

DEFENDING THE THIRD-PARTY DOCTRINE: A RESPONSE TO EPSTEIN AND MURPHY

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In a recent article, *The Case for the Third-Party Doctrine*,¹ I challenged the consensus view among academic commentators that the third-party doctrine of Fourth Amendment law is a terrible mistake. I argued that the third-party doctrine serves two important functions. First, it furthers technology neutrality by correcting the substitution effects of third parties; second, it ensures the ex ante clarity of Fourth Amendment rules. I also argued that the primary criticisms of the doctrine are significantly weaker than critics have alleged. In particular, I noted that substitutes for Fourth Amendment protection already exist that address the concern that the doctrine provides too much power to the government. As I noted in my article, my aim was not to defend the third-party doctrine in every possible application. Rather, my goal was “to replace the partial view of the third-party doctrine found in existing scholarship with a richer and more balanced account of its costs and benefits.”²

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[†] Professor, George Washington University Law School. Thanks to Richard Epstein and Erin Murphy for their interesting and thought-provoking essays. Thanks to Paul Schwartz for convening the event that made them possible. And thanks to the editors of the BTLJ for allowing me to publish my response in the Journal.

1. Orin S. Kerr, *The Case for Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

2. *Id.* at 566.

In contributions published in this issue, my friends Richard Epstein and Erin Murphy have offered us their own thoughts on the third-party doctrine.³ Epstein brings the perspective of an outsider to Fourth Amendment law, and Murphy brings her perspective as an accomplished defense attorney. Each of their articles is at least in part a response to my article, and in this brief essay I am delighted to offer my thoughts in reply. On the whole, I find myself agreeing with much of Epstein's framework. Our differences are more a result of our different assumptions than of different analysis. On the other hand, I have a fundamental disagreement with Murphy's approach. Despite her welcome efforts to persuade me to change course, I find myself sticking to my position in the face of her critique.

I will start with a reaction to Richard Epstein's article, and then offer a few responses to Erin Murphy's.

I. A RESPONSE TO PROFESSOR EPSTEIN

Richard Epstein and I are not as far apart on the third-party doctrine as he may think. My sense is that we differ mostly on our assumptions. First, Epstein derives from first principles what I take from more traditional legal sources. Second, Epstein assumes that he is not bound by the all-or-nothing framework of existing law, by which government conduct either is not a search or is a search that requires probable cause and a warrant.⁴ In contrast, my defense of the third-party doctrine takes this foundational aspect of Fourth Amendment law as a given.

A. HOW MUCH DO EPSTEIN'S FIRST PRINCIPLES ADD?

Epstein uses a remarkable range of different legal sources to derive from first principles a new methodology for the meaning of "reasonable expectations." Relying on insights from libertarian political theory, the common law of torts, and Fifth Amendment takings law, Epstein concludes that the question of "reasonable expectations" requires a cost-benefit analysis.⁵ Specifically, the goal should be to "find[] that set of rules, which when laid down generally, produces the best mix of privacy and security that is obtainable in light of the limited knowledge that we have" and the fact that some suspects will be innocent and others guilty.⁶

3. Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199 (2009); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239 (2009).

4. Epstein, *supra* note 3, at 1211.

5. *Id.* at 1202.

6. *Id.*

I wonder, though, what has this first-principles rethinking actually added? It seems to me that Epstein's formula largely replicates existing doctrine. Consider *Hudson v. Palmer*, a case that considered whether a prison inmate has a reasonable expectation of privacy in his prison cell.⁷ The Court stated that the expectation of privacy analysis "necessarily entails a balancing of interests," in this case a balance between "the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell."⁸ The Court's opinion balanced these two competing interests and concluded that the balance favored security: inmates do not have a reasonable expectation of privacy in their cell because "recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions."⁹

Hudson's analytical framework seems to match Epstein's theory without incorporating his first principles rethinking into the meaning of "reasonable expectations." To be sure, the Supreme Court has not always been clear about the normative framework triggered by the reasonable expectations framework; I have argued elsewhere that institutional limitations on lower court decision-making have made the consistent recognition of such a normative framework unworkable.¹⁰ At the same time, it seems to me that the driving force behind the existing doctrine is the same normative inquiry that Epstein identifies.

I have a somewhat similar reaction to the second part of Epstein's Article, in which he applies his general approach to a few specific cases. As a policy matter, Epstein's approach does not seem particularly new. His balancing is the same basic type of ballpark balancing that occurs frequently in Fourth Amendment law and in the rest of the field of criminal procedure.

Consider Epstein's analysis of how much privacy should extend to remotely stored data on a computer network.¹¹ Epstein argues that a reasonable suspicion standard is appropriate here, but that the law might impose some use restrictions on the disclosure of information.¹² Epstein also argues that the law should allow the government to obtain an ex parte order requiring the third party not to destroy or return the remotely stored documents.¹³ Congress is way ahead of Epstein here: Epstein's view of how to treat remotely stored files was enacted in a 1986 statute, the Stored Communications

7. 468 U.S. 517 (1984).

8. *Id.* at 527.

9. *Id.* at 526.

10. See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 542-49 (2007).

11. Epstein, *supra* note 3.

12. *Id.* at 1224-25.

13. *Id.*

Act (SCA).¹⁴ The SCA uses a mixed threshold for compelling content held by ISPs,¹⁵ contains disclosure restrictions,¹⁶ and includes the authority to issue a letter to the ISP to preserve the documents pending a court order.¹⁷ This longstanding framework seems quite similar to what Epstein imagines.

B. ALL-OR-NOTHING VERSUS FLEXIBILITY

The greatest difference between Epstein and myself are our assumptions about the consequences of applying the third-party doctrine. My argument assumes the standard all-or-nothing options of Fourth Amendment law: if government conduct is a search, then it is a search that ordinarily requires a warrant based on probable cause to be constitutional.¹⁸ Epstein eschews these options in favor of a more flexible Fourth Amendment.¹⁹ In his view, courts should have the option of saying that a search is either a full probable cause search or merely a reasonable suspicion search.²⁰ As a result, he imagines a world in which the issue is not whether to apply the third-party doctrine, but rather what degree of privacy is optimal given the range of tools that can be imagined.

That assumption changes everything, as it means that Epstein ends up answering a very different set of questions. Consider the role of substitution effects. In my article, I argue that the Fourth Amendment corrects for the substitution effects of how individuals use third parties.²¹ The use of the third party allows individuals to replace an outside transaction that is unprotected by the Fourth Amendment with an inside transaction that receives a full warrant protection. This argument largely depends on the all-or-nothing framework of existing law: If the choices are between no protection and full protection, a third-party doctrine that results in no protection is better than an alternative world in which crimes can be protected in their entirety by a full warrant requirement. By assuming away the all-or-nothing framework, Epstein dramatically changes the costs and benefits of the third-party doctrine.

Epstein's assumption also eliminates the institutional choice between constitutional regulation and either statutory or administrative regulation. My defense of the third-party doctrine takes as a baseline the inflexibility of Fourth Amendment law and the flexibility of its alternatives. In this environment, the third-party doctrine enables the flexible non-constitutional al-

14. 18 U.S.C. §§ 2701-11 (2006).

15. 18 U.S.C. § 2701(b).

16. 18 U.S.C. § 2702.

17. 18 U.S.C. § 2703(f).

18. *See* *Katz v. United States*, 389 U.S. 347, 354-56 (1967).

19. Epstein, *supra* note 3, at 1210.

20. *Id.* at 1211.

21. Kerr, *supra* note 1, at 573-81.

ternatives while avoiding the very high social costs of the inflexible protective option of Fourth Amendment law.²² Epstein's response is to envision a flexible Fourth Amendment that eliminates the institutional choice: it presupposes no difference between what constitutional and non-constitutional rules might create. In my view, the institutional choice is too critical to make that step as lightly as Epstein does.²³

II. A RESPONSE TO PROFESSOR MURPHY

Erin Murphy offers a spirited frontal assault on my article. She directly attacks my two central arguments in favor of the doctrine—first, that it counters substitution effects, and second, that it provides *ex ante* clarity.²⁴ I am delighted by the verve of Murphy's critique. At the same time, I do not find myself persuaded by her arguments.

A. DO THE SUBSTITUTION EFFECTS REALLY EXIST?

Murphy begins by questioning whether a substitute effect actually exists.²⁵ She doubts that the substitution effect occurs, or at least how important it is when it does.²⁶ Most criminals do not act rationally, she posits, and few are likely to make a conscious decision to use third parties to avoid detection.²⁷ Further, many crimes must be committed in person, and substitution effects will not appear if no third party is used. Even if there are some kinds of crimes that allow wrongdoers to use third parties to introduce substitution effects, she argues, they do not seem to be so important as to justify a rule designed to block those effects.²⁸

I am not persuaded. First, Murphy mistakenly assumes that the role of substitution effects depends on subjective intent. To be sure, the case for the third-party doctrine is clearest and most dramatic with a defendant who makes a conscious choice to use a third party to evade detection. But the danger of substitution effects does not rely on the point. What matters is how much protection the Fourth Amendment provides given the third par-

22. Kerr, *supra* note 1, at 590-600.

23. I do not mean to wade into the debate of whether in fact the Fourth Amendment would be better if judges had more options than no protection or full protection. Other commentators have analyzed this issue far better than I can here. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). For my purposes, it is enough to note that existing doctrine does not allow it, and that my case for the third-party doctrine presupposes the framework of existing law.

24. Murphy, *supra* note 3, at 1241.

25. *Id.*

26. *Id.*

27. *Id.* at 1242.

28. *Id.* at 1243.

ties that criminals actually use, not whether criminals happen to use third parties because they have calculated that it will help them avoid detection, or because it's convenient, or for some other reason. The reality is that criminals do in fact use the telephone, banks, and other third parties to commit crimes. Their motivations as to *why* are irrelevant to the substitution effect. So long as criminals take steps that replace outside acts with third-party transactions in the course of their crimes, the substitution effect will exist.

Murphy also notes that many crimes are committed without third parties.²⁹ That is true, but I am not sure how it is relevant. The fact that many crimes are not committed using third parties in a world with the third-party doctrine does not show the rule isn't useful, just as the fact that many people commit crimes individually does not show that severe penalties for conspiracy aren't useful. Murphy also notes that it may be difficult or even impossible to commit some crimes using third parties, such as drunk driving.³⁰ But this only suggests that the third-party doctrine is not necessary to maintain technology neutral Fourth Amendment rules for investigations of those particular offenses. Again, I am not sure how that is relevant. In my view, the key question is not whether the third-party doctrine is necessary for the police to investigate every type of crime. The question is whether, on the whole, the rule enables the proper balance between privacy and security given the need for rules that encompass investigations into all different types of crimes.

B. DO THE INNATE DANGERS OF GROUP CRIMES NEGATE THE NEED FOR THE THIRD PARTY DOCTRINE?

My favorite of Murphy's arguments is her assertion that the third-party doctrine is not needed because relying on a third party to commit a crime is already risky.³¹ According to Murphy, "enlisting third-party assistance in crime tends to generate, rather than obfuscate, opportunities to get caught."³² Third parties can rat you out to the cops, and their use can leave a paper trail.³³ As a result, a rational criminal will not rely on third parties regardless of the Fourth Amendment rule.³⁴ The criminals that do rely on third parties are therefore not very rational, and their conduct is unlikely to be impacted by the operative Fourth Amendment rule.³⁵

I think there are three difficulties with this argument. First, as discussed above, the rational actor assumption is largely beside the point. The key ques-

29. *Id.*

30. *Id.*

31. *Id.* at 1244.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

tion is how the third-party doctrine (or its absence) distributes privacy, not how often a wrongdoer makes the conscious decision to use a third party (or refrain from it) to avoid being caught. Second, the risks of involving third parties in crime generally presuppose the existence of the third-party doctrine. Although the use of a third party can create a paper trail, that paper trail matters because the third-party doctrine leaves it unprotected. In a world without the third-party doctrine, the risks of group crimes would be much lower. The now-exposed paper trail presumably would be as protected as secret plans stored in the suspect's sock drawer.

Even assuming the cost-benefit framework that Murphy suggests, I think the cost Murphy identifies tends to be small or even negligible in most of the interesting applications of the third-party doctrine. The cost is high when a wrongdoer seeks a co-conspirator or solicits crime. If A hires B to kill C, A must disclose his criminal plans to B, creating a potential witness against A. At the same time, the most controversial applications of the third-party doctrine do not communicate criminality or seek conspirators. The most controversial cases involve provider/customer relationships with third-party service providers such as banks, telephone companies, and ISPs. These companies have no reason to watch their customers' conduct closely. Such businesses often have thousands if not millions of customers, and they are not looking to rat them out. On the contrary, as I explain in my article, they have very good business reasons to protect their customers' privacy.³⁶ As a result, the cost Murphy identifies may exist in theory, but is likely small in the most controversial applications of the doctrine.

C. MURPHY ON MURKINESS

Murphy also cautiously disagrees with my view that the third-party doctrine furthers the goal of *ex ante* clarity.³⁷ She does so by offering her own answers to a hypothetical I offer in my article involving an anonymous blog comment about a bribe of a Senator.³⁸ In my article, I offered that hypothetical to illustrate that if you assume a probabilistic view of expectations of privacy, in which a reasonable expectation of privacy exists when privacy is likely, then whether the Fourth Amendment applies depends on unknowable information history rather than known information location.

Murphy answers the hypothetical with two steps.³⁹ First, she relies on existing law holding that the Fourth Amendment does not regulate subpoenas

36. See Kerr, *supra* note 1, at 598-600.

37. Murphy, *supra* note 3, at 1245.

38. See Kerr, *supra* note 1, at 584.

39. Murphy, *supra* note 3, at 1245.

to testify.⁴⁰ So long as the person called to testify only testifies to what they know, then the Fourth Amendment isn't implicated. Second, she concludes that she would not personally object to a Fourth Amendment rule that all other cases would be protected by the Fourth Amendment.⁴¹ Thus, we arrive at a form of ex ante clarity: The Fourth Amendment protects everything except the subpoena to testify in person.

Murphy's solution is interesting, but I fear that it does not respond to the hypothetical. The hypothetical presupposes a world without the third-party doctrine, in which the question of whether an expectation of privacy is "reasonable" must be answered by a probabilistic determination in each case of whether there was a person who once had the information who reasonably expected privacy. That is, the question is whether someone along the line actually and reasonably expected privacy that the subpoena violated. What existing doctrine provides, and what legal rules Murphy would find acceptable, cannot answer this.

More broadly, Murphy's difficulty identifying an alternative to the third-party doctrine nicely demonstrates my concerns with ex ante clarity.⁴² My argument about ex ante clarity is that replacing the third-party doctrine is surprisingly hard. The police need certain answers about what rules they must follow. The existing third-party doctrine provides legal answers that eliminate the difficult task of devising specific rules for each and every use of third party records. When Professor Murphy turns to replacing the third-party doctrine, she acknowledges with admirable candor that she has "no idea" what should replace the third-party doctrine.⁴³ She offers a few vague proposals for what the new law might look like, but she does not jump into the nitty-gritty of classifying all of the possible cases.⁴⁴ I don't mean that as criticism of her substantive proposals. Murphy's essay is brief, and complete answers would be overly ambitious. However, Murphy's admitted uncertainty about what should replace the third-party doctrine supports my point that the ex ante clarity problem is a serious one.

III. CONCLUSION

In the introduction to *The Case for the Third Party Doctrine*, I stated that my goal was "to replace the partial view of the third-party doctrine found in existing scholarship with a richer and more balanced account of its costs and

40. *Id.* at 1246.

41. *Id.*

42. *See id.* at 1251.

43. *Id.*

44. *Id.*

benefits.”⁴⁵ My hope was that a fresh perspective on the doctrine could help inspire a deeper understanding of its dynamics. I am delighted that Richard Epstein and Erin Murphy have now taken up the challenge; we are all better off for their efforts. If my article helped triggered their contributions, the article was more successful than I ever expected.

45. Kerr, *supra* note 1, at 566.

