From Victorian Secrets to Cyberspace Shaming

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Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy
Lawrence Friedman. Stanford, 2007. Pp ix, 348.

The Future of Reputation: Gossip, Rumor, and Privacy on the Internet
Daniel J. Solove. Yale, 2007. Pp vii, 247.

INTRODUCTION

Worrying about privacy is a growth industry. The public is highly concerned about how its personal information is collected, stored, and processed. Technology companies compete to create new applications that will analyze personal data and meet new needs, such as the ability to broadcast one's GPS data to family and friends (no more lunches alone). The government is interested in access to personal data for law enforcement, regulatory, and administrative purposes. And the media, when not reporting on the latest privacy invasions by companies or government, is publishing "tell-all" stories on anyone viewed as newsworthy, that is, deemed worthy of its attention.

Two excellent guides to this cauldron of law, social change, and technology have now been published. These are Lawrence Friedman's *Guarding Life's Dark Secrets*, and Daniel Solove's *The Future of Reputation*. The focus of the first book is on past attitudes toward privacy and how the modern legal era of privacy emerged in the twentieth century. It also contains some thoughts about the future of privacy. The second book picks up the story and brings it into the future of the Internet, bloggers, and social networking sites.

In *Guarding Life's Dark Secrets*, Friedman deftly explores legal culture, by which he means "the ideas, attitudes, and values that people hold with regard to the legal system" (p 5). He especially is

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interested in the history of certain formal and informal "leeways" in the law that traditionally permitted the protection of privacy (p 267). The formal leeways were the ways in which the law more or less explicitly permitted individuals to enjoy second chances after misbehaving. Friedman also examines informal ways in which "social norms," or simply "human laziness and imperfection," allowed the law to have "a little bit of heart and forgiveness, at least for respectable people" (p 267). When Friedman reaches the present, at the end of the book, one of his major concerns is the way that technology creates a new "capacity to squeeze leeways out of the system" (pp 267–68).

In *The Future of Reputation*, Daniel Solove proves an able guide to developments on the Internet and their effect on personal privacy. He also provides valuable portraits of selected historical, legal, and social developments that have shaped the law of information privacy. In the first part of his book, Solove argues that gossip is being reshaped on the Internet in ways that increase its negative effects. Moreover, shaming, which offline has long helped maintain civility and order, has problematic aspects once it takes place in cyberspace. In the second part of *The Future of Reputation*, Solove considers how the law should strike the proper balance between online expression and harm to others. He carefully sketches a middle path, while also acknowledging certain potential weaknesses of this approach.

In this Review, I discuss and analyze the main arguments of both books. Friedman and Solove make major contributions to our understanding of privacy law. The great benefit of Friedman's work comes from its rich depiction of the legal and social context of privacy in the nineteenth and twentieth centuries and the uncertain fate of it in the twenty-first century. The merit of Solove's work is his precise guidance through the new landscape of Internet-based phenomena and his insights into how these affect privacy and reputation—often in a fashion unanticipated by the general public.

I also offer critiques of each volume. Regarding *Guarding Life's Dark Secrets*, I argue that Friedman's terminology regarding social structure is looser than it should be, which leads to a sacrifice of some intellectual clarity in the otherwise brilliant landscape of his book. Moreover, Friedman does not talk much about financial privacy, but this topic is one that is worthy of consideration. Finally, Friedman warns that in the future, technology will work as a way to squeeze discretion and privacy out of the legal system. In my view, however, technology is today accompanied by a series of discretionary choices that affect privacy. Technology provides new and complex ways to disguise discretion.

In *The Future of Reputation*, Solove is interested in how norms can affect behavior and even supplement law. I would have liked to have heard more from him, however, about how cyberspace affects

the generation of norms, and how his privacy-promotive norms are to be generated. Moreover, Solove largely views law as an independent variable. He approaches law as a norm entrepreneur and calls for a number of changes in it. Yet, in certain instances, I wished his proposals to be more detailed and more fully operationalized. Finally, I suggest a number of new Internet-based phenomena that Solove might consider in the future, perhaps in *Reputation 2.0*, the (hypothetical) next edition of his book.

I. FRIEDMAN'S *DARK SECRETS*

As I noted above, most of *Guarding Life's Dark Secrets* looks at the past and the transition to the modern era. In the past, according to Friedman, privacy often occurred as a secondary result of a series of rules and exceptions to the requirements that he terms "the Victorian compromise." It is to this topic that I now turn.

A. The Victorian Compromise: Its Rise and Fall

Friedman carefully explores the specific historical, social, and legal elements that constituted the Victorian compromise. This arrangement was a "complicated network of doctrines . . . that operated chiefly for the benefit of respectable men and women—people with reputations to protect" (p 4). The Victorian compromise took place between "strict and unbending rules of decency and propriety" and far more permissive rules, which allowed "space for slippage, for leeways, for second chances—for ways to protect and shield respectable men and women who deviated from the official norms" (p 4).

How was the Victorian compromise structured? First, it emphasized a certain kind of moral code. Society expected people to follow these rules of propriety in order to be considered respectable. The law and social norms "defined respectability, virtue, [and] good reputation (reflecting wider social norms)" (p 13). The social code stressed that men were to engage in discipline, self-control, frugality, and moderation in all things, including enjoyment of alcohol. As part of this social code, a code of sexual behavior stressed delay of sexual gratification until marriage. And, as Friedman points out, "There was an ideal woman as well as an ideal man" (p 37). The ideal woman was expected to be married, a mother, loyal to her family, and more virtuous than any man (p 37).

Yet, this definition of conventional morality was only the first step. The Victorian compromise was as concerned with appearances as with reality. Friedman stresses that Victorian society accepted the inevitability of deviations from its moral code. The prevailing view in the United States was that society was "a delicate plant," and while socialization into the right kind of morals was essential, failures could also

be expected (p 14). As a result, the law was sometimes ready to forgive certain transgressions and also to make sure that everyone forgot them. The legal system "engaged in a kind of cover-up," and it is at this juncture that privacy enters into Friedman's analysis (p 13). Privacy provided a way for certain people, mostly men of a certain social status, to receive a second chance.

Friedman convincingly depicts both the nineteenth-century social code and the complicated system under which law and society accepted lapses from it. He observes, "The ethos of second chances was never simple and never absolute" (p 28). Friedman explains the Victorian compromise, in part, by way of an analogy with the current laws against speeding, "Everybody violates these laws—at least sometimes and to some extent" (p 67). Yet, these laws are not dead letters. The police arrest the most blatant violators, and the public as a whole approves of these statutes. Friedman explains: "Society needs speed limits. If we removed the speed limits, some people might drive at wild, dangerous speeds" (p 67).

Thus, the Victorian compromise was built on a theory of social control that refused a rule of zero tolerance. Deviations were needed to provide "cover, protection, and immunity for elites who strayed from the straight and narrow path" (p 67). The ultimate goal was social stability, which required respect for people in authority and for protection of their reputations. As Friedman argues, "The reputation of men who governed, who set the tone and the example for the rest, was the reputation of society in general. And this reputation was based on *external* appearance, on outward behavior. It was, as it were, a kind of costume or dress" (p 68). Thus, the goal of the law was to protect both the truly virtuous and those who appeared to be so. Here, Friedman draws a useful analogy with the history of seditious libel; an attack of any prominent member of society "was, like seditious libel in the old days, a danger to the fabric of society, to the structure on which society rested" (p 67).

As an initial example of how the law protected deviations from otherwise strict moral codes, Friedman considers the law of blackmail. The criminalization of blackmail was a way to protect "men who had a bit of dishonorable fun on the side" (p 94). Otherwise, "bottom-feeders" would be "raking up the dead past, by threats and plots and schemes" (p 97). These laws helped keep secret any lapses, or deviations, from an otherwise honorable life, and prevented con men from profiting from "some dark secret from the citizen's past" (p 97). In other words, a legal ban on blackmail served the purpose of keeping a secret life under wraps and furthered the image of the respectability of the elite. It thereby maintained some level of privacy as a secondary result of these other goals.

Friedman also examines other examples of how the law sought to protect the appearance of virtue. These include the regulation of red light districts and prostitution, attempts at censorship to protect public prudery, and the laws prohibiting criminal conversation and alienation of affection. Criminal conversation permitted a deceived husband to bring a lawsuit against a man who had sexual relations with his wife; the lawsuit for alienation of affections allowed a legal action against anyone who destroyed the relationship between husband and wife (pp 117–20). Friedman argues that these actions served "as a shield for women who slipped—by promoting an image of women as chaste but weak, as easily seduced, or as cheated out of their innocence" (p 120). Yet, as he also shows, these legal actions also became invitations for blackmail and extortion by unsavory characters.

Friedman's chapter on censorship introduces the topic of the downfall of the Victorian compromise. The book vividly depicts the fall of the Victorian compromise at the end of the nineteenth century and the beginning of the twentieth. Hollywood played a not unsubstantial role in the transition to a new moral sense in the United States. As Friedman explains, "[T]he movies, even without nudity, drugs, or sex, even when they tried to preach the old-time morality, were in fact deadly enemies of the old-time morality" (p 161). The movies did not conform to the nineteenth-century idea of moderation, and, in fact, they undercut it. The world of the cinema was a dream world, a world of endless possibilities, which "also helped to breed a culture of envy and desires" (p 161).

The themes of the Victorian compromise, privacy, and Hollywood are all found in Friedman's perceptive discussion of *Melvin v Reid*,[1] the famous "Red Kimono" case.[2] Friedman also fills in some factual gaps in the appellate opinion, which is a casebook staple. The result casts a darker light on Mrs. Melvin and her past, ties the case to his larger themes regarding the Victorian compromise, and also leads to a rich series of ironies. I wish to sketch this opinion and then explore the insights about privacy to which it leads.

In this decision from 1932, a California appellate court, the District Court of Appeal, Fourth District, was extremely sympathetic to the interests of the plaintiff, Gabrielle Darley Melvin, in rehabilitating herself. Earlier in her life, Melvin had been a prostitute who shot and killed Leonard Topp, her pimp. A spectacular trial in 1915, the year of that crime, resulted in her acquittal. Leading newspapers widely re-

1 297 P 91 (Cal Ct App 1931).

2 Id at 91.

ported on the trial, and, as I will discuss below, these historical accounts are now available in easily searchable electronic databases.[3]

Hollywood later discovered this story.[4] Adela Rogers St. John, the daughter of Melvin's criminal attorney, covered the trial as a journalist, and subsequently wrote a short story based on Melvin's life and used Melvin's actual name in it. An early film pioneer, Dorothy Reid, then purchased the rights to the short story and produced and codirected a film, which the California appellate court referred to as *The Red Kimono*, but which has also been released under the title, *The Red Kimona*.[5] St. John wrote the screenplay for the film, which also used Melvin's real name, added fanciful details to her life story, and, in particular, invented a plot concerning her later life. *The Red Kimona* was a box office hit—albeit one that the critics of the day did not appreciate.[6]

In response to the glare of new publicity, Melvin sued and was successful first before the Superior Court, Los Angeles County, and then before the appellate court. On appeal, the *Melvin* court noted that the case came to it on a "demurrer," which meant, as a matter of civil procedure, that the court had to take all allegations of the plaintiff as true and decide if a claim could exist under the facts as pled.[7] Thus, one might consider the court's discussion of the facts simply as mandated by the procedural posture of the case. Yet, its very enthusiasm for Melvin's account goes far beyond procedurally necessity and reveals much regarding the California court's own view of the matter.

With gusto, the *Melvin* court told how the plaintiff had "abandoned her life of shame" and taken her place in "respectable society."[8]

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3 See, for example, *Dardley Girl on the Stand*, LA Times II1 (June 19, 1915); *Sees Fate of Killer Sealed*, LA Times I11 (June 18, 1915); *She Loved Too Much: Girl, Forsaken, Accused of Slaying Ex-soldier Admirer*, Wash Post 10 (Feb 7, 1915); *Murder is the Charge: Girl is Held to Higher Court for Alleged Slaying of Her Sweetheart on January 1*, LA Times II3 (Jan 21, 1915); *She Doesn't Know*, LA Times II1 (Jan 4, 1915); *Topp's Slayer Unstrung*, LA Times II15 (Jan 3, 1915); *Slays Him to Stop Wedding*, LA Times II10 (Jan 2, 1915). For articles about the *Melvin* litigation, see *Woman's Past Her Own*, LA Times 1 (Mar 3, 1931); *Film Suit Asks Damages*, LA Times A2 (June 9, 1928); *Sues Mrs. Wallace Reid*, NY Times 31 (June 9, 1928).

4 *Melvin*, 297 P at 91.

5 *The Red Kimona* (Mrs. Wallace Reid Productions 1925). As restored by the Library of Congress, the movie currently is released on DVD under this title and so I will refer to it as *The Red Kimona* in this Review.

6 Regarding the contemporary critics, see Mordaunt Hall, *The Screen: The Red Kimono*, NY Times 23 (Feb 3, 1926) ("There have been a number of wretched pictures on Broadway during the last year, but none seem to have reached the low level of 'The Red Kimono,' a production evidently intended to cause weeping, wailing, and gnashing of teeth."). See also Anthony Slide, *The Silent Feminists: America's First Women Directors* 90 (Scarecrow 1996) ("Critical response was very negative."). On the success of the film, see Hans J. Wollstein, *Red Kimono*, online at http://www.allmovie.com/cg/avg.dll?p=avg&sql=1:40699~T0 (visited Sept 1, 2009) ("A huge box-office success.").

7 See *Melvin*, 297 P at 91.

8 Id.

Moreover, by producing the movie, the defendant had acted in a reprehensible fashion that was not "justified by any standard of morals or ethics."[9] Melvin deserved a right to start over again; she deserved a second chance. The *Melvin* court stated that "[o]ne of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal."[10] It also observed, "Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."[11] The court topped this statement with a final rhetorical flourish: "Even the thief on the cross was permitted to repent during the hours of his final agony."[12]

Thus, California's public policy was to permit former criminals a chance at rehabilitation, and this policy would prohibit the use of the names of such person in a film. According to the *Melvin* court,

> The use of appellant's true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.[13]

The court then faced the difficulty of finding a legal basis for this judgment. Friedman observes that the court seemed to be "groping about for some legal hook on which to hang its opinion—anything at all" (pp 217–18).

The *Melvin* court first rejected both the emerging tort principle of privacy and the idea of a property right in the facts of one's life as potential grounds for its opinion.[14] It then seized on the right to pursue happiness, as guaranteed by the California Constitution, as a legal basis for Melvin's cause of action. The *Melvin* court declared that this state constitutional right was "not to be ruthlessly and needlessly invaded by others."[15] In the aftermath of this holding, Dorothy Reid appears to have settled with Melvin, as I will discuss below, and there are no further reported legal proceedings in regard to the matter.

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9 Id at 93.

10 Id.

11 *Melvin*, 297 P at 93.

12 Id.

13 Id.

14 Id at 92–93 (noting that because the details of Melvin's crime were a matter of public record, her right to privacy could not have been violated).

15 *Melvin*, 297 P at 94.

In Friedman's view, *Melvin* demonstrates a legal regime that protects second chances (p 219). It provides a splendid illustration both of the Victorian compromise and of its tenacity. California in 1932 was as far removed from nineteenth-century morality as anywhere in the United States, and yet here was the California court employing the rhetoric of a bygone era: Melvin had "abandoned her life of shame," taken a place in "respectable society," and "lived an exemplary, virtuous, honorable, and righteous life."[16] Recall also how the law of blackmail, in Friedman's analysis, kept con men from profiting from past mistakes of respectable people. The law thereby imposed a zone of privacy on these errors of the respectable. Regarding *Melvin*, Friedman argues, "The result of the case was, in a way, the functional equivalent of the (presumed) result of laws against blackmail: the right of decent people to start over again, to begin a new life, unencumbered by the debris of the old one" (p 218).

One might wonder how a case about protecting a woman fits in with the Victorian compromise, which is, as Friedman argues, mostly about protecting (respectable) men. Yet, the court depicts Gabrielle Darley as married to Bernard Melvin and having abandoned her previous "life of shame" and becoming "entirely rehabilitated."[17] In a critical passage, the court stated that Mrs. Melvin had assumed "the duties of caring for their home."[18] The court thereby comfortably situated her at the domestic hearth and imagined her carrying out work as the lady of the house. In this fashion, the court endeavored to safeguard Mr. Melvin's privacy as well. It reaffirmed a sense of the family as a locus for a certain kind of privacy. It viewed privacy as an interest of the family in noninterference by the state and in a freedom from public scrutiny.[19]

Melvin also provides a rich series of ironies. Friedman explains that the *Melvin* court had been sold a bill of goods. Its image of Melvin as an innocent victim "was almost surely a blatant lie," as was her depiction of herself before the court as a decent and respectable woman (p 218). Friedman writes, "There is good evidence that she was, in fact, as phony as a three dollar bill" (p 218). Melvin may even have been working as a prostitute and madam at the time of the trial, and more than one of her husbands managed to share "the distressing habit of turning up dead" (p 218). Yet, the California court enthusiasti-

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16 Id at 91.

17 Id.

18 See id.

19 On the family as a locus for an ideology of noninterference and the relation of this ideology to traditional patriarchal views, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv L Rev 1497, 1501–13 (1983).

cally accepted the image that Melvin presented to it and reached to find a basis under which her claim could go forward.

As noted above, newspaper collections are now available in electronic databases and subject to full text searches. In this way, a modern researcher has more information easily available than Melvin's contemporaries did. As an example, an easy search in the ProQuest Historical Newspapers database from the comfort of one's office reveals that all was not harmonious in the Melvin household. In 1922, nine years before the opinion in *Melvin*, an article in the LA Times noted that Gabrielle Darley had caused the arrest of her husband, Bernard Melvin, for embezzling $2,000 from her.[20] The husband told the newspaper, "She's wealthy and has thousands in the bank. I didn't steal that money from her. She gave it to me."[21] On a more philosophical note, he added, "We loved each other once, but we're through now, and she hates me. She hated Topp and she killed him. I'm in jail. The man pays, I guess."[22]

Despite the true nature of all these circumstances, the stereotype of Melvin as having rehabilitated herself reinforced a social belief in redemption. As Friedman perceptively notes of both Melvin's earlier trial for murder and her later appeal for violation of her privacy:

> What is interesting is how eager a jury and a panel of judges were to believe in the picture that Gabrielle Darley Melvin presented to them. It fit their stereotypes of women, it soothed their ethical sense, and, in the case of the California court, it reinforced their belief in redemption and reform. Perhaps the court imagined that no former prostitute and murder suspect would have the gall to sue unless she was telling the truth (p 219).

One is reminded of the statement in John Ford's *The Man Who Shot Liberty Valance*: "This is the West, sir. When the legend becomes fact, print the legend."[23]

There are additional ironies beyond the likelihood that Melvin was still engaged in prostitution at the time that the court was pointing to her respectability and rehabilitation. First, the *Melvin* court's holding against Reid appears to have caused considerable hardship to an important pioneering woman producer and director. According to Friedman and others, the settlement with Melvin after the court's decision led Reid to lose her West Hollywood home.[24] Yet, the *Melvin* court had stated that no one had a property right to his name or life

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20 *Slayer Has Man Jailed*, LA Times II7 (Dec 15, 1922).

21 Id.

22 Id.

23 *The Man Who Shot Liberty Valance* (Paramount Pictures 1962).

24 See Slide, *The Silent Feminists* at 91–92 (cited in note 6).

story.[25] Under this logic, Reid had as much the chance to make a movie based on the plaintiff's life as anyone else. Moreover, the author of the original account of Melvin's trial and of the screenplay, Adela St. Rogers, appears to have escaped legal liability. She went on to become a prolific journalist, author, and friend of the family of Richard Nixon.[26] In 1970, President Nixon awarded her the Presidential Medal of Freedom for her journalism.[27]

A further irony is that *The Red Kimona* itself is a protofeminist account, a morality play, regarding the difficulty faced by a former prostitute in finding a life free of shame and notoriety. In his account of the film in *The Silent Feminists*, a study of women who directed silent films in America, Anthony Slide states, "Reid deserves considerable praise for her refusal to condemn Gabrielle Darley and her lifestyle. Not once is that suggestion made that Darley might have chosen anything other than prostitution."[28] In an endnote to *Guarding Life's Dark Secret*, Friedman observes that the film actually makes a point similar to the *Melvin* court. The film "is completely sympathetic to Gabrielle, and condemns the narrow-minded people in society who refused to allow her to rehabilitate herself" (p 319 n 15). The capsule film reviews by Slide and Friedman are entirely accurate and easy to verify.

The Library of Congress has carefully restored *The Red Kimona*, and it is currently available on DVD in a series devoted to "Early Women Filmmakers." The film ends with Gabrielle Darley cleaning floors in a hospital in New Orleans during an influenza epidemic. At long last on the verge of happiness, she has been reunited with Freddy the chauffeur (long story), who has vowed to marry her. Thus, both film and court shared a vision of Melvin that did not reflect her actual life, but settled on the same "narrative arc"—as one says today in Hollywood.

There are also two further ironies that I can add to those that Friedman identified. One of these is that the *Melvin* court publicized the story of Gabrielle Darley Melvin in a far more lasting fashion than the movie. It became a famous tort opinion whose reach outlasted that of the film. Generations of law students might say, "I didn't see the movie, but I read the case." The difficulty is that the plaintiff who seeks to redress a violation of her privacy also gains further publicity for the information in question. More generally, the digitalization of

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25 See *Melvin*, 297 P at 94.

26 See Richard Nixon, *Remarks on Presenting the Presidential Medal of Freedom to Eight Journalists* 10 (Apr 22, 1970), online at http://www.nixonlibraryfoundation.org/clientuploads/directory/archive/1970_pdf_files/1970_0131.pdf (visited Mar 19, 2009).

27 Id.

28 Slide, *The Silent Feminists* at 91 (cited in note 6).

historical newspaper collections and other material has made certain kinds of information even more accessible today than in the past.

Interestingly enough, Friedman shows that in accounts of blackmail in the nineteenth century, the courts and media displayed notable reticence about revealing much regarding the underlying secret information. In contrast, garden variety privacy cases have generally been freer with their factual explanations as well as the names of the plaintiffs. As we will see, in *The Future of Reputation*, Daniel Solove proposes that courts more readily allow plaintiffs to sue under a fictitious name.

The final irony present in *Melvin* is that this case simultaneously proved to be both shortsighted and prescient about the future path of the law. Where it rejected a tort right to privacy, later state courts would embrace this interest. In particular, California has proven a fertile state legal system for the privacy tort.[29] Regarding the *Melvin* court's glimpse of the future, it concerns the court's identification of a right of privacy in the California Constitution's protection of certain inalienable rights.

In 1972, four decades after *Melvin* was decided, the California public enacted an initiative that explicitly put the word "privacy" in the state constitution.[30] The California Constitution now explicitly guarantees, among its inalienable rights, an interest in pursuing and obtaining privacy.[31] The US Constitution, like the California Constitu-

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[29] For the development of privacy law in California, see, for example, *Gates v Discovery Communications*, 101 P3d 552, 553–54 (Cal 2004) (holding that a television station was not liable for the publication of facts obtained from public records); *Shulman v Group W Productions, Inc*, 955 P2d 469, 477 (Cal 1998) (holding that while a media broadcast of an accident scene was not actionable for invasion of privacy, the recording of private conversations within the rescue helicopter could be actionable); *Times Mirror Co v Superior Court*, 244 Cal Rptr 556, 560 (Cal Ct App 1988) (holding that the publication of a murder witness's name could constitute an invasion of the witness's privacy); *Sipple v Chronicle Publishing Co*, 201 Cal Rptr 665, 666 (Cal Ct App 1984) (holding that the plaintiff's membership in "the San Francisco gay community" mentioned in newspaper articles, was not a private fact within the meaning of tort law for invasion of privacy); *Diaz v Oakland Tribune, Inc*, 188 Cal Rptr 762, 773 (Ct App 1983) (concluding that a student body president could claim an invasion of privacy against newspaper defendants for disclosing her transsexual identity, where such a fact was not newsworthy per se); *Briscoe v Reader's Digest Association*, 483 P2d 34, 43–44 (Cal 1971) (holding that the publication of the plaintiff's name in relation to a prior conviction was actionable for invasion of privacy, since a jury could reasonably conclude that the plaintiff's criminal history was not newsworthy), overruled by *Gates*, 101 P3d 552; *Gill v Hearst Publishing Co, Inc*, 253 P2d 441, 443 (Cal 1953) (holding that the publication of a couple's photograph was not actionable for invasion of privacy, but that the publication of the accompanying article was actionable).

[30] For a discussion of the initiative and an analysis of its meaning, see *Hill v NCAA*, 865 P2d 638, 641–49 (Cal 1994).

[31] See Cal Const Art 1, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

tion, has also been found to protect substantive due process privacy.[32] Unlike the California Constitution, however, the US Constitution does not explicitly use the term "privacy." Indeed, the California right even extends to the private sector, which means that, unlike the US Constitution, there is no "state action" requirement before its protections are applicable.[33]

The most important impact of California constitutional privacy rights has not concerned information privacy, however, but substantive due process privacy. As a recent example, the California Supreme Court found in May 2008 that the state constitution's privacy and due process provisions guaranteed a basic civil right of marriage to all individuals and couples, without regard to sexual orientation.[34] A statewide referendum, Proposition 8, overturned this judicial result in November 2008, and the matter returned to the California Supreme Court.[35] In May 2009, the California high court decided that Proposition 8 had amended the California Constitution in a procedurally valid fashion.[36] Proposition 8 created a constitutionally-permissible "exception to the preexisting scope of the privacy of due processes clauses of the state constitution"; it served to limit use of the designation of marriage under California law exclusively to opposite-sex couples.[37] Yet, the California Supreme Court also found that voters did not intend the referendum to have a retroactive effect.[38] As a result, the Court decided that Proposition 8 did not affect the validity of the approximately 18,000 same-sex couples who married before its enactment.[39]

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32 See, for example, *Lawrence v Texas*, 539 US 558, 578 (2003) (holding that the right to liberty under the Due Process Clause gives homosexuals the right to privacy to engage in consensual sexual activity at home); *Planned Parenthood v Casey*, 505 US 833, 851 (1992) (reaffirming the essential holdings of *Roe v Wade*, 410 US 113 (1973), including *Roe*'s conclusion that a woman's decision to terminate her pregnancy is subject to privacy protection under the Due Process Clause); *Griswold v Connecticut*, 381 US 479, 484–85 (1965) (citing a constitutional right to privacy in order to strike down a state law forbidding the use of contraceptives).

33 See *Hill*, 865 P2d at 641–43.

34 *In re Marriage Cases*, 183 P3d 384, 385, 399 (Cal 2008). For other California due process privacy cases, see *In re Marriage of Harris*, 96 P3d 141, 153–54 (2004) (ruling that a state grandparent visitation statute did not violate the state constitutional right to privacy); *Conservatorship of Wendland*, 28 P3d 151, 159 (Cal 2001) (determining that the right to refuse medical treatment is guaranteed by the state constitutional right to privacy); *American Academy of Pediatrics v Lungren*, 940 P2d 797, 816 (Cal 1992) (holding that the right of a pregnant minor to obtain an abortion is protected by the state constitutional privacy right).

35 See Maura Dolan and Jessica Garrison, *Justices Will Hear Prop. 8 Challenges*, LA Times A1 (Nov 20, 2008).

36 See *Strauss v Horton*, 207 P3d 48 (Cal 2009).

37 Id at 78.

38 Id at 119–20.

39 Id at 59, 121.

Privacy has gone from being a shield, under the Victorian compromise, to a sword, at least as far as certain substantive decisions about marriage, contraception, and abortion are concerned. Substantive due process privacy now provides protection in a way that the Victorian compromise did not. As for the fate of the Victorian compromise, Friedman observes, "The old code of morality has been largely (of course not entirely) dismantled. An openly gay congressman, a divorced president, rich industrialists with mistresses, men and women who live together without bothering to get married—none of this spells public doom or scandal any longer" (p 205). As for the tort right of privacy, *Guarding Life's Dark Secrets* shows that it has proven of mixed utility in protecting privacy. Friedman demonstrates how the First Amendment, limitations within the privacy tort and defamation action alike, and changes in cultural attitudes have left Americans with limited protection for privacy and reputation.

Friedman masterfully depicts the successive stages in the decline of the old system that protected the reputation of elites. He shows how courts have developed the First Amendment in a fashion that limits the scope of defamation law and tort law. *New York Times v Sullivan*[40] and its progeny have greatly cabined the reach of defamation law, and the rise of a robust concept of "newsworthiness" has restricted the tort right of privacy.[41] As Friedman summarizes the issue of newsworthiness, "Whatever a newspaper or a magazine or a TV station prints or shows or reveals must be of public interest, almost by definition; otherwise there would be no point in printing this news" (p 223). Friedman also depicts the larger social trends that led to these legal developments and the decline of the Victorian compromise. In his view, we now live in a contested "permissive society" but one whose every aspect "has been and will continue to be contested" (p 202). To my ears, this summation gets it just right.

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40 376 US 254 (1964).

41 See id at 279–83 (1964) (concluding that the First Amendment prohibits a "public official" from recovering damages for defamation related to his official conduct unless he proves by clear and convincing evidence the falsity of the statements and that they were made with actual malice). See also *Curtis Publishing Co v Butts*, 388 US 130, 154–55 (1967); *Associated Press v Walker*, 388 US 130, 154–55 (1967) (extending *New York Times*'s limitations on recovery for defamation of "public figures"). But see *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 763 (1985) (permitting damages for private figures when the disputed speech is of public concern); *Time, Inc v Firestone*, 424 US 448, 454–55, 455 n 3 (1976) (safeguarding recovery for private individuals by confining the definition of "public figures" to those who attain "especial prominence in the affairs of society" or those who voluntarily and affirmatively "thrust" themselves to the "forefront of particular public controversies"), quoting *Gertz*, 418 US 323, 345 (1974); *Gertz*, 418 US at 348 (affording greater protection for private individuals than public figures and officials under defamation laws).

B. Class, Money, and the Future

Guarding Life's Dark Secrets covers much ground, and does so with great ease and abundant insights. Friedman shows that one collateral result of the decline of the Victorian compromise has been a loss of privacy for celebrities and other famous people (p 230). At least under the old regime, an expectation of surface respectability was matched by the law's willingness to provide privacy in certain circumstances for certain people, including the famous. Friedman's insight is that one result of the rise of celebrity culture is the illusion that we know the famous person, and hence "it is easy for us to believe in the end that we have the *right* to learn about the lives of celebrities" (p 226).

Friedman also includes select and insightful comparative elements from countries such as England, France, Australia, and Germany. His comparative analysis concludes that "European countries grant much more right to privacy, even for public figures" (p 225). Friedman also concedes that there is an epidemic of gossip about celebrities in the US and Europe alike, and that "the differences seem rather blurred" if one examines the actual media cultures in the US and Europe (p 225). Friedman is drawing a distinction between the formal laws in Europe and the US, which are quite different, and relative media practices, which are not so different. The converging of media practices continues apace as reality shows reach Europe, and contestants in the United Kingdom and the Continent prove eager to sacrifice as much of their privacy as possible. A reality show, *Big Brother*, which alludes to George Orwell's *1984*, was first broadcast in the Netherlands in 1999 and has been a hit in Europe, in the United States, and throughout the rest of the world. As a recent essay about the horrors of a different German reality show (also a ratings sensation) advises, "Just shaking one's head about it doesn't do any good, one has to turn off [the television]."[42]

Another valuable example in *Guarding Life's Dark Secrets* concerns Friedman's discussion, in the context of the American breach of promise action, of the German Civil Code's analogous allowance for *Kranzgeld* (or "wreath money") (pp 117, 212). This German action allowed recovery of damages to an engaged woman who had sexual intercourse only to be later rejected as a spouse (p 212). Amidst these intellectual and analytical riches, there are, however, three areas to which Friedman might have altered his approach or expanded his analysis.

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[42] See Andreas Laux, *Dschungelcamp: Kopfschuetteln allein nuetzt nichts*, Focus (Jan 25, 2009) (author's translation), online at http://www.focus.de/kultur/kino_tv/dschungelcamp-kopfschuetteln-allein-nuetzt-nichts_aid_364179.html (visited Sept 1, 2009).

1. Everyday people.

Throughout *Guarding Life's Dark Secrets*, the issue of social class is pivotal. While Friedman also acknowledges the force of religion in American life, he views the class structure of the United States as a major force driving public prudery and censorship laws and sustaining the Victorian compromise. In my judgment, even with this acknowledgement, Friedman somewhat underestimates the centrality of religion in these matters.[43] Nonetheless, I wish to concentrate here on his analysis of class.

In comparison to European society, Friedman views the United States as a society that is "a nation of wanderers, movers, immigrants, a restless and unbuttoned society" (p 171). As a result of this mobility, there is an accompanying "fear of falling" (p 170). There is a notion that "the country teeters on the verge of destruction, that it hangs in the balance, that doom is ahead if the country were to let down its moral and ethical guard" (p 170). This danger occurs because the United States "always insisted that it was classless, because it lacked a formal aristocracy, because it was so overtly egalitarian, because ordinary people voted and stood for office" (p 170). Yet, nagging doubts persisted about whether ordinary people had "the virtue, the moral fiber, the integrity" to run a country (p 170).

My concerns in this context are that Friedman sometimes makes contradictory comments about class and also uses a shifting and sometimes imprecise terminology to discuss it. In particular, he sacrifices some analytical clarity about his exact views as a result of his open-ended terminology. As for the possible contradictions, Friedman notes that it is due to the lack of a ruling class in the US that a felt need existed in this country for "*internalized* controls" on the population (p 38). In this regard, Friedman observes, "The country has no natural ruling class. Deference is in short supply. People move about the country, immigrants pour in, nothing seems firm and settled, men rise and fall in the social scale" (p 38). Yet, Friedman also writes that below the surface of American society, there was a complex reality. He observes, "Underneath were what remained of a society where people deferred to authority and a hidden and disguised class system. Society was in fact highly stratified. People could be ranked in terms of money, honor, and respect" (p 40). One wonders how a society could be both highly stratified, and yet one in which there was a sense that "nothing seems firm and settled" in the United States (p 38). Friedman also concedes that "as the country matured—as it got older and weal-

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[43] See Robert Wuthnow, *Religion*, in Peter H. Schuck and James Q. Wilson, eds, *Understanding America* 275–305 (PublicAffairs 2008).

thier—an indigenous upper crust developed on top of the middle-class masses" (p 38).

To be sure, one can reconcile some of this language about class. Friedman may be proposing that there was an upper crust in the United States, but no natural ruling class, as in a system with a hereditary aristocracy. If this is Friedman's point, it is still not entirely clear how much additional ballast an upper crust plus hereditary aristocracy adds to social stability if society is, nonetheless, undergoing rapid change.

Alternatively, the point may be that the ruling class in the United States necessarily would shift over time, and there would be social insecurity as a result. Yet, there was also no shortage of social insecurity in the nineteenth century in England. Friedman discusses great Victorian novelists at numerous junctures in *Guarding Life's Dark Secrets*, and Charles Dickens might be used to demonstrate the pervasive sense in Victorian England of the instability of social structure and the fear of the middle class of falling in the social order. In *David Copperfield*, Dickens draws on his terrifying and wounding childhood encounter with debtors' prison and his experience working in a blacking factory to portray a nightmarish fall into the lower class.[44] In *Nicholas Nickelby*, Dickens sets his protagonist, Nicholas, on the path from lost middle-class respectability to the topsy-turvy world of the theater and the Crummles stage company, until Dickens allows him to crawl back to the middle class.[45]

The apparent contradictions in *Guarding Life's Dark Secrets* are, at least in part, most likely a reflection of an open-ended quality in the terminology that Friedman uses to discuss these matters. Sometimes Friedman speaks of the elite class, by which he means "the men who ran the country and made the laws" (p 140). Other times, he speaks of "high-class respectable men" as opposed to "members of the lower orders" (p 140). Sometimes, Friedman seems to have staked out a three-part division: (1) elites; (2) "ordinary people," who were also open to temptation and occasionally protected by the Victorian compromise; and (3) an underclass from which one expected only trouble (pp 30, 35, 37). Other times, Friedman writes about "the rich, the well-born, and the dominant political classes" as opposed to "ordinary citizens," which would seem to collapse the middle class and lower orders (p 140).

There is also use of the term "bourgeoisie," which scholars traditionally have used to depict a certain slice of the middle class in Europe, whose status rests on education and job status as opposed to the

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44 See generally Charles Dickens, *David Copperfield* (Oxford 1997) (originally published 1850). For Dickens's childhood experiences, see generally Peter Ackroyd, *Dickens: Public Life and Private Passion* (Hylas Publishing 2002).

45 See generally Charles Dickens, *Nicholas Nickelby* (Oxford 1987) (originally published 1839).

true aristocracy and the proletariat. Friedman asks why the law created "institutions and arrangements that consciously or unconsciously went to some lengths to shield and coddle the reputation of the bourgeoisie" (p 140). At a different point, he summarizes, "In short, law and society protected bourgeois respectability in two quite distinct ways: first, by punishing (gross) deviations from the standards; and second, by providing a shield or cover-up for *some* deviations from those very standards" (p 13). Classic members of the bourgeoisie include Gustave Flaubert's characters in *Madame Bovary*: Emma Bovary's husband, Charles, with his mediocre medical practice, the crafty merchant Lheuereux, and Monsieur Homais in his pharmacy shop.[46] Friedman may or may not have this slice of the middle class in mind.

The shifting terms that Friedman employs in talking about class in *Guarding Life's Dark Secrets* result in at least some lost analytical clarity. Class structure in the United States has changed over time: the Jeffersonian ideal of a nation of small landowners has given way to an urbanized and suburbanized country—one with great wealth concentrated in few hands, a shrinking middle class, and a large underclass.[47] Other important developments in this period have been the increasing role that education plays in upward social mobility, and the persistent influence of race.[48] There is also a complex relationship between class and gender as elements of social structure.[49] Friedman talks about how the law works to "protect the people who matter in society" (p 12). Yet, over the period that he writes about in the book, "the people who matter" changed. As Friedman observes, for example, regarding the late twentieth as well as the twenty-first century, "[e]lites tend to get

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46 See generally Gustave Flaubert, *Madame Bovary: Patterns of Provincial Life* (Knopf 1993) (originally published 1857).

47 For a discussion of the increased concentration of wealth in fewer hands from 1975 to 1995, see Andrew Hacker, *Money: Who Has How Much and Why* 10–11, 223–40 (Scribner 1997). As Hacker has more recently observed, "[T]he 300,000 top Americans collectively have almost as much income as the bottom 150 million Americans—nearly half the population." Andrew Hacker, *They'd Much Rather Be Rich*, 54 NY Rev Books 34 (Oct 11, 2007).

48 On the role of education, see Claude S. Fischer and Michael Hout, *Century of Difference: How America Changed in the Last One Hundred Years* 3, 9–22 (Russell Sage 2006) ("[S]ince midcentury, education became a key sorter of Americans."). For a discussion of the role of race focusing on blacks in America, see Orlando Patterson, *Black Americans*, in Peter H. Schuck and James Q. Wilson, eds, *Understanding America* at 410 (cited in note 43) (noting "persisting gaps in achievement" between blacks, Hispanics, and whites at the same time that there has been growth of "a thriving black middle and upper class").

49 For a perspective on this question based on empirical sociology filtered through a theoretical Marxist perspective, see Erik Olin Wright, *Class Counts: Comparative Studies in Class Analysis* 239–78 (Cambridge 1997) (finding variations in inequalities due to class and gender that vary independently of each other).

redefined as celebrities" (p 226).[50] Without consistent terminology for discussing social structure, Friedman's analysis of the changes in the law, which is largely his dependent variable, fail to be connected to a host of social changes. I return to this point about law as a dependent variable below in Part III.B where I analyze Solove's vision of the law.

For Friedman, a more precise metric or series of consistent terms to track elites or the upper class would have been extremely useful. Class can be defined in relation to means of production, to scarce skills, to the ability to hire labor, and to authority.[51] As a different example, one might discuss class by looking at multiple, paradigmatic categories drawn from established patterns of cultural discourse. In an illustration of this technique in a recent article involving analysis of gendered judicial interpretations of law, Jeannie Suk looks at a series of images of women in recent Supreme Court decisions about privacy.[52] She shows how the past is a prologue, and how different justices draw on certain paradigmatic images of women, which then shapes their evaluation of the underlying legal interests in a series of cases.[53] Suk carefully unpacks the meaning of each image and demonstrates the historical associations that different justices brought to a different meaning of femininity.[54] In a summary, she states, "Privacy is the lady of the house in her bath, the lady at home receiving callers, the battered wife in the disordered home."[55]

2. Money, money, money.

As a further thought, one also wonders if society treated access to information about money and sex in different ways over the period that Friedman considers. In a review of Gerald Gunther's biography of Learned Hand, Richard Posner wondered in 1994 why Gunther did

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50 As a further example, in writing about the history of censorship in the United States, Friedman observes that what the "elites" typically were permitted to see and read was not the same as the masses (p 156). Yet, the definition of and membership in the "elite" class in mid-eighteenth-century America was certainly different than in mid-nineteenth-century America, and tracking the changes in the makeup of the structure of elite society against changes in censorship law would have been rewarding.

51 Wright, *Class Counts* at 20–25 (cited in note 49).

52 See generally Jeannie Suk, *Is Privacy a Woman?*, 97 Georgetown L J 485 (2009).

53 Id at 488–513 (noting, for example, that Justice Antonin Scalia's image of the lady in the bath in *Kyllo v United States*, 533 US 27, 38–39 (2001), is a "familiar Western trope").

54 Id (contrasting Justice David Souter's image of a high-society lady receiving callers with Chief Justice John Roberts's image of a battered woman in *Gregory v Randolph*, 547 US 103, 117–18 (2006)).

55 Id at 513.

not write more about Hand's finances.[56] Posner drew a contrast between this lack of curiosity about Hand's money and all that Gunther wrote about other aspects of Hand's personal life, including the nature of Hand's relationship with his wife. In this review, Posner also expressed a mock concern that in raising this question it might make him seem "more interested in money than in sex."[57]

At the risk of running this same danger, I wish to offer my own thoughts about money and privacy. Specifically, information about the confidentiality of one's tax returns provides a window into attitudes toward financial privacy. In my own study of this topic, I have found that the shifting substantive meaning of taxes over American history makes it somewhat difficult to analyze changes in attitudes toward the privacy of personal tax data.[58] Taxes have gone from being predominately tariffs levied on imports, which only the wealthy were able to purchase, to taxes on income, beginning during the Civil War, which again reached only the most wealthy Americans.[59] It was only relatively late in American history, during World War II, that a federal income tax was finally levied on a broad segment of the population.[60] The enshrining of a bedrock concept of tax privacy in the Internal Revenue Code only occurred in 1974, as part of a series of post-Watergate legislative reforms.[61]

The history of tax privacy demonstrates, first, that a progressive tax rate, which allows deductions in the name of other policy considerations, brings with it a requirement for collection of widespread personal data about many areas of life. While there has been a high level of public concern about the privacy of tax information, there has also been recognition that fairness in the overall tax burden and effectiveness in tax administration generally weigh against any individual right

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56 See Richard A. Posner, Book Review, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L J 511, 533 (1994), reviewing Gerald Gunther, *Learned Hand: The Man and the Judge* (Knopf 1994).

57 Id at 534.

58 Paul Schwartz, *The Future of Tax Privacy*, 61 Natl Tax J 883, 883–95 (2008) (noting that the government mostly treated tax returns as public records until confidentiality of such information was expressly codified in 1976).

59 Id at 883–90.

60 Thus, the income tax bill enacted in 1913 affected fewer than 4 percent of Americans and left unaffected the "average working American." Steven R. Weisman, *The Great Tax Wars* 281 (Simon & Schuster 2002). A wartime statute in 1917 expanded the reach of income tax to millions of Americans by lowering the threshold for taxation to $1,000 in income for an individual, and $3,000 for a couple. Id at 336. Nonetheless, by 1920 "out of a population of 106 million Americans and a workforce of 41.7 million, only 5.5 million income tax returns were filed." Id at 345. It was not until World War II that "for the first time the income tax became a mass-based phenomenon" in the US. Id at 354.

61 Id. The key provisions are codified at 26 USC § 6103 (regulating the general confidentiality of tax return information, while providing specific authorizations for disclosure).

of nondisclosure vis-à-vis the government.[62] Tax information includes data about medical expenses, charitable donations, and many other kinds of sensitive information.[63] In the area of family structure alone, tax law permits a deduction for the party who pays alimony, places a tax on alimony for the party who receives it, and determines which divorced parent may claim a deduction for a dependent child.[64] Thus, information about one's finances reveals person-specific information that is about far more than money.

The history of tax privacy also shows that a long-running debate has taken place about (1) the compliance benefits flowing from widespread publicity for personal tax information, versus (2) the negative impact on personal privacy.[65] Over time, the policy interest in compliance through *public* access to such data has declined. The focus of compliance has shifted, to making sure that the government has the access to personal tax information that it requires to see that individuals comply with their tax obligations and for other enforcement reasons, such as oversight of child support obligations.[66] The US has also acted to allow the sharing of personal tax information among tax compliance officials in different nations. Under US pressure, even historical Swiss bank secrecy has started to crumble.[67]

In sum, the topic of tax-information privacy reveals, simultaneously, that there has been a high public level of concern regarding such data and successful governmental initiatives to insure that the government gains the kind of access to personal information that it needs to promote compliance.[68] It would be rewarding to hear Friedman's thoughts on whether people were equally concerned in the past as in the present about access to information about their finances, and how Americans thought about this issue over time. It would also be rewarding to compare the public's concerns about access to information regarding finances with its concerns about access to information regarding health, sexual practices, and family life.

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62 At early points in US history, the government took this proposition to an extreme in efforts to collect its fair share of individual taxes. At times in the nineteenth century, for example, the government permitted newspapers to print information about individual tax obligations to discourage the filing of fraudulent returns. Schwartz, 61 Natl Tax J at 884 (cited in note 58).

63 For the provisions containing the individual deductions, see 26 USC §§ 151–224.

64 26 USC §§ 71, 152(e), 215.

65 Schwartz, 61 Natl Tax J at 887–92 (cited in note 58).

66 Id at 886.

67 See Lynnley Browning, *A Swiss Bank, Not By Choice, Will Open Files*, NY Times A1 (Feb 19, 2009) (reporting that UBS will divulge names of Americans who used offshore accounts to evade taxes).

68 Regarding the core provisions allowing governmental access to tax information in § 6103 of the Internal Revenue Code, I have summarized, "The list of authorizations in Section 6103 can be characterized as long and extensive." Schwartz, 61 Natl Tax J at 894 (cited in note 58).

3. The future and the past.

When Friedman turns his thoughts to the future, he wonders about the impact of culture, media, and technology on privacy. He views us as living today in a "Peeping Tom society," which he also calls "a prying, gossiping society" (p 259). To make matters worse, computers now collect, store, and share massive amounts of personal information. As Friedman observes, there is a newfound ability of companies and the government to "compile a kind of dossier on you, your life, and your works, terribly complete and with devastating accuracy" (pp 268–69). There is also a new focus, an understandable one after 9/11, on national security (p 266). Finally, a "small but significant number of people are willing to tell everything," whether on television's many reality shows, blogs, or YouTube (p 260).

Friedman ends his book wondering about the impact of modern technology on the Victorian compromise's leeways, formal and informal, the "little bit of stretch and give—or, if you will, little bit of heart and forgiveness, at least for respectable people" (p 267). The danger is that "[m]odern technology has the power to destroy these leeways" (p 267). We have gone from the nineteenth century, "a world of privacy and prudery, a world of closed doors and drawn blinds" to the twenty-first century, which "is the world of the one-way mirror, the world of the all-seeing eye" (p 272). Friedman worries that this world will be a heartless one of "total, 100 percent enforcement" (p 267). In contrast, perhaps the old leeways acted as "a force for the good" (p 267).

Guarding Life's Dark Secrets shows how the old regime could be both forgiving and unfair in its use of these leeways. Friedman states, "[T]he norms in fact tolerated certain deviations within certain limits. The law was like a man who uttered stern words with his fingers crossed behind his back" (p 65). As Friedman demonstrates, the metaphorical "stern man" also favored certain individuals, parties deemed otherwise respectable, in deciding whether or not to enforce the law. Although his book only briefly looks ahead, I am not sure that the future will feature as little discretion as Friedman assumes. Rather, discretion takes a different form when embedded in systems for information technology than when legal and social guardians exercise it as part of the Victorian compromise.

Technology provides a way of disguising discretion. As an example, consider data mining. In data mining, "a series of techniques are used to extract intelligence from vast stores of digital information."[69] In one variant, subject-based searches, law enforcement starts from

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[69] Ira S. Rubinstein, Ronald D. Lee, and Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U Chi L Rev 261, 262 (2008).

the usual predicate of suspicions about a known individual and then tries to gather information about this person.[70] In pattern-based searches, by contrast, the government investigator develops a model of assumptions about the activities and fundamental characteristics of culpable individuals or indicators of terrorist activities.[71] The government official then searches databases with personal and transactional information for matches, or "hits," that indicate a match between the chosen model and patterns left by suspicious individuals.[72]

Data matching involves great amounts of discretion. It is different than Friedman's "leeways" in that the discretion is largely front-loaded, or ex ante. The new discretion is also different than the old world of the Victorian compromise in another fashion: it is now centered on the process itself, as opposed to choices regarding forgiveness for a specific respectable kind of individual, who violated the moral code. The discretion occurs, for example, at the time when the software code for the match is written, when decisions are made about which databases to include, and when choices are made regarding accountability measures, such as standards for the validation of models used in data modeling. Thus, discretion today is hidden in technical decisions about software and system design.

II. SOLOVE'S WORLD OF REPUTATION AND RUMOR

The Future of Reputation looks at the dark side of the free flow of information on the Internet. The bright side is, of course, easy to see; the Internet places a borderless, endless library in our homes and permits communication with others all but instantly. At the same time, however, "the free flow of information threatens to undermine our freedom in the future" (p 4). The dark side begins with how "[d]etails about your private life on the Internet can become permanent digital baggage" (p 10). The Internet can cause lingering damage to people's reputations as the records of personal information become permanent, easily searchable, and otherwise accessible in ways never before possible. A recent country song proclaimed, "Everyone dies famous in a small town."[73] Something similar can happen on the Internet—and while affected parties are alive.

Moreover, established social practices involving gossip and shaming are now moving to the Internet and taking on powerful new negative aspects. The two are related: gossip is the process of sharing social

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70 Id at 262–63.

71 Id at 262.

72 Id at 262–63.

73 Miranda Lambert, *Famous in a Small Town*, in *Crazy Ex-girlfriend* (May 1, 2007).

information, and shaming is a way of enforcing social norms, which are informal rules of conduct. Solove depicts a flood of gossip and incommensurate shaming episodes, as well as an ocean of bad, incorrect, and incomplete information in cyberspace.

The Future of Reputation begins with a story that involves blogs and the "dog poop girl," as Solove calls the woman who let her dog defecate in a subway train in South Korea one fateful day and then refused to clean up the mess (pp 1–11). An international public shaming episode followed.

A. Gossip, Shaming, and Law in the Global Village

The story of the dog poop girl provides a powerful starting point for *The Future of Reputation*. The incident would likely have been forgotten had a fellow passenger not taken a picture of the dog poop girl, her pet, and the fecal matter on the floor of the subway, and had this photograph not spread around the Internet, migrated to mainstream media in South Korea, and become national news in that country (pp 1–2). The resulting public shame and embarrassment led the dog poop girl to drop out of her university. Even then her travails were not over. In short order, a blog in the United States picked up the story, which led another blog in the United States, Boing Boing, to discuss it.[74] Boing Boing receives almost ten million visits per month, which ranks it ahead of most traditional media sources (p 2). Soon, newspapers and websites around the world were discussing the dog poop girl and using her actual name in many of these stories.

Solove wonders whether this international notoriety was appropriate or merited. All of us have engaged in some rudeness or bad behavior at one time or another, even if these actions did not involve pets and cleaning up afterwards. Solove asks, "[I]s it going too far to transform the dog poop girl into a villain notorious across the globe?" (p 2). He offers a kind of requiem for her and her sufferings: "[N]ow her image and identity are eternally preserved in electrons. . . . [F]orever, she will be in the digital doghouse for being rude and inconsiderate. . . . And should people's social transgressions follow them on a digital rap sheet that can never be expunged?" (p 8).

Thus, Solove's concerns about the Internet's dark side begin with the Internet's creation of a permanent digital record of transgressions and other, sometimes random, information. He also worries that the

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[74] Solove does not mention the woman's name. For those who are not willing to accept the Solovian virtues of knowing less (about that, more below), see Mark Frauenfelder, *Woman Doesn't Clean up Her Dog's Mess—Blog Infamy Ensues*, Boing Boing (June 29, 2005), online at http://www.boingboing.net/2005/06/29/woman-doesnt-clean-u.html (visited Sept 1, 2009).

public can instantly and remotely search massive amounts of data of variable accuracy (pp 35–38). He breaks his analysis further into separate studies of gossip and shaming online.

Gossip has now moved online, and one result is that gossipers have far less control over who receives their information. In addition, as we move to the global information village, various data fragments can have a devastating impact. Solove argues, "The people of the global village have weak rather than strong ties; they are often known not for their whole selves but for various information fragments others hastily consume" (p 33). And he adds, "[I]t can be quite awkward to confront people about the weird things you find out about them online" (p 38).

Like Friedman, whose scholarship he cites, Solove views America as a land of social mobility and second chances (pp 72–73). The difficulty today is that the Internet strips away context and also makes gossip permanent. Indeed, as I noted in reference to Friedman's book, the ability to search through newly digitized collections of information, such as old newspapers, means that past information is more accessible than ever before. As I discuss below, however, Lawrence Lessig and Robert Post have wondered whether these issues are really questions concerning privacy, or rather are about attention span (Lessig) or public comprehension (Post).[75]

According to Solove, moreover, the negative impact of gossip is heightened by a similarly problematic dimension of shaming in the digital age (p 78). Traditionally, shaming, like gossip, has occurred within the borders of a fixed, geographical community and functioned as a means of reinforcing behavioral norms. As is the case for gossip, there are significant problems with shaming in the context of the Internet. It can lead to permanent alienation, disproportionate punishment, a lack of due process, and vengeance and bullying (pp 74–78). In his example of the worldwide discussion of the behavior of the dog poop girl, Solove already introduced the theme of how difficult it is to keep online shaming within any limits. In the worst cases, Internet shaming can even reach the point of vigilantism and violence (pp 99–101). Solove's concern is that "[i]nstead of enhancing social control and order, Internet shaming often careens out of control. . . . Shaming becomes uncivil, moblike, and potentially subversive of the very social order that it tries to protect" (p 102).

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[75] See Lawrence Lessig, *Privacy and Attention Span*, 89 Georgetown L J 2063, 2070–71 (2001) (arguing that in a world of short attention spans, private information will continue to be judged out of context, and that privacy will not always be able to remedy this problem); Robert C. Post, *Three Concepts of Privacy*, 89 Georgetown L J 2087, 2088 (2001) (critiquing the view that privacy should work to block information in order to prevent error because public knowledge and comprehension is "necessarily dependent upon information").

As an illustration of this point, Solove discusses the Nuremberg Files website, which listed the names and personal information of physicians who performed abortions and of their families (pp 100–01). The website also contained the names of abortion clinic owners and employees. In one instance, after a sniper killed a doctor at his home in New York, the Nuremberg Files website placed a strikethrough on the doctor's name.[76] This example of Internet vigilantism is chilling.

What, then, is Solove's response to this dismal future for reputation? In Part II of his book, Solove seeks to use the law and other means, including norms, to locate a middle ground. His purpose is to suggest a series of "delicate compromises that involve making some modest sacrifices on both sides" (p 190). At the core of Solove's approach is the bedrock acceptance of the law and of lawsuits. On the one hand, he rejects an authoritarian approach, which would involve direct restrictions on Internet speech (p 120). This approach would be oppressive of free speech and problematic under existing First Amendment jurisprudence. Solove argues, "Lawsuits can chill speech," especially "[i]f it is too easy to win a lawsuit" (p 120). On the other hand, Solove also rejects the libertarian approach (p 190). Under that approach, the Internet would be permitted to be a law-free environment. The problem is that "the threat to privacy by the increasing spread of personal information online is too significant to ignore" (p 190). Thus, *The Future of Reputation* favors a middle ground that permits lawsuits for certain privacy violations, but in which the law generally functions as a background threat and informal attempts will first be made to resolve privacy disputes (pp 113, 123–24). Solove also argues for use of technology to heighten privacy, and, in some cases, alterations to the law to increase formal privacy protections. Finally, there are some instances in which he thinks the law gets it right, more or less.

1. Law in the background.

In many instances, Solove wants the law to only be used after failure of other means of resolving conflicts about privacy (p 122). As he summarizes this point, "[L]aw must function as a credible threat yet lawsuits must be a last resort, a measure that provides redress only in egregious cases or when informal ways to resolve disputes don't exist or have failed" (p 190). Somewhat more specifically, he writes

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[76] Following an en banc ruling by the Ninth Circuit—to the effect that the site constituted a "true threat" to the doctors' lives and that such threats were not protected speech under the First Amendment—the original website was changed. See *Planned Parenthood of Columbia/Willamette, Inc v American Coalition of Life Activists*, 290 F3d 1058, 1063 (9th Cir 2002) (en banc). For the revised Nuremburg Files site, see *The Nuremburg Files* (Pathway Communications), online at http://www.christiangallery.com/atrocity (visited Sept 1, 2009).

that lawsuits should only be open "if the speaker doesn't take reasonable steps to address the harm or if the damage is irreparable. Perhaps parties should even be required to seek alternative dispute resolution before going to court" (pp 191–92). At any rate, the need is for the law to "encourage people to work out their problems among themselves, which will often provide quick and inexpensive results" (p 192). It is not entirely clear, however, how Solove intends these aims to be operationalized across a variety of modern contexts in which information is collected and processed on the Internet. I return to this point in Part II.A.2.

Solove is more specific, however, regarding the need for society to accept a norm, bolstered in turn by law, in which people are willing to accept less information. Indeed, he has further developed this concept in another important book, *Understanding Privacy*.[77] As an example of how we could be led to accept less personal information, social network websites should require people to promise confidentiality as a term of membership (p 192). Solove writes, "In other words, people should be given choices over how to control the dissemination of their personal information, and those reading people's profiles should be aware of (and bound to) those preferences" (p 192). Once this technological fix is in place, a revitalized law of confidentiality would kick in, and the law would hold accountable the people who violated these agreements.

2. Technology.

As the preceding example regarding social network websites indicates, Solove addresses the issue of the technological design of websites and other elements of the Internet. Important work by Lawrence Lessig and Joel Reidenberg a decade ago argued that technological configurations and system design choices constitute a powerful baseline for information privacy.[78] In the information privacy context, scho-

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77 See Daniel Solove, *Understanding Privacy* 1–11 (Harvard 2008) (developing a taxonomic framework for privacy and arguing that privacy should be assessed based on its importance to society, rather than in terms of individual rights). For his treatment of these themes in an article, see Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure*, 53 Duke L J 967, 967 (2003) (responding to the critique that disclosure protections both inhibit freedom of speech and restrict useful information for judging others). In contrast, Lior Strahilevitz is the chief contemporary theoretician of the virtues of knowing more. See Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw U L Rev 1667, 1669 (2008) (advocating "government policies that will hasten the widespread availability of previously private consumer information in certain contexts").

78 See Lawrence Lessig, *Code and Other Laws of Cyberspace* 109 (Basic Books 1999) ("Nature doesn't determine cyberspace. Code does. . . . How code writers change it could depend on us."); Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, 76 Tex L Rev 553, 554–55 (1999) (discussing how technological capabilities and system design choices impose rules on participants, and how user preferences also create overarching default rules). For a critical reaction to Lessig's arguments about privacy, see Paul M.

lars such as Jerry Kang and I began in the late 1990s to consider how technology and system design would shape privacy in cyberspace, as then constituted.[79]

In *The Future of Reputation*, Solove returns to this topic and shows how Internet "architecture" can have a profound impact on privacy in the brave new world of blogs and social networking sites (pp 200–04). For example, Solove wishes social networking websites would change their defaults so they no longer "encourage people to expose a lot of information with very little thought about the consequences" (p 200). The companies that run these sites should change the defaults on these sites so that openness will not be privileged over privacy (p 201). The law is not to require this result, but norm entrepreneurs, such as Solove, should somehow raise the privacy consciousness of these companies and motivate them to take this step. He writes, "The law should not force companies to set specific defaults, but the companies should be encouraged to think about how the design of their websites affects privacy" (p 201).

More generally, technology should be deployed to allow more privacy choices on social networking websites. The need is for a more granular approach to one's social relationships (p 202). Current categories are too sociologically simplistic—for example, Facebook envisions a social universe that consists of "friends" and the rest of the universe (p 202–03). Solove points out that people actually operate within a social system with elaborate levels of exposures and different ways of sharing information with different members of one social network (p 202).

3. Alterations to the law.

At times, Solove wishes for there to be more law, or, at least, more effective law. For example, he seeks to expand the law's recognition of privacy so that it extends to more circumstances in which information is gathered from public observation. Privacy should not be an on-off switch, which fails to exist when one is in public areas (pp 162–63). The world is not a binary place that exists in only two distinct realms, public and private (p 166). More specifically, an as-

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Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-control, and Fair Information Practices*, 2000 Wis L Rev 743, 744–45.

[79] See Schwartz, 2000 Wis L Rev at 776–86 (cited in note 78) (arguing in favor of a vision of fair information practices as liability rules embedded in a compulsory licensing system); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand L Rev 1609, 1671 (1999) (distilling fair information principles around four essential requirements: defined obligations that limit the use of personal data, transparent processing systems, limited procedural and substantive rights, and external oversight); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan L Rev 1193, 1201 (1998) (advocating a default rule in cyberspace that allows only "functionally necessary" processing of personal information unless the parties explicitly opt out).

sessment of a privacy interest in publicly observed information about behavior should involve examination of three factors: accessibility, confidentiality, and control (pp 169–86). Solove discusses a number of incidents that illustrate different facets of each of these elements. Nonetheless, it remains uncertain how these elements can be combined into a single yardstick for assessment of individual cases.

In *The Future of Reputation*, Solove also identifies problems with the Communications Decency Act of 1996 (CDA),[80] a federal statutory provision that provides broad immunity for speech on the Internet. The relevant statutory language reads, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[81] Like the rules for publicly observed behavior, the CDA's categories are binary: the person who sends a post or other information to a company that maintains a web site or accepts user-generated content is liable for the content, and not the company, which the CDA shields from liability. Solove writes, "Unfortunately, the law currently immunizes people for comments on their blogs, even when they know about the harmfulness of the information and ignore pleas to do anything about it" (p 191). As long as there is some other responsible information content provider, the law frees from responsibility the person who runs the site and knows there is defamatory or otherwise harmful material on it.[82] As part of a better reconciliation of the rights of free speech and privacy, Solove proposes that "a blogger who knows about a statement on his site that is defamatory or invasive of privacy should be obliged to take it down" (p 191). Here, too, further details about the pros and cons of specific solutions would be helpful. In a recent article, Danielle Citron has sought to develop such "orderly articulation of the standard of care for ISPs and website operators."[83]

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80 Communications Decency Act of 1996 (CDA), Pub L No 104-104, 110 Stat 137, codified at 47 USC § 230.

81 47 USC § 230(c) (1).

82 See, for example, *Batzel v Smith*, 333 F3d 1018, 1027–28 (9th Cir 2003) (noting that Congress, in passing the CDA, wanted to "encourage the unfettered and unregulated development of free speech on the Internet" and to encourage content providers to self-police for offensive material on the Internet); *Zeran v America Online*, 129 F3d 327, 328 (4th Cir 1997) (holding that America Online was immune from liability, even though it delayed removing defamatory messages posted by an unidentified third party); *Blumenthal v Drudge*, 992 F Supp 44, 50–53 (DDC 1998) (holding that America Online was immune from liability, where it merely made the Drudge Report's gossip column available to its subscribers); *Barrett v Rosenthal*, 146 P3d 510, 513 (Cal 2006).

83 See Danielle Keats Citron, *Cyber Civil Rights*, 89 BU L Rev 61, 123 (2009) (proposing that website operators configure their sites to retain visitors' IP addresses so that while visitors can post anonymously, their identities can still be traced if they engage in unlawful behavior).

Solove also wants employers to notify applicants whom they Google (p 203). Specifically, he proposes that a "requirement that employers who conduct online searches of applicants notify them about the search will at least give applicants a chance to be heard" (p 203). The proposal is certainly intriguing. Solove does concede that it might be difficult to enforce, and, as a further difficulty, admits that enforcement might lead to subpoenas to collect information about management searches (p 203). In this fashion, a policy proposal to protect the privacy of some employees might lead to incursions on the privacy of employers and other employees.

This result does not necessarily require abandonment of the proposal. In a similar fashion, after all, the law of sexual harassment in the workplace, as Jeffrey Rosen warns, can lead to significant violations of privacy.[84] Rosen is concerned with the way that harassment claims can lead to sweeping investigations of consensual relationships involving innocent third parties.[85] But as Robert Post has responded to Rosen, "antidiscrimination law limits individual liberty in the interest of achieving specified social goals."[86] Its impact on privacy needs to "be measured against the consequences of failing to intervene."[87] In a similar fashion, Solove might have assessed the inadvertent privacy costs of his proposed regulation of employers' use of search engines to gather information about job applicants. Solove should explain whether these costs could be minimized and whether this regulation ultimately would be more beneficial than harmful.

4. Tweaking the status quo.

Sometimes Solove calls for only modest alterations to the law or modest changes in how courts interpret it. For example, he proposes that in more cases the law allow people to sue without having their names revealed on record (p 148). He also calls for limits on the ability to speak about one's own life when it reveals intimate information about others (p 134). Such a limit would restrict, for example, the right to write an autobiography. In this regard, Solove calls only for a requirement that one not speak about others "irresponsibly" (p 135). Even this obligation, however, ignores the venerable, if ignoble, literary tradition of score settling in just this venue, and I will, at any rate, return to the topic of responsible memoirs in a moment.

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84 See Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 94–95 (Random House 2000).

85 Id at 94.

86 Post, 89 Georgetown L J at 2097 (cited in note 75).

87 Id at 2096.

Regarding fictitious suits, as we have seen, Friedman noted that the American legal system generally disfavors this approach. In Solove's view, the law should not disfavor fictitious names in this fashion (p 120). He argues, "The American approach . . . penalizes people for using the law to protect their rights" (p 120). In reaction, Solove wishes that people be allowed "to seek a remedy for the spread of information about them without having to increase the exposure of the information" (p 121). Here, too, more details about this proposal would have been useful. One wonders how courts should decide which litigants to protect in this fashion and how to assess the cost to the American tradition, which opens the administration of justice to public view.

To return to the limited right to engage in autobiography, Solove argues that speech about one's own life is not unfettered once it implicates others (pp 134–35). Basically, Solove would take into account the potential for damage to others and, as noted above, impose an obligation not to have one speak about others "irresponsibly." To illustrate his views, he discusses *Bonome v Kaysen*[88] (pp 135–36). The case offers a rich study of how one's reputation is intertwined with that of others.

Susanna Kaysen was the bestselling author of *Girl, Interrupted*, which was made into a successful film. The litigation in question concerned her second memoir, *The Camera My Mother Gave Me*. This autobiography concentrated on her troubled relationship with her boyfriend, J. Joseph Bonome. As the *Bonome* court summarized, "One of the central themes of the book concerns the impact of her chronic pain on the emotional and physical relationship with Kaysen's boyfriend."[89] The memoir featured graphic descriptions of Kaysen's sex life with Bonome, depictions of his insensitivities to her problem, and her discussion of whether he had tried to rape her.[90]

In her book, Kaysen did not mention Bonome's name and altered details of his life, such as his occupation and the place from which he came.[91] Yet, the court observed that Bonome's family, friends, and clientele knew that he was having a relationship with Kaysen, which led them to identify the character in the memoir as a portrayal of him.[92] The *Bonome* court acknowledged that the book may have caused Bonome to suffer "severe personal humiliation" and severe damage to his reputation "among a substantial percentage of his clients and acquaintances."[93]

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88 2004 WL 1194731 (Mass Super Ct).
89 Id at *2.
90 Id.
91 Id at *1.
92 *Bonome*, 2004 WL 1194731 at *2.
93 Id.

Nonetheless, the court found for Kaysen. It did so because she had a right to tell her own story, which in this context implicated "her own right to disclose intimate facts about herself."[94] The court assessed the conflict of this interest with Bonome's own right "to control the dissemination of private information about himself."[95] The critical point proved to be the court's assessment that the details about the couple's "sexual affairs" were "included to develop and explore . . . broader topics . . . of legitimate public concern."[96] These topics were, first, "the way in which Kaysen's undiagnosed physical condition impacted her physical and emotional relationship with 'her boyfriend,'" and, second, "the issue of when undesired physical intimacy crosses the line into non-consensual sexual relations in the context of her condition."[97] In light of the right guaranteed by the First Amendment, for Kaysen to speak about her own life, there need only be a "sufficient nexus between those private details" and at least one issue of public concern.[98] It is also clear that the concept of a matter of public concern was one to which the court took a broad approach.

Finally, the court found it important that Kaysen did not use Bonome's name in the book.[99] As a result, Bonome was not subject "to unnecessary publicity or attention."[100] The court concluded, "The realm of people that could identify Bonome as the boyfriend are those close personal friends, family, and business clients that knew of the relationship."[101] The resulting harm within this group was one that Bonome would suffer without remedy.

For Solove, this decision was entirely correct (p 136). He agrees with the court's estimation that Kaysen's and Bonome's lives were intertwined, and that Kaysen had a right to write about her own life (pp 135–36). In addition, a critical factor in his estimation is the extent to which Kaysen took steps to avoid damage to her boyfriend. Solove writes, "The most important consideration, however, should have been whether it was possible for Kaysen to avoid identifying [Bonome]" (p 135). In his judgment, Kaysen took reasonable steps in this regard: "She did indeed take as many steps as possible to conceal the identity of [Bonome], not only omitting his name but even altering details about his life to further prevent his identification" (p 135). Indeed, "[i]t wasn't

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94 Id at *4.
95 Id.
96 *Bonome*, 2004 WL 1194731 at *4–6.
97 Id at *6.
98 Id.
99 Id at *7.
100 *Bonome*, 2004 WL 1194731 at *7.
101 Id.

possible to do much more"; therefore, Kaysen "appears to have exercised the appropriate level of care in the steps she took to protect [Bonome] from being identified. She should win for this reason" (pp 135–36).

One can imagine, however, that this kind of case-by-case line drawing would introduce substantial uncertainty for memoirists. There is, at any rate, no currently imposed legal obligation that memoirists disguise names. Moreover, the *Bonome* court's requirement of a "significant nexus" between private details and a public issue would be easy to meet. As an illustration of both points, we can consider *Haynes v Alfred A. Knopf, Inc*.[102]

Writing for the Seventh Circuit, Judge Posner considered a claim by Luther Haynes under the public disclosure tort against the publishers of Nicholas Lemann's *The Promised Land: The Great Black Migration and How It Changed America*. The book chronicled the migration of five million African-Americans from the rural South to urban areas in the North from 1940 to 1970. It focused on the story of Ruby Lee Daniels who told Lemann numerous personal details concerning her troubled marriage to Haynes.[103] The book recounted Haynes's squandering of their money, his alcohol abuse, and his affair with a neighbor.[104] Posner found that it was appropriate to use Haynes as a figure in a book about the black migration to the North. The private details of Haynes's life were related to a public issue. Moreover, Lemann was not obliged to write a "sociological novel," in the fashion of "Dickens, Zola, Stowe, Dreiser, Sinclair, Steinbeck, and Wolfe."[105] In contrast to Solove's preferred approach, Posner found no need to change Haynes's actual name or disguise any details about his life. For Posner, Lemann was engaged in the "nonquantative study of living persons," which was an established "category of scholarship."[106] Finally, he added, "Reporting the true facts about real people is necessary to obviate any impression that the problems raised in the [book] are remote or hypothetical."[107]

B. Shasta County, the Instrumentalization of Recommendations, and *Reputation 2.0*

The Future of Reputation provides an excellent analysis of the impact of the online world on personal privacy. Solove also proves a perfect and tireless guide to this digital world; he has an unfailing eye for

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102 8 F3d 1222 (7th Cir 1993).
103 Id at 1224–25.
104 Id.
105 Id at 1233.
106 *Haynes*, 8 F3d at 1233.
107 Id (quotations omitted).

revealing details and a mastery of all technical aspects of his subject. As a consequence, there is a certain embarrassment for a Reviewer in considering areas for improvement in this book—as indeed is equally the case for Friedman's superb, *Guarding Life's Dark Secrets*. Nonetheless, social psychology provides robust proof of the alacrity with which humans adapt their behavior to an assigned role (Stanford Prison Experiment).[108] In that light, I will adapt my behavior to the role of a critic and suggest two areas that Solove's book might have developed further and some topics for the future. In other words, this Reviewer is already hoping for the next edition, which I will term *Reputation 2.0*, and which will update Solove's analysis as the Internet develops and new digital platforms emerge on it.

1. From Shasta County to cyberspace.

Solove is interested in how norms can shape behavior, and supplement and even supplant law. He writes as a norm entrepreneur and privacy advocate, and seeks to have social norms develop along the lines of his own preferences. For example, Solove discusses the need for a code of ethics for bloggers (pp 195–96). He draws an analogy to norms of journalism and sketches a code of blogosphere behavior:

> People should delete offensive comments quickly if asked. People should ask permission before speaking about others' private lives. Someone who speaks about another person's private life without her consent should take steps to conceal her identity. People should avoid posting pictures of other people without getting their consent. People should avoid Internet shaming (p 195).

These requirements are well characterized as "norms of restraint," as Solove terms them (p 195). But, as he also concedes, such rules are "easier stated in theory than developed or enforced in practice" (p 195). The blogosphere is growing too quickly, in his estimation, for there to be stable norms.

How are norms to be created and maintained in cyberspace then? At this juncture, Solove looks to the law, at least in part, and states, "The law can help shape norms in the blogosphere, however, by threatening to become involved if such norms don't evolve" (p 196). One way that it can do so is to "make the boundary between online and offline more salient in people's minds" (p 196). Otherwise, people will view the Internet as a simple extension of their offline world.

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[108] See generally Craig Haney, Curtis Banks, and Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Intl J Crim & Penology 69 (1973). For a discussion of social psychology, see generally Elliot Aronson, *The Social Animal* (Freeman 7th ed 1995).

Thus, Solove recognizes that cyberspace is different, and that these differences affect privacy and norm generation alike. Here, I would have liked to have read more from Solove about the relationship of cyberspace to norm generation. At one point, Solove discusses Robert Ellickson's seminal work, *Order without Law: How Neighbors Settle Disputes*, which examines conflict resolution mechanisms of ranchers in Shasta County, California (pp 193–94).[109] Solove points to the reliance of the ranchers on norms rather than law to deal with conflict. For example, stray cattle disputes do not lead to claims by ranchers against each other, or even attempts by one rancher to recoup the costs for taking care of a stray cow. As Solove summarizes, "The ranchers had a well-developed system of norms, and they didn't need to resort to the law" (pp 193–94). His conclusion from this visit to Shasta County is that the "law is a puny instrument compared with norms," and also that the law can help shape norms (p 194).

There is another possible reading of the Ellickson study, and it is one that cuts against Solove's use of this scholarship, at least without possible explanations or even modifications. The first problem concerns any use of Ellickson's *Order without Law* in a pro-privacy piece of scholarship. Ellickson generally favors gossip, and explicitly proposes that more, and not less, reputational information be circulated.[110] The second problem is that it is quite a distance from the small groups with fixed geographical limitations of Ellickson's Shasta County to Solove's wide cyberworld of reputation. As I will elaborate below, moreover, there are a number of other important distinctions to be made between Shasta County and cyberspace.

In *Order without Law*, Ellickson shows how Shasta ranchers rely on social norms, including the exchange of gossip about social behavior, to resolve disputes without resort to, and indeed without regard for, legal sanctions.[111] Solove wants to develop a norm against cybergossip, but the ranchers prove dependent on the sharing of neighborly gossip. Consider an owner of wayward livestock who fails to make amends for damages to the victim rancher. According to Ellickson, initial remedial norms in these circumstances "entitle a trespass victim to increase the pressure by circulating truthful negative gossip about

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109 See generally Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard 1991).

110 Id at 232–33, 285–86.

111 Id at 280–86. As Robert Cooter observes, "Reality cannot be explained by a powerful model of the wrong phenomenon. The Coase Theorem models bargaining over legal rights, legal rights which Ellickson found that ranchers ignore." Robert D. Cooter, Book Review, *Against Legal Centrism*, 81 Cal L Rev 417, 421 (1993), reviewing Ellickson, *Order without Law* (cited in note 109).

the cattleman's misconduct."[112] The "negative gossip," in turn, will encourage "its target to square accounts because a person's opportunities typically depend to a significant degree on reputation."[113] Thus, a desire for good reputation induces desirable conduct among the ranchers. Solove's depiction of the traditional use of gossip earlier in *The Future of Reputation* tracks Ellickson's account.

Yet, where Solove preaches the gospel of learning to live with less personal information (pp 65–66), Ellickson is profoundly prodisclosure. In Ellickson's depiction, gossip and social norms serve both as a substitute for law and as a subject for lawmaking to promote greater flow of personal data. Indeed, he wants law to require disclosure of reputational information, at least sometimes, if it is likely to be concealed or undersupplied.[114] While legally mandated disclosure may not always be needed, we live in a world of costly information.[115] Ellickson proposes that the law generally make it easier "for people to obtain the information they need to engage in informal social control."[116] In a memorable comparison, he writes, "[J]ust as the credible prospect of an omniscient and omnipotent god can deter sin, improved circulation of accurate reputational information can deter fly-by-night opportunism."[117] The intellectual heir to Ellickson in this regard is Lior Strahilevitz, who argues that "it is desirable for the government to promote the publication of information when rational discrimination is common but irrational discrimination is uncommon."[118]

If the law can help reputational information circulate more freely, people will work harder to maintain the good opinion of others. The extent to which Ellickson is prodisclosure can be demonstrated in another fashion. In regard to the free circulation of information, Ellickson sees both good and bad developments on the horizon. Writing in 1991, he states that the good development is the "arrival of the computer age," which will create promising opportunities for maintaining up-to-date information banks regarding past transgressions as well as subsequent good behavior.[119] The bad development is a potential for lawmakers' overzealous protection of privacy; such safeguards would consist of "imposing new regulatory burdens on the collection and dissemination of truthful . . . information about past behavior."[120]

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112 Ellickson, *Order without Law* at 214 (cited in note 109).
113 Id.
114 Id at 285.
115 Id at 281.
116 Ellickson, *Order without Law* at 285 (cited in note 109).
117 Id.
118 Strahilevitz, 102 Nw U L Rev at 1669 (cited in note 77).
119 Ellickson, *Order without Law* at 285–86 (cited in note 109).
120 Id at 286.

As a consequence of these aspects of his work, Ellickson offers a mixed bag for an author who argues for development of cyberspace norms that promote the sharing of less personal data. A visit to Ellickson's Shasta County provides additional reasons to wonder about norm generation in cyberspace. As we have seen, Solove concedes that the blogosphere is growing too quickly for there to be stable norms in it. In contrast, Shasta County has a stable membership. Solove also acknowledges, in language I have cited earlier, the presence of "weak rather than strong ties" in the global village (p 33). The occupants of Shasta County have strong ties. In addition, Shasta County is a small-group setting. It shares this aspect with some other private legal systems, such as those in Lisa Bernstein's work looking at merchants who sell cotton, diamonds, or grain and feed.[121] Thus, a question is whether and the extent to which the concept of group norms is "scalable" as the entity to which they apply becomes larger. The ability to enter and exit a group and the cost of enforcing norms are also likely to be critical issues.

A further distinction between norm generation in Shasta County and in cyberspace is also possible. The ranchers in Shasta County have a fairly complete picture of one another. As Ellickson shows, for example, they maintain various kinds of "subaccounts" with each other, relating to fencing obligations, assistance in collecting loose livestock, and many other services.[122] As a consequence, people in Shasta County have a ready context in which to place seemingly or actual bad behavior. Indeed, these mental accounts of behavior are held long term; in one instance, Ellickson discusses an offsetting trade in services that may have occurred with a decade separating the first and second actions.[123] On the Internet, by contrast, one bad, embarrassing, or noteworthy action can define the entirety of a person. We have already seen Solove's example of the dog poop girl. He also provides other memorable illustrations of this phenomenon involving Internet sensations such as the Star Wars Kid, Little Fatty, and Gary of the Numa Numa Dance (pp 42–48).

Finally, norms have traditionally evolved through face-to-face encounters, and so the process of creating norms in cyberspace will raise new issues in this regard. Face-to-face communication is an important part of developing social networks, establishing their norms, and, in

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121 See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich L Rev 1724, 1724–25 (2001) (noting that cotton merchants conduct business under contractual default rules that are privately drafted and settle disputes in merchant tribunals). See also, for example, Richard Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J Legal Stud 515, 528–33 (2002) (analyzing norms for allocating parking spaces on public streets "in heavy and permanent snow" conditions, as in Chicago in the winter of 2000–2001).

122 Ellickson, *Order without Law* at 79–81 (cited in note 109).

123 Id at 80.

general, making group decisions. In his study of human networks, Alex Pentland emphasizes the importance of nonverbal social signaling.[124] Social signaling needs a face-to-face element, according to Pentland, because it has a "two-way" function. It changes "both the messenger as well as the receiver."[125] Pentland calls for further work in researching how "far-flung organizations" can draw on possibilities ranging from "high-end computer graphics avatars to low-end animated computer sprites."[126] Solove's world of blogs and social networking sites may lack "continuous signaling channels between all the participants," and, even more, be without the participation of people in a group social circuitry.[127] Indeed, unlike the ranchers in Shasta County, some participants in certain online environments may be relatively indifferent to their cyber-reputations.[128]

All of which is not to say, of course, that norms and reputation are absent from cyberspace. For example, an empirical literature already exists concerning eBay reputation mechanisms.[129] Even more to the point, Viktor Mayer-Schönberger and John Crowley have developed an ambitious model of how real world regulators can take concrete steps to assist virtual world self-governance based on participatory lawmaking and fair law enforcement mechanisms.[130] The key point regards the need for a working theory of norms and reputation in cyberspace to take account of the full range of characteristics present there. To go further, I would propose that Solove's "norms of restraint" might be further developed through consideration of mechanisms for "brokerage" and "closure" in reputational clusters in cyberspace. Ronald Burt has developed a model of social capital in which relationship networks combine individuals who serve to broker new information, and to close the network from new information and members.[131] In Burt's view, trust can be associated both with redundancy of information, and

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124 Alex (Sandy) Pentland, *Honest Signals: How They Shape Our World* 82–83 (MIT 2008) ("When you send an email or issue a memo, the receiver is more likely to feel isolated from the decision making because they are missing the two-way engagement of social signaling.").

125 Id at 82.

126 Id at 83.

127 Id.

128 On the indifference towards reputation sanctions of some participants in virtual worlds, see Phillip Stoup, Note, *The Development and Failure of Social Norms in Second Life*, 58 Duke L J 311, 331 (2008) (observing that the "sanction of gossiping" in Second Life is ineffective because offenders can easily change their identities); Viktor Mayer-Schönberger and John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 Nw U L Rev 1775, 1798–1802 (2006).

129 See, for example, Paul Resnick, et al, *The Value of Reputation on eBay: A Controlled Experiment*, 9 Experimental Economics 79, 99 (2006).

130 Mayer-Schönberger and Crowley, 100 Nw U L Rev at 1825–26 (cited in note 128).

131 Ronald S. Burt, *Brokerage and Closure: An Introduction to Social Capital* 162–63 (Oxford 2005).

the ability to close networks and otherwise control people.[132] Burt's work provides extremely promising analytical tools for further ideas regarding how and where privacy norms might develop and be maintained in areas of cyberspace.

2. Images of law: the stern man and the need for more details.

Recall that Friedman viewed a system of leeways as leading to protection of privacy.[133] As Friedman states, in language that I have already cited, "The law was like a man who uttered stern words with his fingers crossed behind his back" (p 65). Interestingly enough, Solove also sees the law as offering stern words—his vision of it is perhaps as a parent lurking in the background and ready to wag a finger and punish if necessary. Recall Solove's argument that "law must function as a credible threat yet lawsuits must be a last resort, a measure that provides redress only in egregious cases or when informal ways to resolve disputes don't exist or have failed" (p 190). He views the law's role as "encourag[ing] people to work out their problems among themselves, which will often provide quick and inexpensive results" (p 192).

These images of the law are somewhat similar. Yet, in Friedman's account, law is the dependent variable, and in Solove's account, it is more of an independent variable. *Guarding Life's Dark Secrets* maps changes in law in reaction to the moral code at the heart of the Victorian compromise. Solove is more interested in how changes in law will alter the behavior of individuals. In this light, Solove is calling for a grand normative experiment. He wants the law to hover and nudge us into the right patterns of behavior in cyberspace. Here are some of his preferences: we are to learn to accept less information (pp 65–66), to withhold names when we blog (pp 100–02), to have software technicians think about how their designs affect privacy (p 201), and to take careful measures when we write about identifiable people to disguise their identities (pp 135–36).

As I have already indicated at various junctures above, I wished Solove to explain in greater detail how the law, as an independent variable, is to get us from here to there. I need a better sense of the kinds of legal nudges that were to be supplied and the circumstances in which they were best suited for application. The difficulty of this task is itself demonstrated by how *The Future of Reputation* itself handles privacy norms. Sometimes Solove chooses not to provide further publicity for someone's name. The best example would be his account of the dog poop girl, in which he also uses digital pixels to obscure her face

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132 Id.

133 See Part II.B.3.

(p 3). The photo in question is from a blog entry available on the Internet in which her face is shown and her name named. Sometimes Solove provides a medium level of disguise by supplying only a first name but by continuing to obscure the embarrassing image from the Internet. Here, the examples would be Ghyslain aka the Star Wars Kid, Qian aka Little Fatty, and Gary of the Numa Numa Dance (pp 42–49). These attempts are somewhat defeated, however, by Solove's full and rich description of some of the humiliating photographs and mashup videos of these individuals on the Internet. The likely result of these passages will be to encourage at least some readers to work with a search engine to track down these primary sources.

Finally, Solove sometimes concedes that the cat is out of the bag and that further efforts to shield individuals' identities are futile, and thus he reveals names. He does so, for example, whenever an individual is a named plaintiff or defendant in a published case. In sum, Solove is working with an intuitive sense of where lines should be drawn in revealing personal data. These lines, however, are not ones that we can expect the law or others to recreate. This intuitive sense of proper publication strategies may also not be one that is generally desirable.

The issue of operationalizing recommendations would also be especially important to win over Lessig and Post, two likely skeptics of the Solovian normative project. As I have briefly noted above, these authors are not convinced that the flood of information on the Internet is a privacy issue. Lessig argues that the problem is one of "attention span," and one largely "without a solution at hand."[134] Post views the right of privacy as occupying a different discursive sphere than "public comprehension."[135] In the latter, the public seeks to understand "public matters and to hold public officials accountable," and, hence, discourse follows "the imperatives of knowledge, rather than the decencies of community norms."[136] Each of these scholars would require a different kind of answer, but the core response by Solove would have to demonstrate how his normative proposals would both solve the problem of "attention span" and also be consistent with the classic requirements of public knowledge and debate.

3. *Reputation 2.0*.

In *The Future of Reputation*, Solove examines a variety of new phenomena shaping communicative activities on the Internet. These start with blogging, in which "[w]e all can be pundits now, sharing our

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134 Lessig, 89 Georgetown L J at 2072 (cited in note 75).

135 Post, 89 Georgetown L J at 2093 (cited in note 75).

136 Id.

thoughts and pictures with a worldwide audience" (p 19). Indeed, Solove writes from the vantage point of an active blogger; he organized and writes at Concurring Opinions, one of the leading blogs among law professors. His enthusiasm for the brave new world of blogging is almost palpable; as he writes, "I still can't contain my amazement about these developments. Never before in history have ordinary people been able to reach out and communicate to so many around the globe" (p 20). Solove also carefully analyzes the privacy implications of social networking websites, such as Facebook and MySpace, in which people associate within their social circles.

These are the top two areas of concern for Solove, but not his exclusive focus. He ably discusses "vlogs," or video blogs; Wikipedia, an online encyclopedia created through open-source-like collaboration; and the posting and sharing of video footage of third parties on Internet sites, such as YouTube (pp 142–46, 164). Finally, Solove analyzes websites, such as BitterWaitress, Don't Date Him Girl, and ones on which students discuss law professors. These websites allow discussion of the strengths and weaknesses of otherwise low-profile individuals and worldwide access to these data (pp 87–90).

One of the extraordinary aspects of the Internet, however, is its rapid rate of change. It is a commonplace that each year online represents the equivalent of seven years of change in the normal, offline world. By this equation, *The Future of Reputation* was published almost fourteen and not two years ago. There are important new phenomena that Solove might consider in a future edition of his book. These developments begin with virtual worlds, such as Second Life, in which participants assume virtual personas, or avatars.[137] In *The Future of Reputation*, Solove carefully explains how anyone can become a blogger in less than three minutes. It would be wonderful to read in a similar fashion about Solove's future adventures as an avatar in a virtual world. Leading the way in this regard, Judge Posner has already made an appearance in a virtual world—through an avatar that looked (relatively) like him.[138]

Reputation 2.0 might examine other emerging cyber-phenomena, including cloud computing, Twitter, and the melding of real time personal GPS data to cell phone applications. In cloud computing, a user accesses software and services over a network. On the user side, access is possible through a "thin" resource, such as a Blackberry or an iPhone, with the "intelligence," software, and databases in the cloud—the net-

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137 See Stoup, 58 Duke L J at 315–20 (cited in note 128).

138 Wagner James Au, *Judge Richard Posner Comes to Second Life (Updated)*, New World Notes (Nov 28, 2006), online at http://nwn.blogs.com/nwn/2006/11/judge_richard_p.html (visited Sept 1, 2009).

work of servers and connections.[139] Similar to other trends, such as the use of browsers and search engines that Solove describes, cloud computing sends personal information out beyond the hard drive on any user's own computer. Significant implications for privacy follow as a result.

As for Twitter, it is a microblogging service that allows its users to send and read other users' messages.[140] These are communications, known as tweets, which are messages of no more than 140 characters in length. The emphasis of Twitter is on answering the (immortal) question, "What are you doing right now?" Finally, many "location-aware" programs now exist for cell phones, in particular, the iPhone and Google Android. Geo-enthusiasts use location information to identify friends who are in physical proximity, and to receive tailored information as they enter a given area, including data about shops, restaurants, and other kinds of services.[141] There is no shortage of privacy issues, however, associated with the location-aware applications. As an example, the privacy settings for these location-aware applications may or may not be sufficiently granular at present. The critical issue is the ability to decide which contacts are permitted access to different kinds of location information.

CONCLUSION

This Review first examined Lawrence Friedman's *Guarding Life's Dark Secrets*. This book is a fascinating exploration of America's legal culture concerning privacy. Friedman carefully depicts a specific historical, social, and legal phenomenon that he terms the Victorian compromise. This arrangement permitted slippage between a strict moral code and the inevitable failures following it. Friedman provides a rich depiction of this nineteenth century social code and the complicated structure under which law and society accepted lapses from it. He also depicts the decline of this old system, which served to protect the reputation of elites, and brings his masterful account into the twenty-first century.

My critique of this book concentrated, first, on Friedman's sometimes contradictory comments about class, a crucial issue for him, and the shifting and, at times, imprecise terminology he uses to discuss it. Second, Friedman emphasizes privacy issues revolving around sexual matters. It

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139 Galen Gruman and Eric Knorr, *What Cloud Computing Really Means*, InfoWorld (Apr 7, 2008), online at http://www.infoworld.com/article/08/04/07/15FE-cloud-computing-reality_1.html?source=fssr (visited Sept 1, 2009).

140 See *Twitter*, online at http://twitter.com (visited Sept 1, 2009); David Pogue, *State of the Art: Twitter? It's What You Make It*, NY Times B1 (Feb 12, 2009).

141 See Mathew Honan, *I am Here: One Man. Two Phones. Dozens of GPS Apps.*, Wired 70 (Feb 2009) (claiming that "with the proper social filters, location awareness needn't be invasive or creepy"); Katherine Boehret, *Tracking Friends the Google Way*, Wall St J D2 (Feb 4, 2009).

would have been worthwhile as well to hear his thoughts about the privacy of financial information. Third, *Guarding Life's Dark Secrets* ends with concerns that the future will be one of total enforcement with an absence of the old use of discretion, or leeways, that could act as a force for good. I am less convinced, however, that the use of technology in decisionmaking today squeezes discretion out of the system. Rather, modern data processing systems build discretion in from the start, as the example of datamining demonstrates. As a result, discretion is more frequently exercised today in an ex ante rather than ex post fashion.

In its next Part, this Review looked at Daniel Solove's *The Future of Reputation*. This book discusses the free flow of rumor on the Internet and the dark implications of this development for privacy. The Internet now creates a permanent, searchable record of transgressions and assorted random and not-so-random bits of personal data. Moreover, shaming is now uncivil and even can reach the point of vigilantism. Solove's response to these dangers is to explore a wide range of solutions that draw on law and other means, including norms. Throughout, Solove demonstrates a mastery of technical details and an eye for telling details. He proves a sure-footed and insightful guide to a series of developments that have moved gossip and shaming online.

I identified two areas of Solove's book that might have received additional development and some topics for a future edition. First, I would like to have read more from him about norm generation in cyberspace. In this regard, his use of Robert Ellickson's seminal *Order without Law* raised a series of questions. For one thing, Ellickson is profoundly prodisclosure where Solove preaches the virtues of learning to live with less information. Moreover, cyberspace differs from the real space of Ellickson's Shasta County in ways that might have profitably been explored. Second, Solove largely views law as his independent variable, and he might therefore have explained in greater detail the operationalization of his grand normative experiment in favor of more privacy.

Finally, since the recent publication of *The Future of Reputation*, the rapid change common on the Internet has meant a number of new cyber-developments with significant implications for privacy. These include virtual worlds, cloud computing, microblogging services, and location-aware programs. Solove might consider these new Internet phenomenon in the next edition of his book, which this Review has already christened *Reputation 2.0*.