

COMMENT: PROFESSOR POSNER'S LECTURE ON PRIVACY*

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Let's see now. I covered the common law in my second edition. Anything left? *Maybe* a few odds and ends. Such as? Preemption, preferred stock, prescription, presumptions, principal and agent, privacy . . . *privacy!* Hardly touched on privacy in my second edition. It's ripe for a withering economic analysis. Okay, I'll *buy* it. I'll do privacy for my Sibley lecture and shoot off a copy to Little Brown so they can start setting type for the third edition.

Privacy, hmmm. What good is it? No, that's not the question an *economist* would ask. What can you *sell* it for? That's the right question. Practically nothing is my reply. What about that big lug the other day, sits down next to me on the plane, and proceeds to tell me the entire story of his life, how playing tackle for the Chicago Bears prepared him for a career in selling insurance. Didn't have the heart to tell him what his life's story was worth. As a matter of fact, it had *negative* worth. Was just about to offer to *pay* him a nickel to shut up when I realized that the transaction costs might be too high.

Nah, you can't sell privacy for much. Everybody's got it. A glut on the market. Wait a minute, class—isn't it like parts of the body, worth a lot to the holder but not to everyone else? Ah, but I dealt with that problem in my book. Parts of the body *would* have value to people who would pay to witness a mutilation. Helluva potential market in ears and tongues. Privacy's a lot different. Why? Come on now, think. That's right. The reason is that you can see an ear or a tongue, but . . . the more you see privacy the less there is! In fact, maybe if you look closely enough there's nothing there at all. Maybe if we run privacy through our Jiffy Economic Analyzer it will come out the other end as nothing more than chopped bits of property interests of various kinds. Wonder what Prosser has to say on the subject. Is it too late to call him up and ask?

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The preceding monologue was taped on a Supersnoop which I used in my car across the street from a house registered in the name of Richard A. Posner at 2 a.m. on February 30th. Since I did not

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see the subject who was pacing around in the living room of the house, his identity must remain undisclosed. However, he suffered no harm, since I was able to record this monologue through means that did not involve interference with the subject's freedom of movement. Great things, these unobtrusive, self-focusing, ultra-sensitive Supersnoops. When they first hit the market, only a few rich people had them. Now they're so common a whole new national sport has arisen. I got mine free in my package of Crunchies, the cereal that makes such a racket when you add milk that it serves as an effective cover for private conversations around your breakfast table. I had to pledge, though, when I bought the Crunchies that I would use the Supersnooper only against people and not corporations.

I

Professor Posner is making a major contribution to our understanding of law. While it is fashionable to view his economic perspective as one-sided or distortive, most legal writers work from an implicit theory which may be just as skewed once it is teased out of their analyses. The fact that Posner's economic theory analysis is explicit is certainly no charge against him. To be sure, in the present lecture, Posner does not purport to account for every variance from his model. As usual, he dismisses some cases as wrongly decided or some statutes as inadvisedly enacted. Nevertheless, the burden falls upon us to inquire whether his admittedly partial explanation is so intrinsically desirable that it should shape our future attitude toward the right of privacy. Even if he ultimately fails to convince us, his writings always have sufficient heuristic value to be justified on that ground alone.

At this stage in Posner's scholarship, we may discern at least two major difficulties with his economic analysis of law: nonpecuniary motivation and noneconomic values. An example of the first is his mention of the legislative tendency to give more and more protection to the privacy of individuals and to give less and less protection to business firms and other organizations. Posner initially remarks that this trend is "perhaps startling" and "mysterious to the economist,"¹ but at the end decides that it is "not surprising" since "[n]o one has argued that most *legislation* has an implicit economic logic."² Posner's selective use of legislative examples paral-

¹ Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 405 (1978).

² *Id.* at 422.

lets his vacillation on the issue of surprise. He takes the Bureau of the Census, for instance, as illustrative of an economic point even though the Bureau's powers are purely statutory. As I will try to show later, one can interpret the Bureau illustration in a way that does not prove Posner's point at all. On the other hand, the laws against wiretapping fit Posner's scheme since by reducing external effects (except to criminals against whom courts may authorize wiretapping), conversation will not become so costly as to result in a great deal of social waste. But is the wiretapping legislation part of the legislative trend that Posner decries, or is it different in some inexplicable way from the Freedom of Information Act and sunshine legislation?³

A second major difficulty in Posner's work concerns noneconomic values. If privacy is a noneconomic value, then Posner's analysis, as he informs us at the outset, would come to a "grinding halt."⁴ To avert that mishap, Posner views privacy instrumentally "as inputs into the production of income or some other broad measure of utility or welfare."⁵ But in what sense do I view my own privacy as a means to some other end? To be sure, some people might value their privacy so much that they could command a high price for giving it up. Howard Hughes might have charged a small fortune for endorsing a brand of cigarettes.⁶ But these instances are surely unusual. I do not want to sell my privacy even if I could; I simply want to keep it for its own sake.

There may be, however, a crucial difference in this respect between a person and a business enterprise. Business firms, as Posner notes, use privacy as a means to produce income. A trade secret is useful to a firm because it provides a monopoly, which of course enhances profits. Any firm would reveal its trade secrets if it could obtain equivalent monopoly rights for a worthwhile period of time; this is in fact what happens when the government awards a firm a

³ Even when legislation seems avowedly economic, Posner's emphasis on the economic approach may overlook a significant portion of reality. Consider the goal of antitrust legislation to prevent business organizations from becoming so big that they could challenge the political power of the government. According to Professor Scherer, Posner "completely ignores" the goal of diffusion of power as an end in itself even though that goal, which the major debates that led to the Sherman Act clearly articulated, "could scarcely have escaped his notice." Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 *YALE L.J.* 974, 980 (1977).

⁴ Posner, *supra* note 1, at 394.

⁵ *Id.*

⁶ This point is slightly different from Posner's examples of commercial endorsement of products by famous athletes or movie stars. Manufacturers pay the sports or entertainment personalities not for giving up their privacy but because they already have recognition value.

patent that makes the former trade secret a matter of public record. The public inspection to which the patent or copyright is open does not annoy the corporation. As an artificial person, the firm suffers no mental distress when the patent reveals its hidden processes; it simply lacks sensitivity to the value of "privacy." A corporation does not want privacy for its own sake. Privacy to a corporation is only an intermediate good. Hence there should be no surprise that legislatures are giving more and more protection to the privacy of individuals and less and less protection to corporations and governmental entities. Even if we concede that Posner has made a case for limiting intrusion into corporate records because of the costs to the corporations in combatting intrusion or avoiding disclosure, why does he segue so easily into governmental organizations? Here disclosure serves a political purpose; it makes the bureaucracy more responsive to the public by throwing some sunlight into smoke-filled rooms. Similarly, the "increasingly stringent ethical standards requiring disclosure of income"⁷ make it harder for those who want to run for public office to have conflicts of interest. Isn't this, too, a step toward a more democratic government? Surely it makes private deals, bribery, and corruption in government a little harder. I am sure Posner opposes at least the latter two.

II

Nevertheless, let us proceed with the counterfactual assumption that privacy for real persons is an intermediate good. Posner's question then becomes: to whom should society assign property rights in cases involving the desire to conceal information? He regards as uncontroversial those cases in which transaction-cost considerations argue against the assignment of a property right to the possessor of a secret. Posner gives as examples the sale of magazine subscription lists and the household interviews by the Bureau of the Census. He also uses these examples in his discussion of the tort of appropriation. Thus they are worth scrutiny here.

The sale of magazine subscription lists is not an earth-shaking problem in itself; I can hardly understand why people complain about getting mail solicitations. A piece of mail does not intrude upon their privacy, and in any event the recipient has the simple alternative of throwing it out without opening it. But the example is important because it demonstrates on Posner's part a rather static

⁷ Posner, *supra* note 1, at 405.

conception of adjustments that can be made as a response to transaction costs. It is true, as Posner argues, that a magazine having a present subscriber list would incur excessive costs if it had to obtain each subscriber's consent before it could sell the list to another periodical. In that case, the magazine presumably would not sell the subscription list. Hence a potential source of profit to the magazine—the sale of its subscription list—would be cut off. But surely the free market can cope with this problem. Magazines will soon copy the telephone company's policy with respect to unlisted numbers: magazines will have a two-tier subscription policy, offering the lower subscription price to those readers who consent to the inclusion of their names on a subscription list to be sold to other magazines and the higher price to those readers who want their names excluded from the list. The higher price is economically justified because the magazine can pass on to the consenting readers in the form of a lower subscription price the profit to the magazine resulting from the sale of its subscription lists.⁸

My unlisted-number analogy illustrates the point in a slightly more complex fashion. *Prima facie*, the telephone company should save money when a subscriber asks for an unlisted number since it does not have to print the name and number in the telephone book. An unlisted number will even discourage directory-assistance requests after a while. But on balance the telephone company loses money since an unlisted number will attract to it fewer telephone calls, and clearly the company accrues its main profits from the volume of telephone calls made in the system. Hence the company is justified economically in charging a higher price for the privacy privilege of having an unlisted number.

The Bureau of the Census example throws a different light on the same problem of high transaction costs. Clearly Posner is right that it would be very costly for the Bureau to have to pay interviewees for their information.⁹ But it does not follow that because of the high transaction costs the interviewee has no property right. Rather, the

⁸ To take care of Posner's footnote 13, we might add a third tier to the magazines' subscription prices: a very, very high price for those who want to be selective as to the other magazines to which the publisher can sell their name.

⁹ Posner's differentiated price proposal, however, would not work. For although the Bureau theoretically could employ a sampling procedure to minimize costs, "word" would soon get out that those persons selected as part of the sample could jack up their price, since they have the opportunity to skew the sample severely by refusing to be interviewed once they are selected. The resulting costs to the Bureau would approach those of interviewing the entire population rather than a sample, at which point the Bureau would conduct the interviews coercively or not at all.

legislative process worked out a complex bargain between the government and the interviewees. Society decided, first of all, that instead of taxing itself to pay itself to be interviewed by the Census Bureau, it would empower the Bureau to elicit information without paying interviewees. But second, because society conceded that the government could get this information for free, society imposed elaborate safeguards upon the use of the information. Posner recognizes these safeguards against disclosure, but he curiously seems to think that the government has benevolently assumed them. A more realistic approach would consider the safeguards against disclosure of census information part of the bargain which the public exacted from the government when the public consented to the census procedure. Finally, the bargain itself would not make sense unless the public *valued* its privacy, and the government recognized, through the legislative process, that initially the public did have a property right in this privacy which the public exchanged in the two-sided bargain between the government and the public.

Professor Posner also would not assign an individual a property right in privacy when the individual seeks to conceal discreditable information. Here Posner's examples seem unrealistically incomplete. He includes obvious examples of discreditable information such as past criminal activity, immoral conduct, or material misrepresentation. But what of the following example from personal experience? My refrigerator needed repairs, so I called General Electric's repair service in Illinois. Two workmen arrived and proceeded to break parts, leave wires disconnected, and demolish the ice-cube maker while getting the refrigerator temporarily to cool the food properly. But an hour after they left the refrigerator conked out altogether; it at least had functioned marginally before they came. Since it was a weekend, I was unable to get another repair service to come and undo the damage before all the food spoiled. Nevertheless, GE wanted to be paid. I wrote to them explaining what had happened, claiming that their bill of \$70 made no sense since their work left me worse off than before they came and adding that they owed me money for the spoiled food. Did they take me to court (where I was fairly confident I would win even on the counterclaim)? No; a phone call, some dunning letters, and then silence. Result: I did not pay their bill, and I am undoubtedly on their deadbeat list.

Surely a business firm dealing with thousands of customers would find my actions to be those of a true deadbeat. Perhaps if they had to categorize me they would call me "litigious personality—AVOID." If list-swapping were efficient, I would find myself on

everyone's credit-risk list. Yet would Posner, a professor of law, say that a customer should have to give up his legal rights in such cases and pay the \$70 to avoid future difficulties in securing credit or contracting for services? And of course the example can be broadened. Posner's scheme would subject to adverse publicity in credit markets any person falsely or even negligently suspected of not having paid his bill. Given the increasing ease of computerized business information exchanges, such a person might be gradually denied credit without even being able to find out why. Thus Posner's scheme would tend to subject persons to some of the penalties imposed on criminal offenders without any constitutional safeguard of a fair hearing or trial.

Professor Posner is rightfully concerned about individuals who want to misrepresent themselves by controlling information that others have about them. But again his economic analysis fails to take into account probable real-world responses. If the law downgrades property rights in privacy, the individual will not desire privacy any less. In fact, privacy will become increasingly valuable. Rich persons will spend greater amounts of money for elaborate privacy mechanisms while profiting from their ability to pry on everyone else. For instance, bankers would pry on their customers, but how often even today do we get a glimpse into the bankers' private world? Bankers may manipulate their own finances and overdraw their personal checking accounts at their own banks, but we can be quite certain that the local credit bureaus will never receive information about them. Entertainment personalities today spend large amounts of money for elaborate misrepresentations about their personalities and even deduct the cost of the misrepresentations as a public-relations business expense. If the stories celebrities feed to the gossip-columnists become our role models, as Posner thinks they do, then the public is also learning the lesson that one must engage in some misrepresentation in order to follow the example of the public figures.¹⁰ In addition, the average person engages in some misrepresentation as a defensive maneuver, to combat the misrepresentations of others. Although the average person

¹⁰ A major lesson taught by Hollywood is the use, or overuse, of cosmetics, hair dyes, facelifts, false bras, toupees, elevator shoes, and the millions of other products which keep our economy alive. All these involve misrepresentations which, depending on one's point of view, may be material. If Posner's scheme were carried to its logical conclusion, and all these industries had to close their doors, the resulting great depression would make the name of Richard Posner immortal in business circles, surely an ironic result.

may want to "manipulate the world" around him,¹¹ his motivation is in part to avoid being disadvantaged by others who are also manipulating and especially by those who can manipulate elaborately and successfully because of their wealth advantage.¹²

CONCLUSION

There are many insights in Posner's lecture that are instructive and stimulating, and in general I applaud the adoption of any perspective, including economics, that will enable us to be more scientific and analytical about law. There are some things in his lecture that I would have liked to discuss but cannot do so here—not because of lack of space (a readily available plea in avoidance), but because I would need much more time to think the matters through. An example is the competing constitutional rights of free speech and free press. How much does the right to express oneself or remain silent safeguard personal misrepresentation? How does the right of a free press figure in Posner's notion of a newspaper's external costs?¹³ Would recent Supreme Court defamation cases distinguishing between public figures and private persons¹⁴ also be relevant in deciding where to draw the line in many of the areas of privacy where Posner tries to draw the line by a more circuitous route? I look forward to pacing around in my living room at 2 a.m. trying to puzzle out these Posner-prompted problems.

¹¹ Posner, *supra* note 1, at 400.

¹² A Posnerian objection here would be that disadvantages of wealth are unpersuasive; the law should not be a surrogate for transfer payments from rich to poor. But my rejoinder is that the question is to whom should the law assign the property rights in the first place? Under this view, Posner's scheme would not meet his own goal evenhandedly.

¹³ Posner's *Sidis* example seems to reduce to an argument that two wrongs (the *New Yorker's* story in the first place and the theft of the story from the *New Yorker* by all the other magazines) make a right (no need to compensate *Sidis*).

¹⁴ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).