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Privacy and the Limits of History

Neil M. Richards
Washington University in St. Louis School of Law, nrichards@wustl.edu

Book Review

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Lawrence M. Friedman, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy.* Palo Alto: Stanford University Press, 2007. Pp. 360. $29.95.

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Lawrence Friedman's *Guarding Life's Dark Secrets* is a fascinating and important contribution to the history of legal ideas and to our understandings of the development of the law regulating privacy, reputation, and indecent activity. Friedman weaves for us a nuanced and compelling tale of the rise and fall of the "Victorian Compromise," a series of interlocking legal doctrines protecting the reputations of elites around the turn of the twentieth century. *Dark Secrets* undeniably advances our understanding of both the genesis of privacy law and the relationships between law and culture in the Gilded Age. As a work of legal history, it is an instant classic—a must-read for anyone interested in privacy law. But although *Dark Secrets* is first-rate legal history, it is less successful in its latter chapters when Friedman shifts his focus from the past to the present. The limits of Friedman's social criticism raise important questions about the ability of history alone to provide answers to social problems in our modern, networked information society.

Friedman's dual purpose in *Dark Secrets* is to explain the Victorian Compromise and what it represented, and to tell the complicated story of its decline and ultimate abandonment over the course of the twentieth

* Professor of Law, Washington University School of Law.

century. The first half of the book describes the Compromise at its height in the late nineteenth century and consists of a series of chapters demonstrating how the Compromise was reflected in a myriad of common law doctrines regulating reputation and privacy. In these chapters, Friedman argues that the Compromise had two principal components. On the one hand, the Compromise was the legal embodiment of a theory of social morality, particularly for the upper classes. Many of the legal doctrines that constituted the Victorian Compromise dealt with matters of sex, vice, and other personal habits. Thus, libel and slander protected reputation from lies, the doctrines of seduction and breach of promise gave special protection to the honor of women in sexual matters, and obscenity law kept public discourse at an appropriately prudish level. But on the other hand, although the law forbade certain instances of 'immoral' conduct, it also recognized that such conduct was inevitable, and sought to shield these slippages from the bright-line standards demanded by conventional morality. Protection of slippages seemed particularly important for "pillars of society," particularly upper-class men. For instance, Friedman argues that blackmail law should be understood as protecting upper-class men against threats by lower-class blackmailers when those elite men strayed from the demanding standards of morality and respectability.

The notion of slippage from the demands of morality is central to Friedman's argument about the nature of the Victorian Compromise. A less charitable interpretation of the Compromise might charge simple hypocrisy, but Friedman argues that the Compromise reflected a nuanced theory of society, albeit a vision of society that modern observers might find distasteful. The Victorian Compromise presumed that society was fragile and needed to be protected through rules of propriety; respect for the reputations of elites was deemed essential for the maintenance of social stability. But at the same time, it was acknowledged that those all-too-human elites would inevitably stray from the path of respectability and engage in immoral conduct. In order to protect the social fabric (and with it the existing social order), the Victorian Compromise represented an effort to manage these inevitable deviations. Thus, the Victorian Compromise not only established the moral norms that should govern society, but also (ostensibly to preserve society itself) created zones of privacy within which elites could misbehave. On this latter point, Friedman effectively contrasts the formal demands of Victorian morality with the existence in most major cities of red-light districts where prostitution, gambling, and other forms of vice were rampant.

In the second half of the book, Friedman describes the decline of the Victorian Compromise over the course of the twentieth century. The ultimate rejection of the Compromise and the social model it reflected resulted from two very different forms of critique. Attacks on the

Compromise came first from conservative social critics who objected to the permissiveness of the privacy zones the Compromise created to protect misbehavior. These critics sought to replace the leeways allowed by the Victorian compromise with a strict moral code that would govern sin and vice through law. The conservatives achieved their greatest successes in the local regulation of obscenity and other sexually-themed expression, as well as the regulation of alcohol production and consumption through national Prohibition. Ultimately, the conservative response was a failure, because the Victorian Compromise came to be destroyed not from the right, but from the left. This second wave of attacks on the Compromise came from proponents of what Friedman calls "the permissive society" (4). In a society marked increasing consumerism, mass media, and the sexual revolution, this second group of critics gradually swept away national Prohibition, much of the regulation of sexuality and sexual expression, and the regulation of vice and morals more generally. Friedman argues that the progressives' victory in defining the norms of American culture made both the social conservative position and the Victorian Compromise irrelevant, and represents, at least from a nineteenth century perspective, the "triumph of sin" (192). He concludes by arguing that in our modern society, privacy remains an important social value and that although its contexts have changed slightly over the past century, it will remain a source of social and legal conflict.

Taken as a whole, Friedman's argument in *Dark Secrets* is an important contribution to our understandings of the evolution of the understandings of blackmail, defamation, and the regulation of sex and vice in post-Civil War American culture. According to his account, law is a largely dependent variable that is influenced by larger social forces; although law can sometimes affect how society is ordered, law is more often a reflection of social norms than a creator of them. For anyone familiar with Friedman's earlier work, such as his epic *History of American Law*, this model of legal causation should be familiar.[1] But even for those who would assign a greater causal primacy to law, Friedman's great contribution here is to demonstrate the tremendously complex relationship between laws protecting reputation and morals on the one hand, and private activity and social norms on the other. Friedman demonstrates convincingly that law and culture have had a mutually-dependent relationship throughout modern American history.

Friedman's insight into the complex relationship between legal rules and cultural norms in the context of privacy law suggests numerous implications. One particularly important contribution that *Dark Secrets* makes here is in the way it situates the establishment of the right to privacy within the social conflict marked by the uneasy Victorian

1. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005).

Compromise. Scholars of privacy law have traditionally used the publication of Warren and Brandeis's 1890 article "The Right to Privacy"[2] to date the birth of privacy law in America. In their influential article, Warren and Brandeis argued that the common law should be read as including a tort that could protect individuals (especially Brahmin elites like Warren) from disclosure of their private affairs by the press. Friedman ably demonstrates not only that the Warren and Brandeis project was but one dimension of the Victorian Compromise, but it was a late and relatively minor contribution to the Victorian effort to protect the reputation and standing of elites. It was also less original than many scholars have realized, as there is significant evidence that Warren and Brandeis were themselves relying on existing legal traditions (such as the law of confidentiality) in arguing that the common law should be read to include a "right to privacy."[3] Friedman's explication of the nineteenth century doctrines protecting reputation further demonstrates that there was an extensive body of "privacy law" long before Warren and Brandeis. In short, Friedman's masterful situation of twentieth century privacy law alongside the older Victorian Compromise means that any future examination of the origins of modern American privacy law must start with *Dark Secrets*.

A second major contribution of *Dark Secrets* is more implicit in Friedman's argument, but no less significant. Friedman's account of the ongoing struggles over morality and decency between conservatives and progressives suggests that what we now think of as the "culture wars" is hardly a modern phenomenon. A recurring issue in many recent legal debates has been to what extent "traditional morality" can be used as a basis for statutory and even constitutional law. This issue was most famously raised in the Supreme Court sodomy cases of *Bowers v. Hardwick*[4] and *Lawrence v. Texas*,[5] but it recurs in other areas as well. The complexity of Friedman's account of the history of the regulation of sexual activity suggests that any appeals to "tradition" in this area of the law are problematic. Indeed, the lesson that *Dark Secrets* suggests to us is that when it comes to the regulation of sexuality (and particularly disfavored forms of sexual activity and expression), there are very few traditions other than a persistent and long-standing tradition of conflict over the relevant legal and social norms.

Friedman's account, therefore, has the potential to strip away a great deal of the mythology and sentimentality that surrounds "traditional morality." His depiction of the complex Victorian Compromise shows

2. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. For an account of this phenomenon, *see* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 123 (2007).

4. 478 U.S. 186 (1986).

5. 539 U.S. 558, 562 (2003).

how overt norms of respectability and prudery coexisted not only with widespread violation of these norms in private, but also with a formal legal order that expressly (and we must imagine intentionally) created loopholes within which the overt norms could be violated with impunity. From this perspective, the actual practice of decency norms in Victorian society suggests that in the future, normative claims of "traditional" morality based upon historical evidence from this period must be viewed with deep suspicion. To be clear, Friedman does not sharpen his presentist argument in this way, but this is just one of many implications that can be teased out from Friedman's rich and provocative intellectual history.

In the second half of *Dark Secrets*, Friedman attempts to sketch out some contemporary implications of his own. Beyond its historical narrative, an avowed goal of *Dark Secrets* is to "examine privacy in our own times" (4) and to say something about the modern problems of pervasive electronic surveillance (5). Particularly when viewed in light of the masterful historical story in the first half of the book, the contemporary chapters at the end of *Dark Secrets* are somewhat disappointing. Whereas the early chapters clearly lay out the interlocking legal doctrines constituting the Victorian Compromise, Friedman's contemporary analysis is more muddled bringing in such disparate topics as constitutional privacy, spatial privacy, defamation, censorship, online privacy, and the "War on Terror." Ironically, Friedman's treatment of the seemingly unrelated nineteenth century doctrines shows their coherence, while his treatment of modern doctrines of "privacy" is more scattershot. To be fair, contemporary privacy law is famously muddled, and this is certainly not Friedman's fault. But when one considers that one of Friedman's great gifts, demonstrated in *Dark Secrets* as in his earlier work, is his ability to describe order in the law where others might see chaos, it is disappointing that Friedman's contemporary analysis does not live up to his own exceptionally high standards.

One might excuse the lack of clarity in the final chapters of *Dark Secrets* on the ground that contemporary privacy law is just inherently muddled and incoherent to a degree that even the finest works of scholarship might be unable to make sense of it. This is certainly a possibility, but I think the inability of *Dark Secrets* to unlock the puzzle of contemporary privacy is a function of the way it views the historical development of privacy law. To return to an observation made earlier in this essay, *Dark Secrets* treats privacy law in the same way Friedman has envisioned law in his earlier work: as a dependent variable that is the product of larger social forces over time. Privacy law, from this perspective, is an observed social phenomenon that has little substantive content of its own. Moreover, contemporary privacy law in Friedman's account seems to be what is left after the victory of the permissive society over both the Victorian Compromise and its conservative social critics. It

is thus little more than the remnant of the discredited social mores of a bygone age. Viewed in this way, it is unsurprising that contemporary privacy law seems muddled, and potentially a dead end.

Friedman's methodological perspectives of historicism and law-as-dependent-variable serve him well throughout *Dark Secrets*, but what is an advantage when he seeks to describe the development of law in the past is a handicap when he seeks to prescribe law for the present and future. Put bluntly, Friedman's methodology ably explains where we are, but at the same time gives us no sense of where we might now want to go. The Victorian Compromise is dead, but the challenge of contemporary privacy law is to identify the privacy values that matter in modern society, and to find some way to reconcile them with competing values such as security, efficiency, or equality, and with civil liberties such as free expression.[6] In recent years, a group of scholars engaged in what I have elsewhere called the "Information Privacy Law Project"[7] have sought to do precisely this kind of intellectual work. But to be successful, such a project must have more than a merely historicist orientation, and it must imbue privacy law and privacy theory with agency and vitality, rather than treating it as a dependent variable. Histories of the sort Friedman has given us will certainly remain indispensable to the normative project of articulating why legal protection of privacy is valuable (and also why it often is not). But history alone is insufficient to sort out the problems of modern privacy law, particularly as privacy law attempts to move forward to deal with new technological and social challenges.

Moreover, the particular story that Friedman tells is merely one narrative among many in privacy law. As he shows so ably, legal controls over reputation and information have a long and complex history, often involving bodies of law that are neither identified as privacy law nor have much to do with privacy at all. For all its nuance, the Victorian Compromise itself probably has little to teach us about privacy in a modern networked society. Privacy law might still protect reputation, and might still create leeways within which individuals can misbehave, but the social theory underlying the Victorian Compromise is a poor basis for building new understandings of the value of privacy and reputation. But even if the Victorian Compromise represents a dead end, other legal traditions might provide more fertile ground for re-imagining privacy law in the twenty-first century. For example, as I have argued elsewhere, modern theorists of privacy can learn a great deal from the long-standing

6. For examples of recent works engaging in this task from largely non-historicist premises, *see, e.g.*, DANIEL J. SOLOVE, THE MEANINGS OF PRIVACY (2008); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008); CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000).

7. Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L. J. 1087 (2006).

traditions of confidentiality law,[8] and the protections of privacy and freedom of the mind embodied in our tradition of free speech and thought.[9] Other scholars have made similar sorts of arguments drawing from other legal traditions in new and interesting ways.[10]

The challenge of privacy law moving forward is to identify the values that privacy serves, whether relying on our legal traditions or not, and to articulate their importance to contemporary society. The project of privacy law, then, is to engage in the normative struggle whose history Friedman recounts so well. In this endeavor, history is of course both helpful and useful, but it is insufficient by itself to move the law where it needs to go. Assessing the contemporary implications of Friedman's excellent project requires methodologies that are not Friedman's, whose strength is as a preeminent legal historian and not a normative theorist or social critic. In this light, the relatively murky final chapters of *Dark Secrets* should not detract from the overall picture of insight, clarity, and staggering erudition that runs throughout the work as a whole. Rather than quibble about the limits of Friedman's contemporary analysis, privacy scholars should rejoice that a first-rate work of legal history has helped to explain the muddle that is modern privacy law. Friedman has told privacy scholars a critical part of the story of how the law assumed its present state. Their task is now to move the law forward by imaging how it could be in the future.

8. See Richards & Solove, *supra* note 3.

9. *See* Richards, *supra* note 6.

10. *See, e.g.*, Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241 (2007).