

Privacy at the Limits of Control

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A great deal of common law jurisprudence—especially within criminal and constitutional law—treats an agent’s *control* as a primary (though not the sole) factor in determining the scope of the agent’s reasonable expectation of privacy. We raise a new philosophical challenge for this ‘control theorist’ approach. The challenge concerns a class of cases in which it seems that an agent both loses control over information and retains a reasonable expectation of privacy with respect to that information.

Informational Privacy and Search and Seizure

Under Canadian law, a party has standing to contest a search only if they bear a particular type of relation to the target of the search. Canadian courts have recognised that what underlies the individualistic protection right is a privacy interest: we have an interest in preserving our privacy against intrusion. How far does the right extend? In answer, Canadian courts recognise a protection against unreasonable search and seizure only where there exists an objectively reasonable expectation of privacy.

Marakah Reasoning

Our springboard is *R v Marakah* [2017], a recent seminal decision from the Supreme Court of Canada. It concerns a case involving two drug dealers, Marakah and Winchester. Here is how the majority in *Marakah* [2017] characterises the control relevant for determining whether a subject’s expectation of informational privacy is objectively reasonable:

Control must be analyzed in relation to the subject matter of the search: the electronic conversation. Individuals exercise meaningful control over the information they send by text message by making choices about how, when, and to whom they disclose the information. (*Marakah*, at para 39)

The majority insists that Marakah had this control over the text conversation with Winchester, and that his control was not totally undermined by Winchester having control over the same:

[A] person does not lose control of information for the purposes of s. 8 simply because another person possesses it or can access it. Even where “technological reality” (*Cole*, at para. 54) deprives an individual of exclusive control over his or her personal information, he or she may yet reasonably expect that information to remain safe from state scrutiny. Mr. Marakah shared information with Mr. Winchester; in doing so, he accepted the risk that Mr. Winchester might disclose this information to third parties. However, by accepting this risk, Mr. Marakah did not give up control over the information or his right to protection under s. 8. (*Marakah*, at para 41)

Control Test

The following ‘control test’ operationalises the standard judicial understanding of the tight connection between privacy and control:

CONTROL TEST: A subject’s expectation of privacy is objectively reasonable only when she controls the target of her expectation (unless the case is merely pathological or involves constructive control)

For a ‘control theorist’, pathological cases are *idiosyncratic* cases in which non-control factors suffice to establish a reasonable expectation of privacy. A well-known class of non-pathological exceptions to the main control test are cases of ‘constructive control’. Despite its name, constructive control is not a genuine form of control: it is a relation that can serve as a legal substitute for genuine control. Constructive control thus generally applies *only where* there exists a professional or commercial relationship that gives rise to appropriate obligations.

Our Challenge

Our challenge begins with a normative judgment:

1. Marakah had an objectively reasonable expectation of privacy with respect to his earlier electronic conversation with Winchester.

1 is not a statement of law. It instead expresses a normative judgement about privacy’s scope that the law ought to capture. Our challenge brings out how control theorists cannot easily accommodate the judgment in question. Consider the control test:

2. A subject’s expectation of privacy is objectively reasonable only when she controls the target of her expectation (unless the case is merely pathological or involves constructive control) [Control Test]

Marakah’s case clearly does not involve constructive control: neither Winchester nor Marakah owe the requisite obligations to one another. We are also convinced that *Marakah* is not merely pathological. If we are right, **1** and **2** entail **3**:

3. Marakah continued to control his earlier electronic conversation with Winchester. [From **1** and **2**]

The problem is that **3** is inconsistent with **4**:

4. Under no plausible reading of ‘control’ did Marakah still control his earlier electronic conversation with Winchester.

Our main aim is to defend **4**.

No Control in Marakah

The majority insists that Marakah’s control of the information conveyed during the earlier electronic conversation with Winchester is sufficient for control of that conversation.

But, if the information conveyed is merely one amongst several individuating components of a conversation, then the majority mistakenly infers control over a conversation from control over merely one of its components.

That inference is not generally safe: control of a part does not entail control of the whole. And the inference does not work in this particular case.

Their mistake was in thinking that because control over the information sufficed for control over the conversation when the conversation was ongoing, it would remain sufficient once the conversation was over.

This is a mistake because it rests on a subtle misapplication of an apparently compelling principle governing explanation, namely that if one thing explains another, then it will always explain it. The proper application of this principle requires that one hold fixed whatever is doing the explaining. Where the majority erred was in assuming that Marakah's *later* control of information was the same as his *earlier* control of that information.

What explained his earlier control over the conversation was not a generic control over information, but control which could itself be exercised in a particular way. When he was a participant in the ongoing conversation, Marakah could *shape the conversation* by exercising control over the information he conveyed.

By disclosing information in a particular way, Marakah affected not only the information conveyed in the conversation, but also other features which contribute to individuating the conversation: when the conversation took place, who was participating in it, and so on.

Once the conversation was over, this ability to shape the conversation disappeared with it. Marakah retained control over how and when to disclose the information, yet exercising that control no longer constituted a way of shaping the earlier conversation.

Is there another way to save the majority's claim that Marakah retained control over the earlier electronic conversation? We think not.

Looking Ahead

Our challenge arises because control theorists have long operated with a too-narrow understanding of control's explanatory role with respect to privacy's scope. Elsewhere we use our challenge to motivate a more nuanced understanding of control's explanatory role. While the view allows the presence of control to often be essential to explaining why in a particular expectation of privacy is objectively reasonable, it locates control's fundamental explanatory role at a higher level. Control theorists should say that control plays a central role in determining privacy's scope by constituting a standard that a relation must meet in order to help underwrite an objectively reasonable expectation of privacy.