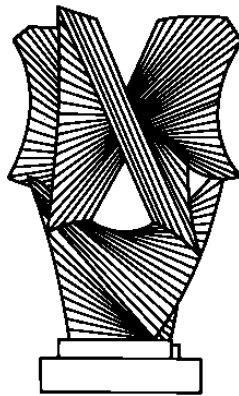


CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 75
(2D SERIES)



DECONSTRUCTING PRIVACY:
AND PUTTING IT BACK TOGETHER AGAIN

Richard A. Epstein

Deconstructing Privacy: And Putting It Back Together Again

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I. Beware of Conceptual Knock-out Punches

It is a common conceit of academic conferences to insist that progress in some given area of law or political theory is hampered by the hopeless confusion of certain standard terms. My usual attitude toward claims of this sort is one of passionate rejection. The English language has served us well for such a long period of time that I bring a strong presumption of distrust to any claim of the conceptual poverty of ordinary language. The radical claims for lack of understanding are in general falsified by the success of communication in ordinary life, as measured by the coordination of human behavior that language facilitates.

To be sure, it is easy to point to cases that test any term we might care to use, but it is important to note the low payoff that usually attaches to any learned demonstration that bizarre cases can confound general theories. Novel cases, almost by definition, occur infrequently in everyday life, so that routine business can proceed apace without diversion or delay so long as the large bulk of situations we encounter are concentrated at the opposite end of the continuum. The nonrandom practice of selection means that lawyers (or philosophers) can dwell at great length on peculiar and nonrecurring cases, without upsetting the basic fabric of ordinary discourse.

Learned attacks on language, however, tend to go deeper. Thus, it is often said that when we deconstruct language we discover to our sorrow so much pervasive confusion that we cannot see our way to the bottom of the simplest of cases. At this point, the agenda is not one that is politically neutral. The terms singled out for attack are usually the staples of traditional legal discourse. Bringing these terms down carries with it a conceptual victory over the classical components of the traditional legal order.

A couple of examples make the point clear. The frequent attacks on the use of the law of tort, and its associated notions of individual responsibility, often begin with the observation that its core concept of causation defies rational explication. For example, in *The Common Law*, Oliver Wendell Holmes's attack on strict liability rested on the view that causation was so expandable a concept that it could provide no limits to potential

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liability, so that the plaintiff could recover from the defendant for anything.¹ Holmes then claimed that a test using the foresight of the reasonable man could supply the needed limitation, without examining the easy cases where the subsequent action of a third party breaks any causal connection.² What Holmes sought to do with strict liability, in later years a second generation sought to do with the negligence test of reasonable foresight, whose own ambiguity was thought to justify resort to workers' compensation. Once again, the conceptual point is far from dispositive, given the extensive litigation that has grappled with accidents that "arise out of and in the course of employment."³ Marginal cases arise under every system.

The same level of conceptual disarray has been used to undermine the system of property rights in constitutional discourse. The conventional accounts of the police power all allow the state to enjoin without compensation the commission of a nuisance on public or private property. But then nuisance is stretched to cover the use of an ordinary apartment house in *Euclid v. Ambler Realty*,⁴ so as to provide a zone of comfort for large single family homes nestled behind white picket fences. Put "nuisance" in quotation marks, and the constitutional barriers to the public regulation of private property quickly tumble. It is, therefore, no accident that the limited revival of the takings clause came in a decision, *Lucas v. South Carolina Coastal Commission*,⁵ which looked to the Restatement (Second) of Torts to establish some baseline for nuisances that predated (and superseded) any legislative efforts in that direction. Yet we have seen no such conceptual equivocation in First Amendment law, where the scope of the police power has been narrowly construed, lest the constitutional protection of freedom of speech follow the same dizzying descent we have witnessed in the area of property rights. The more courts and scholars care about a subject, the more confident they are about its conceptual foundations.

The question that I wish to address in the law of privacy is whether this area is also marked by false claims of conceptual incoherence that lead, as with tort and property, to a gradual erosion of the protection of the classical forms of individual rights. On this point, the answer is, to say the least, decidedly mixed. There is little question that *some*

¹ See, for his usual rhetorical flourish, Oliver Wendell Holmes, *The Common Law* 95 (1881): "nay, why need the defendant have acted at all, and why is it not enough that his existence is at the expense of the plaintiff?"

² The man who breaks into my house, steals my knife, and uses it to kill a third person has caused the harm, not I. I may be responsible if water breaks through the wall of my reservoir and floods a downstream neighbor, but I am not responsible if a stranger pumps my water into the basement of my neighbor, or stuffs my toilet with water to flood a downstairs neighbor. See, e.g., *Rickards v. Lothian*, [1913] A.C. 263.

³ See Arthur Larson, *The Law of Workmen's Compensation*, in 10 or so loose-leaf binders.

⁴ 272 U.S. 365, 394-95 (1926).

⁵ 505 U.S. 1003 (1992).

right of privacy forms an essential component of the classical liberal order. By the same token, privacy has been invoked to support a large number of other asserted rights which are quite inconsistent with the classical liberal view. Thus, the right of privacy has been used to insist that individuals have a basic entitlement, apart from contract, to keep private their medical records from the prying eye of employers and insurers. The right of privacy has also been invoked to justify the right of a woman to abort a pregnancy prior to term. At the very least, privacy has been subjected to some conceptual overload by being pressed into service in defense of such a heterogeneous set of rights.

My modest mission in this paper is to deconstruct the term privacy, to reveal the present confusions in the term. At first glance it looks as though I fall into the same camp as Holmes and the other common law writers who wanted to dethrone the traditional law of torts, and Justice Sutherland (an odd candidate for the position),⁶ who did so much to undermine the traditional conceptions of private property. In this context, however, appearances are deceiving. I wish to deconstruct the current multiple uses of the term, but with a happy ending. Rightly understood, there is light at the end of this conceptual tunnel. We can conclude that some claims of privacy make perfectly good sense, even if others uses of the conception are profoundly misguided and should be eliminated. Deconstruction is really just disaggregation. In some contexts, privacy works hand-in-hand with the classical liberal conceptions of individual rights and responsibilities. In other cases, privacy turns out to be at war with these conceptions. Deconstruction of the term is a way-station toward its conceptual reconstruction, both for ordinary discourse and the harder work of law.

II. The Conceptual Framework

The best way to understand the right of privacy is to place it within a larger conceptual framework. Although it is easy to identify countless variations on two basic themes, it is convenient to divide the political theories into two large camps. The first of these is the classical liberal tradition that stresses certain ideas: private property, freedom of expression, and freedom of contract, coupled with a limited government designed to prevent the use of force and to supply the infrastructure (roads, courts, defense) needed for the protection of public life. On the other side lies the modern redistributivist state, which never fully denies the catalogue of individual rights and duties in the classical liberal state, but adds to them additional public functions. These include the elimination of (most forms) of discrimination in public life, which covers not only government affairs, but ordinary market transactions between private individuals (as opposed to the regulation of intimate personal affairs), and an extensive system of

⁶ For a more detailed examination of his life, see Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (1994) Princeton University Press.

subsidies and restraints that allow for massive government redistribution from some groups to others. It is not as though this theory only allows for redistribution based on need, although that is surely the strongest possible case. Rather, the theory allows the political branches of government to decide who should subsidize whom: working class families can be asked to subsidize Medicare recipients. Impoverished urban residents could be asked to subsidize dairy farmers; well-heeled tenants could be protected against their landlords by rent control statutes and the like.

In earlier work I have identified six key elements that mark the sensible classical liberal legal order.⁷ Briefly summarized, the rules run as follows. The initial rule speaks in terms of autonomy or self-ownership. It excludes the possibility that any individual can be owned by another, or that the talents of all individuals belong in some social commons, to be taxed and regulated for collective purposes. The second of these rules, that of first possession, offers a relatively inexpensive means by which to link individual persons with external things. It allows individuals to assert ownership claims over previously unowned things, so that under private ownership they can be used, consumed, developed, or traded in accordance with the fancy of their respective owners. Not all resources should be taken out of the commons with all possible speed; in some cases a regime of common use will perform better than one of limited ownership, as in the case of natural waterways. But for land and chattels, their cultivation and development depends heavily on the system of private ownership, which is most easily and directly achieved by taking things into possession.

The third rule is one of voluntary exchange, which allows the transfer of services (vested in an individual under the autonomy principle) and private property (initially acquired under the first possession rule). These exchanges allow property to move from lower to higher-valued uses, so that one consistent legal focus should be on reducing transaction costs that slow down the otherwise sensible redeployment of social resources. In the ordinary case, a voluntary transfer produces mutual gains between the parties, and these gains only accumulate as the velocity of transactions increases. These transactions do have consequences on third parties, but, as a first approximation, the externalities are positive as well as negative. The increased wealth of any individual will, on net, improve the trading opportunities of all other persons. The individual who loses out because of his inability to secure gains in any single transaction therefore has the comfort of knowing that other transactional possibilities remain on which he can seize, perhaps by altering the mix of price or quality of the goods and services provided.

In order to make sure that labor and property are transferred mainly by contract, the law of tort imposes restrictions on the use of force and fraud to secure unilateral

⁷ Richard A. Epstein, *Simple Rules for a Complex World* (1995).

changes in ownership. The justification for forbidding use of these means is easy to articulate in the frequent cases where the forced transaction results in a negative sum game; no matter what standard of social welfare is adopted, it does not make any sense to spend resources to move resources to inferior uses. In some cases, it is possible that the gains to the winner of some discrete taking by some metric could be found to exceed the losses to its losers. Yet, even if we concede that some summation of utilities across individuals is possible, it is a large leap to assume that they take place in transactions motivated only by the self-interest of one side. Instead, the law recognizes that the rule in favor of voluntary exchange and the prohibition against coerced exchanges constitute strong presumptions, but not absolute commands. It is thus possible to address situations where these presumptions could be overcome. The tort doctrines of necessity, both public and private, offer examples of situations in which the need to use resources is so imperative, and the difficulty of securing consent so acute, that the individual in need is allowed to take, subject to the obligation to compensate thereafter.⁸ The necessity rule represents an ancient deviation from strong libertarian positions that enjoys widespread support in both common and civil law systems. It, like the law of restitution in general, is hedged in by sharp limitations so that one cannot simply decide to cut the neighbor's lawn in summer or shovel his walk in winter, simply because he is away for the weekend. The necessity has to be imperative, and the compensation should be as complete as possible once the peril has passed.

The last rule is, in a sense, a generalization of the necessity rule to allow for the creation and funding of a variety of public goods. The problem has been well understood for a long time. Ordinary market transactions require the consent of buyer and seller, and work best in a regime where each has multiple choices. In contrast, the creation of a system of highways requires the unanimous consent of a large number of individuals, and one holdout can doom the common scheme. A set of coercive institutions from which all benefit and by which all are bound overcomes this obstacle, and in principle produces the social gains that no system of markets could generate. Thus a system of reciprocal regulation stands a good chance of supplying the implicit in-kind compensation of government benefits generated by these programs, typically in the form of limitations that are imposed on each member of the group for the benefit of the others.

It is not possible in the abstract to declare that any system of collective action meets that compensation standard: there is always a need to search for the disparate impact from which it could be inferred that the scheme of collective action is in reality nothing more than a disguised transfer of wealth from one individual or group to another. Thus, a rule that limits all subdivision members to the construction of a single family home on an individual lot is far more likely to pass muster than a restriction of all further

⁸ For discussion, see Richard A. Epstein, *Torts* §2.15 (1999).

construction on any lot within the subdivision, when all but one have been fully developed. The clear implication is that the lone outsider is being pressed into service to supply open space for his neighbors, even when he is left in possession of his land. The object of both the necessity and the takings rule is to permit the movement from a less to a more desirable social state in those circumstances in which high transaction costs block any voluntary movement in that direction. The rules are designed to achieve that end and only that end. These rules are *not* designed to facilitate the covert transfer of wealth between individuals or interest groups. The provision of public goods is part and parcel of this scheme. The redistribution of wealth is not.

III. Applications to Privacy

It is important to see how this system makes sense when applied to the law of privacy, as it has developed over the past century. In dealing with this issue, it should be clear at the outset that the system will never operate as cleanly as any system of property rights in land. The indefinite and elusive nature of its subject matter will routinely generate more than its fair share of boundary disputes. Yet, even accepting those limitations, it is possible to make some measurable progress to a sensible end. In order to do so, it is best to divide the cases into two broad classes which track the familiar common law classification. The first of these deals with interactions between strangers, and situates the subject of privacy as a province of the law of tort. The second of these deals with the protection, if any, afforded privacy as an outgrowth of consensual arrangements between parties, which is a species of contract law. The former appears to raise a larger set of complexities. Let us take them in order.

A. Tort Law and Privacy Rules

Our traditional legal system offers extensive protection to privacy interests even where those interests are not singled out by name for special protection. The ordinary rules of private property grant the owner the exclusive possession of land and the structures thereon. The owner's ability to repel trespasses from all comers works in a sensible way to limit the intrusions that other individuals are able to make into anyone's private life. The people who cannot walk through someone else's grounds or lift up his window shutters will be much less likely to pry into his personal affairs. The ordinary rules of property allow a landowner to keep other individuals off his property. They also allow that owner to erect walls that keep the individual off; these walls can also ensure privacy by blocking direct observation of what takes place on the land. Indeed, in one of the early cases dealing with concerns of privacy, the trespass action was allowed against a man who gained entrance into a woman's bedroom during childbirth when he pretended to be a doctor's assistant.⁹ The defendant's fraud vitiated the

⁹ DeMay v. Roberts, 9 N.W. 146, 149 (Mich 1881).

consent given to his entry and thus exposed him to a trespass action, which included as damages the plaintiff's shame and embarrassment at having him watch the birth. It takes no great thinker to realize that the interest in privacy, as a freeloader interest, is advanced by reference to a tort whose origins lie in the desire to protect individuals against neighbors who trample their corn, drive off their cows, or break down their houses.

It is equally important to realize the imperfect nature of this protection. To be sure, the system works very well when the rights of individual owners are respected so that there is no occasion to invoke the tort of trespass in the first place. But that interest is subject to erosion when individuals are determined to finesse the classical forms of protection. In a sense, the issue dates back to Blackstone, for the question often arose what sort of protection, if any, a landowner got from someone who eavesdropped on the conversations inside her house.¹⁰ The term "eavesdropping," both in Blackstone and today, contains a certain built-in ambiguity. The term could refer to a trespasser who hangs from your eaves to listen to what goes on. The dictionary, however, skirts the trespass question by eschewing the literal meaning—that is, a person who drops from the eaves—and moves quickly to the modern idea of privacy: "To listen, or try to listen, secretly, as to a private conversation."¹¹ All of a sudden, the element of physical trespass does not loom large at all. It does not matter, as it were, whether the person who overhears the conversation hangs from his own eaves or from yours. Eavesdropping now offends a distinct interest in privacy. No longer does the faithful protection of land interests reflect the full set of ordinary expectations that people have about each other. The question, therefore, is how to think about the protection of privacy in those cases that go beyond the established forms of common law protection.

It is at this point that we have to recognize the limitations inherent in the normal libertarian rules which protect both person and property against the use of force and fraud. The facile explanation is that so long as there is no trespass there is no wrong. But the correct response is to invoke the last of our simple rules and to fashion a generalized right of privacy that goes beyond trespass and works on average to the long-term benefit of all. Any creation of a property right necessarily imposes some limitation on the natural liberties of other individuals to do what they want with their own bodies or land. The justification for these limits comes from the greater long-term gains that a system of private property provides, which is why its defenders rightly rely on metaphors about the need to reap where one has sown. One key question is whether the

¹⁰ *Eaves-droppers*, or such as listen under walls or windows, or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable as the sessions, and punishable by a fine and finding securities for good behavior." 4 Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND 169 (1769) (cited in *Berger v New York*, 388 US 41, 45 (1967)).

¹¹ 1 Funk & Wagnalls, *New Comprehensive International Dictionary of the English Language* 398.

last ounce of reciprocal gains has been achieved by the trespass law. The insistent demands for, and the broad support of, a separate privacy interest give us good reason to think that they have not.

The basic intuition starts from the simple observation that the prohibition against eavesdropping and similar forms of behavior satisfies the condition of formal equality. There are no self-selected individuals who remain outside the prohibition. At one level, the rule embodies a strong reciprocal element, which is not found in skewed impositions that apply to some individuals but not to all. Standing alone, however, the condition of formal equality is also consistent with an outcome of dual ruin, in which both parties chafe under restrictions that each would like to remove.

In this instance, however, we can glean evidence from another quarter that this sorry state of affairs does not hold, by looking to the analogous voluntary arrangements that govern the same issue. Thus we may ask the question of whether a condominium association would pass some general rule to stop eavesdropping should it become a common practice. In the alternative, we can note, right now, the strong social custom that makes it inappropriate for individuals at one table to seek to overhear private conversations (the use of the phrase is suggestive) that take place at another. The norm allows the removal of partitions that might otherwise be required, and it allows for a reduced separation between tables so as to lower the cost of basic service. No one claims that this norm is perfect in all regards. One would not give highly confidential information about a desirable chemical formula or to announce the combination to a safe in a crowded restaurant, given the obvious risks. But we do have at the very least a social norm that seems to help improve the efficiency of the use of crowded spaces, both public and private, for less sensitive matters. The eager embrace of these practices accounts in large measure for the larger social recognition of the privacy interest.

This norm gives us a window into general constitutional law. The Constitution contains a prohibition against unreasonable searches and seizures.¹² A quick inspection of the text shows how powerfully “thing”-oriented it is in its basic conception; both the global protection against unreasonable searches and seizures and the more particular protection of the warrant clause make it clear that only places are searched, and only persons or things are seized. But what if the government decides to conduct its “search” not by entry but by eavesdropping, perhaps with powerful electronic equipment that operates at a distance? One possible approach to this situation is for the courts to wash their hands of the entire affair. If one concluded that this snooping counted as neither a search nor a seizure, then the question of reasonableness or of warrants would never arise at all. Yet this position cannot sustain itself in the long run, for the same

¹² “The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. 4.

transformation of the law of trespass that took place in the private sphere has already taken place in the public sphere. As a good rule of thumb, the principle of limited government should caution us against the creation of a “second set of books”—against giving ordinary terms special meanings—in working out on an ad hoc basis the relationship between the individual and the state. The possibility of slippage with the creation of ad hoc rules is sufficiently great to usher in an era of serious abuse. That is one lesson that is learned from the elastic rendition of the police power in land use cases.¹³ Only when the police power is linked to the private law conception of nuisance does it offer a viable sense of what the government may enjoin without compensation. Unmoored from its private law background, just about anything can become a nuisance so that government supremacy in land planning is secured by little more than a play on words.¹⁴

In the privacy setting, we face exactly the same situation; the last of our simple rules has been used in the private sphere to extend the boundaries of the person to cover intrusions through snooping and prying into individual space. The same restrictions could, and should, apply to the government. As a textual matter, that result is most easily obtained by recognizing that government searches of persons, houses, papers, and effects can take place from afar—as with a searchlight—without the need for any trespass to trigger the constitutional guarantee. These searches have long been regarded as improper when undertaken by private parties,¹⁵ and it is but a small giant-step, so to speak, to hold that “search” in the context of the Fourth Amendment is subject to the same transformation that animates the private law.¹⁶ All this is not to say that these devices could never be used: the basic text holds that the individual right of “security” is only against “unreasonable” search and seizures. The government, therefore, should be able to show that certain searches are reasonable, for example because of the imperative need to discover evidence that is about to be destroyed. My point here is not to go into the set of justifications that could be developed under this relatively open-ended constitutional norm. It is only to insist on parity between the two kinds of search cases that precludes a lower standard of justification for searches at a distance than for those that involve the direct entry onto someone else’s private property.

¹³ For recent Supreme Court expositions, see *Lucas v. South Carolina Coastal Comm’n*, 515 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 574 (1994). The issue is again before the Supreme Court in *Del Monte Dunes v. City of Monterey*, 118 S. Ct. 1359 (1998) (cert. granted) (No. 97-1235). 95 F.3d 1422 (9th Cir. 1996) (case below).

¹⁴ For discussion, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, chs. 9 & 10 (1985).

¹⁵ Two of the early cases: *Roach v. Harper*, 105 S.E. 2d 564 (W. Va. 1958) (landlord used hearing device to listen to tenant’s private conversations); *Rhodes v. Graham*, 37 S.W.2d 46 (Ky. 1931) (tapping telephone wires).

¹⁶ *Katz v. United States*, 389 U.S. 347 (1967).

At this point, it is clear that the extension of the perimeter of rights around the individual encapsulated in the idea of privacy is consistent with the general libertarian approach, with its congenial respect for the defensive use of private property. The question here is how much further the idea of privacy can be pushed. In this regard, it is useful to consider two possible extensions. The first of these concerns the preservation of the right of privacy within public space. The second concerns the extension of an asserted right of privacy to cover cases in which individuals make harmful comments about other individuals, without prying or spying into their lives.

B. Privacy on the Commons

In speaking of commons, I do not mean anything more complicated than an area, such as a highway or park, from which none can be excluded but which none are able to privatize. Within the commons, the danger of inconsistent uses is evident, and these can only be ironed out by a set of regulations that impose correlative limits on the rights of various users. To give one simple example, it is hard to justify any rule that prevents people from walking about naked in the privacy of their own homes. Yet it makes sense to impose limitations of this sort for people who come and go along public roads and, for the most part, public beaches. The danger of this rule is that it does not give any weight to people whose preferences run in the opposite direction; to accommodate them, it may be sensible to set aside some public beaches on which nude bathing is possible. Indeed, in many European and Latin American countries the general social norms have switched enough to tolerate women going about bare-breasted on ordinary beaches, a practice that has generally not taken hold in the United States.

The same concern about use rights covers the question of privacy. Thus, one has to ask to what extent individuals should be forced to moderate their conduct in public spaces in order to respect the privacy of others. One obvious example is that it is generally regarded as wholly improper to closely follow another individual on the public sidewalk. It is probably actionable as a matter of tort law to “shadow” other individuals in public spaces, whether or not the event is observed by others. Thus, the “overzealous surveillance” of others, often public figures, has in general been treated as an invasion of privacy, even when it takes place on public streets. This conclusion holds even if (as is inescapable) “mere observation” does not create any liability.¹⁷ The rule makes sense in light of the reciprocal nature of the rights and duties in question. A prohibition against looking at other individuals on a public street imposes limitations that ruin its utility for everyone concerned. The prohibition is confined to outlier situations, to extreme forms of conduct for which, at an intelligent guess, the balance of convenience runs in the opposite direction. On one level, following closely on another person’s heels looks a bit like an assault, and thus an ordinary common law tort, even if

¹⁷ *Nader v. General Motors*, 255 N.E.2d 765, 771 (N.Y. 1970).

no physical contact is made. On another, if it is done in plain view, it partakes a bit of defamation, as though the shadower had some reason to follow the other person, which is now communicated to the rest of the world.¹⁸ Even short of shadowing, it is far from obvious what the norm is regarding taking pictures of other individuals in public places. For the most part, tort law will not intervene, but some clear social sanctions will be invoked if one person purposely takes photographs of individuals walking down the street. The matter becomes the source of intense litigation when Paparazzi go to inordinate lengths to bag their quarry.

C. Immunity from Comment or Criticism

There are, however, other instances where invoking claims of reciprocal long-term advantage fail to justify an extension of the right to privacy. To see where the breaking points develop, suppose that the claim of privacy is no longer tied to some particular invasion or intrusion by either the state or another individual. Thus, there are many things that I might wish to keep private about my past or present activities, and it is seductive to claim, by way of analogy to cases of shadowing or snooping, that other people cannot speak of these things, either in public or in private without my consent. The idea has its mischievous analogue in other cases. The idea of “harm” is easily unlinked from its close connection with force or fraud to cover those cases where individuals suffer from the competition of other individuals.¹⁹ In principle, these forms of competitive harms should be candidates for the expansion of the common law rules because a general prohibition against competition will advance the long-term welfare of all individuals. But this purported transformation will fail, given the superior output that competitive markets yield over their economic rivals. A balkanized society, in which established players may block new entrance and thus continue to hold their customers in thrall, is a recipe for stagnation on a grand scale. The price of competitive harms in one transaction is paid in order to liberate the far greater productive powers of the system.

This asserted extension of privacy suffers, or should suffer, the same fate as the desire to expand the idea of harm to cover the case of competitive losses. It is one thing to spy and pry on another individual. It is quite another to comment on their latest play, their new outfit of clothes, or their general health or pallor. Cumulatively, this information is of great value to all individuals in deciding with whom to deal and why, both in a business and social sense. An organized society that allowed aggrieved individuals to ban the unfavorable comments of others would come close to being a police state. Liberty of conscience and thought depends on the free circulation of ideas,

¹⁸ *Schultz v. Frankfort Marine Accident & Plate Glass Insurance Co.*, 139 N.W. 386 (Wis. 1913), followed in Restatement (Second) of Torts, § 568, illus 1.

¹⁹ For my discussion of this theme, see Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good*, ch. 3 (1998).

and it would create a nightmare of epic proportions to envision a system in which A gave consent to X to talk about his interactions with B, while B demanded silence on the same transaction: no one could ever enter into the multiple transactions needed to unravel the legal knot. The right of fair comment has long been established at common law before the First Amendment was thought to control these things—in part on the very sensible and commendable ground that the critic or commentator could be restrained in his pronouncements by virtue of the fact that his remarks in the public domain were subject to the like criticisms of others.²⁰

Another way to see the same point is to note the twisted relationship between this form of privacy and the general law of defamation, which makes it *prima facie* tortious to publish a *false* comment about the plaintiff to some third party which leads him to lower his estimation of P or otherwise refuse to do business with her.²¹ Here we do not have to worry about any transformation of the fundamental prohibition against force or fraud. The fact that the false statement of fact is made *about* the plaintiff to a third party, rather than being made *to* the plaintiff, only increases its danger. The plaintiff will be able to mount defenses when confronted with these false statements. But when these statements are part of a whispering campaign behind her back, they may lead third persons to shun her so that she is unable to mount the deserved counterattack.

The risk of third party misbehavior is far lower, to say the least, if the statements are true (and here for the moment, I shall assume that this means the truth, the whole truth and nothing but the truth). Now all individuals are given better information with which they can make more accurate choices to do business with the person or group on whom the aspersions are passed. The key question is whether society in the aggregate flourishes better with less information or with more information. Obviously, we shall have to make exceptions (as for military intelligence) when we move to the pole of open information. Yet there is little doubt that we are better off as a group there than at the other pole. The right to privacy, sensibly construed, leads us one step past the common law rules of trespass, but it hardly takes us that second step. The boundary line between truth and falsity becomes critical. The question is how well that line can be policed.

At one level, the answer is: fairly well. The issue is one that has to be resolved in a large number of contexts: no one can make a claim of fraud for true statements uttered to another person. The definition of truth that is used in ordinary two-party disputes over misrepresentation can easily be carried over to deal with the more complex tripartite arrangements whenever publication is made about the plaintiff to a third party. At this point, it is easy to understand how the constitutional brigade now

²⁰ See, e.g., *Carr v. Hood*, 170 Eng. Rep. 981 (K.B. 1808).

²¹ The classical definition of defamation is that of Baron Parke, which refers to a statement that “is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.” *Parmiter v. Coupland*, 151 Eng. Rep. 340, 342 (Ex 1840). For the various limitations on the definition, see Richard A. Epstein *Torts*, § 18.4 (1999).

marches in reverse. No longer do we prop up the Fourth Amendment to expand claims of privacy. Now we invoke, often under the name of the First Amendment, a newsworthiness privilege that prevents the state from blocking the publication of any true account of matters of public interest and concern, defined not by the state, but by the individual or institution that publishes the material in the first place.²²

As with all privileges, it is possible to identify cases in which its assertion is regretted. In this area, the cases that seem to call for the greatest uneasiness are those in which newspapers reveal the names of rape victims available from the public record,²³ those in which gay activist groups or others choose to “out” people who otherwise wish to keep their sexual orientation private,²⁴ and those in which individuals dredge up long-forgotten events of individuals who have made a return to respectability.²⁵ One point in favor of the broad newsworthiness privilege is that public reaction, often bordering on outrage, lead to sensible forms of self-regulation. Today most media outlets will not publish the names of rape victims even if these names appear in other newspapers until the matter becomes one of common notoriety. Similarly, outing can easily lead to a public backlash against the groups that engage in it. As matters stand, it is very hard to identify any clear *content* based limitation on the newsworthiness privilege in privacy cases.

D. Broadcast of Illegally Seized Information

The hardest questions in this area arise at the intersection of two rights. Thus, in cases where individuals trespass or eavesdrop for their own titillation, it becomes very difficult to assert any public interest in their conduct. The matter becomes much more vexed whenever the acquired information is then published to the world at large. To make the case most vivid, assume for the moment that the methods of collection involve a trespass (or some invasion of privacy that is for these purposes akin to a trespass). The critical question is whether the ends justify the means: does the public release of true information justify the trespass? No one holds that it does where the news gathering has caused physical damage to property. Yet losses of this sort are trivial in most cases. The nub of the issue is whether the individual owner of the property is entitled to

²² *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128-1129 (9th Cir. 1975). Once again we see the same pattern that we saw in the nuisance cases. When the Supreme Court cares about constitutional doctrine, it migrates back to the common law baselines. In *Virgil*, the court announced that the provisions contained in the Restatement (Second) of Torts, §§ 652A-E that outline. For an early recognition of the privilege, see *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940) (adopted in Restatement (Second) of Torts, § 652D, illus. 19).

²³ *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975) (acquiesced in Restatement (Second) Torts § 652D, comment *d*, and illus. 12).

²⁴ *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. App. 1984).

²⁵ For one early attempt at this, see 297 P. 91, 93 (Cal. App. 1931) (explicitly recognizing “the right to pursue and obtain safety and happiness without improper infringements thereon by others.”).

damages that compensate, not only for any physical entry or property damage, but also for the consequential losses that follow from the publication of the information.

The legal response to this question has been divided, but the clear movement has been toward a greater recognition of a newsworthiness privilege even in trespass cases. The first judicial foray into this area was in *Dietemann v. Time, Inc.*²⁶ In that case, the *Time*'s investigative reporters were in league with the local district attorney, and posed as patients for the plaintiff's quack medical treatment, which involved putting his hand on the breast of the *Time*'s female reporter. Publication of this bit of investigation netted the plaintiff \$1,000 in damages, as Judge Hufstедler took the hard line that nothing in the First Amendment either excused or justified the trespasses that had taken place. The simplest way to think of the issue is to ask whether or not the plaintiff could have enjoined the activities of the defendant's reporters if he had known of their true intentions. Given the right to exclude, it seems clear that he could. That protection does not insure him immunity against any public revelations of the information if obtained by other means. No doubt, the police could obtain an appropriate search warrant if his conduct was illegal under some local law. It also seems clear that individual patients who enter for ordinary treatment are entitled to report about their treatment to others, including reporters, unless, perhaps, they sign some form of confidentiality agreement as a condition for treatment—a red flag that would send most customers scampering off quickly in the opposite direction.

In this case, the use of photographic equipment seems to extend beyond the implied license that most individuals extend for the use of their property in those cases where they have the right to exclude.²⁷ As that is the case, why should the defendants be allowed to gain the benefit of their broadcast simply because their deception was successful? One possibility is to tie the damages awarded to a restitution theory, so that the defendant has to disgorge all the profits that it obtained from the exercise. That remedy has the modest advantage of removing any incentive to engage in the wrong in the first place, on the assumption that a court or jury, after the fact, could tease out the portion of net profits that were attributable to the one article. Yet, in most cases, the restitution measure is available at the election of the plaintiff in cases in which the defendant's gains from using the plaintiff's property exceed the plaintiff's losses from

²⁶ 449 F.2d 245 (9th Cir. 1971).

²⁷ Note, in dealing with this issue, I take the position that there is no class of private property that "is affected with the public interest" just because customers have been allowed to enter as a matter of course. That implied license is of course valid until countermanded. But it is not as though it converts the land to some quasi-form of public property. In order for that to take place, some form of a dedication is generally required, which might apply to a public way, but not to a closed office. Obviously the entire civil rights movement is in tension with this view, at least where the denial to entry is done on grounds of race, sex or national origin.

its use.²⁸ But, in the usual case where the damage to the plaintiff exceeds the gains to the defendant, the plaintiff is entitled to insist on ordinary tort damages. In this instance, the plaintiff will urge that the appropriate baseline constitutes the state of affairs before the publication of the dangerous report, which includes whatever peace and solitude that the plaintiff enjoyed. This was clearly the theory on which the plaintiff proceeded in *Dietemann*.

Subsequent cases have taken a dimmer view of this matter, but for reasons that seem far from overpowering. In *Howell v. New York Post*,²⁹ the plaintiff had been institutionalized at a psychiatric hospital with the knowledge of her immediate family, but no one else. The Post sent an investigative reporter, who trespassed on hospital land and used a telephoto lens to take a picture of Hedda Nussbaum (the live-in lover of Joel Steinberg, who had been involved in a terrible killing of six-year-old Lisa Steinberg) rehabilitating with friends. The medical director of the hospital begged the Post not to run the story with plaintiff's picture in it, but was rebuffed. The New York Court held that the Post was within the newsworthiness privilege because the cropped picture would not give the public an accurate impression of the course of Nussbaum's recuperation.

What is one to make of all this? No one questions the right of the Post to publish public information about Hedda Nussbaum. But, ironically, the belated recognition of the privacy interest has actually led to an odd setback in the protection of privacy. Courts have learned the lesson that trespass is not critical to the issue, for indeed this situation would not differ materially if the defendant's reporter had stayed off the grounds only to use a stronger photographic lens, or had taken the picture from public airspace above the hospital. The sensible accommodation is to treat both forms of intrusion as actionable, but the current view gives recourse against neither. Indeed one frightening implication of *Howell* seems to be that if the hospital staff had discovered the intrusion, they could not have prevented him from taking the picture. So much for the right to be left alone.

Another case, somewhat closer to the line, is *Desnick Eyes Services v. ABC*,³⁰ in which Judge Posner refused to award damages for invasion of privacy against ABC Prime Time Live, which sent its reporters to secretly tape the defendant's practice of recommending unnecessary surgery to its patients. The case follows the familiar pattern of allowing parties to publish information that they had no right to obtain in the first place. Here again, the principles of *Dietemann* seem to govern; it hardly makes a difference in principle that one person operated his business out of his home while a second ran his in an ordinary doctor's office. In order to justify the result, Posner offers

²⁸ See, e.g., *Phillips v. Homfay*, 24 Ch. D. 439 (1883).

²⁹ 612 N.E.2d 699 (N.Y. 1993).

³⁰ 44 F3d 1345 (7th Cir 1995).

a set of examples to show that fraud is sometimes acceptable in ordinary affairs. Thus, he notes that it is a common practice for restaurant reviewers to conceal their identity from the proprietors of the restaurants they review. If the restaurants were called in advance, and told that *Chicago Magazine* would only run anonymous reviews, I have no doubt that the restaurant would accept that condition. The negative inferences that are drawn from exclusion are devastating, and a positive review that had been planted by the restaurant itself would be dismissed with contempt by readers—think only of the fierce customer reaction to Amazon.com’s bright idea of taking a handsome fee for allowing publishers, unbeknownst to customers, to run favorable reviews of their own works. Customers demand and receive a bold set of assurances that the line between reviews and advertisements is scrupulously observed. So the secret restaurant critic, who publishes an unbiased report, will receive a very different reception from the investigative crew that will publish dirt if it finds it, and kill the story if it does not.

Posner’s second comparison involves dinner guests who conceal their true opinion about their hosts’ dinner party. Yet, we all engage in some white lies in order to ease social interactions and to avoid unnecessary embarrassment and pain. These social conventions are not observed in order to cast public aspersions on the host; nor would it be considered good form to broadcast an honest critique of a private dinner party. The point here is not that we have an instance of fraud, but that we have fraud whose motivation is not to berate the target, not to make him part with his money, but to smooth over interactions in the long haul. There is no anticipated harm from these white lies.

The reason the matter takes on such difficulty is that the case looks like one in which the protection of private interests is pitted against the concerns of the public at large. In this regard, cases of this sort are quite different from the ordinary defamation case. In this situation, the publication of *false* information is harm not only to the person who is defamed, but also to the public at large who hears the defamation and becomes less informed in consequence. The modern view is to recognize a qualified privilege that can only be overridden by proof of actual malice (which, for these purposes, constitutes statements known to be false or made in reckless disregard as to whether they are true or false).³¹ The privilege is subject to attack on the ground that public debate is not enhanced by the dissemination of false information which a media defendant, even if grossly negligent, has no duty even to correct. In the privacy cases, however, the information is true by assumption, so the inquiry comes down to this: is the asserted public gain sufficient to offset the loss sustained by the deliberate violation of private rights brought about by fraudulent entry?

Making these judgments is tricky, because they cannot be vindicated in any obvious sense by the implicit-in-kind logic that animates the takings exception to the general

³¹ The key case on this point is still *New York Times v. Sullivan*, 376 U.S. 254 (1964).

libertarian norms against the use of force and fraud. We have to assume that in the particular instance one party suffers large uncompensated losses for the benefit of others. That objection is met in part if a general rule announced in advance places all parties on notice of the basic principle, so that all institutions are benefited and burdened equally. At this point, the question is how to net out gains and losses. That question is genuinely close. One point is that the publication of this information is not the only way for the press to investigate possible business irregularities, as by interviews with former customers. These investigations may be undertaken by public authorities with licensing power, or by private individuals who believe that they have been bilked out of money. Indeed, any absence of individual complaints is some evidence that the problem might not be as great as the public broadcast suggests.

This last observation leads to the larger point. What is truth anyhow? Unlike the restaurant critic, investigative reporters publish by design only negative material. And often they package it in suggestive ways. Thus, suppose that reporters are tipped that the cleanliness at one XYZ restaurant is well below the average level of the chain. Investigative reporters then catch accurate footage of rats and roaches on one of ten visits to that restaurant. They do not call health inspectors and no citations are issued; no customers report any ill effects. A publication that says that XYZ has rats in its restaurants is true in a sense. But it creates the systematically false impression that the condition in the worst restaurant represents the average quality of the chain. The question is: does particular instance count as the truth when the party who runs the story knows that it has not been duplicated in other situations? Matters are even worse if the broadcaster also knows that the rate of health violations in XYZ's competitors is the same as it is for XYZ. My own (minority) view is that the law of defamation should require, if it does not, that the defendant speak the truth, the whole truth, and nothing but the truth. If it knows that its viewers will draw systematically misleading information from the published stories, then it should be treated as telling false stories. Clearly, lines have to be drawn, but the defendant should have the burden of showing that a story that is true in isolation is not false in context. That standard is not impossible, for it is applied to the incomplete statements that are made in any securities prospectus.

Nonetheless, this approach does not appear to be the law today, given the scope of the newsworthiness privilege and the unwillingness of courts to weigh what is said against what has happened. As that is the case, we can no longer assume that these cases of investigative revelation pit a positive externality to the world against the negative aspects of the trespass as between the parties. Now this statement of "truth" has both negative and positive aspects, and the former could easily outweigh the latter. At that point, the case for the general rule on overall social grounds becomes far weaker. For myself, I think that on balance the view in *Dietemann*—that the publication of truthful information is a fair shot for private damages—is troubled, but correct.

IV. Contract and Privacy

The issue of privacy must also be understood in relationship to the law of contract. Here the initial point of departure is that individuals by agreement can regulate the use of information that they share with each other. The common law rules on trade secrets, for example, take the position that individuals are allowed to keep quiet by contract such matters as formulas and trade lists.³² The right to keep this information quiet means that the paradigmatic wrong is the disclosure of the information to the public at large or to competitors, because with disclosure comes the loss of the competitive advantage that trade secrets normally secure.

It would be, however, a major mistake to assume that trade secrets are the only kinds of information that parties are allowed to keep private. The ordinary interaction between patient and physician involves the transfer of sensitive information about the patient's condition to the physician, normally under a guarantee of confidentiality. That confidentiality is breached by *truthful* disclosures to third persons who are not authorized to receive the information in question. The clear upshot of the situation is that the scope of the duty of confidentiality is determined by contract, and that the duty normally follows the information into the hands of third parties. Researchers who receive information about individual patients are thus required to respect any personal confidences and anonymity in the publication of their overall reports. It follows, therefore, that the law of contract operates much like the law of trespass. Although its primary objective is to secure the exchange of property and labor between persons, it can easily be extended to protect the transfer of information in both personal and business contexts.

Much of the modern concern with the right to privacy arises in the context of these consensual situations. Information is easily divisible and reproducible; unlike land, it can be given away on the one hand and retained on the other. Its transmission can be welcomed for some purposes and feared for others. Only a strong system of internal controls can ensure that information is used for some purposes and not for others. Only a reliable system of contracts can devise the permissible splits: a law firm may use sensitive financial information to determine how to defend the corporation from a takeover bid, but not to allow its partners trade in shares of the client for its own account.

At this point, privacy once again fits snugly within the framework of classical liberal virtues. Yet, some of the most controversial applications of the principle today show how claims of privacy cut strongly in the opposite direction. In dealing with privacy in the tort context, I indicated that any protection of privacy always raised the

³² *Ruckelshaus v. Monsanto, Inc.*, 467 U.S. 986, 1001 (1984), which relied on the definition of trade secrets in RT § 757. The case offers (in addition to the definition of nuisance, and the scope of the privacy interest) a third instance where Restatement definitions end up doing double duty as constitutional norms.

risk of fraud, and I tried to indicate the reasons why this form of fraud could be justified as a way to ward off media investigators and ordinary voyeurs. The situation becomes, however, quite different when claims of privacy are invoked not to support, but to override the principle of freedom of contract. Common illustrations of this come from many sources. A job applicant may have had a criminal record or may suffer from a serious medical condition. An employer might wish to know about these things in order to decide whether to give an offer or not. The general rule of freedom of contract says that, in competitive markets at least, a person may refuse to deal for good reason, for bad reason, or for no reason at all. The point of this rule is not to celebrate irrational behavior, but to avoid the morass that arises in both the factual and legal questions that come in deciding which refusals to deal are “for good cause” and which are not.

In monopoly-type situations, a duty not to discriminate is introduced as a counterweight to monopoly power.³³ Yet most labor markets are highly competitive, so the original preference for freedom of contract holds on the ground that the asserted irrationality of one party is best countered by taking one’s business to another. It is a commonplace feature of modern life to regard this limitation on firm power as insufficient in a number of contexts. With respect to juvenile criminal records, it is said that the information should be concealed in order to encourage past wrongdoers to get a fresh start on a clean slate. The fear is that former offenders will not be able to gain jobs if dogged by their criminal record, thereby nipping any rehabilitation in the bud.

The argument has some power as far as it goes, but it does not go far enough. The object of a system of criminal sanctions is to minimize the number of violations, cost of prevention held constant. The efforts to protect rehabilitation may improve efforts at rehabilitation, conditional on the performance of criminal conduct—which operates to the good. But by the same token, the rule in question reduces the cost of the initial crime by lessening the social sting of a criminal conviction. The overall empirical argument depends on the relative strength of these two effects (before and after the initial incident), a proposition on which it is hard, to say the least, to obtain reliable empirical evidence.

There is, however, a second feature within the practice of expunging criminal records that is more germane in this context. The information in question is surely material to the decision of any prospective employer. Past criminal conduct is correlated with the possibility of future criminal conduct. The hiring in question could easily result in increased exposure to theft or personal violence for the employer and other employees, for which civil and criminal sanctions after the fact are at best imperfect. The state-sanctioned concealment of this information thus works a material fraud on the employer for which the state offers no compensation should matters turn out awry. No longer are we dealing with the amiable white lies that people use to keep their

³³ For a longer discussion, see Richard A. Epstein, *Principles for a Free Society*, ch. 10 (1998).

indigestion secret from their friends. The object of the concealment is not defensive; it is not to be left alone. It is to give a false impression to gain an advantage which exposes the person and property of other persons to substantial risk. Context matters. When someone conceals illness to avoid a social embarrassment, little is lost. When he does so in order to obtain employment for which he is unfit, the resulting consequences could prove enormous.

My own view in these cases remains that of the unrepentant libertarian. The employer can ask any question of the employee that she wants. The employee may refuse to supply whatever information is demanded. In the end, the two can decide whether the information is more valuable when kept private or when shared. In many cases, the personal life of an employee will be regarded as something to which the employer has no right. If so, it will not be because of some high first principle, but because of the joint recognition that the information is worth less to the employer than its concealment is to the employee. Let the employee receive comprehensive benefits from the employer, such as health care, and the calculus may well shift radically: now it does matter whether the employer drinks, smokes, or exercises on a regular basis. If that information is relevant to an insurer in setting a risk, then it is relevant to the employer who has to foot the bill for the long-term health plan. The key point here is that there is no independent public-regarding view of what counts as relevant information for an employer. Even on such matters as intimate sexual practices, an employer could ask if he cares, for example, about the risk of AIDS. In most cases, however, it would be suicidal to do so because the balance of advantage is seen to lie elsewhere. But we should not confuse a social regularity with some hovering social standard of privacy. Whatever regularities are observed in practice should not conceal the point that in each individual case we have only the exercise of the joint judgment of the contracting parties.

This position is, however, in massive disrepute today in large numbers of contexts.³⁴ The entire structure of the Americans with Disabilities Act works on the premise that handicap discrimination is inappropriate in employment relationships. That position is not enforceable if the employer is allowed to take sensitive medical information into account in deciding whether to hire individual workers or in deciding whether or not to include them in the firm's health plan.³⁵ An overwhelming sense of

³⁴ Paul R. Billings, Mel A. Kohn, Margaret de Cuevas, Jonathan Beckwith, *Discrimination as a Consequence of Genetic Testing*, 50 AM. J. OF HUM. GENETICS 476, 476 (1992). See also, Joseph S. Alper & Marvin R. Natowicz, *Discrimination as a Consequence of Genetic Testing*, 50 AM. J. HUM. GENETICS 465 (1992); and Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, AM. J. OF LAW & MED. 109 (1991).

³⁵ I discuss the question at far greater length in Richard A. Epstein, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE, chapters 5 and 6 (1997). See also, Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 BOSTON U. L. REV. 1 (1994).

opinion erects an employee right of privacy with respect to this information, so that strong civil and criminal sanctions are brought to bear against any employer (and in some settings, any insurer) who seeks to uncover the risk and price accordingly.³⁶ Further proposals are afoot, for example, to make it impermissible to require the release of any sensitive information that employees might have about genetic predispositions to certain conditions, be it Huntington's Disease or breast cancer.³⁷

The implicit logic of this position reverses the classical rules of insurance contracting, which imposed on the insured a duty to disclose any risk or condition that might affect the insurers risk.³⁸ The net effect of the new rules is to force employers and low risk coworkers to undertake the high risk of certain employees, for which they receive no compensation at all. The practice will obviously encourage spirited efforts to tailor coverage in ways that minimizes the risk, even if it means abandoning or reducing coverage to other employees whom the firm is willing to insure. In this context, there is at least the glimmer of a respectable compromise, which has the benefit of transparency appropriate for deliberative democracies. The level of subsidy required is the difference between the price that the market charges for covering disabled persons and its ordinary rates. Nothing prevents those costs from being placed on-budget, where they can be covered in full or in part, depending on the preferences of the community as a whole. Yet this approach has public costs, so the preferred solution is to create rights which limit contractual freedom and require the creation of hidden subsidies that are

³⁶ See, e.g., Maine R.S. § 5011A, "Rates for policies subject to this subsection may not vary based on age, gender, health status, claims experience, policy duration, industry or occupation."

³⁷ For recommendations on breast cancer, see, e.g., Barbara A. Koenig, et al, Genetic Testing fro BRCA1 and BRCA2: Recommendations of the Stanford Program in Genomics, Ethics, and Society, 7 J. Women's Health 531, 542 (1998): "Privacy legislation must be strengthened as one part of a strategy to limit genetic discrimination. Employers and insurers should be prevented from making decisions based on genetic information by putting health professionals and others who have access to the information under an obligation not to disclose it."

The recommendation comes after this description of the sad state of medical services: "In addition, genetic services are delivered within a social context described by King as shaped by 'a paternalistic medical establishment, an opportunistic biotechnology industry and a malevolent insurance industry.'" It is nice to be among friends. The reality? The most recent New York Times story on the Managed Care syndrome notes that its efforts at cost-containment have lagged because of their utter inability to enforce any of the planned restrictions on coverage. See Michael M. Weinstein, Managed Care's Other Problem: It's Not What You Think, New York Times, February 28, 1999, section 4, at 1: "Rarely a week goes by with a health maintenance organization getting hammered in the press or in court for denying payment for the care of a gravely ill patient." But the diagnosis of the key problem? "That problem is too many medical treatments rather than too few."

³⁸ *Lindenau v. Desborough*, 108 Eng. Rep. 1160 (C.P. 1828). See also, Lord Mansfield's earlier opinion in *Carter v. Boehm*, 97 Eng. Rep. 1162 (1766). For a statutory recognition of the duty, see Marine Insurance Act, 1906, s. 18(1).

borne by some but not all firms in the larger economic environment. Karl Llewellyn once said that “covert tools are bad tools.” That condition applies in this case.

V. Conclusion

Privacy today is one of our most newsworthy topics, but it suffers from regrettable overuse. Sometimes claims of privacy are invoked in order to keep people apart, and thus recognize and enforce our right to be left alone. Even within this broad category, it is necessary to distinguish between cases. Snooping and prying are the most obvious candidate for legal and social sanctions. At the other extreme, claims of privacy should fall flat when invoked to immunize individuals from comment and criticism. In between lie difficult cases in which people try to preserve some semblance of privacy in public places, or to deal with the wide-scale dissemination of information acquired by illegal means but of great value to the public at large. On the other side, a very different type of privacy claim often arises in connection with various forms of consensual transactions. In this context, it is again necessary to make one critical distinction between privacy claims that grow out of contract, such as those arising in confidential arrangements, and privacy claims that are raised in opposition to contract, such as those arising out of the operation of antidiscrimination laws.

In my view, the treatment of these two types of claims should be determined by our general attitude toward contracts in general. For someone who starts with a market-oriented, classical liberal perspective, these claims should be respected when created by contract, but emphatically rejected when invoked to limit the freedom of exchange of information between trading partners. In the end, the debate over the use and limitations of the privacy concept folds back into the larger ongoing debate over the use and limits of government power. The deconstruction of privacy depends on our ability to isolate the individual pieces of the puzzle for separate examination and review. The successful reconstruction of privacy is not something beyond our capacity, but depends on linking the analysis of privacy to more general theories of rights and duties, both legal and social.

This paper was prepared for a Conference on Privacy Sponsored by the Social Philosophy and Policy Center of Bowling Green University, held at the Stanford Park Hotel, April 23 to April 25, 1999. All rights reserved. Readers with comments should address them to:

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