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Some Questions for the Barrier Theory

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In articulating his novel theory of a right to privacy, Professor Rickless takes as a starting point several paradigm cases in which privacy rights are violated and paradigm cases in which privacy rights are not violated. These include *The Loud Fight*, *The Quiet Fight*, *The Pornographic Picture* in the wall-safe, and *The Subway Map* obscured by a raincoat.¹ Rickless allows that standard views of the right to privacy—“control” accounts, “inaccessibility” accounts, William Parent’s “information-based” account, and Judith Jarvis Thomson’s reductionist account—can successfully explain why the paradigm cases are, or are not, violations of the right to privacy.²

For example, on control accounts, *The Quiet Fight* constitutes an infringement of the right to privacy in that by training his amplifier on the house in which the fight takes place, Jones infringes the fighting

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1. Samuel C. Rickless, *The Right to Privacy Unveiled*, 44 SAN DIEGO L. REV. 773, 778 (2007).

2. *Id.* at 779–82. See generally W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 269–70 (1983); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

couple's claim to noninterference with their decision that others not hear their conversation.³ On accessibility views, *The Quiet Fight* constitutes an infringement of a privacy right because Jones infringes the couple's claim that others not experience and learn about their conversation.⁴ Parent's information-based account explains the violation in terms of Jones's possession of undocumented information that the couple has chosen not to reveal.⁵ And Thomson, of course, posits that the couple in the quiet fight simply has the right to not be listened to.⁶ As with *The Quiet Fight*, Rickless explains how and why each of the standard accounts arrives at the right answer in each of the paradigm cases.

Despite the fact that the standard accounts get several paradigm cases right, Rickless contends that those accounts are incorrect. The problem for the standard accounts, and the impetus for Rickless's novel approach, comes in their failure to account for other paradigm cases. The first such paradigm case is *The Threatened Loss Counterexample*, in which *A* invents but does not use a powerful X-ray device that can look into homes. The mere threat that *A* could look through a person's walls deprives that person of the ability to determine who will acquire information about that person. Thus, it is sufficient to infringe a claim to privacy on the control view. But surely *A* infringes no right to privacy by inventing, though not using, the X-ray machine. Similarly, Rickless contends that the existence of the X-ray machine infringes a right to privacy on accessibility views, for on those views the right to privacy consists in one having a claim against others that they not be able to garner personal information about the rightholder. Again, however, *A* infringes no right by inventing the X-ray machine.⁷

Parent's information-based theory fares a little better, as it accommodates *The Threatened Loss Counterexample*. However, it is unable to accommodate a different case, *The Ex-Nazi*. In *The Ex-Nazi*, Goldberg possesses *A*'s powerful X-ray device. Rather than exercising *A*'s restraint, though, Goldberg actually trains the device on Rudolf's safe. In doing so, Goldberg learns that Rudolf was once a member of the Nazi party. Because Nazi party membership is documented, and one may have privacy only in undocumented information, Goldberg's learning the information through the X-ray device does not violate Rudolf's right to privacy on Parent's view. But Rickless asserts it *does* violate that right.⁸ Thus, Parent's account of the right to privacy is unsatisfactory.

3. Rickless, *supra* note 1, at 779.

4. *Id.*

5. Parent, *supra* note 2, at 270; Rickless, *supra* note 1, at 780.

6. Rickless, *supra* note 1, at 781–82; Thomson, *supra* note 2, at 304.

7. Rickless, *supra* note 1, at 783–84.

8. *Id.* at 784.

Regardless of the problems encountered by the standard, nonreductionist views, Rickless is unmoved by Thomson's reductionism. On Thomson's view, privacy rights are really just a cluster of rights, which include the rights that one not be listened to and that one not have one's property examined.⁹ However, where another person accidentally comes upon the pornographic picture that had been in one's safe, but was blown into the street by a freak tornado, surely no right has been violated.¹⁰ And where a similarly fortuitous weather event allows a couple's quiet fight to be broadcast to neighbors, surely the couple's right to privacy has not been violated.¹¹ Thus, Thomson's view appears to find rights where none exist, and is therefore an inadequate account of the right to privacy. As an alternative, Rickless offers the Barrier Theory, according to which:

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*.¹²

The Barrier Theory gets the right answer in all of the paradigm cases Rickless offers. The cases in which a privacy right is infringed—*The Quiet Fight*, *The Pornographic Picture*, and *The Ex-Nazi*—are cases in which a person breaches a barrier and learns personal information. Thus, under the Barrier Theory the cases constitute violations of privacy rights.

In *The Loud Fight*, *The Accidentally Amplified Fight*, *The Pornographic Tornado*, and *The Threatened Loss Counterexample* cases, no one breaches such a barrier. And in *The Subway Map* and *The Pornographic Tornado* no one learns or experiences a personal fact. In those cases, then, the Barrier Theory gets the right answer: No right to privacy has been violated.¹³

Having set out the basics, Rickless considers several questions one might pose for the Barrier Theory. For example, must the barrier be solid? No. Must the barrier be erected by, rather than merely used by,

9. *Id.* at 785; Thomson, *supra* note 2, at 306.

10. This is Rickless's *The Pornographic Tornado* case. Rickless, *supra* note 1, at 785.

11. This is Rickless's *The Accidentally Amplified Quiet Fight*. *Id.* at 786.

12. *Id.* at 787.

13. *Id.*

the rightholder? No. Must the barrier be morally permissible in the first instance? No. While Rickless's answers seem correct, I think that they raise some concerns about the Barrier Theory.

I. THE NATURE OF THE BARRIER

Rickless asks whether the relevant barrier must be solid. He explains that the barrier need not be solid by providing the example of *The Man in the Bushes*, who sneaks and eavesdrops on a couple that have chosen to talk on a secluded bench so that others will not overhear their conversation.¹⁴ This is a clear case of a privacy right violation, but the barrier breached is the air between the couple and any potential eavesdroppers. Rickless concedes that any number of things may be appropriate barriers, such that their breach, coupled with learning some personal facts, will constitute a violation of someone's right to privacy. By way of example, he mentions window blinds, smell-masking agents, air, and data encryption.¹⁵

However, I am uncertain how to understand the nature of these barriers that are a necessary aspect of privacy rights. Consider the following case. 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.¹⁶

Surely *A* violates *B*'s right to privacy. I think it would be implausible to contend that *B* has no moral right that *A* refrain from his massive data collection and analysis. When *B* eventually discovers *A*'s activities, *B*'s complaint would seem to be that *A* violated *B*'s right to privacy, and that complaint would be justified. I do not see, though, that *A* breaches a barrier.

One possibility is that *A* does breach a barrier, which is just the sheer *difficulty* of getting all that information. One might use the difficulty of gathering and analyzing small bits of information as a way of preventing

14. *Id.* at 788.

15. *Id.*

16. This case tracks an example I use in Alan Rubel, *Claims to Privacy and the Distributed Value View*, 44 SAN DIEGO L. REV. 921, 942 (2007).

others from learning other personal facts about oneself. For example, Joe might use the fact that it is difficult to follow him around and monitor his purchases and behavior as a way to hide his chronic drinking. Similarly, one might create a barrier to being followed by walking or driving briskly, turning often and without warning, and so forth. Understanding “barrier” so broadly, however, would seem to undermine the explanatory power of the Barrier Theory.¹⁷

II. “USED BY”

Supposing that the data accumulation case does constitute a violation of *B*’s right to privacy, and supposing that the sheer difficulty of getting all that information is the barrier that *A* breaches, it is not at all clear that *B* uses the difficulty of getting the information as a means to keep others from learning or experiencing personal facts about himself. It seems more likely that it simply never occurred to *B* that someone would go to such lengths to find out detailed information about him.

It seems that many of the things that constitute actual barriers to others learning personal facts about us are fortuitous. Consider, for example, the efforts of credit card companies to keep others from learning information about my account. I certainly benefit from those efforts to the extent that they prevent me from being defrauded. However, it is plausible that many people do not think about, much less deliberately use, those efforts as a means of keeping others from learning personal facts. However, it seems that *B*’s stealing a look at *A*’s financial records violates *A*’s right to privacy, even where *A* did not deliberately use the protections afforded such records to keep others from learning personal facts.

The same could be true of the protections afforded medical records, educational records, and so forth. For example, many people may not realize the extent to which there are barriers to others learning information in their medical records, though they benefit from the barriers. However, it would still seem that others breaching the barriers would constitute

17. Rickless responds to the counterexample, which he aptly calls *The Shadow*, by noting that *B*’s actions occur in public, and are the sorts of information-gathering tactics employed by private investigators. Rickless, *supra* note 1, at 794 n.45. This is correct. I take it, though, that *The Man in the Bushes* example takes place in public. Similarly, one could breach the barrier of a smell-masking agent (for example, with an electronic nose of some sort) in public. I am also uncertain whether the information-gathering activities of private investigators render those activities permissible per se. Being a private investigator may in some circumstances give rise to certain privilege rights.

violations of privacy rights. Indeed, the same thing will be true of the walls of one's house. I may not use the walls of my house as a barrier to protect information. I may think 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 my wall and learns some personal fact about me, it would surely be the case that *A* has violated my right to privacy.

Thus, even where one does not deliberately or intentionally use the barriers that protect information as a means to keep others from learning personal facts about oneself, it seems that breaching those barriers may violate a right to privacy. Perhaps violating a right to privacy requires instead that another person breach a barrier that in fact protects one's privacy, regardless of whether one actually intentionally uses the barrier as a means to protect privacy.

III. BARRIER-BREACHING

Rickless states that data encryption will be a barrier, the breach of which will constitute a violation of a privacy right.¹⁸ Thus, where *A* encrypts data in order to prevent others from learning personal facts about *A*, *B*'s decrypting that data violates *A*'s right to privacy on the Barrier Theory. The Barrier Theory does not contain a requirement that the encryption must be generally effective, however, and I wonder whether using a barrier that happens to not work in a particular circumstance will underwrite a right to privacy on the Barrier Theory.

Suppose, for example, that a multilingual couple have the habit of conversing in different languages so that they may discuss personal matters in public spaces, but without others learning facts about them in the process. Generally this is an effective barrier. They deliberately choose to speak in languages that no one nearby is likely to understand. Suppose also that the couple converse in Cantonese in a restaurant in a small town with no known Cantonese speakers. However, there just happens to be a person passing through town sitting at the next table who is fluent in Cantonese. It is unclear from the Barrier Theory whether the person at the next table breaches the relevant barrier when she comprehends the conversation. Does she breach the barrier when she actively listens and translates deliberately? Does she breach the barrier when she records the conversation and later translates it with the aid of a Cantonese-English dictionary?

My concern here is not a matter of mere line drawing; there will always be cases in which a particular theory will be difficult to apply.

18. *Id.* at 788.

Rather, my concern is that fleshing out the Barrier Theory may demand positing a condition that *B*—the person learning the personal facts about the rightholder—take some positive action toward breaching the barrier and acquiring personal information about the rightholder. That is, I am not certain of the extent to which a person breaching the relevant barrier must act to deliberately breach the barrier in order for a rights violation to obtain.

IV. ACQUISITION AND DISSEMINATION

Thomson argues that the cluster of rights that make up the right to privacy includes the right that others not cause one distress by publishing personal information (as illustrated by *The Picture in the News* case), and the right to confidentiality (as illustrated by *The Inveterate Gossip* case).¹⁹ Rickless contends that the two cases involve wrongs, but that those wrongs are better understood as wrongs of causing distress and betraying confidence. Rather than multiplying rights beyond necessity, he asserts that we may limit the right to privacy to information acquisition. He writes that “[i]f 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.”²⁰

I am not sure we can do that so neatly. Take the example of the powerful X-ray machine that can see through walls. Clearly *A*'s using such a machine to watch *B* in her home is a violation of *B*'s right to privacy on the Barrier Theory, based on *A*'s acquisition of information. However, we can tweak the case to make it a violation of the right to privacy based on dissemination. Suppose that *A* trains the X-ray machine on *B*'s house, but rather than watching *B* and acquiring information, *A* sets the machine to begin broadcasting the image on television and simply walks away, never viewing the images himself. Clearly this violates *B*'s right to privacy. Just as clearly, it is the dissemination of the information that constitutes the violation, not the acquisition. Those people acquiring information about *B* by turning on their televisions do not violate *B*'s right to privacy any more than the neighbors who have *The Quiet Fight* fill their ears on the wind of a freak weather

19. Thomson, *supra* note 2, at 309.

20. Rickless, *supra* note 1, at 796.

event, even though they are the only ones who acquire information. It is A , who has merely disseminated the information, who has violated B 's right.