Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History

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Who steals my purse steals trash . . .

But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed.

—William Shakespeare, Othello, Act III. Sc. 3

Shakespeare, as usual, was on to something. Reputation—a good name—is worth a great deal to people. It deserves, and gets, legal protection. Defamation is the most obvious legal tool for doing this; and a most significant one. For businesses, trademark law is another important legal tool, which can be used to protect the name and good will of a company. But these are not the only ways in which law protects reputation. This Article is about some of the less obvious aspects in which the law dealt with, and guarded, reputation, in the nineteenth

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2. See, e.g., NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 3, 11 (1986), though this is mostly about politically-charged defamation cases.
century and the first part of the twentieth century; and also, briefly, the
dramatic changes in the law bearing on reputation in the last half of the
twentieth century.

Your "reputation," of course, is what other people think of you. And
what they think of you is, among other things, a function of what
they know about you. Hence any study of reputation is also a study of
the flow of information about other people—and the power to control
that flow. There is a connection, then, between "privacy" and reputation.
What other people know about you (or think they know) is what
determines your reputation. For some people, however, a good
reputation depends on what other people do not know about them. For
these people, the people with skeletons in their closet, "privacy" and
secrecy are important for them in order to preserve their reputation.

One issue Shakespeare did not take up, of course, was what a "good
name" consists of. A good name is a quite variable concept. Time and
place affect it. Information (or gossip) that would have destroyed a
person's reputation a hundred years ago—sex outside of marriage—
would not have the same impact today. It should come, then, as no
surprise, that the law that concerns reputation also varies a great deal
over time.

Much of what follows in this Article is speculative and qualitative.
But this is an exploration of legal culture, and indeed, an exploration of
past legal culture; the kind of legal archaeology this Article represents
almost always suffers from a lack of rigor. Some aspects of this Article
might be (and should be) tested empirically; but for other aspects, the
data are simply not at hand.

In 1899, the legislature of Illinois passed a statute which made it a
crime to "seduce and obtain carnal knowledge of any unmarried female
under the age of eighteen years of previous chaste character." A person
convicted of this offense could be fined, or put into county jail up to one
year, or both. There were two additional clauses in the statute. The first
provided that the defendant could not be convicted "upon the testimony
of the female unsupported by other evidence." The second clause
announced that "the subsequent intermarriage of the parties shall be a
bar to . . . prosecution."

This statute was by no means unique. Other states had somewhat
similar statutes, or variations on it. A New York law of 1909 sought to
punish any person who "under promise of marriage, seduces and has

4. Id.
5. Id.

http://scholarlycommons.law.hofstra.edu/hlr/vol30/iss4/1
sexual intercourse with an unmarried female of previous chaste character.\textsuperscript{6} Note that this statute applied to women of any age; but it had the added clause, "under promise of marriage." An Alabama statute conveniently catalogued some techniques of seduction: "Any man who, by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried woman..."\textsuperscript{7}

Clearly, and most obviously, the Illinois law on its face tried to offer some protection to respectable young women, who might fall victim to a "seducer." Laws of this type were an expression, too, of the norm that people were not supposed to have sex outside of marriage. They were part of a network of rules and laws about the place of respectable women (and men) in society; rules and laws which, indeed, defined the very concept of respectability, and prescribed the behavior that a person had to follow in order to be considered "respectable." This is also the thrust of the second proviso of the statute. The point was to force the seducer to marry the girl and make an honest woman of her; the marriage was obviously one way to salvage the injury to her reputation, at least in part. It also gave her a way out of her problem—otherwise, she was "ruined," she was damaged goods, and would have a hard time on the marriage market. The first proviso is, on the other hand, a form of protection for the reputation of men—a shield against young women who might want to blackmail a respectable man, or ruin his reputation by accusing him of seduction.

Behind this law, and others in the same period, was a particular normative order, and also a particular status system. American society has always been quite proud of its commitment to equality. The slogan, all men are created equal, is at the very core of the American tradition. But of course this maxim was never meant literally, and in practice it certainly never applied to African-Americans or, for that matter, to women. This much is obvious. But even among men there was, quite naturally and obviously, a status hierarchy in the United States. It was in some ways more subtle than the status hierarchies in Europe. There was, in fact, a good more "equality" in the United States than in England or on the continent. There was no king, no nobility, no aristocracy. In England, a tiny elite owned almost all the land; in America, particularly outside the South, millions of families owned a farm, a lot in town, or

\textsuperscript{6} Act of Apr. 30, 1909, art. 195, § 2175, 1909 N.Y. Laws 1317. The phrase "under promise of marriage" appears in other statutes. See, e.g., Wyo. Comp. Stats. 1910, section 5907, 1373; 1920 Pa. Laws 8043 (concerning "seduction of any female of good repute, under twenty-one years of age... under promise of marriage.").

\textsuperscript{7} ALA. CODE § 7776 (1907).
some other piece of land. By the middle of the nineteenth century, essentially all adult white men were eligible to vote (which was true in very few other countries at the time). Americans were not so foolish as to believe that people really were equal—in wealth, or character, or ability. “Equality” meant equality of opportunity: it meant that people (or rather white men) were not frozen into particular social slots, but could move up and down in the social scale, according to their abilities, and, to be sure, the luck of the draw.

In any event, status was a reality—high status and low status, though on a different and more complicated basis than in England or France. There was in fact an American elite; and, most definitely, American elitism. Wealth, obviously, was an important marker of status. More generally, status depended on respectability, that is, a reputation for decency and good moral values. The way you lived and behaved and comported yourself provided the world with signs and indicia of respectability. It was possible to be poor and respectable, and there were many people who fit this description. But below a certain threshold—at a certain level of poverty and destitution—respectability vanished. There was nothing about paupers in the poor house that society seemed to value or respect. In particular, men who could not work or did not work could not hope for respectability. They became labeled as “tramps” or “hoboes.” They were vilified, and treated as criminals. And women who lacked “virtue” were simply ostracized—at least in polite society.

On the issue of the status hierarchy, the Illinois statute is a rather revealing document. The law extended its protection to respectable women; but only “chaste” women were or could be respectable. The Illinois statute, and similar statutes in other states were, of course, silent about class and race. But class and race were most definitely implied. I would be amazed to find a single reported case where a black woman invoked the statute against some white man who had seduced her, and in which the man was actually prosecuted. The statute, by implication,
applies only to people who could and should be eligible—legally and
socially—to marry. As a Pennsylvania court put it (actually, in a breach
of promise case), "[a] man has a right to require that his wife shall come
to him with an unstained name."12 "[T]he law will not enforce a contract
of marriage in favor of a party to it who is not fit to be married at all."13
A man, thus, is not "bound" by a contract to marry, if "in ignorance of
her true character," he became engaged to a woman who has led a
"vicious or reckless life."14 By the same token, it would be legally
impossible for such a women to be "seduced."15

The seduction laws were designed to protect middle-class
respectability of women and men. If a (respectable) man had a "right" to
a woman with an "unstained name," it followed that a name-stain would
be utterly devastating to any women who hoped to occupy a respectable
niche in society. Marriage for most respectable women was absolutely
crucial, because it was the gateway to the only truly acceptable mode of
life. For a women to be seduced, or to be jilted, or to be the victim of
"criminal conversation" was an almost insuperable barrier to a
respectable marriage and a respectable life.

The official moral code of the nineteenth century—the code that, in
effect, defined respectability—was clearly expressed in penal codes and
other laws, and in literature, sermons, speeches, textbooks and in the
press. These norms supported the status hierarchy of the century. The
basic norms are familiar enough—they are what are still called
"traditional values." Sex outside of marriage—adultery and
fornication—were not only sins, they were in some respects also crimes.
It goes without saying that the "crime against nature" was also a crime
against the state. So was bestiality.16 Public drunkenness was against the
law, and so, too, generally speaking, was gambling. Men were supposed

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*Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J.


13. Id.

14. Id.

15. Nor, as a practical matter, raped. Of course, technically even a prostitute could be raped,
but juries had other ideas. On this point, see the discussion in HARRY KALVEN, JR. & HANS ZEISEL,
*The American Jury* 249 (1966). Legally, the only issue in rape (other than the intercourse itself)
was consent. But the juries that Kalven and Zeisel studied were very sensitive to anything they
considered "contributory behavior" on the part of the woman; and the material in their study makes
clear that men would not be convicted, if they raped women who went to bars, got into cars with
men, or had a history of sexual activity. See id. at 249-54.

16. Defined in Pennsylvania as sodomy, which included, along with the usual prohibition on
oral and anal sex, "any person who carnally knows in any manner any animal or bird." 1920 Pa.
Laws 8043. Apparently carnal knowledge of a reptile or amphibian was unthinkable.
to be faithful, moderate, law-abiding; they were supposed to avoid all sorts of vice and debauchery. Women were supposed to be chaste before marriage, humble, faithful, and obedient afterwards. There were of course dissenters from this or that aspect of the code—proponents of free love, or Mormon polygamists; but they were generally treated with horror or scorn. 17

The criminal justice system was supposed to protect and maintain the traditional code, by punishing those who violated it. But, paradoxically, protection of the moral code also meant something which, on the surface, seems totally inconsistent: protection of the very people who violated the code—or to be more accurate, protection for some of the people who violated it; and who violated it in a particular way. The law, in other words, did two things at once. First of all, it defined what a good reputation consisted of, what respectability and virtue meant; and what sorts of behaviors would forfeit that reputation (and, perhaps, forfeit one’s freedom as well). Yet at the same time, the law contained doctrines and institutions whose purpose was to preserve and protect the reputation of at least some of the people who belonged to respectable society—even when that person (man or woman) slipped and deviated, in certain common ways.

This, of course, is far too general a statement. It would be more accurate to say that there was a strain, a tendency, in the law, to offer this kind of protection of a man (or woman’s) good name; to make it more difficult to lose a reputation. We can use the Illinois statute I began with to illustrate what I mean. The statute, first of all, buttresses a crucial element of the nineteenth century moral code: sexual intercourse is for married people only, as we said. Respectable people have sex only within marriage. Seduction, like adultery and fornication, is a wrong and a crime and should be punished. But if that were all the statute was about, the two added provisos would be unnecessary. The first proviso clearly protects some men against the accusation of seduction; the second proviso salvages something for at least some women.

Thus the law, in addition to expressing the official values, had another, more subtle and implicit task—to provide a kind of limited safety valve for those who gave in to their “animal” instincts. The job of the law was to control and monitor these failings; and to provide second chances for people (especially men) who transgressed in certain ways.

The flesh, after all, was weak. The system protected bourgeois respectability, and reinforced it, both by punishing (gross) deviations; but also by shielding some of those who lapsed, from the worst consequences of their misbehavior.

When we describe these as functions of the law, we of course do not mean that these functions were overt, and conscious. There are no treatises, no pamphlets, no writings that clearly say: this is what we are trying to do. Most people—including lawyers and judges—never really understand their own society, what makes it tick. Rarely or never do the underlying cultural assumptions emerge into daylight; rarely or never are they described in the way that a good anthropologist would describe them, or perhaps a historian. What we are doing here is exploring a legal culture. We are trying to look at the legal system ethnographically. It is the point of view of the outside observer, the person with a pencil and a pad, and an eye for obscure detail. The outside observer takes nothing for granted. He or she wants to understand the system better than it understands itself: wants to make it cohere, wants to unpack its postulates, and expose its inner core.

The rest of this Article will continue to explore the themes just discussed, first, as they played themselves out in the late-nineteenth and early-twentieth centuries; then by taking a brief look at what has happened since about 1950.

I. THE VICTORIAN COMPROMISE

There was always of course, even in the most Victorian of times, a dark underside to social behavior. Men (and some women) did not always live up to the stern ideals of the code. Men drank, gambled, broke the Sabbath, and consorted with prostitutes. Not all women were chaste and obedient. Some of this sinning—probably most of it—was done in secret. This was a necessity. If someone violated the code—especially women—the consequences could be severe. For men, there was of course the well-known double standard; men were more easily forgiven if they sowed a few wild oats, at least when they were young. Parents and husbands had a tremendous interest in protecting the chastity of daughters and wives; chastity of sons and husbands was somewhat secondary.

Elsewhere, I have described certain aspects of crime and punishment in nineteenth century law as the Victorian compromise.18

Suppose we take a look at the laws of the nineteenth century—at least the laws of the first two-thirds of the century—insofar as they dealt with sexual morality and other “victimless” crimes. To begin with (the evidence is very patchy, to be sure), society seemed much less interested in prosecuting and punishing these crimes than had been true in, say, seventeenth century Massachusetts. Nothing is more common in the colonial records than punishing fornicators and other offenders of this sort; there are literally hundreds, maybe thousands, of instances, in which fornicators stand in the stocks, pay a fine, are whipped, or forced to marry.\footnote{See id. at 34-35.} By the nineteenth century—and probably even earlier—the steam had gone out of this engine. Moreover, the formal law was reconstituted in a very interesting way. Take adultery, for example. It continued to be a crime in the Republican period. But some states changed the definition of adultery on their statute books; what was outlawed now was not simple adultery, but “open and notorious” adultery.\footnote{See, e.g., \textit{CAL. PENAL CODE}, § 266 (1872).} That is, secret, occasional, clandestine adultery was no longer against the law; adultery was a crime only when the adulterer not only broke the rules, but rubbed people’s noses in that fact.

In Florida, for example, under a law of 1868, the punishment for fornication was quite mild—a maximum of three months in jail. But the punishment for what we might call flagrant fornication was much more severe. If a man and woman, “not being married to each other,” were so brazen as to “lewdly and lasciviously associate and cohabit together,” they could receive up to three years in state prison.\footnote{1868 Fla. Laws ch. VIII.} Adultery was a crime under Florida law; but the adultery statute was amended in 1874, to apply only to those who lived “in an open state of adultery.”\footnote{1874 Fla. Laws ch. 1986.} Adultery that was not “open” was apparently not a crime at all. Statutes in many states sounded a similar theme.

These statutes, in effect, turned the eye of the criminal justice system away from the occasional sinner: sporadic illicit sex between social equals, even unmarried ones, was not a crime so long as it was kept respectably quiet. No one’s reputation was at stake (legally at least) so long as sinners observed the proprieties. Cities also found ways to let men have sex with their social unequals—with prostitutes. Keeping a
brothel was almost universally a criminal offense. Yet, typically, cities permitted, or even fostered, the development of areas specialized for vice—the so-called "red-light districts." This was, of course, often a matter of police pay-offs; and there were, in many cities, brothel riots when citizens attempted to get rid of this scandalous behavior. Nevertheless, there was widespread toleration, and the red-light districts were themselves "open and notorious." There were even published guidebooks—the earliest example, in New York, from 1839, was piously entitled "Prostitution Exposed," but what it really exposed were the addresses of the houses of New York City. This was, of course, a great boon for prospective customers from out of town. The author sported the marvelous pseudonym of A. Butt Ender.

New York City was not the only city where prostitution and red-light districts were "open and notorious." In quite a few cities, ordinances and police regulations even set out a code of rules to govern the districts. Sometimes, they established the boundaries of the district. Sometimes they specified the ways in which "respectable" brothels (as it were) were supposed to operate. These were rules, in short, regulating a completely illegal business. A survey of 1910-1911 found thirty-two cities in which vice was "regulated"; in quite a number of cities, the "social evil" was segregated; in some of these, there was a regular system of physical examination of prostitutes. In some cities, brothels simply paid monthly fines, as a kind of license fee. In St. Paul, Minnesota, for example, under a plan in effect in the 1860s, madams of local brothels came to police court once a month and paid a fine. City officials denied that this amounted to a system of licensing, but this in effect is what it was.

23. See, e.g., ME. REV. STAT. ANN., ch. 125, § 9 (1903). Interestingly, it was not usually the case that prostitution itself was criminalized; and prostitutes were often or usually arrested on such charges as "vagrancy." See id.

24. Alexis de Tocqueville, that shrewd observer of the American scene, noted that there were, in the United States, "at the same time a great number of courtesans and a great many honest women." This "state of affairs" could lead to "deplorable individual wretchedness," but was no danger to the "body social," and it did not "weaken national morality. Society is endangered not by the great profi
gacy of a few but by the laxity of all. A lawgiver must fear prostitution much less than intrigues." ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 598 (J.P. Mayer ed., 1969).


27. See id.

28. See 1911 MINN. VICE COMM’N REP. 59-60.

As in the punishment of "open and notorious" adultery, there is a theme of containment and control. Vice is tolerated—if it stays put, in its place, where it belongs. What struck me initially about this system—the "Victorian compromise"—is that it makes a good deal of sense, as a practical technique for monitoring and limiting behavior. If you assume that vice cannot be wiped out, perhaps the best you can do is keep it within tolerable limits, prevent it from spreading, and confine it to places where it is visible and easily controlled. Vice laws, then, were a little bit like modern laws against speeding. Everybody breaks these laws, at least sometimes; but the laws are far from pointless. They affect the time, manner, and mode of speeding; the worst and most blatant offenders are caught and punished, while the "ordinary" speeder gets away with his offense. Speeding laws almost certainly cut down on the sheer amount of speeding; as a result, speeding probably stays within roughly acceptable limits. The speeding laws permit and foster a decent degree of control, while not interfering with the God-given right to speed a little, some of the time.

This control function was one of the points of the "Victorian compromise." But, I now believe, it was not the only one. A law that punished "open and notorious" adulterers was more than a way to put a cap on adultery. It also protected the reputations of "respectable" men who wandered occasionally and quietly off the straight and narrow path. The same is obviously true of men who were customers of the better houses in the red light districts. They ran no particular risk, if they kept within the rules, just as the houses themselves ran no particular risk if they kept within the rules. Moreover, even though prostitution—the buying and selling of sex—was in theory just as wrong for the man as for the women, prosecution of customers was rare to nonexistent. Nor did their names ever appear in the newspaper.

The "Victorian compromise," moreover, had a very strong element of class bias, or class preference, if you will. The customers were protected from publicity and prosecution; the women were not. A prostitute, after all, had no reputation to lose. The more high-class the gentleman, the more immunity. The better class of men were customers

30. In Madison, Wisconsin, in 1870, a brothel was raided and the resident "nymphs" were arrested; the customers went free. The legislature was in session, and one newspaper suggested, sarcastically, that the men had to be released "for fear one or both houses of the legislature would be without a quorum." Bonnie Ripp-Shucha, "This Naughty, Naughty City": Prostitution in Eau Claire from the Frontier to the Progressive Era, WIS. MAG. HIST., Autumn 1997, at 31 (quoting 3 ROBERT C. NESBIT, THE HISTORY OF WISCONSIN: URBANIZATION AND INDUSTRIALIZATION, 1873-1893, at 625 (William Fletcher Thompson ed., 1985)).
of polite, well-managed houses, the ones that paid fines and were protected by the police. There was also a kind of "gentlemen's agreement" that protected highly-placed people from scandal. The ordinary newspapers kept discreetly quiet. Of course, this "gentlemen's agreement" broke down from time to time, and perhaps quite sensationaly—most of the reported seduction cases were, after all, sensations that blackened the reputation of a person of standing; another sensation was the adultery trial of the Rev. Henry Ward Beecher. Still, in general, the gentlemen's agreement had a very long run. It was still around, in modified form, in the 1960s, when the press reported absolutely nothing about President Kennedy's incessant womanizing. Both law and social practice, then, tended to respect and guarantee the privacy, and hence the reputations and respectability, of people who were well off, or held public office.

Respectable women themselves could fall back on certain protections. If they allowed themselves to be "ruined" by a bounder, who then refused to make an "honest woman" of them, they had the right to sue for breach of promise of marriage. In theory, any jilted woman (or man) could bring this action; but it was clearly understood that this was mainly a remedy for respectable, middle-class women, women who had been deceived by men, and who had been seduced and abandoned. In fact, working-class women made use of these lawsuits; and they (or their families) had other legal devices, which they could use to force a seducer to do the right thing—threats of prosecution for statutory rape, for example.

Frequently, the plaintiff in a breach of promise case had been "ruined"; often, too, she had been "ruined" to the point of pregnancy. What was "ruined" of course was her position in the marriage market. These suits were, in a way, the civil version of seduction. Some of the cases were flamboyant and scandalous. In Kentucky, Miss Madeleine Pollard, in 1893, brought a breach of promise case against a Congressman, W.C.P. Breckenridge. Miss Pollard was twenty-eight years old; Breckenridge was fifty-six. She claimed she had had a nine year affair with the Congressman, who promised to marry her after his

32. There is literature on this interesting cause of action; see infra notes 115-130 and accompanying text.
wife died; instead, he married another woman. Breckenridge never denied the affair; but he did deny the promise, and he also claimed that Miss Pollard had not been exactly unsullied when their affair began. A jury found for Miss Pollard and awarded her $15,000, an enormous sum in those days.34

In theory, either a man or a woman could sue for breach of promise of marriage. In practice, only women brought such lawsuits; and, indeed, as a judge in an early Alabama case (1846) put it: "in our own country, a just regard to public morals, has long since confined the action alone to the female sufferer."35 Presumably it was ungentlemanly for a man to complain if he was jilted (and it would also be quite rare for him to suffer any real financial loss).36 There were, apparently, at least a few lawsuits brought by men in the United States; but these must have been very exceptional. Olson v. Saxton37 was a pretty bizarre affair. The plaintiff, Arthur P. Olson, was a married man when he first began a relationship with Mollie Patton, the defendant (later married to one John Saxton); he eventually got a divorce. Olson had advanced money to Patton, and built her a house. The debt, he said, was canceled when she promised to marry him. At one point, he presented her with a bill for $1,700, but (he said), she talked him into deducting $5 for "each act of sexual intercourse." There must have been a lot of this, because the claim was reduced to $1500. Olson lost his case.38

The action, then, was a woman's action. For one thing, women's feelings were supposed to be more delicate than a man's; and the emotional damage from a jilting much greater for her than for him. But the plaintiff's point, very often, was not simply that she had been jilted: the real harm was the loss of her virginity (and, sometimes, that she became pregnant, and gave birth to an illegitimate child).39 Jilting itself

36. Apparently, in nineteenth century England, there were occasional lawsuits brought by men. In a data base of 322 breach of promise cases, there were a small number (8%) in which the plaintiffs were men. Moreover, although most of the women won their cases (over 80% were successful), of the twenty-five male plaintiffs, only seven won their suits. See Susie L. Steinbach, Promises, Promises: Not Marrying in England, 1780-1920, at 210, 214 (1996) (unpublished dissertation, Yale University). Another study gives rather similar figures (also for England): 97% of the plaintiffs were women, and they won 70% of their cases; men were 3%, and tended to win little or nothing. See Ginger S. Frost, "I Shall Not Sit Down and Crie": Women, Class and Breach of Promise of Marriage Plaintiffs in England, 1850-1900, 6 GENDER AND HISTORY 224 (1994).
37. 169 P. 119 (Or. 1917).
38. So did the male plaintiff in Clark v. Kennedy 297 P. 1087 (Wash. 1931).
39. In theory, this was not the case: "illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes . . . . Both consenting, they are both in fault," and
was bad enough, especially if it took the woman off the marriage market during crucial years, and the very fact that a woman had been courted and sweet-talked by another man (even without loss of virginity) was probably something of a deterrent to prospective suitors. The damage, of course, was incomparably more serious if the woman had been "ruined," she was used goods, and this almost killed her marriage prospects, as well as embarrassing her and her family.\(^4\) Behind these cases, then, was the image of the innocent woman or girl, "ruined" and debauched by a bounder, who had (falsely) promised to marry her. Thus breach of promise was the civil equivalent of the crime of seduction. The story behind the cases was supposed to be something like the story behind the famous trial of Harry K. Thaw, who went on trial for murdering the great architect, Stanford White, in Madison Square Garden. Thaw's excuse was that, years before, White had drugged and "ruined" Thaw's exquisitely beautiful wife.\(^4\) The plight of the plaintiff, in these cases, had great appeal for nineteenth century juries. Breach of promise cases sometimes produced damage verdicts which, for the time, were quite extraordinary.\(^2\)

Of course, a woman who sued for breach of promise had to be somewhat desperate—she was airing her dirty linen in public; and often this was acceptable only because the dirty linen was already public knowledge. Even in the nineteenth century, it was undignified to bring an action for breach of promise. Gilbert and Sullivan satirized this kind of lawsuit in \textit{Trial by Jury}.\(^\text{43}\) But in theory at least, the threat of a lawsuit might convince a man to do the right thing.

A married woman who committed adultery violated the code, but she was safe so long as her sins were hidden; if her crime was open and notorious, she ran the risk of prosecution, though probably this was never much of a risk. Her lover ran this small risk too, along with a much more serious one. This was the risk of a sound thrashing by an irate husband, or, perhaps, a bullet in the brain. Under the "unwritten

\(^4\) Ginger Frost's study of English cases found that the plaintiff and defendant had had sex in a quarter of the cases; and in three quarters of these, the woman became pregnant. \textit{See} Frost, \textit{supra} note 36, at 233.

\(^5\) \textit{See} FRIEDMAN, CRIME AND PUNISHMENT, \textit{supra} note 18, at 397-98.

\(^6\) On the damages in nineteenth century English cases, see Steinbach, \textit{supra} note 36, at 211. Many of the recoveries in England were quite modest, but a few were substantial.

\(^7\) In the operetta, the judge saves the day by offering to marry the defendant himself. \textit{See} W. GILBERT & A. SULLIVAN, \textit{TRIAL BY JURY} (1875), \textit{reprinted in} W. GILBERT, \textit{THE SAVOY OPERAS} 6 (1926).
law," juries were loath to convict a man whose crime was killing his wife's lover. Here one can cite another Congressman, Dan Sickles; he shot to death Philip Barton Key, who had been carrying on with Sickle's wife, Teresa. The trial was, for its day, quite sensational—a media circus. The jury acquitted Sickles on the rather dubious (legal) grounds of "temporary insanity."

Why should the law, consciously or unconsciously, go to great lengths to shield and coddle the reputations of the bourgeoisie? One rather cynical answer is that the men who made the laws had an interest in protecting themselves and their ilk; they also had a certain interest in protecting the reputations of their sisters and daughters. Moreover, high-class, respectable men felt they had more to lose than members of the lower orders, if they fell from grace. Beyond this, there was a serious point (or rationalization?). Just as "open and notorious" adultery was a threat to society, so too was open and notorious debauchery of any sort; it weakened the faith of ordinary citizens in the honesty and probity of the rich, the well-born, and the dominant political classes. It was important for people to believe in their moral leaders. In any event, the "best people" seemed to feel this way. There were two ways to deal with the problem, and prevent the harm to society: one was to punish severely those members of the better classes who strayed; the other was to bob and weave and shield.

The better classes, one might guess, believed in themselves—in their strength and intelligence. They undoubtedly thought they deserved to lead. A man might stray a bit, but this did not go to the core of their beings. Ordinary people were different: they were more easily ruined and perverted. Vice for them was a kind of contagious disease. Democracy, that fragile structure, gave power to masses of people; it did so in the belief that they could be trusted; that they would be responsible and respectable themselves; that they would exercise self-control. Ordinary citizens were like children—prone to corruption, to false ideas. The shepherds were supposed to exhibit "correct standards of life" to the members of the flock. It harmed society, therefore, if anybody went about sling mud at the shepherds.

The normal story told about America is a story about a steady progression to more and more complete democracy, a slow but inexorable expansion of democratic habits and institutions. This standard story has, of course, a good deal of plausibility. The states dropped

property qualifications in the nineteenth century. All adult white males, in essence, gained the right to vote. Ultimately, the right was extended to blacks and women. In almost every state, the people elected their judges in the nineteenth century. Only in the federal courts, and in a handful of states, were the judges appointed. But each step in the direction of popular sovereignty caused great anxiety among many of the older elites. At all stages in American history, there is evidence of suspicion of the mass public—or at least suspicion of the bottom quarter or third of it. American culture deified “the people,” but detested “the mob.”

This suspicion of the masses crops up at various points in the legal system. One notable example is the reaction against the election of judges, in the late-nineteenth century, and into the twentieth century. States did not eliminate elections, but they tried to render them toothless and harmless. In general, the age of heavy immigration from eastern and southern Europe brought out the elitism and xenophobia of great numbers of people. There were striking attempts to get rid of anything that might corrupt the morals of the ordinary Joe and Jane. Public executions ended in the nineteenth century. One powerful motive was the notion that these spectacles were not only barbaric and unseemly, but they that also fed the blood lust of the mob. Executions moved out of the public square, into the courtyard of jails and prisons; and then, with the invention of the electric chair, indoors, altogether beyond the prurient eyes of the public. In a number of states, there were laws that required executions to be held in the middle of the night. The Minnesota law (of 1889) not only insisted on these night-time executions, but provided also that reporters had to stay away; and newspapers were not allowed to print any of the details of an execution, only the fact that it occurred.

Striking, too, were experiments in actual censorship. This too had a very strong class basis. In the Soviet Union and its satellites, during the palmy days of Communism the party censored books, newspapers, and broadcasts; but of course some scholars and high party members could nonetheless gain access to such dangerous stuff as Time Magazine or the New York Times. This kind of censorship seems very unAmerican; but in

45. See generally KEYSSAR, supra note 8.
47. See LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 476 (2002) [hereinafter FRIEDMAN, AMERICAN LAW].
48. On this development, see FRIEDMAN, CRIME AND PUNISHMENT, supra note 18, at 75-76, 168-71; STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 144-61 (2002).
fact American history has some mild parallels, particularly with regard to sex, violence, and lurid descriptions of crime. Obscenity, of course, was banned totally; and the Comstock Act made it a crime to send obscenity through the mails. The statutory definition of obscenity was very broad indeed. It included any “article or thing designed or intended for the prevention of conception or procuring of abortion.”

In the late-nineteenth and early-twentieth centuries, too, there were frequent calls to curb the yellow press; many people believed that graphic accounts of crime and violence were breeding more crime and violence, and in particular corrupting the young. The “Pennsylvania Chautauqua Circle,” in a letter sent to the editor of the North American, put the matter this way: the enormous amount of coverage of “crime and immorality” in daily and Sunday papers has a “vicious and demoralizing effect upon the public in general and especially upon the minds of the young”; the members of the Circle wished to “earnestly protest and remonstrate against such annals of crime and immorality being published in detail repeatedly . . . in your otherwise valuable paper.” A number of states passed statutes to get at the root of the problem. Kentucky, for example, had a statute in the late-nineteenth century which made it illegal to sell or circulate any newspaper or book devoted to news and pictures about “criminals, desperadoes, fugitives from justice,” or showing “men and women in improper dress, lewd or unbecoming positions, or men and women influenced by liquor, drugs, or stimulants.” A Kentucky statute of 1894 also made it an offense to make or sell books, newspapers, or pamphlets “principally made up of criminal news, police reports or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.”

In the early twentieth century, a new and powerful medium developed—the movies. There was a great rush to subject them to

51. Id.; see Act of Mar. 31, 1887, ch 113, 1887 Neb. Laws 672 (making it a crime to advertise any “medicine, drug, nostrum, or apparatus,” which claimed to treat or cure “venereal diseases.”).
53. Id. at 81.
55. Act of Jan. 27, 1894, ch. 2, sec. 2, 1894 Ky. Acts 4; a less sweeping Nebraska statute, made it a crime to “sell, give away, or show to any minor child,” any newspaper or magazine “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime”; but it was also forbidden to “exhibit” such books or pictures “upon any street or highway, or any place within the view, or which may be within the view of any minor child.” Act of Mar. 31, 1887, ch 113, sec. 4, 1887 Neb. Laws 673.
Chicago enacted an ordinance in 1907 which gave the chief of police power to censor movies—he had the right to ban “obscene or immoral” movies. The ordinance was challenged in court, after the chief withheld his approval from two movies, one called James Boys and one called Night Riders. In Block v. City of Chicago, the Illinois Supreme Court upheld the ordinance. Movies, said the court, were cheap, and they attracted children and people of “limited means,” who did not go to plays in “regular theatres.” These were “classes whose age, education and situation in life specially entitle them to protection against the evil influence of obscene and immoral representations.” The films in question were crime movies, which would have harmful effects on “youthful spectators.” In Pennsylvania, a state board of censors had the power to ban movies that would “debase or corrupt the morals.” The Ohio Board of Censors was supposed to approve only movies which were “moral, educational or amusing and harmless.” And the Supreme Court, in 1915, upheld Ohio’s law on grounds similar to the Illinois decision: movies were dangerous and seductive, and could be “used for evil.” Hollywood responded by creating the so-called Hays office, the Motion Picture Producers and Distributors of America; led by Will Hays, this organization imposed a rigorous code on the movies: no dirty words, no “indecent movements,” crime must never pay, lustful kissing was banned, “sex perversion,” drug traffic, and “white slavery” were not even to be mentioned. In general, the movies were supposed to present “correct standards of life.”

57. See Block v. Chicago, 87 N.E. 1011, 1011 (Ill. 1909) (citing an Illinois statute that provides for the regulation of movies).
58. See id.
59. Id.
60. See id.
61. Id.
62. See id.
64. 1913 Ohio Laws 399.
66. On movie censorship and the Hays office, see David A. Horowitz, An Alliance of Conscience: Independent Exhibitors and Purity Crusaders Battle Hollywood, 1920-1940, 59 Historian 553 (1997). In 1917, the National Board of Review, acting together with the National Association of the Motion Picture Industry, announced a ban on “undraped figures” in movies; the motion picture “should be in no sense an art pandering to lasciviousness and passion. It must not deliberately or even unintentionally cater to sensuality.” Nude Figure Barred From Movie Screen, N.Y. Times, Jan. 22, 1917, at 9.
Propriety, then, was a major concern. Propriety was particularly to be observed when women were around. Courts often chased women out of the courtroom if a trial touched on delicate or indecent subjects. Women were modest, delicate creatures, and highly moral—at least if they were middle class. In 1913, a girl “in male garb in New York City, tried to sneak into a prize fight, and nearly set off a riot. Women in New York City were not allowed to attend prizefights; the fight arena was apparently not a place for decent women. “Open and notorious” impropriety, especially if it had a mass audience, was against the interests of society; indeed, it was a threat to society.

A. Blackmail

There is something of a literature today about blackmail, or the puzzle or paradox of blackmail. Blackmail is the crime of extorting money, by threatening to make public some embarrassing or disgraceful secret in the victim’s past. A number of scholars have wondered why blackmail is a crime at all. If I know something about you, something that happened long ago, and if you prefer to keep these facts hidden, why is it so wrong for you to buy my silence? As Leo Katz put it, “no one knows, or at least no one can agree on is why blackmail is a crime. How,” he asks, “is it different from an ordinary bargain?” A few scholars think that, in fact, there is no sensible answer to Katz’s question; they feel that the whole concept of blackmail makes no sense.

67. For example, in the sensational Rhinelander-Jones annulment case in 1925, the judge cleared the courtroom of women before allowing Rhinelander’s love letters to be read. See Earl Lewis & Heidi Ardizzone, Love on Trial: An American Scandal in Black and White 140-41 (2001).

68. What made the trial of Lizzie Borden, in the 1890s, so sensational was the fact that Lizzie, an upper-class woman, unmarried, presumably chaste, a churchgoer, was accused of bashing in the heads of her father and step-mother—suggesting, in short, a writhing nest of corruption underneath the bourgeois surface. Lizzie was, as you recall, acquitted. On the cultural meaning of the trial, see generally Cara W. Robertson, Representing “Miss Lizzie” : Cultural Convictions in the Trial of Lizzie Borden, 8 YALE J.L. & HUMAN. 351 (1996).

69. Girl in Male Garb Tries to See Fight, N.Y. TIMES, Sept. 4, 1913, at 20. The girl, eighteen years old, was charged with “impersonating a person of the opposite sex,” but was released by the judge after a “lecture on deportment.” Id.


71. “Society would be better off, and human rights more secure, if our blackmail legislation were terminated.” Walter Block, Trading Money for Silence, 8 U. HAW. L. REV. 57, 73 (1986); and many of Block’s later writings.
Others have tried to find some sort of economic or normative rationale for the blackmail laws, with more or less success.\textsuperscript{72}

I have no intention of entering into this normative debate, although much of it is interesting and some of it is even illuminating. But I also find blackmail rather intriguing. Why do we have laws against blackmail? What social function are blackmail laws supposed to serve? The history of blackmail, its social meaning, and its role in the legal system of the nineteenth century shed light, I think, on the "puzzle" of blackmail.\textsuperscript{73}

First, a matter of definition. Blackmail is closely related to extortion, and statutes often combine the two; but there is an important distinction between them. Newspapers often muddy the waters by calling shake-downs and other forms of extortion "blackmail." "Extortion" is a much less problematic crime—it's illegal to threaten to break a man's kneecaps unless he comes up with a wad of cash; and there's no "puzzle" as to why. The word "blackmail," in fact, originally referred to this kind of extortion; only in the nineteenth century did cases and statutes begin to extend the idea, and criminalize what we think of today as (pure) blackmail—buying silence about some guilty secret.

Georgia, in 1817, enacted one of the first statutes which at least approaches the modern meaning. The law made it a crime to "send or deliver any letter or writing, threatening to accuse another person of a crime, with intent to extort money, goods [or] chattels."\textsuperscript{74} Note that this statute says nothing about whether the accusation is true or not. In any event, an Illinois statute of 1827 went a step further; this law made it illegal to "send or deliver any letter, or writing, threatening to accuse another of a crime or misdemeanor, or of exposing and publishing any of his or her infirmities or failings, with intent to extort," etc.\textsuperscript{75} A Massachusetts statute, of 1835, can be cited next: under this statute, blackmail no longer required a "letter or writing"; verbal threats would do. Ultimately, about half of the states criminalized blackmail in situations where what the blackmailer threatened to expose was not only


\textsuperscript{73} I am indebted for some of the information in this section to Alex Lue, a Stanford law student, and his paper, Blackmail: American Style (unpublished manuscript, on file with Author).

\textsuperscript{74} Act of 1816, 1816 Ga. Laws 178.

\textsuperscript{75} 1827 Ill. Laws 145.
actual crimes, but also infirmities, immoral conduct, or other things that would expose the victim to ridicule or disgrace in society.\footnote{See Alice Kramer Griep, Criminal Law–A Study of Statutory Blackmail and Extortion in the Several States, 44 Mich. L. Rev. 461, 465 (1945-46).}

Of course, it is certainly a benefit to society to expose criminals and denounce their crimes. If a person knows about a crime, she has a duty to report it to the authorities, and not to use the knowledge for private gain, selling silence to the criminal for cash. Many reported blackmail cases fall into this category. The crimes vary; in a California case from 1901, the state charged the defendant with threatening to expose the evil deeds of one Greenwald. Greenwald had, apparently, violated federal law, in that he “sold and delivered cigars in a form other than in a new box.”\footnote{People v. Sexton, 64 P. 107, 108 (Cal. 1901).} (The defendant, clearly small potatoes, wanted $30).

But what is the social interest in protecting people from the exposure of “infirmities or failings?” Suppose a blackmailer approaches a “respectable” citizen. The blackmailer knows, or thinks he knows, some dark secret from the citizen’s past. An illegitimate child, perhaps; secret adultery; habituating a brothel; or the like. Many of these “infirmities or failings,” many of these skeletons in the closet, are not crimes at all. Why is bargaining for silence so wrongful? One thing is clear—making blackmail a crime might deter possible blackmailers. To the extent this happens, people with guilty secrets are protected; their pasts remained buried. Is this a good thing?

In this society, yes. To begin with, American society is and has been a society of extreme mobility, in every sense of the word: social, economic, geographical. Mobility has meant freedom; mobility has been an American value. People often moved from place to place; they shed an old life like a snake molting its skin. They took on new lives and new identities. They went from rags to riches, from log cabins to the White House.\footnote{There is dispute, of course, about how much actual social mobility existed in the United States—how easy it was to move up the ladder. But social mobility was an American dream, myth, ideal—however you want to phrase it. And there were, in contrast to some old world societies, no formal barriers to upward mobility, at least not for white men.} American culture and law put enormous emphasis on second chances.\footnote{See Lawrence M. Friedman, The Republic of Choice: Law, Authority, and Culture 101-06 (1990) [hereinafter Friedman, The Republic].} Culture and law were against locking men into fixed positions in society; society offered many ways to be reborn in another place, with another name, perhaps, and almost another life (women had many fewer options, of course). The blackmailer struck a blow against this feature of
American society. The blackmailer raked up the dead ashes of the past; his behavior seemed to go against the American grain.

The blackmail statutes also protected (or tried to protect) reputation. If you have no standing in the community, nobody can blackmail you (at least not about "infirmities and failings.") The blackmail statutes were thus another example of the legal shield protecting reputation—protecting the appearance of bourgeois respectability. The blackmail laws, in other words, fit neatly into a pattern of rules, norms and doctrine—the adultery laws, the Victorian compromise in general. They protected people who were leading a double life—but discreetly; as well as those who had an earlier life to cover up. And these blackmail statutes began to appear, roughly, about the same time, and with the same underlying ethos, as the other laws that made up the Victorian compromise.80 The mobility point is implicit in discussions of blackmail.81 One can ask, under what social circumstances is such a scenario possible? And the answer points, of course, to a society in which people (especially men) are extremely mobile, and in which it is possible to move and start over again.

Reported cases of blackmail are comparatively few; but some of them are suggestive. In People v. Williams,82 a California case of 1899, the defendant, Elsie Williams, was charged, along with a male associate, with trying to squeeze money ($2,000) from one W.A. Nevilles. The defendants, it was alleged, threatened to accuse him, publicly, of committing adultery with Elsie Williams (which was almost certainly true). The defendants were convicted, but the appeal court reversed the conviction, partly because the trial court had allowed in damaging but inadmissible evidence. This consisted of a statement by the (male) co-defendant that he was building a house, in which he would put the defendant and another woman, and that he would "bring business men out there, and we will get them full of wine, and afterwards blackmail them." This evidence was not fit for the ears of the jury; but for us it is highly significant. The defendant’s plan was an arrow in the very heart of the Victorian compromise. It threatened the immunity of men like

80. Blackmail is also often what I have elsewhere called a crime of mobility. That is, it is a characteristic of a mobile society. Blackmail would be rare or nonexistent in a traditional society, where people stayed put their whole lives. A guilty or embarrassing past is almost impossible under such circumstances. See Lawrence M. Friedman, Crimes of Mobility, 43 STAN. L. REV. 637, 638 (1991).
81. See Posner, supra note 72, at 1821 ("Suppose the blackmailer's victim is a person who had been convicted of a crime... and eventually... pardoned. Years later the blackmailer appears on the scene . . . .").
82. 59 P. 581 (Cal. 1899).
Nevilles: their right to go to a brothel (at least occasionally) and sin, without losing their precious reputation and their standing in society.

The "honest whore" is a staple of literature; but there were plenty of dishonest ones as well. They played on the fact that most customers did not care for publicity. Prostitutes frequently robbed their customers, who hardly dared complain to the police. Blackmailers had other tricks up their sleeves. Matthew Hale Smith, writing in 1880, tells about a naive New York minister, who received a message about a woman, gravely ill, who "could not die in peace unless her babe was baptized"; and who summoned the reverend to her "dying pillow." The minister went to the place mentioned; but found himself instead "in one of the most notorious houses in New York"; he was told by the people there ("of the most abandoned and desperate class") that "his midnight visit . . . could easily be proved." They demanded money, and he was soon in the hands of the blackmailers.

B. Privacy

The rise of the so-called tort of invasion of privacy is also connected to the social urge to protect the reputations of the respectable. As most law students know, a famous article written by Samuel D. Warren and Louis D. Brandeis, and published in the Harvard Law Review in 1890, was a significant factor in launching the tort. In this article, the two authors argued that the common law had a duty to act to protect people's "privacy." The article, indeed, went further, and claimed that the common law already contained principles and precedents which would let courts shape a remedy for breach of the right of "privacy." And why was this right necessary? Because (said the authors) the press was misbehaving; it was "overstepping . . . the obvious bounds . . . of decency." Gossip had become a commodity, a business. Irresponsible journals were threatening the reputation of respectable people. This was, of course, the age of the so-called "yellow press." And, as the authors noted, this was also the age of a new invention, the first "candid" camera. This camera, The Kodak, you had to sit quietly for your portrait. The Kodak made it possible for someone to take your picture without permission—perhaps even without your

83. Matthew Hale Smith, Sunshine and Shadow in New York 132 (1879).
84. Id. at 133.
85. See id.
87. Id. at 196.
awareness. This added to the fears that Warren and Brandeis expressed in their article.

Not many courts took up the invitation to create this new tort. Some states, which did respond, only protected the right in cases where the invasion of privacy was for profit—that is, cases in which a company made unauthorized use of a name or a picture in an advertisement. This was the situation in New York. Few cases went very far in embracing the ethos that underlay the Warren and Brandeis article. One particularly interesting one that did was a California case, Melvin v. Reid. The plaintiff, Gabrielle Darley Melvin, had had a rather checkered career. At one time, she had been a prostitute. She was arrested and tried for the murder of her former boyfriend in 1918; the jury acquitted her. At this point, she claimed she saw the light, married a man named Bernard Melvin, and, in the words of the court, “abandoned her life of shame,” and took her place in “respectable society.” Many of her new friends and neighbors, she said, had no idea about her scarlet past. But in 1925, Hollywood produced a movie based on her life and times. The movie was called The Red Kimono. It used her real name, Gabrielle Darley.

Mrs. Melvin brought a lawsuit against the movie company, seeking damages for invasion of privacy. The California appellate court was sympathetic to her, and felt that her story, if true, gave her a cause of action. The producers of the movie (said the court) had been truly reprehensible; their acts were not “justified by any standard of morals or ethics.” They had invaded Mrs. Melvin’s privacy. She had a right to live

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89. The Warren and Brandeis article has given rise to a fair amount of discussion, particularly about the underlying assumptions and meaning of their piece. For one interesting take on the article, see generally Stacey Margolis, The Public Life: The Discourse of Privacy in the Age of Celebrity, 51 ARIZ. Q. 81 (1995).


91. See id.

92. See id.

93. See id.

94. See id.

95. See id.

96. The actual title of the movie is The Red Kimono, but the California court, in its decision, uses the more conventional spelling. The film is of some importance in the history of American cinema. It was produced by Dorothy Davenport Reid, who also was one of the directors. Most of the movie concerned Gabrielle’s travails in the year or so after her trial, but this part of the film (I believe) is probably fiction. In one of the opening scenes, however, we see what purports to be a newspaper column, which explicitly uses the name “Gabrielle Darley,” and the movie certainly claims to be based on truth. Interestingly, there is a good chance Ms. Darely’s story was complete hokum—that she was never respectable at all. See generally Leo W. Banks, Murderous Madam, TUCSON WEEK. June 5, 2000. The court, however, was totally convinced.
a new life, a respectable life, free from this kind of publicity. The court, in fact, groped for some legal hook to hang its opinion on. For our purposes, however, what is important is the court's attitude: clearly, the court was doing its best to protect honor, decency, reputation—in precisely the way that Warren and Brandeis had wanted it done. It was also protecting a regime of second chances. In a way, the result of the case was functionally equivalent to the (presumed) result of the blackmail laws. It was protection of the right to start over again, to begin a new life, unencumbered by the debris of the old one.\(^{97}\)

The case was decided in 1931; and too much should not be read into it. Moreover, there were already signs of a cultural shift, a change in the climate of opinion. The California court spoke the language of second chances; it spoke about the rights of a respectable person to start all over again. But the facts of the case were quite extreme. Ms. Melvin had been a prostitute, had been on trial, too, for murder. It is hard to be "ruined" more thoroughly than she had been at the time of her trial. A fresh start, a new life was not easy under those circumstances. The idea of a fresh start had always had its limits; and whatever they were, Gabrielle Darley Melvin had crossed those limits. Perhaps another way to read the case is as a sign of the erosion of those limits. By 1931, sexual and cultural mores were changing. It was much harder to "ruin" a woman once and for all.

C. Decline and Fall

The years after 1870 were tough years for the Victorian compromise. It began to unravel in a serious way. The story is extremely complicated, and I will touch on it only briefly here. In essence, the enemies of the "Victorian compromise" mounted a sort of zero tolerance campaign. It would be wrong to think of this solely as a conservative reaction, a reaction of traditionalists against the loose morals of the times. The campaign made for strange bedfellows: outraged clergymen, good-government Progressives, public-health junkies, eugenicists, feminists and others. What united them was the belief that vice and

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97. The movie, ironically, makes a very similar point, is completely sympathetic to Gabrielle, and condemns the narrow-minded people in society who refused to allow her to rehabilitate herself. In the movie, Gabrielle, destitute because her scarlet past meant that nobody will give her a chance at a job, returns in despair to New Orleans, apparently to work once more as a prostitute. But she is (conveniently) hit by a car and put in the hospital. When she recovers, she gets a job at the clinic, and is scrubbing the floor diligently when Fred, a chauffeur who is in love with her, comes in by chance and finds her. He is in uniform (the first World War has begun); but presumably when the war is over they will marry and will lead a respectable life together as husband and wife.
debauchery could and should be defeated and wiped off the face of the
earth. They did not share the view that people (and especially men)
needed an outlet for their “animal instincts.” Rather, they thought that
vice and debauchery were atavistic, were primitive throwbacks, and that
the march of civilization should and would put an end to them. As Jane
Addams put it, the human race “must constantly free itself from the
survivals and savage infections of the primitive life from which it
started.” Addams (according to Barbara Hobson) believed that
prostitution was a “prehensile tail that would wither away as society
evolved.” Addams believed that it was possible to “perfect” society,
and destroy the “social evil” once and for all.

On the formal level, the laws against victimless crime were beefed
up. Severe laws were passed against abortion; drug sale and drug use
were criminalized. As we noted, it had become a federal crime to send
“obscene” material through the mail (including information about
contraception); and, of course, what counted as obscene in those days
would be completely unexceptional today. A number of states began to
experiment with sterilization. The point was to prevent “degenerates”
from breeding. Crime, degeneracy, prostitution and feeble-mindedness
ran in families—so people believed, and the books that told the dismal
tale of the descendants of the “Jukes” and the “Kallikaks” drove home
this point—families whose children and grandchildren and great-
grandchildren formed a kind of dynasty of crime and morbidity.
Sterilization laws would keep the Jukes and the Kallikaks from breeding
like rabbits and swamping respectable citizens with their bad seed.
The crown jewel of the campaign against vice, of course, was national
Prohibition: the “noble experiment” of getting rid of liquor, the saloon,
and drunkenness.

During this period, too, there were changes in the laws about sexual
behavior. Almost all states raised the age of consent. Sex with a woman
below the age of consent, even if she was an eager partner, was legally

98. Hobson, supra note 25, at 154 (quoting A Case of Futility, Boston Globe, Dec. 4, 1977,
100. See id. at 154.
101. Under the Comstock law also information about contraception, was by definition dirty
stuff. See Andrea Tone, Black Market Birth Control: Contraceptive Entrepreneurship and
102. See generally Ysabel Rennie, The Search for Criminal Man: A Conceptual
103. See generally Philip R. Reilly, The Surgical Solution: A History of Involuntary
Sterilization in the United States 41-55 (1991). The first of these laws was passed in Indiana.
defined as rape. At common law, the age of consent was ten—an awfully low age. But in the late-nineteenth and early-twentieth century, states raised the age of consent dramatically—to sixteen in many states, to eighteen in others. This begins to seem (to us) awfully high. In a state like California, where the age of consent was eighteen, teen-age sex was, in essence, criminalized—for the male at least. The female was, by definition, a victim.\footnote{104}

This was also the period of the Mann Act, passed by Congress in 1910, the well-known “White Slave Traffic Act.”\footnote{105} This law made it a crime to transport a woman across state lines, for prostitution, “debauchery,” and “other immoral purposes.” Courts extended the meaning of the law, but the root notion clearly was the struggle against the sex business. Also, in this period, there was a strong “red-light abatement movement.” In city after city, vice commissions were formed; and huge campaigns were mounted to get rid of the vice districts, close them down, and end the “social evil” for good.\footnote{106} Some of the most famous of these districts, like Storyville in New Orleans, passed into history. Vice, of course, managed to survive.

When the Supreme Court upheld the Mann Act, critics of the law warned that the act would give blackmailers a rare opportunity, and a new and rather powerful weapon. And, in fact, there is evidence that some blackmailers reaped a good harvest out of the Mann Act. Newspaper accounts sometimes mentioned regular “blackmail rings.”\footnote{107} This was, perhaps, regrettable; but the leaders of the struggle against the Victorian compromise were willing to accept this situation. They rejected the whole theory on which the old compromise was based. If a man did not want to be blackmailed, the safest course was to live a clean, pure life. The reformers believed in abstinence. The wages of sin were literally death. The “social evil,” for example, was not only immoral, it was lethal. It brought disease and insanity along with disgrace. This was the theme of Ibsen’s shocking play, \textit{Ghosts}; a man of supposedly impeccable reputation (already dead at the beginning of the play) has, through his secret vices, brought about the destruction of his

\footnote{104. On this movement, see generally \textit{Mary E. Oudem, Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States 1885-1920}, at 8-37 (1995).}

\footnote{105. On the history of the Mann Act, see generally \textit{David J. Langum, Crossing Over the Line: Legislating Morality and the Mann Act 213-15} (1994).}


family. There could be no compromise with an evil so dangerous and so great. As the campaign against vice heated up, many citizens were for the first time forced to choose between their reputation and their vices. In the long run, the vices found a way to win out.

II. THE TRIUMPH OF SIN

By 1920, national Prohibition was just beginning; but in other regards, the crusade against vice had just about run its course. With hindsight, we can see that the end of the war was in sight. The collapse of Prohibition, of course, was an especially dramatic event. But over the next decades, the whole house of cards collapsed. Legal (and social) developments in the last half of the twentieth century reversed course dramatically. The Supreme Court has fumbled and stumbled, trying to define obscenity, and to reconcile free speech and sex speech. But in the end, events passed them totally by. In society at large, especially in the big cities, pornography was, in essence, decriminalized. The Mann Act was amended into toothlessness. Many states wiped adultery and fornication off their statute books. The Supreme Court did away with the last vestiges of the ban on contraception, in Griswold v. Connecticut, and, in Roe v. Wade, it struck down strict laws that limited or prohibited abortion. Moreover, cohabitation, once a matter of scandal, became so common as almost to amount to a way of life. A strong gay rights movement made impressive gains in law and in society; many states repealed their sodomy laws, and in other states, the Supreme Court did the dirty work for them. Gambling spread from its desert stronghold in Nevada, first to Atlantic City, then to river-boats on the Mississippi, to Indian reservations, and in essence to the country as a whole.

Of course, the story of the triumph of vice is much more complicated than this paragraph suggests. There were many ups and downs and ins and outs; and the culture wars have never really ended. Millions of earnest citizens have fought and are still fighting to preserve traditional values. But the main line of development seems quite clear. Law and society tolerate levels of “vice”—indeed, open and notorious

109. On these various developments, see Friedman, AMERICAN LAW, supra note 47, at 231-37.
vice—that would have been considered totally unacceptable two generations ago.

What the purity crusaders had not reckoned with, and could not, was the collapse of the ideology that sustained their efforts and fed their passion. The so-called sexual revolution swept away almost everything they had accomplished between 1870 and 1920. This "revolution" was only in part a revolution in behavior—more significant was the revolution in attitudes. What was once considered vice, debauchery, or sin, now openly demanded social legitimacy. One landmark along the way was the famous Kinsey report. The first volume, in 1948, dealt with male sexual behavior. A second volume carried the news about the female of the species. Kinsey's work was, perhaps, junk science; but it had a powerful and explicit message. Dirty behavior was, in fact, as common as dirt. The laws against adultery, sodomy, fornication, and bestiality were laughable; any attempt to enforce them strictly would simply put almost the whole population in jail.112

Social (and legal) developments in the last half of the twentieth century produced a radically new definition of respectability. These developments pushed outward the boundaries of acceptable behavior—they redefined the limits of tolerance, not only in polite society; and for public figures; but also for the general public. The impact was enormous—on criminal law, family law, and elsewhere in the legal order. And on the way the legal system behaved, as well as the way it was supposed to behave. The impact, of course, is hard to measure. But there must have been an effect, for example, on blackmail. You cannot, after all, blackmail someone who flaunts his or her "infirmities" or secrets—someone who "lets it all hang out."113

The process of recasting the law began as early in the 1930s. One interesting symptom was the campaign to abolish so-called "heart balm" lawsuits—that is, lawsuits for breach of promise of marriage.114 In the 1930s, a number of states went so far as to wipe this action off the books and ban these lawsuits. In the process, they often also got rid of actions


113. During the McCarthy period, and at other times, purges of gays and alleged gays, and discrimination against them, were often justified by claiming that these men and women were subject to blackmail. But of course an openly gay intelligence officer or CIA agent cannot be blackmailed on this account.

for seduction, alienation of affections, and "criminal conversation."\textsuperscript{115} In other states, breach of promise survived, but in a wounded form. An Illinois statute from 1947 began by reciting that breach of promise actions had been "subject to grave abuses," and were "an instrument for blackmail by unscrupulous persons for their unjust enrichment."\textsuperscript{116} Under the statute, damages were limited to "actual" damages.\textsuperscript{117} There were to be no "punitive, exemplary, vindictive or aggravated damages"; the statute also required the victim to give notice, in writing, within three months of the breach of the promise, setting out the date the marriage was supposed to be performed, the damages incurred, and asserting whether the defendant was or was not "still willing to marry."\textsuperscript{118}

The decline and fall of breach of promise seems to parallel the decline and fall of an ideal of female middle-class chastity.\textsuperscript{119} The actual story is probably quite a bit more complicated. The thrust of the doctrine (breach of promise of marriage) was to protect elite women, and their reputations—and, not incidentally, to protect fathers, brothers, and other members of her family from disgrace. Whether this was ever the way the law operated is hard to tell. A careful study of the English cases came to the conclusion that most plaintiffs were "lower middle-class and working-class spinsters," women who were self-supporting, and who had had long courtships. A "substantial minority had unplanned pregnancies."\textsuperscript{120}

It is hard to tell from many of the American cases exactly who the plaintiffs were, socially speaking; but it seems likely that the actual cases were often less sensational—and less dubious—than the literature would suggest.\textsuperscript{121} In both England the United States, it is easy to find attacks on this cause of action. The trials, according to the English journal, \textit{The Spectator}, in 1893, were "demoralising spectacles" which

\begin{itemize}
\item \textsuperscript{115} See, e.g., Act of June 22, 1935, No. 189, 1935 Pa. Laws 450 (abolishing both breach of promise and alienation of affections).
\item \textsuperscript{116} Act of July 8, 1947, 1947 Ill. Laws 1181 (relating to action for breach of promise or agreement to marry).
\item \textsuperscript{117} See id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} On breach of promise actions, see, in addition to the sources cited in the next few notes, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 33-63 (1985). For Canada, see Rosemary J. Coombe, \textit{The Most Disgusting, Disgraceful and Inequitous Proceeding in our Law": The Action For Breach of Promise of Marriage in Nineteenth-Century Ontario, 38 U. TORONTO L.J. 64 (1988); see also supra notes 92-96.
\item \textsuperscript{120} Frost, supra note 36, at 225.
\item \textsuperscript{121} See Mary Coombs, \textit{Agency and Partnership: A Study of Breach of Promise Plaintiffs,} 2 YALE J.L. & FEMINISM 1 (1989).
\end{itemize}
"serve no good end." An American jurist, writing in 1929, criticized these actions as "lurid and sensational," dear to the heart of the yellow press; This cause of action "does nothing but harm," and "can and does function as an instrument of blackmail." The heart of the criticism was that a virtuous, respectable woman would never bring such an action, because of the disgrace and the humiliation; and also because marriages were supposed to be based on love, and when love was gone, so was the right to complain. The actual plaintiffs were not the women the law meant to protect, but a different class of women altogether: scheming gold-diggers, who seduced men, or allowed men liberties, and then turned around and threatened lawsuits, in order to squeeze money out of their rich sex-partners. In the twentieth century, certainly, breach of promise cases, at least as they were reported in the newspapers, did seem to sustain this story. Time and again, the plaintiff was no chaste and seduced young thing, but a mature and rather worldly-wise woman. Among these plaintiffs was Ida May McNabb, a forty year old widow, with three children, who won a jury verdict of $30,000 in 1915 from a man described as a wealthy mine-owner. A jury as late as 1936 awarded a quarter of a million dollars to one Lilian Mendel, who sued the department store heir, Frederic Gimbel, for breach of promise. She had been an assistant buyer for a gown shop, in 1917, twenty-two years old, when she met Frederic (who was then twenty-five).

It is very likely that the newspaper stories were misleading—they reported what was lurid and unusual. There is no way of knowing what the "ordinary" American case was like; and the British evidence suggests that working-class women, many of whom had been really harmed by their faithless fiancés, were often the plaintiffs in these cases;

122. Steinbach, supra note 36.
124. Rosemary Coombe quotes a Canadian journal article from 1859: "Wounded love does not console itself with 'damages.' Marriage ought not to be where love is not." Coombe, supra note 119, at 68. A woman who brings such an action (for breach of promise) proves that she was not really in love, and hence not in a "moral condition to marry"; she is thus "entitled to no damages, for she has incurred none." Id.
125. See $30,000 For Mrs. McNabb, N.Y. Times, Apr. 21, 1915, at A4. Ms. McNabb actually was able to produce a "marriage contract," signed by the defendant, and promising her all sorts of things, including a home, a share of his estate, and the money to educate her children. See id. In the same year, the newspapers reported a suit by a widow with a fourteen year old daughter, Mrs. Vivian Clark, against Albert Froelich, a wealthy broker, who had jilted her (she said) and married another woman. See Widow Sues Broker For Failure to Wed, N.Y. Times, June 30, 1915, at A22.
126. See $250,000 Awarded in F.A. Gombel Suit, N.Y. Times, Apr. 2, 1936, at L26. Frederic had been foolish enough to write love letters to Ms. Mendel. See id. After the verdict, the trial judge threatened to set the verdict aside, unless Ms. Mendel would agree to a reduction of the award to $150,000. See Rules on Gimbel Verdict, N.Y. Times, Apr. 16, 1936, at L5.
and that the cases served a useful function.\textsuperscript{127} It has to be remembered, too, that juries, who heard the evidence, did not find these cases absurd, disgraceful, and groundless. Nonetheless, at the time of the Mendel-Gimbel trial, New York state was in the process of getting rid of breach of promise cases for good. The law that abolished them came before the New York Court of Appeals, which sustained the law. “Thoughtful people,” said the court, had “long realized” that “scandals growing out of actions to recover damages for breach of promise ... constitute a reflection upon the courts and a menace to ... marriage”; and could even be described as “a danger to the state.”\textsuperscript{128}

Still, this campaign could not have been so successful, unless the ethos underlying the breach of promise cases had not been itself already breached. The breach of promise action was a failure, we are told; it did not conform to “changed mores concerning sex morality, the status of women, and the functions of the family.”\textsuperscript{129} These actions, in other words, no longer seemed necessary, because (at least in the opinion of middle-class men), they no longer served a useful purpose. Chastity was still, of course, a value for respectable women; but it had lost at least some of its currency. This was another reason why it was possible—and probably desirable—to get rid of breach of promise. After all, women of the 1930s were not as easily “ruined” as they had been in nineteenth century. Hadn’t Gabrielle Melvin shown the way?\textsuperscript{130} These lawsuits remained a possibility, in many states, long after the 1930s; they are now pretty much dead. In some states, the courts killed them, in others the legislature.

III. REPUTATION IN THE LATE-TWENTIETH CENTURY

In the last half of the twentieth century, the laws and doctrines that were designed to punish name-robbers were substantially recast; and, in part, dismantled. Of course, people still cared a lot about their reputations. But many kinds of behavior which once threatened reputation no longer did so, or did so not quite so dramatically. The public, in general, was also more willing to accept behavior that had

\begin{itemize}
  \item \textsuperscript{127} See Frost, supra note 36, at 225.
  \item \textsuperscript{128} Fearon v. Treanor, 5 N.E.2d 815, 817 (N.Y. 1936).
  \item \textsuperscript{129} Feinsinger, supra note 114, at 979.
  \item \textsuperscript{130} Not everybody felt it was a good thing to get rid of breach of promise cases. They were vigorously defended by Frederick L. Kane, a professor at Fordham Law School, in Heart Balm and Public Policy, 5 Fordham L. Rev. 63 (1936). Professor Kane found the evidence of blackmail flimsy; and felt the “agitation for heart balm” laws were “only one aspect of a movement to destroy the concept and ideal of marriage as an outmoded tradition.” Id. at 66-72.
\end{itemize}
once been forbidden or taboo, if they happened to find out about it. They also began to feel entitled to find out about it. Warren and Brandeis conceived of their shiny new tort as a shield to protect the privacy of elites. It never quite worked out that way. And now both the law and the mores had shifted direction. Today, elite status often means, not a right to extra privacy, but in fact giving up most of your claims to a private life.

This, at least, is the message that the cases on invasion of privacy seem to convey. Melvin v. Reid now looks like something of an anomaly. The case law—certainly from the 1930s on—backed away from the ethos of protecting respectability. And for “public figures,” for celebrities, the public had an insatiable curiosity; and this curiosity turned into something close to a right to know everything there was to know about the public figure. The big people did not lose their privacy overnight. It happened in fits and starts and in stages. Franklin D. Roosevelt was able to hide his wheelchair from the public; obviously the media cooperated in keeping the extent of his disability hidden. And no newspaper, during the time John F. Kennedy was President, reported on his sexual adventures. This, of course, is now dramatically different.

Presidents are obviously public figures. But the concept of a public figure itself has been stretched beyond all recognition. Anybody the public could conceivably be interested in must be a public figure. This definition virtually destroys invasion of privacy in the Warren and Brandeis sense, or in the sense of Melvin v. Reid.132

In the well-known 1940 case of Sidis v. F-R Publishing Corp.,133 the New Yorker magazine ran an article about William James Sidis, who had once been a child prodigy—a math whiz who graduated from Harvard at sixteen. Where is he now, the New Yorker asked. Basically, he was nowhere: he had become a kind of neurotic hermit, who collected streetcar transfers. Sidis did not appreciate this return to the limelight. On the whole, he would seem much less “public” a figure than Gabrielle Darley Melvin. But even though the magazine was “merciless in its dissection of intimate details of its subject’s personal life,”134 the public apparently had a right to find out what had become of this former child

131. People knew that Roosevelt was a polio victim, but they never saw his wheelchair. Incredibly, out of 35,000 still photographs of Roosevelt at his Presidential library, only two (which somehow managed to survive) show him sitting in a wheelchair. See HUGH GREGORY GALLAGHER, FDR'S SPLENDID DECEPTION xiii (1985).


133. 113 F.2d 806, 807 (2d Cir. 1940).

134. Id.
prodigy. At least the court so held. Later, in the 1970s, a certain Mike Virgil, a well-known "body surfer," objected to a magazine article which reported on his bizarre habits: he supposedly ate spiders, dove down stairs head first to impress the "chicks," and so on. A federal appeals court sent the case back down for retrial, and the trial judge dismissed the case: "bodysurfing" was a "matter of legitimate public interest," and the "personal facts" about Mike Virgil were a "legitimate" attempt to explain his "extremely daring and dangerous style of body surfing," and could not be objected to as "morbid and sensational." In hindsight, it looks as if the Warren and Brandeis idea of privacy—protection from the despicable nosiness of the media—never got much past the starting post; and is now effectively dead. After all, if a newspaper or a magazine or a TV station reveals something, it is almost by definition newsworthy; otherwise, why would they reveal it in the first place? What survives of the tort of invasion of privacy is a commercial right: nobody can use your name or your image to make money, without your permission, in an ad, or a pamphlet or brochure advertising a product.

To be sure, "privacy" is still an important value—perhaps more valuable than ever. In the first place, it has had a distinguished career in some of its other disguises, most notably as a constitutional principle, from Griswold v. Connecticut through Roe v. Wade and beyond. The constitutional right of "privacy" is in some ways the very opposite of the Warren and Brandeis right. It is the right to make certain life-choices free from the heavy hand of the law—and, if one wishes, to make these choices in an "open and notorious" way. "Privacy" is also vitally important to a public which worries about the power of governments and big institutions to intrude into their lives—into their "privacy" in this more modern sense. The public loves the "morbid" and the "sensational," but they hate surveillance and the technology of surveillance (except for criminals and terrorists); and they are intensely

135. Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976); see also Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975);

136. In the fairly well-known case of Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665 (Cl. App. 1984), Oliver Sipple, described in one article as a "husky ex-Marine," deflected a gun which Sarah Jane Moore had aimed at President Gerald Ford. See id. at 666. The Chronicle story, praising him as a hero, also made it clear that Sipple was gay. See id. Sipple sued, claiming his parents and siblings learned "for the first time of his homosexual orientation," and this constituted an invasion of privacy. Id. at 667. He lost the case. First of all, the court doubted that his sexual orientation was all that private, since he had marched in gay parades, and so on. See id. Also, the publication was "not motivated by a morbid and sensational prying," but rather by "legitimate political considerations." Id. at 670. Indeed, the story helped "dispel the false public opinion that gays were timid, weak, and unheroic figures." Id. Thus, Sipple and his story were of genuine public interest.
suspicious of anything that puts information, data, records and the like in the hands of authorities. They hate the fact that credit companies, banks, and hospitals can compile dossiers on them. They fret over wiretapping (again, except for criminals and terrorists). They are alarmed at the idea that the government can read their email messages, tap into their financial records, listen in on their conversations. They want to control as much as possible, how much information others have about them—especially about their money. Proposals for a national identity card are greeted, in some quarters, with about as much enthusiasm as a letter bomb. But the point is not modesty or respectability; it is an issue of power and control and political muscle.

The kind of class distinction that was implicit in the Warren and Brandeis article—the moral distance between the elites and the masses—has also broken down; or, to put it another way, the distinction has blurred considerably. At one time, arguably, elite behavior set the tone and the standard for behavior. Today, the situation is much more complex. The tastes, dress, music, and habits of ordinary people, especially young people, often seem to set the style; these often form the vanguard for the tastes, dress, music, and habits of everybody. Blue jeans and rock-and-roll, like jazz in an earlier period, came out of working class and black culture; and are now essentially classless and universal; indeed, they have become global.

Censorship of the movies—censorship of almost anything—is now close to extinct. The Supreme Court has wrestled with pornography, and how to define it. But the case-law seems more and more to be futile, marginal; an argument about definition on board a sinking ship. There are still some controls over prime-time network TV, and the FCC makes sure that the “seven dirty words” do not reach sensitive ears. There are still concerns over what children see and hear and child pornography is still an important issue, on TV and the internet, partly because of the very pervasiveness of “smut.” The movies have evolved a rating system. But otherwise, for consenting and volunteering adults, almost anything goes. Blackmail is not extinct, but it is likely that it has a more limited orbit than it had before.

139. Posner, among others, thinks that blackmail has always been a rare crime. See Posner, supra note 72, at 1841. This may be correct (as compared to burglary, for example). But we have absolutely no information about how common it might have been, or is now. It must have always
The mass media are key factors in these volcanic social developments. The mass media are of course commercial operations; they live and die by their circulation, ratings, and advertising revenues. In general, entertainment, fun, leisure activities, occupy a greater and greater role in society. The fun industry may well be the largest industry in the country, if you put all of its branches together. Fun is a form of consumption; and consumption is the key to modern life. Billions of dollars are spent every year on advertising; advertising, in this society, is absolutely pervasive. Advertising is meant of course to sell products; but in order to do this, advertising (all advertising) has to convey a message of individualism, consumption, and pleasure. Advertising, and the media in general, are therefore the archenemies of traditional values. This is true, even though televangelists are enormously popular, and many of the overt messages on TV and in the media in general are messages that claim to be opposed to the dominant culture. In a sense, however, such messages undermine themselves, because they necessarily use the channels of mass culture; and they must appeal to the individual, and to the ethos of individualism, even when the appeal is an appeal to embrace old-time values, and to submerge the self in some higher goal or to higher authorities.

In particular, television breaks down the apparent barrier between elites and the mass audience. The elites tend to become redefined as celebrities.\textsuperscript{40} A celebrity is not just a famous person; a celebrity is a famous and familiar person. This is most obviously true of political leaders. The President is on TV literally every day. We know, or think we know, everything about him: his walk, his talk, what he wears, where he lives, his family, his personal likes and dislikes, even his cats and dogs. He becomes a familiar figure—in fact a very familiar figure. He is so familiar that it is easy for people to forget that they do not actually know him personally.

The President is not unique. Other authority figures who, historically, were remote, even God-like, have also become familiar names, faces, and images—have, in other words, become celebrities themselves. This is true of the Pope and the Dalai Lama, and even, to a degree, the Emperor of Japan. A celebrity society, an entertainment society, is a society which breaks down the (apparent) barriers between the leaders and the led, between the stars of stage and screen and the ordinary earthlings; between the high and the mighty, the rich and the

\footnotesize{been a radically underreported crime. Posner found only 124 published blackmail cases. See id. But newspaper accounts suggest that this might have been the tip of an iceberg.

\textsuperscript{140} See FRIEDMAN, THE REPUBLIC, supra note 80, at 121-24.}
famous; and everybody else. The social distance between the President and his voters, or between the Pope and his flock, becomes not much different than the distances between sports idols and their fans. In reality, of course, the barriers are still there; but conceptually, emotionally, they have vanished. One could argue that, for security reasons, the celebrities have had to make themselves more distant. The President moves within a cocoon of secret service agents, rich celebrities never go anywhere without their bodyguards. But these human barriers are, in fact, testimony to the erosion of the psychological and cultural barriers between the star and the fan. Those barriers have become almost invisible. So much so, that some people forget that there is any distance between them and their idols—note the slightly addled but scary people who “stalk” the stars, for example. The felt boundaries are so flimsy, that people can mourn and weep and wring their hands over the death of the Princess of Wales, and spend their precious dollars on flowers to be heaped up in her memory, to express their grief. They are bewailing the death of a person they never met, and were never likely to meet; but who was so often on television, whose image was so striking and ubiquitous, that for many people it was as if they had known her personally, as if her death was a death in the family.

Technology has transformed the home—transformed the place where people live out their lives, especially their emotional lives. It is a historical commonplace that “privacy” is a modern invention. Medieval people had no such concept. They also had no privacy. Nobody was ever alone. Nobody had his own private space. And everybody was imbedded in a community—and a face-to-face community at that. Privacy, as idea and reality, is the creation of modern bourgeois society. It was above all a creation of the nineteenth century. The “privacy” of the nineteenth century middle class home has, in part, broken down in the late-twentieth century. People still have private space; and it is an article of faith for the middle class that each child needs its own room. But that room, and the whole house, has been invaded by the media. First came radio, then TV, now the internet. Of course, the family is supposed to control what comes into the home; and nobody is forced to watch TV or surf the net against their will. In particular, adults monitor (or try to monitor) what children hear and watch. Nonetheless, the very presence of radio and television in the home, the voices and images available at the flick of a switch, have a profound effect on the whole modern notion (and reality) of “privacy.” Hordes of young people in 2002 are never alone in the sense of Walden pond or a quiet corner to themselves; they walk the streets babbling on their cell phones, they log on to the
computer as soon as they get home, they sit for hours glued to the TV set, they listen to music through headsets while they jog or do homework. Sometimes—often—their companions are friends and schoolmates. But often they are absorbing sounds and voices and faces and images from far away. They are immersed in the stuff which the media beam into their heads.

The media make possible and foster what we might call the peeping Tom society. It is a prying, gossiping society. Gossip has always been an important social phenomenon. But gossip was at one time gossip about people one knew personally. This kind of gossip, of course, survives, and always will. Now, however, there is also celebrity gossip—tons of it. There were precursors, to be sure—very notably, the Hollywood fan magazines. But now celebrity gossip fills up the pages of the supermarket tabloids, which could not survive without this gossip; and it is a more and more significant factor on TV and in the newspapers as well. The big stars and the big people generally have become so familiar, that we are on a first-name basis with them. The tabloids can speak about Tom or Liz or Brad or Diana or Oprah or Barbara, and everybody knows who they are talking about.

Our society has become used to observing, watching, spying on "public figures," that is, famous people, celebrities, stars of the movies, basketball players, soap opera stars—and Presidents, kings, and popes. The public observes them through the media (and perhaps now also through the internet). For "public figures," then, privacy has largely disappeared as a value, and in part as a fact. This helps break the link between respectability and privacy. A public figure no longer has any secrets; and no longer any right to his secrets. It is perhaps for this reason that the "right of privacy" never made much headway in its original sense; and has for all practical purposes disappeared, as we have seen. What Warren and Brandeis wanted, what they thought necessary, was genteel respect for the decency and privacy of people like themselves. But modern courts have decisively rejected this notion—principally because modern society rejected it first.

The "candid camera," among other things, was a worry for Warren and Brandeis; perhaps it was one of the factors that set them off on their quest for a legal remedy. But the eye of the camera, today, is much more pervasive than any camera of the late-nineteenth century. And the camera is exceedingly seductive as well as intrusive. The barrier between the public and the private has broken down not only for celebrities, but for at least some members of the general public. A small but significant number of people are willing to take their arguments and
disputes on television, and let Judge Judy decide; or to talk openly about their sex lives on the trash talk programs, like that great social document, the Jerry Springer show. A few are even willing to install cameras all over their home, and let the rest of the world watch them eat, drink, dress and undress. A much larger, an incomparably larger number of people, are willing and eager to watch these and other people, as they air their dirty laundry in public.

The range of publicly acceptable behavior has shifted dramatically. Past scandals now seem almost quaint. Movie stars, like millions of other people, have affairs, live together without getting married, even have children without bothering to marry. Male sports stars brag about how many women they have serviced; entertainment stars talk about their love life, or admit that they are gay, or go to drug rehabilitation centers in a blaze of publicity. Millions of people today cohabit (and are “open and notorious” about it), or freely confess to various mental and psychological failings. The National Enquirer sells millions of copies, and is largely devoted to celebrity gossip. It has lost ground recently—but only because the more respectable journals have copied its style, to an extent. People magazine is perfectly respectable—a more chaste version of the supermarket tabloids. Gossip is no longer a whisper but a shout. Of course, the people who fill the pages of these magazines and

141. On a recent program (Sept. 27, 2001), which I watched strictly for research purposes of course, a young man announced that he was a male prostitute, and had been on this job for years (it was fun and exciting he said, and the money was good), but had not bothered telling this fact to his live-in girlfriend—at least not before the show. The girl in question then appeared, learned her boy friend’s secret, and promptly gave him his walking papers, while the studio audience whooped and hollered and clapped in delight at the spectacle. Millions more were watching the show at home, no doubt. Of course, the young man and his girlfriend might have been actors, (on this point, see generally JOSHUA GAMSON, FREAKS TALK BACK: TABLOID TALK SHOWS AND SEXUAL NONCONFORMITY (1998)), but they were presented as real people. In either event, they were getting their fifteen minutes of fame, and never mind how.

142. Such people are affected by what David Bromwich has called the “mood of broadcast intimacy.” David Bromwich, How Publicity Makes People Real, 68 Soc. Res. 145, 146 (2001). The mass media, he feels “have been so naturalized in the lives of many that they ... confer on experience a reality it would otherwise lack.” Id.

143. For what it is worth, I will report that the very nonrandom sample of applications to Stanford Law School that I have read in recent years often contain confessions of weakness; they admit to psychological failings, adopt postures of victimhood, talk about their illnesses, their personal tragedies, and on and on—all of which would once have been inconceivable. The applicants clearly think that they are not hurting themselves by their true confessions; quite the contrary. They think this helps their cause. They may very well be right.

144. On the tabloids, see generally S. ELIZABETH BIRD, FOR ENQUIRING MINDS: A CULTURAL STUDY OF SUPERMARKET TABLOIDS (1992); on the relationship between these marvelous cultural icons and the “regular” media, see generally RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY (2001).
tabloids are usually famous people; and in a celebrity society, a society that admires or even worships celebrities, celebrities can almost literally get away with murder. But the privilege of bending the traditional rules is not only for the rich and famous.

It is worth mentioning, too, that bankruptcy and divorce have lost most of their stigma. It is much less of a shame to have loved and lost; and to have gambled on a business or lost; or run up too much in credit card debt. Old hierarchies and old moral norms have crumbled and been replaced by newer, more subtle ones. In short, in the last two decades, society has redefined the very concept of respectability. It now allows a much wider, or at least different, range of behavior. To be sure, the traffic is not all one way: the voters are, today, much more tolerant about candidates who have been divorced, or suffered a nervous breakdown—they are more accepting of candidates who are Jewish or Catholic or black or gay; but a person who admitted that he had no religion at all, and was in fact anti-religion, would have a tough time indeed getting elected.

It is important not to exaggerate the degree of social change. Obviously, privacy, even in the classic sense, is still an important value for many people. The lavatory door is still closed. In general, to be sure, people are willing to expose more of themselves—body and soul—than would have been true a century ago. Taboos against nudity are weaker than they were even in the 1950s; and people of all shapes and ages routinely display, on the beach for example, far more flesh than would have been considered “decent” in the past. Taboos against discussing sex and vice have weakened greatly as well; and in some circles downright disappeared. Still, most people do not in fact go around naked, even psychologically naked. Most people would not dream of appearing in front of Judge Judy or Jerry Springer. They are far too “private” to expose themselves in public, though they may enjoy watching other people to do it. And even in this day and age, there are embarrassing secrets most people would prefer to keep hidden. Damage to reputation is still a real problem. It may be situational—if we found out that a Certified Public Accountant had a collection of whips and chains, his practice might survive; but a nursery school teacher or day care worker would be immediately fired.

IV. Conclusion

Let me sum up my argument: at one time, in the nineteenth century, elaborate legal arrangements expressed a traditional, and distinctive,
moral code. The law also acted to protect and enforce this code. It did this, first, by punishing deviance; but it also protected it, paradoxically, by allowing certain safety valves. One implicit goal was to protect the respectability and reputations of the better sort of people, especially (but not exclusively) men. Rules about blackmail, seduction, and breach of promise were part of a package of norms that at least potentially performed this function. The whole set of arrangements which I called the Victorian compromise can be analyzed in these terms; and so too of the right of privacy which Warren and Brandeis advocated, in the late-nineteenth century.

The cosy arrangements of the Victorian compromise began to break down in the late-nineteenth century. The people who led the attack were those who wanted to stamp out vice altogether; they refused to be accomplices to what they considered hypocrisy and degeneracy. At first, they scored a number of successes—new laws that cracked down on vice, and strengthened the legal tools that controlled, or tried to control, sexual behavior. Ultimately, however, their efforts were a dismal failure. In the late-twentieth century, because of the so-called “sexual revolution,” because of the pervasive influence of the media, “respectability” was redefined to include a much wider range of behaviors. The nineteenth century code weakened and tottered on its base. Some of it was redefined, some of it was eliminated altogether. “Privacy” was no longer protected for “public” figures. For these people, there was a kind of trade-off. They lost their privacy, and there was pervasive exposure of their “infirmities.” On the other hand, because of the way reputation and respectability were redefined, it became much harder to “ruin” them. For ordinary citizens, too, concepts of reputation and privacy were reshaped, though in different, and somewhat complicated ways. The intrusion of the media into the home blurred the distinction between public and private space, and between public and private figures.