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PRIVACY, SECRECY, AND REPUTATION

Richard A. Posner*

In a recent article I attempted to analyze privacy from the standpoint of economics.[1] Because the subject of privacy is a large and difficult one which had never been approached from an economic angle, the article was necessarily incomplete. The present article carries the analysis forward in a number of areas covered inadequately or not at all in the previous one. While that article was limited to the concept of privacy as concealment of facts and communications, this one considers several other aspects of privacy--for example, the desire for seclusion that may lead a person to resent telephone solicitations even if the caller makes no effort to extract private

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1. Richard A. Posner, The Right of Privacy, 12 Ga. L. Rev. 393 (1978) (hereinafter cited Right of Privacy). An abbreviated version of the article, but which includes some additional material on privacy legislation, appears in Regulation, May/June 1978, at p. 19, under the title An Economic Theory of Privacy.

information from him. The present article also tries to establish some empirical foundations for the economic analysis of privacy. Further, it extends the analysis to defamation, on the ground that blackening another's reputation by means of false accusations is a practice closely related to enhancing one's own reputation by concealing discreditable facts about oneself--which the first article argued is an important motivation for seeking privacy. The present article also attempts (1) to explain the rash of state statutes dealing with privacy in credit and in employment and (2) to analyze the role of government both as a possessor of privacy and as an invader of the privacy of its citizens. These two parts of the article are preliminary, tentative, and inconclusive.

I. The Origins of the Economic Analysis of Privacy

There is an extensive literature on privacy. Although it is primarily the work of lawyers such as Brandeis, Bloustein, Fried, and Prosser, and the political scientist Westin,[2] historians, sociologists, and philosophers have also contributed to it.[3] However, like my first article on privacy, this one, for better or for worse, owes little to the previous literature. Its provenance is the economic analysis of nonmarket behavior, pioneered by Gary Becker;[4]

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2. This literature is reviewed in Right of Privacy 406-09.

3. See, e.g., David H. Flaherty, Privacy in Colonial New England (1972); Judith Jarvis Thomson, The Right to Privacy, 4 Phil. & Pub. Affairs 295 (1975); and Edward Shils, Privacy: Its Constitution and Vicissitudes, 31 Law & Contemp. Prob. 281 (1966). For a recent and representative sample of pre-economic views of privacy see Privacy (John B. Young ed. 1978).

4. See essays collected in Gary S. Becker, The Economic Approach to Human Behavior (1976).

the economic analysis of law, a field partly derivative from Becker's work on racial discrimination, crime, marriage, and other areas of non-market behavior and partly an independent field growing out of work by Calabresi, Coase, and others;[5] and the economics of information.[6]

It is thanks to Becker that the sorts of things one talks about in a discussion of privacy, such as gossip, prying, "self-advertising," slander, and seclusion, are now considered to be at least potentially within the domain of economics. But since, with minor exceptions, privacy has not been subjected to economic analysis,[7] I have had to attempt such an analysis myself. A conclusion of that analysis stressed in my previous article is that secrecy is entitled to legal protection where it is necessary to protect an investment in the acquisition of socially valuable information, but not where it serves to conceal facts about an individual which, if known to others, would cause them to revalue him downward as an employee, borrower, friend, spouse, or other transactor.[8] Although this conclusion may seem normative, its

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5. See generally Richard A. Posner, Economic Analysis of Law (2d ed. 1977).

6. See, e.g., J. Hirshleifer, When Are We in the Theory of Information?, 63 Am. Econ. Rev. Papers and Proceedings 31 (1973).

7. Greenawalt and Noam have discussed business privacy; see reference and criticism in Right of Privacy 405-06. And there have been a few studies in which the assumption that physical privacy is a superior good has been used to explain why the secular increase in personal incomes is associated with an increase in the number of people living alone. See Robert T. Michael, Victor R. Fuchs & Sharon R. Scott, Changes in Household Living Arrangements 1950-1976 (Working Paper No. 262, Nat'l Bur. Econ. Res., July 1978), and references cited therein.

8. See Right of Privacy 394-404.

main purpose is different. It is to help us understand privacy-related behavior and the legal reaction thereto. For example, an economic theory of privacy sets the stage for an empirical test of the hypothesis that the common law is best explained as an effort (however unwitting) by the judges to formulate rules that maximize economic efficiency.[9] My previous article found the common law of privacy to be generally congruent with the economics of the problem,[10] and the present article makes the same finding with regard to the common law of defamation.[11]

II. The Etymology of the Term "Privacy"

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

The original meaning of the word "private" was nonpublic, in the sense of uninvolved in matters of state.[12] Its root, moreover, is the same as that of words like "privation" and "deprivation." Originally, to be uninvolved in public affairs was to be deprived and it would not in those days have been a compliment (as it is in some quarters today)

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9. A thesis developed in Posner, supra note 5, especially pts. I and VI.

10. See Right of Privacy 409-21.

11. See Part V, infra.

12. See Oxford English Dictionary entry under privacy. See also the discussion of the history of privacy in Shils, supra note 3.

to call someone a "very private person." This etymology is a clue to an important if controversial point--that the concept of privacy, in anything like the senses in which we use it today, is a Western cultural artifact. The idea that it might be pleasant to be off the public stage, as it were, was hardly meaningful in a society in which physical privacy was essentially nonexistent--was not only prohibitively costly but also extremely dangerous. Privacy was then the lot of the pariah.[13]

Gradually the word private lost its unfavorable connotations, probably because the growth in the differentiation of institutions and in wealth and public order made it both economically feasible and physically safe for people to have a measure (though initially a very small one) of physical privacy. By the seventeenth century we find a concept of privacy as withdrawal from the cares of public life through physical removal to a secluded garden or country estate. This aspect of privacy may be called "seclusion." Its outstanding characteristic is a reduction in the number of social interactions. An equivalent term is "retirement" in its complex modern sense in which we speak of a person being "retiring" and also of a person being "retired."

The sense of privacy as seclusion has been immensely influential in the privacy literature; it is, for example, the sense in which Brandeis and Warren used the term in their famous article on privacy.[14] Yet it

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

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

is actually a rather archaic concept, belonging to the period when physical privacy was very limited--when people lived in such crowded conditions[15] that to get some privacy required withdrawal to an isolated spot of countryside. The opportunities for physical privacy are so much greater in modern society that few people any more crave the solitude of Walden Pond. The enormous growth of physical privacy was overlooked by Brandeis and Warren when they wrote (well before the era of electronic eavesdropping) that modern man had less privacy than his forebearers.

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

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15. On the paradox of crowding in eras or areas of low population density see note 55 infra.

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

The case for privacy in the sense of concealment of personal information is different from and generally weaker than the case for allowing people who want to reduce their social interactions to choose a "retiring" mode of life; and it is much weaker than the second sense of seclusion which I have noted. It is to be regretted therefore that advocates of a broad right of privacy in the sense of secrecy have conflated the two concepts,

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16. For an elaboration of this view of privacy see Right of Privacy 394-97, 399-400.

17. 5 U.S.C. 552a.

seclusion and secrecy. They have sought to appropriate the favorable connotations that privacy enjoys in the expression "a very private person" to support the right to conceal one's criminal record from an employer. Yet they have not protested against expansive interpretations of the First Amendment that sanction invasions of real seclusion, for example by Jehovah's Witnesses sound trucks.[18] As Professor Freund pointed out some years ago, "On the whole, the active proselyting interests have been given greater sanctuary than the quiet virtues or the right of privacy."[19] The modern privacy advocates want concealment rather than peace and quiet.

Concealment is closely related to another concept and the linkage helps to explain the continuity between defamation and invasion of privacy as torts. I refer to "reputation." A person's reputation is other people's valuation of him as a trading, social, marital, or other kind of partner. An asset potentially of great value, it can be damaged by both false and true defamation. This possibility is the basis of the individual's incentive both to seek redress against untruthful libels

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

19. Paul A. Freund, The Supreme Court of the United States: Its Business, Purposes, and Performance 40 (1961).

and slanders and to conceal true discrediting information about himself--the former being the domain of the defamation tort and the latter of the privacy tort. The concept of reputation is not similarly intertwined with that of privacy as seclusion. Indeed, to an individual who is seeking to reduce his interactions with other people, reputation--what other people think of him as a candidate for various interactions--is of diminished significance.

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

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20. This is the view of the "humanistic psychology" movement. See M. Rotenberg, "Alienating Individualism" and "Reciprocal Individualism": A Cross-Cultural Conceptualization, 17 J. Humanistic Psych. 3 (1977). See also discussion in Michael A. Weinstein, The Uses of Privacy in the Good Life, in Nomos XIII: Privacy 88, 89-93 (J. Roland Pennock & John W. Chapman eds. 1971).

21. However, some minimal level of physical privacy may be necessary for material progress. See pp. infra.

22. See reference and discussion in Right of Privacy 408-09.

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

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

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

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

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

III. Some Economics of Privacy

A. Seclusion

Privacy, as I have noted, began to lose its negative connotations when the countryside was pacified, so that individuals, who lived in crowded conditions, could occasionally seek solitude, retreat, seclusion, and retirement from their busy everyday lives. The desire for seclusion seems at first glance difficult to understand in instrumental terms, as an input into or investment in an activity. It seems, rather, an

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

end in itself, an aspect of consumption or taste--and to label a preference a "taste" is to confess that it has no economic explanation. Nor is a convincing psychological explanation available. A taste for solitude cannot be regarded as a precondition for sanity or even happiness, for at most times and in most places people have lacked it. It is only very recently, taking the whole course of human evolution, that it was safe for people to be alone for even short periods of time. Even today, while intellectuals may like to think of themselves as leading or wanting to lead retired, contemplative lives, the vast mass of people continue, by preference, to live, work, travel, recreate, and be entertained, in groups; even when "alone," the average person will usually be listening to the radio or watching television. Most solitude is involuntary, and mental illness is associated with solitude rather than its absence.[26]

The association between solitude and intellectuality suggests, however, that the demand for at least limited solitude or seclusion, as distinct from the desire to lead a permanently reclusive life, may have an instrumental interpretation after all. People whose work is mental rather than physical require a more tranquil environment than others and this will often entail greater solitude.[27] Further, as we are about to see, a creator of ideas will often seek secrecy in order to enable

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26. See e.g., Gary L. Cooper & Martin D. Green, Coping with Occupational Stress Among Royal Air Force Personnel on Isolated Island Bases, 39 Psych. Rep. 731 (1976).

27. This point, emphasized to me by George Stigler, has implications for explaining the secular trend in privacy, discussed infra at pp. .

him to appropriate the social benefits of his creations; and secrecy often requires solitude. Finally, some measure of seclusion is necessary to assure privacy of communication, an important aspect of privacy which is discussed below.

As a detail, it may be noted that if there is a taste for solitude as an end in itself it is a selfish emotion in a precise economic sense which can be assigned to the concept of selfishness. Solitary activity (or cessation of activity) benefits only the actor. Work, and nonmarket interactions such as love, child care, and even casual socializing, confer benefits on others. Production for the market yields consumer surplus while nonmarket interactive activities presumably yield a form of nonmarket consumer surplus.[28] In an important sense, therefore, the person who works is "unselfish" no matter how exclusively motivated by greed he is. But the individual who retires from the world, like the lazy man (who trades market income for a reduction in the disutility of work), reduces his contribution to the wealth of the other people in the society. It is the antimarket bias of the modern intellectual that has made the term "private person" one of approbation rather than of opprobrium.

For most people, the desire for "privacy" has nothing to do with wanting to be an anchorite, or even with wanting just some peace and quiet. People often want privacy in order to manipulate other people by concealing from them aspects of their character, or prospects, or past that would if

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28. For example, the "output" of a social game of tennis is presumably greater than the opportunity costs (or prices) of the activity to the players. Each is conferring a net benefit on the other.

known reduce their opportunities to engage in advantageous market or nonmarket transactions.[29] But that is not always the case, of course, and I want now to examine an important case where privacy is desired for reasons neither reclusive nor manipulative. This is the case of "innovation."

B. Innovation

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

The choice between these methods of fostering the production of socially valuable information depends on a weighing of the relative costs and benefits of the two methods in particular circumstances. On the benefit side, compare statutory and common law copyright. Statutory copyright gives the author or publisher a property right in his work: no one may copy it without his authorization. Common law copyright

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

uses the method of secrecy: so long as the author does not publish his manuscript the law will protect him against unauthorized dissemination by others.[30] Obviously, the method of secrecy would be self-defeating for the author who wanted to publish his work, or where the practice of an invention immediately disclosed the embodied innovation. And even where secrecy would afford some protection (a publisher might earn substantial revenues before a pirate edition could be printed and distributed), it might be an extremely costly method of protection--it might entail, for example, accelerated, secretive book publication at costs much higher than if the publisher had a property right in the published work. As a further example, a secret process might have valuable applications in some other industry yet the owner of the process might be afraid to sell it because of the danger that the secret would get out to his competitors.

Property rights are not, however, always the superior method of enabling private appropriation of the social benefits of information. The legal costs of enforcing a property right are sometimes disproportionate to the value of the information sought to be protected: the patent system could not be used to protect a popular host's dinner recipes. Often what may be termed the "tracing" costs of information preclude reliance on a property-right system. If ideas as such were patentable or copyrightable, as distinct from the sorts of concretely embodied ideas that the patent and copyright laws in fact protect, the

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30. Common law copyright is not simply an aspect of trespass law. If I, being lawfully on your premises, make a xerox copy of your manuscript but do not remove or damage the manuscript, there is no theft or conversion but there is an infringement of your common law copyright.

scope of, and the difficulty of determining, infringement would be excessive. For these and other reasons secrecy is an important social instrument for encouraging the production of information (especially, as we shall see, where the formal rights system in intellectual property is undeveloped). Many examples come to mind. The shrewd bargainer who conceals from the other party to a negotiation his true opinion of the value of the object of the transaction is legitimately engaged in appropriating the social benefit of superior knowledge of market values; and so with the large purchaser of some company's stock who places a lot of small orders under false names so that his activity will convey less information to the sellers that they have undervalued the stock.[31] Secrecy is the indispensable method of protecting not only the speculator's investment in obtaining information vital to the prompt adjustment of markets to changed conditions but also the investment in information both of the great chef and of the housewife who "buys" the esteem of her friends with her imaginative cooking. The lawyer work product doctrine is best understood as the use of secrecy to protect the lawyer's (and hence client's) investment in research and analysis of a case.

C. Concealment of Personal Facts

In speaking of privacy as seclusion and as innovation, I have had no occasion to bring reputation into the discussion. Reputation is the

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

opinion in which someone is held by others as a candidate to transact with, either socially or commercially. A good reputation implies that people are eager to transact with the individual and a bad one that they are averse to transacting with him. Reputation affects the individual's wealth by determining the terms that people will offer him in transactions. Thus, withdrawal, temporary or permanent, from society is normally not motivated by a desire to enhance reputation. To take the extreme case, the recluse has little use for a reputation. Nor does the inventor seek "privacy" (secrecy) for the purpose of creating or enhancing a reputation. In contrast, the third sense of privacy which I am interested in explicating--privacy as the concealment of discreditable facts about oneself--is closely related to reputation, for it is a method (though not the only or even the most effective method) of enhancing reputation.

People do not conceal a criminal past because they desire seclusion or because if they reveal their past they will be impeded in reaping the fruits of innovative activity. They conceal it in order to secure a good reputation. This point is obvious enough in the parallel case of a producer who conceals the dismal safety record of his product. The individual who hides a history of mental illness or some other relevant health defect from his employer, family, and friends, or a history of bankruptcies from his creditors, or tastes, eccentricities, opinions, attitudes, and the like that if known would impair his reputation among friends and acquaintances is engaged in the same kind of activity as a producer who conceals defects in his product. Only

the modern intellectual's prejudice against market activity makes this a startling equation.[32]

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

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32. On the contemporary tendency to favor the enhancement of liberty in the personal sphere and its suppression in the economic sphere see Aaron Director, The Parity of the Economic Market Place, 7 J. Law & Econ. 1 (1964); and Ronald H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. Papers & Proceedings 384 (1974).

33. This process has been analyzed extensively in the context of racial discrimination (see e.g., Gary S. Becker, The Economics of Discrimination (2d ed. 1971); and Harold Demsetz, Minorities in the Market Place, 43 N.C.L. Rev. 271 (1965)), but would seem to be equally at work in the case of discrimination against convicts, homosexuals, etc.

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

The different treatment of past criminal conduct in the law of torts and the law of evidence provides further insight on this point. In tort law, save in California, there is no right of action against someone who publicizes an individual's criminal record, no matter how far in the past the crime occurred.[34] However, in criminal trials, the use of past crimes to impeach a witness's testimony is limited (in the judge's discretion) to relatively recent crimes.[35] In both cases, it is arguable

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34. See Right of Privacy 415-16.

35. See McCormick's Handbook of the Law of Evidence 87 (Edward W. Cleary (2d) ed. 1972).

that people can be trusted to discount negative personal information by its recency. In the tort case, the people doing the discounting--friends and acquaintances, creditors and other employers, and other actual and potential transactors--pay a price, in lost opportunities for advantageous transactions, if they attach undue weight to events in the remote past. No rule is needed. Jurors pay no similar penalty, and in these circumstances a paternalistic approach to the question of the rationality of their decisions may therefore be warranted.

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

There is no evidence that people are generally less rational about how far to carry their search for employees, spouses, friends, and so forth than they are in the ordinary economic activities that we leave to the market (indeed employment is one of those activities). A

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36. See further on this point pp. _____ infra. Notice how the existence of minimum-wage laws retards the process by which members of different groups obtain access to the employment market.

growing empirical economic literature on nonmarket behavior, including marriage, procreation, and criminal activity, finds that people behave about as rationally in these areas as do firms and consumers in explicit markets.[37] These findings argue for allowing market principles to determine the weight to be given the sorts of discrediting information that people seek to conceal. The market approach suggests in turn that whatever rules governing fraud are deemed optimal in ordinary product markets ought in principle to apply equally in labor markets, credit markets, and "markets" for purely personal relationships as well. Thus, if economic analysis would deem the refusal to disclose a particular type of fact fraudulent in the market for goods, such refusal ought also to be deemed fraudulent when made by someone seeking a job, a personal loan, or a wife. Annulment of a marriage because of fraud is thus a strict analogue to recission of a fraudulent commercial contract. Of course, in many areas of personal relations the costs of fraud are too slight to warrant formal legal remedies.

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

1. Concealment sometimes serves, paradoxically, the function (distinct from the innovation function of secrecy discussed earlier) of promoting rather than impeding the flow of accurate information. At any moment a person's mind is likely to be brimming over with vagrant, half-formed,

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37. See Becker, supra note 4, Introduction, and studies cited in note 53 infra. The absence of a minimum wage in the nonmarket sector is a factor favoring the weeding out of irrational antipathies in that sector.

As this example suggests, clothing, adornment, cosmetics, and the like serve not only to communicate but also to misrepresent, though this sort of misrepresentation has rarely been thought worth public intervention to correct. A misrepresentation rationale for the sporadic efforts to regulate luxury in dress cannot be entirely excluded, however. Barbara Tuchman writes of the fourteenth century:

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

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

3. Any concept of concealment as misrepresentation must, by analogy to commercial misrepresentation, incorporate some notion of materiality. People may, for reasons imperfectly understood (or at least not illuminated by economics), assiduously conceal facts about themselves which if known would not affect their social interactions; much of the traditional (and rapidly vanishing) reticence about nudity has this character. No efficiency interest is promoted by requiring disclosure of the immaterial concealed fact. By the same token, there is little demand for such disclosures.

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40. Barbara W. Tuchman, A Distant Mirror: The Calamitous 14th Century 19 (1978).

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

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

D. Communication

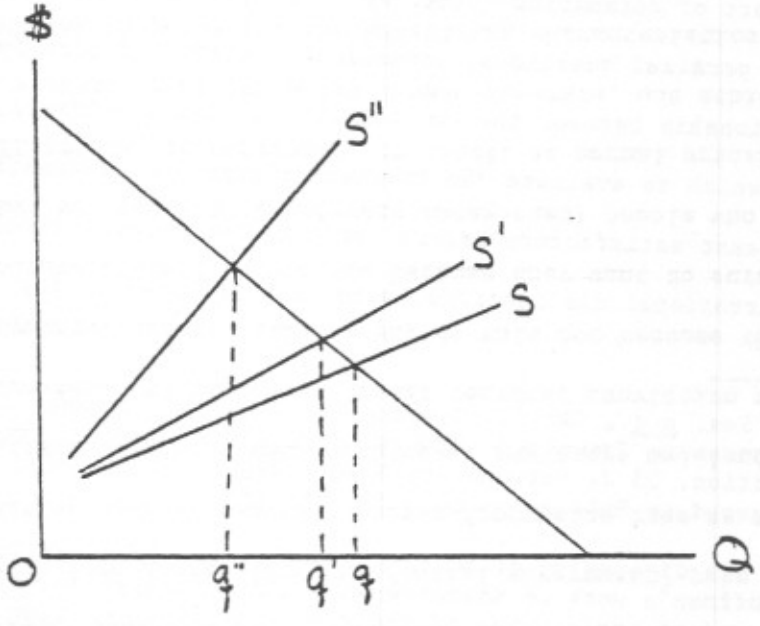
The privacy of communications requires separate consideration. In one sense, a communication (letter, phone call, face-to-face conversation, or whatever) is simply a medium by which facts are (selectively) disclosed. It might seem, therefore, that if the facts are the sort for which secrecy is desired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

C's wrath, the knowledge that C might overhear the conversation may induce A to withhold information that might be valuable to B. This is the reason for, among other things, the practice of according anonymity to referees of articles submitted to scholarly journals.

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

The distinction is developed in Figure 1. D is the schedule of marginal private benefits to the individual from the activity of concealing material facts about himself. S is the cost to him of this concealment. He carries his output of the activity to the intersection of the curves, at q. If we assume, first, that the benefits to the individual are exactly equal to the costs to those from whom he conceals

material facts about himself (i.e., that the benefits are a series of transfers from them to him) and, second, that these transfers are eventually transformed into equivalent social costs,[41] then the social costs of the activity are the entire area under the D curve to the left of q. Assume that some change in law or technology occurs which makes it somewhat more costly for the individual to conceal material facts about himself. The effect is to shift S upward to S' (a proportionately equal shift in the supply curve is assumed). The result is a small decline in the activity and hence in its social costs. If, however, the event that shifts the supply curve--say, the introduction of indiscriminate wiretapping--imposes costs on socially productive as well as socially unproductive activity, costs not shown in the diagram, the net social benefits of the change could well be negative.



41. The usual assumption in the economics of crime literature. See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 171 n.3 (1968); and Gordon Tullock, the Welfare Costs of Tariffs, Monopolies and Theft, 5 W. Econ. J. 224 (1967).

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

The shift from S to S' is a guess as to the effect on the amount of concealment of personal facts of allowing eavesdropping, and the shift from S to S" a guess as to the effect of refusing to recognize a property right in personal information such as a criminal record or a history of mental illness. The costs of concealing the past are higher than those of using indirectness in speech and they rise rapidly with the scale of the activity, as suggested by the slope of S". When Thomas Eagleton was nominated for Vice-President on the Democratic Party ticket in 1972, there was no way he could have concealed his history of mental illness, but he could have concealed his opinions of third parties in a regime of conversational publicity.[42]

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

I have identified several areas where secrecy appears to promote social

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

welfare. The question arises as to the nature of the legal protection accorded secrecy in these areas. Suppose A in conversation with B slanders C, B repeats the slander to C, and C sues A for defamation. Has A the right to sue B to recover any damages paid out to C, on the ground of breach of confidence? The general answer is no, unless A and B have a contract obligating B to respect A's confidences. Such contracts are rarely made, presumably because the costs of a broken confidence are normally low relative to the costs of negotiating and enforcing a contract. Also there are effective nonlegal sanctions for breach of promise by a social friend or family member because of the continuing nature of the relationship.[43] An occasional exception is where the confidence is imparted in the course of business dealings, especially where the confidence imparted is a valuable trade secret; and here one often finds explicit contracts forbidding breach of confidence.

If the fact imparted in confidence is discreditable, a contract designed to prevent its disclosure might well be viewed as contrary to public policy and hence unenforceable. This result would be in harmony with the analysis in this paper, and is the general approach of the law. If I confess a crime and exact your promise not to reveal my confession to anyone, the promise is unenforceable no matter what formalities of contractual obligation are employed. Yet there is an important set of exceptions to this principle: at common law, information

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43. See Richard A. Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Studies 411, 417 (1977).

imparted in confidence in conversations between spouses, between client and lawyer, and between certain government officials ("executive privilege") is given extraordinary protection.[44] For example, a husband who has confessed a crime to his wife can prevent her from testifying to the confession in a criminal proceeding. This result seems puzzling from an economic standpoint. True, the marital and lawyer-client relationships would be impaired if the spouse and the client respectively had to exercise extreme circumspection in communication, because the nature of these relationships makes it easy for the spouse or lawyer to detect guilt from an unguarded remark. But why should society wish to strengthen the bonds of matrimony and of legal representation for criminals?[45]

One answer is that if there is a sufficiently strong social interest in promoting the marriage relationship, the spousal immunity, though it results in higher costs of crime than otherwise, may be justifiable in terms of the encouragement it offers to spouses to communicate with each other without concern for possible later use of testimony against them.[46] It is not surprising, therefore, in an era when the importance attached to stable marriages has declined, to find a strong movement against the immunity.[47]

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44. See McCormick's Handbook of the Law of Evidence, supra note 35, chs. 9-10, 12. The doctor-patient privilege is statutory.

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

46. This is the traditional rationale of the immunity (see McCormick's Handbook of the Law of Evidence, supra note 35, at 172) and, as Gary Becker has stressed, is consistent with the recent economic analyses of the family.

47. See id., 1978 Pocket Part, at 30.

The opposite extreme from the spousal and lawyer-client privileges would be a rule requiring people to disclose material facts about themselves--to issue periodic disclosures similar to those that corporations are required to make under the federal securities laws. Theory and experience suggest that in neither area is such a reporting requirement necessary or appropriate.[48] We can leave to contract, formal or informal, the task of eliciting the amount of disclosure that creditors, employers, spouses, friends--or shareholders--deem optimal in deciding whether and on what terms to deal with the individual or corporation in question. I am arguing in short for a uniform approach to the regulation of personal and commercial or corporate information. My previous article (in its discussion of the privacy tort) and the present one (in its discussion of the defamation tort in Part V) provide evidence that the common law, consistently with the implications of the economic analysis in this paper, has applied a unitary standard to the personal and commercial-corporate spheres.

F. Physical Privacy

The most elementary concept of privacy is that of physical privacy, as when one speaks of a "private apartment," or of lacking "privacy" when one has to share a kitchen with another family or an office with a coworker. Physical privacy is important not in itself but as the precondition for the various sorts of privacy I have been discussing--seclusion, innovation, concealment, and conversational privacy. It can

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48. On the disclosure requirements of the federal securities laws see George J. Benston. Corporate Financial Disclosure in the UK and the USA (1976); and George J. Stigler. Public Regulation of the Securities Market, 37 J. Bus. 117 (1964).

be used to relate a society's level of privacy to its material conditions. Poor people or poor societies cannot afford the amount of physical space necessary to create privacy.[49] In the poorest of societies physical privacy is obtainable only by retreating to the wilds, often at considerable danger. Apart from purely spatial considerations, poor societies lack the occupational and recreational mobility that fosters privacy by making it costly to keep track of people. Urbanization is a powerful facilitator of privacy by enabling individuals to obtain anonymity.

The historical growth in privacy involves a shift both in demand and in supply. Insofar as people seek private homes, move to cities, etc. as their incomes rise in order to obtain greater privacy (a plausible motivation in light of the many private benefits, in innovation, concealment, etc., that privacy affords), we may describe privacy as a superior good (i.e., proportionately more is demanded as income rises) which has increased tremendously over time as a result of the secular growth in incomes.[50] However, developments that have facilitated privacy, like the city, the private home, and the automobile, have been motivated by other desires besides just desire for privacy. In incidentally lowering the costs of obtaining privacy, these developments have futher promoted its growth and provide an additional reason for observing an increase of privacy as society becomes wealthier and more urban.

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49. On the conditions of privacy in poor societies see text at notes 54-55 infra.

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

Another factor operating on the supply side is the cost of surveillance, until recently a highly labor-intensive activity which had presumably been growing relatively more costly as an aspect of the general lag of productivity growth in the labor-intensive service sector compared to the capital-intensive manufacturing sector. This trend has probably been reversed by developments in electronics over the past 50 years, beginning with wiretapping. Recent advances in computerized data processing have enabled the accumulation at low cost of vast amounts of private information by credit bureaus, insurance companies, other private firms, and government. At the same time the government's demand for personal information has grown as an incident to the expansion of the size, and concomitant taxing requirements, of government.

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

G. Curiosity and Prying

Just as there is a demand for privacy, so there is a demand for pestering, prying, and invading privacy in other ways. The tendency in thought is to couple an uncritical enthusiasm for privacy with an uncritical revulsion against prying. Yet the prying that used to be the preserve of the village gossip but is now more likely to be done by investigative reporters and gossip columnists serves the important social function of unmasking the misrepresentations that people employ to deceive others into transacting with them on advantageous terms.

(I use transaction in the broadest sense, to include the individual who wants to be "our" Vice-President without disclosing his history of mental illness.)

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

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

the growth of physical privacy has shut off direct observation of how strangers live.[51]

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

IV. The Empirical Evidence for the Economic Approach

The preceding part of this paper repeated and extended the economic analysis that I used in my previous paper as the basis for arguing that the common law rules relating to privacy are economically efficient and therefore provide evidence for the positive economic theory of the

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51. Compare Westin's description of how the houses of the wealthy in ancient Rome were cheek-by-jowl with the tenements of the poor (Alan F. Westin, Privacy in Western Society: From the Age of Pericles to the American Republic 44 (Report to Ass'n of Bar of City of N.Y. Spec. Comm. on Sci & Law, Feb. 15, 1965)), a pattern that persists to this day in many European cities but is virtually unknown in the U.S. On transaction-cost obstacles to purchasing the private information recounted in gossip columns from the subjects see Right of Privacy 417-18.

common law. I will not repeat or attempt to add to that evidence here,[52] but will instead take up a different point. If one accepts (at least for argument's sake) that the privacy cases are broadly consistent with the economic theory of privacy, what evidence is there that the theory itself is correct?

Much of the evidence at this stage is indirect. Empirical studies of a wide variety of personal behavior not usually considered economically motivated, including the choice of a spouse and the decision whether to commit a "noneconomic" crime such as malicious mischief or rape, confirm the applicability of the economic model to such behavior.[53] These studies establish a presumption that the economic approach is applicable to other sorts of personal behavior as well, such as that involved in privacy situations.

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

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52. See Right of Privacy 409-21; and with regard to defamation, Part V of this paper, infra. Bloustein, supra note 24, at 442-47, points out that some of the privacy cases protect a kind of shyness (e.g., about nudity) that is not always motivated by a desire to conceal discreditable facts about oneself. That the cases protect such shyness is not inconsistent with the economic theory of the privacy tort (a point Bloustein fails to understand); it is, rather, the shyness itself that presents a puzzle from the economic standpoint. See note 38 supra and accompanying text.

53. For illustrative studies see Gary S. Becker, Elisabeth M. Landes & Robert T. Michael, An Economic Analysis of Marital Instability, 85 J. Pol. Econ. 1141 (1977); William M. Landes, An Economic Study of U.S. Aircraft Hijacking, 1961-1976, 21 J. Law & Econ. 1 (1978); and studies cited in Becker, supra note 4, at 9-11.

1. Although there is no convenient metric for ranking societies by the amount of privacy they afford, some gross distinctions are possible, and suggestive. For example, privacy is virtually nonexistent in most primitive societies (American Indian, tribal African, and so on).[54] People live crowded together in small villages, lack private rooms and often even doors to the outside, are rarely alone, and have little opportunity for concealment of any sort.[55] The absence of privacy (suggested by the lack even of a word for it in the languages of primitive peoples) implies, if the economic analysis summarized in Part II is correct, that speech in primitive and ancient societies will tend to be more formal and circumspect than in modern societies, in just the same way (another bit of evidence of the economic model) that modern people speak more formally the larger the audience.[56] The Homeric epics, which assumed their final form in the late eighth or early

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54. See e.g., Right of Privacy 396 n.10; John Beard Haviland, Gossip, Reputation, and Knowledge in Zinacantan (1977); and John M. Roberts & Thomas Gregor, Privacy: A Cultural View, in Nomos XIII: Privacy, supra note 20, at 199. For a vivid evocation of the lack of privacy in primitive societies see E.E. Evans-Pritchard, The Nuer 15 (1940).

55. For example, the Yanoama Indians live in large collective dwellings of up to 100 yards in diameter. As many as 250 people will live in each dwelling, grouped in families each of which clusters around its own hearth. There are no walls within the dwellings. The Yanoama villages are surrounded by thousands of square miles of virgin forest but it is considered dangerous to leave the village. See Napoleon A. Chagnon, Yanoama: The Fierce People (2d ed. 1977); William J. Smole, The Yanoama Indians (1966).

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

seventh century B.C., provide the most striking but not the only evidence of the precision and decorum of primitive speech--so at variance with the crudeness of primitive technology.[57]

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

The amount of privacy necessary to sustain innovative activity of a high order appears, however, to be less than we take for granted today. For example, only the very wealthy in ancient Rome enjoyed the sort of physical privacy most people in the advanced countries enjoy today and their privacy was greatly compromised by the fact that they were under continual observation of their servants, many of whom, apparently,

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57. See also Right of Privacy 402 n.20; and Language in Culture and Society pt. II (Dell Hymes ed. 1964), It is relevant to note that rhetoric was an important field of education and scholarship in Aristotle's time (and indeed long before)--and has virtually disappeared today.

were disloyal (servants were often paid police informers).[58] In the medieval manor the whole household would often sleep together in the great hall (with the lord and lady, perhaps joined by one or two favored guests, in the only bed). As late as the seventeenth century it was common for the well-to-do to have servants sleep in their bedrooms for protection against possible intruders. As late as the eighteenth century bedrooms opened into each other rather than into a common hallway.

It is my conjecture that at some point, reached long ago, further increases in the amount of personal privacy no longer increased significantly the incentive to innovate but did, of course, continue to increase the ability of people to conceal their activities for manipulative purposes. The identification of this point of diminishing social returns to privacy is, obviously, a research task of formidable difficulty; it will not be attempted here.

Another interesting comparison is between modern-day America and Europe.[59] There is more physical privacy in America than in Europe. Europeans live in more crowded conditions; single-family houses are rarer;

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58. My main source for the history recounted in the paragraph is the interesting study by Alan F. Westin, Privacy in Western History: From the Age of Pericles to the American Republic (Report to Ass'n of Bar of City of N.Y. Spec. Comm. on Sci. & Law, Feb. 15, 1965). For a more specialized study see Richard Goldthwaite, The Florentine Palace as Domestic Architecture, 77 Am. Hist. Rev. 977 (1972).

59. See Herbert J. Spiro, Privacy in Comparative Perspective, in Nomos XIII: Privacy, supra note 20 at 121, and for the factual basis of this paragraph Edward T. Hall, The Hidden Dimension chs. 11-12 (1966).

"suburban sprawl" remains largely an American phenomenon;[60] many Europeans still live in villages; there is greater occupational and geographical mobility in the U.S. than in Europe. These characteristics bearing on physical privacy are reinforced by the greater intrusiveness of the state in Europe than in America--the internal passports, and so on. The lack of privacy implies on an economic view, and one finds, that Europeans are (1) more formal and precise in their use of language; and (2) more reserved and circumspect with strangers--more "private." (The behavior of Japanese, who also lack privacy by American standards, supports this point.) The American gabbles freely to strangers; the European and Japanese does not. The reason suggested by the analysis in this paper is that the American is so favorably situated for concealing discreditable information about himself that he incurs little cost in revealing himself to a stranger. The chance that this stranger will encounter him again, or knows people who know him, or is otherwise a candidate for significant future interactions with him, is less in the American than in the European or Japanese setting.

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

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

displaying important differences in grammar and vocabulary from standard English, are expressive instruments of considerable subtlety and power.[61] Lack of privacy may explain the emphasis placed in this otherwise deprived culture on rhetorical skill.

2. Like the comparative studies, the psychological studies reveal greater circumspection where the costs of candor are higher. Experimental study has shown, for example, that a man approached by a stranger will tend to speak less freely to him than a woman approached by a stranger.[62] This difference need not be ascribed to some fundamental biological difference between the sexes. An economic explanation is possible. Because men are more likely to be involved in market activities than women, they generally derive greater value from concealment of possibly discreditable information than women do, and this fact may be responsible for the greater reticence that traditionally distinguishes men from nonworking women. The same study showed that a man will generally speak about himself with greater candor to a female than to a male stranger. This behavior is consistent with the fact that a man (excepting the occasional Don Juan) is more likely to be a candidate for future transactions with another man (who might be a tax collector, a detective, the employee of a competitor, and so on) than with a woman.

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61. See, e.g., William Labov, Language in the Inner City: Studies in the Black English Vernacular (1972), and for a very brief discussion Peter Trudgill, Sociolinguistics: An Introduction 65-66 (1974).

62. See Zick Rubin, Disclosing Oneself to a Stranger: Reciprocity and Its Limits, 11 J. Experimental Soc. Psych. 233 (1975), and studies cited therein.

Still another relevant finding in this study is that out-of-towners at the Boston airport, when approached by a stranger, were more likely to confide personal information in the stranger than residents of Boston were. The experimenter himself offered an explanation thoroughly consistent with the economic approach: "Whereas the Bostonian subject might conceivably expect to run into the experimenter again some day on Beacon Hill or in Copley Square, the out-of-towner could be virtually certain that their paths would never again cross."[63] In the same spirit George Stigler has speculated that the candor (startling to a modern reader) with which the characters in nineteenth-century English novels reveal their incomes reflects the absence of income tax.

The psychological studies relating to privacy also tend to refute the notion, which is inconsistent with the economic model, that privacy is a psychological necessity. Studies of crowding, a proxy for lack of privacy, indicate that the pure effect of crowding on various measures of mental health or stability is insignificant.[64] Privacy is not something we "need," as we need food or air; it is something we want in order to advance plans far removed from biological imperatives. Rational behavior respecting privacy is also suggested by the way in

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63. Id. at 255-56.

64. See, e.g., Jonathan L. Freedman, Stanley Heshka & Alan Levy, Population Density and Pathology: Is There a Relationship?, 11 J. Experimental Soc. Psych. 539 (1975).

which people will substitute reticence for physical privacy when the latter is in short supply,[65] a substitution obviously related to the tendency to use more formal modes of expression with larger audiences (less privacy).

The evidence discussed above, and a little more that could be added,[66] obviously does not establish the economic theory of privacy on empirically firm foundations. Each piece of evidence is susceptible of alternative explanations. What may be said at this early stage in the economic study of privacy is that the economic model has a certain power to organize and explain a diverse array of fairly well-attested, if not systematically measured, phenomena.

V. An Economic View of Defamation

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

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65. See, e.g., Carl I. Greenberg & Ira J. Firestone, Compensatory Responses to Crowding: Effects of Personal Space Intrusion and Privacy Reduction, 35 J. Personality & Soc. Psych. 637 (1977), and Arab behavior discussed in Hall supra note 59, at 148.

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

per quod.[67] As we shall see, economic theory is quite useful in explaining the general structure, although not all of the details, of defamation law.

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

The falsification of reputation is therefore a matter of legitimate social concern. Such falsification can take either of two forms. A firm or an individual--it doesn't matter which--may try to create an undeservedly good reputation either by affirmative misrepresentation or by the concealment of discreditable facts about itself or himself. It is this process that gives rise to the kind of pseudo-privacy claim

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67. Prosser states: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm." William L. Prosser, Handbook of the Law of Torts 737 (4th ed. 1971) (footnote omitted). Chapter 10 of the Prosser book contains a lucid summary of the rules of defamation law on which I have drawn heavily in the following discussion.

discussed in this and my previous article. Or--and here is where the tort of defamation comes in--the falsification of reputation can take the form of blackening some person's (or some firm's) deservedly good reputation.

One can identify in a broad way the factors that make it more or less likely that attempts at defamation[68] will be made. First, if everything is known about an individual, and his reputation therefore is not an extrapolation from limited knowledge but simply the sum of all the facts about him, defamation will not succeed--it will not be believed. (Stated otherwise, if the costs of information are very low, any falsity in an aspersion about a person or product will be detected.) And in these circumstances defamation will not pay. This suggests that it is a problem chiefly of relatively modern as distinct from tribal or village societies; and the paucity of references to defamation in accounts of primitive society supports this observation.[69] A factor pushing in the other direction, however, is the inverse relationship between the importance of reputation as a factor inducing or deterring transactions and the existence of well-developed remedies for breach of contract. In the absence of such remedies the parties' interest in preserving their reputations

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

69. Defamation was a recognized wrong among the Nuer people of the Sudan, but, significantly, it is said to be "usually associated with false accusation of witchcraft" (P.P Howell, A Manual of Nuer Law 70 (1954))--a type of accusation whose falsity is difficult to detect among people who believe in witchcraft, even if they lack privacy.

for honoring contracts is the only solid assurance that neither will terminate opportunistically. That is why "honor among thieves" is not a contradiction in terms and, perhaps, why honor is a central value in primitive cultures. The less developed the social institutions of contract are, the greater the potential losses from having one's reputation blackened.

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

Weighing the above factors, one might conclude that the problem of defamation is apt to be most serious in a society that has recently emerged from the tribal-village state in which reputations cannot be credibly falsified but that has not yet developed effective institutions of contract which would reduce the importance of reputation as a factor inducing people to transact with one. Consistently with this suggestion, the defamation tort was broadly defined in medieval England (as it had been in late, but not early, republican Rome[70]),

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70. See H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 191, 273 (3d ed. 1972).

and defamation suits were apparently common, but afterward the right was curtailed by the creation of various defenses and by rules strictly construing defamatory utterances against the victim.[71]

Since defaming an individual and disparaging a competing producer or his goods are the same thing--fraud--the question arises why the tort of defamation developed earlier and further than that of disparagement.[72] An answer is suggested by the economic literature on fraud.[73] That literature distinguishes among "search" or "inspection" goods, whose quality and fitness are ascertainable on inspection before sale; "experience" goods, whose qualities are revealed only in use (e.g., the durability of a camera); and "credence" goods, whose qualities are so difficult to discover that the buyer is heavily dependent on the good faith of the seller. The buyer's need

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71. See C.H.S. Fifoot, History and Sources of the Common Law: Tort and Contract, ch. 7 (1949); Van Vechten Veeder, The History and Theory of the Law of Defamation I, 3 Colum. L. Rev. 546-57 (1903); and R.C. Donnelly, History of Defamation, 1949 Wis. L. Rev. 99, 100-01. In the time of Alfred the Great slanderers were punished by having their tongues cut out. Veeder, supra, at 549.

72. On the common law's restrictive approach to disparagement see American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900).

73. See, e.g., Michael R. Darby & Edi Karni, Free Competition and the Optimal Amount of Fraud, 16 J. Law & Econ. 67 (1973); and Philip Nelson, Information and Consumer Behavior, 78 J. Pol. Econ. 311 (1970).

for legal protection rises as we move along the spectrum from search to credence goods. In the formative era of the common law of disparagement (say, up to the enactment of the Federal Trade Commission Act in 1914) most goods were still search goods and the need for legal protection against disparagement by a competitor was therefore small. But long before then an individual had become a "credence" good, to be taken on faith rather than inspection, and his need for legal protection of reputation was greater than that of the producer of a disparaged good. If A called B a crook, B's social and business acquaintances probably would not know B so intimately as to be confident of the falsity of A's claim.[74]

To equate defamation with commercial disparagement may seem to give defamation too commercial an air and to ignore the "dignitary" interests that the tort also protects. However, the tort is not in fact designed for the protection of peace of mind, self-esteem, or other "private" interests or sensitivities. This is shown by the requirement of "publication." The aspersion must be communicated to someone besides the victim in order to be actionable. It must lower other peoples' opinion of the victim's character--that is, impair his opportunities for advantageous (social or business) transactions.[75] A wounding lie that does not impair those opportunities is not

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74. A similar point is made by Paul H. Rubin in an unpublished paper on unfair competition. It is consistent with this distinction that corporations can complain of defamation to the same extent (mutatis mutandis) as individuals, for the corporation itself is bound to be a "credence" good even if its products are "search" goods. If a competitor says a corporation doesn't pay its bills, prospective creditors of the corporation have no ready means to falsify the assertion.

75. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." American Law Institute, Restatement of the Law of Torts, Second, §559 (tent. ed. 1976).

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

The defamation and privacy torts interact in two other notable ways. First, if A in private conversation with B slanders C, and an eavesdropper overhears the conversation, the slander is not actionable.[76] This is the logical corollary of the social judgment, which I have argued has an economic basis, that the privacy of conversations should be protected in order to foster effective communication. Second, privacy and defamation differ in that a disclosure of private information, to be actionable as an invasion of privacy, must be "publicized"[77]--that is, disseminated widely--whereas defamation is actionable so long as one person reads or hears it. This has seemed to some an arbitrary distinction, but it makes sense once the economic relationship between the two torts is grasped. Normally the disclosure that gives rise to a privacy claim is truthful (if it were false, it would be actionable as defamation). When such a disclosure is made in a small circle, which will normally be the circle of people acquainted with the individual whose privacy has been thus breached, there is a social benefit: the individual is unmasked, and his acquaintances enabled to reevaluate their relationships with him in the light of a more complete knowledge of his character.[78] If, however,

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76. See Prosser, supra note 67, at 774; and Restatement of Torts §555, comment n. (Am. Law Inst. 1934).

77. See Prosser, supra note 67, at 810.

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

the disclosure is widely publicized, it is likely to reach beyond the circle of his acquaintances, to people whom he has neither present dealings with nor any substantial likelihood of dealing with in the future. Disclosures so publicized are less likely to perform the unmasking function, and more likely to invade the interest in seclusion (as distinct from manipulation), than more selective disclosure. Thus, the publicity requirement carves out the subset of disclosures that are likeliest to involve invasions of legally protected interests. To be sure, the harm to the individual from publicizing private information about him to strangers is normally less than that of publicizing such facts to people with whom he has advantageous relationships. That harm, however, is simply the obverse of the benefit to them from the knowledge, so there is unlikely to be a net social benefit from protecting the individual's privacy. If, however, private information about an individual is publicized to strangers, they derive relatively little benefit which may not outweigh the harm to him from the invasion of his interest in seclusion. Stated otherwise, publicity appears to be a necessary (though not a sufficient) condition for a privacy action to confer net social benefits.

The situation with defamation tends to be reversed. Defamation is likely to do its worst social harm precisely in the circle of the individual's friends or acquaintances. It is they whom the lie is likely to deflect from advantageous social transactions, to their own injury as well as the defamed individual's. To be sure, they are also better placed to detect the falsity of the defamation than strangers are. Nonetheless, it seems clear that a requirement of publicity would place some of the most costly defamations beyond the reach of the law.

Let us consider the economic rationality of some of the other distinctive features of the defamation tort. First of all, it is a strict-liability

tort; that the defendant may have exercised reasonable care to prevent the defamation is immaterial to liability. In one well-known case, the author of a fictitious newspaper story by sheer fortuity gave a character in the story the name of a real person, Artemus Jones. Jones sued for libel and won upon a showing that his neighbors the story was about him.[79] The economic analysis of the choice between strict liability and alternative bases of liability (no liability, negligence liability, and so on) turns on the relative abilities of the injurer and victim to avoid harm. There was nothing Jones could have done to avoid being defamed, whereas the author or publisher might have checked to see whether there was a real-life counterpart to the fictitious villain, or at least have included the now-standard disclaimer to the effect that any resemblance to any person living or dead is purely coincidental.[80] In general, victims of defamation cannot avoid being falsely defamed (save perhaps by curtailing their social interactions drastically, often at great cost), so that casting liability on them would have no beneficial allocative consequences; in contrast, most false defamations can be avoided by reasonable inquiry on the part of the defamer. In these circumstances a rule of strict liability is attractive from an economic standpoint.[81]

It is consistent with this distinction that the mere disseminator of a slander or libel--a newspaper distributor, for example--is liable for defamation only if he is negligent in failing to recognize the defamatory or untruthful character of the utterance. Since the costs to the disseminator

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79. Hutton & Co. v. Jones, [1909] K.B. 44, aff'd, [1910] A.C. 20.

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

81. On the economics of the choice between strict liability and negligence see Posner, supra note 5, at 137-42, 441-42.

of preventing defamation are normally prohibitive, a rule of strict liability would be economically unjustifiable.

Another notable exception to strict liability is the no-liability rule applicable to group defamations--"all lawyers are shysters," for example. Two economic considerations support this rule. First, the injury to the individual member of the group tends to be trivial. The difference in this respect between group and individual defamation is the difference between the demand facing an individual firm and the demand facing the industry of which it is a part. The substitutability of the products of other firms in the industry is likely to be so great as to make the individual firm's demand almost perfectly elastic, but the industry demand may be highly inelastic because products of other industries are not close substitutes. If people believe the libel "X is a shyster lawyer," they can and will substitute other lawyers and X's business may drop off drastically. But if they believe that all lawyers are shysters there isn't much they can do about it-- there are no close substitutes for lawyers. The loss of business to the profession, and hence to the individual lawyers if they are assumed to share proportionately equally in the profession's loss of business caused by the defamation, will be small. A supporting point is that most group libels, if attributed to all members of the group, are inherently incredible and hence do little harm and if attributed only to some or even to most members do little harm to any individual. Few people would believe that <u>all</u> lawyers are shysters. But if for the sake of credibility the libel is restated in the form "most lawyers are shysters," then the harm to the individual lawyer must be discounted by the probability that a client or prospective client will view him as included in the shyster majority rather than the nonshyster minority.

Most group libels are probably taken by most readers to refer to some rather than all members of the group libeled. This factor further attenuates the harm suffered by any particular member of the group.

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

Another feature of the defamation tort--that there can be no actionable defamation of a dead person--may also seem based on the costs of determining whether the aspersion is true or false. There is, however, another possible explanation for this rule. The economic function of reputation is to foster transactions. Once the transactor is dead any subsequent injury to his reputation can have no market impact. Stated otherwise, personal reputation is a form of nontransferable human capital and hence is extinguished by death. To be sure, this point is somewhat overstated: being told that your father was a thief or a bankrupt may, if I believe in the heritability of criminal tendencies, affect my willingness to transact with you. The law does, however, provide a remedy for the most serious of these cases, by allowing a descendant to maintain a defamation action where the deceased ancestor is alleged to have possessed some clearly inheritable defect or disorder.[82]

The best known, and a much criticized, distinction in the law of defamation is that between the standards for proving slander (oral defamation) and those for proving libel (written). Slander is actionable without proof of special damages (that is, without proof of actual pecuniary loss) only if the slanderer alleges conduct falling into one of the four per se categories: criminal acts, loathsome disease, female unchastity, and unfitness for one's

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82. See Developments in the Law--Defamation, 69 Harv. L. Rev. 875, 893-94 (1956).

job. Outside of these categories a slander, to be actionable, must be shown to have caused an actual monetary loss to the victim. Libel is not so confined. The victim need prove special damages only if the identity of the individual libeled is not evident on the face of the libel; if extrinsic facts are necessary for the identification, then special damages must be proved unless the libel alleges conduct falling within one of the four categories defining slander per se.

The idea of a per se category is surely not in itself to be criticized. It is a familiar legal technique (widely used, for example, in antitrust law) and can readily be justified, in principle, by reference to the trade-offs between the costs of error and the costs of reducing the probability of error by a more detailed examination of the facts in a particular case. The principal criticism of the per se categories in slander is that they haven't kept pace with changing times. They made pretty good sense when first established.[83] To be thought unchaste (if a woman, in traditional societies) would drastically reduce a woman's opportunities for marriage, a transaction of immense importance for women in such societies. To be thought to have leprosy, syphilis, or plague--the disease classified as loathsome for purposes of the tort--would greatly reduce one's opportunities for interactions of all sorts; and so if one were thought a criminal. Finally, to be thought unfit for one's job would have a direct effect upon one's ability to participate in advantageous market activities. Other slanders might, of course, also do serious harm to a person's ability to have advantageous dealings with others--and were actionable, but only upon proof of actual economic loss.

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83. On the historical origin of the categories see Veeder, supra note 71, at 560 n.1.

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

These details to one side, the stricter treatment of written than oral defamation makes sense. While anomalous cases can be imagined--the private letter versus the public address to a large audience--in general, and putting aside the recent (in the evolution of the common law) cases of radio and television, written defamations tend to reach larger audiences than spoken and hence to import greater harm to the victim. To be sure, the larger audience may often be composed of strangers, so that the incremental harm is small. But by the same token strangers will, as noted earlier, generally be less able to detect the falsity in the defamation than acquaintances, so the added harm may not be small, after all. There are, moreover, other reasons that support the law's stricter treatment of libel than of slander. First, as we saw in Part II in discussing the privacy of communications, it is costly to avoid occasional casual defamations in speech. To have to choose one's words very deliberately, to have to consider carefully the possible constructions

or misconstructions that might be placed on words spoken about another person, reduces the effectiveness of oral communication. A requirement of deliberateness imposes fewer costs on written communications. Writing is a more deliberate process than speaking anyway: the incremental cost of avoiding defamation in writing is therefore smaller than it is in slander.[84]

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

The defense of truth requires mention, if only because of the frequent criticism that it is unfair for the law to treat truth as an absolute defense.[85] The harm to an individual from the revelation of a true but perhaps minor or long-forgotten blemish in his character may, it is argued, outweigh any

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84. This consideration suggests that the rule that a defamatory radio broadcast is slander if the speaker is speaking extemporaneously but libel if he is reading from a manuscript is not the "unctuous casuistry" that R. H. Donnelly, supra note 71, at 123-24, terms it.

85. See, e.g., Developments in the Law--Defamation, supra note 82, at 932.

benefit from correcting the false impression on which his reputation rests. The law has proved stubbornly resistant to the suggested reform. Its response is consistent with the economic view presented in this paper. The law will provide no protection to people, any more than to sellers of goods, who misrepresent their qualities in order to induce others to enter into advantageous personal or business relationships with them.

Other important defenses are grouped under the rubric of privilege. There are both "conditional" and "absolute" privileges in defamation law. A conditional privilege entitles the defendant to make a false and defamatory utterance so long as he is not motivated by "actual malice"; in practice this means so long as he honestly, though perhaps unreasonably, believes the utterance to be true. An absolute privilege is good even if actual malice is shown. A typical example of conditional privilege would be an employer's giving a character reference for a former employee, and a typical example of absolute privilege would be a critic's comment on a movie.[86]

The effect of privilege is to reduce the costs of making the statements to which the privilege attaches. Why might the law want to do that? One possibly relevant justification for allowing a person to externalize some of the costs of an activity comes into play if the benefits of the activity are also externalized, so that if he is forced to bear the full social costs he may not carry the activity to the socially optimal point. This technique is occasionally employed in the common law.[87] In the case of a

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

87. See Right of Privacy 417; and William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Legal Studies 83, 128 (1978).

character reference, the benefit of the reference enures to the employer receiving it rather than to the employer giving it. It is fairly plain that if a former employer were liable for defamation, he would either not supply a character reference or omit from it any negative references to the employee's character. To be sure, the prospective employer could compensate the former employer for the risk of liability for defamation; or the employee could waive his right to sue for defamation. But either solution would involve heavy transaction costs relative to the values involved, and, as a practical matter, would probably eliminate most character references. The law's solution thus seems the efficient one.

Most conditional-privilege cases are of this general sort but not all are. The conditional privilege that credit bureaus enjoy to commit the aptly named "slander of credit"[88] is difficult to justify economically. There is no externalization of the benefits of a credit bureau's activities--it charges its clients for its services. The conditional privilege of credit bureaus is a significant anomaly; it set the stage for an important part of the privacy legislation discussed in the next part of this paper.

The critic's absolute privilege rests on a completely different ground, the absence of misrepresentation. If I say "Charlie Chaplin is a crummy actor," or even "Chaplin can't act," I am expressing a true (if silly) opinion rather than stating a false fact. Nor is my opinion any less genuine, or more misleading, if it is the product of a malicious dislike of the actor. Misrepresentation comes into play only if the critic makes a false statement of fact, such as that some author is a plagiarist.[89]

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88. See Prosser, supra note 67, at 790.

89. See Fitzgerald v. Hopkins, 70 Wash. 2d 924, 425 P.2d 920 (1967). The other absolute privileges at common law mainly involve governmental (including judicial) officials and are part of the larger tort immunity of governmental figures, a subject beyond the scope of this paper.

To summarize a somewhat cursory survey of an exceedingly complex body of law, the basic doctrines of the defamation tort seem generally consistent with the economics of the problem. I do not, of course, mean to suggest that economics can explain every outcome in a field of the common law which, more than most, perhaps because of its bifurcated historical origins (the tort of slander developed in the medieval ecclesiastical courts, and that of libel in criminal proceedings in Star Chamber against seditious writings), contains many anomalous features.[90] In law as in consumer behavior and every other activity studied by economists, economics is more successful in explaining central tendencies than in accounting for individual decisions.

VI. The Statutory Privacy Movement

Many state and federal statutes relating to privacy have been enacted in recent years. My previous article had little to say about these statutes beyond observing that the general trend of legislative activity was at once to increase the privacy of individuals (meaning by privacy here the concealment of personal information) and decrease that of business firms and other organizations, including universities and government agencies. I suggested that this trend was perverse from an efficiency standpoint, since concealment of discreditable personal facts rarely serves a social purpose whereas concealment in a business or organizational context often serves to protect the incentive functions associated with entrepreneurial privacy and to shield communications, rather than just to foster manipulation.[91] I stand by this characterization, except that I am persuaded by Professor Rubin that the

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90. Enumerated and pungently denounced in James C. Courtney, Absurdities of the Law of Slander and Libel, 36 Am. L. Rev. 552 (1902).

91. See Right of Privacy 404-06; and Posner, The Economics of Privacy, supra note 1, at 25-26.

government's claims to privacy should be discussed separately from those of private business firms.[92]

I want to take a closer look at the statutes designed to protect personal privacy from invasions by nongovernmental entities. Most of these are state statutes limiting the kinds of information which either an employer or a creditor can obtain (from any source) with regard to the prospective employee or prospective borrower.[93] In the employment context, the emphasis is on limiting the employer's access to the employee's history of arrests and of remote or "irrelevant" convictions. In the credit context, the emphasis is on limiting the creditor's access to the prospective borrower's (adverse) credit history. These statutes differ widely in their details and often a state will have an employment statute but not a credit statute or vice versa. There is also a federal Fair Credit Reporting Act, which bars creditors from inquiring about, or denying credit on the basis of, bankruptcies of the prospective borrower that occurred more than 14 years before or any other adverse information (including arrests and convictions) that occurred more than seven years before. This is the most important federal statute directly regulating privacy in the private sector.[94]

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

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92. See Paul H. Rubin, Government and Privacy: A Comment on "The Right of Privacy," 12 Ga. L. Rev. 505 (1978); and Part VII, infra.

93. The statutes are listed and discussed in Privacy Protection Study Commission, Report, App. I: Privacy Law in the States (G.P.O. 1977).

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

perceived "market failure" justifying public intervention. This approach doesn't get one very far in the privacy area. There is no economic reason to suppose that employers would demand from employees and job applicants more information than was cost-justified in terms of its benefits to the employer in screening out unsuitable employees. As noted earlier, the common law courts (with the exception of the California courts) have rejected the idea that a person is entitled to conceal his criminal record, even one relating to the distant past, because other people might react "irrationally" to its disclosure.[95] Any such argument would be particularly weak in the context of employment, where competition exacts a heavy penalty from any firm that makes irrational employment decisions. Regarding the credit statutes, it is true as remarked earlier that the common law courts have unaccountably immunized credit bureaus from slander-of-credit actions. But the way to solve this problem, as routinely done by state legislatures in many other areas, is to repeal the common law immunity. Or, if private defamation actions are considered an inadequate corrective to such slanders, the negligent collection and dissemination of false credit information could be punished criminally. To limit the true information that a credit bureau may collect and disseminate is hardly an apt solution.

If the privacy statutes cannot be explained by reference to a failure of the private market, can they perhaps be explained by reference to heightened public consciousness of the inequity of discrimination? Economists have

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95. See note 34 supra and accompanying text.

argued that much racial and sexual discrimination may be the product simply of the costs of information.[96] These costs may lead people to base judgments on very limited data, including the average characteristics of some racial group to which the individual being judged belongs. There is a great national movement against discrimination, even of the efficient kind motivated purely by information costs, in the areas of race and sex; and it is possible to argue that this movement has increased public sensitivity to other instances in which crude proxies are used to screen out applicants for jobs or credit. After all, it is the same sort of injustice to deny a person a job because of a flat rule against employing anyone who has a criminal record, though careful investigation would have shown that this individual's criminal record ought not disqualify him from the job,[97] as it is to deny a black a job because of the average qualities of the blacks in the relevant employment pool.

The suggestion, in short, is that the concern initially focused on black and (slightly later) female discrimination has stimulated a broader compassion for victims of discrimination, which is now recognized to occur every time a person is denied an advantage on the basis of some general presumption that excludes consideration of his individual circumstances. The difficulty with the "compassion" theory of the privacy laws is its far-reaching and unacceptable implications. Since the costs of information are always positive and often very high, it is impossible to imagine how society would function without heavy reliance on proxies in lieu of full investigation of all relevant facts.

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96. See e.g., Edmund Phelps. The Statistical Theory of Racism and Sexism, 62 Am. Econ. Rev. 659 (1972).

97. An alternative rationale for facilitating the concealment of a criminal record, based on the rehabilitation goal of criminal punishment, is discussed and rejected in Right of Privacy 415 n.46. See also Richard A. Epstein, Privacy, Property Rights, and Misrepresentations, 12 Ga. L. Rev. 455, 471-74 (1978).

If we are sorry for the man whose 15-year-old bankruptcy judgment bars him from obtaining fresh credit, we should be equally sorry for the young man who is denied admission to the college of his choice because of his performance on a standardized test which may not accurately reflect his true academic potential. The appeal to our compassion is as strong yet the trend, of course, is back to heavier reliance on test scores in education.

Another possibility is that the privacy statutes are a response to the pressures of some interest group more compact than the public, or the altruistic public, at large. Much legislation has been shown to be of this type.[98] However, with privacy as with other broadly "consumerist" legislation, the benefited groups seem wholly to lack the characteristics of an effective political interest group. The benefited groups here are people with criminal records and people with poor credit records. The former group is furtive, disreputable, and unorganized. The latter group is, if more numerous, not compact in the ways identified by the interest-group theory as favorable to effective political action. And it is probably less numerous than the group which consists of the people who will have to pay higher interest rates to compensate lenders for the bad loans that they make because they are unable to obtain sufficient information with regard to the borrowers' creditworthiness: I mean other marginal borrowers, as the most creditworthy borrowers will tend to be selected into lower interest-rate categories.

A somewhat more plausible candidate for an effective interest group beneficiary of the privacy laws is the blacks, whose political effectiveness as an interest group in recent years seems well established. Imagine the

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98. See, e.g., William A. Jordan, Producer Protection, Prior Market Structure and the Effects of Government Regulation, 15 J. Law & Econ. 151 (1972); and George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Management Sci. 335 (1978).

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

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

arrest records, laws that wipe out these hurdles to obtaining credit and employment may benefit more blacks than they hurt.

A possible empirical test of this hypothesis is to compare states which have enacted civil rights laws with states which have enacted credit and/or employment privacy statutes. Landes's 1968 study of employment discrimination identified 29 states as having enacted laws (with at least some enforcement machinery) forbidding racial discrimination in employment, 21 of them before the enactment of the federal Civil Rights Act of 1964.[99] A 1977 study for the Privacy Commission identifies eight states as having enacted laws protecting the privacy of private-sector employees and job applicants.[100] Six of these states (75 percent) are among the 29 states identified in Landes's study as having enacted antidiscrimination laws with "teeth," and five (63 percent) are among the 21 "early" antidiscrimination states. Thus, a state which enacted a nondiscrimination statute was somewhat more likely to adopt an employee privacy statute than one that did not enact a nondiscrimination statute.

On the credit side, the analysis is complicated by the fact that the federal government acted with respect to both discrimination (in the Equal Credit Opportunity Act)[101] and privacy (in the Fair Credit Reporting Act)[102] before the states did. However, if we continue to use the Landes list

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99. William M. Landes. The Economics of Fair Employment Laws, 76 J. Pol. Econ. 507 n.1. (1968).

100. See Privacy Law in the States, supra note 93, at 17-19.

101. 15 U.S.C. §1691.

102. 15 U.S.C. §1681.

as indicative of states having a strong civil rights movement even if they did not legislate specifically with reference to credit, then it is suggestive that of the 11 states[103] that have enacted credit privacy restrictions more stringent than the federal Fair Credit Reporting Act (which was not preemptive in this regard), nine (82 percent) are on Landes's list and six (55 percent) are among the 21 early enacters on that list. This is further evidence that a state which has a strong antidiscrimination policy is likelier than a state which does not have such a policy to pass a privacy statute.

Although the results of the empirical tests support the hypothesis, they are statistically very weak. Furthermore, they are equally consistent with the alternative hypothesis that both the antidiscrimination statutes and the privacy statutes are motivated by compassion--but compassion for blacks rather than compassion for poor credit risks, and ex-convicts, as such.

The suggested approach does not treat the privacy movement as a unitary phenomenon resulting from the activities of one political interest group, but instead breaks out one set of privacy statutes, those limiting the information that can be collected by employers and creditors, groups them with the civil rights laws, and seeks to explain just that set as an aspect of the civil rights movement. I see nothing improper with this approach in principle, for there is no basis for a presumption that, from the standpoint of political demand, privacy is a unitary phenomenon.

To be sure, I earlier suggested that a combination of the rising demand for privacy (based on its charateristic as a superior good) and the recent dip in the costs of invading privacy as a result of technological advances in

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103. See Privacy Law in the States, supra note 93 at 9 n.47.

electronic surveillance and electronic data storage and retrieval might be relevant to explaining the movement for privacy legislation. However, that is not a promising alternative explanation with regard to the particular privacy statutes under discussion. Viewed from the standpoint of society as a whole, placing limitations on employers' and creditors' access to information is not even a zero-sum game; it is a negative-sum game because, putting aside the occasional errors that are better corrected by repealing the common law immunity against slander of credit or by expanding public officers' liabilities for false arrest, the effect of such statutes on the public as a whole is to increase the amount of fraud in society, raise interest rates, and reduce business productivity. However, the statutory restrictions increasingly being placed on the retention and dissemination of private information by the government may indeed be a response to a broad public demand for greater privacy based on the growth in incomes (which has shifted the demand curve for privacy to the right) and the reduction in the costs of invading privacy (which has moved the supply curve for privacy to the left), for, as we are about to see, there is no presumption that governmental infringements of privacy are optimal.

VII. Government and Privacy

In my previous paper I made a few casual, and as Professor Rubin has pointed out erroneous,[104] references to the government as a possessor of privacy and as an invader of its citizens' privacy. I said that as a possessor of privacy government should be treated like a private business organization, and its communications and its "innovative" facts (if any) shielded from involuntary disclosure. With regard to the government as invader of privacy I said that the growth of occupational mobility, urbanization, and so on had

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104. See note 92 supra.

resulted in the government's having less information about individuals than it used to. Rubin pointed out, first, that the government has different incentives from private firms and, specifically, might want to conceal information about its operations from an electorate whose incentives to inform itself about the government's operations are already perilously weak; and second, that the growing activity of the government as tax collector (from individuals), employer (especially in wartime), and social insurer had given it in fact vastly greater information about people than it used to have. I accept these points--and their implication that the issues raised by governmental claims of and alleged invasions of privacy are so different from those raised by private claims and invasions that the two domains of privacy cannot be discussed as one. This in itself is a significant point becuase those who propose restricting the collection, retention, and dissemination of information by private firms and institutions, such as credit bureaus and private employers, often try to bolster their case with examples of governmental invasions of privacy (or excessive claims of govermental privacy)--without recognizing that government behavior in the privacy area may raise different issues from the behavior of nongovernmental entities.

The goverment's claim for privacy, for example, is both different from and normally weaker than that of private entities. One of the privacy interests discussed in Part II of this paper--seclusion--has no application to a government agency, or to the leading agents: the politician, whether elected or appointed, is unlikely to be a person of retiring disposition, though he may need occasional peace and quiet to plan his work. Nor is the concept of privacy as innovation broadly applicable to the government, since, with the important exception of security, both domestic and foreign, the government

does not engage in entrepreneurial activity. Sometimes the government finds itself a custodian of private information, as where it obtains some firm's trade secret in the course of carrying out a statistical or law enforcement activity. Here the claim of privacy, though nominally asserted by the government, is really the claim of some private entity.[105]

To the government's claim to informational privacy in the areas of (1) security, and (2) information obtained from private parties which would be entitled to protection were it still in their hands, it might seem we should add the government's claim to conversational privacy. It is true that if government conversations were public the effectiveness of communications within the government, and hence the ability of the government to carry out its duties, would be impaired. But efficiency in government, if defined as minimizing the costs of implementing government plicy, is not an unalloyed virtue: if it were, the principle of separation of power, which is inefficient in that narrow sense, would be rejected.[106] The value of publicity of governmental communications in deterring plots against the public might be greater than the cost in reduced efficiency of government, though I will not attempt to evaluate this trade-off here.

I turn now to the role of the government as a pryer into the secrets and conversations of its citizens. In some areas the government's need for information parallels that of private entities. For example, the government is a very large employer and has a legitimate interest in checking the background of prospective employees. However, the variance in the amount of

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

106. See Posner, supra note 5, at 492-93.

information required by governmental employers of prospective employees is probably greater than in the private sector, holding constant any differences in job specifications. For some jobs, especially in the federal government, the government snoops more intrusively into the prospective employee's background, associations, etc. than a private employer would do for a job of equivalent responsibility. Other jobs are handed out with less regard for the prospective employee's competence or character than a private employer would have. The reason for the greater variance in the public sector is that public employment is a political activity, rather than purely a means to carrying out the agency's responsibilities, and is only weakly constrained by efficiency considerations.

Most of the controversy over government as snooper involves the exercise of the government's law enforcement functions. I suggest that the principal issue for policy is the substantive merit of the law being enforced. The clearer it is that the forbidden conduct is antisocial, the more willing we are to allow the government to obtain private information, through eavesdropping, informers, interrogation, searches, and other means, regarding that conduct. The most reprobated instances of the use of informers and other methods of surveillance by government, whether the government of ancient Rome or that of Nazi Germany or the Soviet Union, are ancillary to the enforcement of laws or policies that we don't like.[107] A related point is that excessive snooping by the law-enforcement arms of government is more or less proportional to the extent of public regulation. If the government interests itself in a very small part of private behavior--say, coercion plus evasion of the (modest)

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107. On Rome see Westin, supra not 51, at 50, 52-53.

taxes necessary to support a government whose only substantive concern is with the prevention of coercion (external or internal)--then the measures it takes to unmask antisocial activity will tend to be extremely limited (save in crisis periods, when the populace will probably welcome extreme measures). It is only when the state becomes involved in regulating private consensual behavior, such as drinking or taking drugs or lending money at high interest rates or prostitution or political discussion, that its ancillary surveillance activities become oppressive and threatening.

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

1. Electronic eavesdropping. If eavesdropping could be precisely targeted on conversations plotting illegal conduct, the concern with this surveillance technique would be much reduced. It is true, as explained in Part II of this paper, that eavesdropping increases the cost and reduces the effectiveness of communication; but this fact is converted from an objection to eavesdropping into an argument for using it once it is conceded that the conversation is part of the illegal behavior which society is legitimately interested in discouraging. The analogy would be to the seizure of contraband, the least controversial (and most clearly permitted by the Fourth Amendment) form of search and seizure. The case for eavesdropping on conversations that merely reveal past illegal conduct, like the parallel case for seizures of evidence of past crimes as distinct from contraband and actual fruits of crime, is weaker because, by the argument in Part II, its principal effect is simply

to induce circumspection in conducting the illegal activity so as to leave no traces.

Eavesdropping cannot, however, be neatly targeted on actual plottings, but is bound to pick up other conversation as well. Moreover, to be fully effective, eavesdropping has to be conducted on suspects some of whom are innocent and not just on obvious offenders (if the offense is obvious, the value of the eavesdropping is merely cumulative--unless it discloses new suspects). So a substantial and costly impediment to effective communication for lawful purposes is created. But again the scope of government is an important factor in evaluating this surveillance method. With limited government the occasions for electronic surveillance would be many fewer than they are today because the range of potential suspects would be much narrower. It is logical for the Soviet government to wiretap the telephones of intellectuals and our government those of "baby brokers" and loan sharks, but a government that relied more on the private market to regulate behavior, and less on the state, would have no incentive to tap these phones.

2. Undercover informants. The reason informers are commonly hated is that they are so often hired to enforce laws regulating private consensual behavior. It is these laws, the source of "victimless crime," whose enforcement requires planting an informer--there isn't a complaining witness otherwise. The informer has much the same effect on communications as electronic surveillance does. In ancient Rome, as mentioned earlier, the servants of the rich were often employed as undercover agents by the police to spy on their employers. Since the police were looking mainly for evidence of subversive opinions, the effect of the servant-informer network was similar to the use of wiretaps and bugs by a modern totalitarian state. Given the parallel

between the informer and the bug, the lack of any constitutional or statutory limitations on the planting of informers among suspect groups is hard to square with the extraordinary restrictions with which the use of electronic eavesdropping is hedged about.[108]

3. Confessions. The Fifth Amendment provides that no individual may be forced to incriminate himself. This provision entitles criminal defendants not to take the stand, and the witness in any type of proceedings not to give testimony that could lead to his conviction for a criminal offense. The policy of the Fifth Amendment is also used to bar the introduction in a criminal trial of a confession of the defendant that was obtained by torture or other coercion. Among the various arguments given for the privilege against self-incrimination,[109] the commonest is that it is necessary in order to protect people from being coerced into giving false confessions. However, this argument is answered by requiring that the confession by corroborated or otherwise validated independently.

I want to suggest--without attempting to develop a point whose proper elucidation would carry us far beyond the scope of this paper-- that the persistence of the privilege is related to the scope of government, and that in a system of truly limited government the privilege would lack vitality. I am suggesting in short a connection between Bentham's advocacy of limited government and his desire to abolish the privilege. In a system that punished

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108. This is a major theme in Geoffrey R. Stone, The Scope of the Fourth Amendment: Privacy and Police Use of Spies, Secret Agents, and Informers, 1976 Am. Bar Found. Res. J. 1193.

109. Reviewed in McCormick's Handbook of the Law of Evidence, supra note 35, at 251-53.

only a limited set of primarily coercive acts, a requirement that confessions be corroborated would go far toward eliminating the objections to compulsory self-incrimination. But governments are in fact prone to punish a very broad range of behavior and even thought, including the harboring of hostile feelings toward the government and refusal to conform to specified religious beliefs. Offenses so gossamer often cannot be corroborated even in principle, so that if forced confessions are permitted there is no external check on their validity. The confessions of the victims of Stalin's purges were of this nature. As late as Blackstone's time it was a capital crime in England to "compass" (that is, imagine) the death of the king. And the privilege against compulsory self-incrimination apparently arose in England in protest against proceedings in Star Chamber and other tribunals concerned with political and religious offenses.[110] In sum, I see the privilege designed less to vindicate ideals of procedural justice than to complement other provisions of the Constitution and Bill of Rights limiting the scope of government regulation in the area of belief.

This analysis reinforces my suggestion that the most compelling objection to intrusive surveillance by the government has to do not with the means but with the end. A full analysis of the question must, however, await another paper.

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110. See id. at 244-46.