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THE RIGHT OF PRIVACY

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INTRODUCTION

The concept of "privacy" is elusive and ill defined. Much ink has been spilled in trying to clarify its meaning.[1] I will avoid the definitional problem by simply noting that one aspect of privacy is the withholding or concealment of information. This aspect is of particular interest to the economist now that the study of information has become an important field of economics.[2]

Heretofore the economics of information has been concerned with topics relating to the dissemination and, to a lesser extent, concealment of information in explicit (mainly labor and consumer-goods) markets: such topics as advertising, fraud, price dispersion, and job search. The present Article attempts an economic analysis of the dissemination and withholding of information primarily in personal rather than business contexts. It is thus concerned with such matters as prying, eavesdropping, "self-advertising," and gossip. The line between personal and commercial is not always clear or useful, and I shall not maintain it unwaveringly; the emphasis, however, is on the personal.

The first part of the Article develops the economic analysis. I

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[1] *See, e.g.*, Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975). On the variety of legal contexts of the term "privacy," see Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

[2] *See* G. STIGLER, *The Economics of Information*, in THE ORGANIZATION OF INDUSTRY 171 (1968).

remark in passing the irony that personal privacy seems to be valued more highly than organizational privacy, judging by current public policy trends, although a reverse ordering would be more consistent with the economics of the problem. The second part of the Article examines the principles of tort law that protect a "right of privacy" in both commercial and personal contexts (the former is discussed only briefly, however) and concludes that the judges in tort cases have been sensitive to the economics of privacy.

I. The Economics of Privacy

A. *Privacy and Curiosity as Intermediate Goods*

People invariably possess information, including facts about themselves and contents of communications, that they will incur costs to conceal. Sometimes such information is of value to others: that is, others will incur costs to discover it. Thus we have two economic goods, "privacy" and "prying." We could regard them purely as consumption goods, the way economic analysis normally regards turnips or beer; and we would then speak of a "taste" for privacy or for prying. But this would bring the economic analysis to a grinding halt because tastes are unanalyzable from an economic standpoint. An alternative is to regard privacy and prying as intermediate rather than final goods, instrumental rather than ultimate values. Under this approach, people are assumed not to desire or value privacy or prying in themselves but to use these goods as inputs into the production of income or some other broad measure of utility or welfare.

The second approach, which views privacy and prying as intermediate goods, is the one taken here, in order to allow the economic analysis to proceed. Obviously, that would be an inadequate reason if privacy and prying did not in fact possess important attributes of intermediate goods. I shall try to show that they do; the reader will have to decide whether this approach captures enough of the relevant reality to be illuminating.

B. *The Demand for Private Information*

The demand for private information (viewed, as it will be throughout this Article, as an intermediate rather than final good) is readily comprehensible where the existence of an actual or potential relationship, business or personal, creates opportunities for gain by the demander. This is obviously true of the information which the tax collector, fiancé, partner, creditor, and competitor, among

others, seek. Less obviously, much of the casual prying (a term used here without any pejorative connotation) into the private lives of friends and colleagues that is so common a feature of social life is also motivated, to a greater extent than we may realize, by rational considerations of self-interest. Prying enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him. For example, in choosing a friend one legitimately wants to know whether he will be discreet or indiscreet, selfish or generous, and these qualities are not always apparent on initial acquaintance. Even a pure altruist needs to know the (approximate) wealth of any prospective beneficiary of his altruism in order to be able to gauge the value of a transfer to him.

The other side of the coin is that social, like business, dealings present opportunities for exploitation through misrepresentation. Psychologists and sociologists have pointed out that even in everyday life people try to manipulate by misrepresentation other people's opinion of them.[3] As one psychologist has written, the "wish for privacy expresses a desire . . . to control others' perceptions and beliefs vis-à-vis the self-concealing person."[4] Even the strongest defenders of privacy describe the individual's right to privacy as the right to "control the flow of information about him."[5] A seldom-remarked corollary to a right to misrepresent one's character is that others have a legitimate interest in unmasking the deception.

Yet some of the demand for private information about other people is not self-protection in the foregoing sense but seems mysteriously disinterested—for example, that of the readers of newspaper gossip columns, whose "idle curiosity" Warren and Brandeis deplored,[6] groundlessly in my opinion. Gossip columns recount the

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[3] Erving Goffman develops this point in an interesting book in which he refers explicitly to "misrepresentation" but uses the term without any pejorative connotation. E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 58 (1959).

[4] Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307, 307 (1966).

[5] Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. BAR FOUND. RESEARCH J. 1193, 1207.

[6] Even gossip apparently harmless, when widely and persistenly circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of

personal lives of wealthy and successful people whose tastes and habits offer models—that is, yield information—to the ordinary person in making consumption, career, and other decisions. The models are not always positive. The story of Howard Hughes, for example, is usually told as a morality play, warning of the pitfalls of success. Tales of the notorious and the criminal—of Profumo and of Leopold—have a similar function. Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational.

The expression "idle curiosity" is misleading. People are not given to random, undifferentiated curiosity. Why is there less curiosity about the lives of the poor (as measured, for example, by the frequency with which poor people figure as central characters in novels) than about those of the rich?[7] The reason is that the lives of the poor do not provide as much useful information in patterning our own lives. What interest there is in the poor is focused on people who are (or were) like us but who became poor rather than on those who were always poor; again the cautionary function of such information should be evident.

Warren and Brandeis attributed the rise of curiosity about people's lives to the excesses of the press.[8] The economist does not believe, however, that supply creates demand.[9] A more persuasive explanation for the rise of the gossip column is the secular increase in personal incomes. There is apparently very little privacy in poor societies,[10] where, consequently, people can easily observe at first

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other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890).

[7] Surely not because writers know the lives of the rich more intimately than those of the poor: Shakespeare's protagonists are kings and nobles, but he was no aristocrat.

[8] The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Warren & Brandeis, *supra* note 6, at 196.

[9] "In this, as in other branches of commerce, the supply creates the demand." *Id.*

[10] *See* D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 83 (1972); T. GREGOR, MEHINAKU: THE DRAMA OF DAILY LIFE IN A BRAZILIAN INDIAN VILLAGE 89-90, 360-61 (1977); and anthropological data reported in the first chapter of A. WESTIN, PRIVACY AND FREEDOM (1967). Gregor's findings on privacy are summarized in M. HARRIS, CANNIBALS AND KINGS: THE ORIGINS OF CULTURES 12 (1977):

[T]he search for personal privacy is a pervasive theme in the daily life of people who live in small villages. The Mehinacu apparently know too much about each other's business for their own good. They can tell from the print of a heel or a buttock where

hand the intimate lives of others. Personal surveillance is costlier in wealthier societies both because people live in conditions that give them greater privacy from such observation and because the value (and hence opportunity cost) of time is greater[11]—too great to make a generous allotment of time to watching neighbors worthwhile. People in the wealthier societies sought an alternative method of informing themselves about how others live and the press provided it. A legitimate and important function of the press is to provide specialization in prying in societies where the costs of obtaining information have become too great for the Nosey Parker.

C. *Property Rights in Private Information*

That disclosure of personal information is resisted by, *i.e.*, is costly to, the person to whom the information pertains yet is valuable to others may seem to argue for giving people property rights in information about themselves and letting them sell those rights freely. The process of voluntary exchange would then assure that the information was put to its most valuable use. The attractiveness of this solution depends, however, on (1) the nature and provenance of the information and (2) transaction costs.

The interest in encouraging investment in the production of socially valuable information presents the strongest case for granting property rights in secrets. This is the economic rationale for according legal protection to the variety of commercial ideas, plans, and information encompassed by the term "trade secret." It also explains why the law does not require the "shrewd bargainer" to disclose to the other party to the bargain the bargainer's true opinion of its value. What we mean by shrewd bargainer is (in part) someone who invests resources in acquiring information about the true values of things. Were he forced to share this information with potential sellers he would obtain no return on his investment, and the process—basic to a market economy—by which people transfer goods through voluntary exchange into successively more valuable uses would be impaired. This is true even though the lack of candor in the bargaining process deprives it of some of its "voluntary" character.

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a couple stopped and had sexual relations off the path. Lost arrows give away the owner's prize fishing spot; an ax resting against a tree tells a story of interrupted work. No one leaves or enters the village without being noticed. One must whisper to secure privacy—with walls of thatch there are no closed doors.

[11] *See* S. LINDER, THE HARRIED LEISURE CLASS ch. VII (1970).

At some point nondisclosure becomes fraud. One consideration relevant to deciding whether a transacting party has crossed the line is whether the information that he seeks to conceal is a product of significant investment.[12] If not, the social costs of disclosure, which, to repeat, arise from the effect of disclosure in dampening the incentive to invest in information gathering, will be low. This consideration may be decisive on the question, for example, whether the law should require the owner of a house to disclose latent, *i.e.*, nonobvious, defects to a purchaser. The ownership and maintenance of a house are, of course, productive activities in which it is costly to engage. But the owner acquires knowledge of the defects of his house costlessly (or nearly so); hence forcing him to disclose those defects will not reduce his incentive to invest in discovering them.

Transaction-cost considerations may also militate against the assignment of a property right to the possessor of a secret. Consider, for example, (1) whether the law should require the Bureau of the Census to buy the information that it seeks from the firms or households it interviews and (2) whether the law should allow a magazine to sell its subscriber list to another magazine without obtaining the subscribers' consent. Requiring the Bureau of the Census to pay (that is, assigning the property right in the information sought to the interviewee) would yield a skewed sample were the price uniform. To get a representative sample despite the different costs of disclosure (and hence price for cooperating) to the firms and households sampled, the Bureau would have to use a highly complicated, differential price schedule. In the magazine case the costs of obtaining subscriber approval would be high relative to the value of the list.[13] If, therefore, we believe that these lists are generally worth more to the purchasers than being shielded from possible unwanted solicitations is worth to the subscribers, we should assign the property right to the magazine; and the law does this.[14]

The decision to assign the property right away from the individual is supported in both the census and subscription-list cases by the fact that the costs of disclosure to the individual are small. They are small in the census case because of the precautions the government takes against disclosure of the information collected to creditors, tax

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[12] *See* Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

[13] A few magazines offer the subscriber the option of having his name removed from the list of subscribers that is sold to other magazines. But this solution is unsatisfactory to the subscribers (presumably the vast majority) who are not averse to *all* magazine solicitations.

[14] *See* Shibley v. Time, Inc., 45 Ohio App. 2d 69, 341 N.E.2d 337 (1975).

collectors, or others who might have transactions with the individual in which they could use the information to gain an advantage over him. They are small in the subscription-list case because the information about the subscribers that is disclosed to the purchaser of the list is trivial; the purchaser cannot use it to impose substantial costs on the subscribers.[15]

The type of private information discussed thus far is not, in general, discreditable to the individual to whom it pertains. Yet we have seen that there may still be good reasons to assign the property right away from him. Much of the demand for privacy, however, concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is, as suggested earlier, to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancée. It is not clear why society should assign the property right in such information to the individual to whom it pertains; and the common law, as we shall see, generally does not. A separate question, to which we return later, is whether the decision to assign the property right away from the possessor of guilty secrets implies that the law should countenance any and all methods of uncovering those secrets.

An analogy to the world of commerce may help to explain why people should not—on economic grounds, in any event—have a right to conceal material facts about themselves. We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people "sell" themselves as well as their goods. They profess high standards of behavior in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character. There are practical reasons for not imposing a general legal duty of full and frank disclosure of one's material

[15] No doubt many subscribers to *Christian Motherhood* would be offended to be solicited by *Playboy*, but it is unlikely that *Playboy*'s publisher would consider the subscribers to *Christian Motherhood* a sufficiently promising source of new *Playboy* subscribers to want to buy the subscription list.

personal shortcomings—a duty not to be a hypocrite. But everyone should be allowed to protect himself from disadvantageous transactions by ferreting out concealed facts about individuals which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities.

It is no answer that such individuals have "the right to be let alone."[16] Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves.[17] Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?

Some private information that people desire to conceal is not discreditable. In our culture, for example, most people do not like to be seen naked, quite apart from any discreditable fact that such observation might reveal. Since this reticence, unlike concealment of discreditable information, is not a source of social costs, and since transaction costs are low, there is an economic case for assigning the property right in this area of private information to the individual; and this, as we shall see, is what the law does. I do not think, however, that many people have a *general* reticence that makes them wish to conceal nondiscrediting personal information. Anyone who has ever sat next to a stranger on an airplane or a ski lift knows the delight that people take in talking about themselves to complete strangers. Reticence comes into play when one is speaking to people—friends, relatives, acquaintances, business associates—who might use information about him to gain an advantage in some business or social transaction with him. Reticence is generally a means rather than an end.

The reluctance of many people to reveal their income is sometimes offered as an example of a desire for privacy that cannot be explained in purely instrumental terms. But I suggest that people conceal an unexpectedly low income because being thought to have a high income has value in credit markets and elsewhere, and that they conceal an unexpectedly high income in order (1) to avoid the attention of tax collectors, kidnappers, and thieves, (2) to fend off

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[16] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). It is a good answer if the question is whether people should have a right to be free from unwanted solicitations, noisy sound trucks, obscene telephone calls, etc. These invade a privacy interest different from the one discussed in this paper, since they involve no effort to obtain information.

[17] *See* text at note 3 *supra*.

solicitations from charities and family members, and (3) to preserve a reputation for generosity that might be demolished if others knew the precise fraction of their income that they give away. Points (1) and (2) may explain anonymous gifts to charity.

D. *Privacy of Communications*

To the extent that people conceal personal information in order to mislead, the economic case for according legal protection to such information is no better than that for permitting fraud in the sale of goods. However, it is also necessary to consider the *means* by which others obtain personal information. Prying by means of casual interrogation of acquaintances of the object of the prying must be distinguished from eavesdropping, electronically or otherwise, on a person's conversations. *A* in conversation with *B* disparages *C*. If *C* has a right to hear this conversation, *A*, in choosing the words he uses to *B*, will have to consider the possible reactions of *C*. Conversation will be more costly because of the external effects, and the increased costs will result in less, and less effective, communication. After people adjust to this new world of public conversation, even the *C*'s of the world will cease to derive much benefit in the way of greater information from conversational publicity, for people will be more guarded in their speech. The principal effect of publicity will be to make conversation more formal and communication less effective rather than to increase the knowledge of interested third parties.

Stated differently, the costs of defamatory utterances and hence the cost-justified level of expenditures in avoiding defamation are greater the more publicity that is given the utterance. If every conversation were public, the time and other resources devoted to assuring that one's speech was free from false or unintended slanders would rise.[18] Society can avoid the additional costs by the simple and relatively inexpensive expedient of providing legal sanctions against infringement of conversational privacy.

Some evidence in support of this analysis is the experience, well-known to every academic administrator, under the Buckley Amendment.[19] That law gives students access to letters of recommendation written about them, unless they waive in advance their right of

[18] To be sure, the elimination of the false slander is a social gain, as it might mislead the individual hearing it (*B* in the example in text). But the elimination of the true slander is a social loss.

[19] Family Educational Rights and Privacy Act of 1974, § 513, 20 U.S.C. § 1232g (1974).

access. Almost all students execute such waivers because they know that the information value of a letter of recommendation to which the subject of the letter has access is much less than that of a private letter of recommendation.

As additional evidence, notice that language becomes less formal as society evolves. The languages of primitive peoples are more elaborate, more ceremonious, and more courteous than that of twentieth-century Americans. One reason may be that primitive people have little privacy. Relatively few private conversations take place because third parties are normally present and the effects of the conversation on them must be taken into account. Even today, one observes that people speak more formally the greater the number of people present. The rise of privacy has facilitated private conversation and thereby enabled us to economize on communication—to speak with a brevity and informality apparently rare among primitive peoples.[20] Allowing eavesdropping would undermine this valuable economy of communication.

In some cases, to be sure, communication is not related to socially productive activity. Communication among criminal conspirators is an example. In these cases, where limited eavesdropping is indeed

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[20] There is some anthropological evidence supporting this analysis in a paper by Clifford Geertz, who writes:

> In Java people live in small, bamboo-walled houses, each of which almost always contains a single nuclear family. . . . There are no walls or fences around them, the house walls are thinly and loosely woven, and there are commonly not even doors. Within the house people wander freely just about any place any time, and even outsiders wander in fairly freely almost any time during the day and early evening. In brief, privacy in our terms is about as close to nonexistent as it can get. . . . Relationships even within the household are very restrained; people speak softly, hide their feelings and even in the bosom of a Javanese family you have the feeling that you are in the public square and must behave with appropriate decorum. Javanese shut people out with a wall of etiquette (patterns of politeness are very highly developed), with emotional restraint, and with a general lack of candor in both speech and behavior. . . . Thus, there is really no sharp break between public and private in Java: people behave more or less the same in private as they do in public—in a manner we would call stuffy at best. . . .

Unpublished paper *quoted in* A. WESTIN, *supra* note 10, at 16-17.

An additional bit of evidence concerning the relationship between linguistic formality and publicity is that written speech is usually more decorous, grammatical, and formal than spoken. In part this is because spoken speech involves additional levels of meaning—gesture and intonation—which allow the speaker to achieve the same clarity with less semantic and grammatical precision. But in part it is because the audience for spoken speech is typically smaller and more intimate than that for written speech. This makes the costs of ambiguity lower and hence the cost-justified investment in achieving precision through the various formal resources of language smaller. This potential for ambiguity is the reason why people who speak to large audiences normally do so from a previously prepared text.

permitted, its effect in reducing communication is not an objection to but an advantage of it.

The analysis in this section can readily be extended to efforts to obtain people's notes, letters, and other private papers; the efforts would inhibit communication. Photographic surveillance—for example, of the interior of a person's home—presents a slightly more complex question. Privacy enables a person to dress and otherwise disport himself in his home without regard to the effect on third parties. This informality, which is resource-conserving, would be lost were the interior of the home in the public domain. People dress not merely because of the effect on others but also because of the reticence, remarked earlier, concerning nudity and other sensitive states; that reticence is another reason for giving people a privacy right with regard to places in which these sensitive states occur.

E. *Summary of the Economic Approach*

The two main strands of the argument—related to personal facts and to communications—can be joined by remarking the difference in this context between ends and means. With regard to ends there is a prima facie case for assigning the property right in a secret that is a byproduct of socially productive activity to the individual if its compelled disclosure would impair the incentives to engage in that activity; but there is a prima facie case for assigning the property right away from the individual where secrecy would reduce the social product by misleading the people with whom he deals.[21] However, merely because under this analysis most facts about people belong in the public domain does not imply that the law should generally permit intrusion on private communications, given the effects of such intrusions on the costs of legitimate communications.

I admit that the suggested dichotomy between facts and communications is too stark. If you are allowed to interrogate my acquaintances about my income, I may take steps to conceal it that are analogous to the increased formality of conversation that would ensue from abolition of the right to conversational privacy, and the costs of these steps are a social loss. The difference is one of degree. Partly because eavesdropping and related modes of intrusive surveillance are such powerful methods of eliciting private information and partly because they are relatively easy to protect against, we can expect that people would undertake evasive maneuvers, costly

[21] The concept of "dealings" is to be broadly understood: we all have dealings in a nontrivial sense with the President of the United States, for example.

in the aggregate, if surveillance compromised conversational privacy. It is more difficult to imagine that people would take effective measures against casual prying. One is unlikely to alter his income or style of living drastically in order to assure better concealment of his income or of other private information from casual or journalistic inquiry. (Howard Hughes, however, was a notable exception to this generalization.)

I have now sketched the essential elements of a legal right of privacy based on economic efficiency: (1) the protection of trade and business secrets by which businessmen exploit their superior knowledge or skills (applied to the personal level, as it should be, the principle would, for example, entitle the social host or hostess to conceal the recipe of a successful dinner); (2) generally no protection for facts about people—my ill health, evil temper, even my income would not be facts over which I had property rights although I might be able to prevent their discovery by methods unduly intrusive;[22] (3) the limitation, so far as possible, of eavesdropping and other forms of intrusive surveillance to surveillance of illegal activities.

F. *Application to Legislative Trends in the Privacy Area*

Some implications of the analysis are perhaps startling in light of current legislative trends in the privacy field. As noted, the law should in general accord private business information greater protection than it accords personal information. Secrecy is an important method of appropriating social benefits to the entrepreneur who creates them while in private life it is more likely to conceal discreditable facts. Communications within organizations, whether public or private, should receive the same protection as communications among individuals, for in either case the effect of publicity would be to encumber and retard communication.

Yet, contrary to this analysis, the legislative trend is toward giving individuals more and more privacy protection respecting both facts and communications and giving business firms and other organizations, including government agencies, universities and hospitals, less. The Freedom of Information Act, sunshine laws opening the deliberations of administrative agencies to the public, and the erosion of effective sanctions against breach of government confidences have greatly reduced the privacy of communications within the government. Similar forces, for example the Buckley Amend-

[22] A conclusion also reached, though on different grounds, in Thomson, *supra* note 1.

ment and the opening of faculty meetings to student observers, are at work in private institutions such as business firms and private universities. Increasingly, moreover, the facts pertaining to individuals—arrest record, health, credit-worthiness, marital status, sexual proclivities—are secured from involuntary disclosure, while the facts concerning business corporations are thrust into public view by the expansive disclosure requirements of the federal securities laws (to the point where some firms are "going private" in order to secure greater confidentiality for their plans and operations), the civil rights laws, line of business reporting, and other regulations. A related trend is the erosion of the privacy of government officials through increasingly stringent ethical standards requiring disclosure of income.

The trend toward elevating personal and downgrading organizational privacy is mysterious to the economist. To repeat, the economic case for privacy of *communications* seems unrelated to the nature of the communicator, whether a private individual or the employee of a university, corporation, or government agency, while so far as *facts* about people or organizations are concerned the case for protecting business privacy actually seems stronger, in general, than that for individual privacy.

Greenawalt and Noam appear to reach the opposite conclusion in a recent paper.[23] Since they base their analysis, in part anyway, on economics, it requires attention here. They offer two distinctions between a business's or other organization's interest in privacy and an individual's interest. First, they argue that the latter is a matter of rights while the former is based merely on instrumental, utilitarian considerations. However, their reasons for recognizing a right of personal privacy seem utilitarian—that people should have an opportunity to "make a new start" by concealing embarrassing or discreditable facts about their past, and that people cannot preserve their sanity without some privacy. Inconsistently, Greenawalt and Noam disregard the utilitarian justification for secrecy as an incentive to investment in productive activity—a justification mainly relevant, as I have argued, in business contexts.

The second distinction they suggest between business and personal claims to privacy is a strangely distorted mirror of my argument for entrepreneurial or productive secrecy. They argue that it is difficult to establish property rights in information and even re-

[23] K. GREENAWALT & E. NOAM, *Confidentiality Claims of Business Organization* (forthcoming in Columbia University conference volume).

mark that secrecy is one way of doing so. But they do not draw the obvious conclusion that secrecy can promote productive activity by creating property rights in information. Instead they use the existence of imperfections in the market for information as a justification for the government's coercively extracting private information from business firms. They do not explain how the government could, let alone demonstrate that it would, use this information more productively than firms, and they do not consider the impact of this form of public prying on the incentive to produce the information in the first place.

G. *Noneconomic Theories of Privacy*

By way of contrast to the economic theory of privacy, I shall examine briefly some of the other theories of privacy that have been proposed, beginning with that of Warren and Brandeis. They wrote:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality.[24]

This analysis of privacy is wholly unsatisfactory. Narrowly directed

[24] Warren & Brandeis, *supra* note 6, at 196. *See also* quotation in that footnote.

to providing a justification for a right not to be talked about in a newspaper gossip column, the analysis is based on a series of unsupported and implausible empirical propositions: (1) newspapers deliberately try to debase their readers' tastes; (2) the gossip they print harms the people gossiped about far more seriously than bodily injury could; (3) the more gossip the press supplies, the more the readers will demand; (4) reading gossip columns impairs intelligence and morality.

Professor Edward Bloustein is representative of those theorists who relate privacy to individuality:

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.[25]

At one level, Bloustein is saying merely that if people were forced to conform their private to their public behavior there would be more uniformity in private behavior across people—that is to say, people would be better behaved if they had less privacy. This result he considers objectionable apparently because greater conformity to socially accepted patterns of behavior would produce (by definition) more conformists, a type he dislikes for reasons he must consider self-evident since he does not attempt to explain them.

To be sure, Bloustein is suggesting that publicity reduces not only deviations from accepted moral standards but also creative departures from conventional thought and behavior. However, history does *not* teach that privacy is a precondition to creativity or individuality. These qualities have flourished in societies, including ancient Greece, Renaissance Italy, and Elizabethan England, that had much less privacy than we in the United States have today.

Professor Charles Fried argues that privacy is indispensable to the fundamental values of love, friendship, and trust. Love and friendship, he argues, are inconceivable "without the intimacy of shared

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[25] Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964).

private information,"[26] and trust presupposes an element of ignorance about what the trusted one is up to: if all is known, there is nothing to take on trust. But trust, rather than being something valued for itself and therefore missed where full information makes it unnecessary, is, I should think, merely an imperfect substitute for information. As for love and friendship, they, of course, exist and flourish in societies where there is little privacy. The privacy theories of both Bloustein and Fried are ethnocentric.

Even within our own culture, it may be questioned whether privacy is more supportive than destructive of treasured values. If ignorance is the prerequisite of trust, equally knowledge, which privacy conceals, is the prerequisite of forgiveness. The anomie, impersonality, and lack of communal or altruistic feeling that some observers find in modern society can be viewed as aspects of the high level of privacy our society has achieved. The relationship of privacy to social values seems, in short, highly complex.

Fried is explicit in not wanting to ground the right of privacy on utilitarian considerations, the sort congenial to economic analysis. But the quest for nonutilitarian grounds has thus far failed. It may be doubted whether the kind of analysis that seeks to establish rights not derived from a calculation of costs and benefits is even applicable to the privacy area. As Walter Block has pointed out, it makes no sense to treat reputation as a "right." Reputation is what others think of us, and we have no right to control other people's thoughts.[27] Equally we have no right, by controlling the information that is known about us to manipulate the opinions that other people hold of us. Yet this control is the essence of what most students of the subject mean by privacy.

Greenawalt and Noam mention additional, though utilitarian, grounds for valuing privacy besides those emphasized in economic analysis—the "fresh start" ground and the "mental health" ground.[28] The first holds that people who have committed crimes or otherwise transgressed the moral standards of society have a right to a "fresh start" which the inability to conceal their past misdeeds would deny them; the second states as a fact of human psychology that people cannot function effectively unless they have some private area where they can behave very differently, often scandalously differently, from their public self, *e.g.*, the waiters who curse in the

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[26] C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970).

[27] W. BLOCK, DEFENDING THE UNDEFENDABLE 60 (1976).

[28] *See* note 23 *supra.*

kitchen the patrons they treat so obsequiously in the dining room. The first point rests on the popular though implausible and, to my knowledge at least, unsubstantiated assumption that people do not evaluate past criminal acts rationally, for only if they irrationally refused to accept evidence of rehabilitation could one argue that society had unfairly denied the former miscreant a fresh start.[29] The second point has some intuitive appeal but seems exaggerated and ethnocentric and, to my knowledge, is offered as pure assertion without any empirical or theoretical support.

The foregoing review of noneconomic theories of privacy is incomplete. But if I have not done full justice to the previous literature on privacy, I may at least have indicated sufficient difficulties with the noneconomic approaches to suggest the value of an economic analysis. To recapitulate, that analysis simply asks (1) why people, in the rational pursuit of their self-interest, attempt on the one hand to conceal certain facts about themselves and on the other hand to discover certain facts about other people, and (2) in what circumstances such activities will increase rather than diminish the wealth of the society.

II. The Tort Law of Privacy

It is well known that, although the Warren-Brandeis article stimulated the development of the tort law of privacy, the law has evolved very differently from the pattern they suggested; and Bloustein offered his theory of privacy by way of criticism of Prosser's authoritative article describing the privacy tort.[30] Perhaps, then, the tort law is closer to economic than to noneconomic thinking about privacy. This possibility raises an interesting question in the positive analysis of law. Another advantage of focusing on the tort law of privacy is that since it involves mainly private rather than governmental intrusions, we can consider the privacy issue free of the complexities which the quite proper concern with privacy as a safeguard against political oppression injects.[31]

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[29] I return to this point *infra* at note 46.

[30] Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

[31] With regard to the political dimension of the privacy question, I shall digress only long enough to register disagreement with the widespread view that technological advances have increased the power of government vis-à-vis the citizens. The increase in governmental surveillance and the refinement of surveillance techniques are better viewed as responses to the growth in urbanization, income, and mobility—developments that have weakened governmental control by reducing the information that government has about people: by, in short, increasing privacy.

A. *Commercial Privacy*

The broad features of the tort law are those described earlier in the discussion of what an economically based privacy right would look like: (1) substantial protection of the confidentiality of business dealings; (2) public entitlement to obtain by prying most private facts about individuals; but (3) strict limitation on *intrusion* to obtain those facts. The first of these areas is the domain of trade-secrets law, a branch of the tort law of unfair competition. Although the best known kind of trade secret is the secret formula or process, the legal protection is much broader—"almost any knowledge or information used in the conduct of one's business may be held by its possessor in secret."[32] In a well-known case, the court held that aerial photography of a competitor's plant under construction was tortious and used the term "commercial privacy" to describe the interest protected.[33] This decision illustrates the judicial willingness to protect those secrets that enable firms to appropriate the lawful benefits that their activities create.

The appropriate outer bounds of the commercial-privacy tort are somewhat difficult to discern. It is accepted, for example, that a firm may buy its competitor's product and take it apart with a view to discovering how it was made even though "reverse engineering" may reveal secrets of a competitor's production process. How is this type of prying to be distinguished from aerial photography? One difference is that if the law permitted aerial photography of a competitor's plant under construction, the principal effect would not be to generate information; it would be to induce the competitor to expend resources on trying to conceal the interior of the plant. These resources, as well as those devoted to the aerial photography itself which they offset, would be socially wasted. In contrast, the possibility of reverse engineering is unlikely to lead a manufacturer to alter his product in costly ways. Another difference is that aerial photography might disclose secrets that would be more difficult to protect alternatively through the patent system than the kinds of secrets that reverse engineering is likely to reveal.

My analysis of commercial privacy is incomplete. It merely suggests that economic principles may be at work in this field, a field worthy of independent attention.

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[32] Smith v. Dravo Corp., 203 F.2d 369, 373 (7th Cir. 1953).

[33] E. I. du Pont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970). *See also* Smith v. Dravo Corp., 203 F.2d at 377 (7th Cir. 1953).

B. *Personal Privacy*

The tort of invasion of personal privacy has four aspects: (1) appropriation, (2) publicity, (3) false light, and (4) intrusion.[34]

1. *Appropriation.*—In the earliest cases involving a distinct right of privacy, an advertiser uses someone's name or photograph without his or her consent.[35] The classification of these as "privacy" cases is sometimes criticized because often what the law protects is an aversion not to publicity but to not being remunerated for it: many of the cases involve celebrities avid for publicity. But this characteristic of the cases is an embarrassment only to a tort theory that seeks to base the right to privacy on a social interest in concealment of personal information—an unattractive approach, for reasons explored in Part I. There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal.

The subscription-list question discussed earlier may seem to involve the identical "right to publicity."[36] However, transaction costs preclude a magazine from purchasing from another magazine's subscriber the right to solicit him. Furthermore, the multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero. This cost makes it important to have a method for assigning the photograph to one of a few very valuable uses. But the multiple use of a subscription list has little or no negative impact on the list's value.

Professor Bloustein, as one might expect, does not want to recognize an economic basis for the "right of publicity" and tries to make this branch of privacy law a criticism rather than vindication of the market place. He writes: "Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others."[37] But this cannot be the theory of the tort law. The law does not forbid a man to use his photograph "for trade purposes"; it merely gives him a property right in such use.

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[34] For a good summary of the legal principles in this area, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS ch. 20 (4th ed. 1971).

[35] *See, e.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[36] *See* Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976).

[37] Bloustein, *supra* note 25, at 988.

Nor is the theory of the tort protection against a subtle form of misrepresentation which may occur when an advertiser uses another person's name in conjunction with an advertising message. Although this is an element in some of the cases, the legal right is much broader. The decision in *Haelan Laboratories v. Topps Chewing Gum* shows this to be so. The court held that when a baseball player had licensed the exclusive right to the use of his likeness in advertising to one manufacturer of bubble gum, no other bubble gum manufacturer could use the player's photograph in advertising without the licensee's permission.[38] The court expressly stated that "a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture."[39] A misrepresentation rationale cannot explain the result in cases such as *Haelan.*

2. *Publicity.*—If an advertiser uses an individual's picture without his consent, that individual's legal rights are, as we have just seen, infringed. But if the same picture appears in the news section of the newspaper there is no infringement (at least if the picture is not embarrassing and does not portray the person in a false light—separate tort grounds discussed later). The difference in treatment seems at first glance arbitrary. If a particular publication of an individual's photograph would represent the most valuable use of his likeness, why cannot the newspaper purchase the property right from him?

A superficial answer is that the news photograph has public-good aspects that are absent when an advertiser uses the same photograph. A newspaper that invests resources in discovering news of broad interest to the public may not be able to appropriate the social benefits of the discovery and hence recoup its investment because a competitor can pick up and disseminate the news with only a slight time lag, without having to compensate the first newspaper. In other words, the first newspaper's research creates external benefits, and one method of compensating the newspaper for conferring these benefits is to allow it to externalize some of its costs as well (whether it is the best method is a separate question). But while external benefits conceivably may explain (as we shall see) why a newspaper does not have to pay the newsworthy people about whom it writes, they do not explain the newspaper's right to print

[38] Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953).

[39] *Id.* at 868. For similar cases see Note, *supra* note 36, at 534-41.

photographs without payment. The newspaper can copyright the photograph and then no competing medium can republish it without the newspaper's permission.[40]

Two other reasons may, however, explain the difference in legal treatment between the photograph used in advertising and the same photograph used in the news column. First, the social cost of dispensing with property rights is greater in the advertising than in the news case. As suggested earlier, if any advertiser can use a celebrity's picture, its advertising value may be impaired; if Brand *X* beer successfully utilized Celebrity *A*'s picture in its advertising, competing brands might run the same picture in their advertising until the picture ceased to have any advertising value at all. In contrast, the multiple use of a celebrity's photograph by competing newspapers is unlikely to reduce the value of the photograph to the newspaper-reading public. Second, in the news case the celebrity might use the property right in his likeness, if he had such a right, to misrepresent his appearance to the public—he might permit the newspaper to publish only a particularly flattering picture. This form of false advertising is difficult to prevent except by communalizing the property right.

The case for giving the individual a property right may seem even more attenuated where the publicity is of offensive or embarrassing characteristics of the individual, for here publicity would appear to serve that institutionalized prying function which, as noted above, is important in a society in which there is a great deal of privacy facilitating the concealment of discrediting facts from one's fellows. This conclusion is both correct, in general, and the result reached, in general, in the cases; but there is a class of facts which the individual strongly desires to conceal and of which the social value of disclosure is also quite limited. Suppose a person has a deformed nose. The deformity is of course well known to the people who have dealings with him. A newspaper photographer snaps a picture of the nose and publishes it in a story on human ugliness. Since the deformity is not concealable or concealed from people who have dealings with the individual in question, publication of the photograph does not serve to correct a false impression that he might exploit.

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[40] This is so even after Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968), held that the "fair use" exception to copyright encompassed the publication of detailed, accurate charcoal sketches of the Zapruder film of the assassination of President Kennedy in a book about the assassination. The court emphasized the absence of competition between plaintiff and defendants, who did not publish a magazine. Also, the book did not reproduce the photograph itself.

To be sure, readers of the newspaper derive value from being able to see the photograph; otherwise the newspaper would not publish it. However, because the individual's desire to suppress the photograph is not related to misrepresentation in any business or social market place, there is no basis for a presumption that the social value of disclosure exceeds that of concealment. In these circumstances the appropriate social response is to give the individual the property right in his likeness and let the newspaper buy it from him if it wishes to publish a photograph of his nose.[41]

Daily Times Democrat v. Graham[42] is a similar case. A woman was photographed in a fun house at the moment when a jet of air had blown her dress up around her waist. The local newspaper later published the photograph without her consent. In holding that the newspaper had invaded her right of privacy, the court stressed that it was undisputed that she had entered the fun house solely to accompany her children and had not known about the jets of air. In these circumstances the photograph could convey no information enabling her friends and acquaintances to correct misapprehensions about her character which she might have engendered. If anything, the photograph misrepresented her character.

The foregoing analysis may seem to support recognition of a property right in privacy wherever (1) no element of misrepresentation is involved and (2) the information is contained in a photograph which a purchaser of the property right could copyright, thereby eliminating any externality. However, an exception to this rule is necessary for the frequent case where the nature of the event photographed makes transaction costs prohibitive. It would be inefficient to assign the property right in his likeness to an individual photographed as part of a crowd watching a parade, and unidentified to the photographer; or, perhaps, to the accident victim with whom negotiations would be infeasible given the time limit within which the photograph must be published if it is not to lose its newsworthiness. In the former case, the property right is plainly more valuable, as a general matter, to the photographer than to the subject of the photograph; but this conclusion is less clear in the latter case, so that, putting aside first amendment considerations, which will not

[41] This hypothetical case was suggested by the facts of Griffin v. Medical Society, 11 N.Y.S.2d 109 (Sup. Ct. 1939), where, however, publication was in a medical journal rather than a newspaper and the suit was based on alleged appropriation of the photograph for advertising purposes. Lambert v. Dow Chem. Co., 215 So. 2d 673 (La. App. 1968), is closer to the hypothetical case.

[42] 162 So. 2d 474 (Ala. 1964).

be discussed here, some type of balancing of costs and benefits is required. I shall have something to say a bit later on about how this balancing is done.

The cases discussed above are sharply distinguishable in terms of the economic analysis developed in this Article from those where, for example, a newspaper reveals past illegal or immoral activity that an individual has sedulously endeavored to conceal from his friends and acquaintances. Since such information is undeniably material in evaluating an individual's claim to friendship, respect, and trust, affording legal protection to its concealment would be inconsistent with the treatment of false advertising in the market for goods. Nevertheless, an early California case, *Melvin v. Reid*, held that the right of privacy extended to such information.[43] The case was rather special because its posture on appeal required the court to accept as true the plaintiff's allegations which implied that disclosure of her unsavory past could convey no useful information to anybody.[44] And a later California case, *Briscoe v. Reader's Digest Association*, held that the right of privacy does not extend to information concerning recent, as distinct from remote, past criminal activity.[45] This distinction moves the law in the right direction but, from an economic standpoint, not far enough. Remote past criminal activity is less relevant to a prediction of future misconduct than recent—and those who learn of it will discount it accordingly—but such information is hardly *irrelevant* to people considering whether to enter into or continue social or business relations with the individual; and if it were irrelevant, publicizing it would not injure the individual.[46] People conceal past criminal acts not out of bashful-

[43] 112 Cal. App. 285, 297 P. 91 (1931).

[44] Among the facts alleged were that "after her acquittal, she abandoned her life of shame and became entirely rehabilitated; that during the year 1919, she married Bernard Melvin and commenced the duties of caring for their home, and thereafter at all times lived an exemplary, virtuous, honorable and righteous life . . . ." 112 Cal. App. at 286, 297 P. at 91.

[45] 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

[46] It is arguable that the privacy of past criminal acts is based on a social policy of encouraging the rehabilitation of criminals. This argument raises complex issues. Rehabilitation may reduce recidivism, but it also reduces expected punishment costs; hence, whether there is more or less crime in a system that emphasizes rehabilitation is unclear. And there is a question whether concealment is a "fair" method of rehabilitation, since it places potentially significant costs on those who deal in ignorance with the former criminal. It remains, however, possible that rehabilitative goals have been a factor in judicial protection of the former criminal's privacy.

Another factor may be a belief, very uncongenial to economic analysis, that people react irrationally to information concerning past criminal acts. The Restatement gives the example of a former criminal, Valjean, who, though completely rehabilitated, is ruined when news of

ness but precisely because potential acquaintances quite sensibly regard a criminal past as negative evidence of the value of cultivating an acquaintance with a person.

In light of this analysis, one is not surprised to find that, outside of California, the principle of *Melvin v. Reid* is rejected.[47] This result has been reached under the tort law, but it has been reinforced by the recent decision of the Supreme Court in *Cox Broadcasting Co. v. Cohn,* which suggests that the first amendment may privilege the publication (or, as in that case, the broadcast) of any matter, however remote, contained in public records.[48] This privilege would seem to erase the distinction between recent and remote past criminal activity and to eliminate any right of privacy with respect to either. However, it should be noted that *Cox* itself did not involve past criminal activity. The fact publicized was the name of a dead rape victim. The publicity caused distress to the victim's family while providing no information useful to people contemplating transactions with her (since she was dead) or with her family. Nor was her name critical to the information value of the broadcast in which it appeared. As a matter of tort law (my only concern in this Article), it would seem that the state court acted properly in holding that the broadcast invaded the family's right of privacy.

Another, but I think more defensible, case in which a court refused to recognize an invasion of the right of privacy despite the absence of potential misrepresentation is *Sidis v. F-R Publishing Corp.*[49] The *New Yorker* magazine published a "where is he now" article about a child-prodigy mathematician who had as an adult become an eccentric recluse. One could argue that the *New Yorker*'s exposé had produced information useful to people contemplating dealing with Sidis, but the argument would be rather forced because his craving for privacy was so extreme as to reduce to a very low level

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his past comes to light. RESTATEMENT (SECOND) OF TORTS §652D, Illustration 26 (Tent. Draft No. 22, 1976). On the assumption of complete rehabilitation, the suggestion that the information would ruin Valjean's career imputes irrationality to the people dealing with him.

Perhaps the Restatement's draftsmen were referring not to irrationality, but to the rational basing of judgments on partial information. To attach adverse significance to past criminal acts without conducting the kind of thorough investigation that would, in a few cases, dispel their significance is not irrational or malevolent; it is a method of economizing on information costs. *See also* Phelps, *The Statistical Theory of Racism and Sexism,* 62 AM. ECON. REV. 659 (1972).

[47] *See* Rawlins v. Hutchinson Publishing Co., 318 Kan. 295, 543 P.2d 988 (1975); Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 81-82 (1974).

[48] 420 U.S. 469 (1975).

[49] 113 F.2d 806 (2d Cir. 1940).

his dealings with other people. And, given that craving, it is not at all certain that the *New Yorker* would have been willing to pay the price Sidis would have demanded from the magazine to sell his life story to it. But a distinct economic reason, alluded to earlier, provides some support for the court's conclusion that the publication did not invade Sidis' legal rights. The story was newsworthy in the sense that it catered to a widespread public interest in child prodigies. But once the *New Yorker* published its story any other magazine or newspaper could, without compensating it, publish the facts that the *New Yorker* had gathered (perhaps by costly research), so long as the republication did not contain the actual language of the *New Yorker* story. Given the number of potential republishers, there was no market mechanism by which the full social value of the information that the *New Yorker* had gathered could be brought to bear in negotiations with Sidis over the purchase of the right to his life story. In these circumstances there is an argument for not giving him that right—in other words, for allowing the *New Yorker* to externalize some of the social costs of its research, *i.e.*, the costs imposed on Sidis, since it must perforce externalize some of the benefits.

This discussion may seem to overlook a simple way of reducing the costs of disclosure to Sidis without substantially impairing the value of publication to the readers of the *New Yorker*'s story or to readers of other magazines that had picked up the story—not use his real name in the story. But the magazine would also have to change other details in order to conceal his identity effectively, and the changes would substantially reduce the information value of the story: readers would not be certain whether they were reading fact or fiction. In *Barber v. Time, Inc.*,[50] however, the court held that a magazine had invaded an individual's right of privacy by naming her in a story about a disagreeable disease she had, because the news value of the story was independent of the use of her true name. The same was true, I have suggested, in *Cox*.

All this is not to say that the result in *Sidis* was necessarily correct, especially in a global economic sense. Merely because the *New Yorker*'s story may have generated external benefits, it does not follow that that the sum total of the benefits of the story exceeded the sum of the costs, including the costs to Sidis. Obviously this is a difficult comparison for courts to make. They do, however, try: in

[50] 348 Mo. 1199, 159 S.W.2d 291 (1942).

deciding whether newspaper publicity is unlawful they look to the offensiveness of the details publicized and the newsworthiness of the publication, and offensiveness and newsworthiness serve as proxies for the costs and benefits, respectively, of publication.[51]

These proxies are, however, extremely crude, raising the question why, rather than eliminate property rights in one area (privacy) in order to offset the inefficient consequences of failing to recognize property rights in another area (news), the law has not recognized a property right in news. Then there would be no objection to allowing Sidis to block publication of his story. The existence of property rights in both news and privacy would enable the market to function effectively and courts would no longer have to estimate values.

To answer this question, and thus decide whether decisions like *Sidis* are appropriate second-best solutions to intractable problems of economic optimization or simply wrong, would carry us too far away from the privacy area and entangle us in difficult questions of copyright law and policy. Nor could one stop there. If practical difficulties preclude extending copyright protection to ideas, there is still to be considered the possibility that Sidis might be given a property right in (certain) facts about himself, which the *New Yorker*, once having purchased it from him, could enforce against any newspaper or magazine that published its own version of Sidis' story. This solution would assimilate Sidis' case to that of the man with the deformed nose, but would also involve serious practical difficulties that cannot be adequately addressed here. Nor is this the place to evaluate the other privileges the law grants to newspapers in order (perhaps) to offset their lack of property rights in the news. Clearly, however, an adequate theory of the legal rights and liabilities of the news media would consider the extent to which news gathering confers external benefits and whether the recognition of property rights in the news might not be more efficient than the many immunities society has extended to the press—at some cost to the Sidises of this world—in order to compensate it for not having property rights in the fruits of its efforts.

To summarize a rather untidy discussion of the most interesting branch of the tort law of privacy, the law distinguishes in a rough way between discreditable and nondiscreditable private information and accords much less protection to the former, as it

[51] In the language of the Restatement, the matter publicized, to be actionable, must be "of a kind which (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT, *supra* note 46, at 21.

should—though, in California, still too much from an economic standpoint. Where privacy is not a form of misrepresentation, the protection is broader but is limited by problems of externalities and transaction costs that argue against complete privacy protection even with regard to nondiscrediting facts. In a rough way, the Restatement's test, which involves a balance between offensiveness and newsworthiness, captures the essential economic elements of the problem; but it would be a better economic test if it were limited to the class of cases in which publicity serves no unmasking purpose. If what is revealed is something the individual has concealed for purposes of misrepresenting himself to others, the fact that disclosure is offensive to him and of limited interest to the public at large is no better reason for protecting his privacy than if a seller advanced such arguments for being allowed to continue to engage in false advertising of his goods.

3. *False Light.*—Sometimes the privacy plaintiff seeks damages because the newspaper or other news medium has distorted the facts about him. The existence of a tort of defamation which, as the commentators have noted, covers much of the same ground as the false-light privacy tort may seem to compel the conclusion that portraying someone in a false light should be actionable. There is, however, an economic argument that no legal remedy is either necessary or appropriate. The argument is that the law can and should leave the determination of truth to competition in the market place of ideas. What this argument overlooks, however, is that competition among the news media may not take into account the full costs of being placed in a false light. Suppose *Life* magazine runs an article about a family held hostage which inaccurately shows the captors subjecting the family to beatings, verbal sexual assaults, and other indignities. The article imposes private and social costs by conveying misinformation about the family that may deter others from engaging in certain social or other relationships with its members. If there is a public demand for the accurate portrayal of the family's characteristics, a competing magazine *may* run a story that will correct the false impression created by *Life*'s story, but this is not certain. For in considering whether to publish such an article, the competitor will not consider the benefits of correction to the family and the people who might transact with its members; it will consider only its readers' interest in reading such an article.[52]

[52] *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 407-08 (1967) (separate opinion of Harlan, J.). To be sure, the family could, in principle at least, pay *Life* to run a correction, but this

This argument may not seem decisive in light of the earlier point that the publication of newsworthy articles generates external benefits which might justify allowing the newspaper or magazine to externalize some of its costs as well. However, encouraging cost externalization to take the form of distorting the truth would be inefficient since distortion would reduce the social benefits as well as costs of publication.

The analysis in this section suggests, incidentally, an economic reason why the law limits the rights of public officials and other "public figures" to seek legal redress for defamation. The status of a public figure increases an individual's access to the media by making his denials newsworthy, thus facilitating a market, as distinct from a legal, determination of the truth of the defamatory allegations. The analysis may also explain, on similar grounds, the traditional refusal of the common law to recognize a right to recover damages from a competitor for false disparagement of his goods:[53] the disparaged competitor can rebut untruthful charges in the same advertising medium the disparager used.

4. *Intrusion.*—Eavesdropping, photographic surveillance of the interior of a home, ransacking private records to discover information about an individual, and similarly intrusive methods of penetrating the wall of privacy with which people surround themselves are tortious.[54] This result is consistent with the economic analysis in Part I, but cases involving "ostentatious surveillance," as by a detective who follows someone about everywhere, present a more difficult question. The common thread running through the cases in which the courts have held that ostentatious surveillance was tortious is that the surveillance exceeded what was reasonably necessary to uncover private information and became a method of intimidation, embarrassment, or distraction. An example is the famous case of Mrs. Onassis and the aggressive photographer, Ron Gallela.[55] The court affirmed Gallela's right to photograph Mrs. Onassis but required him quite literally to keep his distance, since the methods he was using to obtain the photographs impaired her freedom of movement to a degree impossible to justify in terms of the additional information he could obtain thereby. It is no answer to say

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solution has the unfortunate characteristic, compared with tort liability, of encouraging inaccurate reporting.

[53] *See* American Washboard Co. v. Saginaw Mfg. Co., 103 F. 281 (6th Cir. 1900).

[54] *See, e.g.*, Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958); Dietemann v. Times, Inc., 449 F.2d 245 (9th Cir. 1971).

[55] Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

that she could have paid him to keep his distance; if she had no property right, paying him to desist would simply invite others to harass her in the hope of being similarly paid off.

Consistent with the analysis in this Article, the common law does not limit the right to pry through means not involving interference with the subject's freedom of movement. Thus in Ralph Nader's suit against General Motors the court affirmed the latter's right to hire someone to follow Nader about, question his acquaintances, and, in short, pertinaciously ferret out personal information about Nader which General Motors might have used to undermine his public credibility.[56] Yet I would expect a court to enjoin any attempt through such methods to find out what Nader was about to say on some subject in order to be able to plagiarize his ideas.

CONCLUSION

The analysis in Part II of this Article suggests that the common law response to the problem of privacy has been broadly consistent with the economics of the problem as developed in Part I.[57] I have

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[56] Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

[57] There is a danger that by examining as narrow a branch of the common law as the privacy tort, one will overlook other common law principles related to privacy but perhaps inconsistent with the privacy tort. Blackmail may appear to be such a principle. If I am correct that the facts about a person (as distinct from his communications) should be in the public domain so that those who have to decide whether to initiate (or continue) social or business relations with the person will be able to do so on full information, does it not follow that the Nosey Parker should be allowed to sell back the information he obtains to the individual?

Imagine that a person has a criminal record which he is anxious to conceal. Newspaper publication would be privileged because the crimes were committed in the recent rather than the remote past, although having served his sentence the person is not subject to further criminal liability in respect of them. Someone who made it his business to conduct research into people's pasts and sell the results to the newspaper would thus be subject to no sanction, but if he tried to sell his research to the object of it he would be guilty of the crime of blackmail.

The difference of treatment is all the more puzzling because in the analogous area of false advertising of goods there seems to be no difference. If a customer sues a seller for false advertising, his objective is more likely to be to obtain a financial settlement than to publicize the falsehood, but this is not considered an improper objective, and settlement is freely permitted. Blackmail would seem to serve a function similar to that of the false advertising suit by creating a deterrent to acquiring or concealing characteristics that are undesirable in the eyes of people having social or business dealings with the person blackmailed.

The cases are not, however, precisely analogous. A closer analogy to the customer's suit for false advertising might be a wife's divorce action based on her husband's concealment from her of his homosexuality. Here, too, settlement is permitted. The counterpart to the blackmail case in the false advertising area would be a suit, which is not permitted, by someone, neither customer nor competitor, who is simply in the business of bringing enforcement actions. The policy against such suits, as against blackmail, is founded on considera-

not discussed all of the privacy cases nor are all those I have discussed consistent with economic theory. Nonetheless, especially given the absence of a well-developed competing positive theory of the privacy tort, the economic approach holds promise of increasing our understanding of this puzzling branch of law.

No one has argued that most *legislation* has an implicit economic logic, so it is not surprising that recent legislative trends in the privacy field have not conformed to the economics of the privacy problem. Broadly stated, the trend has been toward expanding the privacy protections of the individual while contracting those of organizations, including business firms. This trend is the opposite of what one would expect if efficiency considerations were motivating privacy legislation.

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tions—based on the economics of private law enforcement—that have nothing to do with a judgment that false advertising is a less serious offense in the personal than in the commercial sphere. These considerations are expounded in Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-43 (1975).