

Posner, Richard A.

**Working Paper**

## The Right to Privacy

Working Paper, No. 2

**Provided in Cooperation with:**

George J. Stigler Center for the Study of the Economy and the State, The University of Chicago  
Booth School of Business

*Suggested Citation:* Posner, Richard A. (1978) : The Right to Privacy, Working Paper, No. 2, The University of Chicago, Center for the Study of the Economy and the State, Chicago, IL

This Version is available at:

<https://hdl.handle.net/10419/262404>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE

WORKING PAPER SERIES

THE RIGHT OF PRIVACY

Richard A. Posner\*

Working Paper No. 002

CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE

The University of Chicago  
1101 East 58th Street, Chicago, Illinois 60637

Center working papers are distributed informally and in limited number for comments only. They should not be quoted without the written permission of the author.

\*Lee and Brena Freeman Professor of Law, University of Chicago Law School; member, Senior Research Staff, Center for the Study of the Economy and the State, University of Chicago.

1978

## THE RIGHT OF PRIVACY

Richard A. Posner\*

### Introduction

The concept of "privacy" is elusive and ill defined, and much ink has been spilled in trying to clarify its meaning.<sup>1</sup> 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.<sup>2</sup>

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-good) markets: such topics as advertising, fraud, price dispersion, and job search. The present paper attempts an economic analysis of the dissemination and withholding of information mainly 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 paper develops the economic analysis. I remark in passing the paradox that personal privacy seems to be valued more highly than organizational privacy, judging by current public policy trends, but that a reverse ordering would be more consistent with the economics of the problem. The second part of the paper 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 -- they will incur costs to discover it. Thus we have two economic goods, "privacy" and "prying." We could regard them as pure consumption goods, the way turnips or beer are normally regarded in economic analysis; 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 final values. Under this approach, people would be assumed not to desire or value privacy or prying in themselves but to use these goods as an input into the production of income or some other broad measure of utility or welfare.

It is the second approach, which views privacy and prying as intermediate goods, that will be taken here. This will allow the economic analysis to proceed but 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 enlightening.

### B. The Demand for Private Information

The demand for private information (viewed, as it will be throughout this paper, 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 sought by the tax collector, fiancé, partner, creditor, competitor,

etc. Less obviously, much of the casual prying (a term not used here with 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 usually think, 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, one wants to know in choosing a friend whether he will be discreet or indiscreet, selfish or generous -- qualities not necessarily 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 other people's opinion of them, using misrepresentation.<sup>3</sup> 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."<sup>4</sup> Even the strongest defenders of privacy describe the individual's right to privacy as the right to "control the flow of information about him."<sup>5</sup> 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 seems mysteriously disinterested -- for example, that of the readers of newspaper gossip columns, whose "idle curiosity" has been deplored,<sup>6</sup> groundlessly in my opinion. Gossip columns recount the 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. That does not make it any less educative. The fascination with the notorious and the criminal -- with Profumo and with Leopold -- has a similar basis. Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational.

Moreover, 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? 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.<sup>7</sup> The economist does not believe, however, that supply creates demand.<sup>8</sup> A more persuasive explanation for the rise of the gossip column is the secular increase in personal income. There is apparently very little privacy in poor societies,<sup>9</sup> where, consequently, people can readily observe at first 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<sup>10</sup> -- too great to make the expenditure of a lot of time watching neighbors a worthwhile pursuit. An alternative method of informing oneself about how others live was sought and was provided by the press. 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 strongest case for property rights in secrets is presented where it is necessary in order to encourage investment in the production of socially valuable information. This is the 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 "shrewd bargainer" is not required to disclose to the other party to the bargain his true opinion of its value. A shrewd bargainer is (in part) one who invests resources in obtaining information about the true values of things. Were he forced to share this information with potential sellers, he would get no return on his investment, and the process -- basic to a market economy -- by which goods are transferred 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.

At some point nondisclosure becomes fraud. One consideration relevant to deciding whether the line has been crossed is whether the information sought to be concealed by one of the transacting parties is a product of significant investment.<sup>11</sup> If not, the social costs of nondisclosure are

reduced. This may be decisive on the question, for example, whether the owner of a house should be required to disclose latent (i.e., nonobvious) defects to a purchaser. The ownership and maintenance of a house are costly and productive activities. But since knowledge of the house's defects is acquired by the owner costlessly (or nearly so), forcing him to disclose these defects will not reduce his incentive to invest in discovering them.

As examples of cases where transaction-cost considerations argue against the assignment of a property right to the possessor of a secret, consider (1) whether the Bureau of the Census should be required to buy information from the firms or households that it interviews and (2) whether a magazine should be allowed 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 unless the Bureau used a differentiated price schedule designed to assure a representative sample despite the different costs of disclosure (and hence prices for cooperating) to the firms and households sampled. In the magazine case the costs of obtaining subscriber approval would be high relative to the value of the list.<sup>12</sup> If, therefore, we are confident 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 this the law does.<sup>13</sup>

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



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 in these cases should assign the property right in information to the individual to whom it pertains; and under the common law, as we shall see, generally it 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 any and all methods of uncovering those secrets should be permitted.

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 a seller in hawking his wares should be permitted 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 conceal some of the facts that the people with whom they deal 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 personal shortcomings -- a duty not to be a hypocrite. But we should be allowed to protect ourselves from disadvantageous transactions by ferreting out concealed facts about other individuals which are material to those individuals' implicit or explicit representations concerning their moral qualities.

It is no answer that such individuals have "the right to be let alone."<sup>15</sup> Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves.<sup>16</sup> Why should others be asked to take their self-serving claims at face value and 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 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, family, acquaintances, business associates -- who might use information about him to gain an advantage in business or social transactions 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 conceal an unexpectedly high income in order to (1) avoid the attention of tax collectors, kidnappers, and thieves, (2) fend off solicitations from charities and family members, and (3) preserve a reputation for generosity that would be shattered if the precise fraction of their income that was being given away were known. Points (1) and (2) may explain anonymous gifts to charity.

#### D. Privacy of Communications

To the extent that personal information is concealed in order to mislead, the case for according legal protection to it is weak. Protection would simply increase transaction costs, much as if we permitted fraud in the sale of goods. However, it is also necessary to consider the means by which personal information is obtained. 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 this 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: 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 on 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. The additional costs are avoided by the simple and inexpensive expedient of permitting conversations to be private.

It is relevant to observe 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. There are relatively few private conversations 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.<sup>17</sup> This valuable economy of communication would be undermined by allowing eavesdropping.

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 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; communication would be inhibited. A more complex question is presented by photographic surveillance -- for example, of the interior of a person's home. Privacy enables a person to dress and otherwise disport himself in his home without regard to the effect

on third parties. This economizing property would be lost if the interior of the home were 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; this 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 by-product 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 if secrecy reduces the social product by misleading others. However, the fact that under this analysis most facts about people belong in the public domain does not imply that intrusion on private communications should generally be permitted, given the effects of such intrusions on the costs of legitimate communications.

Admittedly, 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 evasive maneuvers, costly in the aggregate, would be undertaken if

conversational privacy were compromised. It is more difficult to imagine people taking 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 was a notable exception to this generalization.)

We have now sketched the essential elements of an economically based legal right of privacy: (1) Trade and business secrets by which businessmen exploit their superior knowledge or skills would be protected. (The same principle would be applied to the personal level and would thus, for example, entitle the social host or hostess to conceal the recipe of a successful dinner.) (2) Facts about people would generally not be protected -- my ill health, evil temper, even my income would not be facts over which I had property rights though I might be able to prevent their discovery by methods unduly intrusive under the third category.<sup>18</sup> (3) Eavesdropping and other forms of intrusive surveillance would be limited (so far as possible) to 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, private business information should in general be accorded greater legal protection than 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 simply to conceal legitimately discrediting or deceiving 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.

But contrary to the above the legislative trend is toward giving individuals

more and more privacy protection respecting both facts and communications, and 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 are at work in private institutions such as business firms and private universities (e.g., the Buckley Amendment, and the opening of faculty meetings to student observers). Increasingly, moreover, the facts -- arrest record, health, credit-worthiness, marital status, sexual proclivities -- pertaining to individuals 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 (as are other recent trends in public regulation). 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 seems actually stronger, in general, than that for individual privacy.

Greenawalt and Noam appear to reach the opposite conclusion in a recent paper which is limited however to privacy claims vis-à-vis government;<sup>19</sup> since

their analysis is based, in part anyway, on economics, it requires our attention. They offer two distinctions between a business's (or other organization's) interest in privacy and an individual's interest. First, they say the latter is a matter of rights and that the former is based merely on instrumental, utilitarian considerations. The reasons they offer for recognizing a right of personal privacy are, however, utilitarian -- that people need an opportunity to "make a new start" (i.e., to conceal embarrassing or discreditable facts about their past), that people cannot preserve their sanity without privacy, etc. (I shall have more to say about these considerations in the next section of this paper.) Yet 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 the 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 remark 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 valuable information. Instead they use the existence of imperfections in the market for information as a justification for government regulation designed to extract private information from business firms. They do not explain, however, 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 or more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality.<sup>20</sup>

This analysis of privacy is wholly unsatisfactory. Narrowly directed to providing a justification for a right not to be talked about in a newspaper gossip column, their 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 that is supplied, the more will be demanded; (4) reading gossip columns impairs intelligence and morality.

Professor 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.<sup>21</sup>

At one level, Bloustein is saying merely that if people were forced to conform their public to their private 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 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.

At a deeper level, Bloustein is suggesting that publicity reduces not only deviations from accepted moral standards but also creative departures from conventional thought and behavior. But history does not suggest that privacy is a precondition to creativity or individuality. These qualities have flourished in societies (such as that of ancient Greece, or Renaissance Italy, or Elizabethan England) that had much less privacy than we in the United States have today.

Professor 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 private information,"<sup>22</sup> 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, while love and friendship exist and flourish in societies where

there is little privacy. The privacy theories of both Bloustein and Fried are ethnocentric.

Fried is explicit in not wanting to bottom the right of privacy on utilitarian considerations, the sort congenial to economic analysis. But the quest for nonutilitarian grounds has thus far failed. It is doubtful whether the kind of analysis that seeks to establish rights not derived from a calculation of costs and benefits is at all applicable in 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.<sup>23</sup> 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 of the essence of what most students of the subject mean by privacy.

Greenawalt and Noam mention additional grounds for valuing privacy besides those emphasized in economic analysis: the "fresh start" ground and the "mental health" ground.<sup>24</sup> 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 will be denied them if they cannot conceal their past misdeeds; 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 kitchen the patrons they treat so obsequiously in the dining room). The second point has some intuitive appeal but seems exaggerated and, to my knowledge at least, is offered as pure assertion without any empirical or theoretical support. The first rests on the popular though implausible and again, to my knowledge, unsubstantiated assumption that people do not evaluate past criminal acts rationally, for only if there were an irrational

refusal by the public to accept evidence of rehabilitation could it be argued that the former miscreant had been unfairly denied a fresh start.<sup>25</sup>

The foregoing review of noneconomic theories of privacy is, incomplete. But if I have not done 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 which, to recapitulate, asks (1) why people, in the rational pursuit of their self-interest, want 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 the tort law of privacy, though stimulated by the Warren-Brandeis article, has evolved very differently from the pattern they suggested; and Bloustein's theory of privacy was offered by way of criticism of Prosser's authoritative article describing the privacy tort.<sup>26</sup> Perhaps the tort law conforms to the economic theory of privacy -- a theory sharply at variance with the theories of either Warren and Brandeis or Bloustein. Thus an interesting question in the positive analysis of law is raised. 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 introduced by the quite proper concern with privacy as a safeguard against political oppression.<sup>27</sup>

### 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) the confidentiality of business dealings is well protected; (2) facts about individuals are generally regarded as being in the public domain; but (3) intrusion to obtain those facts is strictly limited. The first of these areas is the domain of "trade secrets" law, a branch of commercial tort law (unfair competition). The best known kind of trade secret is the secret formula or process but 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 secret."<sup>28</sup> In a well-known case aerial photography of a competitor's plant under construction was held to be tortious and the court used the term "commercial privacy" to describe the interest protected,<sup>29</sup> suggesting a willingness to protect those secrets which 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, though "reverse engineering" may reveal commercially valuable trade secrets of a competitor's production process. How is this type of prying to be distinguished from aerial photography? One difference is that if aerial photography of a competitor's plant under construction were permitted, the principal effect would be not to generate information but to induce the competitor to expend resources on trying to conceal the interior of the plant, and 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 (I conjecture) 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 kind of secrets

likely to be revealed through reverse engineering.

My analysis of commercial privacy is incomplete. It merely suggests that economic principles may be at work in this field, a field so complex as to warrant independent treatment.

#### B. Personal Privacy

The tort of invasion of personal privacy has four aspects: (1) appropriation, (2) publicity, (3) false light, and (4) intrusion.<sup>30</sup>

1. Appropriation. In the earliest cases involving a distinct right of privacy, a person's name or photograph is used in advertising without his or her consent.<sup>31</sup> The classification of these as "privacy" cases has been criticized because often what is protected is an aversion not to publicity but to not being remunerated for it: many of the cases involve celebrities avid for publicity. But this 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 photograph will be purchased by the advertiser to whom it is most valuable. Making the photograph the communal property of advertisers would not achieve this goal.

The subscription-list case discussed earlier may seem to involve the identical "right to publicity."<sup>32</sup> 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 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 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."<sup>33</sup> But this cannot be the theory of the tort law. The law does not forbid a man to sell his photograph for advertising; it merely gives him a property right in such use. Nor can the theory of the tort be protection against a subtle form of misrepresentation which may occur when one's name is used in conjunction with an advertising message. This is an element in some of the cases. But the legal right is much broader. This is illustrated by the Haelan decision, which held that when a baseball player had sold the exclusive right to the use of his likeness in advertising to one manufacturer of bubble gum, another bubble-gum manufacturer could not use the player's photograph in his own advertising without the licensee's permission.<sup>34</sup> The court stated expressly 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."<sup>35</sup> The results in cases such as this cannot be explained on a misrepresentation rationale.

2. Publicity. If an individual's picture is used in advertising without his consent his 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 the same photograph is used in advertising. 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 other news media can pick up and disseminate the news with only a slight time lag and they do not have to compensate the newspaper that first discovered it. In other words, the newspaper's activities create external benefits, and one method of compensating it is to allow it to externalize some of its costs as well. But while this may explain (as we shall see) why newspapers do not have to pay the newsworthy people about whom they write, it does not explain the newspaper's right to print photographs without payment. The newspaper can copyright the photograph and then no competing medium can republish it without the newspaper's permission.<sup>36</sup>

Two other reasons may 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 only a particularly flattering picture to be published. This is a form of false advertising difficult to prevent except by communalizing the property right to his likeness.

The case for an individual 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 the institutionalized prying function that we saw earlier is important in a society in which there is a great deal of privacy facilitating the concealment of discrediting facts from one's fellows. There is, however, a class of facts as to which concealment is strongly desired yet the social value of disclosure is 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. 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 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.<sup>37</sup>

Daily Times Democrat v. Graham<sup>38</sup> was 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 photograph was later published (without her consent) in the local newspaper. In holding that her right of privacy had been invaded the court stressed the undisputed fact 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.

Such cases are to be distinguished from those in which 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, recognizing a right to conceal it would be inconsistent with the social reaction to false advertising in the market for goods. Nevertheless an early case, Melvin v. Reid, held that the right of privacy extended to such information.<sup>39</sup> But the case was rather special because in the posture in which it reached the appellate court the plaintiff's allegations had to be accepted as true, and they implied that disclosure of her unsavory past could convey no useful information to anybody.<sup>40</sup>

A later case held that the right of privacy does not extend to information concerning recent, as distinct from remote, past criminal activity.<sup>41</sup> 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 will accordingly be discounted by those who learn of it. But it would be incorrect to regard such information as 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.<sup>42</sup>

A recent Supreme Court decision, Cox Broadcasting, suggests that the First Amendment may privilege the publication of any matter, however remote, contained in public records.<sup>43</sup> This would seem to erase the distinction between recent and remote past criminal activity and to eliminate any right of privacy with respect to either. This result has not, however, been reached under the tort law, nor was the rationale of Cox a concern with misrepresentation inherent in concealing past criminal activity. Indeed, Cox did not involve past criminal activity at all. 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 article in which it appeared. As a matter of tort law, therefore, it would seem that the state court acted properly in holding that the family's right of privacy had been invaded. (The inroads of constitutional law on the tort law of privacy raise interesting questions that will not be pursued further here.)

Another, but I think more defensible, case in which a right of privacy was denied despite the absence of potential misrepresentation is Sidis v. F.R.-Publishing Corp.<sup>44</sup> The New Yorker magazine published a "where is he now" article about a child-prodigy mathematician who as an adult had become an eccentric recluse. It would be possible, but difficult, to argue that the New Yorker's exposé had produced information useful to people contemplating dealing with Sidis -- his craving for privacy was so extreme as to exclude the possibility of many such transactions. 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, supports the court's conclusion that the publication did not invade Sidis's 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 actual language used by the New Yorker was not copied. Given the number of potential republishers there was no market mechanism by which the full social value of the information gathered by the New Yorker could be brought to bear in negotiations with Sidis over the purchase of the right to his life story. In these circumstances there was 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 which had picked up the story): not use his real name in the story. But other details would also have to be changed in order to conceal his identity effectively and once that was done the information value of the story would be substantially reduced -- readers would not be certain whether they were reading fact or fiction. In Barber v. Time, Inc.,<sup>45</sup> however, a magazine was held to have 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 Broadcasting.

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 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 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 here function as proxies for the costs and benefits, respectively, of publication.<sup>46</sup>

These proxies are, however, extremely crude. This raises 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 attempt 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 is this the place to evaluate the other privileges newspapers have been granted 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 Sidis's of this world -- in order to compensate it for not having property rights in the fruits of its efforts.

3. False Light. Sometimes recovery of damages is sought because the newspaper or other news medium has distorted the facts about a person.<sup>47</sup> At first glance the case for recovery for damaging falsehoods may seem obvious. This is suggested by 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. It is however arguable that no legal remedy is either necessary or appropriate -- that the determination of truth should be left to competition in the market place of ideas. What this argument overlooks is that the costs of being placed in a false light may not be taken into account in the competition among news media. Suppose Life magazine runs an article about a family held hostage in which the family is inaccurately shown to have been subjected to beatings, sexual assaults, and other indignities. The article imposes private and social costs by conveying misinformation about the family which might 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 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 subscribers' interest in reading such an article.<sup>48</sup>

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 rights of public officials and other "public figures" to seek legal redress for defamation are limited relative to those of purely private persons. 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 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:<sup>49</sup> the disparaged competitor can rebut untruthful charges in the same advertising media used by the disparager.

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.<sup>50</sup> This is consistent with the economic analysis in Part I, but a more difficult question is presented by cases involving "ostentatious surveillance" -- as by a detective who follows someone about everywhere. The common thread running through the cases in which ostentatious surveillance is deemed tortious is that the surveillance exceeds what is reasonably necessary to uncover private information and becomes a method of intimidation, embarrassment, or distraction. An example is the famous case of Mrs. Onassis and the aggressive photographer, Ron Gallela.<sup>51</sup> Gallela's right to photograph her was affirmed but he was required 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. Nor is it an answer 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.

Consistently with the analysis in this paper, 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 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.<sup>52</sup> 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 paper 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.<sup>53</sup> I have not discussed all of the privacy cases nor are all those I have discussed clearly 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 privacy legislation were motivated by efficiency considerations.



F o o t n o t e s

\* Professor of Law, University of Chicago. This is the text of the Sibley Lecture to be given on March 2, 1978, at the University of Georgia Law School. The paper is part of a collaborative project with George J. Stigler on the law and economics of privacy, conducted under the auspices of the Center for the Study of Economy and the State at the University of Chicago. I am indebted to Richard A. Epstein, Charles Fried, Kent Greenawalt, Anthony T. Kronman, William M. Landes, George J. Stigler, Geoffrey R. Stone, James B. White, and participants in the Law and Economics Workshop at the University of Chicago Law School for helpful comments on earlier drafts.

1. See, e.g., Judith Jarvis Thompson, *The Right to Privacy*, 4 *Phil. & Pub. Affairs* 295 (1975). On the variety of legal contexts of the term privacy see Gary L. Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 *Calif. L. Rev.* 1447 (1976).

2. See George J. Stigler, *The Economics of Information*, in his *Organization of Industry* 171 (1968).

3. This is the theme of an excellent book by Erving Goffman, *The Presentation of Self in Everyday Life* (1959). He refers explicitly to "misrepresentation" but uses the term without any pejorative connotation. *Id.* at 58.

4. Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 32 *Law & Contemp. Prob.* 307 (1966).

5. Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 *Am. Bar Foundation Research J.* 1193, 1207.

6. Even gossip apparently harmless, when widely and persistently 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 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.

Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 *Harv. L. Rev.* 193, 196 (1890).

7. "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." Samuel D. Warren & Louis D. Brandeis, supra note 6.
8. "In this, as in other branches of commerce, the supply creates the demand." Id.
9. See David H. Flaherty, Privacy in Colonial New England 83 (1972); Thomas Gregor, Mehinakui: The Drama of Daily Life in a Brazilian Indian Village 89-90, 360-61 (1977); and anthropological data reported in the first chapter of Alan F. Westin, Privacy and Freedom (1967). Gregor's findings on privacy are summarized in Marvin Harris, Cannibals and Kings: The Origins of Cultures 12 (1977), as follows: "...the 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 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."
10. Cf. Staffan Burenstam Linder, The Harried Leisure Class ch. VII (1970).
11. Anthony T. Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. Legal Studies (1978).
12. 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.
13. See *Shibley v. Time, Inc.*, 45 Ohio App. 2d 69, 341 N.E.2d 337 (1975).
14. 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.
15. *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.
16. See text at note 3 supra.
17. Some anthropological evidence supporting this analysis is found 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

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 Alan F. Westin, supra note 9, at 16-17.

An additional bit of evidence concerning the relationship between linguistic formality and publicity is the fact 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 same clarity to be achieved 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, which makes the costs of ambiguity lower and hence the cost-justified investment in achieving precision through the various formal resources of language greater. This is why people who speak to large audiences normally do so from a previously prepared text.

18. A conclusion also reached, though on different grounds, in Judith Jarvis Thompson, supra note 1.

19. Kent Greenawalt & Eli Noam, Confidentiality Claims of Business Organizations, forthcoming in Columbia University conference volume (McGraw-Hill).

20. Samuel D. Warren & Louis Brandeis, supra note 6, at 196. See also quotation in that note.

21. Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962, 1003 (1964).

22. Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice 142 (1970).

23. Walter Block, Defending the Undefendable 60 (1976).

24. See note 19 supra.

25. I return to this point infra at note 42.

26. William L. Prosser, Privacy, 48 Calif. L. Rev. 383 (1960).

27. 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 citizen. 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.

28. *Smith v. Dravo Corp.*, 203 F.2d 369, 373 (7th Cir. 1953).

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

30. For a good summary of the legal principles in this area see William L. Prosser, *Handbook of the Law of Torts* ch. 20 (4th ed. 1971).

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

32. See Note, *The Right of Publicity -- Protection for Public Figures and Celebrities*, 42 *Brooklyn L. Rev.* 527 (1976).

33. Edward J. Bloustein, supra note 21 at 988.

34. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

35. Id. at 868. For similar cases see Note, supra note 32 at 534-41.

36. This is so even after *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968), which 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 (the latter did not publish a magazine). Also, the photograph itself was not reproduced.

37. This hypothetical case was suggested by the facts of *Griffith 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.

38. 162 So.2d 474 (Ala. 1964).

39. 112 Cal. App. 285, 297 P. 91 (1931).

40. 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.

41. *Briscoe v. Reader's Digest Assn.*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

42. 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 reduces recidivism, to be sure, 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 his past comes to light. American Law Institute, Restatement of the Law, Second, Torts, Tentative Draft No. 22, at 30 (May 1976). On the assumption of complete rehabilitation, the suggestion that Valjean's career would be ruined imputes irrationality to the people dealing with him.

It is conceivable, though unlikely, that the Restatement's draftsmen were referring not to irrationality but to rationally basing 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 the unfavorable judgment is not irrational or malevolent; it is a method of economizing on information costs. Cf. Edmund Phelps, *The Statistical Theory of Racism and Sexism*, 62 Am. Econ. Rev. 659 (1972).

43. *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

44. 113 F.2d 806 (2d Cir. 1940).

45. 159 S.W.2d 291 (Mo. 1942).

46. In the language of the Restatement, the matter publicized, to be actionable, must be of "of a kind which (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." American Law Institute, supra note 42, at 21.

47. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

48. See 385 U.S. at 407-08 (separate opinion of Harlan, J.).

49. See *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (6th Cir. 1900).

50. See, e.g., *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958); *Dietemann v. Times, Inc.*, 449 F.2d 246 (9th Cir. 1971).

51. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

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

53. 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 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 the fact that her husband had concealed from her the fact 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 considerations -- 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 William M. Landes and Richard A. Posner, *The Private Enforcement of Law*, 4 *J. Legal Studies* 1, 42-43 (1975).