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COMMENT

Privacy Rights, and Why Negative Control is *Not* a Dead End: A Reply to Munch and Lundgren

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Abstract

Lauritz Munch and Björn Lundgren have recently replied to a paper published by us in this journal. In our original paper, we defended a novel version of the so-called 'control theory' of the moral right to privacy. We argued that control theorists should define 'control' as what we coined 'Negative Control'. Munch and Lundgren have recently provided a range of interesting and challenging objections to our view. Independently of each other, they give almost identical counterexamples to our definition of Negative Control. In this comment, we show that while the counterexamples are genuine counterexamples, they do not force us to abandon the idea of Negative Control. Furthermore, we reply to two additional objections raised by Lundgren. One of these replies involves giving a new account of what the relation is between the concept of privacy and the right to privacy.

Keywords Privacy · Privacy rights · Control theory · Access theory · Negative Control

Introduction

In this journal, we have recently defended a novel version of the so-called 'control theory' of the moral right to privacy (Mainz and Uhrenfeldt 2020). Lauritz Munch and Björn Lundgren have independently of each other replied to our paper with a range of interesting and challenging objections (Munch 2021; Lundgren 2021a). In this comment, we reply to the most important ones.

In our original paper, we tried to show why there is at least a *pro tanto* reason to favor the control theory over the rival 'access theory'. Classic versions of the control theory of the moral right to privacy hold, roughly, that an agent A's right to

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privacy is violated if, and only if, A does not have the relevant type of control over the access to A's personal information. The version of the rival access theory that we discussed in our original paper adds a necessary condition for A's right to privacy to be violated; that agent B actually accesses A's personal information.

One of the crucial features of our version of the control theory is that it specifies how the control theorist should define the term 'control'. We argued that the control theorist should define control as what we coined 'Negative Control'. Based on the three well-known types of freedom—negative freedom, positive freedom, and republican freedom—we formulated three corresponding types of control. To wit, we contrasted Negative Control with Positive Control and Republican Control, respectively.[1] By defining control as Negative Control, we argued, the control theorist can avoid all the classic objections to the control theory. The reason for this is that all of the classic objections to the control theory assume a definition of control that is either Positive Control or Republican Control. On our account, agent A's right to privacy is violated, if, and only if, A involuntarily loses Negative Control due to the actions of agent B, for which B is responsible (Mainz and Uhrenfeldt 2020, p. 12). We defined Negative Control as follows:

> *Negative Control:* Agent A enjoys Negative Control over access to relevant information P, if, and only if, A is capable of preventing agent B, who attempts to access, from accessing P. (Mainz and Uhrenfeldt 2020, p. 7)[2]

Munch and Lundgren provide almost identical counterexamples to the definition of Negative Control. In light of these counterexamples, we suggest how the definition could be altered. The alteration involves incorporating some of the components of a more recent version of Negative Control that Mainz has recently put forward in this journal (Mainz, *forthcoming*).[3]

In the next section, we discuss how the definition of Negative Control can be altered in order to accommodate the counterexamples provided by Munch and Lundgren, respectively. In the final section, we reply to two additional objections raised by Lundgren.

[1] We defined Positive Control like this: Agent A enjoys Positive Control over the access to relevant information P, if, and only if, A tries (or could try) to give agent B actual access to P, and succeeds. And, we defined Republican Control like this: Agent A enjoys Republican Control if, and only if, agent B does not have the ability to get access to relevant information P about A (Mainz and Uhrenfeldt 2020, p. 7).

[2] The paper is only available online and lacks pagination, so the page numbers refer to the pages pages in the online version, starting from 1.

[3] Mainz (*forthcoming*) was accepted for publication before Munch and Lundgren's replies were published. The version of Negative Control put forward in that paper was therefore not supposed to handle the objections from Munch and Lundgren.

Two Counterexamples to Our Account

Let us begin with two almost identical counterexamples offered by Munch and Lundgren, respectively. These counterexamples purport to show that a loss of Negative Control is not a necessary condition for a violation of the right to privacy. To illustrate this point, Munch provides a hypothetical that is a modified version of one of our hypotheticals. Our original hypothetical is the following:

> *Wiretapping* Smith and Jones are neighbors. Unbeknownst to Jones, Smith wiretaps Jones's telephone, using a fancy device which allows Smith to listen in on Jones's conversations without violating Jones's property rights. As it happens, Jones is on vacation for several months, and therefore does not use the telephone in that time period. (Mainz and Uhrenfeldt 2020, p. 13)

Wiretapping purports to show that the rival access theory cannot explain the intuition that Smith violates Jone's right to privacy, because Smith does not actually access Jone's personal information.[4] The control theory, on the other hand, can easily explain this intuition, if control is defined as Negative Control: Smith attempts to access Jone's personal information, but Jones is not capable of preventing Smith from accessing. Now, Munch provides an altered version of Wiretapping, which he calls

> *Wiretapping #2.* Smith and Jones are neighbors. Smith wiretaps Jones's telephone, using a fancy device which allows Smith to listen in on Jones's conversations without violating Jones's property rights. Unbeknownst to Smith, Jones has an even fancier device enabling him to both monitor the extent to which he is being subjected to wiretapping and shut down the tapping at the mere push of a button. Jones does *not*, however, deploy his device to prevent Smith's plan. (Munch 2021, p. 5)

Wiretapping #2 is a counterexample to our definition of Negative Control, because it demonstrates that a violation of the right to privacy can occur, even when no one loses Negative Control. Jones is in fact capable of preventing Smith, who attempts to access, from accessing. He just decides not to make use of this capability. Even so, Smith violates Jones's right to privacy. Thus, a loss of Negative Control is not a necessary condition for a violation of the right to privacy.

Lundgren provides a counterexample that is almost identical to Munch's Wiretapping #2. He writes:

> Imagine a case in which Smith is prevented from accessing Jones's phone not because of a malfunctioning device, but because Jones has a machine to prevent wiretapping. In this case, Jones retains negative control of his private

[4] As Munch says in footnote 8 in his reply, we might interpret Wiretapping such that Smith actually accesses at least some information about Jones—for instance the fact that Jones is not using the phone. But as we say in the paper, the verdict would be the same even if the wiretap randomly malfunctions so that Jones does not even get access to the information that Smith is not using the phone (Mainz and Uhrenfeldt 2020, p. 13).

> information. However, we may still want to claim—as in Mainz and Uhrenfeldt—that Smith has violated Jones's right to privacy. (Lundgren 2021a)

We grant that Smith violates Jones's right to privacy in the two hypotheticals, and we acknowledge that they are clear and cleverly constructed counterexamples.[5] We do not, however, think that this leads us to the conclusion that the idea of Negative Control is a 'dead end', as the title of Munch's reply suggests. Rather, we think that the definition of Negative Control can be altered to handle the counterexamples, without abandoning the underlying idea that control should be interpreted as something akin to the idea of negative freedom.

It lies beyond the scope of this reply paper to provide a fully developed alternative to our original definition of Negative Control. However, the version of Negative Control put forward in (Mainz, *forthcoming*) contains elements that can work as a useful starting point. For present purposes, let us call this version

> *Negative Control #2:* An individual A has Negative Control over relevant information *f* with respect to B, if, and only if,
> (i) B does not attempt to access *f* (or attempts to give others access), or ii) B does attempt to access *f* (or attempts to give others access), but fails due to A's intentional actions directed at preventing B from accessing *f*, or, due to random circumstances, or, due to the incompetence of B,
> and,
> (iii) A does not voluntarily let B access *f*.[6] (Mainz, *forthcoming*)

Let us briefly clarify what Negative Control #2 holds. Negative Control #2 implies that A has privacy *if* either (i) or (ii) is satisfied, while (iii) is also satisfied. Correspondingly, A does not have privacy if neither (i) nor (ii) are satisfied, if (iii) is not satisfied, or if neither (i), (ii), or (iii) are satisfied.

Importantly, Mainz did not *defend* this definition in (Mainz, *forthcoming*). He used it merely to show what the Negative Control account might look like if it was used to define the *concept* of privacy. Negative Control #2 was thus not intended as a definition of the type of control that is at stake in the right to privacy. Nevertheless, parts of it can be used to avoid the counterexamples from Munch and Lundgren. Here is how.

[5] We do think, however, that the counterexamples are underspecified in an important sense. They say nothing about why Jones might choose not to push the button. Suppose that Jones decides not to push the button, because doing so would be extremely costly for him, or because he simply 'freezes' in the situation. Now compare a situation in which Jones chooses not to push the button because he would actually like Smith to listen in on his conversations. We think that any plausible theory of rights should be able to say that there is a rights-violation in both cases. But it seems that the wrongnesses involved in the two cases are not identical. The wrongness that occurs in the former case seems much worse than the one that occurs in the latter. Nevertheless, we grant that a rights-violation occurs in both cases. As Munch points out, denying this would be akin to denying that an assaulter violates the rights of the assaultee, even if the assaultee is capable of fending off the assaulter (Munch 2021, p. 6).

[6] Note that the information is called *f* in this definition, while it was called P in the original definition from Mainz and Uhrenfeldt (2020). Note also that while the original definition concerns *agents* in general, this definition is concerned with *individuals*.

Let us first consider condition (ii). Thanks to condition (ii), the definition avoids the two counterexamples, because Smith does not fail in his attempt to access Jones's personal information—let alone fail because of any of the reasons described in (ii). Because Smith does not fail in his attempt, Jones does not have Negative Control, and thus Smith violates Jones's right to privacy. Admittedly, it seems *prima facie* strange to say that Jones does not have control even though he decides not to deploy the device. We contend, however, that this is only superficially problematic. By analogy, consider how we normally think about property rights. If we have a property right in a painting, then we have—*inter alia*—a control right over the painting. Nevertheless, this control right is plausibly violated when we decide not to fend off a burglar who is trying to steal the painting. This is so even if we are perfectly capable of fending off the burglar.[7]

Had Jones deployed his fancy device and jammed Smith's wiretap, then Smith's attempt to access would have failed because of Jones's intentional actions directed at preventing Smith from accessing. In that case, Jones would still enjoy Negative Control, and Smith would plausibly not have violated Jones's right to privacy.

What about condition (i)? Condition (i) does not help us avoid any of the two counterexamples. It does, however, provide a reply to another of Munch's objections. As Munch notes in footnote 3 in his reply, our original definition of Negative Control implies that A *only* has Negative Control in the moment where someone actually attempts to access the information. Strangely, A does not have Negative Control when *no one* attempts to access. Condition (i) lets us escape this admittedly strange implication of our original definition. The reason is that (i) explicitly states that no one attempts to access. So, given that we have a disjunction consisting of (i) and (ii), it is sufficient for having Negative Control that no one attempts to access one's personal information.

Now, what about condition (iii)? We suggest that this condition should be dropped. The reason is that condition (iii) is implausible when we are concerned with the *right* to privacy, because including (iii) implies that Smith violates Jones's right to privacy, if Jones voluntarily tells Smith a personal secret about himself. This would be a very unfortunate result, so we must drop condition (iii).[8]

Negative Control #2 constitutes a promising starting point for developing a plausible definition of what kind of control is at stake in the control theory of the moral right to privacy. Moreover, it straightforwardly avoids Munch's

[7] One difference to note between Wiretapping #2 and Lundgren's counterexample is that the latter does not explicitly state whether Jones deploys the device, while the former says explicitly that Jones does *not* deploy the device. But given that Lundgren stipulates that Smith is *prevented* from accessing Jones's phone, it seems that Jones deploys the device. However, regardless of whether Jones deploys the device or not, ii) can elegantly handle the example. Jones either deploys the device or he does not. If he *does*, then Smith does not violate Jones's right to privacy because Smith's attempt to access fails because of Jones's intentional actions directed at preventing Smith from accessing. In that case, Jones still enjoys Negative Control, and Smith does plausibly not violate Jones's right to privacy. If Jones does *not* deploy the device, then Smith does not fail his attempt to access Jones's personal information—let alone fail because of any of the reasons described in (ii). Because Smith does not fail his attempt, Jones loses Negative Control, and thus Smith violates Jones's right to privacy.

[8] For discussion of similar cases, see the Too Much Info cases in Mainz and Uhrenfeldt (2020).

and Lundgren's counterexamples without abandoning the core idea of Negative Control.

Two Further Objections from Lundgren

Let us now move on to two additional objections raised by Lundgren. The first objection is that we do not recognize that privacy is the object of the right to privacy. By defining the right to privacy in terms of control, Lundgren says, one must also define the concept of privacy in terms of control (Lundgren 2021a, p. 3). Lundgren has recently defended this view of the relation between the right to privacy and the concept of privacy thoroughly in Lundgren (2020). This contribution to the literature is very welcome, and it opens up the underdeveloped discussion of what the relation is between the right to privacy and the concept of privacy. Lundgren claims that because we define the *right* to privacy in terms of control, we must subscribe to a control-based definition of the *concept* of privacy. This is a problem for us, Lundgren says, because we ignore the counterexamples to theories that define the concept of privacy in terms of control.

We do not think that Lundgren gets the relation between the right to privacy and the concept of privacy completely right, and—consequently—we think that his objection to us misfires. We grant Lundgren's point that privacy is the object of the right to privacy. The right to privacy is a right to be in a condition of *privacy*. However, it is a *non sequitur* to say that by endorsing a control-based theory of the *right* to privacy, we are therefore necessarily committed to endorsing a control-based theory of the *concept* of privacy. To see why this is a *non sequitur,* consider the difference between claiming that

> the right to privacy is a right to be in a condition of privacy*[defined in terms of control]*

and claiming that

> the right*[defined in terms of control]* to privacy is a right to be in a condition of privacy.

In the first claim, the control-part attaches to the *concept* of privacy, while in the second claim, it attaches to the *right* to privacy. We agree with Lundgren that the concept of privacy should *not* be defined in terms of control. In fact, Mainz has recently defended the view that privacy should be defined in terms of access (Mainz, *forthcoming*). Lundgren does not seem to recognize—neither in Lundgren (2020), nor in his reply to us—the difference between the two claims above. The difference between the two claims allows us to reject Lundgren's view, because it allows us to reject the view that if the right to privacy should be defined in terms of control, then so should the concept of privacy. Simply put, we can consistently hold that we have control rights (whatever that means exactly) over the access to our personal information (whatever that means exactly).

An analogy to property rights may be helpful here: it is one thing to be in a condition of possessing a car, and another thing to have a property right—which conventionally includes a *control* right—over the car. A car thief is in a condition of possessing the car, but he does not have a control right over the car. And, the owner of the stolen car has a control right over the car, but he is not in a condition of possessing the car (because the car thief is). We can consistently endorse the view that property rights should be defined in terms of control (among other things), while also endorsing the view that the concept of possession should not. Still, having a property right in X is to have a right to possess X.

Something similar holds for the relation between the concept of privacy and the right to privacy. We can define the right to privacy in terms of control, without being forced to define the concept of privacy in terms of control. This is consistent with the view that the concept of privacy is the object of the right to privacy. It is not clear why the relation we have sketched out here does not constitute the 'appropriate consistency' between the definitions of the right to privacy and the concept of privacy that Lundgren is asking for (2021a, p. 4).[9]

The second objection raised by Lundgren is that Wiretapping is a problematic test case for whether our version of the control theory is more plausible than the rival access theory. He thinks that Wiretapping does nothing to convince someone who does not already have control-based intuitions (Lundgren 2021a, p. 4). Lundgren thinks that there are two viable options for an access theorist to reply to Wiretapping. The first one is simply to deny that one shares the intuition that Smith violates Jones's right to privacy. The second one is to reformulate the access theory, such that it can accommodate the intuition that Smith violates Jones's right to privacy.

Regarding the first option, we contend that very few people would be willing to bite the bullet and say that Smith does not violate Jones's right to privacy in Wiretapping. The reason why we used this exact case is that it seems to be a paradigmatic example of a privacy violation. The methodological motivation for choosing the example is that if we are trying to reach a reflective equilibrium between the considered judgment about Wiretapping, and a general theory of the right to privacy, then we think that the general theory of the right to privacy has to give, until it is consistent with the considered judgment that Smith at least wrongs Jones in Wiretapping. In other words, if the pre-theoretical intuition is sufficiently strong in this case, then the intuition should guide us in our theory construction. This is what we mean when we say that Wiretapping is a test case.[10]

Regarding the second option, Lundgren claims that the access theorist can '[…] easily agree with the intuition that Smith has violated Jones' privacy, but deny that

[9] Keep in mind that we are *not* arguing that there is no relation between the concept of privacy and the right to privacy. A loss of the former is indeed a necessary condition for a violation of the latter. All we are saying is that accepting the view that the right to privacy is a control right does not force us to accept the view that the concept of privacy should be defined in terms of control.

[10] And, as we say, if the access theorist feels that we are stacking the deck of cards in favor of the control theory here, then we invite the access theorist to provide an example that stacks the deck of cards in favor of the access theory (Mainz and Uhrenfeldt 2020, p. 13). The counterexamples from Munch and Lundgren may in fact be just such an example.

the limited access conception cannot explain this' (Lundgren 2021a, p. 4). The access theorist can agree with the intuition, if she drops the view that actual access to private information is a necessary condition for a violation of the right to privacy:

> [...] the right to privacy protects against substantial risks of access, not merely actual access. That is, while actual access to someone's private information might be a necessary criterion for when someone's privacy is diminished, it is not clear that we should hold that actual access is a necessary criterion for when the right to privacy is violated. (Lundgren 2021a, p. 4)

This is a view that Lundgren defends in (Lundgren, 2021b). Let us call it the 'substantial risk view'. Notice that Lundgren decides to appeal to a view that has—as Lundgren admits—never been defended in print, in order to accommodate Wiretapping.[11] Given this, it does not appear to be an 'easy' concession on behalf of access theorists. If this is the best option—and Lundgren seems to think that it is—then it is worth highlighting that the solution has taken him quite far away from the original access theories which crucially hold that actual access is a necessary condition for a violation of the right to privacy. So, even if Lundgren's new version of the access theory turns out to be correct, then our Wiretapping case still has bite against the original access theories.[12]

However, we believe that there are at least two reasons why the substantial risk view that Lundgren appeals to is bound to fail. The first reason is the following: recall Lundgren's counterexample regarding a device that can block wiretapping. Now suppose that there is a substantial risk that the device will malfunction, but luckily for Jones, the device works. Jones deploys the device before Smith gets a chance to listen in on Jones's conversations. On Lundgren's substantial risk view, Smith violates Jones's right to privacy. On our view, Smith does *not* violate Jones's right to privacy, because Smith fails due to Jones's intentional actions directed at preventing Smith from accessing (Jones has Negative Control). To see why our verdict of this case is more plausible than Lundgren's, consider a brief example: you see that your neighbor is about to peep into your bedroom through the window. Before he gets a chance to look, you close your curtains. The curtains are old, so there is a substantial risk that they will fall down when you close them. Luckily, they do not fall down, and you successfully block your neighbor's attempt to peep into your bedroom. In this case, it seems more intuitive to say that there was a morally problematic attempt to violate your right to privacy, but that the attempt fails.[13] This is what our view holds, while Lundgren's does not. Lundgren's

[11] It is not completely true that no one has defended this view in print before. Munch has defended something very similar in Munch (2020).

[12] See e.g. Thomson (1975). Thomson is probably the most prominent access theorist, and she explicitly defends the view that actual access is a necessary condition for a violation of the right to privacy (Thomson 1975, p. 304).

[13] When we wrote the original paper, we were not fully convinced that actual access is a necessary condition for a violation of the right to privacy. For this reason, we could consistently hold at the time that Smith violates Jones's right to privacy in Wiretapping, even when Smith does not get access to any personal information about Jones. Since then, we have come around to the view that a loss of privacy *is* a necessary condition for a violation of the right to privacy, and therefore we no longer believe that Smith violates Jones's *right* to privacy. Luckily, this does not force us to abandon the strong intuition that

view seems more akin to conceptually categorizing attempted murder as a successful murder.

The second reason takes the form of a *tu quoque*: if Lundgren opts for the substantial risk view, then he is faced with the same difficulty that he argues that our view is faced with—namely, that there is seemingly no 'appropriate consistency' between the *right* to privacy and the *concept* of privacy. On the substantial risk view, actual access is not a necessary condition for a violation of the right to privacy. And it is, for obvious reasons, not a sufficient condition either.[14] If it is neither a necessary, nor a sufficient condition, then it is difficult to see how there is *any* relevant relation between the right to privacy and the concept of privacy. This is, as mentioned, the problem that Lundgren initially raised against *our* position.

Where does all of this leave our Negative Control account? When it comes to the right to privacy, Munch and Lundgren have convincingly shown that the original definition of Negative Control was flawed. In this comment, we have suggested that what we call Negative Control #2 can avoid their objections to our original definition. We think that Negative Control #2 constitutes a promising starting point for developing a more refined version of the Control Theory of the moral right to privacy. We leave it for another occasion to further develop such a theory.

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Declarations

Ethical approval There are no ethical statements to be declared.

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Footnote 13 (continued)

Smith is wronging Jones. We can simply say—as Lundgren suggests (Lundgren 2021a, p. 5)—that Smith merely *attempts* but fails to violate Jones's right to privacy, and that this attempt is wrongful.

[14] Actual access as a sufficient condition is a non-starter. This view implies that if you voluntarily give out personal information, then *your* right to privacy is violated.