a private person's experiencing or discovering a personal fact about X by means of a (highly offensive) breach of a barrier used by X to prevent others from accessing personal facts, and (ii) a sub-class of Fourth Amendment violations concerning the government's experiencing or discovering a personal fact about X by means of a (not necessarily highly offensive) breach of the same sort of barrier. If the idea is to provide theoretical unity across the moral and legal realms

in the area of privacy, then both tort law and constitutional law stand in need of considerable revision.

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NOTES

¹ In this Parent is following Thomson, who writes (1975, 125-126 n. 1): “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 doors no longer suffices to prevent others from doing so. But my right to privacy is not violated [or infringed] until my neighbor actually does train the device on the wall of my house. It is the actual looking that violates [or at least infringes] it, not the acquisition of power to look.”

² Thomson claims that Professor Jones’s right that Matt not print the information about the contents of Jones’s wall-safe is overridden by “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” (Thomson 1975, 130). It follows, on Thomson’s analysis, that Matt’s *infringement* of Professor Jones’s right to privacy does not also count as a *violation* of this right.

³ It might be argued that privacy tort law simply does not consider rights-infringements that do not result in some sort of damage to the right-holder. On this view, barrier breaches of the relevant sort would not count as intrusion-on-seclusion torts unless they resulted in the acquisition of damaging experience or information. The principle that tort law does not range over inconsequential rights-infringements therefore forces the Barrier Theory and Section 652B to range over the same sorts of wrongs. But this sort of

extensional equivalence is purely accidental, and does not follow directly from the *definition* of the intrusion-on-seclusion tort.

⁴ See, for example, Parent (1983a).