



PRIVACY

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Guarding Life's Dark Secrets:
Legal and Social Controls
Over Reputation, Propriety,
and Privacy

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An internationally renowned legal historian, Lawrence M. Friedman is a leading expositor of the history of American law to a global audience of lawyers and lay people alike—and a key figure in the law and society movement. He is particularly well known for treating legal history as a branch of general social history. From his award-winning *A History of American Law* first published in 1973 to his *American Law in the 20th Century* published in 2002, his works have become classic textbooks in legal and undergraduate education. He is the recipient of six honorary law degrees and is a fellow in the American Academy of Arts and Sciences. Before joining the Stanford Law School faculty in 1968, he was a professor of law at the University of Wisconsin Law School and at Saint Louis University School of Law. Professor Friedman has an appointment (by courtesy) with the Stanford University Department of History and the Department of Political Science.

The following is an excerpt from Professor Friedman's book *Guarding Life's Dark Secrets: Legal and Social Controls Over Reputation, Propriety, and Privacy* (Stanford University Press, November 2007).

. . . Three general trends or stories form the heart of this book. First, I describe, chiefly for the nineteenth century, a complicated network of doctrines that seemed to be designed to protect reputation and that operated chiefly for the benefit of respectable men and women—people with reputations to protect. I call this network of doctrines the Victorian compromise. The doctrines—about sexual behavior notably—in practice seemed to lead to paradoxical results. On the one hand, there were strict and

unbending rules of decency and propriety, but at the same time the rules gave space for slippage, for leeway, for second chances—for ways to protect and shield respectable men and women who deviated from the official norms. In this regard, it created for them an important zone of privacy.

The second theme is the destruction of this network and the death of the Victorian compromise. The Victorian compromise was first attacked by strong moralists, who detested its tolerance of sin. Then, in the second half of the twentieth century the Victorian compromise was attacked by the agents of the permissive society. As a result, the old structure was largely dismantled.

The third theme, which is closely related to the second, examines privacy in our own times. And here too there is a paradox. We live in a permissive society. On the legal side the Supreme Court has interpreted the Constitution to include a constitutional right of privacy; and this has given ordinary people much more leeway, much more freedom, especially with regard to sex, reproduction, and choices of intimate partners. On the other hand, the elites—celebrities, public figures—have lost some of their privacy rights. They no longer have the freedom they once had to violate decency rules, with some degree of impunity, under the sheltering wing of the Victorian compromise.

At the end of the book I present a fourth theme—a theme I can only touch upon. Law and society have given ordinary people more privacy, more leeway, more choices, but technology threatens to take at least some of this away. More and more the modern world is a world of surveillance. Cameras are everywhere. Sophisticated devices can amass dossiers on everybody; our whole lives can be

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recorded, stored, and accessed—for what ultimate purpose, nobody knows. But only future years will tell us how this story turns out.

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[S]ome legal institutions have the obvious aim of shielding people against direct and unwarranted attacks on reputation. Libel and slander laws protect people who are victims of lies. What is even more interesting are those legal institutions that act to protect the reputation of people who are *not* innocent—people who are the victims, not of lies, but of the bitter truth. And these legal institutions are one of the main subjects of this book.

Take, for example, the crime of blackmail. Suppose that I demand money from a man and threaten to reveal his guilty secret unless he pays up. This is blackmail; this is an act labeled a serious crime in many criminal codes. Yet who is the victim here? It is a man who has committed a crime or who has done some scandalous or awful act, one that would blacken his reputation if the news got out. Yet the law defines him as a victim. The blackmailer will be the one to go to jail. When society makes blackmail a crime, it does this not to protect the innocent but curiously enough to protect the guilty. (Whether the law actually has much of an impact on behavior one way or another is a different question.)

Blackmail is only one example of a more general phenomenon. Take the old law about breach of promise. If a man promises to marry a woman and then backs out, she can sue him for damages. In many cases her real complaint is that she had sexual intercourse on the strength of his promise. For a respectable woman loss of virginity and, especially, birth of a bastard could have a devastating effect

on prospects of marriage and a middle-class life. Sometimes the lawsuit or the threat of a lawsuit could force the bouncer to marry the woman and salvage her reputation. Yet here too the woman, like the blackmail “victim,” is hardly innocent. She violated nineteenth-century norms. She was guilty of fornication, which in many states was actually a crime. But despite her sins and transgressions, the law gave her this remedy. Like the victim of blackmail, this sinner too was classified as a victim, with the right to seek recourse from the man who had victimized her.

The living law of prostitution is yet another example of protection for those who, in theory, had forfeited the right to protection. Prostitutes themselves were mostly social pariahs. No social leaders ever spoke out in favor of prostitution. Nonetheless, prostitution flourished. There were brothels and streetwalkers in every city. Once in a while the police cracked down on the trade. They swept prostitutes off the street, closed houses of prostitution, arrested whole troops of “sporting” women. Yet, curiously enough, prostitution itself for much of our history was not actually illegal. Prostitutes were jailed as vagrants, and brothel keepers could be prosecuted, but buying and selling sex itself was not clearly labeled a crime. What this meant is that *customers* of prostitutes were immune from prosecution. All the crusading zeal was directed against the women (especially streetwalkers) and against madams and landlords who ran disorderly houses. A screen of silence, and even some aspects of the formal law, shielded the men and protected their privacy and their reputations.

The protective rules were related to a larger legal phenomenon that I have called the Victorian

compromise. This compromise put enormous emphasis on surface behavior. The official rules remained in place, sometimes expressed in quite general or absolute terms; meanwhile, the law in action was quite different. There is a kind of double standard. No real attempt is made to enforce the official rules with vigor. They remain slogans or a kind of facade; or they are enforced selectively, according to norms and rules that are never made explicit. The legal position of prostitution is a good example. It was never exactly legal but never exactly illegal. There were thousands of women who sold their bodies for a living, and these women all had customers, men who came from every walk of life. Obviously, any man who had sex with a prostitute or visited a brothel was guilty of fornication or adultery; and these were criminal acts in many states. Yet no man was prosecuted for these crimes.

There is an old saying: If you can't be good, be careful. This could have been the motto for many laws about vice and sexual misconduct in the middle of the nineteenth century. Be discreet. If you must sin, sin quietly and privately. If you keep what you do under wraps, you can preserve your reputation, your place in respectable society. A man lost his reputation if he was a flagrant, blatant womanizer. A woman who had sex outside marriage forfeited any claims to decency. The same was true, of course, for people who lied and cheated, who staggered around the streets in a drunken fog, and so on. But men and women who were careful, whose sins were secret and well camouflaged, were able to avoid most evil consequences. For much of the nineteenth century it was not a person's "private" life as such that was decisive but rather the way he or she *managed* this private life.

The Victorian compromise should not be dismissed as mere hypocrisy. The living law had a curious double standard, but this had a purpose, at least implicitly. Again, we can take prostitution as an example. Men, people thought, had powerful sex drives. They could not satisfy these drives with respectable women. They had to find some other

outlet. It was useless to try to stamp out vice. What society should aim at was moderation, control, some way to keep the lid on. The laws relating to prostitution were like laws against speeding today. Nobody really thinks speed limits are totally effective. Everybody violates them from time to time. Enforcement is a sometime thing. But the laws, at existing levels of enforcement, are not useless or hypocritical. Arguably, they keep the *amount* of speeding under control. If you took off the lid entirely, who knows how fast and how recklessly some drivers might drive on the roads.

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The criminal justice system was supposed to protect and maintain the traditional code by punishing those who violated that code. Paradoxically, however, protection of the moral code also meant something that on the surface seems totally inconsistent: protection of the very people who *violated* the code—or to be more accurate, protection for *some* of the people who violated it and for some who violated it in a particular way. This was the thrust of the Victorian compromise. In other words, the law did two things at once. First, it defined respectability, virtue, good reputation (reflecting wider social norms). But second, it engaged in a kind of cover-up. One strain or tendency in the law actually acted to make it more difficult for respectable people to lose their reputations. This subtle and implicit task worked to provide a kind of limited safety valve for those who gave in to their "animal" instincts. Some people (especially men) who transgressed in certain ways got second chances. The flesh, after all, was weak. 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. How and why this second job was accomplished is one of the themes of this book.