The Right to Privacy Unveiled

SAMUEL C. RICKLESS*

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I. INTRODUCTION

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

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the person, and therefore plays no autonomous explanatory role in moral theory.[1] Among nonreductionists, there are numerous accounts of the right to privacy. For one group of nonreductionists (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,[2] while others insist that it is the right to control *access* to oneself.[3] For another group of nonreductionists, the right to privacy is the right to cognitive *inaccessibility*, physical *inaccessibility*, or both.[4] Though these are by far the most widely adopted nonreductionist accounts of the relevant right, they are by no means the only ones currently on offer. There are hybrid accounts proposing that the right to privacy is a cluster of various rights of control,[5] or a cluster of various rights of control and restricted access.[6] Further, 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 rightholder.[7]

The purpose of this paper is to bring order to this theoretical chaos. In 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.

1. Judith Jarvis Thomson, *The Right to Privacy*, *in* RIGHTS, RESTITUTION, AND RISK 117, 125–26 (William Parent ed., 1986); Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1, 18 (1959).
2. *See* CHARLES FRIED, AN ANATOMY OF VALUES 140–41 (1970); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967); Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, *in* NOMOS XIII: PRIVACY 56, 56 (J. Roland Pennock & John W. Chapman eds., 1971); Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76, 76 (1978); Adam D. Moore, *Privacy: Its Meaning and Value*, 40 AM. PHIL. Q. 215, 215–16 (2003).
3. *See* Ernest Van Den Haag, *On Privacy*, *in* NOMOS XIII: PRIVACY, *supra* note 2, at 149, 149; Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280–81 (1974); James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 323 (1975); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 28, 32 (1976); Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315, 315 (1975).
4. *See* ANITA L. ALLEN, UNEASY ACCESS 16–17 (1988); Roland Garrett, *The Nature of Privacy*, 18 PHIL. TODAY 263, 264 (1974); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422–23 (1980).
5. JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 41 (1992).
6. JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY 53, 66 (1997).
7. W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 269 (1983) [hereinafter Parent, *Privacy*]; W.A. Parent, *Recent Work on the Concept of Privacy*, 20 AM. PHIL. Q. 341, 346 (1983) [hereinafter Parent, *Recent Work*].

The paper is organized as follows. In Part II, 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 Part III, I describe some well-known paradigm cases in which the right to privacy is infringed, and explain how standard theories accommodate these examples. In Part IV, I consider counterexamples to the standard theories. In Part V, 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 nonreductionist 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.

II. RIGHTS

According to Thomson, whose theory of rights is heavily 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.[8] 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.[9] 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 . . . ."[10] 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."[11] Finally,

8. JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 41 (1990).
9. *Id.* at 44–45.
10. *Id.* at 57.
11. *Id.*

"for *X* to have an immunity against *Y* just is for *Y* to lack a power as regards *X*."[12] For example, "[y]ou . . . have an immunity against me if I lack the ability to make you cease to own your typewriter."[13]

Among the more important cluster-rights are what Thomson calls "liberties."[14] 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* 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 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.[15] 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.[16] 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. By 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

12. *Id.* at 59.
13. *Id.*
14. *Id.* at 53–54.
15. Hohfeld calls them "right[s] in the strictest sense." WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (Walter Wheeler Cook ed., Yale University Press 1923).
16. THOMSON, *supra* note 8, at 122.

latter, but not great enough to justify infringing the former.[17] 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 . . . .[18]

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."[19] 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.[20] 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 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 is not 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?

III. 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

17. *Id.* at 153.
18. *Id.* at 154.
19. *Id.*
20. *Id.* at 361.

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:

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.[21]

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:

The Pornographic Picture

Hugh owns a pornographic picture that he does not want anyone else to see. He locks it in his wall-safe and only takes it out at night or after pulling down his shades. Black hears about the picture and wants to see it. Black trains his X-ray device on Hugh's wall-safe and looks at the picture.[22]

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.[23]

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

21. Adapted from Thomson, *supra* note 1, at 117–18.
22. Adapted from Thomson, *supra* note 1, at 120.
23. Adapted from Thomson, *supra* note 1, at 122.

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 and distinguish the right to privacy.

Consider the most popular nonreductionist 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 noninterference—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 noninterference 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. Further, 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 passersby 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 noninterference, 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 adverting 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, the right to privacy is the claim that others not possess undocumented personal information about the claimholder.[24] 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 . . . ."[25] He defines documented information as "information belonging to the public record."[26] Thus, for Parent, Jones infringes the married couple's right to privacy in *The Quiet Fight* because, thanks to his amplifier, he now possesses information about the couple that does not belong to 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

24. *See generally* Parent, *Privacy*, *supra* note 7, at 269; Parent, *Recent Work*, *supra* note 7, at 346.

25. Parent, *Privacy*, *supra* note 7, at 270.

26. *Id.* This would include information "in court proceedings, newspapers, or other documents available for public inspection." Parent, *Recent Work*, *supra* note 7, at 347.

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, defends a reductionist account of the right to privacy.[27] She begins by distinguishing, nonexhaustively, 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 [*X*] away or tear [*X*]."[28] 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.[29]

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—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

27. For more on Davis's theories, see generally Davis, *supra* note 1.

28. Thomson, *supra* note 1, at 120–21.

29. *Id.* at 126.

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."[30] On her view, there is no autonomous right to privacy distinct from other rights. Thus, in *The Pornographic Picture*, it is not 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 is not 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.[31]

IV. COUNTEREXAMPLES TO THE STANDARD ACCOUNTS

Standard nonreductionist 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 nonreductionist 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:

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]

30. *Id.* at 126–27.
31. *Id.* at 132–33.

> home. Still A has not invaded my privacy. He doesn't do that until he actually looks through his device.[32]

The Threatened Loss Counterexample stresses 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. Thus, *A* infringes a claim to decisional noninterference 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 claimholder. 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

32. Parent, *Recent Work*, *supra* note 7, at 344. In this, Parent is following Thomson, who writes:

> If my neighbor invents an X-ray device which enables him to look through walls, then I should imagine I thereby lose control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated [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.

Thomson, *supra* note 1, at 125–26 n.1.

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 *nonreductionist* 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 nonreductionist 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 that Thomas does not infringe Hugh's right to privacy by looking at Hugh's pornographic picture on Hollywood Boulevard. The picture is 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.[33] I conclude that Thomson's reductionist theory delivers the wrong result in *The Pornographic Tornado*.

And it is not 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*:

33. Hugh certainly has neither waived nor forfeited the relevant claim.

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 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.[34] So Thomson's theory delivers the wrong result in *The Accidentally Amplified Quiet Fight* as well.

V. 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 explains the point that "[w]here 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."[35] 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 claimholder. I propose to turn this insight into a more precise nonreductionist account of the right to privacy, one that promises to avoid all the problematic counterexamples discussed thus far.

Let us go back to Thomson's initial examples. In *The Quiet Fight* the married couple have 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 or obstacle in the way of those (such as passersby) 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-

34. The couple certainly have neither waived nor forfeited the relevant claim.
35. Thomson, *supra* note 1, at 128.

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 or obstacle 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 *nonreductionist* 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 nonreductionist 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:

The Man in the Bushes

> [*X* and *Y*, a married couple,] have to talk over some personal matters. It is most convenient [for 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.[36]

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, nontransparent 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 rightholder. The answer, I take it, is no. For consider the following case:

My Wall

> Michael does not 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*

36. *Id.* at 120.

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 in 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.[37]

A further question is whether the mere breaching of the relevant kind of barrier—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*:

37. Alan Rubel questions whether *Y*'s infringement of *X*'s right to privacy requires that *X* actually *use* the relevant barrier to keep others from learning or experiencing some personal fact about *X*. Rubel proposes the following interesting case (call it *The Point of Having Walls*):

> [Suppose *B* does not] use the walls of [his] house as a barrier to protect information. [Perhaps *B* thinks] of them as a way to keep out the cold, displaying pictures, and holding up the roof. Nonetheless, when *A* trains his X-ray device on [*B*'s] wall and learns some personal fact about [*B*], it would surely be the case that *A* has violated [*B*'s] right to privacy.

Alan Rubel, *Some Questions for the Barrier Theory*, 44 SAN DIEGO L. REV. 801, 806 (2007). My reaction to this is that, as stated, *The Point of Having Walls* is underdescribed. For let us suppose that *B* spends months looking in vain for a glass house, and that *B* is unable to raise enough money to build a glass house of his own. *B* then reluctantly buys a house with nontransparent walls. When the case is described in this way, my intuition is that *A* does *not* infringe *B*'s right to privacy when *A* acquires personal facts about *B* by training an X-ray device on the walls of *B*'s house. It is only by illegitimately assimilating this sort of case to the typical case (namely, one in which the relevant homeowner *does* rely on the walls of his house to prevent others from acquiring personal facts about him) that *The Point of Having Walls* could reasonably be thought to serve as a counterexample to the Barrier Theory.

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 because 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.[38]

Some theorists have proposed cases resembling *The Loud Woodpecker* to establish the opposite result. Julie Inness proposes this case:

The Stranger on the Bus

> [I]f 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.[39]

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

38. Yet another question is whether a barrier breach that results in the extraction and acquisition, but *not* in the actual experiencing, of personal facts is sufficient *on its own* to count as an infringement of the right to privacy. To my mind, this is a borderline case. To fix ideas, consider a variant of *The Loud Woodpecker* (call it *The Tape Recorder*) in which Brown (i) manages to record the couple's conversation on a portable tape recorder that he has slipped under the bench on which they are sitting, (ii) escapes with the tape of the conversation, but (iii) never listens to the tape. Has Brown infringed the couple's right to privacy in *The Tape Recorder*? The answer is, at the very least, unobvious. My own reaction is to say that, even though Brown extracts and acquires the relevant personal information by breaching a barrier on which the couple are relying to prevent others from experiencing their conversation, he does not actually infringe the couple's right to privacy unless he actually listens to the tape. But I see room for reasonable disagreement here. It may also be that our considered intuitions are simply not fine-grained enough to distinguish between cases that, for compelling theoretical reasons, ought to be distinguished. In any event, this sort of case merits further discussion. Thanks to Alan Rubel for bringing this case to my attention.

39. INNESS, *supra* note 5, at 34.

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.[40]

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

The Stranger on the Train

> [I]f 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.[41]

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. Although I agree, 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

40. It is also worth noting that there is something morally wrong about the eavesdropping attempts in *The Loud Woodpecker* and in *The Stranger on the Bus*, even if neither constitutes an infringement of a right. It is no more permissible to unsuccessfully attempt to violate a right than it is to succeed in violating it. Just as it would be wrong for *A* to attempt to kill an innocent person even if *A*'s attempt is unsuccessful, so it is wrong for Brown to attempt to listen in on the couple's conversation in *The Loud Woodpecker* even if his attempt is unsuccessful, and so it is wrong for the stranger to attempt to listen in on the relevant conversation in *The Stranger on the Bus*. The moral here is that the fact that a wrong has been committed does not entail that a right has been violated.

41. INNESS, *supra* note 5, at 34.

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."[42] 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. But 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).[43]

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 appears 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, a claim's stringency varies with how bad

42. *Id.* at 33–34.
43. *Id.* at 34–35.

its infringement would be for the claim holder.[44] 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 am 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 many salespeople) 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 solicitations) 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 am 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 whatsoever. The reason why Caroline's behavior gives the appearance of falling below the infringement threshold is that it leads to the acquisition of completely inconsequential information. 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

44. For a description of the Aggravation Principle, see *supra* notes 18–19 and accompanying text.

Lauren and Caroline are filled in, we see that they do not establish that information 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.[45]

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."[46] 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 to others constitute an infringement of the 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 case:

45. As a potential counterexample to the Barrier Theory, Alan Rubel proposes this sort of case (call it *The Shadow*):

> Suppose that *A* takes an interest in *B*. *A* follows *B* around as *B* goes about his daily routine, and gathers data all the while. *A* notes the things *B* buys, the books *B* checks out from the library. He casually eavesdrops on *B*'s conversations, retrieves a bit of *B*'s hair from the barbershop floor and runs a quick DNA test. He does the same to *B*'s spouse and children to check parentage. He conjures pretexts to interview *B*'s friends, coworkers, and family to find out as many details about *B* as he possibly can. Through *A*'s efforts he learns a great deal about *B*'s life: his proclivities, his intellectual commitments, his political views, details about his relationships, and so forth.

Rubel, *supra* note 37, at 804. Rubel claims that the Barrier Theory *wrongly* predicts that *A* does not infringe *B*'s right to privacy in *The Shadow*. In reply, I would urge that this prediction is not mistaken. Crucial to the evaluation of *The Shadow* is the fact that the activities of *B* on the basis of which *A* gathers information about *B* are carried out *in public*, and intentionally so. As I see the case, by conversing in public, purchasing items in public, walking down a public street, and so on, *B* waives his right of privacy in respect of the information that others might gather by watching his public behavior. Furthermore, by voluntarily throwing out his hair, *B* has also waived his right to privacy in respect of information that might be extracted from the hair, including color, consistency, smell, cellular structure, and DNA. In addition, by voluntarily sharing information about *B* with *A* in conversation, *B*'s friends have waived their right to privacy in respect of that information. So I see no reason to suppose that *A* infringes *B*'s right to privacy in *The Shadow*. In fact, the information-gathering activities in which *A* engages in the case are typical of the information-gathering activities that are now used (I take it, permissibly) by private detectives all over the world.

46. Thomson, *supra* note 1, at 128.

The Picture in the News

> [Matt] find[s] out by entirely legitimate means (e.g. from a third party who breaks no confidence in telling [him]) that [Professor Jones] keep[s] a pornographic picture in [his] wall-safe; . . . though [he] know[s] it will cause [Professor Jones] distress, [Matt] print[s] 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![47]

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 . . . ."[48] 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.[49]

Here is the second sort of case:

The Inveterate Gossip

> Sally gives George information on the condition that he shall not spread it. However, George spreads the information about Sally anyway.[50]

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."[51] 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 . . . ."[52]

47. *Id.* at 129–30.
48. *Id.* at 130.
49. 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 . . . ." *Id.* 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.
50. Adapted from Thomson, *supra* note 1, at 129.
51. *Id.*
52. *Id.*

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 that Professor Jones has "the right to not be caused distress by the publication of personal information,"[53] 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."[54] Now consider *The Inveterate Gossip*. It is true 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 is all.

Now I do not 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. However, 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 nonreductionist 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.

VI. CONCLUSION

I have been arguing that antireductionists are correct to insist that the right to privacy plays an autonomous explanatory role in moral theory.

53. *Id.* at 130.
54. *Id.*

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 antireductionist 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 rightholder 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 United States 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.[55] Under current United States law, violations of the first sort fall under the law of torts.[56] 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, Sections 652B–E, there are four separate ways in which a person's right to privacy may be invaded (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 (type 652B);[57] (ii) by appropriating to one's own use or benefit the name or likeness of another (type 652C);[58] (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 (type 652D);[59] or (iv) by knowingly or recklessly giving publicity

55. *See, e.g.*, 16B AM. JUR. 2D *Constitutional Law* § 603 (1998).
56. *Id.*
57. RESTATEMENT (SECOND) OF TORTS § 652B (1977).
58. *Id.* § 652C.
59. *Id.* § 652D.

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 (type 652E).[60] As should be plain, it follows from the Barrier Theory that privacy torts of types 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 rightholder. Torts of type 652C are best understood as violations of the right to property, while torts of types 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, 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.[61] I conclude that, viewed from the standpoint of moral theory, it is artificial and theoretically unmotivated to treat all four 652 sections 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.[62] 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

60. *Id.* § 652E.

61. *See supra* notes 37–38 and accompanying text. 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 rightholder. 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.

62. *See, e.g.*, Parent, *Privacy*, *supra* note 7.

Amendment's proscription of unreasonable searches.[63] 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 rightholder. 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 does not plan to introduce the evidence acquired thereby in a criminal case.

Privacy law is therefore best understood as having two basic components: (i) a subclass 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 subclass 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.

63. *See* U.S. CONST. amend. IV.