Privacy, Property Rights, and Misrepresentations

Richard A. Epstein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
PRIVACY, PROPERTY RIGHTS, AND MISREPRESENTATIONS

Richard A. Epstein*

I. INTRODUCTION

In his Sibley lecture, The Right of Privacy, my colleague, Professor Richard A. Posner, has made another important contribution to the distinguished literature on the law of privacy. As is his habit, he has approached his subject strictly from an economic point of view, and by his singleness of focus, he has clarified many issues that perhaps have eluded less systematic efforts.

In this Article, I wish to comment upon some of the conclusions that Posner reaches and upon the methods that he uses to reach them. My major purpose is not to show that his conclusions are wrong, for in most places I think that they are correct. Instead, the point of my remarks is to show that in many instances he could place his conclusions upon firmer ground if he justified them by the traditional theories of tort law, all of which seek, among other ends, to protect the individual in the liberty of his action to the extent that it does not infringe upon the like liberty of other individuals. This classical, libertarian view of tort law has, of course, deep roots in the tort literature, including the literature related to the law of privacy. In order to show the directions in which the classical view leads, I shall concentrate upon two particular features of Posner’s Article. The first feature concerns the method he uses to “assign” property rights to different individuals in various privacy situations. The second concerns the central role which implied misrepresentations play in the traditional view of tort liability.

II. PROPERTY RIGHTS

The first point upon which I wish to comment concerns the treatment of the “property rights” question that Posner adopts both in connection with general torts problems and with the tort of invasion

* Professor of Law, University of Chicago. Fellow, Center for Advanced Study in the Behavioral Sciences, 1977-78. The research for this Article was supported in part by grants from the National Science Foundation (BNS - 76-22943), the Andrew W. Mellon Foundation, and the Rockefeller Foundation.


2 Posner, supra note 1, at 399.

3 Following Posner’s lead, I do not examine at all the constitutional questions raised by the first amendment.
of privacy in particular. As a general matter, I think that his tort writings suffer from the incurable failure of not recognizing any noneconomic constraints upon the assignment of property rights or upon the rules required for the vindication of those rights when violated. Judges, lawyers and economists may impose upon all individuals whatever assignment of rights and duties that they think appropriate, free of any limiting conception of individual autonomy, individual self-determination, or private property. All rights are thus by implication initially vested in the parties that make the legal rules (whose consent is needed before any conduct is "allowed") while, even as matter of legal theory, no rights are initially vested in the parties bound by the rules so promulgated and enforced. The constant refrain is what assignment by the state of any given resource will maximize some conception of aggregate welfare, taking into account, of course, transaction costs that impede voluntary exchanges.

Over a very wide range of legal issues this approach seems to miss the essence of legal theory. The legal system has very deep and powerful societal roots, and the values that it protects and advances are responsive to many noneconomic as well as economic values and concerns. Within our culture there are certain dominant moral side-constraints which hold that certain distributions of property rights among individuals are impermissible, even if, one might add, these distributions are brought about from previously acceptable distributions by solely consensual means. The nineteenth century arguments about the abolition of slavery did not in the slightest depend upon the relationship of slavery to material output. The abolitionist of that or any other era regards it as immaterial that the liberation of the slaves might reduce transaction costs or increase the gross

---

4 For a sample of those writings, see R. Posner, ECONOMIC ANALYSIS OF LAW ch. 6 (2d ed. 1977); Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & ECON. 201 (1971); Posner, Strict Liability: A Comment, 2 J. LEGAL STUD. 205 (1973); Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29 (1972).

5 The point about consensual exchanges is of especial importance in connection with contracts, either absolute or conditional, by which one person agrees to become a slave of another. Here is a case where even if the legal system thought the process of agreement were perfect, it would not provide the remedy of specific performance to the promisee. Note that it is also possible to argue that the law should never enforce these transactions because their very terms suggest that they are tainted with fraud or duress. See Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 283 (1975). But the objections to the position seem to go deeper than this, having to do with the nonforfeitable aspects of liberty. In passing, it should also be noted that the objections to specific performance do not carry over where the promisee seeks damages only. If the law allows damages for breach of standard employment contracts, it seems proper to allow them for contracts for slavery.
national product. The gut position about slavery was, and is, that it is simply wrong for any person to own another person. This position in turn rests upon the further belief that each person has a natural right to own his person as a condition of birth and as part of the recognition of his common humanity. Liberty, freedom, and personal autonomy are ideals of the law, and they cannot be reduced to simple efficiency considerations, however important efficiency may be in its own right. The "root" premise of American and indeed all jurisprudence is that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." Or to take another expression of the same sentiment, that "every person has a right to complete immunity of his person from physical interference of others, except insofar as contact may be necessary under the general doctrine of privilege . . . ." And that assignment of rights remain intact for the fool, the egotist, or the saint. The belief in self-determination does not depend upon a showing that the individual will act to maximize the welfare of the whole. It rests upon the showing that within a perimeter of rights, the choice of action is his and his alone.  

A similar set of constraints exists with respect to things external to the individual. A strong moral case exists to support the rule that a person who takes possession of an unowned thing thereby acquires ownership of it. That rule might be supported by efficiency argu-

---

4 Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). Here the court allowed the plaintiff to maintain an action for trespass when her doctor removed a tumor from her body without her consent or knowledge. Other courts have used the concept of the right to control one’s own body to support the aggressive application of informed consent doctrines in medical malpractice. See, e.g., Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972). Its application in the latter context is much more dubious since the principle of autonomy can be used equally well to support a finding of an implied-in-fact waiver that allows the physician to determine whether disclosure or silence is in the best interests of the patient in any given case. For my criticism of Canterbury, see Epstein, Medical Malpractice: The Case for Contract, 1 Am. B. Found. Research J. 87, 119-28 (1976).

7 Mohr v. Williams, 95 Minn. 260, 261, 104 N.W. 12, 16 (1905).

There are situations, notably cases involving infants and incompetents, where it is not possible to realize the ideal of self-determination. Here the legal response is, of course, to appoint for the individual a guardian whose job is to protect his ward against the world. Guardianship is, of course, far removed from slavery even though both involve control over another person. The first involves acting for the benefit of the ward; the second involves the systematic exploitation of the owned. The strains imposed upon the guardian reveal the nature of the guardianship relationship. A parent refuses to allow a child to receive medical attention because of the parent's religious beliefs, or a parent wants to permit the removal of the incompetent's kidney in order to save the life of a person who is a child of the guardian and sibling of the ward. For the different responses to this last issue, see Strunk v. Strunk, 445 S.W.2d 145 (Ky. App. 1969); Lausier v. Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975).
ments on the ground that it simplifies the rules whereby unowned things may be put to productive use. Yet even if it could be shown that some other rule for determining ownership might marginally improve aggregate output, it does not follow that the traditional rule must automatically be rejected. Taking possession of unowned things does not violate the rights of any other person and is an expression of individual freedom of action. The closeness of the "his" of possession and the "his" of entitlement are so strong that very powerful arguments indeed are needed to displace the original common law rule.

The importance of social expectations about the original distribution of property rights within the culture manifests itself in yet another fashion. One rule common to all theories of tort liability is that the party who has suffered the injury is the only party who is entitled to pursue the legal remedy against the person who wrongly caused the injury. The strength of this rule is universal. It does not depend upon the theory used to account for causal nexus between defendant's act and plaintiff's harm; and it retains its undiminished vigor under the legal regimes of both negligence and strict liability. The destruction or damage of a thing is the violation of a property right of the owner, and given that initial property right, it is only fair and just that the party who possessed the original thing receive as of right the cause of action needed to vindicate its loss—his loss.

This lock-step sequence, so common to all legal systems, represents to Posner some insignificant "detail" of the legal system. In many cases, Posner could argue, efficiency or instrumental grounds may justify the assignment of the cause of action to the owner of the thing. Yet if it could be shown, for example, that better incentive effects are created through an auction in which the highest bidder wins the right to bring an action for the personal injuries that X suffered at the hands of Y in the accident at Fourth and Main, then Posner could not murmur a single protest. Most of us recognize

---

9 Indeed, it might be that under an economic approach the law should make a sharp distinction between valuable property that a person finds by luck and that which he finds by systematic investigation.


It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss. But that the damages are paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use.

(footnote omitted).

11 A similar point is clearly applicable in eminent domain situations. Posner's essential concern must be that the state pay compensation for any taking of private property, but this
that some efficiency limitations may restrict the maxim that makes the cause of action follow the injured person. We need only note the many class action cases in which the law abandons the ideal of individualized vindication of rights, particularly where virtual representatives of the injured parties litigate many common claims of very small size. Yet even here it becomes clear beyond a doubt that simple efficiency considerations do not dominate the situation to the exclusion of all others. The elaborate class action rules which ensure that each person receives notice of the suit, the right to opt out of it, and some portion of the compensation are only understandable in terms of the persistent importance of the individual control over individual claims. The class action rules cannot be explained on the ground that class actions are solely concerned with the incentive effects of legal rules, for such an explanation would mean that the attorneys entitled to prosecute should, almost as a matter of course, keep all of the recoveries, with the members of the putative class getting nothing at all. The strong sense of individual property rights adds a second dimension that complicates the problems in the area and shows that the traditional legal conceptions continue to retain their vitality and force even where efficiency arguments point in the opposite direction.

Posner’s basic theoretical structure for treating the law of privacy suffers from all the weaknesses that plague his general treatment of common law liability subjects. His reliance on the unbounded discretion of the state, simply as a matter of collective choice, to use economic criteria to assign property rights to or away from individuals continues to ignore the powerful moral constraints that abound in this area. Consider the early cases that grappled with recognition of the new tort of invasion of privacy. The New York Court of Appeals held in Roberson v. Rochester Folding Box Co. that the defendant’s use of the plaintiff’s picture to advertise the defendant’s flour products and its description of her as the “Flour of the Family” did not constitute an invasion of privacy sufficient to support a private cause of action. One possible response to that decision is

requirement leaves it open whether the state must pay the compensation to the property owner. For Posner’s own view on eminent domain, see R. Posner, Economic Analysis of Law § 3.5, at 39-44 (2d ed. 1977).

12 For the modern law on class actions, see Fed. R. Civ. P. 23. The merits of these compromises are beyond the scope of this paper. For an analysis of the conflicting objectives of the modern law, see Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47 (1975).

13 171 N.Y. 538, 64 N.E. 442 (1902).
that the court wrongly decided the case because recognizing the
universal right of others to use flattering portraits of the plaintiff
removed all guarantees that others would put her picture to its
highest and best use through market processes. It is impossible for
the plaintiff to buy out all possible users, and the successful buy-
out of a single user only increases the value of the picture to other
advertisers who continue to exploit it. And it creates the wasteful
incentive of having other individuals use the picture, not to advance
their own trade, but solely to “hold up” the party portrayed for
compensation. From Posner’s point of view, and it seems the correct
view, the case was wrongly decided. 14

Yet many other persons believe that the New York court wrongly
decided the case for reasons resting on very different premises. An
editorial in the American Law Review noted: “The decision under
review shocks and wounds the ordinary sense of justice of mankind.
We have heard it alluded to only in terms of regret.” 15 And the
leading Georgia case of Pavesich v. New England Life Insurance
Co., 16 which dealt with a similar misappropriation of the plaintiff’s
picture in the defendant’s advertisements, strongly endorsed the
cause of action for the very reasons that hearken back to the twin
consciousness of liberty and slavery. The use of such pictures in adver-
tisements, the court wrote

> brings not only the person of an extremely sensitive nature, but
even the individual of ordinary sensibility, to a realization that
his liberty has been taken away from him, and, as long as the
advertiser uses him for these purposes, he can not be otherwise
than conscious of the fact that he is, for the time being, under
the control or another, that he is no longer free, and that he is
in reality a slave without hope of freedom, held to service by a
merciless master . . . .17

Likewise Bloustein’s language, quoted by Posner—“Use of a photo-
graph for trade purposes turns a man into a commodity and makes
him serve the economic needs and interests of others” 18—does not
clearly anticipate Posner’s criticism that in many cases the plaintiff

14 Posner, supra note 1, at 411-12.
15 36 Am. L. Rev. 614, 636 (1902).
16 122 Ga. 190, 50 S.E. 68 (1906).
17 Id. at 220, 50 S.E. at 80.
18 Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39
wants to be so exploited, but only for a price.19 Yet if the quote is rephrased to say that "[u]se of a photograph for trade purposes solely at the will of another allows others to turn him into a commodity and to make him serve the economic needs and interests of others," then Posner's criticism of Bloustein no longer is persuasive. After rephrasing the quotation, the crucial question becomes not will the photograph be used for trade purposes but who shall have the right to so use it. The right of self-determination, which was at the root of Bloustein's concerns, again emerges as the center of the discussion.

Posner would do well to ponder these various sentiments and the language in which they are couched, for they suggest just how far his perception of the problem is removed from those of the judges who decide cases and the lawyers who argue them. The conflict between the approaches is muted because Posner comes out with the same results in appropriation cases that the traditional tests demand. But it is by no means clear that we are on firmer philosophical grounds when we ignore the florid, but powerful, sentiments of Pavesich only to embrace Posner's exclusively economic approach. Posner's property right assignments depend in many crucial places upon a whole set of institutions that are beyond the scope of the tort law, but which nonetheless influence the use of photographs or names or, for that matter, any private information. The incentive structures that these institutions create are by no means clear, and there is, for example, good reason to assume that many features of the patent and copyright law—think only of the antitrust law associated with the leverage of patents and copyrights into related markets—are themselves of dubious economic value. Let the law governing these other institutions change, and the tentative property right assignments that appeal to Posner should change as well. Yet nowhere in Posner's Article is there an adequate discussion of ways in which changes in other areas of the law interact with his views on privacy law. Throughout the Article, however, there are a host of unexamined empirical assumptions about the way in which these other institutions mesh with the tort law. Posner notes, for example, that "reverse engineering," unlike aerial photography, is a difficult and expensive way to learn about a competitor's products.20 Is that true of all products at all times? And no matter what

---

19 Posner, supra note 1, at 411.
20 Id. at 410.
the relative ease of "reverse engineering" (or the difficulty of guarding against it), surely, in his view, the protection afforded to inventors under the patent and copyright laws should influence at least in part the scope of the law of privacy. In a word, Posner's economic approach to privacy questions makes it imperative that he undertake an exhaustive inquiry into the total complex of legal rules that govern any given social problem before attempting to make efficiency pronouncements about a small subdivision of the applicable legal rules. Yet here he seems implicitly to assume that the law of patents and copyrights either works perfectly or bears no relationship to the question of property rights in privacy cases. Neither of those assumptions is correct, given Posner's approach to the subject. The empirical substrate upon which his edifice rests is extensive, tenuous, and unexamined.

Given the shakiness of his economic foundations, it is tempting to return again to the simpler, florid approach of Pavesich. The view in Pavesich is that the plaintiff in fact owns his name and his portrait, and their use by another constitutes but a refined form of theft. The question of resource allocation never arises since the court can be quite confident of its own intuitive judgment of ownership rights. The complications that arise in related areas of law are also of no immediate concern because the basic strategy of the traditional approach, whether of privacy or any other area of private common law, is to decide each issue in isolation from all others on

---

21 Indeed, it is precisely these empirical complications that make it impossible for the economic approach to allow one to choose with confidence among the central legal theories. For example, in his A Theory of Negligence Posner argued that negligence rules were justified on efficiency grounds. See Posner, A Theory of Negligence, supra note 4, at 32-33. Yet in his next article on the same subject, he noted that the combination of incentive effects and administrative costs made it impossible to decide between negligence and strict liability until more empirical work was done. See Posner, Strict Liability: A Comment, supra note 4, at 211-12. Indeed, the issue is even more complicated than his own writings have acknowledged because a consequentialist account of the tort law requires us to take into consideration the strength and pitfalls of the various types of public regulation that impinge upon safety matters. For example, does the extensive inspection of canned foods influence the choice of legal rules in products liability cases? The traditional corrective justice approach, with its concentration upon the past conduct of the participants to the immediate dispute, escapes many of these complications.

22 The classic Warren and Brandeis article demonstrates an acute awareness of the high moral theme. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The point did not escape another student of tort law, Harry Kalven, who in his fine article on privacy, wrote of the Warren and Brandeis article: "The impact of the article resides not so much in the power of its argument as in the social status it gave to the tort. In the vernacular of the sports pages, it lent it 'class.'" Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 328 (1966).
the assumption that the sole basis of proper decision is the conduct and rights of the two immediate parties to the law suit.\textsuperscript{23} The sentiments in \textit{Pavesich} may not have the elegance of economic theory, but they do have a kind of intuitive solidity which may be worth even more. The opinion has the universal appeal to which ordinary people, and ordinary judges, can instantly respond.

The weaknesses in Posner's standard methodology do not, however, seem to have particularly unfortunate consequences in privacy situations. One reason is that the results he advocates are in large part in keeping with the traditional tort law. A second and more important reason is that his economic approach is relatively more valuable because our intuitive sense of property rights begins to break down in privacy contexts. This last point needs historical and analytical amplification.

Invasion of privacy as a separate and distinct tort only emerged at the end of the nineteenth century. One possible explanation of this phenomenon is that civilization required centuries to advance to the point where it recognized the vital importance of protecting privacy. By this view, privacy represents the highest development of the tort system and, by implication, embodies one of its great achievements. I take a very different view of the subject. The Warren and Brandeis article begins with an elaborate catalogue of the personal and property interests protected by common law: the actions of trespass, and later negligence, protect the inviolability of the person and of the things he owns; the action of nuisance protects the interest of quiet enjoyment in land; the action of assault protects emotional tranquility; the action of false imprisonment protects freedom of locomotion; the action of defamation protects (somewhat imperfectly) the interest in reputation.\textsuperscript{24} Two points are striking about this list. First, each of the vested interests is more important than privacy; and second, one or another of these torts covers most of the useful grounds occupied by the tort of privacy.\textsuperscript{25} Privacy, however lofty its pedigree, is the \textit{least} important tort for a civilized society. Its late emergence testifies to its marginal role, not to its moral sophistication. The security against the invasion of the person


\textsuperscript{24} See Warren & Brandeis, \textit{supra} note 22, at 193-96. Posner properly picks up this point. See Posner, \textit{supra} note 1, at 408, where he cites Walter Block's criticism of treating a good reputation as a right. See also W. Block, \textit{Defending the Undefendable} 60 (1976).

\textsuperscript{25} This is indeed the basic strategy which Professor Kalven adopted in his article. See Kalven, \textit{supra} note 22, at 328.
is more important than the security against the use of one's name in some commercial advertisement.

We must look again at cases like Roberson and Pavesich. They indicate that some protection against the wrongful use of a name or picture for commercial purposes strikes a responsive chord. They are the best cases for protection against invasion of privacy and may perhaps be better treated as a separate branch of law called commercial appropriation, analogous to trademark and copyright law. Yet it is quite clear that the ownership of one's own image that underlies the tort of privacy is not so powerful that it gives each person exclusive control in all circumstances over the way in which others are permitted to view him. There are, for example, no tort doctrines that make it improper to look at someone else on the street, and only some informal and shifting social conventions make it bad manners to stare at a stranger. Likewise, it is difficult to think that the ownership of one's image means that one cannot be photographed on the street or at a ball park, or, more importantly, when involved in some newsworthy event, even one as prosaic as an intersection collision or a flood. And Sidis v. F-R Publishing Corp., in which a New Yorker feature article brought an eccentric recluse into the public eye, can on one level be read to say that the law does not vest any person with the exclusive right to control information about his remote past, no matter how painful he finds its fresh republication. The point is that the law in none of these situations gives the plaintiff ownership of the information he wants suppressed. In all of these cases, the correlative rights of others to their own thoughts and sensations place strong constraints on the expansion of the new ownership interest. And without that ownership, there is no need ever to consider whether the plaintiff has by some form of assumption of risk, whether express or implied, waived the rights of control that were prima facie his.

So much of the law of privacy is shot through with these fundamental ambiguities about basic entitlements. These ambiguities

---

26 113 F.2d 806 (2d Cir. 1940).
27 Thus the issue arises in Sidis where the plaintiff was the subject of a New Yorker article after he disclosed in an interview much of the most painful information in the piece. It could be argued that his actions amounted to consent for the publication, a conclusion, however, that the recent decision in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), places in some doubt. In Virgil, the plaintiff's consent to give an interview to a Sports Illustrated reporter did not bar his cause of action when he retracted his consent before publication.
One traveling upon the public highway may expect to be televised, but only as an
within the moral theory lend some attractiveness to Posner’s approach, no matter how great its own inherent limitations. The economic theory supplements the moral theory at the very point that the latter begins to falter. Far from undermining our moral sense of entitlements, we find that in marginal cases the economic approach strengthens that moral sense. The moral theory may be quite powerful when it insists that every person owns his own body, but it is vastly weaker when it makes the claim of ownership with respect to the control of information about that body. Within this void the economic theories of property rights are of some assistance because they point toward a private assignment of rights to information that is the product of individual effort and initiative and toward a public assignment of rights to newsworthy events. The New York privacy statute passed in response to Roberson recognized this distinction. The statute provided that “[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, is guilty of a misdemeanor,” and recognized a private action for damages and injunctive relief for the individual so affected.30 These provisions take precedence over both the moral and the economic theory of rights, assuming, of course, that they are not unconstitutional.31

The statute hardly reveals any firm clarity about the contours of the right of privacy. Furthermore, the opinion goes on to note that the plaintiff “consented” to appear in public as part of a half-time act at a football game, thus further compromising and confusing the inherently vague question of original property rights by notions of assumption of risk and consent.


Id. § 51.

But see Spahn v. Julian Messner, Inc., 21 N.Y. 124, 233 N.E.2d 840, 286 N.Y.S. 2d 832 (1967). In Spahn, the New York Court of Appeals, in response to the constitutional standards that the Supreme Court set up in Time, Inc. v. Hill, 385 U.S. 374 (1967), decided to construe the New York statute in a manner that avoided any conflict with the first amendment guarantee of free speech. The court wrote:

We hold in conformity with our policy of construing sections 50 and 51 so as to fully protect free speech, that, before recovery by a public figure may be had for an unauthorized presentation of his life, it must be shown, in addition to the other requirements of the statute, that the presentation is infected with material and substantial
III. Misrepresentation

One of the most welcome aspects of Posner's Article is that it calls attention to the central role of misrepresentations, both express and implied, in any system of private law. Here, as always, Posner argues that we can explain and justify most of the case law results by an economic theory that shows it is inefficient and unwise to allow persons to make misrepresentations either about the goods they sell or about themselves. I agree with his general sentiment but wish to point out that his basic position makes good sense for noneconomic reasons.

The model that is involved is simple. At bottom, the central premise of tort law is to protect the individual against the use of force to damage the person or to limit freedom of action. False words are the weak sidekick of force—presumptively bad in themselves though less dangerous than force. The tort of misrepresentation is thus designed to supplement the prohibitions against the use of force. Force and the threat of force undermine the voluntariness of the conduct of the individual to whom they are directed, thus placing limitations upon that individual's liberty of action. False words also undermine the voluntariness of the individual's conduct; they, too, place limitations upon liberty of action. Trespass says, "Do not strike the plaintiff"; misrepresentation says, "Do not mislead him." The first is the greater wrong, but the second is a wrong as well.

An examination of the elements of force and misrepresentation shows the parallels between the two torts. Trespass requires acts of the defendant which invade the person or property of the plaintiff. Misrepresentation also demands acts by the defendant, but lest there be no tort of misrepresentation at all, the acts need not be physical invasions but only statements by the defendant. Cases of simple nondisclosure, absent any specific duty to disclose, are no more actionable than the simple failure to act as a good Samaritan in physical injury cases. The statement must be false because a true statement enhances the knowledge and increases the freedom of the party to whom it is directed and can hardly amount to a violation of basic rights. Reliance on the misrepresentation is the causal analogue to mechanical causal connection in all physical injury tort actions. And lastly, the detriment requirement places in relief the falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth.

Id. at 127, 233 N.E.2d at 842, 286 N.Y.S.2d at 834.

See, e.g., Posner, supra note 1, at 399.
element of damages needed to complete any tort action.

The traditional theories identify not only the similarities between force and misrepresentation but also their differences. Thus one necessary feature of the law of misrepresentation is that the defendant makes the statements to a particular party and not to total strangers. One does not inflict a misrepresentation as a blow, for those who hear the statements must first interpret and then act on any misrepresentation. A strong interaction, which established social institutions support, is necessary for many misrepresentations. While in some cases, the shared conventions of ordinary language suffice to set the context, in others, the specific practices of certain institutions, whether the stock market, the office, or the neighborhood bar, are required as well. This conventional overlay brings to the fore matters of the selective silence and social setting that must be used in evaluating the content of any given representation. The selective silence of a speaker is vital, because it shows how the distinction between action and nonaction blurs at the margins. Whenever the defendant tells some but not all of the story, his actions may look more like deliberate falsehood and less like simple nondisclosure. Cases with the stark power of the good Samaritan are harder to find in the misrepresentation context. Tones of voice, gestures, and other nonverbal communications show how individuals constantly make implied statements about themselves, statements with which they hope to manipulate others into acting in the speaker's best interests.

Consider, for example, the classic case of Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817), which laid down the general rule that one party in possession of information about "extrinsic circumstances, which might influence the price of the commodity," need not communicate the information to the other party to the transaction because "[i]t would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." Id. at 194. Yet even with that doctrine the court ordered a new trial. The buyer in the case had remained silent when asked if he knew anything that might have influenced the price of the commodity sold. In fact, a treaty ending the War of 1812 had been just signed, of which the buyer had knowledge while the seller did not. The court quite rightly did not treat this as a simple case of nondisclosure, given the direct question, but remanded the case to determine "whether any imposition was practiced by the vendee upon the vendor." Id.

The recognition of the importance of nonverbal conduct is by no means a recent event. Thus consider the passage in Walters v. Morgan, 3 De G. F. & J. 718, 723, 45 Eng. Rep. 1056 (1863)

Simple reticence does not amount to legal fraud, however, it may be viewed by the moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree of specific performance of the agreement.
This last point is of especial importance for the law of privacy, for if express representations are actionable whenever they under-
mine the plaintiff's autonomy by inducing him to act under mis-
take, then misrepresentations, fairly implied in fact, should be ac-
tionable as well. The importance of implied misrepresentations fol-
lows as a matter of course in the so-called "false light" cases where
the very phrase suggests that a collection of individual, partially
true statements are sufficient to misrepresent the overall tempera-
ment or position of the plaintiff. And implied misrepresentations
are crucial as well in evaluating two other forms of the tort of inva-
sion of privacy, commercial appropriation and revelation of embar-
rassing personal facts, although here their relevance might at first
blush seem to be more problematic.

The commercial appropriation cases seem not to involve any ob-
vious question of misrepresentation at all. The defendant has used
the plaintiff's image in a true and proper way, and the gist of the
cause of action sounds in restitution.\textsuperscript{3} The plaintiff wants from the
defendant an amount of damages equal to the economic benefits
that the defendant derived from the use of the plaintiff's portrait
or name in the defendant's business. Such indeed is the position
of Posner, who has correctly noted that many plaintiffs, far from
wanting privacy, want the cash for the publicity value associated
with their names or portraits.\textsuperscript{3} Yet there is still another side to the commercial use cases in which
the misrepresentation principles are quite crucial. The essence of
the tort of misrepresentation is that its measure of damages is the
plaintiff's own harm. These theories therefore remain of great im-
portance where the plaintiff's harm exceeds the defendant's bene-
fits. Roberson neatly illustrates the interaction between the misre-
presentation and restitution theories.\textsuperscript{37} Although restitution was
available in principle, it promised low damages. A host of other
pretty women could have served as suitable substitutes for the
plaintiff. There was no specific feature which made the plaintiff's
portrait worth more to the defendant than that of another woman,
and the cost of a substitute (ignoring the possibility that others
desirous of publicity might have posed for free) was the measure of

\textsuperscript{3} See, e.g., O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (both the majority and
dissenting opinions discuss the relationship between the misrepresentation and restitution in
the privacy context).
\textsuperscript{3} Posner, supra note 1, at 411.
\textsuperscript{3} See text accompanying note 13 supra.
the plaintiff's marginal contribution and hence the defendant's benefit.

A misrepresentation theory presents quite a different picture. It is true, as the court notes, that the portrait of the plaintiff was flattering and accurate in all respects. But it would be inaccurate to confine the picture's representation to the physical likeness of its subject. The picture also "says" that the plaintiff has lent herself, with or without consideration, to a commercial enterprise and that she endorses or perhaps uses the product. The representation that the plaintiff lent herself to the commercial enterprise might be of particular importance if the plaintiff found herself severely compromised in her circle of friends, none of whom thought that the appearance of her picture upon the circular was consistent with either her social status or theirs. The damages from this representation could be quite substantial and would in no way be reduced or eliminated by the willingness, or even eagerness, of many other women to have their pictures adorn the defendant's circular. Although the court does not pursue the point, the case really shades off into a subtle form of defamation. Indeed, from this point of view, the whole matter is closely akin to the later English case of Tolley v. Fry, where the defendant used the plaintiff's name in a jingle to promote the sale of its chocolates. The plaintiff, a well-known amateur golfer, was allowed to recover on the theory that the jingle compromised his standing as an amateur in the social circles in which he traveled. The restitutionary theory presumably was available in Tolley as it was in Roberson. Yet the misrepresentation theory remained important because of the separate, and possibly greater, measure of damages it entailed.

Implied misrepresentations of fact have a very different role to play in connection with that branch of the law of privacy concerned with the revelation of embarrassing facts, for here the theory works to aid the defendant in the defense against the basic cause of action. The point of the argument is straightforward enough. In all

---

38 It will be observed that there is no complaint made that plaintiff was libeled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear.


40 I put to one side those situations in which the defendant obtains the truthful information
of these cases, the plaintiff has withheld from a third party some essential truth about himself or his past conduct, such as a past criminal offense. The defendant, for whatever motive, has told the truth to that third party. The plaintiff's conduct kept the third party in ignorance and undermined the voluntary status of his conduct. The defendant's representations removed that ignorance and enhanced the voluntary nature of the third party's conduct. Acceptance of the cause of action therefore cuts against the classical ideal of freedom from induced ignorance, just as it cuts against the economic theory. The real question is why the plaintiff should be able, not to put too fine a point on it, to work a fraud upon his family, friends, and business associates.

But it is said that the wrongs which the defendant has disclosed may have taken place years before and that others should disregard them. Posner in his good economic style says that the law should allow revelation of the information because third persons will discount information concerning events which occurred years before. That may be true and it may not, but the great strength of the classical (libertarian) conception is that it does not depend upon the dubious factual assumption that most individuals will, without the benefit of market transactions, properly discount the information. The suppression of the information is unwarranted, even if the person who hears it might misuse or misinterpret it. Persons should from the plaintiff as a result of some confidential relationship between them. Here the plaintiff may well have an action for breach of promise in the event that the truthful disclosures are made to a third party. The attorney-client relationship is an obvious instance of such a confidential relationship, as is the physician-patient relationship. Note, too, that the relationship does not impose upon the attorney or physician a duty to be deceitful. It only demands that he not volunteer any information to third persons nor, if pressured, divulge the information requested.

One of the puzzling features of this branch of tort law is the requirement that such disclosures become actionable only if the publicity is given “to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” Restatement (Second) of Torts § 652D, Comment a. The Restatement expressly contrasts the publicity required under this tort with the narrower publication requirement of the tort of defamation, where any communication to any third party is actionable. Yet some of the appellate decisions indicate that the plaintiff complained not of the general publicity but of the impact of the information upon a small select circle of family and friends. For example, in Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), the defendant noted in a Reader's Digest article that the plaintiff had been involved in hijacking some eleven years before. Millions of people read the article. The damage complained of was that the plaintiff's 11-year-old daughter and the plaintiff's friends "scorned and abandoned him." Would it have made a difference if only the daughter and a few select friends had seen a draft of the article and the magazine had thereafter destroyed the article? If so, on liability or only on damages?

Posner, supra note 1, at 408-09.
normally be told the truth. Society does not imprison individuals who are likely to make foolish or irrational decisions. So, too, it should not countenance their belief that they are incapable of handling the truth. Although at some point it becomes necessary to institutionalize persons who are incompetent to handle their own affairs, we do not think that the capacity to act in accordance with the dictates of economic theory determines whether they should retain or forfeit their freedom.

So too with fraud: we must be very careful before we justify restrictions upon individuals' freedom of action because of possible errors in discounting the information. And indeed before we are too confident in our own assessments about individual behavior we should note that it may in fact be inappropriate to discount information about a person's past. In cases of this sort, the plaintiff has engaged, until the very moment that the defendant reveals the fraud, in a continuing and deliberate concealment of information known to be relevant to other parties. Indeed, I suspect that one reason why disclosures about the plaintiff come so hard is not because of the past wrong disclosed but because of the plaintiff's present willingness to deceive those persons who are closest and dearest to himself.

The arguments, then, about implied misrepresentation all point to the denial of any cause of action based upon unwanted publication of embarrassing facts. Yet in some instances the suppression of truth might (as might any prima facie wrong) receive some special justification. One such justification is directed towards the rehabilitation of criminal offenders, where it is feared that disclosure of past criminal activities will cut against important objectives of the criminal and social system. Thus Justice Peters wrote: "One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his antisocial acts. In return for becoming a new man, he is allowed to melt into the shadows of obscurity."

There are, I believe, several major problems with this approach.

---

a Here it is at least relevant to note that much of the recent psychological literature suggests that individuals make many mistakes with economic concepts, particularly those involving probabilistic thought, which is in many ways counterintuitive in its implications. See Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

b See, e.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d at 538-39, 483 P.2d at 40-41, 93 Cal. Rptr. at 872-73.

c Id. at 539, 483 P.2d at 41, 93 Cal. Rptr. at 873.
First, it is by no means clear that the suppression of the information will aid the desired rehabilitation. Suppose that every individual knew that third persons could make disclosures about his past with impunity. This rule of law creates two different incentives, both of which seem desirable. First, the offender has incentive to make his current conduct as exemplary as possible in order to be in a position to refute any implication that he is untrustworthy because of his past criminal conduct. Second, he has incentive to make a clean breast of his own past at the early stage of any relationship in order to clear the air and to establish the basis for mutual relationships of friendship and trust. Recognition of a private cause of action for embarrassing disclosures undermines both of these incentives and thus encourages the type of concealment and suppression that is in itself inconsistent with any rehabilitative ideal.

There is a second objection to the rehabilitative ideal. Even assuming that there is some social good to be derived from the suppression of certain past information, it remains an open question whether the suppression should come at the expense of the rights of innocent persons who are now denied the information that they regard as essential to their own decisions. Why is it that the third party may not tell an employer about the arrest record of an individual who seeks employment? Or, to put it another way, why allow a prospective employee to lie about his past criminal conduct? Here we are dealing not only with the rehabilitation of the criminal but also with the freedom of other individuals. It has long been settled that fraud is not justified even when perpetrated for the benefit of the party deceived. Why then does it become fashionable when done for the party who perpetrates the deception?

True, it might be said that there are many other biases in the criminal system that undermine the worth of the information. Yet these errors also may understate the enormity of the criminal’s past wrong, for example, where a charge is reduced because of a technical defect in the evidence or because of a plea bargain. The criminal law may be quite correct in its insistence upon safeguards for the individual accused. Misrepresentation, however, is not a criminal matter, but a civil matter between two private parties. And in this context, the individual who is asked to risk his property and his reputation should not have his freedom compromised solely to advance the private interests of others. He has the right to evaluate information about another’s criminal record as he chooses. Assume the possibility that he will misuse or misinterpret the information is real. It does not justify a suppression of the information (that in
itself can be subject to abuse) but a disclosure of the information, coupled with an explanation about its import and effect. Those who wish to remain quiet about their past can look elsewhere; those who wish to obtain employment should, when asked, tell the truth and explain away the significance of their past conduct as best as they are able. There is a close kinship between force and fraud. And if A for his own advantage cannot use force against B to obtain employment, then the law should not allow him to use fraud either.

The moral principles involved, moreover, are not changed even if the state by statute allows a criminal to lie about his past record and denies the prospective employer the right even to ask questions to clarify the situation. At best the statute casts the government in the unseemly role of aiding and abetting the fraud which one citizen commits against another. The great lesson of the search and seizure cases is that the government should be slow to adopt the techniques of dishonorable citizens even if the government acts for noble ends. Yet the statutes that ban inquiry into arrest or criminal records or any other information about a prospective employee show how easy it is to forget that lesson and to permit good motives to make the government a party to conduct that is intrinsically wrongful when engaged in by a private person. Fraud is a terrible thing (even if torture is worse) to which we become numb through overexposure. We should be very slow to recognize any easy justification for its use against private individuals. The law of privacy makes eminently good sense when it sets itself against the misrepresentations that some individuals make about others. Yet the law perverts privacy

---

47 Indeed, it was none other than Justice Brandeis himself who first pointed out the dangers of allowing the state to engage in forms of conduct that the law would regard as wrongful if engaged in by private individuals:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.


48 Consider the following case: A employs B, a convicted criminal, in a state where it is illegal to ask about prior criminal conduct. If A could have asked the question, he would not have offered the job. B commits a crime that destroys A's property or that renders A liable to C under the doctrine of respondeat superior. Is there any reason why the law should not hold the state, which has foisted B's employment upon A, civilly responsible for A's loss?
in both its meaning and function when in the name of privacy it allows and encourages individuals to misrepresent themselves to others.

IV. Conclusion

Throughout this brief Article I have explored the issues of privacy law with the traditional tools of the private law. The effort has borne mixed fruit. On some issues the answers that I reach seem clear and powerful. On others these analytical efforts do little to resolve the original uncertainty. Critics may take the failure to achieve complete clarity and precision as a sign of the weakness of the method. I prefer, however, to regard it as an unwelcome strength. To the extent that most of our fundamental legal institutions rest upon the implicit, shared expectations of the governed, there is no reason to think that these expectations will be equally instructive or equally uniform on all important issues. To the contrary, while solid results are possible at the core, we should expect some disagreement at the edges, and privacy law does lie at the edge of tort law.

There is also a second sense in which these efforts to understand privacy law are apt to disappoint the reader as much as they do the author. Much of my analytical efforts could be regarded as an evasion in the sense that they do not attempt to plumb the depths of the profound moral sentiments that prompted legal recognition of the privacy conception in the first place. Yet there too I may offer a qualified defense, if only in closing. My failure to deal with privacy as it relates to friendship, trust, love, companionship and the like does not arise from the belief that these are unimportant matters. Indeed, they may be too important to be trusted to lawyers, particularly in an adversary context. Instead, I think that the essential truth on this matter was clearly pointed out by my late colleague, the great Harry Kalven, who sensed that there was an irreducible gap between the means of the tort law and the moral aspiration of privacy. There is in the end, I think, no way that the law can protect and advance privacy in its philosophical sense except through indirection. The law can provide a framework for protecting private property and consensual relationships. Yet those individuals who cherish their own privacy cannot demand more of the legal system. In its philosophical sense, privacy may be one of the highest values of a civilization, but it is one we obtain only by individual effort and planning and not solely as of legal right.

\[\textit{See Kalven, supra note 22, at 326-29.}\]