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Lawrence M. Friedman

Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

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DOUBLE TAKE: THE LAW OF EMBEZZLED LIVES

Lawrence M. Friedman*

Joanna L. Grossman**

I. INTRODUCTION

There was tremendous public sympathy for Notre Dame football player Manti Te'o, whose girlfriend, Lennay Kekua, had tragically died of leukemia. The sympathy, it turns out, was misplaced. Kekua never died because she never lived.¹ She was an internet hoax—a woman Te'o thought he loved, and with whom he had communicated over a long period of time, but who in fact had been created by jokesters.² Te'o appears to have been “catfished”—a modern term which means duped by a fake internet identity. A 2010 documentary, *Catfish*, depicted a man who meets a woman online and falls for her, only to learn later her identity was a far cry from the one portrayed on the Internet.³ In a television series of the same name, we see more unsuspecting people “catfished”—victims of an online dating hoax whose excitement and then humiliation are chronicled for viewer entertainment.⁴ “Catfishing” claimed Manti Te'o as one of its early victims.⁵

At the heart of “catfishing” is a basic problem—how do we ever know whether people are who they say they are? The title of this article

* Marion Rice Kirkwood Professor of Law, Stanford Law School. We are indebted to William Havemann and Jacqueline Smith for help with the research for this article.

** Sidney and Walter Siben Distinguished Professor of Family Law, Maurice A. Deane School of Law at Hofstra University.

1. Erik Brady & Rachel George, *Manti Te'o's 'Catfish' Story is a Common One*, USA TODAY (Jan. 18, 2013), <http://www.usatoday.com/story/sports/ncaaf/2013/01/17/manti-teos-catfish-story-common/1566438/>; Mary Pilon, *In Te'o Story, Deception Ripped from the Screen*, N.Y. TIMES, Jan. 18, 2013, at B11, available at http://www.nytimes.com/2013/01/18/sports/ncaaf/football/deception-ripped-from-the-screen-in-hoax-story-of-manti-teo.html?_r=0.

2. There are still doubters who believe Te'o may have been behind the hoax, in an effort to gain attention during his team's football season.

3. CATFISH (Hit the Ground Running Films 2010).

4. *Catfish: The TV Show* (Catfish Picture Company 2012).

5. The internet has made this sort of hoax more feasible, but it did not invent the sport of fake seduction and humiliation. A Connecticut watchmaker and part-time judge fell for Gladys Wilson, an imaginary woman who, he thought, had written him scores of love letters over fourteen years. Gladys had been created by a man intent on swindling the watchmaker out of his earnings. After the swindler decided the well was dry—he had induced the watchmaker to send him \$6000 in total—he killed off Gladys in one final letter. *Wooded a "Marjorie Daw" for Fourteen Long Years*, N.Y. TIMES, Oct. 2, 1910, available at <http://sundaymagazine.org/2010/10/wooded-a-marjorie-daw-for-fourteen-long-years/>.

invites a second glance, or a second thought, about whether the image a person projects is genuine. For some—for example, spies and con artists—the image is deliberately and intentionally false. Most of us do not project a false image of this kind. But we are all imposters, at least in a mild sort of way. All of us in a sense lead two lives. In fact, more than two. There is, at the minimum, a personal, private life, a life at home, lived largely behind closed doors; and a public open life, a life on the streets, in the office, at school, and so on. People play many roles and show many faces. In reality, all of us are actors; and much of our behavior in everyday life can be called a “performance.”⁶ Part of our job in life is to manage our roles and our identities (as much as we can).

All of us, obviously, have a private core, a zone of privacy, where outsiders are not supposed to enter. Some of it is so personal that absolutely nobody else is allowed to intrude; and where nobody will in fact intrude, unless, in some dystopian future, science develops ways of reading minds and hearts. There are, for most of us, other aspects of our lives, where we let in one or a few selected outsiders: a spouse or “significant other,” for example; or, more prosaically, a tennis partner, or a partner in bridge. The zone of privacy is the subject of a whole flock of legal protections—from rules about the tort of “invasion of privacy,”⁷ to the privilege against self-incrimination, the attorney-client privilege, the rules against unlawful searches and seizures, and so on.

An important aspect of this right to privacy is the right to play our roles. There is no truth serum. There is no mind-reading machine. We are perfectly free to say one thing and mean another; to present ourselves in one way or another; to wear different dress on different occasions; to behave differently behind closed doors from the way we behave out in public. Behind my smiling face, I may be hiding, or trying to hide, my bitter, nasty personality. I love some people, I daydream erotically about some of them, some people I hate, other people bore or even disgust me. I know better than to let people know my “true” feelings. As sociologists and psychologists recognize, asking which roles and aspects of the self constitute the “real” person is, in a way, a question that has no answer. Almost all the roles, in one way or another, are aspects of the “real” you; perhaps even an actor’s performance as Hamlet is an outgrowth of his real personality. Or,

6. Erving Goffman’s *The Presentation of Self in Everyday Life* (1959) is the classic exposition of this point of view.

7. The tort is usually, and conventionally, traced to a famous 1890 article, written by Samuel D. Warren and Louis D. Brandeis. See *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis thought there ought to be a right of privacy, and they even thought there were doctrinal odds and ends lying about in the storehouse of the common law which gave courts what they might need to develop such a right. Today there is a huge and complex body of law on the subject of the right of privacy.

perhaps, the real you is the composite of all the various roles and identities.

Telling white lies (or even non-white lies) is not outlawed in the criminal code. In other words, the law permits us to lead multiple lives, if we wish. In our culture, and probably in most cultures, we tend to think of some roles as “authentic;” as reflecting what people are “really” like. Other roles we consider false or contrived.⁸ Since we are all role-players, since we all go through life like actors and actresses playing now this part and now that part, it is often difficult to draw a line between the “authentic” self, and the spurious self—if, indeed, these are concepts that make sense at all. Sometimes, when we drop the mask and blurt something out, or when somebody overhears something they were not meant to hear, the situation can be harmful or embarrassing. Candor is not always appreciated. Moreover, candor can have consequences; for example, when a political candidate, unaware that a video camera is following him, drops his political persona and says something sincere but politically harmful. This happened to Mitt Romney when he was running for President in 2012. Romney made damaging remarks—47 percent of Americans are mooching off the government—to what he thought was a private and friendly gathering of Republicans.⁹ Yet what we hear, when the clandestine camera is on, is (we think) more authentic than the canned speech—more authentic than careful responses to questions by reporters, and other “performances.” But just as it is no crime to be open and honest, it is generally no crime to be the opposite.

A person growing up in society gets to learn the rules: how we are supposed to behave in different contexts. These societal norms are, in a sense, rules about managing roles. The rules about role-playing are subtle and complex. There are rules about which roles should be kept private, which ones must be kept private, and which ones cannot be kept private. There are rules about which roles are legitimate and which ones are not.

There are also rules about *when* one can play certain roles. Many

8. “Real” performances are seen as “an unintentional product of the individual’s unself-conscious response to the facts in his situation;” while “contrived” performances are “painstakingly pasted together, one false item on another.” GOFFMAN, *supra* note 6, at 70. Matters, however, are not really that simple, as Goffman points out.

9. The full comment was: “There are 47 percent of the people who will vote for the president [Obama] no matter what. All right, there are 47 percent who are with him, who are dependent upon government, who believe the government has a responsibility to care for them, who believe they are entitled to health care, to food, to housing, to you-name-it. . . . My job is not to worry about those people. I’ll never convince them they should take personal responsibility and care for their lives.” Amy Davidson, *Mitt’s Forty-Seven-Per-Cent Problem*, THE NEW YORKER (Sept. 18, 2012), <http://www.newyorker.com/online/blogs/closeread/2012/09/mitts-forty-seven-per-cent-problem.html>.

societies have special periods—carnivals, festivals, and the like—when certain rules of behavior are relaxed. People are allowed to role-play in ways that are not socially tolerated at other times. Halloween costumes are a mild form of this kind of role-playing. The change of rules is even greater for Mardi Gras, and the equivalents, in other societies. In Manuel Gomez' study of the culture and ordering of Burning Man, the city that arises out of nothing in the Nevada desert every year, he notes that participants are allowed a "certain degree of release or licensed elision . . . from their everyday lives;" they can wear costumes, can adopt a "temporary identity—their playa name—and other imaginative elements," which help "conceal their default world identity."¹⁰

Whether at a festival or not, we can, in most respects, project a spurious self on the world—to live, as it were, two lives. Not only is this sometimes harmless; but in some situations the law (and society) give their blessing to a kind of fictional identity. When a child is adopted, for example, the state might issue a new birth certificate, in a sense remaking the child's life from the actual moment of birth: the certificate replaces the names of birth parents with the names of the adoptive parents. In this way, the adoptive parents can present the child as their own biological child if they choose to do so. And then the records are permanently sealed, so no one is the wiser. In a similar vein, a transgender individual in many states can obtain a new birth certificate, reflecting a gender identity created by hormones and surgery rather than genetics.¹¹ A person who has aided the government in prosecuting a dangerous criminal might be offered a new identity as part of the witness protection program. In each of these situations, one is allowed to suppress a "real" identity with the law's blessing. These are extreme examples of what individuals can do to molt or suppress a self, and move on.

But there are limits. This essay is about those limits. It is about situations where it is (or was) considered wrong or illegal to live two lives; or where the "false" life is a lie of the type that would be considered gravely and impermissibly deceptive. Spies project a false, patriotic identity to steal government secrets. Con artists assume a false persona to swindle people out of their money or possessions—and sometimes their hearts. A married man might falsely pretend to be a bachelor, allowing himself to take another wife in contravention of law, social convention, and, most likely, the preferences of both women. We

10. MANUEL GOMEZ, ORDER IN THE DESERT: LAW ABIDING BEHAVIOR AT BURNING MAN (forthcoming).

11. See generally Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373 (2013).

might say that in each of these cases, the double life enables a kind of theft—of secrets, of money, of affections—that we as a society do not tolerate. The law solidifies this by making it a crime to project certain false identities and double lives.

But what of the people who project a false image because their true identities and traits carry a social stigma? People may hide these identities to avoid discrimination or to take wrongful advantage of some benefit or to live a life the law—in a particular time and place—says one cannot have. A light-skinned person, with some African-American ancestry, crosses over into white society, in order to avoid the severe social penalties imposed by a racist social order. The closeted gay passes for straight. A woman pretends to be a man to get by in a man's profession. We might think of all of these instances as "passing," a phenomenon that allows a kind of theft, as it were: the theft of privilege. But our views about these double lives are more varied and complex, and more changeable over time, *than* our views about the double life of a spy, for example. Even at the high point of American racism, the apex of Jim Crow, not all Americans would have denied blacks the rights and privileges held by whites. As social and legal norms moved toward racial equality, the need to "pass" all but dried up, encouraging light-skinned blacks to show their true selves, and to stop projecting an image of whiteness. At least in theory the true black self has the same rights as the white self. A similar story might be told about the gay closet. The evolution in both cases is still underway and is still incomplete. The same is even more true for people who change or try to change genders.

This essay is about double lives and role-playing in law and society—when and why it occurs, how the law responds to it, and its social meaning or significance. The people who "pass," hide, or project false identities constitute a motley and diverse crew, a jumble of people and characters, spies and moles, con-men, blacks passing for whites (and at least one white passing for black); bigamists, adopted children, closeted gays, transgender individuals, illegal aliens—and so on. In some ways, they seem to have little or nothing in common. But there is at least one clear story line. "Passing"—whether designed to steal money or privilege—has no hope of succeeding, except in a period, and in a culture, where identity is problematic, where identity can be simulated. This is a characteristic of modern society—the society that developed since the industrial revolution. In a small, traditional village, roles are fixed, people know each other, and double lives are difficult and rare. Of course, people do role-play; people lie, they dissemble, they hide embarrassing facts. This has always been part of the human condition. But there are severe limits to the possibilities of a double life in traditional society. The modern world, on the other hand—the world

since, say, 1800—is the golden age of duplicity; the high point of double living. At least so far. The world of today, the world of the Internet and social networks, may prove to be another turn of the wheel. We may be moving to a point where no secrets are possible at all and all private selves can be exposed. We hope this never happens; but it is still too early to tell.

II. THE DOUBLE LIFE

Modernity—and, significantly, social and geographic mobility—made the double life possible. Modern society opened the door to various kinds of fraud and chicanery. Prevailing social and legal norms made “passing” desirable: for gays in the closet and for those African-Americans who passed for white. In the world of big cities, a world of immigration, a world in which population was shifting and restless, people bump elbows with strangers, day in and day out. It is easier to hide one’s “real” identity under these conditions, and harder to tell who people *really* are—“really” in the most literal sense of a name, a place of birth, a status in society, and other relevant facts. Social mobility blurs the lines between classes and strata of society. Victorian society (and its American analogue) was famous for its rigid code of morality and etiquette. But underneath it lay a more complex reality—a hidden world, for example, of very un-Victorian sexuality.¹² Victorian literature in its own way often exploited this duality. Robert Louis Stevenson published *The Strange Case of Dr. Jekyll and Mr. Hyde* in 1886; the story of a man with two identities, one of them respectable, the other implacably evil. Literary critics have had a good time spinning theories about how to interpret this book. At the very least, the book presumes a society in which this kind of double life is possible and in which it can be hidden from the world for a long, long time.

“Passing,” then, in the broadest sense of pretending to be someone you’re not, is an important social phenomenon. And like all social phenomena, it is not static. As we pointed out, changing norms in the late 20th century made certain kinds of “passing” less necessary, but not by any means obsolete: same-sex behavior was decriminalized, and many gays and lesbians came out of the closet. A civil rights era made passing for white less advantageous. But of course, the con game is still fraud, and spies are still subject to criminal punishment.

We will, in the following pages, explore the ways in which the conditions of the modern world—the world of the industrial

12. See generally RONALD PEARSALL, *THE WORM IN THE BUD: THE WORLD OF VICTORIAN SEXUALITY* (1983).

revolution—and the particular conditions of our societies, fostered various forms of “passing”; and then the ways in which social change has altered the social and legal meanings of this phenomenon.

A. Passing for Patriots: The World of the Spy

Spying is one of the oldest professions. The spy betrays one country (usually his own), on behalf of another. No doubt every major country today has a network of spies, and tries to ferret out secrets of its enemies, often even secrets of its friends. Spying is also a rather dangerous occupation. A wartime spy is liable to be executed. Peacetime spying can get you at the very least a long term in prison. Julius and Ethel Rosenberg were put to death in the United States in 1953; they had been accused of passing atomic secrets to the Soviets.¹³

For the spy or mole, the act of hiding (concealing an arrangement with a foreign government) is a crime in itself. An old crime, and yet it is in many ways a product of modernity—of modern warfare, of modern politics, and, most of all, of the modern ambiguity about “true” identity. A spy who broadcast his real identity would be immediately arrested and would be useless as a spy. The classic spies have always lived two lives. The best spies are those whose surface identity puts off suspicion; and who are able to infiltrate high levels of government, in order to steal government secrets. A notorious British spy ring, the Cambridge five, consisted of men from impeccable and even upper class origins; it was broken up in the 1950s; some of the members fled to Russia, but another member of the group, Anthony Blunt, went undetected for years (and pursued a career as an art historian).¹⁴

Why does anyone become a spy? Sometimes the motive is simple: money. Aldrich Ames had been an employee of the CIA. He sold CIA secrets to the Soviet Union; among other things, Ames blew the cover of some American agents inside the Soviet Union; this cost them their lives. The Soviets paid Ames handsomely for his work. Soviet money allowed Ames to live a lavish life style.¹⁵ Other spies have betrayed their country out of ideology or conviction. This was true of a number of Soviet agents during the Cold War. Klaus Fuchs was a scientist, German by birth, who worked for the British, but passed atomic secrets to the Soviet Union. He was a committed Communist. The Cambridge five were devout Marxists who admired the Soviet Union. Ideology also

13. See William R. Conklin, *Pair Silent to End*, N.Y. TIMES, June 20, 1953, at 1.

14. See ANTHONY BOYLE, *THE CLIMATE OF TREASON: FIVE WHO SPIED FOR RUSSIA* (1979).

15. See TIM WEINER ET AL., *BETRAYAL: THE STORY OF ALDRICH AMES, AN AMERICAN SPY* (1996).

probably explains the behavior of Julius Rosenberg.¹⁶

Spying, as we said, goes back quite far in history; even the Bible mentions spies. For centuries in Europe, kings and governments had spies and informants in other countries. But spying became a much more important business in the 19th century. This was, in part, to the technology of war; a kind of technological arms race became important to warfare and national defense. A spy who learned secrets about new weapons or army plans would be dangerous to one country, and yet incredibly valuable to another. As a result, major powers began to pay more attention to the spy business. Military and naval intelligence units in England date from the late 19th century, and Parliament passed an Official Secrets Act in 1889.¹⁷

The United States, also established a network of laws against spying—an important Espionage Act was passed in 1917, during the First World War.¹⁸ The Espionage Act made it a crime to gather information “respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation.”¹⁹ In the 1950s, a new law, the Internal Security Act, was passed in response to the perceived threat of Communism.²⁰ The Internal Security Act prohibits the communication of national defense information to anyone not entitled to receive it.

In the early days, the Espionage Act was used primarily to prevent actual foreign moles from infiltrating American society.²¹ Currently, it is used more often to prosecute ex-government employees who have leaked classified information to the press.²² In a recent scandal, Edward Snowden, a former employee of the National Surveillance Agency, made public damaging information about the way the United States

16. See BETTY BURNETT, *THE TRIAL OF JULIUS AND ETHEL ROSENBERG: A PRIMARY SOURCE ACCOUNT* (2003).

17. The Official Secrets Act of 1889 (52 & 53 Vict. C. 52).

18. 18 U.S.C. §§ 792–99 (2012).

19. *Id.* § 793(a).

20. 50 U.S.C. § 797 (2006). A spy might face an elevated charge of capital espionage and treason on the basis of “(a) prior convictions for treason or espionage, for which death or life in prison was authorized; (b) knowingly creating a grave risk to national security; (c) knowingly creating a grave risk of death to another person; and (d) any other aggravating factor for which notice has been given.” 18 U.S.C. § 3592(b) (2012). Under the capital charge, a defendant may face the death penalty if “the offense . . . directly concern[s] nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy,” or if any U.S. intelligence officials were identified and killed as a result of the defendant’s treasonous activity. *Id.*; see also Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 828 (2002).

21. A typical case is *Gorin v. United States*, 312 U.S. 19 (1941).

22. See, e.g., *United States v. Drake*, 818 F. Supp. 2d 909 (D. Md. 2011).

collects information about foreign governments and its own citizens. Snowden is a hero to some and a traitor to others. He faces potential prosecution under the espionage and security laws. His leaks revealed the government's widespread collection of cell phone data; and his actions forced the government to limit this kind of surveillance.²³ In sum, the Snowden controversy illustrates the fine line between spies and whistleblowers.

The spy has also become a staple of popular culture. Spy novels in Britain date from the late 19th century.²⁴ Some authors have been wildly successful practitioners: Eric Ambler, for example, and E. Phillips Oppenheim. More recently, John LeCarre's novels about British intelligence have been enormous best sellers. Readers seem to find spies fascinating—and particularly “moles,” spies deeply imbedded in government institutions. *Tinker, Tailor, Soldier, Spy*, one of Le Carre's most successful books, turns on the search for a “mole” at the very highest levels of the British secret service; the job of Le Carre's hero, George Smiley, is to find out the mole's identity, and unmask him.

In a famous movie, *The Manchurian Candidate*, the plot turns on the existence of a kind of inadvertent “mole.” This man was a prisoner of the Chinese communists, during the Korean War. They brainwashed him, and programmed him to respond, unconsciously, to their commands, when a certain signal is given. Their ultimate object, in the rather complicated and involute plot, is to take over the government of the United States. (Needless to say, they fail.)

Moles are not just the stuff of fiction. In 2010, a network of moles, working for the Russian government, was exposed in the United States. As spies, they seemed almost laughably inept and useless. So, for example, Richard and Cynthia Murphy lived in suburban Montclair, New Jersey, living lives “far from the James Bond image. . . . They joined neighbors at block parties, school picnics and bus stops.”²⁵ They had two daughters, and a backyard vegetable garden. They lived in “mundane, suburban anonymity.”²⁶ They were in “deep cover.”²⁷ Their job was to become thoroughly Americanized; they were not to seek secret data, but instead to “infiltrate” American institutions.²⁸

23. See Peter Baker, *Moves to Curb Spying Help Drive the Clemency Argument for Snowden*, N.Y. TIMES, Jan. 5, 2014, at A16.

24. David A.T. Stafford, *Spies and Gentlemen: The Birth of the British Spy Novel, 1893-1914*, 24 VICTORIAN STUDS. 489 (1981).

25. Bob Drogin & Geraldine Baum, *A Spy Story Set in Suburbia*, L.A. TIMES, June 30, 2010, at A1.

26. *Id.*

27. Scott Shane & Charlie Savage, *In Ordinary Lives, U.S. Sees the Work of Russian Agents*, N.Y. TIMES, June 28, 2010, at A1.

28. Jerry Markon & Philip Rucker, *The Spies Next Door*, WASH. POST, June 30, 2010, at A1.

Presumably they could then give their Russian handlers more or less valuable insights into American society. The Murphys were charged, along with six other defendants, with conspiracy to act as unregistered agents of a foreign government and conspiracy to commit money laundering.²⁹ The complaint claimed that they were Russian spies, part of a deep covert operation, trained in techniques and language before moving to the U.S. They were armed with a “legend”—a false identity—designed to further their ability to infiltrate American society. For the Murphys, being married and having children were ways to deepen their legend. In pursuit of secrets, they assumed the most ordinary of ordinary lives. As one intercepted e-mail explained, “You are sent to USA for long-term service trip. Your education, bank accounts, car, house, etc.—all these serve one goal: fulfill your main mission, i.e. to search and develop ties in policymaking circles in the U.S. and send intels (intelligence reports) to C(enter).”³⁰

These “moles” almost seemed like a joke, a caricature. When the 2010 “moles” were exposed, the neighbors were astonished. It must have unsettled them to think that their neighbors were actually spies, under deep cover, secretly biding their time, less like the harmless “moles” that burrow in the ground and eat earthworms, than like spiders hiding in their web, ready at some point to pounce on hapless victims or harm a careless nation. This very idea of a mole is both chilling and fascinating; and helps account for the success of books and movies that turn on this subject.

The suburban moles in Montclair were a reminder how little we may actually know about the “real” selves of people we see every day. Sometimes, after a brutal, pathological killer is unmasked, neighbors testify how shocked they are to learn that Mr. X, so quiet and ordinary, had been burying dead bodies in his cellar year after year, or sneaking out at night to murder almost at random.

Of course, the United States also has its spies. It maintains, no doubt, a network of agents in other countries; and it may have “moles” living in suburban Moscow or Beijing, for all we know. Countries also spy on their own people. They try to infiltrate extremist organizations—or what they consider extremist organizations.³¹ The Federal Bureau of Investigation has done this, for example.

There is a good deal of ambivalence about government spying on its

29. *Id.* The Washington Post article above included a copy of the complaint, available at <http://documents.nytimes.com/criminal-complaints-from-the-justice-department?ref=europe>.

30. *Id.*

31. See, e.g., ROB EVANS AND PAUL LEWIS, UNDERCOVER: THE TRUE STORY OF BRITAIN'S SECRET POLICE (2013). This is a vivid account of the way in which the “Special Demonstration Squad” inserted moles into extremist organizations—for example, ecoterrorist groups.

own citizens, or on friendly countries; the revelation, in 2013, that the government had bugged the cell phone of the prime minister of the Federal Republic of Germany caused something of an international incident.³² There is no such ambivalence about spying on enemies. These spies are not villains, but heroes (in our view): those who, for example, were insinuated into Nazi Germany or occupied France, during the Second World War. In May 2012, the United States foiled a plot to blow up an airplane bound for this country. The tip came from a Saudi Arabian, who had infiltrated the terrorist group, and then betrayed them to Saudi Arabian and American authorities.³³

The old game of spying is, in short, very far from dead. What is new, however, is a different kind of “spy.” There has been a revolution in the technology of spying. Many modern “spies” are not at all like the heroes and villains in the novels of Le Carre. These “spies” never run any personal risk. He or she sits in a room and examines tons of data, brought in by electronic surveillance devices. Such a spy might still lead a double life, in the sense of concealing what he or she actually does for a living. But the controversy over surveillance, and the legal limits of such surveillance, is not as much focused on the spies themselves, but what they are spying on. In other words, citizens want the government to ferret out spies and terrorists; but many people do not like the invasion of their own privacy. These competing policy interests were at the heart of the dispute over Edward Snowden’s whistleblowing.

Modern society is vulnerable to people who can simulate identity. Everybody is aware that people are not always what they seem, and sometimes in sinister and deadly ways. This is not exactly a new phenomenon; it is enough to mention the Faust legend of selling one’s soul to the devil. For example, in the 16th and 17th century, most people were totally convinced that witchcraft was a reality: people who had gone over to the dark side; and whose other life was not really human. The classic example was the moral panic that consumed Salem, and resulted in the famous witchcraft trials. In this notorious 17th century episode, a whole community became convinced that the devil had been at work, enlisting local women, converting them into witches, to pursue his evil plans.³⁴

The term “witch hunt” has gone into the language; and, of course, it

32. Tom Cohen, *Top Senator: Obama Didn’t Know of U.S. Spying on Germany’s Leader*, CNN (Feb. 1, 2014), available at <http://www.cnn.com/2013/10/28/politics/white-house-stopped-wiretaps/>. The program was authorized under Section 215 of the Patriot Act, with the main goal of thwarting domestic terrorism.

33. Scott Shane & Eric Schmitt, *Double Agent Disrupted Bombing Plot, U.S. Says*, N.Y. TIMES, May 9, 2012, at A1.

34. See EARLE RICE, THE SALEM WITCH TRIALS (1996).

refers to far more than the literal search for witches. It is used to describe a kind of modern paranoia about spies, agents of foreign countries, and other sinister enemies of the people. During the Cold War, and particularly during the McCarthy period, millions of people in the United States became convinced that Soviet spies had penetrated every branch of government and were working their evil magic on such American institutions as Hollywood, the state department, and elite universities. Incited by Senator Joseph McCarthy and right-wing members of Congress, a massive campaign against “reds” and their fellow-travelers followed. Those on the other side labeled the campaign a witch-hunt. Of course, there were in fact Soviet agents; but the campaign against “un-American activities” vastly magnified the problem and ruined many lives and careers. Fear of spies, Communists, terrorists and aliens from outer space may be a specific pathology of our times. Moral panics, to be sure, are nothing new. The Los Angeles McMartin incident was a modern moral panic. People came to believe that the McMartin day-care center was a festering hive of Satanic practices.³⁵ The Protocols of the Elders of Zion is a famous hoax, first printed in 1903; the document purports to describe a secret plot of Jewish leaders to control the world.³⁶

The paranoia that gripped the country during the McCarthy period has passed into history. Perhaps we are in the midst of a new burst of paranoia—this time, not about Communists, but about Muslim extremists, jihadists and members of Al Qaeda. The September 11th attacks on the twin towers and the Pentagon also led to a burst of legislation—very notably the U. S. Patriot Act—designed to beef up national security. This law, passed in almost indecent haste after the attack (it was signed into law on October 26, 2001), and of gargantuan length, dealt with surveillance, border control, money laundering, wire-tapping, and in essence provided powerful new weapons for the detection and apprehension of “terrorists.”³⁷ A whole new cabinet post was created: the Department of Homeland Security, which swallowed up various other agencies, and diverted enormous resources and attention to the threat of terrorism.³⁸

Again, some of the plots are real; certainly, real terrorists hijacked planes and destroyed the Twin Towers in New York City, on 9/11. But

35. See Robert Reinhold, *The Longest Trial—A Post-Mortem*, N.Y. TIMES, Jan. 24, 1990.

36. See George Johnson, *The Infamous 'Protocols of Zion' Endures*, N.Y. TIMES, July 26, 1987.

37. 115 Stat. 272 (Oct. 26, 2001); the short title of the act is “the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001;” the first letters of the major words in the title give us U.S.A. Patriot, and hence the common name “Patriot Act.” The Act was extended in 2011.

38. See MARIANO-FLORENTINO CUELLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* 125-150 (2013).

there are people who are willing to believe all sorts of wild notions and conspiracy theories, and who imagine for themselves vast plots and threats to their comfortable life. Much of this paranoia comes from the far right. The lunatic fringe is convinced that there are secret government plots, insidious international conspiracies, some of them oozing out of the United Nations, with its black helicopters, and plans to subvert American sovereignty. At its worst, this kind of thinking leads down the road to homegrown terrorism. Timothy McVeigh, who blew up the federal building in Oklahoma City, came out of this sort of right-wing background.³⁹

B. *Passing for Human*

The classic agents of the devil were not truly human; and for many red-blooded Americans, spies and Communists also lacked humanity. In the well-known movie, *Invasion of the Body Snatchers* (1956), creatures from outer space arrived on planet Earth.⁴⁰ Secretly and quietly, they took over and inhabited the bodies of actual people. After a while, it was impossible to tell who was human and who was not: aliens and Americans looked exactly the same. The movie is “conventionally interpreted in a cold war context;” the “pod people/body snatchers” were “seen as a metaphor for the ‘communist threat.’”⁴¹ The original and two later versions of this movie reflected “the fear that one’s closest associates and relatives are not who they appear to be.”⁴²

People in developed countries today rarely believe in witches, at least not in the literal sense. A sizeable number of people do think that we can be, or even have been, invaded by aliens from outer space. This is, of course, crude science-fiction. But the underlying theme is less crude, and far more widespread: who is this person I married, the person I sleep with, the person I see every day? Do I really know him or her? In Alfred Hitchcock’s 1941 movie, *Suspicion*, a young English woman marries a slightly disreputable man; and then begins to suspect he is trying to kill her to get her money. In fact, the husband is innocent (the

39. John Kifner, *McVeigh’s Mind: A Special Report*, N.Y. TIMES, Dec. 31, 1995.

40. A lesser-known movie, from 1958, has the intriguing title: *I MARRIED A MONSTER FROM OUTER SPACE* (Paramount Pictures 1958). In this movie, directed by Gene Fowler, Jr., a young woman, Marge, finds her husband, Bill, acting more and more strangely. She discovers that this person is not really Bill at all, but an alien, who has taken over Bill’s body. He and the other men in town—also taken over by aliens—come from a planet where the woman are extinct; and they have come down to mate and save their own kind from extinction.

41. RAY PRATT, *PROJECTING PARANOIA: CONSPIRATORIAL VISIONS IN AMERICAN FILM* 32 (2001).

42. *Id.* at 35.

studio insisted on a happy ending). But the plot turns on the wife's inability to know who or what her husband really is.⁴³ The exploding divorce rate in country after country is at least indirect evidence that people get married to other people who are, in a sense, strangers; or become strangers.

Both science fiction and reality rest, of course, on an aspect of life (and not only modern life) which is undeniable: that people have a private core, which can be hidden but not easily suppressed. The underlying notion, then, is simply the mystery of identity. Who are we, anyway? The private core may be different from the public roles, and even from the semi-private roles people play within the family, at work, and at the office. In traditional society, people often had firm beliefs in witches and devils—in the inhuman; but these were not close at hand, as a general rule. In the modern world, a complex world, with so much interaction with strangers, the witches and devils, or their modern equivalents, are terribly close. On the whole, people tend to trust people in their immediate circle. Outside is a dark and mysterious void.

C. *Passing for Honest*

The term, "confidence man," often shortened to "con man," dates from the last years of the first half of the 19th century. The Oxford Dictionary traces it to 1849. Herman Melville published a novel called *The Confidence Man* in 1857. A confidence man is, essentially, a swindler, a crook; somebody who wins the confidence of a victim (the "mark") and then proceeds to cheat him. Cheating and fraud are of course not new in human life. But in the 19th century swindling reached some sort of social climax: this was the high water mark, perhaps, of the confidence game. The confidence game was, like bigamy, a "crime of mobility," that is, a crime that "depended on anonymity, ambiguity of identity, and the fluidity of lines that separated strata and classes in the population."⁴⁴ These were not, as we pointed out, conditions easily met in small societies, or in very traditional societies, or in small towns with a fixed population. But in the bustling, boiling flux of 19th century life, there was fertile soil for clever men and women to practice their dark talents.

The con man essentially does his work by lying about his identity, pretending to be something he (or she) is not, prying money out of his

43. In another well-known movie, *GASLIGHT* (Metro-Goldwyn-Mayer 1944), directed by George Cukor, and released in 1944, Paula, the niece of a murdered woman, marries Gregory, who is secretly her aunt's murderer, and who tries to drive Paula mad for his own nefarious purposes. Of course, he is unmasked at the end of the movie.

44. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 195 (1993).

victim (the “mark”) with some scheme or other. James Crawford, dressed as a priest, went from house to house in 1902, asking for money; Mrs. Emma Meyer, who wore the “garb of the Little Sisters of the Poor” did the same.⁴⁵ Fake doctors, army officers, and noblemen plied their dubious trade at a time when people moved freely about from place to place, and could shed identities the way a snake sheds skin. The con man continued his work well into the 20th century, if not the 21st. There was, for example, the man who, in 1935, called himself “Commissioner Laynar of the State Tax Department” in New York, and went around collecting money for “needy families that could not get on the relief rolls.” In fact, the only needy “family” he was thinking of was his own.⁴⁶ And one “Ramon Padilla,” in 1928, claimed to be the son of the Spanish Ambassador; he wheedled money out of “incautious persons” in Washington, D. C.⁴⁷

Impostors are an especially flamboyant kind of con man. Some were astonishingly successful at role-playing. In France, a man who called himself the Marquis de Roquefeuil became “one of Paris’s most popular society men... lionized in the best society.” The charming “Marquis” wooed and married a Countess who was twenty years his senior. The real members of the De Roquefeuil family unmasked him; and he ended up facing prison in 1911.⁴⁸

A few skillful (and pathological) people have in a sense made a career of impostorship. A notorious example was Stephen Weinberg. For fifty years, he passed himself off as all sorts of things: an ambassador, a doctor, a lawyer, a naval officer, a “Serbian diplomat and a smooth-talking reporter at the United Nations.” In 1921 he “talked himself into the White House... by posing as a State Department protocol officer.” At one point, he spent time in a federal prison. Ironically, he met his doom working at a legitimate job—night manager of a motel. A hold-up man shot him to death, and escaped with \$200.⁴⁹

An even more striking example was Ferdinand Demara. He was a man of many names, and many identities: a civil engineer, a sheriff’s deputy, a prison official, a doctor, lawyer, teacher, even a Trappist monk. Most remarkably, he posed as a surgeon named Dr. Joseph Cyr, during the Korean War. The fake Dr. Cyr served on a Royal Canadian

45. *Id.* at 196.

46. *Impostor is Hunted in Fake Relief Plea*, N.Y. TIMES, Nov. 20, 1935, at 18.

47. *Envoy Warns of Impostor*, N.Y. TIMES, Feb. 21, 1928, at 11. There was an actual Ramon Padilla, who was the son of the Ambassador, and had nothing to do with the scheme.

48. *Unmasked Impostor Posed as a Marquis*, N.Y. TIMES, Apr. 9, 1911, at C3. The real name of the Marquis was Paul Reiss, son of a wine seller, “wanted by the police” in France and elsewhere for “bankruptcy, swindling, and bigamy.” *Id.*

49. John F. Murphy, *Notorious Impostor Shot Dead Defending Motel in Hold-Up*, N.Y. TIMES, Aug. 28, 1960, at 1.

Navy Destroyer. The ship picked up dozens of injured men who needed medical treatment. Demara quickly read a few pages from a medical textbook, and then carried out a series of complicated operations. The parents of the real Dr. Cyr, unfortunately, got wind of this; and the false surgeon was exposed as a fake.⁵⁰

Frank Abagnale was another impostor who at one point practiced medicine, posing as a pediatrician in a Georgia hospital. Abagnale also pretended to be an airline pilot. He later moved to Louisiana, armed with a forged degree from Harvard Law School, and practiced law. Abagnale did time in prison; but in the 1970s, he was released, after promising to help give advice to the FBI about scam artists. He became a successful businessman, consulting on fraud prevention. Apparently it takes one to know one. In 2000, he published a book about his exploits, *Catch Me If You Can*, later made into a Hollywood movie, starring Leonardo DiCaprio.⁵¹ And in 1988, a promising young man named (he said) Alexi Indris-Santana was told he was admitted to Princeton University. Alexi was, in fact, one James Hogue, 31 years old, in prison at the time for bicycle theft. Released, he jumped parole, and proceeded to Princeton. There he was an A student, a track star, and was even accepted into the exclusive Ivy Club. Unfortunately, at a track meet, a Yale student saw him and recognized him; he was arrested a few days later on a warrant as a fugitive. When he got out of prison again, he somehow managed to convince a museum at Harvard to hire him as a security guard; but a jewelry theft tripped him up once more.⁵² Hogue was charged with forgery, wrongful impersonation, and falsifying records. He had borrowed \$22,000 in financial aid, which he was ordered to pay back.⁵³

An impostor figured in one of the most sensational trials of 19th century England. The man claimed to be Roger Tichborne, the heir of a baronet, James Tichborne. Roger Tichborne had disappeared in 1859, and was presumed lost at sea. His mother refused to give up hope; she was sure her son had somehow survived and managed to reach Australia. She advertised in the Australian press; sure enough, a man turned up, who claimed to be the long-lost heir. Even though elements of his story were clearly preposterous, she believed him, and so did

50. A movie, *THE GREAT IMPOSTOR* (Universal International Pictures 1961), was based on his exploits. See also Joe McCarthy, "The Master Impostor: An Incredible Tale," *LIFE*, Jan. 28, 1952, at 79.

51. FRANK W. ABAGNALE WITH STAN REDDING, *CATCH ME IF YOU CAN: THE TRUE STORY OF A REAL FAKE* (2000).

52. James Barron & M. A. Farber, *Tracing a Devious Path to the Ivy League*, *N.Y. TIMES*, Mar. 4, 1991.

53. See *Top 10 Imposters*, *TIME* (May 26, 2009), available at http://content.time.com/time/specials/packages/article/0,28804,1900621_1900618_1900619,00.html.

many other people. In all likelihood, the Tichborne claimant was one Arthur Orton, the son of a butcher from Wagga Wagga. After a sensational trial, he was found guilty of perjury, and sent to prison. He died in poverty.⁵⁴ A 20th century analog was “Anastasia,” who claimed to be the daughter of the last Russian Czar. The whole family had been murdered, but (it was said) “Anastasia” had mysteriously and miraculously survived.⁵⁵

As we pointed out, the con game is a crime of mobility. It is also a crime of what we might call the credentialed society. Credentials are a key to social mobility: the college degree, the license, the diploma, the ordination as a priest, the swearing in of the police officer. This is, in a way, a modern paradox: anybody can (supposedly) rise in society, no matter what their background—but you must do it in patterned ways, and you have to earn the right credentials. It is against the law to take a short-cut, to pass yourself off as something you are not; practicing law without a license, or medicine, or any other profession, is a criminal act. Many states have protections against identity fraud, and for acts as insignificant as falsifying a driver’s license.⁵⁶ Yet it is not against the law to tell lies, so long as you are not claiming a credential, and so long as there is no attempt to squeeze money out of a victim. The First Amendment protects the right to lie about one’s own identity—up to a point. Congress tried to make it a crime for a man to claim he had won the Medal of Honor (the “Stolen Valor” act), but the Supreme Court struck this law down; the law as written, the Court felt, went too far; it violated the First Amendment right of free speech.

The same period that gave birth to the conman gave birth to his nemesis, the detective. The policeman had the job of keeping order in public places; the job of the detective was to ferret out hidden, clandestine criminals, including, very notably, confidence men. As a contemporary wrote in 1895, it is “second nature” for detectives to “unravel plots, unmask falsehoods, and extort the truth.” A skilled detective has a “wonderful memory,” and can recognize the faces of known crooks, “however altered or disguised.”⁵⁷ By the end of the 19th century, every city had a detective force. Business was also thriving for private detectives. The most famous in its day was Alan Pinkerton, and his organization, the Pinkerton Agency. In a way, there was a kind of

54. On this famous case, see DOUGLAS WOODRUFF, *THE TICHBORNE CLAIMANT: A VICTORIAN MYSTERY* (1957); GEDDES MACGREGOR, *THE TICHBORNE IMPOSTOR* (1957).

55. See Michael Specter, *Moscow is Almost Certain: Anastasia Died with Czar’s Family*, N.Y. TIMES, Sept. 7, 1994.

56. See, e.g., OKLA. ADMIN. CODE § 595:10-1-101 (2013).

57. HELEN CAMPBELL ET AL., *DARKNESS AND DAYLIGHT: OR LIGHTS AND SHADOWS OF NEW YORK LIFE* 524 (1895).

arms race, between the conmen and their enemies, the detectives: the conmen devising more and better ways to fleece people; the detectives figuring out more and better ways to find and arrest these frauds.

Another “crime of mobility” was blackmail, and blackmail went hand in hand with the confidence game. New York in the 19th century has been described as a city “full of adroit rogues;” some of whom practiced black-mail “as an art.” Blackmailers (men and women) were adept at trapping foolish tourists and visitors to the big city. A man might come to New York from some small town, and decide to patronize one of New York’s many brothels—something he probably would not dare to do back home. Alas, sometimes our poor visitor got more than he bargained for: falling into the clutches of blackmailers, who demanded money as the price of their silence.⁵⁸

Some of the cruder forms of the confidence game are obsolete; but the problem is still very much alive. It is still possible to take on a false identity; the social conditions that gave birth to the con man still characterize modern society. The confidence game and its many variants are still crimes, defined typically as fraud. In California, for example, a person who “knowingly and designedly, by any false or fraudulent representation or pretends, defrauds any other person of money, labor, or property,” can be sent to prison; this is just as much a larcenous act as picking a person’s pocket.⁵⁹ Indeed, technology has created new ways to swindle people, including identity theft and the various forms of hacking. And technology gives the con man ways to troll for victims on a mass scale. The classical con man perhaps had to go door to door, pretending to be something he was not; his modern descendant has ways of flooding the inboxes of millions of potential victims, at very little cost in money and time. His scam can succeed, even if the suckers form a tiny minority.

Just as the “victim” of blackmail was often not exactly blameless, so too of the various victims of Internet scams. As the old saying goes, you can’t cheat an honest man. Only a fool will believe that he can earn a fortune by helping (say) a Nigerian prince with a small transfer of funds to a foreign bank account. This e-mail scam has become routine.⁶⁰ The contemporary world is a world full of lotteries, Ponzi schemes, and a host of other ways that seem to promise quick and painless wealth—

58. MATTHEW HALE SMITH, *SUNSHINE AND SHADOW IN NEW YORK* 128 (1880).

59. CAL. PENAL CODE § 532(a) (West 2014). There are also many specific frauds which have their own code section, for example, 532b, impersonating a veteran, or 537, getting food or lodging at a hotel or restaurant, without paying, and with intent to defraud the owner; or 538d, impersonating a police officer.

60. See *FBI—Common Fraud Schemes*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/scams-safety/fraud>.

some of these are legal (the lottery), some illegal, some simply too good to be true.

D. Passing for Innocent

In a sense, most criminals lead double lives—a criminal life, and an ordinary life. Even burglars have families, go to restaurants, pay rent, watch television, play games, and try to get a night's sleep. They must, of necessity, keep their other life, the burglary life, a secret, at least from the authorities. Success depends on secrecy, and, to some degree, on the constitutional right against self-incrimination. Each form of criminality has its own way of maintaining this double life—from the ski mask of the armed robber, to the elaborate bookkeeping tricks of the “wolves of Wall Street.”

Each period and society defines crime in its own way, and each has its own forms of criminality. So, for example, corruption and bribery are, in a way, conspicuously modern. Selling public offices, or handing them over to favorites or family members, is against the law in the United States, and other modern countries. Bribery is a crime. But what we consider bribery and corruption was simply normal and expected behavior in, say, the France of Louis XVI, or the England of Henry VIII. The king handed out lucrative jobs to his favorites; clerks did the actual work, and the concept of a “public servant” hardly existed. Nor was there, in that period, anything remotely like “investigative journalism,” a staple of the modern press. The nobles and landed gentry had no need to lead double lives.

Of course, there was crime in the old days as well; the highwaymen wore masks, the sneak thieves worked in quiet and at night. The 19th century, as we indicated, brought in new forms of criminality—particularly crimes of mobility and identity. The crisis of identity also lies at the core of that 19th century invention, the mystery story or novel. Edgar Allan Poe is often given credit for inventing the mystery story in the 1840s. By the end of the 19th century, this was a well-established genre. The most famous detective of them all, Sherlock Holmes, the brainchild of Arthur Conan Doyle, made his appearance in the 1880s. Since then, literally thousands and thousands of “mysteries” have been published.⁶¹ It is not easy to make generalizations about the endless diversity of these books and stories, yet for the most part they do follow a common pattern: a crime (usually murder) is committed. But by whom? The reader does not know. Clues may be scattered throughout

61. Six of them, it might be noted, by one of the co-authors of this article. See, e.g., LAWRENCE M. FRIEDMAN, *THE BOOK CLUB MURDER* (2013); LAWRENCE M. FRIEDMAN, *DEATH OF A ONE-SIDED MAN* (2013); LAWRENCE M. FRIEDMAN, *A HEAVENLY DEATH* (2014).

the text; the reader for the most part fails to see them. In the well-crafted mystery novel, we learn who committed the crime only at the very end of the book. And, if the book is successful, the unmasking comes as a complete surprise. It is the person we least suspect. Thus, the story turns on concealment of a “true” identity: the killer has succeeded in fooling us and everyone in the novel, except the “detective,” for two or three hundred pages.

Many of the big criminal trials, the trials that make headlines, have a similar element of mystery. This is one of the reasons why these trials so fascinate the public. Was this man, in the dock, innocent or guilty? For example, Claus von Bulow, defendant in a very notable trial: did he really try to kill his wife, Sunny von Bulow? Or was he innocent, despite appearance; was he the victim of trumped-up charges? In short, who was he really? Was there a secret, more authentic, identity?⁶² Did Lizzie Borden, in Fall River, Massachusetts, in the 1890s, really take an axe and kill her father and stepmother?⁶³ Was this woman, a church-going, upper middle-class spinster, actually a cold-blooded killer, hiding a violent streak under her bourgeois exterior? Did Casey Anthony really kill her child, or was she telling the truth, that the toddler had just wandered off to her death?⁶⁴

In fiction, the villains are revealed in the end for what they truly are. Real life is much more uncertain. The trial, like the detective story, almost always ends with a definitive verdict: guilty or innocent (a few trials, of course, end with a hung jury). The verdict, however, is definitive for the defendant, rather than the public, which may remain unconvinced. In general, the persistence of crime, despite changes in shape and definition, means the persistence of double lives.

But the arms race, so to speak, continues: between society (meaning police and detectives) on the one hand, and criminals, on the other. Forensic tools, DNA testing, fingerprinting, analysis of hairs and fibers make it possible to find, identify, and punish criminals who might have escaped in the past. In theory, these techniques also shield innocent people who only seem guilty; and the complex rules of criminal procedure are supposed to balance the interests of the state and the accused. Of course, whole books have been written about whether and how this balance works. The point made here is that the forensic techniques—DNA, for example—are ways to decide the contested

62. On this case, see ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE* (1986).

63. See DAVID KENT, *FORTY WHACKS: NEW EVIDENCE IN THE LIFE AND LEGEND OF LIZZIE BORDEN* (1992).

64. See Lizette Alvarez, *Casey Anthony Not Guilty in Slaying of Daughter*, N.Y. TIMES, July 5, 2011, at A1.

question of identity: what is this person's actual self? Is he a killer? A rapist? The father of this child? And the rules on the other side—rules about search and seizure, for example, or about warrants, or admissibility of evidence, are rules which allow even the guilty to protect some precious core of identity, in the interests of freedom, rights, and the greater good of society.

E. Passing for Family

British intelligence was puzzled; why were staff people from Soviet bloc embassies so interested in “cemeteries and country churchyards?” Eventually they figured out the reason: they “were looking for the gravestones of dead children, in order to obtain their birth certificates and then apply for passports, driving licenses” and so on.⁶⁵ Spies, after all, need to construct a phony identity, and this seemed like an excellent way to do so. Indeed, Donald Heathfield, a Russian agent in the United States, “used the stolen birth certificate of a Canadian baby who died in 1963.”⁶⁶

Spies, however, are not the only ones who have used this, or a similar ploy, to build a false identity for themselves. Many Chinese immigrants constructed “fictive families” as a way to get into the United States. From about 1880 on, American laws—as “harsh as tigers”—barred almost all Chinese from entering the country; the law also prevented Chinese residents from becoming naturalized citizens. On the other hand, under the 14th Amendment, anyone actually born in the United States was automatically a citizen.⁶⁷ This made the birth certificates of dead Chinese babies extremely valuable. A fair number of Chinese, arriving by ship in San Francisco during the era of Chinese exclusion, claimed to be citizens by birth. Consular officials suspected that most of these people were lying. Most of them, in fact, *were* lying. But the gambit succeeded at times; the federal courts were often willing to lend a sympathetic ear to the claims of these supposed citizens.⁶⁸ After the great earthquake and fire of 1906 destroyed much of San Francisco—and, incidentally, reduced to ashes virtually all of Chinatown, and most municipal records—there was another opportunity to claim birthright

65. EDWARD LUCAS, *DECEPTION: THE UNTOLD STORY OF EAST-WEST ESPIONAGE TODAY* 162 (2012).

66. *Id.* at 153.

67. See U.S. CONST. amend. XIV, § 1 (stating “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside”).

68. See ESTELLE LAU, *PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION* (2007); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

citizenship: through documents supposedly lost in the disaster. This practice was greeted with skepticism by local officials. The Chinese immigrant, knocking on the doors of America, felt compelled to lie—forced to tell a fib because of laws that were racist and discriminatory.⁶⁹ Chinese exclusion is now history; and the behavior of the Chinese, locked out of the American dream by despicable laws, no longer seems false and fraudulent.

Other immigrants, too, have created fictive families, as a way to become citizens. Spouses of American citizens often have a more or less automatic right to citizenship; but the suspicious souls at the Immigration and Naturalization Service (“INS”) have tried to thwart what the INS considered “sham” marriages.⁷⁰ In *Lutwak v. United States*, the defendants wanted to bring relatives, who survived World War II, to the United States. They arranged for these men to be male “war brides,” by marrying them off to former U. S. servicewomen.⁷¹ The marriages were to be “in form only,” and the brides were paid for their services. The government prosecuted, the “brides” became witnesses for the state, the defendants were convicted, and they lost their appeal to the Supreme Court. The marriages, incidentally, were technically valid under Illinois law (where they took place) and the law of France (home country of the men). The INS insisted that such a marriage was genuine only if a couple planned to live on indefinitely as husband and wife, and that view prevailed in the Supreme Court. The Chinese in fictive families were telling an outright lie; the marriages in the *Lutwak* case were on the other hand technically valid. We do not usually inquire into the *reasons* why A marries B. However, the government claimed that a marriage entered into solely for immigration purposes is fraudulent, and the Supreme Court supported that claim. It is as if, when a couple gets married, they make by implication a statement to the authorities that they are genuinely fond of each other and intend to live together indefinitely. If one took this seriously, a lot of marriages would (legally) fail.

And to an extent they do. A marriage based on fraud, or a lie, can be

69. For about a century, the typical divorce petition in the United States was a kind of family fiction. The law did not allow couples to get a divorce, even if both parties wanted one: there had to be “grounds” for divorce. This led to a system of collusion: the plaintiff in a divorce action—usually the wife—accused the other spouse of adultery or cruelty (depending on the jurisdiction); whatever the reality of the life of the family, the particular story which the petition told was simply not true. Indeed, family law in general was shot through with these fictions. Today, in the era of no-fault divorce, these family fictions are no longer necessary. See generally JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* (2011).

70. See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007).

71. *Lutwak v. United States*, 344 U.S. 604 (1953).

“annulled,” that is, treated as if it never happened. But only for the most extreme forms of misrepresentations to a would-be spouse, and only when the false projection goes to something the state feels is at the heart of every marriage. Lies about sex, fertility, and intent to procreate go to the “essentials of the marriage” and thus can lay the basis for annulment on grounds of fraud.⁷² But other sorts of lies—about one’s character, wealth, personal habits, or political affiliation—are generally not enough. A certain amount of role-playing, even outright fabrication, is an expected part of courtship. Divorce is the remedy for expectations dashed when a “real” self is revealed after the wedding. Only when divorce law is strict, do annulment petitions flood in. In New York, for example, which had the nation’s strictest divorce law, the state was inundated with petitions for annulment.⁷³ Devout Catholics whose religion forbids divorce also prefer annulment (which the church allows in proper cases). In a way, annulment cases are more like *Lutwak* than like the Chinese fictive family.

It is one thing to lie to a fiancé about personal traits or characteristics, or about feelings of love. Lies to the government about one’s intentions are quite another thing. The INS denies very few petitions on the grounds of marriage fraud (less than 1%); but it investigates diligently. Congress enacted new protections against marriage fraud in 1986 based on rising (possibly misplaced) concern that this kind of fraud was prevalent. Spouses married less than two years gain permanent residence only conditionally; they must wait an additional two years during which time the citizen and the immigrant must jointly petition for removal of the conditional status—and demonstrate that the marriage is bona fide.⁷⁴ The ominous “Stokes unit” in New York takes couples that have failed the initial screening interview and subjects them to separate and invasive questioning, similar to a marathon stint on *The Newlywed Game*.⁷⁵ In the government’s search for authenticity, couples are asked questions ranging from “where’s the hamper” to “who’s the boss.” Their answers are then compared to root out sham marriages. Too many mismatches can derail the quest for a green card and lead to deportation of the immigrant “spouse.” The government treats this “fictive family” as a fraud.⁷⁶ The consequences, for those caught, are criminal and likely

72. The “essentials” test was set forth in *Reynolds v. Reynolds*, 85 Mass. 605 (1862), and was adopted in many states.

73. New York permitted divorce only on grounds of adultery until 1966, while most other states had long permitted divorce on a variety of other grounds, including nebulous and manipulable ones like “extreme cruelty.” See GROSSMAN & FRIEDMAN, *supra* note 69, at 180–87.

74. Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, § 216(g), 100 Stat. 3537, 3541 (codified at 8 U.S.C. § 1186a(g) (2006)); Abrams, *supra* note 70, at 1682–94.

75. See Nina Bernstein, *Do You Take This Immigrant*, N.Y. TIMES, June 13, 2010, at MB1.

76. As Kerry Abrams points out, the federal marriage fraud rules are also designed to prevent

also to include deportation. Accordingly, these cases were, and still are, taken seriously.

Other forms of family fiction have not lost their stain of immorality. Bigamy is a family fiction that has grown no less odious over time. Bigamy seemed to flourish in 19th century America. This was, as we said, a nation of high mobility. People moved freely from place to place. Indeed, starting over, going off to find one's fortune was part of the American dream, or myth, or experience. Still, one was supposed to play by certain rules. A married man from, say, New Hampshire, might move on (by himself) to Ohio, pretend to be a bachelor, woo a woman, hiding his other life, and marry once again. This was the banal, sordid story behind dozens of bigamy cases.

Bigamy is a classic crime of mobility. In a small, ingrown village, it would be next to impossible to pull this off: everybody would know if you were married or not. But the 19th century was a restless period, as we pointed out; a century of immigration from abroad and tremendous coming and going inside the country. This situation made the con man possible; and also the bigamist. The cities and towns were environments full of strangers. People were constantly reinventing themselves, often for other, less sinister reasons. There are no accurate statistics about bigamy and other family frauds. And for every actual bigamist, no doubt there were countless men who only dreamed of it—if not bigamy, at least for a sex life broader than Victorian convention deemed acceptable.

In a popular British movie, *The Captain's Paradise* (1953), starring Alec Guinness, the main character runs a ferry between Gibraltar and Morocco; he has a wife in both places, and leads a true double life. He asks the crew on each journey to tell him when the ship is half way between the two ports, at which time he flips the picture over his bed to display the right wife. The wives serve different roles for the captain. His Moroccan wife is young and sexy; with her, he goes out dancing and drinking every night, and never has a home-cooked meal. His Gibraltar wife is his helpmate, and the mother of his children. He chafes when each tries to step out of the role he sees for them. He tells his exotic wife, when she dons an apron and starts to boil water, that "if you cook, all that beauty will vanish." And, after an uncomfortable night at a club to which his traditional wife has dragged him, he tries to extract a promise from her that she will never go dancing again.

A similar plot was at the center of *Boeing Boeing*, a French play, which was a great hit in London in an English translation in 1962.

unilateral marriage fraud "where a foreign man or woman tricks a citizen into marriage . . . only to divorce the unlucky spouse once permanent residency has been obtained." Abrams, *supra* note 70, at 1683 n. 267.

Bernard, a businessman in Paris, is engaged to three beautiful women, from three different countries, all of them flight attendants. Bernard chose then because of their incompatible flight schedules; they were never in Paris at the same time. Bernard describes his scheme to a friend as “mathematical, geometrical, and poetic.” The slapstick comedy gets its farcical plot from a simple turn of events—Boeing develops a jet that can fly faster, and the women began showing up in Paris ahead of schedule; one night, they are all in town. In the end, Bernard finds himself abandoned by all three, but not because they discovered his betrayal. One of the women was herself a two-timer, one ran off with his best friend, and the third decided to try the single life. In *The Captain’s Paradise*, too, Alec Guinness ends up alone, even though his secret was never revealed. His insistence that his wives be one-dimensional brings an end to both of his relationships. His traditional wife leaves him to marry her cousin, who takes her drinking and dancing. His Moroccan wife says that sometimes she just wants to cook and eat dinner at home; she leaves him for a cab driver who wants a traditional wife.

The movie and the play are both comedies, both fiction, but real life has a way of imitating if not outdoing fiction. A medical school professor at Stanford University, Norman Lewiston, died suddenly in 1991, at the age of 52; only then did it turn out that this noble and caring doctor, an expert on cystic fibrosis, in fact had three wives; two in the Bay Area, and one in San Diego. He told the second wife that he was divorced; he told the same story to his colleagues, who knew his first wife, but were invited to the second wedding. For the third, he forged two sets of divorce papers to prove he was free to marry. He spent after work hours with wife #2; then he went to wife #1, telling wife #2 that he had to sleep at the hospital. He got out of town to see wife #3 by claiming he had to attend frequent medical conferences. Wife #2 found out her husband’s secret only after he died; the hospital told her another wife had already come to claim the body.⁷⁷ His third wife had discovered his secret just a few months before his death; they had reached an agreement to get the marriage annulled, but the paperwork was never filed. The strain of juggling this triple life might have hastened his death.⁷⁸

Gordon Getty, a billionaire, and a prominent citizen of San Francisco, had a wife, Ann, and four sons. This was, apparently, not enough for him. In fact, he had another family in Los Angeles—a female partner (they weren’t married) and three daughters. The news of his second

77. Richard C. Paddock, *Doctor Led Three Lives with Three Wives*, L.A. TIMES, Oct. 14, 1991.

78. *Id.*

family broke when the Los Angeles daughters filed a petition in court to change their last name to Getty.⁷⁹ It is not entirely clear whether Getty's double life was really that hidden. An article in the Los Angeles Times spoke of "open secrets and closed mouths, about a man with a double life and the singular city that has sheltered him."⁸⁰

There are no doubt many such secrets, open or closed; sometimes they stay secret, sometimes they are revealed by chance or fate. In Chile, in 2010, the world was electrified by the saga of thirty-three men, trapped 2300 feet underground for more than two months in a gold and copper mine (17 days without any communication from rescuers). Finally, to great global joy, the men were rescued. Their families had been keeping vigil nervously, waiting anxiously for the rescue. For some men, however, secrets rose to the surface along with the men themselves. At least five of the rescued miners had double lives: a secret mistress or a second wife and, in some cases, two sets of children. The government offered compensation to the miners' families, but this set off a furious controversy. Sometimes two women showed up to claim the money for the same man; they learned about each other, and about their man's infidelity and betrayal. At least one wife and mistress came to blows.⁸¹ One wife took the high road; she stayed home on rescue day and let her husband's mistress meet him as he came to the surface. The wife told a reporter that she was "happy for him, and if he remakes his life, good for him."⁸² The government toyed with the idea of sending word down to the trapped miners that each would have to send up one name—and only one—to avoid the headache of sorting out benefits. In any event, if the mine disaster had not happened, the double lives of the miners would not have come to light.

Bigamy is probably a fairly rare crime. True double lives like the Stanford doctor's are even rarer.⁸³ More prosaic forms are surely much more common: men who are carrying on affairs, and women who have

79. Maria L. La Ganga & Jocelyn Stewart, *California and the West: 2nd Getty Family an Open Secret*, L.A. TIMES, Aug. 30, 1999.

80. *Id.*; see also Stacy Finz & Jaxon Van Derbeken, *Getty's Secret Double Life*, SFGATE (Aug. 21, 1999), <http://www.sfgate.com/news/article/Getty-s-Secret-Double-Life-Second-family-in-2911639.php>. Even after the story broke, Ann Getty did not divorce her husband.

81. Fiona Govan, *Mistresses and Wives Clash over Trapped Chilean Miners*, TELEGRAPH (Sept. 2, 2010), <http://www.telegraph.co.uk/news/worldnews/southamerica/chile/7978509/Mistresses-and-wives-clash-over-trapped-Chilean-miners.html>.

82. Bonnie Goldstein, *Wronged Wife of Chilean Miner Out-Classes Jenny Sanford*, POLITICS DAILY (Oct. 14, 2010), <http://www.politicsdaily.com/2010/10/14/wronged-chilean-miners-wife-out-classes-jenny-sanford/>.

83. Bigamy laws are not routinely enforced, except for raids on polygamous communities—in which the plural marriages are in any event hardly a secret. GROSSMAN & FRIEDMAN, *supra* note 69, at 28-31.

lovers.⁸⁴ What these situations have in common is the double life: the life divided into compartments, each of which is (usually) sealed off from the others. Sealed off in most societies. But not in all. In some societies, elite men are expected to have mistresses, or the situation is at least tolerated. High-level Chinese men, in classic times, were expected to have concubines. Theirs was hardly a double life, in the sense used here.

For much of our history, adultery was a crime; it is still nominally a crime in a fair number of states (about twenty of them), but today this law is rarely enforced.⁸⁵ Adultery is hardly victimless; the common phrase for adultery is “cheating,” and most married people, if they discover their spouse is “cheating,” find the situation intolerable. The social history of adultery is complex. Definitions and redefinitions of marriage—the evolution from traditional to companionate marriage—deeply impact the social meaning of adultery; social definitions also determine whether the adulterer feels driven underground, forced or induced to lead a double life. At one time, interestingly, the formal law practically encouraged adulterers to lead a double life. Under many 19th century statutes, adultery per se was not illegal: only open and notorious adultery was a crime.⁸⁶ A man or woman who successfully hid an affair, or a one-night stand, or a secret fling, had not committed a crime at all. “Cheating” was only a crime when it flew in the face of community standards.

Bigamy is even less victimless than adultery. The second wife is very definitely a victim. This was especially true under the code of the 19th century. If and when the truth comes out, she discovers, to her horror, that she is not a respectable married woman, but a woman sharing a bed with a man who is not really her husband. The marriage is legally void, of course. She is now left high and dry: ruined goods; she has lost time and status in the marriage market. Her situation today would be much less dire. But she still has lost certain *legal* rights, which depend on a regular marriage. Only the bigamist’s first wife (or husband) has these rights: protection against disinheritance, community property (in some states), and so on. The other wives might, in most states, seek protection under the “putative spouse” doctrine, at least if they believed in good faith they were married to the bigamist.⁸⁷ But in some forums, the doctrine does not give the putative spouse full rights.⁸⁸

84. See discussion of adultery rates in GROSSMAN & FRIEDMAN, *supra* note 69, at 111–12.

85. *Id.* at 119–20.

86. See LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 85 (2004).

87. See, e.g., *Spearman v. Spearman*, 482 F.2d 1203, 1206 (5th Cir. 1973).

88. See, e.g., *Williams v. Williams*, 97 P.3d 1124, 1131 (Nev. 2004), in which the court allowed

A man who has a mistress (and a wife who has a lover) is violating the law (technically speaking) in the states that still make adultery a crime. In other states, under modern criminal codes, no crime has been committed. "Cheating" on a spouse was always grounds for divorce, and no doubt is still a prominent reason why people get divorced, even under today's no-fault law, where either party to a marriage can get out without giving any reason. Dr. Lewiston's first wife was the only one provided for in his will and she had community-property rights in his earnings. She also sued the other two wives to claim her husband's share of houses and property (community property) jointly held by the women and her husband. The third wife told a reporter that she had no intention of making claims on his estate: "The only thing I want to inherit is his frequent-flier miles."⁸⁹

Except for the bigamists, the men and women who "cheat" are no longer treated as criminals (even in states where that is nominally still the case). Adultery has been "decriminalized," that is, the state has withdrawn from the business of enforcing honesty in marriage. It is left to individual choice—left to families to work things out. The lying goes on; but not as a way to avoid going to jail.

F. Passing for White

Race relations in the United States have a long and tortured history. The most egregious aspect of this history was the vicious and deep-seated racist strain that tainted relationships between black and white individuals. During the colonial period, there were black slaves in every colony; after the Revolution, slavery was abolished in the northern states, but persisted in the southern ones, and indeed, slavery became absolutely vital to the southern economy. In some parts of the south, slaves outnumbered free whites. After slavery was abolished, the system of white supremacy did not die. Eventually, a severe and oppressive system of Jim Crow and apartheid became the norm in the southern states, and those African Americans who violated the code of white supremacy ran the danger of violent death at the hands of a lynch mob. In the north, white supremacy was also a powerful force, though in a less formal and less violent way.

Because race carried with it such dire consequences, it was important to define who was "black" and who was not. In American law—and American society—race is in many ways a social, rather than a biological, category. A person who is one-eighth black, and seven-

a putative spouse to make a claim for property distribution, but not for spousal support.

89. *Doctor's Polygamy Surprising*, DAILY NEWS, Oct. 9, 1991.

eighths white, is “black” or “African-American,” and will be treated as such, for better or for worse. In part, this practice goes back to the days of slavery. Under the slave codes of the colonial period, the status of the mother determined the status of the child.⁹⁰ Slave-owners were notoriously free to have sex with their helpless female slaves; the resulting light-skinned children would be classified as slaves. The white father usually paid no attention to these children. In any event, if the story repeated itself in the next generation, the children of a light-skinned slave would be even lighter. In a few generations, some slaves in some households simply looked white.

State laws defined how much black blood it took to get a person classified as black. In the 20th century, in some states, this even morphed into the infamous “one drop” rule. The Virginia code of 1887 defined a person as “colored” if they had “one-fourth or more” of black blood. In the code of 1924, anyone with one-sixteenth or more was “colored.” And under the code of 1942, every person “in whom there is ascertainable any negro blood shall be deemed... a colored person.”⁹¹

Since blackness was so disadvantageous, legally and socially, light-skinned “blacks” were tempted to cross over into white society. Mark Twain’s novel, *Pudd’nhead Wilson*, pivots on this situation. In the novel, a slave owner’s baby and a slave woman’s baby are somehow exchanged at birth. The slave grows up thinking he is a master, and the master grows up thinking he is a slave. This plot, of course, would make no sense, unless there were in fact “blacks” that could pass for white. Obviously, this was far from a negligible category, especially after the end of slavery, and especially in states where a person who was 1/16th black was legally black, and even more egregiously in say, Virginia, under the “one-drop” rule. Under the Virginia rule, it was “simply not possible to know whether you had one drop of black blood—to know whether you were a real white person or an imitation. . . . The one-drop rule made whiteness imaginary.”⁹²

“Passing” of course meant hiding a (social) identity; it meant living a second life. Thomas Jefferson freed the children of his slave, Sally Hemmings—they were almost certainly his children as well. The two oldest, William Beverley and Harriet, “left Monticello as white people”;

90. So, for example, as early as 1662, Virginia (Laws Va. 1662, Act xii) provided that “all children borne in this country shall be bond or free only according to the condition of the mother.”

91. Va. Code § 49 (1887); Va. Code § 67 (1924); Va. Code § 67 (1942). Also, in the section of the 1942 code dealing with miscegenation, a white can only marry another white, and a white is a “person who has no trace whatsoever of any blood other than Caucasian,” Va. Code § 5099a(5) (1942).

92. SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 356 (2000). On passing in general, see ALLYSON HOBBS, *A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE* (2014).

they were obviously light enough to pass.⁹³ The saga of the Healy family, in the 19th century, is one of the most astonishing stories of “blacks” who passed for white. The Healy’s were the children of a white Irish immigrant and a slave woman. Their father sent the children north to be educated in Catholic schools. Most of them (not all) were light enough to pass for white. The ones who passed were brilliantly successful in their new lives. One became Bishop of a diocese; another was captain of a ship. A third, also a priest, became President of Georgetown University. All of these positions would have been totally impossible if the secret of their ancestry had been known.⁹⁴ In some families, after generations of “passing,” descendants lost all memory of their African-American forebears. Daniel Sharfstein, in his book, *The Invisible Line*, tells the vivid story of three such families, families that, over the course of time, crossed the line from black to white. Indeed, one descendant fought (as a white man) in the Confederate Army.⁹⁵

For those who “passed,” and for their families, life could be precarious. There was always the danger that the secret heritage might come to light. A person who “passed” was in a sense balanced awkwardly between two worlds, and perhaps not really at home in either one. In a 1949 movie, *Pinky*, directed by Elia Kazan, the main character was a light-skinned woman, Patricia Johnson, who passed for white and became a nurse in the north, and then returned to her black family in the south. In the end, she decides in a sense to give up her whiteness; she resolves to stay in the south and work for the black community.

An interesting California case turned on rights to the estate of a lawyer, Ernest Torregano, who practiced in San Francisco. Torregano was born in New Orleans, to an African-American family. But he himself was very light-skinned. He married, and had a daughter Gladys. He got a job as a Pullman porter (a traditional job for blacks); he later moved to San Francisco, passed for white, studied law and became a member of the bar. His mother, from New Orleans, visited him at one point, and told him that his wife and daughter were dead. She then went back to New Orleans, and told the wife and daughter that Torregano was dead. No explanation is given for these extraordinary lies; the best guess is that she saw him living in San Francisco as a white man, and was afraid the truth about his black family in New Orleans would hurt

93. ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY* 285 (2008). Three of the Hemings children “would live in the white world,” and only one in the black world. *Id.* at 660.

94. The story is told in JAMES M. O’TOOLE, *PASSING FOR WHITE: RACE, RELIGION, AND THE HEALY FAMILY, 1820-1920* (2002).

95. DANIEL J. SHARFSTEIN, *THE INVISIBLE LINE: THREE AMERICAN FAMILIES AND THE SECRET JOURNEY FROM BLACK TO WHITE* 5, 107 (2011).

his career. The truth never came out during his lifetime. But after he died, his daughter, Gladys, somehow discovered the truth. She claimed his estate. In his will, Torregano stated that he had no children (he thought this was true); and he left a nominal amount (one dollar) to anyone who claimed a relationship. This is a standard clause, and usually effective. In this case it was not. The California courts gave the long-lost daughter the opportunity to prove that Torregano's will did not mean what it said.⁹⁶

Cross-racial marriage was forbidden in many states throughout the 19th century, and well into the 20th century; the Supreme Court eliminated the last of these laws in the 1960s.⁹⁷ Particularly in the southern states, racial identity was at times confused and confusing; there were no genetic tests; a lot depended on how people behaved, whom they associated with, and how the community defined them. Sometimes lawsuits turned on whether or not one party or another was black or white.⁹⁸ This issue arose, for the most part, in southern communities. The well-known Rhinelander case, however, in New York, in the 1920s, turned on the racial identity of a woman named Alice Jones.⁹⁹ Kip Rhinelander, from a prominent and wealthy family, had married Jones, a girl from the other side of the tracks. His family was bitterly opposed to the marriage. Kip, under their influence, left Alice and brought a lawsuit to annul the marriage. His wife, he said, had hidden the fact that she had black blood. This, he argued, constituted fraud; and a fraudulent marriage could be annulled in New York. In one dramatic moment during the trial, Alice Jones stripped in front of the jury, so that they could see for themselves whether she looked black or white. In the end, Rhinelander lost his case. Not that the jury, in all likelihood, really believed that Alice had no African-American blood; but they probably felt that Rhinelander must have known this fact, even before the two were married. The annulment action failed. Nonetheless, Alice and Kip never lived together again.¹⁰⁰

A person whose skin is quite light, can "pass" for white; and by the

96. In re Estate of Torregano, 54 Cal. 2d 234, 352 P.2d 505, 507-09 (1960).

97. See *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court struck down Virginia's ban on interracial marriage on due process and equal protection grounds.

98. See generally ARIELA GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2009).

99. See EARL LEWIS AND HEIDI ARDIZZONE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* (2001); ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* 3-4 (2013); ELIZABETH M. SMITH-PRYOR, *PROPERTY RITES: THE RHINELANDER TRIAL, PASSING, AND THE PROTECTION OF WHITENESS* 2-3 (2009). Leonard Rhinelander appealed, but the trial court judgment was affirmed. *Rhinelander v. Rhinelander*, 219 N.Y.S. 548, (1927); the New York Court of Appeals affirmed without issuing an opinion, 245 N.Y. 510, 157 N.E. 838 (1927).

100. LEWIS & ARDIZZONE, *supra* note 100, at 246-47.

same token, a white person can conceivably “pass” for a light-skinned black. This is of course a much rarer situation, but it is not unknown. One remarkable case involved Clarence King, a famous explorer, geologist, and author in the 19th century, a man who led a spectacular double life. In one life, as the great Clarence King, he mixed with high government officials and other luminaries. But King had fallen in love with a black woman, Ada Copeland. He married her, lived with her, and had children; all the while pretending to her that he was James Todd, a light-skinned black man. Todd, he explained, was a Pullman porter, which why he was so often away. This grand deception lasted many years. Only when King was dying did he reveal the truth to his wife.¹⁰¹

“Passing” was not confined to the American scene. In the Third Reich, it was important to be an “Aryan”; it was dangerous and ultimately fatal to be Jewish. Laws defined what quantum of Jewish blood was enough to remove you from Aryan society. No doubt many people tried to hide a non-Aryan blot in family history, as a matter of sheer survival.¹⁰² In the United States, Jews were never hunted down and slaughtered like animals, but a genteel form of anti-Semitism was quite common, and many Jews found it worthwhile to “pass” into Christian society. In Spain, where there had once been a flourishing Jewish community, King Ferdinand and Queen Isabella ordered the Jews expelled in 1492. Thousands left, but some remained and converted to Christianity. Of these, a fair number continued practicing their religion, but in secret; in public, they “passed” for Catholics. After generations, descendants of these “conversos” had often lost all memory of Jewish ancestry; some families still practiced “family” customs which were, in fact, originally Jewish. A researcher, who investigated descendants of “conversos” in New Mexico, reported about people who dropped into his office and told him things like “so-and-so lights candles and does not eat pork.” A few descendants of “conversos” in New Mexico have even returned to the Jewish faith.¹⁰³

A white southerner, in 1900, who discovered black ancestors would most likely have been appalled. A Catholic in Mexico or Spain, in 1900, who found out that some of his ancestors were Jewish (or Arab) was unlikely to be pleased. In the 21st century, the social meaning of such a discovery has become radically different. The stigma has faded;

101. MARTHA A. SANDWEISS, *PASSING STRANGE: A GILDED AGE TALE OF LOVE AND DECEPTION ACROSS THE COLOR LINE* 6–9, 139 (2009).

102. See EUROPA, EUROPA (Artur Brauner & Margaret Ménégoz 1990) (a young Jewish boy in Nazi Europe attempts to “pass” as an Aryan).

103. Kathleen Teltsch, *Scholars and Descendants Uncover Hidden Legacy of Jews in Southwest*, N.Y. TIMES, Nov. 11, 1990.

and the need to “pass” has faded as well.¹⁰⁴ Some Spaniards speak proudly of their “Jewish ancestry,” even though this “fact” no longer has any religious meaning. Similarly, to discover that some ancestor was illegitimate no longer has the power to shock. Australia, as we know, was once a penal colony. Modern Australians, whose line goes back to a convict ancestor, are unlikely to hide their heads in shame, if they ever did.

G. Passing for Legal

We have mentioned how Chinese immigrants constructed “fictive families,” to get a foothold in a country which did not want them to come. Their descendants no longer need to hide their background. Yet today, millions of men, women and children, living in the United States, still have a desperate need to “pass.” These are the undocumented aliens; the people who managed to cross over the Mexican border, or who floated on a rickety boat to some beach in Florida, or simply overstayed a visa. These immigrants need to be as invisible as possible; they need to melt into the mass of the population. This is much easier to do in the United States than in many countries, where strangers from strange countries stick out like a sore thumb. The U.S. is a nation of immigrants; there are millions of legal foreigners already in the country, and there is nothing—accent, skin color, dress—that unambiguously says, this person has no papers.

No one has an exact count of the numbers of aliens who “pass.” One estimate is eleven million.¹⁰⁵ Each of them has his or her own story—a story about living two lives. Harold Fernandez, for example, came to the United States when he was 13. His parents were already here—illegally. Harold and his brothers fled from Medellin, Colombia; they flew to the tiny island of North Bimini. They boarded a wooden boat packed with other immigrants and made the treacherous sea voyage to Florida. Harold turned out to be a terrific student. He was valedictorian of his high school class. He entered Princeton with a fake green card and social security number. Eventually he was exposed; but his story, unlike so many others, had a happy ending: Princeton and its lawyers came to his rescue. Today Harold is a graduate of medical school, and practices as a cardiac surgeon.¹⁰⁶

People like Fernandez are of course not typical. The so-called Dream

104. On pressure for racial assimilation in the modern workplace, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000).

105. See, e.g., *5 facts about illegal immigration in the U.S.*, Pew Research Center, available at <http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/>.

106. Joseph Berger, *An Undocumented Princetonian*, N.Y. TIMES, Dec. 29, 2009.

Act, which has bounced about in Congress, would open the door to citizenship for young people who came in as (illegal) minors, and who completed two years of college or served in the military, and have no criminal record.¹⁰⁷ Congress has never managed to enact the Dream Act. President Obama, however, announced in July 2012, that his government would in effect behave as if the Dream Act was law: the administration would not try to deport those immigrants who would have been covered by the Dream Act.¹⁰⁸ In November 2014, the President announced a kind of super Dream Act, covering millions of the undocumented.¹⁰⁹ For the time being, then, the “Dreamers” (as they call themselves) and all those covered by Obama’s executive action are safe, and can legally work and go to school.

Millions of other undocumented aliens, however, would not qualify for the Dream Act, are not covered by Obama’s actions, do not graduate from Princeton, and do not work as cardiac surgeons. They are poor, sometimes very poor; they have low-level jobs, cleaning latrines, washing dishes in Los Angeles restaurants, picking strawberries, standing on street corners waiting for jobs as day laborers, often living in squalor, easily exploited, without a vote, without power, and with none of the benefits of citizenship. They are also, moreover, in constant fear of “la migra.” They are subject, in a number of states, to draconian laws; in some regards, the Obama administration also has in the past given them no quarter. In 2011, the administration deported 396,906 men and women—a record number.¹¹⁰ Everyone agrees that immigration law needs to be reformed; but there is little or no agreement on details. One compromise proposal would beef up border controls; and at the same time give the illegals a path—long, hard, and slow, perhaps—to the emerald city of citizenship. Congress, so far, seems gridlocked on the issue.

H. Passing for Straight

Historically, gays were mostly “in the closet,” that is, they hid their sexual orientation, at home, at work, in straight marriages, and in public. Strong social taboos against homosexual behavior made the gay closet necessary. The law reflected these taboos; same-sex behavior was at

107. David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010.

108. Julia Preston and John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012.

109. See *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction#1>.

110. Jose Antonio Vargas, *Not Legal Not Leaving*, TIME, June 25, 2012.

one time a felony, a crime that could earn long prison terms for violators. The taboos, of course, have gradually weakened over time. A substantial group of states recognize gay marriage. The gay rights movement and the legal regulation of same-sex behavior are complex topics; we focus here on just a few examples of the ways law forced gays and lesbians to live a kind of double life; and the ways law and society have changed in recent times.¹¹¹

At one time, government was almost unrelievedly hostile. McCarthyism in the 1950s was not only a crusade against (alleged) Communists and communist sympathizers; it also included an effort to purge gays in the federal civil service. The 1950s was a time of “renewed conservatism—social, sexual, political,” and open homosexuality was not a practical option for gay men and women.¹¹² Even the American Civil Liberties Union (ACLU), the most ardent defender of civil rights, distanced itself from any notion of gay rights. The ACLU issued a policy statement in 1957, stating that sodomy laws were constitutional if “deemed socially necessary or beneficial” by state and local governments.¹¹³ Challenges to such laws were “beyond the province of the Union.”¹¹⁴ The federal government, meanwhile, conducted a systematic purge of the civil service.¹¹⁵ Beginning in 1947, the State Department began its campaign against both communists and gays. Hundreds of cases were begun and many led to firings. The effort spread to other federal agencies.

In 1950, the Senate issued a resolution ordering a subcommittee to investigate the employment of gays and “other sex perverts” in the federal government.¹¹⁶ Later that year, the subcommittee issued an interim report in which it tried to document the “extent of the employment of homosexuals and other sex perverts in Government,” the “reasons why their employment in the Government is undesirable,” and the “efficacy of the methods used in dealing with the problem.”¹¹⁷ The report did not concern itself with “so-called latent sex perverts, namely, those persons who knowingly or unknowingly have tendencies or

111. On gays and “covering,” see, in general, Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

112. WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 239 (Mark Blasius & Shane Phelan eds., 1997) [hereinafter WE ARE EVERYWHERE].

113. AMERICAN CIVIL LIBERTIES UNION, HOMOSEXUALITY AND CIVIL LIBERTIES (1957), in WE ARE EVERYWHERE, *supra* note 112, at 274–75.

114. *Id.*

115. For a comprehensive history on this subject, see DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); see also MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009).

116. WE ARE EVERYWHERE, *supra* note 112, at 274–75.

117. *Id.* at 242.

inclinations toward homosexuality or other types of sex perversion, but who, by the exercise of self-restraint or for other reasons do not indulge in overt acts of perversion.”¹¹⁸ It was only the “overt” homosexuals who presented a problem, and were deemed “generally unsuitable” for employment, as well as obvious security risks. Homosexual activity was considered “so contrary to the normal accepted standards of social behavior that persons who engage in such activity are looked upon as outcasts by society generally.”¹¹⁹ Moreover, because homosexual acts were both criminal and immoral, these individuals would be obvious targets of blackmailers; threats to “out” gay men and women could be used to coerce them to give out classified information. This would be all the easier, because gays had weak “moral fiber” and because “perverts” tended to “congregate at the same restaurants, night clubs, and bars,” where any spy could find them and develop a relationship.¹²⁰

The key to eradicating homosexuality from the civil service system, according to the report, was to prevent employment of gays in the first place. In the three years prior to the issuance of the report, 1700 applicants were denied civil service jobs because of a history of homosexuality.¹²¹ On the other hand, the report noted, most federal agencies had not done enough to get rid of employees whose homosexuality was later discovered; and the agencies were reluctant to document sexual orientation so as to prevent these workers from simply moving to another agency. Agency heads were encouraged to get their heads out of the sand and take appropriate steps to get rid of people for whom there was “no place in the United States Government.”¹²² Dwight Eisenhower’s campaign for the Presidency included a slogan, “Let’s Clean House,” and a promise to rid the federal government of a “host of problems, including communism, corruption and sexual perversion.”¹²³

The government waged war against gay people for two decades. The crusade began to lose steam with a 1969 court ruling, *Norton v. Macy*, in which a federal appellate court held that “the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority’s conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity.”¹²⁴ The

118. *Id.*

119. *Id.* at 243.

120. *Id.* at 244.

121. A federal regulation provided that a civil service employee could be removed for “infamous . . . , immoral, or notoriously disgraceful conduct” and for “any . . . other disqualification which makes the individual unfit for the service.” See 5 C.F.R. § 302.203(a)(2), (6) (2012).

122. WE ARE EVERYWHERE, *supra* note 112, at 250.

123. JOHNSON, *supra* note 115, at 121.

124. 417 F.2d 1161 (D.C. Cir. 1969).

case overturned the dismissal of a budget analyst for the National Aeronautics and Space Administration (NASA), who had made an off-duty homosexual advance in a private car. At a minimum, the court reasoned, the civil service commission would have to show a direct relationship between his conduct and the effective needs of the service. Moral condemnation or “transitory institutional discomfiture” by NASA because “one of its own was caught *in flagrante delictu*” was not enough to justify the firing.¹²⁵ That same week, the Stonewall Riot took place; an event that is widely, if inaccurately, credited as the starting point of the gay rights movement. Almost twenty years earlier, in 1950, the Mattachine Society had formed in reaction to the government purge of gays. The Society’s mission was to educate people about homosexuality—which it described as “not a virtue, but rather a handicap”—and minimize persecution. It launched an attack on the anti-gay efforts of the 1950s. In 1975, the Civil Service Commission regulations were officially changed to eliminate “immoral conduct,” the prong used to purge gays and lesbians, as a bar to employment with the federal government. In 1998, President Clinton issued Executive Order 13087, which prohibits discrimination based on sexual orientation in the civilian federal workforce.¹²⁶

For most of American history, gays were barred from military service.¹²⁷ The first documented case of a man dismissed from the service for this reason—Lieutenant Gotthold Frederick Enslin—took place in 1778. General George Washington himself announced his “abhorrence and detestation of such infamous crimes.” At various points over the next two hundred years, the military made efforts to tighten the reins by changing the definition of conduct warranting dismissal to include homosexuality and conducting sting operations to uncover closeted gays. By 1946, military regulations made clear that homosexual acts or tendencies could form the basis for discharge from the military, and a change in 1954 made clear that any such discharge would be dishonorable and would bar a veteran from receiving any military benefits.¹²⁸ During the years of the draft, 1940-1973, appearing gay was one of the ways men avoided it. One of the longest-running gags on the popular TV series *M*A*S*H* involved a corporal in the Korean War, Maxwell Klinger, who dressed in drag in the hopes of being discharged from service. Protest singer Phil Ochs released *Draft Dodger Rag* in 1965, a satiric critique of the Vietnam War, in which he

125. *Id.* at 1167.

126. Exec. Order No. 13,087, 3 C.F.R. 13087 (1999).

127. On this history, see ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990).

128. *Id.* at 128-48.

recites all the standard excuses given to draft boards. As the chorus goes:

Yes, I'm only eighteen, I got a ruptured spleen
 And I always carry a purse
 I got eyes like a bat, and my feet are flat, and my asthma's getting worse
 Yes, think of my career, my sweetheart dear, and my poor old invalid aunt
 Besides, I ain't no fool, I'm a-goin' to school
 And I'm working in a DEE-fense plant[.]

Carrying a purse was, of course, a sign of acting gay.

The ban on gays in the military lasted until 1993. Despite repeatedly promising to lift the ban during his campaign, President Bill Clinton preserved it in a different form. Under his 1993 Don't Ask, Don't Tell (DADT) policy, gay and lesbian service members could not be discharged (or barred entry in the first instance) unless they openly acknowledged their sexual orientation or engaged in same-sex conduct.¹²⁹ "Keep your homosexuality a secret" was, in short, a condition of gaining the right to serve. Congress believed that the need for "high morale, good order and discipline, and unit cohesion" would be undermined by openly gay service members, but could be preserved if gays and lesbians could just keep their sexual nature quiet. Although this policy was supposed to make it easier for gays and lesbians to serve in the military, replacing outright prohibition and active attempts to purge closeted gays, DADT did not end discrimination; over 14,500 service members were dismissed under DADT.¹³⁰

DADT tried to dance a fine line between who you are and how you behave.¹³¹ Although service members were supposed to be punished only for homosexual conduct, a person identified as gay triggered a presumption that that person would tend to follow his or her inclinations and actually *do* the prohibited deeds. The burden was on the service member to disprove this assumption, or, if caught in the act, to try to show that the conduct was a departure from the person's usual behavior or unlikely to recur.¹³²

DADT was abolished in December 2010, during President Barack

129. National Defense Authorization Act of 1994, Pub. L. No. 103-160, 107 Stat. 1547 §571, codified as amended at 10 U.S.C. §654 (2006).

130. See *About "Don't Ask, Don't Tell": SLDN Reports*, SLDN, <http://www.sldn.org/pages/sldn-reports> (last visited Aug. 28, 2014).

131. The Catholic Church has generally condemned homosexuality; but a gay priest who remains celibate might be, under some circumstances, acceptable. See, e.g., Elizabeth Flock, *Catholic Priests: It's 'Empirical Fact' That Many Clergy are Gay*, U.S. NEWS & WORLD REP., July 29, 2013.

132. 10 U.S.C. §§654(b)(1), (2) (2012).

Obama's first term in office. Although bills to get rid of DADT failed to make it through both houses of Congress for many years, important figures like Colin Powell supported the repeal and public opinion had begun to shift dramatically in favor of gay rights generally, including military service.¹³³ Moreover, a federal district court had just ruled that DADT violated the Fifth Amendment's guarantee of due process and the First Amendment's guarantee of freedom of speech.¹³⁴ The judgment was put on hold pending appeal, but in the meantime Congress got rid of the policy.¹³⁵ DADT was replaced with a policy of non-discrimination, effective September 2011.

The military attitude was not an aberration. Indeed, for most of our history, same-sex relations were listed as crimes in the penal codes, and liable to severe punishment. Sodomy was a felony.¹³⁶ An openly gay lifestyle was not legally possible. Gays and lesbians had to remain, as the saying goes, in the closet, for fear of arrest.

Were the sodomy laws constitutional? Until recent times, the answer would have been obvious: of course they were. But that was before the constitutional right of privacy developed in the Supreme Court. The somewhat vague notion of a "right of privacy," which began with *Griswold v. Connecticut*, applied to certain decisions about family life, living arrangements, and reproduction.¹³⁷ It protected the right of both single and married couples to contraception, and most dramatically, a woman's right to have an abortion before a certain point in pregnancy.¹³⁸ But the Court had never said explicitly whether these "rights" included the right to engage in sex in the first place—let alone same-sex behavior. In *Bowers v. Hardwick*, the Court, 5-to-4, refused to extend the right of privacy to protect consensual sodomy. That conduct was not "implicit in the concept of ordered liberty," and was not constitutionally protected.¹³⁹ *Bowers* put a halt to the expansion of the

133. Military Readiness Enhancement Act (MREA) of 2007, H.R. 1246, 110th Cong., 1st Sess. (2007). Rep. Martin Meehan (D-Mass.) first introduced the MREA in the 109th Congress in March 2005; the bill gained 122 bipartisan cosponsors but failed to get past the House Armed Services Committee. See H.R. 1059, 109th Cong., 1st Sess. (2005). Rep. Meehan became Chairman of the House Armed Services Personnel Subcommittee and reintroduced the bill with 110 original cosponsors. A repeal bill passed the House in May 2010, but was voted down in the Senate. See 156 Cong. Rec. H4060-63 (daily ed. May 27, 2010); 156 Cong. Rec. S7246 (daily ed. Sept. 21, 2010).

134. *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

135. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, §2(a)(2)(C), 124 Stat. 3515 (2010).

136. See, e.g., GA. CODE ANN. § 16-6-2 (1986), which authorized imprisonment for up to 20 years for a single act of consensual sodomy and which was upheld by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

137. 381 U.S. 479 (1965).

138. See generally Thomas C. Grey, *Eros, Civilization, and the Burger Court*, 43 L. & CONTEMP. PROBS. 83 (1980).

139. 478 U.S. 186 (1986).

“right of privacy,” at least for the time being, and at least at the federal level; it also meant that many gays and lesbians, in many states, would have to continue to lead a double life. In short, being openly gay at this point in time could be, in some jurisdictions, risky business.

As late as 1997, Robin Shahar, a lawyer, learned this lesson the hard way. After receiving an offer to work in the Georgia attorney general’s office, Shahar went through a “commitment” ceremony—these were the days before any state allowed gay marriage—with her lesbian partner. Although the marriage had no legal meaning, the attorney general revoked her offer of employment. He took the ceremony to be an admission that Shahar planned to violate state law, which made sodomy a crime. And, worse, she was flouting the law by participating in a public ceremony. A federal appellate court upheld the attorney general’s decision; the state’s interest in avoiding public confusion about state policy and in enforcing its own laws outweighed Shahar’s right of association or expression.¹⁴⁰

The Supreme Court may have hung back in *Bowers*, but many states got rid of sodomy laws on their own. Sodomy stayed on the books mainly in the south, and in a few other states (Utah, for example). The gay rights movement flourished; there were gay characters in movies and on television. The creaking door of the closet began to open more and more. On the federal level, *Bowers* lasted less than twenty years. The U.S. Supreme Court sharply reversed course in *Lawrence v. Texas*.¹⁴¹ This case struck down a Texas criminal law very much like the one the Court upheld in *Bowers*. This time, the Court took a broader view of substantive due process, one that looked not only at longstanding tradition but also at evolving standards of tolerance and morality. Those evolving standards of “liberty” included the right of adults to conduct consensual personal relationships “in the confines of their homes and their own private lives.”¹⁴² The right it recognized was said to include the “overt expression” of relationships in “intimate conduct”; the right of individuals, whether married or not, to make decisions about “intimacies of their physical relationship, even when not intended to produce offspring.”¹⁴³ *Lawrence*, on the surface, was supposed to be a mere interpretation of the text of the constitution; this of course is nothing but a convenient myth. In any event, the real force behind the decision was the dramatic change in just seventeen years in

140. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). The sodomy ban was struck down the following year by the Georgia Supreme Court, which held that the state constitution’s right to privacy was broader than the analogous federal one. *See Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

141. 539 U.S. 558 (2003).

142. *Id.* at 567.

143. *Id.*

social acceptance of gay and lesbian behavior. The gay rights movement had been wildly successful in changing attitudes, and a growing number of people rejected the use of criminal law to seek out and punish a gay lifestyle. The majority in *Lawrence* purported to limit its ruling to the protection of conduct in private. It took pains to note that the challenged statute did not involve “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹⁴⁴

In the decade after *Lawrence*, attitudes favorable to gay rights evolved even further. First one state (Massachusetts) and then a dozen more began to allow same-sex marriage. This meant that the need to hide one’s sexual orientation, to pretend in public to be straight, had dissipated even further.¹⁴⁵ Campaigning for re-election, President Obama “affirm[ed]” that for him “personally,” he believed that “same-sex couples should be able to get married.”¹⁴⁶ And although the Supreme Court in 2013 stopped short of invalidating state bans on same-sex marriage, which existed in about two-thirds of the states, it did strike down the federal Defense of Marriage Act (DOMA) as a violation of the equal protection clause.¹⁴⁷ This act refused recognition, for federal-law purposes, of same-sex marriage, even if validly celebrated in a state that did recognize such marriages. Writing for the majority as he did in *Lawrence*, Justice Kennedy noted that DOMA burdened the lives of same-sex married couples “in visible and public ways.”¹⁴⁸ By refusing recognition to a marriage recognized as “dignified and proper” by an American state (New York was the state in the *Windsor* case), Congress acted to “disparage and injure” couples based solely on disapproval of their relationship.¹⁴⁹ There is, beyond a doubt, a strong trend toward recognizing gay marriage.

Gay couples are unlikely to be able to marry in Mississippi or Texas, unless the Supreme Court forces their hand. In some circles, too, and in some regions of the country, it is still highly stigmatic to be gay or lesbian. Gays and lesbians, in many places, and for many reasons, still have to lead double lives. The closet may ultimately go the way of outdoor phone booths; but not just yet.

Constitutional law (state and federal) have made it increasingly

144. *Id.* at 577.

145. The National Gay and Lesbian Task Force tracks and reports same-sex marriage developments at http://www.thetaskforce.org/reports_and_research.

146. Jackie Calmer & Peter Baker, *Obama Says Same-Sex Marriage Should be Legal*, N.Y. TIMES, May 9, 2012, at A1.

147. *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

148. *Id.* at 2694.

149. *Id.* at 2696.

difficult for the government to discriminate on the basis of sexual orientation, or to single out gays and lesbians for adverse treatment or the denial of public benefits. The private sector offers fewer protections. The right to be openly gay in the workplace is shaky. Gay rights in the workplace vary by jurisdiction. This is so, in large part, because no federal law bans employers--or anyone else--from discriminating against gays and lesbians. Title VII of the Civil Rights Act of 1964 prohibits employers with at least fifteen employees from discriminating on the basis of race, color, religion, sex, or national origin.¹⁵⁰ Every court to consider the issue has held that "sex" does not include "sexual orientation."¹⁵¹ Nor do any federal anti-discrimination laws provide protection.

Gay and lesbian employees have, however, successfully used Title VII on a few issues, even without express statutory protection. The Supreme Court held that same-sex sexual harassment was actionable, in a 1998 case, *Oncale v. Sundowner Services*.¹⁵² A gay man, for example, who was harassed by another gay worker, who demanded sex, can sue for sex discrimination, just as a woman who is harassed by a heterosexual man can. But in many of the same-sex harassment cases, the perpetrator is heterosexual, and his harassing behavior has nothing to do with sexual desire. His motivation, rather, is to punish a fellow employee for stepping out of traditional roles, for being an effeminate man, or for simply being a man who does not ogle women. This so-called "gender policing" is prohibited under Title VII, according to a 1989 ruling from the Supreme Court in *Price Waterhouse v. Hopkins*.¹⁵³ There, the Court recognized that using sex-stereotypes—that a woman should not be "macho," for example, or show up at work without make-up—is a form of sex discrimination. Applying the principles of *Price Waterhouse* and *Oncale*, federal appellate courts have ruled in favor of gay men who complained about gender-policing. These men have a right, in essence, to behave in a way that is normal or comfortable for them, whether it conforms to traditional gender norms or not. Antonio Sanchez was a gay, effeminate waiter. His co-workers mocked him for carrying a serving tray "like a woman" and for being a "faggot" and a "female whore." They called him "she," in Spanish and English. He sued for sexual harassment and won. The Ninth Circuit upheld the verdict because "[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should

150. 42 U.S.C. 2000e (2012).

151. See, e.g., *Simonton v. Runyon*, 225 F.3d 122, 124 (2nd Cir. 2000).

152. 523 U.S. 75 (1998).

153. 490 U.S. 228, 235, 258 (1989).

act. . . . [H]e did not conform to their gender-based stereotypes.”¹⁵⁴ Antonio had a right to be himself at work.

Since the 1970s, there have been efforts to establish federal-law protection against discrimination on the basis of sexual orientation. The Employment Non-Discrimination Act (ENDA), which would bar this type of discrimination (and, depending on the version, discrimination on the basis of gender identity), has been introduced in virtually every Congress for more than a decade, but has never passed.¹⁵⁵ More than twenty states, however, have passed laws forbidding employers from discriminating on the basis of sexual orientation. Some states have added provisions to their public-accommodations laws to prohibit this type of discrimination in stores, restaurants, hotels, and other businesses that serve the public. Some have amended housing laws to ban discrimination by landlords.¹⁵⁶ And even without a specific law, many large employers have adopted company policies against discrimination on the basis of sexual orientation. All of these developments reduce the need for gays and lesbians to live double lives; but they do not eliminate it. Many gays and lesbians still feel they had better stay in the closet at work, and elsewhere.

I. Passing for Male or Female

A rare but spectacular form of impostor is the gender impostor: the man who passes for a woman, or the woman who passes for a man. The most famous confidence artist of New Zealand, Amy Bock, at one point (1909), pretended to be a man named Percival Redwood; and, as “Percival Redwood,” Amy even got engaged to a young woman. An elaborate wedding was planned, but the bride found out Percy’s secret. The marriage was annulled, and Amy Bock was arrested.¹⁵⁷

Billy Tipton was a famous jazz musician, a well-known figure in the music world of the 20th century. In reality, there was no such person as Billy Tipton, the man. Billy was really Dorothy Lucille Tipton. Dorothy wanted a career as a jazz artist; but the field, she felt, did not welcome women. For this reason she tried on a male identity, and it worked. Later, she moved to Mississippi, and simply passed herself off

154. 256 F.3d 864, 869-870, 874 (9th Cir. 2001).

155. *See, e.g.*, A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation or Gender Identity, S. 811, 112th Cong., 1st Sess. (2011); A Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation or Gender Identity, H.R. 1397, 112th Cong., 1st Sess. (2011).

156. The ACLU provides a helpful state-by-state map of sexual orientation discrimination laws at <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.

157. The story of Amy Bock is told in JENNY COLEMAN, *MAD OR BAD? THE LIFE AND EXPLOITS OF AMY BOCK* (2010).

as a man. Tipton even had sex as a man: she wore bindings that covered her breasts, made love in the dark, and used an artificial penis. Her partners apparently never suspected the truth. She lived with several women, and adopted three boys. They had no inkling that their "father" was really a woman. In 1989, Tipton died at the age of 74. When the body was examined, Billy's secret finally came out.¹⁵⁸

Another case was the subject of a well-known play, *M. Butterfly*. A French diplomat in China, Bernard Boursicot, in the 1960s, fell in love with a performer in Chinese opera, Shi Pei Pu. Shi Pei Pu looked like a man, but convinced Boursicot that he was actually a woman, raised as a man to please his parents, who desperately wanted a boy. Bernard and Shi Pei Pu had sex (of some sort), and Shi Pei Pu even claimed to give birth to a son (the child was of course not really hers). This weird deception lasted some sixteen years, during which Boursicot engaged in espionage and passed secrets to the Chinese. The French government arrested him and his "wife," and only then did Boursicot learn that he had been living with a man.¹⁵⁹

The movie *Yentl*, with Barbara Streisand (1983), tells the story of a girl who posed as a man, to penetrate the masculine world of Talmud studies.¹⁶⁰ A man who posed as a woman, in order to find work as an actor was the subject of the popular movie, *Tootsie* (1982), starring Dustin Hoffman, and there was a similar theme in *Mrs. Doubtfire* (1993), in which Robin Williams dresses up as a dowdy housekeeper to spend more time with his children after a divorce. Shakespearean theater was full of men passing as women, at least in the theater; in his day, women were not allowed to appear on the stage. Thus Lady Macbeth, Cleopatra, and all the rest of his heroines were played on the stage by men, who specialized in women's roles.

In these real and fictional examples of gender bending some person wishes to assume a new identity, for professional, religious, or romantic ends. In most of the cases, no laws were broken. (Boursicot and his "wife" were in trouble for espionage, not for cross-dressing.) More common than these deceptions is actual sex-change. Perhaps there has always been gender confusion. But modern medical technology, and modern sensibilities, have made it possible to cross over the line between male and female; and redress what a person considers a

158. Her story is told in DIANE MIDDLEBROOK, *SUITS ME: THE DOUBLE LIFE OF BILLY TIPTON* (1999).

159. Joyce Wadler, *The True Story of M. Butterfly; the Spy Who Fell in Love with a Shadow*, N.Y. TIMES MAG., Aug. 15, 1993.

160. *Yentl* was based on a play of the same name, which was in turn based on a short story by Isaac Bashevis Singer.

dreadful biological mistake.¹⁶¹ The “man” in question, becomes a “woman,” through the surgical knife, hormones, and new ways of dressing and acting. The “woman” in question, becomes a “man”, though this is somewhat more difficult to do. The question arises: is the transsexual’s new self his or her “real” identity, at least in the eyes of the law? In a Texas case, *Littleton v. Prange* (1999),¹⁶² Christine Littleton had her male sex organs removed; female ones were constructed. In 1989, Christie married Jonathan Littleton. He died in 1996, and Christine brought a medical malpractice suit. The defendant, a doctor, claimed Christine was not a wife, could not be a wife under Texas law, and therefore had no right to bring any such lawsuit. The Texas court agreed. Christie Littleton was legally a man. Her marriage to Littleton was invalid, and the lawsuit failed.

The Kansas Supreme Court adopted a similar posture in a case decided in 2002.¹⁶³ J’Noel Ball, born a man, went under the knife to become anatomically a woman. She then married a rich old man, Marshall Gardiner. When Marshall died, she claimed a widow’s share of the estate. Ball had no luck: as far as the Kansas Supreme Court was concerned, once a man, always a man. Ball of course looked like a woman, presumably behaved like a woman, talked and dressed like a woman. To the court, however, there was a hidden, private essence, imprinted at birth, which could not be changed, no matter how much surgery was undergone, how many hormones swallowed, how much role-playing was practiced.

Despite rulings like the Kansas decision, many states strike a more tolerant attitude toward transgender individuals, and do their bit to legalize the transition to a new form of sexual identity. In more than half of the states, the state will issue a new birth certificate to a transsexual who has undergone sexual reassignment surgery or has met other medical criteria; the new certificate will reflect the new name and the new sex, as if they had been assigned at birth.¹⁶⁴

A transgender person in one of these permissive jurisdictions has gone through an interesting social process, as well as a psychological and medical one. This person began as two lives, in a sense: on the surface, a male life; underneath, a female sensibility (or vice versa); then, after surgery and therapy, a new identity, and the old life relegated to the past. Lastly, in a sense, the old life is expunged from the records, as much as can be done. This may seem extreme: how can you wipe out

161. The change from female to male is less common and obviously a bit more difficult surgically.

162. 9 S.W.2d 223 (Tex. App., 1999).

163. In re Estate of Gardiner, 42 P.3d 120 (Kansas 2002).

164. See generally Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008).

the past? But the law allows second lives in other cases too: records of juvenile delinquency can be expunged at the age of majority;¹⁶⁵ and some kinds of criminal records as well. In many situations, then, people can live two lives—but serially, rather than simultaneously.

The transsexual may benefit from advances in medical techniques, but this is only part of the story. A world of fluid identities, we pointed out, made the con man possible. Fluid identities also give wider scope for *choice*. Unlike very traditional societies, we allow people to shift even basic aspects of their identity. A born Catholic can become a Buddhist. In an age of expressive individualism, people are allowed—perhaps even encouraged—to change their styles of dress, their habits, their jobs, their religion, their ways of life. And even, in some very extreme cases, exchange their gender for something more to their liking.

J. Passing for Family: Adoption and Society

In a 1996 British film, *Secrets and Lies*, Brenda Blethyn plays the role of Cynthia, a working-class woman whose somewhat pitiful life is upended by a phone call from a grown woman claiming to be the daughter she gave up for adoption many years earlier.¹⁶⁶ The powerful story revolves around the sudden unraveling of secrets and lies of the past. A significant point in the plot is the fact that the daughter is black; the mother is white. But the secrets and lies relate mostly to the adoption itself, and the out-of-wedlock birth that precipitated it, rather than to the race of the biological father. In a recent movie, *Philomena*, nominated for an academy award in 2014, the main character is an Irish woman who gave birth out of wedlock. She was sent with her baby to an institution run by nuns, and the child is given away (or sold) to adoptive parents from America. Years later the woman, Philomena, sets out with a journalist to try to find the son she had been forced to give up.

Adoption, as a formal matter, did not exist in the U.S. until the middle of the nineteenth century. A Massachusetts statute of 1851 was an important early statute legalizing adoption.¹⁶⁷ Every state eventually passed laws more or less along the same lines. These statutes made “parent-child relationships possible where blood could not.”¹⁶⁸ The laws set up a legal procedure to be followed for effecting an adoption, but did little more than that. Only later would states pass laws

165. On this issue, see T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J. L. REFORM 885 (1996).

166. *SECRETS AND LIES* (Channel Four Films 1996).

167. Laws Mass. 1851, ch. 324, p. 815.

168. Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating and Re-Creating Families*, 43 AM. J. LEG. HIST. 235, 253 (1999).

regulating adoption more closely. Early in the twentieth century, states began to set up a process for establishing whether the prospective parents and the child were suitable for each other, and some states allowed adoptive parents to back out if the child turned out to have some disease or defect which had been hidden at the time of the adoption.¹⁶⁹ Adoptions became more professionalized, with greater involvement of agencies, child welfare authorities, and private brokers.

In the first decades, adoptions were a matter of public record, and the parties often knew each other. Many of the children were orphans. This was a time when many women died in childbirth, and both men and women were often carried off by disease. Frequently, relatives took in these orphan children. Only later did adoption become shrouded in secrecy. Sex and shame, rather than death, produced much of the crop of babies for adoption. Laws made it possible to hide adoption details from the outside world—and even the very fact of an adoption. Both the old and new parents could keep the adoption a deep dark secret. Court records could be sealed, and a new birth certificate issued, listing the adoptive parents as the natural parents. A 1930s Illinois law, for example, gave adoptive parents the right to a “clean” birth certificate, with only their names; the registrar was not permitted to indicate adoption or illegitimacy on the new record of birth.¹⁷⁰ Secrecy and confidentiality became the norm by the middle of the twentieth century. By the 1950s, every state followed procedures similar to those in Illinois. Thus, adoption in the 20th century was characterized by “exclusivity, secrecy, and transposition;” the child was “taken from one family and given to another;” the first family disappeared into the ether, and everyone proceeded “as if the first family never existed and the second was created through an act of nature.”¹⁷¹

A second turn in adoption law extended the shroud of secrecy even further. Biological parents (usually just the mother) surrendered a child to an intermediary who selected adoptive parents and shepherded the child through the legal adoption procedures. The adoption was, in short, quite anonymous. The law protected the secret by sealing all information, even from the parties themselves. By the middle of the twentieth century, virtually all adoptions, if no relative or stepparent was

169. A 1917 Minnesota statute, for example, required the state board of control to consider whether the child was a “proper subject for adoption” and allowed the parents to annul the adoption if the child unexpectedly developed “feeble-mindedness, epilepsy, insanity or venereal infection as a result of conditions existing prior to the adoption.” 1917 Laws Minn. ch. 22.

170. 1931 Laws Ill., p. 734; 1937 Laws Ill., p. 1006; Ill. Rev. Stat. 1939, ch. 111 ½ secs. 48a, 57.6.

171. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 997 (1995); see also ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* (2000).

involved, were “closed” and permitted “no disclosure or sharing of the identity” among the parties.¹⁷² Philomena was not to know where her little boy had gone, and the new parents never knew who the mother actually was.

This shift made secrets and lies the norm in adoption. The system was designed to give a clean slate to everyone concerned. Ideally, the birth mother resumed her life, without the stain of an unwed birth; the child could begin life without the stain of illegitimacy. The adoptive parents could choose whether or not to tell the truth to the child, and to relatives and friends, and in either case, they did not have to worry that a birth mother (or father) might suddenly appear. The birth parents, in fact, did not even know their names. Adoptive placements also aimed toward what we might call biological plausibility. Infants were placed with younger women, who would seem like likely mothers themselves. White children went with whites, black children with blacks; Catholic children with Catholic parents, and so on—all this to mimic the “as-if” family—“families in which children to all appearances might have been born to the adoptive parents.”¹⁷³

By the end of the twentieth century, this system had fallen apart. Many factors led to the change. Perhaps the most powerful was the passion of adopted children to know and find their roots. Adopted children grew up to be men and women who learned they had double lives, though not by their choice. By the late 1970s, some of these children were demanding access to their original birth certificates; they wanted to know the names of at least one birth parent. They filed lawsuits claiming a constitutional right to know about their origins. These early lawsuits were, by and large, unsuccessful. Secrets and lies, according to the New Jersey Supreme Court in one well-known case, protected everybody. Sealed records protect the child “from any possible stigma of illegitimacy” and shielded a “loving and cohesive” relationship from the “invasion” of a “natural parent who later wishes to intrude into the relationship.”¹⁷⁴ Meanwhile, the birth parents are “free to move on and attempt to rebuild their lives” while the adoptive parents will be able to raise the child “without fear of interference” or the adverse effects of illegitimacy.¹⁷⁵

But social attitudes changed; and the law changed correspondingly.

172. Joel D. Tenenbaum, *Introducing the Uniform Adoption Act*, 30 FAM. L. Q. 333, 334 (Summer 1996).

173. MARY L. SHANLEY, *MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS* 12 (1st ed. 2001).

174. *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646, 649 (N.J. Super Ct. Ch. Div. 1977).

175. *Id.*

Under pressure from groups like Bastard Nation, an organization of adopted children, and Concerned United Birthparents, an organization of birth mothers, many states took steps to make disclosure possible. Many have created registries that would allow adopted children to find their birth parents—if the birth parents agree. There are also private registries that help match up children and birth parents (again, with mutual consent); the largest one is run by the Adoptees' Liberty Movement Association.¹⁷⁶ The first law to require disclosure without consent of the birth parent came in Oregon, through a voter referendum in 1998. This gave “any adopted person 21 years of age or older born in the state of Oregon” the right to request a copy of his or her original birth certificate, with the names and addresses of their his or her birth parents, as well as other identifying information.¹⁷⁷ A group of birth mothers unsuccessfully challenged the law.¹⁷⁸ They had various reasons for keeping their secrets: for example, some did not want to identify a father who had raped them, some wanted to conceal giving birth out of wedlock. A few states now allow disclosure once an adopted child is legally an adult, or require birth parents to opt-out of disclosure.¹⁷⁹

The closed, anonymous adoption has also now been almost entirely replaced by the so-called “open adoption.” That phrase can mean any number of things, but at core it describes an adoption in which the birth parents know, and often select, the adoptive parents. There are no secrets.¹⁸⁰ Although most adoptive parents prefer the old, secret style of adoption, birth mothers prefer openness, and they call the shots. As the stigma of illegitimacy faded (socially, as well as legally), many more unwed mothers have kept their babies. Meanwhile, as contraception and abortion have become widespread and available, the result is a serious

176. On this and other aspects of adoption in the United States, see The Adoption History Project, available at <http://pages.uoregon.edu/adoption/> (last visited Feb. 6, 2010). On advocacy for birth parents, see Nadine Brozan, *Parents Who Gave Up Babies Organize to Gain New Rights*, N.Y. TIMES, Jan. 23, 1978.

177. Oregon Ballot Measure 58 (1998).

178. See *Doe 1 v. State*, 993 P.2d 822 (Or. Ct. App. 1999).

179. See ALASKA STAT. § 18.50.500 (2009); KAN. STAT. ANN. § 65-2423 (2008); TENN. CODE ANN. §§ 36-1-125 through 129 (1996); see also M. Christina Rueff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L. J. 453 (1998-99). Alabama granted a blanket right to see original birth certificates upon reaching adulthood; but then changed the law. Now there is an automatic right only to non-identifying information about background and circumstances of birth. Information revealing who the birth parents were, however, can be granted by court order or if the birth parents, after an intermediary contacts them, give their consent. ALA. CODE ANN. § 26-10A-31 (2009). For an example of an opt-out approach, see 2009 Ill. H.B. 5428 (enacted May 21, 2010). Before this Act, an adoptee could find his or her birth parents only if they had signed up for the state's Adoption Registry and Medical Information Exchange.

180. See, e.g., EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL BEING OF BIRTH PARENTS IN THE ADOPTION PROCESS 6, 19 (2006), available at http://www.adoptioninstitute.org/old/publications/2006_11_Birthparent_Study_All.pdf.

shortage of babies. Birth mothers who want to give up a baby for adoption have dozens, even hundreds, of families to choose from. Birth mothers often make openness a condition of the arrangement. They sometimes also want the right to have contact with the child after the adoption. This, more than any effort to unseal old records, has driven out secrets and lies from adoption law. The adopted child and the birth mother no longer lead two lives. They may lead a single life, punctuated with one significant event and its consequences.

The twists and turns in adoption law reflect, of course, social change. As we mentioned, illegitimacy no longer carries the same stigma it once carried, in most of the country. It is no longer much of a legal stigma either; thousands of couples cohabit and have children, without bothering to get married at all. This loss of stigma has impacted the supply of babies in the United States, and driven many childless couples to fish for babies overseas. Family structure has altered drastically. A high divorce rate means huge numbers of children who make their home with step-parents, in “blended” families. Huge numbers of children also live in single-parent households, or in gay households. Some are the children of sperm donors, and some have “egg mothers” and “womb mothers.” Very little of all this is secret. In addition, there is the modern passion for “roots,” for knowledge of background, ethnicity, and family history. The adoptive child shares this passion. And, last of all, advances in medical genetics give the child an additional reason to want to know more about his or her medical inheritance, the secret fate that lies hidden in the genomes.

K. Passing for Healthy

As we have mentioned, people have the right to keep some aspects of their lives strictly private. Indeed, there are aspects that must be kept private. The naked body is one example.¹⁸¹ Others are matters of personal choice. Choosing to live two lives, as we have seen, has been a common practice. Sometimes this was because exposure to the light would open the door to stigma (this led light-skinned “blacks” to pass for white), or even criminal prosecution (this was true of gays and lesbians in the past). Today, people have access, if they wish, to information about themselves and their bodies that was never available before. It is not only adopted children who want to know more about their genetic selves. Scientists can now map the human genome. A private company, “23 and Me,” promises to provide (for a price) genetic

181. See Lawrence M. Friedman & Joanna L. Grossman, *A Private Underworld: The Naked Body in Law and Society*, 61 BUFFALO L. REV. 169 (2012).

information to customers, based on their DNA.¹⁸² The company can uncover, it claims, many hidden and private things about people, through analyzing their genes and chromosomes. “Many Americans,” the company tells us, “who consider themselves white or of European ancestry have African ancestry.” This might well come as a shock to some people (fortunately, the “one-drop” rule is history). The company also discovered “two genetic variants associated with whether a person’s big toe or second toe is longer;” as well as genetic factors in chin dimples, freckles, and “attached and unattached earlobes.” More significant findings include genetic features related to disease: for example, 23 and Me has uncovered an “association between inherited variation in the JAK2 gene and rare blood cancers,” and connections to Parkinson’s disease and hyperthyroidism.¹⁸³ Genetic information can, presumably, tell people important information about their medical future. Many people, presumably, will want to know this information, secretly coded inside their cells. (Others will not.)

These medical discoveries raise some interesting social and legal questions: Is there a downside to this kind of knowledge? If it became public, or semi-public, would it open the door to discrimination on the basis of genetics? Could employers use genetic information as an excuse not to hire a job applicant? In general, does a person have the right to keep this information secret? Would a person applying for insurance, or a job, *have* to reveal what he knows about his genes—would he or she *have* to reveal the risk of getting some awful disease? Should couples share this information with each other, before they get married, or have a child? People promise, at the altar, to stay together, in sickness and in health; but do they really mean what they say? Can we live two lives in this new sense: a surface, healthy life; and a secret genetic time-bomb underneath?

At the moment, this is less of a problem than one might think.¹⁸⁴ So far, it turns out, very few diseases are genetically inevitable. One dreaded example is Huntington’s disease, a truly awful condition. Only people with a certain genetic defect will get this disease; but get it they will. There is no treatment; and decline and death are unavoidable. This is an outlier, however. There are other diseases that have genetic correlations, but, unlike Huntington’s disease, they can be treated. Moreover, in most cases, developing the disease is not inevitable; the individuals with some particular gene or genes may run an increased

182. Human beings all have 23 chromosomes, hence the name of the company.

183. *23andMe Research Findings—Parkinson’s Disease, Back Pain and Joint Replacement*, 23ANDME, https://www.23andme.com/about/factoid/pd_phewas_backjoint/ (Apr. 2012).

184. See generally Henry T. Greely, *Genotype Discrimination: The Complex Case for Some Legislative Protection*, 149 U. PA. L. REV. 1483 (2001) (discussing this assertion).

risk of Alzheimer's, or diabetes, or some other condition. This is disturbing, of course, but it is not a death sentence; and it is usually likely but far from certain. In any event, life is full of risks. States forbid insurance companies from discriminating on the basis of genetics, and genetic discrimination is not allowed in employment decisions.¹⁸⁵ Of course, no law forbids a young man or woman from breaking off an engagement after learning bad genetic news about a significant other. How often this would happen is hard to predict.

Work on the human genome is in its infancy. As we find out more, predictions of disease and early death—or of chronic diseases or dementia—might become more precise, and more unsettling. There are two privacy questions here: should we allow people to keep their genetic information to themselves, even if this has an impact on other people—an employer, a prospective mate? And should we prevent doctors, scientists, researchers, and law enforcement bodies from ferreting out genetic information, storing it, using it, or (worst of all) selling or promulgating it?

Most people, we feel, would say yes to both of these questions: keep this information private. Whether this is possible is another question. There are social and legal norms that aim to protect the privacy of medical information. These norms, however, apply to hospitals, clinics, and other such institutions. It is quite a different question in the job market and in personal life. If the skeleton in your closet is a defective skeleton, should you be entitled to keep this a secret, under any and all circumstances? Can you be forced to tell the world, or some part of the world, or the government, about the secrets locked within your genome? If technology can unlock these secrets, who will hold the keys to this technology? These questions, today, are largely theoretical; tomorrow this may no longer be the case.¹⁸⁶ Ironically, then, in an age when light-skinned “blacks” can choose to be part of the white world, or the black; when thousands of gays and lesbians have come out of the closet, where “open” adoption is the norm, a new closet may be forming: the genetic closet—the secrets stored inside our genes and chromosomes.

III. A CONCLUDING WORD

As stated at the outset, in many ways we all live two lives, at the very least an inner and an outer life. All of us are “passing,” in some sense. Social and legal norms tell us when we can legitimately “pass,” and

185. Henry T. Greely, *Banning Genetic Discrimination*, 353 *NEW ENG. J. MED.* 865 (2005).

186. Obviously, there are many occasions where people are forced to swear an oath and tell the truth—witnesses in court, for example, who are supposed to tell the truth, the whole truth, and nothing but the truth, on pain of a perjury prosecution.

when we cannot. These norms change, evolve, and transform over time. Each of the forms of “passing” that we discussed has its own special history and characteristics. But each also reflected the special character of the modern world: a world in which identity is blurred, ambiguous, contested; in which identity can be more easily simulated than in past and traditional societies.

And the direction of change has been similar, with regard to many forms of “passing.” For some, what was once taboo—like same-sex sexual behavior—has become more acceptable. Here the movement in law and society has been toward more openness, with less need to conceal a “true” or more authentic self. The open adoption movement is another example. In the age of civil rights and affirmative action, there is less reason to pass for white. Indeed, there may be reasons to come out of the racial closet; and even the closet of sexual orientation.

Some things stay put. Fraud is still fraud. Spying is still betrayal, still against the law. Bigamy is still cheating. The confidence game is still illegal. We can still live two or three or many lives; but they had better be legitimate ones.

There is also movement in the other direction—towards “passing,” rather than openness. People can live many lives on the Internet, and in social networks. Some of these are purely fanciful. A famous New Yorker cartoon showed a dog in front of a computer. The caption had him saying: on the Internet nobody knows you’re a dog. Blogs and social networks are, in some ways, like the old carnivals, where people wore masks and donned new identities.

The confidence game, as we said, still survives; and there are new variations. Nobody in the 19th century worried about “identity theft.” Today, there are people who live two lives—and one of them is simply stolen from somebody else. Where all this is going is anybody’s guess.

