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## Privacy, Secrecy, and Reputation

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# THE 1978 JAMES McCORMICK MITCHELL LECTURE

## PRIVACY, SECRECY, AND REPUTATION

RICHARD A. POSNER\*

In a recent article I attempted to analyze privacy from the standpoint of economics.<sup>1</sup> Because the subject of privacy is a large and difficult one that had never been approached from an economic angle, the article was necessarily incomplete. The present article carries the analysis forward in a number of areas covered inadequately or not at all in the previous one. That article was limited to the concept of privacy as concealment of facts and communications. This one considers several other aspects of privacy—for example, the desire for seclusion that may lead a person to resent telephone solicitations even if the caller makes no effort to extract private information from him. The present article also tries to establish some empirical foundations for the economic analysis of privacy. Further, it extends the analysis to defamation. Blackening another's reputation by means of false accusations is closely related to enhancing one's own reputation by concealing discreditable facts about oneself—which the first article argued is an important motivation for seeking privacy. The present article also attempts (1) to explain the rash of state statutes dealing with privacy in credit and in employment and (2) to analyze the role of government both as a possessor of privacy and as an invader of the privacy of its citizens. These two parts of the article are highly tentative, however.

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1. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978) [hereinafter cited as *Right of Privacy*]. An abbreviated version of the article that contains, however, some additional material on privacy legislation appears in REGULATION, May/June 1978, at 19, under the title *An Economic Theory of Privacy*.

## I. THE ORIGINS OF THE ECONOMIC ANALYSIS OF PRIVACY

There is an extensive literature on privacy. Although primarily the work of lawyers such as Brandeis, Bloustein, Fried, and Prosser, and the political scientist Westin,<sup>2</sup> historians, sociologists, anthropologists, psychologists, and philosophers have also contributed to it.<sup>3</sup> However, like my first article on privacy, this one, for better or for worse, owes little to the previous literature on privacy. Its provenance is the economic analysis of nonmarket behavior, pioneered by Gary Becker;<sup>4</sup> the economic analysis of law, a field partly derivative from Becker's work on racial discrimination, crime, marriage, and other areas of nonmarket behavior and partly an independent field growing out of work by Calabresi, Coase, and others;<sup>5</sup> and the economics of information.<sup>6</sup>

Thanks to Becker, the sorts of things one talks about in a discussion of privacy, such as gossip, prying, "self-advertising," slander, and seclusion, are now considered to be at least potentially within the domain of economics. But since, with minor exceptions, privacy has not been the subject of economic analysis,<sup>7</sup> I have had to attempt such analysis myself. A conclusion stressed in my previous article is that secrecy is entitled to legal protection where it is necessary to protect an investment in the acquisition of socially valuable information, but not where it serves to conceal facts about an individual that, if known to others, would cause them to lower their valuation of him as an employee, borrower, friend, spouse, or other transactor.<sup>8</sup> Although this conclusion may seem normative, its main purpose is different. It is to help us understand privacy-related behavior and the legal reaction thereto. For example, an economic theory of privacy sets the stage for an empirical test of the hypothesis that the common law is best explained as an effort (how-

2. This literature is reviewed in *Right of Privacy*, *supra* note 1, at 406-09.

3. See, e.g., D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* (1972); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 *LAW & CONTEMP. PROB.* 281 (1966); Thomson, *The Right to Privacy*, 4 *PHIL. & PUB. AFF.* 295 (1975).

4. See G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

5. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

6. See, e.g., Hirshleifer, *Where Are We in the Theory of Information?*, 63 *AM. ECON. REV. PAPERS & PROC.* 31 (1973).

7. Greenawalt and Noam have discussed business privacy; see reference and criticism in *Right of Privacy*, *supra* note 1, at 405-06. Two studies define privacy (very narrowly) as an individual or nuclear family living alone and find that it has risen very rapidly since World War II. See Beresford & Rivlin, *Privacy, Poverty, and Old Age*, 3 *DEMOGRAPHY* 247 (1966); R. MICHAEL, V. FUCHS & S. SCOTT, *CHANGES IN HOUSEHOLD LIVING ARRANGEMENTS 1950-1976* (Working Paper No. 262, Nat'l Bur. Econ. Res., July 1978).

8. See *Right of Privacy*, *supra* note 1, at 394-404.

ever unwitting) by the judges to formulate rules that maximize economic efficiency.<sup>9</sup> My previous article found the common law of privacy to be generally congruent with the economics of the problem,<sup>10</sup> and the present article makes the same finding with regard to the common law of defamation.<sup>11</sup>

## II. THE ETYMOLOGY OF THE TERM "PRIVACY"

The term "privacy" is notoriously difficult to define. My previous article elided the definitional problem by concentrating on just one aspect of privacy, the concealment of private information (including communications). This approach misses some insights that a consideration of the full range of meanings of the term privacy affords.

The original meaning of the word "private" was nonpublic in the sense of uninvolved in matters of state.<sup>12</sup> Its root, moreover, is the same as that of words like "privation" and "deprivation." Originally, to be uninvolved in public affairs was to be deprived and it would not in those days have been a compliment (as it is in some quarters today) to call someone a "very private person." This etymology is a clue to an important if controversial point: the concept of privacy, in anything like the senses in which we use it today, is a Western cultural artifact. The idea that it might be pleasant to be off the public stage was hardly meaningful in a society in which physical privacy was essentially nonexistent—was not only prohibitively costly, but also extremely dangerous. Privacy was then the lot of the pariah.<sup>13</sup>

Gradually the word "private" lost its unfavorable connotations, probably because the growth in the differentiation of institutions and in wealth and public order made it both economically feasible and physically safe for people to have a measure (though initially a very small one) of physical privacy. By the 17th century we find a concept of privacy as withdrawal from the cares of public life through physical removal to a secluded garden or country

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9. A thesis developed in R. POSNER, *supra* note 5, especially parts I and VI.

10. See *Right of Privacy*, *supra* note 1, at 409-21.

11. See part V *infra*.

12. See VIII OXFORD ENGLISH DICTIONARY 1388 (1933) ("privacy"). See also Shils, *supra* note 3 (discussion of the history of privacy).

13. The original sense of "private" is, incidentally, a clue to the undifferentiated character of primitive institutions. The public and private sectors are not distinct in early societies. One can view these societies as prepolitical or pregovernmental, but equally one can view them as lacking a clearly defined "private sector."

estate. This aspect of privacy may be called "seclusion." Its outstanding characteristic is a reduction in the number of social interactions. An equivalent term is "retirement" in its complex modern sense in which we speak of a person being "retiring" and also of a person being "retired."

The sense of privacy as seclusion has been immensely influential in the privacy literature; it is, for example, the sense in which Brandeis and Warren used the term in their famous article on privacy.<sup>14</sup> Yet it is actually a rather archaic concept, belonging to the period when physical privacy was very limited—when people lived in such crowded conditions<sup>15</sup> that to get some privacy required withdrawal to an isolated spot of countryside. The opportunities for physical privacy are so much greater in modern society that few people any longer crave the solitude of Walden Pond. The enormous growth of physical privacy was overlooked by Brandeis and Warren when they wrote (well before the era of electronic eavesdropping) that modern man had less privacy than his forebears.

Seclusion can, however, be given a broader meaning than the kind of fastidious withdrawal suggested in the Brandeis and Warren article. The word "retire" is again helpful in expressing my meaning. One can "retire" from the cares of life to some pastoral retreat; or one can "retire" to one's study to write an article or to plan a sales campaign. Retirement in the first sense implies a reduction in social interactions and therefore in market and non-market production; but retirement in the second sense is, on the contrary, part of the creative or preparatory stage of production. To illustrate the distinction, one can resent telephone solicitations either because one does not like to have anything to do with people or because one is engaged in, or preparing for, a more valuable social interaction than the telephone solicitor has to offer. The word "seclusion" does not have quite the right connotations for the interest in occasional peace and quiet that I have just described, but to avoid multiplying terms I shall use it to embrace both reducing and improving one's social interactions.

The vocal modern demand for privacy has little to do with either a craving for solitude that arose in the past from a combina-

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14. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

15. On the paradox of crowding in eras or areas of low population density, see note 57 *infra*.

tion of the lack of physical privacy in the home and the pacification of the surrounding countryside, or the need of people, especially those engaged in cerebral activity, for some peace and quiet, a need in general adequately fulfilled by the abundant physical privacy of modern Western life. What people want more of today when they decry lack of privacy is mainly something quite different: they want more concealment of information about themselves that others might use to their disadvantage.<sup>16</sup> It is this meaning of privacy that, for example, underlies the federal Privacy Act,<sup>17</sup> which limits the retention and dissemination of discrediting personal information contained in government files. I want to emphasize how far this sense of privacy is from its early meanings up to and including the idea of seclusion stressed by Brandeis and Warren.

The case for privacy in the sense of concealment of personal information is different from and generally weaker than the case for allowing people who want to reduce their social interactions to choose a "retiring" mode of life; and it is much weaker than the second sense of seclusion that I have noted. It is to be regretted therefore that advocates of a broad right of privacy in the sense of secrecy have conflated the two concepts, seclusion and secrecy. They have sought to appropriate the favorable connotations that privacy enjoys in the expression "a very private person" to support the right to conceal one's criminal record from an employer. Yet they have not protested against expansive interpretations of the first amendment that sanction invasions of real seclusion, for example by Jehovah's Witnesses' sound trucks.<sup>18</sup> As Professor Freund pointed out some years ago, "On the whole, the active proselytizing interests have been given greater sanctuary than the quiet virtues or the right of privacy."<sup>19</sup> The modern privacy advocates want concealment rather than peace and quiet.

Concealment is closely related to another concept and the

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16. For an elaboration of this view of privacy, see *Right of Privacy*, *supra* note 1, at 394-97, 399-400.

17. 5 U.S.C. § 552 (a) (1976).

18. See *Saia v. New York*, 334 U.S. 558 (1948). See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating under the first amendment an ordinance making it unlawful for a drive-in movie theater to exhibit films containing nudity when the screen is visible from a public street). *But cf.* *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding a federal statute authorizing recipient of a "pandering advertisement" to instruct the Post Office to inform the sender that he is not to mail such material to the recipient in the future).

19. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* 40 (1961).

linkage indicates the continuity between defamation and invasion of privacy as torts. I refer to "reputation." A person's reputation is other people's valuation of him as a trading, social, marital, or other kind of partner. An asset potentially of great value, it can be damaged both by false and by true defamation. These possibilities are the basis of the individual's incentive both to seek redress against untruthful libels and slanders and to conceal true discrediting information about himself—the former being the domain of the defamation tort and the latter of the privacy tort. The concept of reputation is not similarly intertwined with that of privacy as seclusion. Indeed, to an individual who is seeking to reduce his interactions with other people, what other people think of him as a candidate for various interactions is of reduced significance.

I conclude my discussion of etymology with three observations. First, the modern approbation for privacy has not gone unchallenged. Critics of a collectivist persuasion rename privacy "anxious privatism" and contrast it with traits of openness, candor, and altruism allegedly encouraged by a more communal style of living.<sup>20</sup> This criticism has value in reminding us that privacy is a cultural artifact rather than an innate human need. Most cultures have functioned tolerably well without either the concept or the reality of privacy in either its seclusion or secrecy senses,<sup>21</sup> and this fact must be weighed before one concludes that privacy is a precondition to valued human qualities such as love and friendship, let alone (as sometimes argued) a prerequisite of sanity.<sup>22</sup>

Second, the conventional literature on privacy is almost entirely concerned with the privacy of individuals rather than that of organizations such as business corporations. Moreover, only a limited subset of the individual's activities are thought relevant to the analysis of privacy. In particular, his entrepreneurial activities are ignored. Yet we shall see that the claim to a legally protected right of secrecy is very strong where, for example, the individual is seeking to conceal his true opinion of the value of some commodity involved in a transaction. The common law has long recog-

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20. This is the view of the "humanistic psychology" movement. See Rotenberg, "Alienating Individualism" and "Reciprocal Individualism": A Cross-Cultural Conceptualization, 17 J. HUMANISTIC PSYCH. 3 (1977). See also Weinstein, *The Uses of Privacy in the Good Life*, in NOMOS XIII: PRIVACY 88, 89-93 (J. Pennock & J. Chapman eds. 1971).

21. However, some minimal level of physical privacy may be necessary for material progress. See text following note 60 *infra*.

22. See *Right of Privacy*, *supra* note 1, at 408-09.

nized this claim, as well as the cognate claim of the corporate entrepreneur.

The arbitrary limitations placed on the domain of privacy in much modern discussion suggest an effort to change people's views by redefining terms. Another example is found in the area of constitutional adjudication. The Supreme Court has erected a constitutional doctrine of "sexual privacy" that, for example, forbids states to ban the sale of contraceptives to married couples or to forbid abortions during the first three months of pregnancy.<sup>23</sup> Whatever the merits, constitutional or otherwise, of this doctrine, it does considerable violence to the usual meaning of the term "privacy."<sup>24</sup>

Third, it is important to distinguish the concept of physical privacy: it refers to the conditions of life, not purely architectural, that afford people a greater or lesser measure of distance from others. Doors, private apartments, unattached single-family houses, and private automobiles facilitate privacy in the less tangible senses of seclusion or secrecy. So do broader social conditions such as urbanization and occupational mobility, which, by reducing repetitive contacts between people, also reduce opportunities for observation, imposition, and other intrusions. Modern advances in electronic surveillance operate in the opposite direction. Although they probably do not use electronic eavesdropping, modern communards, as part of their efforts to reduce privacy and individuality, are careful to remove the physical preconditions of privacy, sometimes including doors!<sup>25</sup>

### III. SOME ECONOMICS OF PRIVACY

#### A. *Seclusion*

Privacy, as noted, began to lose its negative connotations when the countryside was pacified, so that individuals, who lived in

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23. See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

24. Professor Bloustein approves this usage, apparently equating "privacy" with "personal liberty." Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429, 447 (1978). In Bloustein's hands, the word "privacy" seems in danger of losing any useful meaning it may once have had. On the elastic quality of the term in Supreme Court jurisprudence, see Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978).

25. The faculty offices at Governors State University, in Park Forest South, Illinois, have, I am told, neither doors nor ceilings, because such barriers to sight and sound would be inconsistent with the university's fundamental policy of "openness."



crowded conditions, could occasionally seek solitude, retreat, seclusion, and retirement from their busy everyday lives. The desire for seclusion is at first glance difficult to understand in instrumental terms, as an input into or investment in an activity. It seems, rather, an end in itself, an aspect of consumption or taste—and to label a preference a “taste” is to confess that it has no economic explanation. Nor is a convincing psychological explanation available. A taste for solitude cannot be regarded as a precondition for sanity or even happiness, for at most times and in most places people have lacked it. It is only very recently, taking the whole course of human evolution, that it was safe for people to be alone for even short periods of time. Even today, while intellectuals may like to think of themselves as leading or wanting to lead retired, contemplative lives, the vast mass of people continue, by preference, to live, work, travel, recreate, and be entertained, in groups; even when “alone,” the average person will usually be listening to the radio or watching television. Most solitude is involuntary, and mental illness is associated with solitude rather than its absence.<sup>26</sup>

The association between solitude and intellectuality suggests, however, that the demand for at least limited solitude or seclusion, as distinct from the desire to lead a permanently reclusive life, may have an instrumental interpretation after all. People whose work is mental rather than physical require a more tranquil environment than others, and this will often entail greater solitude.<sup>27</sup> Further, as we are about to see, a creator of ideas will often seek secrecy in order to enable him to appropriate the social benefits of his creations; and secrecy often requires solitude. Finally, some measure of seclusion is necessary to assure privacy of communication, an important aspect of privacy that is discussed below.

As a detail, it may be noted that if there is a taste for solitude as an end in itself it is a *selfish* emotion in a precise economic sense that can be assigned to the concept of selfishness. Solitary activity (or cessation of activity) benefits only the actor. Work, and non-market interactions such as love, child care, and even casual socializing, confer benefits on others. Production for the market yields consumer surplus, while nonmarket interactive activities presum-

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26. See, e.g., Cooper & Green, *Coping with Occupational Stress Among Royal Air Force Personnel on Isolated Island Bases*, 39 *PSYCH. REP.* 731 (1976).

27. This point, made to me by George Stigler, has implications for explaining the secular trend in privacy, discussed at text accompanying note 52 *infra*.

ably yield a form of nonmarket consumer surplus.<sup>28</sup> In an important sense, therefore, the person who works is "unselfish" no matter how exclusively motivated by greed he is. But the individual who retires from the world, like the lazy man (who trades market income for a reduction in the disutility of work), reduces his contribution to the wealth of the other people in the society. It is the antimarket bias of the modern intellectual that has made the term "private person" one of approbation rather than of opprobrium.

The desire for "privacy" need have nothing to do, however, with wanting to be an anchorite or even with wanting just some peace and quiet. Often people want privacy in order to manipulate other people by concealing from them aspects of their character, prospects, or past that would if known reduce their opportunities to engage in advantageous market or nonmarket transactions.<sup>29</sup> But that is not always true, and I want first to examine an important instance where privacy is desired for reasons neither reclusive nor manipulative. This is the case of "innovation."

### B. *Innovation*

As is well known, there is a problem in obtaining the right amount of information in a free-market system. Once information is produced, its prompt appropriation by others is easy because of the public character of information, but such appropriation prevents the original producer of the information, the innovator, from recouping his investment in its production. There are two methods of overcoming this problem that are compatible with a market system as usually understood. The first is the explicit creation of property rights in information, as in the patent and copyright laws. The second is secrecy. The information is used by the producer but not disclosed until he has had a chance to profit from his exclusive possession.

The choice between these methods of fostering the production of socially valuable information depends on a weighing of the relative costs and benefits of the two methods in particular circumstances. On the benefit side, compare statutory and common law

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28. For example, the "output" of a social game of tennis is presumably greater than the opportunity costs (or prices) of the activity to the players. Each player confers a net benefit on the other. See Homans, *Social Behavior as Exchange*, 63 *Am. J. Soc.* 597 (1958), for a sociological perspective on the element of "trade" involved in nonmarket social behavior.

29. The analogy to fraud in the sale of goods should be evident.

copyright. Statutory copyright gives the author or publisher a property right in his work: no one may copy it without his authorization. Common law copyright used the method of secrecy: so long as the author did not publish his manuscript the law would protect him against unauthorized dissemination by others.<sup>30</sup> Obviously, the method of secrecy would be self-defeating for the author who wanted to publish his work, or where the practice of an invention immediately disclosed the embodied innovation. And even where secrecy would afford some protection (a publisher might earn substantial revenues before a pirate edition could be printed and distributed), it might be an extremely costly method of protection; it might entail, for example, accelerated, secretive book publication at higher costs than if the publisher had a property right in the published work. As a further example, a secret process might have valuable applications in another industry yet the owner of the process might be afraid to sell it because the secret might get out to his competitors.

Property rights are not, however, always the best method of enabling private appropriation of the social benefits of information. The legal costs of enforcing a property right are sometimes disproportionate to the value of the information sought to be protected: the patent system could not be used to protect a popular host's dinner recipes. Often what may be termed the "tracing" costs of information preclude reliance on a property-right system. If ideas as such, as distinct from the sorts of concretely embodied ideas that the patent and copyright laws in fact protect, could be patented or copyrighted, the scope of, and the difficulty of determining, infringement would be excessive. For these and other reasons secrecy is an important social instrument for encouraging the production of information (especially, as we shall see, in settings where the formal rights system in intellectual property is undeveloped). Many examples come to mind. The shrewd bargainer who conceals from the other party to a negotiation his true opinion of the value of the object of the transaction is legitimately engaged in appropriating the social benefit of superior knowledge of market

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30. Common law copyright was not simply an aspect of trespass law. If *A*, being lawfully on *B*'s premises, made a xerox copy of *B*'s manuscript but did not remove or damage the manuscript, there was no theft or conversion but there was an infringement of *B*'s common law copyright.

The recent revision of the copyright law provides statutory protection from the time when the work is "fixed in any tangible medium of expression." 1976 Copyright Act, 17 U.S.C. § 102 (a).

values; and so with the large purchaser of some company's stock who places a lot of small orders under false names so that his activity will convey less information to the sellers that they have undervalued the stock.<sup>31</sup> Secrecy is the indispensable method of protecting not only the speculator's investment in obtaining information vital to the prompt adjustment of markets to changed conditions, but also the investment in information both of the great chef and of the housewife who "buys" the esteem of her friends with her imaginative cooking. The lawyer work product doctrine is best understood as the use of secrecy to protect the lawyer's (and hence client's) investment in research and analysis of a case.

### C. *Concealment of Personal Facts*

In speaking of privacy as seclusion and as innovation, I have had no occasion to bring into the discussion reputation, the opinion in which someone is held by others as a candidate with whom to transact either socially or commercially. A good reputation implies that people are eager to transact with the individual, and a bad one that they are averse to transacting with him. Reputation affects the individual's wealth by determining the terms that people will offer him in transactions. Thus, withdrawal, temporary or permanent, from society is normally not motivated by a desire to enhance reputation. To take the extreme case, the recluse has little use for a reputation. Nor does the inventor seek "privacy" (secrecy) for the purpose of creating or enhancing a reputation. In contrast, the third sense of privacy that I am interested in explicating—privacy as the concealment of discreditable facts about oneself—is closely related to reputation, for it is a method (though not the only or even the most effective method) of enhancing reputation.

People do not conceal a criminal past because they desire seclusion or because if they reveal their past they will be impeded in reaping the fruits of innovative activity. They conceal it in order to secure a good reputation. This point is obvious enough in the parallel case of a producer who conceals the dismal safety record of his product. The individual who hides a history of mental illness or some other relevant health defect from his employer,

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31. A single very large purchase of stock is less likely to be a random event than many small purchases, which may well represent portfolio adjustments unmotivated by superior information.

family, and friends, or a history of bankruptcies from his creditors, or tastes, eccentricities, opinions, attitudes, and the like that if known would impair his reputation among friends and acquaintances is engaged in the same kind of activity as a producer who conceals defects in his product. Only the modern intellectual's prejudice against market activity makes this a startling equation.<sup>32</sup>

It may be objected that many of the facts that people conceal (homosexuality, ethnic origins, aversions, sympathy toward Communism or fascism, minor mental illnesses, early scrapes with the law, marital discord, nose picking, or whatever) would if revealed provoke "irrational" reactions by prospective employers, friends, creditors, lovers, and so on. But this objection overlooks the opportunity costs of shunning people for stupid reasons, or, stated otherwise, the gains to be had from dealing with someone whom others shun irrationally. If ex-convicts are good workers but most employers do not know this, employers who do know it will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain a competitive advantage over the bigots. In a diverse, decentralized, and competitive society such as ours, one can expect irrational shunning to be weeded out over time.<sup>33</sup>

A commercial analogy will help to bring out this point. For many years the Federal Trade Commission required importers of certain products, especially products made in Japan, to label the product with the country of origin. The reason was a widespread belief, whose rationality the Commission was not prepared to confirm or deny, that certain foreign (especially Japanese) goods were inferior. Also, there was believed to be some residual anger over Pearl Harbor. But, as is well known, Japanese products proved themselves in the marketplace, the prejudice against them waned and eventually disappeared, and today Japanese origin is a proudly displayed sign of quality and good value. This is an example of how competition can over time dispel prejudice. It is an example from commerce, but a similar example, this one involving Japanese-American people rather than Japanese products, is available to

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32. On the contemporary tendency to favor the enhancement of liberty in the personal sphere and its suppression in the economic sphere, see Director, *The Parity of the Economic Market Place*, 7 J. LAW & ECON. 1 (1964), and Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROCEEDINGS 384 (1974).

33. This process has been analyzed extensively in the context of racial discrimination (see, e.g., G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); Demsetz, *Minorities in the Market Place*, 43 N.C.L. REV. 271 (1965)), but would seem to be equally at work in the case of discrimination against convicts, homosexuals, etc.

illustrate the competitive process at work in the realm of employment and personal relationships.

The different treatment of past criminal conduct in the law of torts and the law of evidence provides an oblique insight into this point. Save in California, there is no right of action against someone who publicizes an individual's criminal record, no matter how far in the past the crime occurred;<sup>34</sup> however, the use of past crimes to impeach the testimony of a witness in a criminal trial is limited (in the judge's discretion) to relatively recent crimes.<sup>35</sup> In both cases, it is arguable that people can be trusted to discount negative personal information by its recency. But in the tort case the people doing the discounting—friends and acquaintances, creditors, employers, and other actual and potential transactors—pay a price, in lost opportunities for advantageous transactions, if they attach undue weight to information about the remote past. Thus they have an incentive not to react irrationally to such information. Jurors, in contrast, incur no cost from behaving irrationally; the market approach analogy fails, and a paternalistic approach to the question of the rationality of their decisions may therefore be warranted.

*Irrational* prejudices—the sort of thing a market system will tend to weed out—must not be confused with acting on incomplete information. The rational individual or firm will terminate search at the point where the marginal gain in knowledge from additional inquiry is just equal to the marginal cost (in time or whatever). Consequently, if the value of transacting with one individual rather than another is small or the cost of additional information great, the process of rational search may terminate at a very early stage, as some would judge it. If ex-convicts have on average poor employment records, if the cost of correcting this average judgment for the individual ex-convict applying for a job is high, and if substitute employees without criminal records are available at not much higher wages, it may be rational for an employer to adopt a flat rule of not employing anyone who has a criminal record.<sup>36</sup>

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34. See *Right of Privacy*, *supra* note 1, at 415–16.

35. See C. McCORMICK, *LAW OF EVIDENCE* § 43 (2d ed. 1972).

36. See text accompanying notes 99–100 *infra*. Notice how the existence of minimum-wage laws retards the process by which members of different groups obtain access to the employment market. This observation invites the familiar argument that public intervention is warranted to correct the consequences of a previous ill-advised intervention. But the new intervention may turn out, in implementation, to be ill-advised too. For this reason, government's previous failures provide a feeble basis for urging still more public intervention.

There is no evidence that people are generally less rational about how far to carry their search for employees, spouses, friends, and so forth than they are in the activities that we leave to the market (indeed employment is one of those activities). A growing empirical literature on nonmarket behavior, including marriage, procreation, and crime, finds that people behave as rationally in these areas as do firms and consumers in explicit markets.<sup>37</sup> These findings argue for allowing market principles to determine the weight to be given the sorts of discrediting information that people seek to conceal. The market approach suggests in turn that whatever rules governing fraud are deemed optimal in ordinary product markets ought in principle to apply equally in labor markets, credit markets, and "markets" for purely personal relationships as well. Thus, if economic analysis would classify refusal to disclose a particular type of fact as fraudulent in the market for goods, such refusal should equally be classified as fraudulent when made by someone seeking a job, a personal loan, or a wife. Annulment of a marriage because of fraud is thus a strict analogue to rescission of a fraudulent commercial contract. Of course, in many areas of personal relations the costs of fraud are too slight to warrant formal legal remedies.

The concept of privacy as manipulation requires, however, qualification in several respects.

1. Concealment sometimes serves, paradoxically, the function (which is distinct from the innovation function of secrecy discussed earlier) of promoting rather than impeding the flow of accurate information. At any moment a person's mind is likely to be brimming over with vagrant, half-formed, and ill-considered thoughts that, if revealed to others, would provide less information about his intentions and capacities than the thoughts he chooses to express in speech. Concealing one's "inner thoughts" is just the other side of selecting certain thoughts for utterance and by doing so communicating one's intentions and values. Similarly, wearing clothes serves not merely to protect one against the elements but also to make a public statement about one's values and tastes. If we went around naked, babbling the first thing that came into our minds, we would be revealing less of ourselves than we do by dressing carefully and

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37. See G. BECKER, *supra* note 4, *Introduction*, and studies cited in note 55 *infra*. The absence of a minimum wage in the nonmarket sector is a factor favoring the weeding out of irrational antipathies in that sector. Cf. note 36 *supra*.

speaking with reticence. Social interaction would be retarded rather than facilitated.<sup>38</sup> This is not the point, which has no obvious economic interpretation, that hypocrisy is the essential lubricant of social relations. If *A* values *B* as a potential business associate, telling *B* he looks like a frog will obscure rather than elucidate his sincere view of *B*—which is that he values him as a potential business associate.<sup>39</sup>

The borderland between concealment as information and as misrepresentation is illustrated by the dyeing of hair. The purpose may be to communicate something about what kind of person one is or it may be to conceal one's age. That clothing, adornment, cosmetics, accent, and the like serve not only to communicate but also to misrepresent may conceivably explain some of the sporadic efforts to regulate luxury in dress. In the 14th century:

Nothing was more resented by the hereditary nobles than the imitation of their clothes and manners by the upstarts, thus obscuring the lines between the eternal orders of society. Magnificence in clothes was considered a prerogative of nobles, who should be identifiable by modes of dress forbidden to others. In the effort to establish this principle as law and prevent "outrageous and excessive apparel of diverse people against their estate and degree," sumptuary laws were repeatedly announced, attempting to fix what kinds of clothes people might wear and how much they might spend.<sup>40</sup>

2. Concealment sometimes serves a legitimate self-help function. An example is a rich man's concealing his income because he fears that he might be a target for kidnappers. This motive is to be distinguished from wanting to conceal one's income from creditors, adult family members, and the tax collector.

3. Any concept of concealment as misrepresentation must, by analogy to commercial misrepresentation, incorporate some notion of materiality. People may, for reasons imperfectly understood (or at least not illuminated by economics), assiduously conceal facts about themselves that if known would not affect their social interactions; some of the traditional (and declining) reticence about

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38. To be sure, this analysis does not explain why a woman might not want a stranger to watch her giving birth. See *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), discussed in Bloustein, *supra* note 24, at 443. The explanation may be genetic (*cf.* E. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 320 (1975)); it does not seem to be economic.

39. If the above analysis is correct, efforts to improve social interactions through nudism, extreme frankness of speech, and other fashionable techniques of group therapy seem fundamentally confused.

40. B. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* 19 (1978).



nudity has this character.<sup>41</sup> No efficiency interest is promoted by requiring disclosure of the immaterial concealed fact. By the same token, there is little demand for such disclosures.

4. The competitive provision of information may sometimes lead to its overproduction from an efficiency standpoint.<sup>42</sup> For example, some advertising serves partly or even mainly to offset a rival firm's advertising. This point is equally applicable to truthful signaling through dress, manners, and other forms of self-advertising. Even where the signal is true, the effort of each individual to signal loud and clear may result in producing more information about personal characteristics than is optimal. But with self-advertising, as with advertising itself, it is easier to note the problem than to suggest a sensible solution. Nevertheless, the dress codes occasionally found in business firms and private schools, though ostensibly intended to raise the standard of dress, may sometimes produce the opposite result. Limiting variety in dress reduces the amount of resources devoted to this form of self-advertising.

Thus far I have been discussing the case of a good reputation that is founded on fraud and hence is vulnerable to being harmed by truth. But, equally, the possessor of a deservedly good reputation is vulnerable to being harmed by falsehood. It is in this sense that the tort of defamation and the tort of invasion of privacy are closely related. While the courts in defamation cases, as we shall see, are concerned with protecting good reputations from damaging falsehoods, the courts in privacy cases spend much of their time fending off efforts of people to get compensation for the destruction of an undeservedly good reputation by exposure of discreditable facts about them. The circumscribed nature of the privacy tort relative to that of defamation is evidence not that the judges have been hidebound and obtuse but that they have recognized the fundamental difference between the claim to privacy in the form in which it is usually asserted and the claim to be free from defamation.

The falsehood that damages a deservedly good reputation creates the same sort of harm that the concealment of discrediting information does. When the individual is shunned because he is

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41. Such reticence seems to be of comparatively recent origin, even in Western culture. On medieval European attitudes toward nudity, see N. ELIAS, *THE CIVILIZING PROCESS* 163-65 (E. Jephcott trans. 1978).

42. See Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 *AM. ECON. REV.* 561 (1971).

falsely believed to have a criminal record, socially advantageous transactions are forgone. The analogy in the commercial world is the disparagement of a competitor's goods. False disparagement causes consumers to shun transactions that would increase their welfare. Indeed, the false disparager, whether of goods or persons, occupies a position parallel to that of the individual who conceals discrediting information about himself: both use falsehood to divert transactions to themselves from substitute transactors who, if the truth were known, would be preferred.

#### D. *Communications*

The privacy of communications requires separate consideration. In one sense, a communication (letter, phone call, face-to-face conversation, or whatever) is simply a medium by which facts are (selectively) disclosed. It might seem, therefore, that if the facts are the sort for which secrecy is desired in order to enable innovation, the communication should be privileged, and if they are discrediting it should not be. But this approach is too simple. Besides revealing facts about the speaker (or listener), a communication will often refer to third parties. If they were privy to it the speaker would take this fact into account and modify the communication. The modification would be costly both in time (for deliberation) and in reduction of the clarity of the communication. For example, if *A* in conversation with *B* disparages *C*, and *C* overhears the conversation, *C* is likely to be angry or upset. If *A* does not want to engender this reaction in *C*, as well he might not (because he likes *C* or because *C* may retaliate for the disparagement), then, knowing that *C* might be listening, he will avoid the disparagement. He will choose his words more carefully and the added deliberateness and obliqueness of the conversation will reduce its communication value and increase its cost. To be sure, there is an offsetting benefit if the disparagement is false and damaging to *C*. But there is no reason to believe that on average more false than true disparagements are made in private conversations; and the true are as likely to be deterred by the prospect of publicity as the false. If *A* derives no substantial benefit from correctly observing to *B* that *C* is a liar but stands only to incur *C*'s wrath, the knowledge that *C* might overhear the conversation may induce *A* to withhold information that might be valuable to *B*. This is the reason for, among other things, the practice of according anonymity to referees of articles submitted to scholarly journals.

A related point is that eavesdropping is not a very efficient way of finding out facts (say, *A*'s opinion of *C*). If the danger of eavesdropping is known, conversations will be modified, at some social cost, to reduce their informational content for third parties. The parallel in nonconversational information would be the man who, having a criminal record that the law does not entitle him to conceal, goes to great lengths to avoid its discovery by changing his name, his place of work and residence, and perhaps even his physical appearance. If the principal effect of refusing to recognize property rights in discrediting information about the individual were simply to call forth an expenditure on some costly but effective method of covering one's tracks, the social gains would be small, and could be negative. The principal effect of allowing eavesdropping would not be to make the rest of society more informed about the individual but to make conversations more cumbersome and less effective.

The distinction is developed in Figure 1. *D* is the schedule of marginal private benefits to the individual from the activity of concealing material facts about himself. *S* is the schedule of marginal costs to him of this concealment. He carries his output of the activity to the point *q*, where the two curves intersect. If we assume, first, that the benefits to the individual are exactly equal to the costs to those from whom he conceals material facts about himself (*i.e.*, that the benefits are a series of transfers from them to him) and, second, that these transfers are eventually transformed into equivalent social costs,<sup>43</sup> then the social costs of the activity are the entire area under the *D* curve to the left of *q*. Assume that some change in law or technology occurs that makes it somewhat more costly for the individual to conceal material facts about himself. The effect is to shift *S* upward to *S'* (a proportionately equal shift in the supply curve is assumed). The result is a small decline in the activity and hence in its social costs. If, however, the event that shifts the supply curve—say, the introduction of indiscriminate wiretapping—imposes costs on socially productive as well as socially unproductive activity, costs not shown in the diagram, the net social benefits of the change could well be negative.

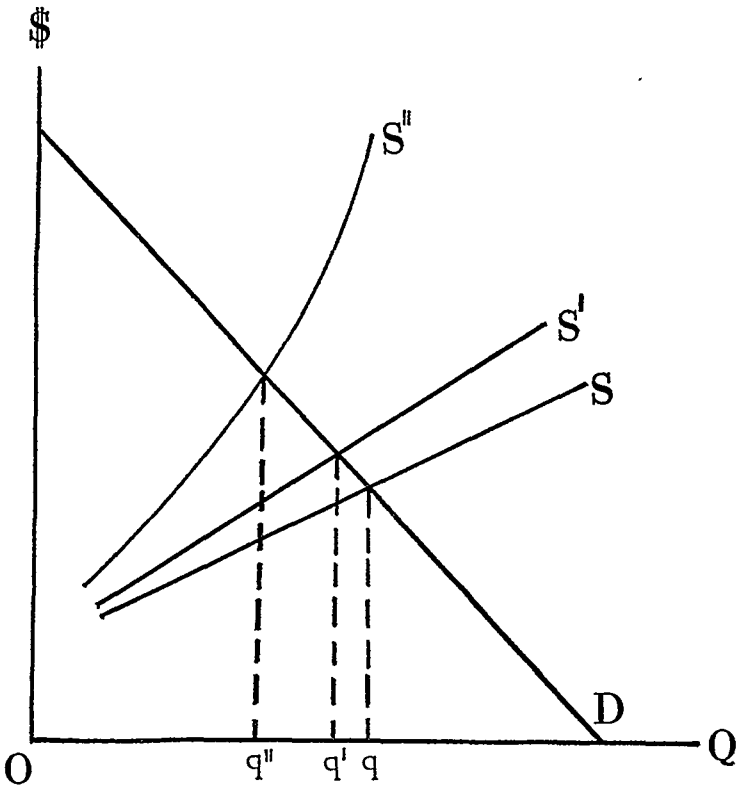
But now suppose that *S* shifts upward as the result of a change

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43. The usual assumption in the economics-of-crime literature. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON 169, 171 n.3 (1968); Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967).

in law or technology that, unlike wiretapping, cannot be offset by moderate additional expenditures by the individual seeking concealment (an example might be the establishment of a very efficient nationwide credit bureau). This shift is depicted by  $S''$  in Figure 1. The reduction in the scale of the concealment activity brought about by this shift is very great and the resulting reduction in the social cost of the activity is likely to outweigh any negative externalities.

Fig. 1



The shift from  $S$  to  $S'$  is (at a guess) the effect on the amount of concealment of personal facts of allowing eavesdropping, and the shift from  $S$  to  $S''$  that of refusing to recognize a property right in personal information such as a criminal record or a history of mental illness. The costs of concealing the past are higher than those of using indirectness in speech and rise rapidly with the scale of the activity, as represented by the slope of  $S''$ . When Thomas Eagleton was nominated for Vice-President on the Democratic Party

ticket in 1972, there was no way he could have concealed his history of mental illness, but he could have concealed his opinions of third parties in a regime of conversational publicity.<sup>44</sup>

E. *The Legal Protection of Privacy, With Special Reference to Confidential Relationships*

I have identified several areas where secrecy appears to promote social welfare. The question arises as to the nature of the legal protection accorded secrecy in these areas. Suppose *A* in conversation with *B* slanders *C*, *B* repeats the slander to *C*, and *C* sues *A* for defamation. Has *A* the right to sue *B* to recover any damages paid out to *C*, on the ground of breach of confidence? The general answer is no, unless *A* and *B* have a contract obligating *B* to respect *A*'s confidences. Such contracts are rarely made, presumably because the costs of a broken confidence are normally low relative to the costs of negotiating and enforcing a contract. Also, effective nonlegal sanctions for breach of promise by a social friend or family member are created by the continuing nature of the relationship.<sup>45</sup> An occasional exception is where the confidence is imparted in the course of business dealings, especially where it is a valuable trade secret; here one often finds explicit contracts forbidding breach of confidence.

If the fact imparted in confidence is discreditable, a contract designed to prevent its disclosure might well be viewed as contrary to public policy and hence unenforceable. This result would be in harmony with the analysis in this paper and is the general approach of the law. If I confess a crime and exact your promise not to reveal my confession to anyone, the promise is unenforceable no matter what formalities of contractual obligation are employed. Yet there is an important set of exceptions to this principle: at common law, information imparted in confidence in conversations between spouses, between client and lawyer, and between certain government officials ("executive privilege") is given extraordinary protection.<sup>46</sup> For example, a husband who has confessed a crime to his

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44. An intermediate case is the impact of pretrial discovery on corporate record-retention policies. Fewer and less candid records are kept, but a large organization cannot function without some document retention.

45. See Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977).

46. See C. McCORMICK, *supra* note 35, chs. 9, 10, 12. The doctor-patient privilege is statutory.

wife can prevent her from testifying to the confession in a criminal proceeding. This result is puzzling from an economic standpoint. True, the marital and lawyer-client relationships would be impaired if the spouse and the client respectively had to exercise extreme circumspection in communication, because the nature of these relationships makes it easy for the spouse or lawyer to detect guilt from an unguarded remark. But why should society wish to strengthen the bonds of matrimony and of legal representation *for criminals*?<sup>47</sup>

A possible answer in the case of the spousal immunity is that if there is a sufficiently strong social interest in promoting the marriage relationship, the immunity, although it raises the costs of crime, may be justifiable in terms of the encouragement it offers to spouses to communicate with each other without concern for possible later use of testimony against them.<sup>48</sup> It is not surprising, therefore, in an era when the importance attached to stable marriages has declined, to find a strong movement against the immunity.<sup>49</sup>

The opposite extreme from the spousal and lawyer-client privileges would be a rule requiring people to disclose material facts about themselves—to issue periodic disclosures similar to those that corporations are required to make under the federal securities laws. Theory and experience suggest that in neither area is such a reporting requirement necessary or appropriate.<sup>50</sup> We can leave to contract, formal or informal, the task of eliciting the amount of disclosure that creditors, employers, spouses, friends—or shareholders—deem optimal in deciding whether and on what terms to deal with the individual or corporation in question. A uniform approach to the regulation of personal and commercial or corporate information is indicated. My previous article (in its discussion of the privacy tort) and the present one (in its discussion of the defamation tort in Part V) provide evidence that the common law, at

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47. A traditional reply in the case of the lawyer-client privilege is that the lawyer's ability to represent his client would be impaired if he were able to appear in the case as a witness. The reply is unavailable in the case of the spousal immunity.

48. This is the traditional rationale of the immunity (see C. McCORMICK, *supra* note 35, at § 86), and, as Gary Becker has pointed out to me, is fully consistent with the recent economic analyses of the family.

49. See C. McCORMICK, *LAW OF EVIDENCE* 30 (2d ed. Supp. 1978).

50. On the disclosure requirements of the federal securities laws, see G. BENSTON, *CORPORATE FINANCIAL DISCLOSURE IN THE UK AND THE USA* (1976), and Stigler, *Public Regulation of the Securities Market*, 37 J. BUS. 117 (1964).

least, has applied a unitary standard to the personal and commercial-corporate spheres.

#### F. *Physical Privacy*

The most elementary concept of privacy is that of physical privacy, as when one speaks of a "private apartment," or of lacking "privacy" when one has to share a kitchen with another family or an office with a co-worker. Physical privacy is important not in itself but as the precondition for the various sorts of privacy I have been discussing—seclusion, innovation, concealment, and conversational privacy. It can be used to relate a society's level of privacy to its material conditions. Poor people or poor societies may not be able to afford the amount of physical space necessary to create privacy.<sup>51</sup> In the poorest of societies physical privacy is obtainable only by retreating to the wilds, often at considerable danger. Apart from purely spatial considerations, poor societies lack the occupational and recreational mobility that fosters privacy by making it costly to keep track of people. Urbanization powerfully facilitates privacy by enabling individuals to obtain anonymity.

The historical growth in privacy involves a shift both in demand and in supply. Assuming people seek private homes or move to cities as their incomes rise, in order to obtain greater privacy (a plausible motivation in light of the many private benefits, in innovation, concealment, etc., that privacy affords), privacy is a superior good (*i.e.*, proportionately more is demanded as income rises) that has increased tremendously over time as a result of the secular growth in incomes.<sup>52</sup> However, developments that have facilitated privacy, like the city, the private home, and the automobile, have been motivated by other desires as well. In incidentally lowering the costs of obtaining privacy, these developments have further promoted its growth and provide an additional reason for observing an increase of privacy as society becomes wealthier and more urban.

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51. On the conditions of privacy in poor societies, see text accompanying notes 56-57 *infra*. An alternative possibility explored in my unpublished paper, *A Theory of Primitive Society, with Special Reference to Law* (Feb. 1979), is that primitive societies deny privacy to their members in order to reduce the incidence of unlawful behavior, which might otherwise be great because of the absence of police, autopsies, and other institutions and devices of detection and enforcement. See also note 25 *supra*.

52. The growth of the proportion of workers engaged in primarily mental rather than physical labor may also be a factor, though one operative principally with regard to privacy at work rather than in the house.

Another factor operating on the supply side is the cost of surveillance, until recently a highly labor-intensive activity that had presumably been growing relatively more costly as an aspect of the general lag of productivity growth in the labor-intensive service sector compared to the capital-intensive manufacturing sector. This trend has probably been reversed by developments in electronics over the past fifty years, beginning with wiretapping. Recent advances in computerized data processing have enabled the accumulation at low cost of vast amounts of private information by credit bureaus, insurance companies, other private firms, and government. At the same time the government's demand for personal information has grown as an incident to the expansion of the size, and concomitant taxing requirements, of government.

If privacy is indeed a superior good, but one whose cost is now rising because of a decline in the relative cost of prying, we may have a clue to the recent legislative movement to give people more privacy. I return to this subject in Part VI.

### G. *Curiosity and Prying*

Just as there is a demand for privacy, so there is a demand for pestering, for prying, and for invading privacy in other ways. The tendency in thought is to couple an uncritical enthusiasm for privacy with an uncritical revulsion against prying. Yet the prying that used to be the domain of the village gossip but is now more likely to be done by investigative reporters and gossip columnists may serve an important social function in unmasking the misrepresentations that people employ to deceive others into transacting with them on advantageous terms. (I use transaction in the broadest sense, to include the individual who wants to be "our" Vice-President without disclosing his history of mental illness.)

A separate function of prying, unrelated to self-protection against deceptive transactors, is educational. People learn about life and form their tastes in great part by imitation of other people. But in a society where physical privacy is highly developed and highly prized, it is difficult to observe the conduct of other people directly. In these circumstances there is a demand for gossip columns. The demand is further stimulated by the high opportunity costs of time. These costs, along with higher literacy, make reading a more efficient method of informing oneself about possible "role models" than trying to observe them in person.



The idea that gossip columns have an informational content is one of the most strongly resisted implications of the economic analysis of privacy. But how else is one to explain why the "prurient" interest in the private lives of the wealthy and celebrated is positively correlated with the possession, not absence, of physical privacy? Gossip columns and movie magazines flourish more in the United States than in Europe where there is (as we shall discuss in the next part of the paper) less physical privacy than in the United States. And although the gossip column, movie magazine, and other vehicles of public gossip are considered the domain of the vulgar and uneducated, they seem to be growing steadily in this country despite the rising level of education—because, I suggest, the growth of physical privacy has shut off direct observation of how strangers live.<sup>53</sup>

No doubt some prying cannot be explained in purely market terms. But most of that is probably done by the government rather than by private employers, creditors, neighbors, and newspaper reporters. Two considerations support this conclusion. First, the government is often engaged in activities for which there are no economic justifications—such as using taxation to transfer wealth from its opponents to its supporters—and in which prying is an important tool. Second, the lack of competitive constraints makes the cost to government of carrying prying beyond the point where marginal benefit and marginal cost are equated less than it would be to private firms and individuals. I return to these points in Part VII.

#### IV. SOME EVIDENCE FOR THE ECONOMIC APPROACH

The preceding part of this paper repeated and extended the economic analysis used in my previous paper as the basis for arguing that the common law rules relating to privacy are efficient. I will not repeat or attempt to add to that evidence here,<sup>54</sup> but will

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53. Compare Westin's description of how the houses of the wealthy in ancient Rome were cheek-by-jowl with the tenements of the poor. A. WESTIN, *PRIVACY IN WESTERN SOCIETY: FROM THE AGE OF PERICLES TO THE AMERICAN REPUBLIC* 44 (Report to Ass'n of Bar of City of N.Y. Spec. Comm. on Sci. & Law, Feb. 15, 1965). This pattern persists to this day in many European cities but is rare in the United States. On transaction-cost obstacles to purchasing the private information recounted in gossip columns from the subjects, see *Right of Privacy*, *supra* note 1, at 417-18.

54. See *Right of Privacy*, *supra* note 1, at 409-21. With regard to defamation, see part V *infra*. Bloustein, *supra* note 24, at 442-47, points out that some of the privacy cases protect a kind of shyness (e.g., about nudity) that is not always motivated by a desire to conceal discreditable facts about oneself. That the cases protect such shyness is not inconsistent with the economic theory of the privacy tort (a point Bloustein fails to understand);

instead take up a different point. If one accepts (at least for argument's sake) that the privacy cases are broadly consistent with the economic theory of privacy, what evidence is there that the theory itself is correct?

Much of the evidence is indirect. Empirical studies of a wide variety of personal behavior not usually considered economically motivated, including the choice of a spouse and the decision whether to commit a "noneconomic" crime such as malicious mischief or rape, confirm the applicability of the economic model to such behavior.<sup>55</sup> These studies establish a mild presumption that the economic approach is applicable to other sorts of personal behavior as well, such as that involved in privacy situations.

There is also some direct evidence for the economic model of privacy, contained in comparative and in psychological studies.

1. Although there is no convenient metric for ranking societies by the amount of privacy they afford, some gross distinctions are possible, and suggestive. In most primitive societies (American Indian, tribal African, and so on), privacy is virtually nonexistent.<sup>56</sup> People live crowded together in small villages, lack private rooms and often even doors to the outside, are rarely alone, and have little

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it is the shyness itself that presents a puzzle from the economic standpoint. See note 38 and accompanying text *supra*. Bloustein's larger point, which I accept, is that the term "privacy" embraces more than just concealment of information; but my first article made clear that concealment is just one aspect of privacy. See *Right of Privacy*, *supra* note 1, at 393. Bloustein also criticizes my discussion of the appropriation cases. See Bloustein, *supra* note 24, at 447-49. His criticism is difficult to understand because he concludes by making a point that is at once an economic point and the heart of my analysis of the appropriation cases: "once one establishes a personal right to a name and likeness . . . a commercial market in the name and likeness can grow and flourish. A name and likeness can only command a commercial price in a society that permits a person to control the conditions under which he may use his name and likeness for commercial purposes." *Id.* at 449. Bloustein makes the further criticism that I should have offered empirical evidence to support the proposition that "poor people 'figure as central characters in novels' less frequently than wealthy ones." *Id.* at 451 (quoting *Right of Privacy*, *supra* note 1, at 396). Since Bloustein never offers empirical evidence for any proposition that he advances, his demand has a somewhat hollow ring. But, in any event, no one who reads novels would doubt that the rich are overrepresented in them on the basis of their fraction of the population.

55. For illustrative studies, see Becker, Landes & Michael, *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977); Landes, *An Economic Study of U.S. Aircraft Hijacking, 1961-1976*, 21 J. LAW & ECON. 1 (1978); and studies cited in G. BECKER, *supra* note 4, at 9-11.

56. See, e.g., *Right of Privacy*, *supra* note 1, at 396 n.10; J. HAVILAND, *GOSSIP, REPUTATION, AND KNOWLEDGE IN ZINACANTÁN* (1977); Roberts & Gregor, *Privacy: A Cultural View*, in *NOMOS XIII: PRIVACY*, *supra* note 20, at 199. For a vivid evocation of the lack of privacy in primitive societies, see E. EVANS-PRITCHARD, *THE NUER* 15 (1940).

opportunity for concealment of any sort.<sup>57</sup> The absence of privacy (suggested by the lack of even a word for it in the languages of primitive peoples) implies, if the economic analysis in Part II is correct, that speech in primitive and ancient societies will tend to be more formal and circumspect than in modern societies, in just the same way—another bit of evidence of the economic model—that modern people speak more formally the larger the audience.<sup>58</sup> The Homeric epics, which assumed their final form in the late eighth or early seventh century B.C., provide the most striking but not the only evidence of the precision and decorum of primitive speech—so at variance with the crudeness of primitive technology.<sup>59</sup> Rhetoric was an important field of education and study in Aristotle's time (and indeed long before), but has virtually disappeared today. There seems to be a secular trend, coincident with and arguably related to the growth of privacy, toward informality in speech and writing and away from insistence on lexical and grammatical precision and on rhetorical craft.

Another implication of the economic analysis of privacy is that mendacity will be less reprobated in a primitive than in an advanced society. Where people, lacking privacy, know each other very well, telling lies is less likely to serve a manipulative purpose (and more likely to serve a dramatic, diplomatic, or metaphorical function) than in a modern, highly differentiated society where relatively little is known about the people with whom one transacts and much, therefore, must be taken on trust. The difference in the view of mendacity taken by primitive and by modern societies was explained long ago by a distinguished sociologist in terms similar to the above.<sup>60</sup>

The absence of privacy in primitive societies has yet another

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57. For example, the Yanoama Indians live in large collective dwellings of up to 100 yards in diameter. As many as 250 people will live in each dwelling, grouped in families each of which clusters around its own hearth. There are no walls within the dwellings. The Yanoama villages are surrounded by thousands of miles of virgin forest but it is considered dangerous to leave the village. See N. CHAGNON, *YANOAMÖ: THE FIERCE PEOPLE* (2d ed. 1977); W. SMOLE, *YANOAMA INDIANS: A CULTURAL GEOGRAPHY* (1976).

58. And the discussion in faculty meetings is more formal if student observers are admitted.

59. See *Right of Privacy*, *supra* note 1, at 402 n.20; see also C. GEERTZ, *PERSON, TIME AND CONDUCT IN BALI: AN ESSAY IN CULTURAL ANALYSIS* (1966); F. KEESING & M. KEESING, *ELITE COMMUNICATION IN SAMOA: A STUDY OF LEADERSHIP* (1956); *LANGUAGE IN CULTURE AND SOCIETY* pt. II (D. Hymes ed. 1964); *POLITICAL LANGUAGE AND ORATORY IN TRADITIONAL SOCIETY* (M. Bloch ed. 1975).

60. See Simmel, *The Sociology of Secrecy and of Secret Societies*, 11 *AM. J. SOC.* 441, 446, 450 (1906).

implication: that primitive societies will be stagnant, noninnovative, and unprogressive. These are indeed well-attested features of primitive society, but the connection with lack of privacy has been overlooked. In the absence of a developed system of property rights in ideas, privacy is essential, according to the analysis in Part III, if people are to appropriate the benefits of their creative ideas. Without such appropriability there is little incentive to develop such ideas. I am suggesting, in short, that people don't merely lack doors and partitions because they are primitive, but are primitive in part because they lack doors and partitions.

The amount of privacy necessary to sustain innovative activity of a high order may, however, be less than we now take for granted. For example, only the very wealthy in ancient Rome enjoyed the physical privacy that most people in the advanced countries enjoy today; and their privacy was greatly compromised because they were under continual observation by their servants, many of whom, apparently, were disloyal (servants were often paid police informers).<sup>61</sup> In the medieval manor the whole household would often sleep together in the great hall (with the lord and lady, perhaps joined by one or two favored guests, in the only bed). As late as the 17th century it was common for the well-to-do to have servants sleep in their bedrooms for protection against possible intruders. As late as the 18th century bedrooms opened into each other rather than into a common hallway.

It is my conjecture that at some point, reached long ago, further increases in the amount of personal privacy no longer increased significantly the incentive to innovate but did, of course, continue to increase the ability of people to conceal their activities for manipulative purposes. The identification of this point of diminishing social returns to privacy is, obviously, a research task of formidable difficulty; it will not be attempted here. I will simply note, both as further evidence of an association between privacy and innovation and as a possible clue to when the point of diminishing social returns was reached, Lawrence Stone's finding that mod-

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61. My main source for the history recounted in the paragraph is the interesting study in A. WESTIN, *supra* note 53. For an excellent brief discussion, see L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 253-56 (1977). See also N. ELIAS, *supra* note 41, at 163; Goldthwaite, *The Florentine Palace as Domestic Architecture*, 77 *AM. HIST. REV.* 977 (1972). Stone places special emphasis on desire to escape prying servants (who were frequent witnesses in criminal proceedings for adultery against their masters) as motivating the demand for privacy. L. STONE, *supra*, at 254. This is evidence for the instrumental theory of privacy advanced in this and my previous article.

ern ideas of privacy date from the early rise of capitalism.<sup>62</sup> Stone suggests an ideological affinity between privacy and entrepreneurship; I am suggesting an economic relationship.

Another interesting comparison is between modern-day America and Europe.<sup>63</sup> There is more physical privacy in America than in Europe. Europeans live in more crowded conditions; single-family houses are rarer; "suburban sprawl" remains largely an American phenomenon;<sup>64</sup> many Europeans still live in villages; and there is greater occupational and geographical mobility in the United States than in Europe. These characteristics bearing on physical privacy are reinforced by the greater intrusiveness of the state in Europe than in America—the internal passports, and so on. The lack of privacy implies, on an economic view, and one finds that Europeans are (1) more formal and precise in their use of language and (2) more reserved and circumspect with strangers—more "private." (The behavior of Japanese, who also lack privacy by American standards, supports this point.) The American gabbles freely to strangers; the European and Japanese do not. The reason suggested by the analysis in this paper is that the American is so favorably situated for concealing discreditable information about himself that he incurs little cost in revealing himself to a stranger. The chance that this stranger will encounter him again, or knows people who know him, or is otherwise a candidate for significant future interactions with him is less in the American than in the European or Japanese setting.

This analysis implies that within the United States we should encounter a high level of rhetorical skills among people living in crowded conditions, such as "ghetto" blacks. Given the educational deficiencies characteristic of this group, it would be surprising to find them well equipped with expressive skills. Yet in fact the research of sociolinguists has established that "Nonstandard Negro English," or "Black English Vernacular," while displaying important differences in grammar and vocabulary from standard English, are ex-

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62. See L. STONE, *supra* note 61, at 259-60.

63. See Spiro, *Privacy in Comparative Perspective*, in NOMOS XIII: PRIVACY, *supra* note 20, at 121, and for the factual basis of this paragraph, E. HALL, *THE HIDDEN DIMENSION* 123-53 (1966).

64. The individual who lives in one community, works in another, and commutes between them in a private automobile has much more privacy than the individual who lives and works in the same community and walks or takes public transportation between home and office: the opportunities for surveillance of the latter individual by his neighbors-co-workers are so much greater.

pressive instruments of considerable subtlety and power.<sup>65</sup> Lack of privacy may explain the emphasis placed in this otherwise deprived culture on rhetorical skill.

2. Like the comparative studies, the psychological studies reveal greater circumspection where the costs of candor are higher. Experimental study has shown, for example, that a man approached by a stranger will tend to speak less freely to him than a woman approached by a stranger.<sup>66</sup> This difference need not be ascribed to a biological difference between the sexes. An economic explanation is possible. Because men are more likely to be involved in market activities than women, they generally derive greater value from concealment of possibly discreditable information than women do, and this fact may be responsible for the greater reticence that traditionally distinguishes men from nonworking women. The same study showed that a man will generally speak about himself with greater candor to a female than to a male stranger. This behavior is consistent with the fact that a man (excepting the occasional Don Juan) is more likely to be a candidate for future transactions with another man (who might be a tax collector, a detective, the employee of a competitor, and so on) than with a woman.

Still another relevant finding in this study is that out-of-towners at the Boston airport, when approached by a stranger, were more likely to confide personal information to the stranger than residents of Boston were. The experimenter offered an explanation that is consistent with the economic approach: "Whereas the Bostonian subject might conceivably expect to run into the experimenter again some day on Beacon Hill or in Copley Square, the out-of-towner could be virtually certain that their paths would never again cross."<sup>67</sup> In the same spirit George Stigler has speculated that the candor (startling to a modern reader) with which the characters in 19th century English novels reveal their incomes reflects the absence of income tax.

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65. See, e.g., W. LABOV, *LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR* (1972). For a brief discussion, see S. ERVIN-TRIPP, *LANGUAGE ACQUISITION AND COMMUNICATIVE CHOICE* 351 (1973), and P. TRUDGILL, *SOCIOLINGUISTICS: AN INTRODUCTION* 65-83 (1974). Labov states elsewhere: "Our work in the Spanish community makes it painfully obvious that in many ways working-class speakers are more effective narrators, reasoners, and debaters than many middle-class speakers who temporize, qualify, and lose their argument in a mass of irrelevant detail." Labov, *A Linguistic Viewpoint Toward Black English*, in *LANGUAGE, SOCIETY, AND EDUCATION: A PROFILE OF BLACK ENGLISH* 10, 21 (J. DeStefano ed. 1973).

66. See Rubin, *Disclosing Oneself to a Stranger: Reciprocity and Its Limits*, 11 *J. EXPERIMENTAL SOC. PSYCH.* 233 (1975), and studies cited therein.

67. *Id.* at 255-56.

The psychological studies relating to privacy also tend to refute the notion, which is inconsistent with the economic model, that privacy is a psychological necessity. Studies of crowding, a proxy for lack of privacy, indicate that the pure effect of crowding on various measures of mental health or stability is insignificant.<sup>68</sup> Privacy is not something we "need," as we need food or air; it is something we want in order to advance plans far removed from biological imperatives. Rational behavior respecting privacy is also suggested by the way in which people will substitute reticence for physical privacy when the latter is in short supply,<sup>69</sup> a substitution clearly related to the tendency to use more formal modes of expression with larger audiences (less privacy).

The evidence discussed above, and a little more that could be added,<sup>70</sup> obviously does not establish the economic theory of privacy on empirically firm foundations. Each piece of evidence is susceptible of alternative explanations. What may be said at this early stage in the economic study of privacy is that the economic model has a certain power to organize and explain a diverse array of fairly well-attested, if not systematically measured, phenomena.

## V. AN ECONOMIC VIEW OF DEFAMATION

My previous article on privacy focused on the privacy tort. Although the tort of defamation (libel and slander) has long been recognized to raise parallel questions, economics is useful in clarifying the precise relationship between the two torts. It also provides a perspective from which to evaluate the frequent charge that defamation is doctrinally the least satisfactory branch of tort law because riddled with arcane and irrational distinctions, such as that between libel *per se* and libel *per quod*.<sup>71</sup> As we shall see,

68. See, e.g., Freedman, Heshka & Levy, *Population Density and Pathology: Is There a Relationship?*, 11 J. EXPERIMENTAL SOC. PSYCH. 539 (1975).

69. See, e.g., Greenberg & Firestone, *Compensatory Responses to Crowding: Effects of Personal Space Intrusion and Privacy Reduction*, 35 J. PERSONALITY & SOC. PSYCH. 637 (1977), and Arab behavior discussed in E. HALL, *supra* note 63, at 148.

70. See discussion of Buckley Amendment in *Right of Privacy*, *supra* note 1, at 401-02, Goffman's work on misrepresentation in everyday life in *id.* at 395, and the studies of the growth of single-person households, *supra* note 7.

71. Prosser states: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 737 (4th ed. 1971) (footnote omitted). Chapter 19 of the Prosser book contains a lucid summary of the rules of defamation law on which I have drawn heavily in the following discussion.

economic theory is quite useful in explaining the general structure, although not all of the details, of defamation law.

Reputation has an important economic function in a market system (or in any system where voluntary interactions are important). It reduces the search costs of buyers and sellers, makes it easier for the superior producer to increase his sales relative to those of inferior ones, and in these ways helps channel resources into their most valuable employments—a process at the heart of the market system. This role is not limited to explicit markets; it is just as vital to the functioning of the “marriage market,” the market in friends, the political market, and so on.

The falsification of reputation is therefore a matter of legitimate social concern. Such falsification can take either of two forms. A firm or an individual—it does not matter which—may try to create an undeservedly good reputation either by affirmative misrepresentation or by the concealment of discreditable facts about itself or himself. It is this process that gives rise to the kind of pseudo-privacy claim discussed in this and my previous article. Or—and here is where the tort of defamation comes in—the falsification of reputation can take the form of besmirching some person's (or some firm's) deservedly good reputation.

One can identify in a broad way the factors that make it more or less likely that attempts at defamation<sup>72</sup> will be made. First, if everything is known about an individual, so that his reputation is not an extrapolation from limited knowledge but the sum of all the facts about him, defamation will not succeed—it will not be believed. (Stated otherwise, if the costs of information are very low, any falsity in an aspersion about a person or product will be detected.) In these circumstances defamation will not pay. This implies that defamation is a problem chiefly of relatively modern as distinct from tribal or village societies; and the relative infrequency of references to defamation in accounts of primitive society provides some support for this observation.<sup>73</sup> An additional factor, however, is the inverse relationship between the importance of reputation as a factor inducing or deterring transactions and the

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72. I use the term generally to mean a *false* aspersion, though the legal approach is to regard the aspersion as the defamation and truth as a defense to liability.

73. Defamation was a recognized wrong among the Nuer people of the Sudan, but, significantly, it is said to be “usually associated with false accusation of witchcraft” (P. HOWELL, *A MANUAL OF NUER LAW* 70 (1954))—a type of accusation whose falsity is difficult to detect among people (even if they lack privacy) who believe in witchcraft. To similar effect, see W. GOLDSCHMIDT, *SEBEI LAW* 131–33 (1967).



existence of well-developed remedies for breach of contract. In the absence of such remedies the parties' interest in preserving their reputations for honoring contracts is the only solid assurance that neither will terminate opportunistically. That is why "honor among thieves" is not a contradiction in terms and, perhaps, why honor is a central value in primitive cultures. The less developed the social institutions of contract are, the greater are the potential losses from having one's reputation impaired.

A related but more complex consideration is the difficulty of "living down" one's reputation in a close-knit tribal or village society. In a mobile urban society such as ours an injury to reputation can often be cured simply by changing one's job or place of residence. However, since a great deal of specific human capital may be lost in such a move, the cure may be a costly one. The greater range of defamatory utterances made possible by modern technology must also be considered: television can besmirch an individual's reputation throughout the world.

Weighing the above factors, one might conclude that the problem of defamation is apt to be most serious in a society that has recently emerged from the tribal-village state in which reputations cannot be credibly falsified but that has not yet developed effective institutions of contract that would reduce the importance of reputation as a factor inducing people to transact with one. Consistently with this suggestion, we find the defamation tort broadly defined in late, but not early, republican Rome.<sup>74</sup> Conditions in the early Republic were presumably close to those of tribal society, while the late Republic may be described as a society recently emergent from the tribal state. Similarly, in medieval England, again a society recently emergent from the tribal state, defamation actions apparently flourished, especially in the ecclesiastical courts. Later, though the tort was more broadly defined in some respects, its practical utility was reduced by the creation of various defenses and, in particular, by rules strictly construing defamatory utterances against the victim.<sup>75</sup>

Since defaming an individual and disparaging a competing

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74. See H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 191, 273 (3d ed. 1972).

75. On the history of defamation in England, see C. FIFoot, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 126-53 (1949); Veeder, *The History and Theory of the Law of Defamation I*, 3 *COLUM. L. REV.* 546-57 (1903); Helmholz, *Canonical Defamation in Medieval England*, 15 *AM. J. LEGAL HIST.* 255 (1971); Donnelly, *History of Defamation*, 1949 *WIS. L. REV.* 99, 100-01.

producer or his goods are the same thing—fraud—the question arises why the tort of defamation developed earlier and further than that of disparagement.<sup>76</sup> An answer is suggested by the economic literature on fraud.<sup>77</sup> That literature distinguishes among “search” or “inspection” goods, whose quality and fitness are ascertainable on inspection before sale; “experience” goods, whose qualities are revealed only in use (*e.g.*, the durability of a camera); and “credence” goods, whose qualities are so difficult to discover that the buyer is heavily dependent on the good faith of the seller. The buyer’s need for legal protection rises as we move along the spectrum from search to credence goods. In the formative era of the common law of disparagement (say, up to the enactment of the Federal Trade Commission Act in 1914) most goods were still search goods and the need for legal protection against disparagement by a competitor was therefore small. But long before then an individual had become a “credence” good, to be taken on faith rather than inspection, and his need for legal protection of reputation was greater than that of the producer of a disparaged good. If *A* called *B* a crook, *B*’s social and business acquaintances probably would not know *B* so intimately as to be confident that *A*’s claim was false.<sup>78</sup>

To equate defamation with commercial disparagement may seem to give defamation too commercial an air and to ignore the “dignitary” interests that the tort also protects. However, the tort is not in fact designed for the protection of peace of mind, self-esteem, or other “private” interests or sensitivities. This is shown by the requirement of “publication.” The aspersion must be communicated to someone besides the victim in order to be actionable. That is, it must lower other peoples’ opinion of the victim’s character and so impair his opportunities for advantageous (social or business) transactions.<sup>79</sup> A wounding lie that does not impair those

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76. On the common law’s restrictive approach to disparagement, see *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900).

77. See, *e.g.*, Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. LAW & ECON. 67 (1973); Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

78. A similar point is made in Jordan & Rubin, *An Economic Analysis of the Law of False Advertising* (forthcoming in J. LEGAL STUD.). It is consistent with this distinction that corporations can complain of defamation to the same extent (*mutatis mutandis*) as individuals, for the corporation itself is bound to be a “credence” good even if its products are “search” goods. If a competitor says a corporation doesn’t pay its bills, prospective creditors of the corporation have no ready means to falsify the assertion.

79. “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” RESTATEMENT (SECOND) OF TORTS § 559 (1976).

opportunities is not actionable. This result is consistent with the fact that the privacy tort does not afford a remedy for an individual's feelings that have been wounded by disclosure of truthful facts material to other people in deciding whether or on what terms to transact with him.

The defamation and privacy torts interact in two other notable ways. First, if *A* in private conversation with *B* slanders *C*, and an eavesdropper overhears the conversation, the slander is not actionable.<sup>80</sup> This is the logical corollary of the social judgment, which I have argued has an economic basis, that the privacy of conversations should be protected in order to foster effective communication. Second, privacy and defamation differ in that a disclosure of private information, to be actionable as an invasion of privacy, must be "publicized"<sup>81</sup>—disseminated widely—whereas defamation is actionable so long as one person reads or hears it. This has seemed to some an arbitrary distinction, but it makes sense once the economic relationship between the two torts is grasped. Normally the disclosure that gives rise to a privacy claim is truthful (if it were false, it would be actionable as defamation). When such a disclosure is made in a small circle, which will normally be the circle of people acquainted with the individual whose privacy has been breached, there is a social benefit: the individual is unmasked and his acquaintances are enabled to reevaluate their relationships with him in the light of a more complete knowledge of his character.<sup>82</sup> If, however, the disclosure is widely publicized, it is likely to reach beyond the circle of his acquaintances, to people with whom he has neither present dealings nor any substantial likelihood of dealing in the future. Disclosures to them are less likely to perform an unmasking function, and more likely to invade the interest in seclusion (as distinct from manipulation), than more selective disclosure. The publicity requirement thus serves to identify the subset of disclosures that most likely entail invasions of legitimate interests. To be sure, the harm to the individual from publicizing private information about him to strangers is normally less than that of publicizing such facts to people with whom he has advantageous relationships. The latter harm, however, is simply the obverse of the benefit to these people from having such knowledge, so there is unlikely to be a net social

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80. See W. PROSSER, *supra* note 71, at 774.

81. See *id.* at 810.

82. Thus, it is not an actionable invasion of privacy for a creditor to write a debtor's employer informing him that his employee has failed to pay the debt when due. See, e.g., *Cullum v. Government Employees Fin. Corp.*, 517 S.W.2d 317 (Tex. Ct. Civ. App. 1974).

benefit from protecting the individual's privacy in such a case. But when private information about an individual is publicized to strangers, they derive little benefit from it, less perhaps than the harm to him from the invasion of his interest in seclusion. Stated otherwise, publicity appears to be a necessary, though not a sufficient, condition for a privacy action to confer net social benefits.

The situation in the case of defamation tends to be reversed. Defamation is likely to inflict its worst social harm precisely in the circle of the individual's friends or acquaintances. It is they whom the lie is most likely to deflect from advantageous social transactions, to their own injury as well as the defamed individual's, because it is they with whom he transacts. To be sure, they are also better placed to detect the falsity of the defamation than strangers are; but there can be no doubt that a requirement of publicity would place many costly defamations beyond the reach of the law.

Let us consider the economic rationality of some of the other distinctive features of the defamation tort. First of all, it is a strict liability tort; the fact that the defendant may have exercised reasonable care to prevent the defamation is immaterial to liability. In one well-known case, the author of a fictitious newspaper story by sheer fortuity gave a character in the story the name of a real person, Artemus Jones. Jones sued for libel and won upon a showing that his neighbors thought the story was about him.<sup>83</sup> The choice between strict liability and alternative bases of liability (such as no liability or negligence liability) turns mainly, in economic analysis, on the relative abilities of the injurer and victim to avoid harm. Jones could have done nothing to avoid being defamed, whereas the author or publisher might have checked to see whether there was a real-life counterpart to the fictitious villain, or at least might have included the now-standard disclaimer to the effect that any resemblance to any person living or dead is purely coincidental.<sup>84</sup> In general, victims of defamation cannot reasonably avoid being falsely defamed, so that casting liability on them would have no beneficial allocative consequences; in contrast, most false defamation can be avoided by reasonable inquiry on the part of

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83. *Jones v. E. Hutton & Co.*, [1909] 2 K.B. 444, *aff'd*, [1910] A.C. 20.

84. In *Washington Post Co. v. Kennedy*, 3 F.2d 207 (D.C. Cir. 1925), where the report of a criminal charge against one man was taken to refer to another man having the same first and last names, the court pointed out that the newspaper could easily (cheaply) have avoided the confusion by using the middle initials of the man it was writing about.

the defamer. In these circumstances a rule of strict liability is attractive from an economic standpoint.<sup>85</sup>

Consistently with this distinction, the mere disseminator of a slander or libel—a newspaper distributor, for example—is liable for defamation only if he is negligent in failing to recognize the defamatory or untruthful character of the utterance. Since the costs to the mere disseminator of preventing defamation are often prohibitive, a rule of strict liability would be economically unjustifiable, in that it would shift losses often with no justification based on the superior ability of the “defamer” to avoid the defamation.

Another notable exception to strict liability is the no-liability rule applicable to group defamations—“all lawyers are shysters,” for example. Several economic considerations support this rule. First, the injury to the individual member of the group tends to be trivial. The difference in this respect between group and individual defamation is the difference between the demand facing an individual firm and the demand facing the industry of which it is a part. The substitutability of the products of other firms in an industry is likely to be so great as to make the individual firm’s demand almost perfectly elastic, but the *industry* demand may be highly inelastic because products of other industries are not close substitutes. If people believe the libel “X is a shyster lawyer,” they can and will substitute other lawyers and X’s business will drop sharply. But if they believe that *all* lawyers are shysters, there isn’t much they can do about it—there are no close substitutes for lawyers. The loss of business to the profession, and hence to the individual lawyers if they are assumed to share proportionately equally in the profession’s loss of business caused by the defamation, will be small.

A related point is that most group libels, if attributed to all members of the group, are inherently incredible and hence do little harm; and if they are attributed only to some or even to most members, they do little harm to any individual. Few people would believe that *all* lawyers are shysters. But if for the sake of credibility the libel is restated in the form “most lawyers are shysters,” then the harm to the individual lawyer must be discounted by the probability that a client or prospective client will view him as included in the shyster majority rather than the nonshyster minority.

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85. On the economics of the choice between strict liability and negligence, see R. POSNER, *supra* note 5, at 137–42, 441–42.

Finally, when group attributes or tendencies are in issue, the costs of determining the truth or falsity of an utterance are greater than when only a single individual's characteristics are at issue.

Another feature of the defamation tort—that there can be no actionable defamation of a dead person—may also seem based on the costs of determining whether the aspersion is true or false. There is, however, another possible explanation for this rule. The economic function of reputation is to foster transactions. Once the transactor is dead any subsequent injury to his reputation can have no market impact. Stated otherwise, personal reputation is a form of nontransferable human capital and hence is extinguished by death. But this point is overstated: being told that your father was a thief or a bankrupt may, if I believe in the heritability of criminal tendencies, affect my willingness to transact with you. The law provides a remedy for the most serious of these cases by allowing a descendant to maintain a defamation action where the deceased ancestor is alleged to have possessed some clearly inheritable defect or disorder.<sup>86</sup>

The best known, and a much criticized, distinction in the law of defamation is that between the standards for proving slander (oral defamation) and those for proving libel (written). Slander is actionable without proof of special damages (that is, without proof of actual pecuniary loss) only if the slanderer alleges conduct falling into one of the four *per se* categories: criminal acts, loathsome disease, female unchastity, and unfitness for one's profession or vocation. Outside of these categories, to be actionable a slander must be shown to have caused an actual monetary loss to the victim. Libel is not so confined. The victim need prove special damages only if the *identity* of the individual libeled is not evident on the face of the libel; if extrinsic facts are necessary for the identification, then special damages must be proved unless the libel alleges conduct falling within one of the four categories defining slander *per se*.

The idea of a *per se* category is surely not in itself to be criticized. It is a familiar legal technique (widely used, for example, in antitrust law) that can readily be justified by reference to the trade-off between the costs of error and the costs of reducing the probability of error by a more detailed examination of the facts in a particular case. The principal criticism of the *per se* categories

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86. See *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 893–94 (1956).

in slander is that they have not kept pace with changing times. They made pretty good sense when first established.<sup>87</sup> To be thought unchaste (if a woman, in traditional societies) would drastically reduce a woman's opportunities for marriage, a transaction of immense importance for women in such societies. To be thought to have leprosy, syphilis, or plague—the diseases classified as loathsome for purposes of the tort—would greatly reduce one's opportunities for interactions of all sorts; and so if one were thought a criminal. Finally, to be thought unfit for one's job would have a direct effect upon one's ability to participate in advantageous market activities. Other slanders might, of course, also do serious harm to a person's ability to have advantageous dealings with others—and were actionable, but only upon proof of actual economic loss.

Superficially, the distinction basic to libel law between a libel that identifies the victim on its face and one where extrinsic facts are necessary to make the identification makes economic sense. Having to know additional facts in order to link up the libel with the intended victim reduces the potential circle of those who will act on the libel to the victim's (and their own) disadvantage. However, the people who know the relevant extrinsic facts are precisely those most likely to be acquainted with the victim, while those ignorant of these facts are likely to be people who have no acquaintance or potential acquaintance with the victim and hence are unlikely to act on the libel anyway. The extrinsic-fact rule can thus be criticized as smuggling a publicity requirement into defamation, where for reasons stated earlier it does not belong, by the back door.

These details to one side, the stricter treatment of written than of oral defamation makes sense. Anomalous cases can be imagined—the private letter versus the public address to a large audience—but, in general and putting aside the recent (in the evolution of the common law) cases of radio and television, written defamations tend to reach larger audiences than spoken and hence to import greater harm to the victim. To be sure, the larger audience may often be composed of strangers, so that the incremental harm is small. But by the same token, strangers will generally be less capable of detecting the falsity in the defamation than acquaintances, so the added harm may not be small, after all. There

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87. On the historical origin of the categories, see Veeder, *supra* note 75, at 560 n.1.

are, moreover, other reasons that support the law's stricter treatment of libel than of slander. First, as we saw in Part III in discussing the privacy of communications, it is costly to avoid occasional casual defamations in speech. To have to choose one's words very deliberately, to have to consider carefully the possible misconstructions that might be placed on words spoken about another person, would reduce the effectiveness of oral communication. A requirement of deliberateness imposes fewer costs on written communications, because writing is a more deliberate process than speaking anyway. The incremental cost of avoiding defamation in writing is smaller than it is in slander.<sup>88</sup>

Second, written defamation is more durable than spoken. Even if initially disseminated less widely than the spoken, it remains in existence to be read later and so its total audience is apt to be larger. A third point, related to the previous ones, is that a defamatory writing is more credible than a defamatory oral statement and hence more harmful to the individual who is defamed. Precisely because the costs of attaining accuracy are lower in written than in spoken communication, and the costs imposed by inaccuracy higher because of the greater durability and (probable) greater audience of the written word, the reader has a greater expectation of accuracy in reading than he does in listening, and will therefore tend to give greater weight to a libel than to a slander. If damages for defamation were readily computable, this difference would be reflected automatically in the damage awards in libel and slander cases; but since they are not, the lower standard for proof of defamation in libel than in slander cases seems sensible.

The defense of truth requires mention, if only because of the frequent criticism that it is unfair for the law to treat truth as an absolute defense.<sup>89</sup> The harm to an individual from the revelation of a true but perhaps minor or long-forgotten blemish in his character may, it is argued, outweigh any benefit from correcting the false impression on which his reputation rests. The law has proved stubbornly resistant to the suggested reform. Its response is consistent with the economic view presented in this paper. The law will provide no protection to people, any more than to sellers of

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88. This consideration suggests that the rule that a defamatory radio broadcast is slander if the speaker is speaking extemporaneously but libel if he is reading from a manuscript is not the "unctuous casuistry" that Donnelly terms it. Donnelly, *supra* note 75, at 123-24.

89. See, e.g., *Developments in the Law—Defamation*, *supra* note 86, at 932.



goods, who misrepresent their qualities in order to induce others to enter into advantageous personal or business relationships with them.

Other important defenses to defamation are grouped under the rubric of privilege. There are both "conditional" and "absolute" privileges in defamation law. A conditional privilege entitles the defendant to make a false and defamatory utterance so long as he is not motivated by "actual malice"; in practice this means so long as he honestly, though perhaps unreasonably, believes the utterance to be true. An absolute privilege is good even if actual malice is shown. A typical example of conditional privilege would be an employer's giving a character reference for a former employee, and a typical example of absolute privilege would be a critic's comment on a movie.<sup>90</sup>

The effect of privilege is to reduce the costs of making the statements to which the privilege attaches. Why might the law want to do that? One possibly relevant justification for allowing a person to externalize some of the costs of an activity is that the benefits of the activity are also externalized, so that if he is forced to bear the full social costs he may not carry the activity to the socially optimal point. This technique is occasionally employed in the common law.<sup>91</sup> In the case of a character reference, the benefit of the reference inures primarily to the employer receiving it rather than to the employer giving it, and in these circumstances it is predictable that if the former employer were liable for defamation he either would not supply a character reference or would omit from it any negative references to the employee's character. To be sure, if he truly wanted an honest reference the prospective employer could compensate the former employer for the risk of liability for defamation or the employee could waive his right to sue for defamation. But either solution would involve heavy transaction costs relative to the values involved and as a practical matter would eliminate most character references. The law's solution may be the efficient one.

Most conditional-privilege cases are of this general sort, but

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90. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the first amendment creates a conditional privilege to defame public officials. This privilege was not a part of the common law and is not examined in this paper.

91. See *Right of Privacy*, *supra* note 1, at 417; Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 128 (1978).

not all are. The conditional privilege that credit bureaus enjoy to commit the aptly named "slander of credit"<sup>92</sup> is difficult to explain economically. There is no externalization of the benefits of a credit bureau's activities—it charges its clients for its services. The conditional privilege of credit bureaus is a significant anomaly; it set the stage for an important part of the privacy legislation discussed in the next part of this paper.

The critic's absolute privilege rests on a completely different ground, the absence of misrepresentation. If I say "Charlie Chaplin is a crummy actor," or even "Chaplin can't act," I am expressing a true (if silly) opinion rather than stating a false fact. Nor is my opinion any less genuine, or more misleading, if it is the product of a malicious dislike of the actor. Misrepresentation comes into play only if the critic makes a false statement of fact, such as that some author is a plagiarist.<sup>93</sup>

To summarize, the basic doctrines of the defamation tort seem generally consistent with the economics of the problem. But this is not to say that economics can explain every outcome in a field of the common law that, more than most, perhaps because of its bifurcated historical origins (the tort of slander developed in the medieval ecclesiastical courts, and that of libel in criminal proceedings in Star Chamber against seditious writings), contains many anomalous features.<sup>94</sup> In law, as in consumer behavior and every other activity studied by economists, economics is more successful in explaining central tendencies than in accounting for individual decisions.

## VI. THE STATUTORY PRIVACY MOVEMENT

Many state and federal statutes relating to privacy have been enacted in recent years. My previous article had little to say about these statutes beyond observing that the general trend of legislative activity was at once to increase the privacy of individuals (by privacy, meaning here the concealment of personal information) and decrease that of business firms and other organizations, in-

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92. See W. PROSSER, *supra* note 71, at 790.

93. See *Fitzgerald v. Hopkins*, 70 Wash. 2d 924, 425 P.2d 920 (1967).

The other absolute privileges at common law mainly involve governmental (including judicial) officials and are part of the larger tort immunity of governmental figures, a subject beyond the scope of this paper.

94. Enumerated and pungently denounced in Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

cluding universities and government agencies. I suggested that this trend was perverse from an efficiency standpoint, since concealment of discreditable personal facts rarely serves a social purpose whereas concealment in a business or organizational context often serves to protect the incentive functions associated with entrepreneurial privacy and to shield communications, rather than just to foster manipulation.<sup>95</sup> I stand by this characterization, except that I am persuaded by Professor Rubin that the government's claims to privacy should be discussed separately from those of private business firms.<sup>96</sup>

I want to take a closer look at the statutes designed to protect personal privacy from invasions by nongovernmental entities. Most of these are state statutes limiting the kinds of information that either an employer or a creditor can obtain (from any source) with regard to the prospective employee or prospective borrower.<sup>97</sup> In the employment context, the emphasis is on limiting the employer's access to the employee's history of arrests and of remote or "irrelevant" convictions. In the credit context, the emphasis is on limiting the creditor's access to the prospective borrower's (adverse) credit history. These statutes differ widely in their details and often a state will have an employment statute but not a credit statute or vice versa. There is also a federal Fair Credit Reporting Act, which bars creditors from inquiring about, or denying credit on the basis of, bankruptcies of the prospective borrower that occurred more than fourteen years earlier, or any other adverse information relating to events (including arrests and convictions) that occurred more than seven years earlier. This is the most important federal statute directly regulating privacy in the private sector.<sup>98</sup>

There are several possible ways of trying to explain statutes such as the above. One, the traditional but now rather discredited approach of many lawyers and economists, is to suppose that the statutes were enacted in response to some perceived "market fail-

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95. See *Right of Privacy*, *supra* note 1, at 404-06; Posner, *An Economic Theory of Privacy*, *supra* note 1, at 25-26.

96. See Rubin, *Government and Privacy: A Comment on "The Right of Privacy"*, 12 GA. L. REV. 505 (1978); Part VII *infra*.

97. The statutes are listed and discussed in REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION, app. I: *Privacy Law in the States* (G.P.O. 1977).

98. The Buckley Amendment (Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (1976)), regulating school records, applies to both public and private schools, so that its major impact falls on public institutions. Many federal statutes, for example those requiring extensive disclosures by corporations to their shareholders, affect privacy indirectly.

ure" justifying public intervention. This approach does not get one very far in the privacy area. There is no economic reason to suppose that employers would demand from employees and job applicants more information than was cost-justified in terms of its benefits to the employer in screening out unsuitable employees. As noted earlier, the common law courts (with the exception of the California courts) have rejected the idea that a person is entitled to conceal his criminal record, even one relating to the distant past, because other people might react "irrationally" to its disclosure.<sup>99</sup> Any such argument would be particularly weak in the context of employment, where competition exacts a heavy penalty from any firm that makes irrational employment decisions. Regarding the credit statutes, it is true, as remarked earlier, that the common law courts have unaccountably immunized credit bureaus from slander-of-credit actions. But the way to solve this problem, as routinely done by state legislatures in many other areas, is to repeal the common law immunity. Or, if private defamation actions are considered an inadequate corrective to such slanders, the negligent collection and dissemination of false credit information could be punished criminally. To limit the true information that a credit bureau may collect and disseminate is hardly an apt solution.

If the privacy statutes cannot be explained by reference to a failure of the private market, can they perhaps be explained by reference to heightened public consciousness of the inequity of discrimination? Economists have argued that much racial and sexual discrimination may be the product simply of the costs of information.<sup>100</sup> These costs may lead people to base judgments on very limited data, including the average characteristics of the racial group to which the individual being judged belongs. There is a great national movement against discrimination, even of the efficient kind motivated purely by information costs, in the areas of race and sex; and it is possible to argue that this movement has increased public sensitivity to other instances in which crude proxies are used to screen out applicants for jobs or credit. After all, it is the same sort of injustice to deny a person a job because of a flat rule against employing anyone who has a criminal record,

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99. See note 34 and accompanying text *supra*.

100. See, e.g., Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

though careful investigation would have shown that this individual's criminal record ought not disqualify him from the job,<sup>101</sup> as it is to deny a black a job because of the average qualities of the blacks in the relevant employment pool.

The suggestion, in short, is that the concern initially focused on black and (slightly later) female discrimination has stimulated a broader compassion for victims of discrimination, which is now recognized to occur every time a person is denied an advantage on the basis of some general presumption that excludes consideration of his individual circumstances. The difficulty with the "compassion" theory of the privacy laws is its far-reaching and unacceptable implications. Since the costs of information are always positive and often very high, it is impossible to imagine how society could function without heavy reliance on proxies in lieu of full investigation of all relevant facts. If we are sorry for the man whose fifteen-year-old bankruptcy judgment bars him from obtaining fresh credit, we should be equally sorry for the young man who is denied admission to the college of his choice because of his performance on a standardized test that may not accurately reflect his true academic potential. The appeal to our compassion is as strong, yet the current trend in education is, of course, back to heavier reliance on test scores.

Another possibility is that the privacy statutes are a response to the pressures of some interest group more compact than the public, or the altruistic public, at large. Much legislation has been shown to be of this type.<sup>102</sup> However, with privacy as with other broadly "consumerist" legislation, the benefited groups seem wholly to lack the characteristics of an effective political interest group. The benefited groups here are people with criminal records and people with poor credit records. The former group is furtive, disreputable, and unorganized. The latter group is, if more numerous, not compact in the ways identified by the interest-group theory as favorable to effective political action. And it is probably less numerous than the group that consists of the people who will have to pay higher interest rates to compensate lenders for the bad loans

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101. An alternative rationale for facilitating the concealment of a criminal record, based on the rehabilitation goal of criminal punishment, is discussed and rejected in *Right of Privacy*, *supra* note 1, at 415 n.46. See also Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 471-74 (1978).

102. See, e.g., Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 J. LAW & ECON. 151 (1972); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 335 (1978).

that they make because they are unable to obtain sufficient information with regard to the borrowers' creditworthiness: I mean other marginal borrowers, as the most creditworthy borrowers will tend to be selected into lower interest-rate categories.

A more plausible candidate for an effective interest group beneficiary of the privacy laws is the blacks, whose political effectiveness in recent years seems well established. Imagine the following sequence. Blacks are discriminated against in credit and employment because (for whatever reason) their performance in these areas is on average poorer than whites'. Some states (and the federal government) pass laws to prevent discrimination against blacks. Barred from using race as a proxy for employment suitability and creditworthiness, employers and lenders cast about for other proxies and settle on arrest records, conviction records, bankruptcies, judgments, and the like. They do this not because they are trying to discriminate against blacks but because they want to screen out (or into lower wage or higher interest-rate categories) people who do not meet their qualifications for employment or credit at normal prices. If, however, race is a pretty good (by which I mean accurate, not ethically attractive or acceptable) proxy for the underlying characteristics in which the employer and creditor are interested, and if the substitute proxies (arrests, etc.) are also pretty good, then the substitute proxies will have almost the same effect on the racial composition of employees and borrowers as explicit use of the racial proxy had. The ban on discrimination will have little practical impact.

In these circumstances the racial group may seek to bar the substitute proxies as well. It is true that barring arrest records from consideration in employment may result in a black who has no arrest record losing a job opportunity to a black who has one, and barring consideration of past bankruptcies may result in a black who has no record of bankruptcy paying a higher interest rate because creditors are unable to exclude blacks who do (assuming a past bankruptcy increases the probability of a future one—which presumably it does if creditors bother to ask about past bankruptcies). However, since a disproportionate number of black credit applicants have poor credit records and a disproportionate number of job applicants have arrest records, laws that wipe out these hurdles to obtaining credit and employment may benefit more blacks than they hurt.

A possible empirical test of this hypothesis is to compare states that have enacted civil rights laws with states that have enacted credit and/or employment privacy statutes. Landes' 1968 study of employment discrimination identified twenty-nine states as having enacted laws (with at least some enforcement machinery) forbidding racial discrimination in employment, twenty-one of them before the enactment of the federal Civil Rights Act of 1964.<sup>103</sup> A 1977 study for the Privacy Commission identifies eight states as having enacted laws protecting the privacy of private-sector employees and job applicants.<sup>104</sup> Six of these states (75%) are among the twenty-nine states identified in Landes' study as having enacted antidiscrimination laws with "teeth," and five (63%) are among the twenty-one "early" antidiscrimination states. Thus, a state that enacted a nondiscrimination statute was somewhat more likely to adopt an employee privacy statute than one that did not enact a nondiscrimination statute. (If it were just as likely to adopt such a statute, the above figures would be 58% and 42%, respectively.)

On the credit side, the analysis is complicated by the fact that the federal government acted with respect to both discrimination (in the Equal Credit Opportunity Act)<sup>105</sup> and privacy (in the Fair Credit Reporting Act)<sup>106</sup> before the states did. However, if we continue to use the Landes list as indicative of states having a strong civil rights movement even if they did not legislate specifically with reference to credit, then it is suggestive that of the eleven states<sup>107</sup> that have enacted credit privacy restrictions more stringent than the federal Fair Credit Reporting Act (which was not preemptive in this regard), nine (82%) are on Landes' list and six (55%) are among the twenty-one early enactors on that list. This is further evidence that a state that has a strong anti-discrimination policy is likelier than a state that does not have such a policy to pass a privacy statute.

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103. Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507, 507 n.1 (1968).

104. See *Privacy Law in the States*, *supra* note 97, at 17-19.

105. 15 U.S.C. § 1691 (1976).

106. 15 U.S.C. § 1681 (1976). Incidentally, the legislative history of this important privacy statute indicates a concern that unregulated disclosure of adverse information to creditors could have a disproportionately adverse effect on blacks. See *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 129-32 (1969).

107. See *Privacy Law in the States*, *supra* note 97, at n.47.

I performed another pair of empirical tests using a slightly different body of data, a very recent and thorough compilation of state and federal privacy statutes by Robert Smith.<sup>108</sup> He divides privacy statutes into fifteen categories and notes which state (or the District of Columbia, or the federal government) has enacted a law in each category.<sup>109</sup> Again using Landes' data and dividing states (including the District of Columbia) into those that enacted fair employment practices laws before 1964, those that enacted them afterward, and those that did not enact them (within the period covered by Landes' study), one finds that the average number of categories in which a state has passed a privacy law is 6.9 for the early-enacting states, 6.5 for the late-enacting states, and 6.3 for the nonenacting states. These differences, although in the predicted direction, are very small, perhaps in part because the fifteen privacy categories in Smith's compilation include many that have no obvious relationship to the distinct interests of blacks, such as wiretapping and Freedom of Information. If we confine our attention to the three categories that seem by the earlier analysis clearly related to the interests of blacks—privacy of arrest records, credit information, and employment records—the above figures change to 1.10 (early-enacting states), 1.00 (late-enacting), and .78 (nonenacting).<sup>110</sup>

Although the results of the foregoing tests suggest (though not at accepted levels of statistical significance) a linkage between civil rights laws and an important subset of privacy laws, they do not provide unambiguous support for the interest-group theory advanced in this section of the paper because they are equally consistent with the hypothesis that both antidiscrimination and privacy statutes are motivated by compassion—but compassion for blacks rather than for poor credit risks, and ex-convicts, as such. A way to distinguish between these alternative hypotheses is to examine the correlation between the presence of a privacy statute and the number of blacks and Hispanics (the two major minority groups that are probably most benefited by the privacy statutes in ques-

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108. R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 1978-79 (1978).

109. *See id.* at 2.

110. The federal government is not included in these statistics. In the 15-category analysis the federal government's "score" is 9, considerably above the average of the early-enacting states, but in the 3-category analysis the federal government's score is 1, identical to that of the late-enacting states—which makes sense since the date of the first federal civil rights act of modern times—the Civil Rights Act of 1964—was used as the break point to divide the early- from the late-enacting states.



tion). If the correlation is positive, that is evidence for an interest-group explanation; if negative, for a compassion explanation (because the cost of compassion is lower, the smaller the benefited group). If there is no correlation, that is evidence against either interpretation.

Table 1 attempts such a correlation. The fifty states are divided into four categories—states that have laws in each of the three relevant categories of privacy statutes (arrest, credit, and employment); states that have laws in two; in one; and in none. The unweighted average percentage of blacks and Hispanics in each category of states is then calculated.<sup>111</sup> The results provide some support for the interest-group theory. The percentage of blacks and Hispanics rises as one moves up the ladder from states with no privacy statutes in the relevant categories to states with statutes in all three categories.

TABLE 1\*  
CORRELATION OF STATE PRIVACY STATUTES  
WITH PERCENTAGE BLACK AND MEXICAN IN STATE

Number of Privacy-Law Categories in Which State Has a Statute (Number of States)	Percentage Black and Mexican In State (average for nation: 9.2)
3 (3)	13.1
2 (7)	10.7
1 (24)	8.7
0 (16)	8.5

The empirical tests thus provide some support for the hypothesis that an important subset of privacy statutes may be ex-

\*Sources: Robert Ellis Smith, *Compilation of State and Federal Privacy Laws 1978-79*, at 2 (1978); U.S. BUR. OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES:1977*, at 31, 35.

111. As my measure of the Hispanic population, I used Mexican parentage. This measure tends to bias the results in Table 1 against the interest-group hypothesis, since it excludes both Puerto Ricans (heavily concentrated in New York State, which is in the second-highest privacy category), and Mexican-Americans whose parents were born in this country (heavily concentrated, judging by the distribution of the population having Mexican parentage, in four states of which three are in the two highest privacy categories).

plained, somewhat surprisingly, in terms of the interests of the black and Hispanic communities. However, the support is weak. None of the results, standing alone, is statistically significant. To be sure, where a series of statistical tests all point in the same direction, the significance of the series may be greater than the significance of each test result evaluated by itself. But where, as here, the samples on which the tests are based are not completely independent, the determination of the significance of the series is elusive. The picture is further completed by the results of some other statistical tests.<sup>112</sup> In sum, the evidence presented in this section is best regarded as suggestive.

Although the approach taken here does not treat the privacy movement as a unitary phenomenon resulting from the activities of one political interest group, but instead breaks out one set of privacy statutes and seeks to explain just that set with reference to the interest groups benefited by them, I see nothing improper with this approach in principle. There is no basis for a presumption that, from the standpoint of political demand, privacy is a unitary phenomenon. To be sure, I earlier suggested that a combination of the rising demand for privacy (based on its characteristic as a superior good) and the recent dip in the costs of invading privacy as a result of technological advances in electronic surveillance and electronic data storage and retrieval might be relevant to explaining the movement for privacy legislation; however, that is not a promising alternative explanation with regard to the particular privacy statutes under discussion. Viewed from the standpoint of society as a whole, placing limitations on employers' and creditors' access to information is not even a zero-sum game; it is

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112. Claire Friedland reran the correlation reported in Table 1 with certain modifications in the statutory classification and using a different measure of Hispanic population. Her results were qualitatively similar to mine and statistically significant.

George Stigler, in his unpublished paper, *Privacy in Economics and Politics* (Jan. 1979), finds (at tab. 3.2) that votes in the House of Representatives on the Privacy Act of 1974 were positively correlated with percent black and Hispanic in the Congressman's district, after correcting for differences in per capita income and in education across districts. The positive correlation remained when an urbanization variable was added to the regression, but was no longer statistically significant. The rationale for including an urbanization variable, however, is unclear to me.

Finally, I reran the correlation in Table 1 using the employment and credit statutes listed in the Privacy Commission's report, note 97 *supra*. The employment statutes were strongly positively correlated with percentage black and Hispanic: the unweighted average black and Hispanic population in the eight states in this category was 11.1%, well above the unweighted average of all the states (9.2%). But the unweighted average for the 11 states that enacted credit protections going beyond the federal Fair Credit Reporting Act was only 7.4%, well *below* the average of all the states.

a negative-sum game because, putting aside the occasional errors that are better corrected by repealing the common law immunity against slander of credit or by expanding public officers' liabilities for false arrest, the effect of such statutes on the public as a whole is to increase the amount of fraud in society, raise interest rates, and reduce business productivity. However, the statutory restrictions increasingly being placed on the retention and dissemination of private information by the government may be a response to a broad public demand for greater privacy based on the growth in incomes (which has shifted the demand curve for privacy to the right) and the reduction in the costs of invading privacy (which has moved the supply curve for privacy to the left), for, as we are about to see, there is no presumption that governmental infringements of privacy are optimal.

## VII. GOVERNMENT AND PRIVACY

My previous paper made a few casual and, as Professor Rubin has pointed out, erroneous<sup>113</sup> references to the government as a possessor of privacy and as an invader of its citizens' privacy. I said that as a possessor of privacy government should be treated like a private business organization, and its communications and its "innovative" facts (if any) shielded from involuntary disclosure. With regard to the government as invader of privacy, I said that the growth of occupational mobility, urbanization, and so on had resulted in the government's having less information about individuals than it used to. Rubin made two important points: first, that the government has different incentives from private firms and, specifically, might want to conceal information about its operations from an electorate whose incentives to inform itself about the government's operations are already weak; second, that the growing activity of the government as tax collector (from individuals), employer (especially in wartime), and social insurer had given it vastly greater information about people than it used to have. I accept these points—and their implication that the issues raised by governmental claims of and alleged invasions of privacy are so different from those raised by private claims and invasions that the two domains of privacy cannot be discussed as one. This in itself is a significant point. Those who propose restricting the

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113. See note 96 *supra*.

collection, retention, and dissemination of information by private firms and institutions, such as credit bureaus and private employers, often try to bolster their case with examples of governmental invasions of privacy (or excessive claims of governmental privacy)—without recognizing that government behavior in the privacy area may raise different issues from the behavior of nongovernmental entities.

The government's claim for privacy, for example, is both different from and normally weaker than that of private entities. One of the privacy interests discussed earlier in this paper—seclusion—has no application to a government agency, or to the leading agents. Whether elected or appointed, the modern politician is unlikely to be a person of retiring disposition, though he may need occasional peace and quiet to plan his work.<sup>114</sup> Nor is the concept of privacy as innovation broadly applicable to the government, since, with the important exception of security, both domestic and foreign, the government does not engage in entrepreneurial activity. Sometimes the government finds itself a custodian of private information, as where it obtains some firm's trade secret in the course of carrying out a statistical or law enforcement activity. Here the claim of privacy, though nominally asserted by the government, is really the claim of some private entity.<sup>115</sup>

To the government's claim to informational privacy in the areas of (1) security, and (2) information obtained from private parties that would be entitled to protection were it still in their hands, it might seem we should add the government's claim to conversational privacy. It is true that if government conversations were public, the effectiveness of communications within the government, and hence the ability of the government to carry out its duties, would be impaired. But efficiency in government, if defined as minimizing the costs of implementing government policy, is not an unalloyed virtue; if it were, the principle of separation of powers, which is inefficient in that narrow sense, would be rejected.<sup>116</sup> The value of publicity of governmental communications in deterring plots against the public might be greater than the cost

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114. To be sure, politicians' very lack of privacy may result in a self-selection toward people lacking much sense of privacy.

115. This is not to say the government may not have a strong incentive to preserve the privacy of such information: the costs of collecting income tax are inversely related to the confidentiality of income tax returns.

116. See R. POSNER, *supra* note 5, at 492-93.

in reduced efficiency of government, though I will not attempt to evaluate this trade-off here.

Let us turn to the role of the government as a pryer into the secrets and conversations of its citizens. In some areas the government's need for information parallels that of private entities. For example, the government is a very large employer and has a legitimate interest in checking the background of prospective employees. However, the *variance* in the amount of information demanded by governmental employers of prospective employees is probably greater than in the private sector, holding constant any differences in job specifications. For some jobs, especially in the federal government, the government snoops more intrusively into the prospective employee's background, associations, etc., than a private employer would do for a job of equivalent responsibility. Other jobs are handed out with less regard for the prospective employee's competence or character than a private employer would have. The reason for the greater variance in the public sector is that public employment is a political activity rather than purely a means of carrying out the agency's responsibilities, and is only weakly constrained by efficiency considerations.

Most of the controversy over government as snooper involves the exercise of the government's law enforcement functions. I suggest that the principal issue for policy is the substantive merit of the law being enforced. The clearer it is that the forbidden conduct is antisocial, the more willing we are to allow the government to obtain private information, through eavesdropping, informers, interrogation, searches, and other means, regarding that conduct. The most reprobated instances of the use of informers and other methods of surveillance by government, whether the government of ancient Rome or that of Nazi Germany or the Soviet Union, are ancillary to the enforcement of unpopular or offensive laws.<sup>117</sup> A related point is that excessive snooping by the law-enforcement arms of government is more or less proportional to the extent of public regulation. If the government interests itself in a very small part of private behavior—say, coercion plus evasion of the (modest) taxes necessary to support a government whose only substantive concern is with the prevention of coercion (external or internal)—then the measures it takes to unmask antisocial activity will tend to be extremely limited (save in crisis periods, when the populace

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117. On Rome, see A. WESTIN, *supra* note 53, at 50, 52-53.

will probably welcome extreme measures). It is only when the state becomes involved in regulating private consensual behavior, such as drinking or taking drugs or lending money at high interest rates or prostitution or political discussion, that its ancillary surveillance activities become oppressive.

The foregoing remarks can perhaps be clarified by discussion of three particularly controversial methods of obtaining evidence or leads for public prosecutions: electronic eavesdropping (wire-tapping and bugging), the use of undercover informants, and the extraction of confessions by intensive interrogation.

#### A. *Electronic Eavesdropping*

If eavesdropping could be precisely targeted on conversations plotting illegal conduct, the concern with this surveillance technique would be much reduced. It is true, as explained in Part III of this paper, that eavesdropping increases the cost and reduces the effectiveness of communication; but this fact is converted from an objection to eavesdropping into an argument for its use once it is conceded that the conversation is part of the illegal behavior that society is properly interested in discouraging. The analogy would be to the seizure of contraband, the least controversial (and most clearly permitted by the fourth amendment) form of search and seizure. The case for eavesdropping on conversations that merely reveal past illegal conduct, like the parallel case for seizures of evidence of past crimes as distinct from contraband and actual fruits of crime, is weaker because, by the argument in Part III, its principal effect is simply to induce circumspection in conducting the illegal activity so as to leave no traces.

Eavesdropping cannot, however, be neatly targeted on actual plottings, but is bound to pick up other conversation as well. Moreover, to be fully effective, eavesdropping has to be conducted on suspects, some of whom are innocent, and not just on obvious offenders (if the offense is obvious, the value of the eavesdropping is merely cumulative—unless it discloses new suspects). So a substantial and costly impediment to effective communication for lawful purposes is created. But again the scope of government is an important factor in evaluating this surveillance method. With limited government the occasions for electronic surveillance would be many fewer than they are today because the range of potential suspects would be much narrower. It is logical for the Soviet government to wiretap the telephones of intellectuals and our government

those of "baby brokers" and loan sharks, but a government that relied more on the private market to regulate behavior, and less on the state, would have no incentive to tap these phones.

### B. *Undercover Informants*

Informers are commonly hated because they are so often hired to enforce laws regulating private consensual behavior. It is these laws, the source of "victimless crime," whose enforcement requires planting an informer—there is not a complaining witness otherwise. The informer has much the same effect on communications as electronic surveillance does. In ancient Rome, as mentioned earlier, the servants of the rich were often employed as undercover agents by the police to spy on their employers. Since the police were looking mainly for evidence of subversive opinions, the effect of the servant-informer network was similar to the use of wiretaps and bugs by a modern totalitarian state. Given the parallel between the informer and the bug, the lack of any constitutional or statutory limitations on the planting of informers among suspect groups is hard to square with the extraordinary restrictions with which the use of electronic eavesdropping is hedged about.<sup>118</sup>

### C. *Confessions*

The fifth amendment provides that no individual may be forced to incriminate himself. This provision entitles criminal defendants not to take the stand, and the witness in any type of proceeding not to give testimony that could lead to his conviction for a criminal offense. The policy of the fifth amendment is also used to bar the introduction in a criminal trial of a confession of the defendant that was obtained by torture or other coercion. Among the various arguments given for the privilege against self-incrimination,<sup>119</sup> the most common is that it is necessary in order to protect people from being coerced into giving false confessions. However, this argument is answered by requiring that the confession be corroborated or otherwise validated independently.

I want to suggest—without attempting to develop a point whose proper elucidation would carry me far beyond the scope of

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118. This is a major theme in Stone, *The Scope of the Fourth Amendment: Privacy and Police Use of Spies, Secret Agents, and Informers*, 1976 AM. BAR FOUND. RES. J. 1193.

119. Reviewed in C. McCORMICK, *supra* note 35, at 251-54.

this paper—that the persistence of the privilege is related to the scope of government and that in a system of truly limited government the privilege would lack vitality. I am suggesting, in short, a connection between Bentham's advocacy of limited government and his desire to abolish the privilege. In a system that punished only a limited set of primarily coercive acts, a requirement that confessions be corroborated would go far toward eliminating the objections to compulsory self-incrimination. But governments are in fact prone to punish a very broad range of behavior and even thought, including the harboring of hostile feelings toward the government and refusal to conform to specified religious beliefs. Offenses so gossamer often cannot be corroborated even in principle, so that if forced confessions are permitted there is no external check on their validity.<sup>120</sup> The confessions of the victims of Stalin's purges were of this nature. As late as Blackstone's time it was a capital crime in England to "compass" (that is, imagine) the death of the king. And the privilege against compulsory self-incrimination apparently arose in England in protest against proceedings in Star Chamber and other tribunals concerned with political and religious offenses.<sup>121</sup> In sum, the privilege may be designed less to vindicate ideals of procedural justice than to complement other provisions of the Constitution and Bill of Rights limiting the scope of government regulation in the area of belief.

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120. See E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 8-9 (1955).

121. See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 301-13; C. McCORMICK, *supra* note 35, at 244-46.



