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 writing to insist that progress in some given area of law or political theory is hampered by hopeless confusion over the meaning of certain standard terms. My usual attitude toward such claims is one of passionate rejection. Because the English language has served us well for such a long period of time, I bring a strong presumption of distrust to any claim of the conceptual poverty of ordinary language. The persistent fears of lack of understanding are in general refuted 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 test cases carefully crafted to embarrass any general theory. But it is equally important to note the low payoff that attaches to the learned use of bizarre cases to confound general theories. Novel cases, almost by definition, occur infrequently in everyday life, so routine business can proceed apace without diversion or delay as the established rules yield clear outcomes in the large bulk of actual cases. Yet these routine cases are often neglected because litigation and philosophical discourse have at least this in common: they tend to focus on marginal cases whose intellectual difficulty exceeds their practical importance. Typically these cases can be decided either way, without upsetting the basic fabric of ordinary discourse.

Learned attacks on language, however, tend to go even deeper. It is often said that when we deconstruct language we unlock to our sorrow pervasive confusion that prevents us from working through the simplest of cases. At this point, however, the agenda is no longer politically neutral, as the terms singled out for attack are usually the staples of traditional legal discourse. Discrediting these terms counts as a conceptual victory over the critical components of the traditional legal order.

A couple of examples make the point clear. The frequent attacks on the central precepts of the law of tort, with its associated notions of individual responsibility, often begin with the observation that its core concept of causation defies rational explication. The issue arises with one of the central debates in the law of torts—that over the proper standard of

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liability in ordinary accident cases.[1] A strict liability standard holds a party liable for harm he caused even if he acted with all possible care and meant no harm to the injured party. The negligence standard requires the injured party to show in cases of accidental harm that the defendant could have avoided the harm he caused by acting with reasonable care. In *The Common Law* (1881), Oliver Wendell Holmes attacked the strict liability rule on the ground that causation was too malleable a concept to impose any limits to a defendant's potential liability; with his usual rhetorical flourish, he wrote: "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] Holmes then claimed that by switching to a negligence system—where the foresight of the reasonable man could prevent the imposition of unlimited liability—that unappetizing result could be avoided. But he never examined any of the easy cases under strict liability, where the subsequent action of a third party breaks any causal connection between the defendant's action and the plaintiff's harm.[3]

Nor did this situation prove stable. What Holmes did to strict liability, the next generation did to the "reasonable foresight" test of negligence, whose own ambiguity in turn was used to justify resort to workers' compensation. Once again, it was easy to point out the linguistic confusions in the ongoing tort system without realizing that any newly minted substitute would be subject to similar objections. The basic test for liability under workers' compensation asks whether the employee's accident is one that "arises out of and in the course of employment." The test looks simple, but it also gives rise to its share of hard questions of coverage: should an employer be liable when a worker is stung by a bee on the premises, is engaged in horseplay, is injured while staying in a hotel on a business trip, or is stealing the employer's materials? The number of disputed cases is enormous, but the lesson is clear.[4] No matter what the direction of a proposed legal reform, marginal cases arise under every system.

The same claim of conceptual disarray has been used in constitutional discourse to undermine the system of property rights. The U.S. constitutional guarantees of liberty and property are stated in categorical terms in both the contracts and takings clauses of the U.S. Constitution. These clauses state, respectively, that "no state shall . . . pass . . . any law im-

[1] For discussion, see Richard A. Epstein, *Torts* (Boston: Aspen Law & Business, 1999), chaps. 2 and 3.

[2] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown & Co., 1881), 95.

[3] Even under strict liability, 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 debris to flood a downstairs neighbor. See, e.g., *Rickards v. Lothian*, [1913] App. Cas. 263.

[4] See Arthur Larson, *The Law of Workmen's Compensation* (New York: Matthew Bender & Co., various dates).

pairing the obligation of contracts";[5] "nor shall private property be taken for public use without just compensation."[6] Yet in the relevant case law these basic guarantees are hemmed in by an acceptance of the state "police power," which allows for regulation to preserve (at the very least) "the safety, health and morals" of the public at large. These conventional accounts of the police power allow the state to enjoin without compensation the commission of a nuisance on public or private property. But in the first of the great zoning cases, *Euclid v. Ambler Realty Co.* (1926),[7] Justice Sutherland stretched the idea of a "nuisance" to cover the use of an ordinary apartment house in a residential area, so as to provide a margin of comfort for large single family homes nestled behind white picket fences. Put the term "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 Council* (1992),[8] that looked to the *Restatement (Second) of Torts* to establish some definition of nuisance that predated legislative initiatives to extend the scope of land use control. Common law principles, thus, had their rebirth as constitutional doctrine.

In contrast, there are no similar conceptual deficits 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 that we have witnessed in the area of property rights. Now, in the context of defamation cases, the Supreme Court can speak about our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . ."[9] There is no skepticism here. Not surprisingly, the idea of a public nuisance has been confined to its common law boundaries in this setting.[10] The more that courts and scholars care about a subject, the more confident they are about its conceptual foundations.

The question that I wish to address is whether the law of privacy is also marked by dubious 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,

[5] U.S. Constitution, art. 1, sec. 10.
[6] U.S. Constitution, amend. 5.
[7] *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926). Sutherland gives a set of reasons why apartment houses could be "parasite[s]" on the community, and concludes: "Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."
[8] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* struck down a state law that prohibited the owners of beachfront lots in hurricane-sensitive areas from building any structure at all. The case involved a so-called "regulatory taking," because the landowner was able to claim compensation for the loss in use value of the property even though the state did not actually occupy the land.
[9] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
[10] *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

decidedly mixed. There is little question that *some* right of privacy forms an essential component of the classical liberal order. By the same token, the idea of privacy has been invoked to support a large number of other asserted rights that are in evident tension with the classical liberal view. For example, the right of privacy has been used to insist that individuals have a basic entitlement to keep private their own medical records from the prying eyes of employers and insurers. But it is not explained why this privacy right cannot be waived by contract. The right of privacy has also been invoked to justify the right of a woman to abort a pregnancy prior to term.[11] Yet it is not explained why the fetus does not count as a person who is protected by the general prohibition against the use of force. A more detailed explication of these claims is surely necessary, now that privacy has been subjected to conceptual overload by being pressed into defending such a heterogeneous set of rights.

My modest mission in this essay is to "deconstruct" the term privacy in order to reveal the present confusions in the use of the term. At first appearance, it looks as though I fall into the same skeptical camp as Holmes on torts, and Sutherland (whose politics make him an odd candidate for this position)[12] on zoning and private property. In this context, however, appearances are deceiving. My deconstruction of the multiple uses of privacy has a happy ending. Rightly understood, we can see light at the end of this conceptual tunnel. Some claims of privacy make perfectly good sense, even if others are profoundly misguided. In my view, deconstruction is not part of some occult literary theory of interpretation. It is just a matter of systematic disaggregation of disparate issues lumped together under a single term. In some contexts, privacy works hand-in-hand with the classical liberal conceptions of individual rights and responsibilities, but in other cases privacy claims are at war with these conceptions. Deconstruction of the term is a way-station toward its conceptual reconstruction, both for ordinary discourse and the hardier 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

[11] See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

[12] For a more detailed examination of his life, see Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton, NJ: Princeton University Press, 1994). Sutherland was one of the conservative justices of the Supreme Court who resisted the encroachments of the New Deal. But he had a soft spot for zoning, which also imposes serious limitations on property rights. Arkes discusses *Euclid* only briefly (ibid., 70–71) as a sound embodiment of the police power. He does not note that the decision involved the deployment of a single 68-acre plot of land, which gave rise to none of Sutherland's concerns about the safety of children, the control of vehicular traffic, and the like.

variations on 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: the elimination of (most forms) of discrimination not only in government affairs but also in ordinary market transactions between private individuals (as opposed to, say, the regulation of intimate personal affairs), and an extensive system of subsidies and restraints that allow for massive government redistribution of income or wealth from some groups to others. It is not as though this theory only allows for redistribution based on need, although that is surely the most justifiable case. More generally, the theory allows the political branches of government to decide who should subsidize whom: working-class families could be required to subsidize Medicare recipients; impoverished urban residents could be required 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.[13] Briefly summarized, the rules run as follows.

(1) 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.

(2) The rule of first possession offers a relatively inexpensive means to link individual persons with external things. It allows individuals to assert ownership claims over previously unowned things, so that they can be used, consumed, developed, or traded in accordance with the fancy of their respective owners. It is not as though all resources should be removed from 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.

(3) The protection of contract, or voluntary exchange, allows the transfer of services (ensured to 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 to reduce the transaction

[13] Richard A. Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard University Press, 1995).

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, these externalities are more positive than 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.

(4) The law of tort prevents involuntary transfers of labor and property by the use of force and fraud. These unilateral transfers always impose losses on one side. Where these losses exceed the gains to the winners, the transactions should be stopped altogether. Where the gains to the winner exceed the losses to the other side, usually a voluntary transaction can be arranged to secure the same result. Either way, there is a presumptive case for voluntary over coerced exchanges.

(5) This presumption against forced exchanges may be overcome in cases of necessity,[14] where the law creates a privilege to individuals stranded at sea, in peril of their lives, to use the property of others without their consent, conditional on payment for harm done. This privilege is hedged in by sharp limitations so that one cannot simply decide to use a neighbor's bicycle because it is too hot to walk, or 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.

(6) The sixth rule, governing takings of private property for public use, is, in a sense, a generalization of the necessity rule that allows for the production and funding of a variety of public goods. Ordinary market transactions require the consent of buyer and seller, and these work best in a regime where each participant has multiple choices of trading partners. In contrast, the creation of a system of highways requires the unanimous consent of a large number of individuals, so that one holdout can doom the common scheme. A forced purchase for compensation could overcome that holdout problem.

Cash compensation, in contrast, is not needed within a general system of reciprocal regulation. In this context, the in-kind benefits generated by regulation serve as a compensation for the state-imposed restrictions. The law prohibits me and my neighbors from building within five feet of the boundary line. Each of us gains on net from this parallel set of restrictions, just as we would all lose if the setback requirements were fifty feet. But so long as all members of the community are equally situated, it is un-

[14] For discussion, see Epstein, *Torts*, 60–65.

likely that they would all vote to adopt schemes that worked against their individual interests. But in many cases the distribution of burdens and benefits is not so neatly correlated. Frequently, one segment of the community seeks to use its political power to gain at the expense of another. Abstractly conceived, therefore, it is not possible to assume that any system of comprehensive regulation supplies all regulated parties with the necessary compensation. In too many cases, a formally neutral system of state regulation 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 a single lot is far more likely to pass muster than a prohibition on new construction within the subdivision when all lots but one have been fully developed. The lone outsider is now forced to supply open space for his neighbors, even when he is left in possession of his land. The takings rule is meant to facilitate the orderly movement from less to more desirable social states whenever high transaction costs block voluntary movement in that direction. 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. Tort and Privacy

It is important to see how this six-part framework applies 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 do the rules governing property rights in land. For land, it is generally clear when one person has crossed the boundary that separates his property from another. The definition and identification of the appropriate boundaries is never as clear in disputes over privacy. Yet, even accepting these 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, which I will examine in this section, deals with interactions between strangers, and situates the subject of privacy as a province of the law of tort. The second, which I shall discuss in Section IV, deals with the protection, if any, given to privacy in consensual arrangements between parties; this protection is a species of contract law.

A. Tort law and privacy rules

Our traditional legal system offers extensive protection to privacy interests even where they 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 exclusive

right of possession works in a sensible way to limit the intrusions that other individuals are able to make into one'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 erect walls that keep other people out; 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.[15] The defendant's fraud vitiated the 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 protection of the privacy interest is "parasitic" on the commonplace tort of trespass, whose origins lie in the desire to protect individuals from 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 the rights of owners are subject to erosion when determined individuals seek to finesse the classical forms of protection. In a sense, the issue dates back to Blackstone in the eighteenth century, for the question often arose as to what sort of protection, if any, a landowner had from someone who eavesdropped on the conversations inside his house.[16] 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 definition, however, skirts the trespass question by eschewing the literal definition—that is, a person who drops from the eaves—and, instead, moves smartly to a definition that implicates the modern definition of privacy: "To listen, or try to listen, secretly, as to a private conversation."[17] 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. The

[15] *DeMay v. Roberts*, 9 N.W. 146, 149 (Mich. 1881).

[16] "*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." William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), 4:169.

[17] *Funk & Wagnalls New Comprehensive International Dictionary of the English Language*, s.v. "eavesdrop."

"Eavesdrop: to stand within the 'wavesdrop' of a house in order to listen to secrets; hence, to listen secretly to private conversation. Also trans. To listen secretly to (conversation); formerly also, to listen within the 'eavesdrop' of (a house); to listen to the secrets of (a person)." *Oxford New English Dictionary*, s.v. "eavesdrop."

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 that 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 last ounce of reciprocal net 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 it has not.

The 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 against that unhappy outcome from another quarter, by looking to the analogous voluntary arrangements that govern the same issue. Thus we may ask whether a condominium association would pass some general rule to stop eavesdropping should it become a common practice. Or we can note, right now, the strong social custom that makes it inappropriate for individuals at one table in a restaurant to seek to overhear private conversations (the use of the phrase is suggestive) at another. The norm allows the removal of partitions that might otherwise be required and a reduced separation between tables, thereby lowering the cost of basic service. No one claims that this norm is perfect in all regards. One would not discuss highly confidential information about a desirable chemical formula nor announce the combination to a safe in a crowded restaurant, given the obvious risks. But we have, at the very least, a social norm that seems to improve 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 social recognition of the privacy interest.

This norm gives us a window into the general constitutional prohibition against unreasonable searches and seizures.[18] A quick inspection of the text of the Fourth Amendment shows how powerfully "thing-oriented" it is in its basic conception: "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." Both the global protection against unreasonable searches and seizures and the more particular protection of the warrant clause are 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 response would be 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 neither the question of reasonableness nor of warrants would arise at all. Yet this position could not be sustained in the long run, for the same transformation as in the private law of trespass took place in the public sphere as well. As a good rule of thumb, the principle of limited government should caution us against the creation of a "second set of books"—against, that is, giving ordinary terms special meanings—in developing on an ad hoc basis the relationship between the individual and the state. The possibility of slippage with the creation of ad hoc rules could usher in an era of serious abuse. That is one lesson learned from the elastic rendition of the police power.[19] Only when linked to the common law conception of nuisance does the police power offer a viable sense of what acts the government may enjoin without compensation. Unmoored from its private law background, just about anything can be deemed a nuisance, so that government supremacy in land planning is secured by what amounts to a play on words.[20]

In this privacy setting, we face exactly the same situation; the last of our simple rules has been extended in the private sphere to prevent 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

[18] U.S. Constitution, amend. 4.

[19] For recent Supreme Court expositions, see *Lucas* and *Dolan v. City of Tigard*, 512 U.S. 574 (1994).

[20] For discussion, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), chaps. 9 and 10.