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### Lawrence M. Friedman's *Guarding Life's Dark Secrets : Legal and Social Controls Over Reputation, Propriety, and Privacy* (book review)

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# GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY

 [ipbr.net/2008/09/guarding-lifes-dark-secrets-legal-and.html](http://ipbr.net/2008/09/guarding-lifes-dark-secrets-legal-and.html)

□ by Lawrence M. Friedman. Stanford: Stanford University Press, 2007. 360pages. Cloth. \$29.95. ISBN: 9780804757393.

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If you are reading this – a book review published in a specialty journal that exists exclusively on-line – then you are surely more aware than most people how modern technology has remade the world. Much of this technological revolution has been beneficial. The internet provides us with instant access to a previously unimaginable wealth of information, and permits us to upload, download, and redistribute it virtually at will. Yet the same technology permits any jerk with a scanner, a cell phone camera, and a laptop to broadcast instantly to the world a plethora of words and images that we never intended for public consumption and that might cause us embarrassment or even more serious harm.

The law has struggled to come to terms with this rapidly changing social landscape. Do criminal and civil causes of action already on the books apply to the nonconsensual capture and dissemination of information about individuals? If so, to which individuals do such laws apply, to what kind of information, and in what circumstances? Can access to certain information be denied to some users? What remedies are available for harm that people suffer from exposure of private information, and against whom do such remedies lie? Or is the real problem the reverse: what recourse do people have who have been denied access to information about or possessed by others? Indeed, the new information environment, along with rapidly changing baseline social assumptions about access and exposure, raise difficult yet profoundly fundamental social questions. What is “privacy”? Why do we value it? What precisely is the harm caused by its invasion?

In his new book, Stanford legal historian Lawrence M. Friedman does not address these questions directly, but lays some useful groundwork for their contemplation by providing a social history of the legal remedies most commonly associated with protecting the privacy of personal information and behavior. Friedman’s argument is discomfiting: the array of legal remedies that we have inherited – the laws of libel, slander, blackmail, censorship, and so on – were designed in different times to treat very different social problems, and speak little if at all to contemporary circumstances.

The heart of Friedman's account is his contention, persuasively documented, that many legal regimes now commonly thought to protect personal privacy evolved originally during the nineteenth century to protect something quite different: reputation. According to Friedman, strict nineteenth-century [\*763] codes of public morality reflected demanding collective ideals of personal virtue. These ideals defined the best life as one characterized by discipline, self-control, hard work, piety, temperance, and frugality. Personal reputation – the key to social respectability and economic prosperity for the upper classes – depended upon compliance with these standards. Strict laws of defamation, for example, prevented public revelation of reputation-damaging misbehavior, even when the charges were true.

At the same time, however, Victorians recognized that human beings were weak, and that few could live up consistently to the highest ideals. Lapses, even among the most privileged and powerful, were inevitable. The result, argues Friedman, was the "Victorian Compromise," in which harsh legal standards were available in principle to punish serious moral breaches, but were generally applied in a way that permitted otherwise respectable men and women to avoid the consequences of more predictable, run-of-the-mill lapses – the occasional affair, for example, or patronizing a prostitute. What looks today like hypocrisy was justified, Friedman argues, by the nineteenth-century belief that protecting the private reputation of the elite served a public good. Democracy during this period was seen as fragile because it depended on the virtue of leading citizens and officials. Preventing stains to their reputations thus served the benevolent public purpose of ensuring social stability. Originally, then, the law's creation of a private space in which individual behavior – and misbehavior – could remain shielded from unwanted view served a social interest in protecting the good reputation of respectable persons.

On Friedman's account, the stable and relatively long-lived Victorian Compromise collapsed toward the end of the nineteenth century, ushering in – or more accurately, reflecting – a period of rapid evolution in social norms, a period from which we have not yet emerged. Friedman breaks this tumultuous era into two very different periods during each of which a different piece of the Victorian Compromise was publicly rejected. In the first period, which lasted until roughly 1920, reformers attacked the belief that human weakness among the elite is inevitable and must therefore be indulged to some degree if social stability is to be maintained. Led by moral zealots like Anthony Comstock, reformers of this ilk argued that the best way to enforce the moral standards upon which a democratic society must rely is simply to enforce them, and to do so uncompromisingly. "Society," Friedman writes, "was capable of perfecting itself" (p.176). Thus, governments began to enforce with great vigor existing laws against prostitution, obscenity, and abortion, and tightened legal restrictions against sex with minors or among unmarried people.

Around 1920, however, Friedman writes, American society suddenly reversed course, now rejecting the first and in some ways much more fundamental piece of the Victorian Compromise – the belief in personal self-restraint as a pillar of elite social respectability and democratic stability. During this period, enforcement of antvice laws like obscenity, fornication, adultery, seduction, and alienation of affections quickly diminished and [\*764] ultimately all but

ceased. What had previously, with the cooperation of the law, been hidden was suddenly brought into public view, but without shame or adverse social consequence. The world that social and political elites now inhabit, Friedman suggests, could not be more different from the one they inhabited during the nineteenth century. Today, not only does the law fail to protect the privacy of celebrities, but it positively abets the destruction of their personal privacy. This is, Friedman tells us, only a logical consequence of the undermining of the Victorian Compromise: if reputation is no longer damaged by the indulgence of personal weakness, then the exposure of such indulgences hardly requires legal protection.

Friedman tells his story mainly through chapters focusing on specific legal regimes such as defamation, blackmail, and censorship. A fascinating chapter on legal protection of the reputation of women walks the reader through a series of now-archaic prohibitions such as the crime and tort of seduction, common law marriage, breach of promise to marry, criminal conversation, and alienation of affections.

Friedman also raises several additional themes in the course of the narrative. A chapter on status and mobility in the nineteenth century explains how geographical and social mobility in the nineteenth-century United States allowed people to escape their prior reputations and start fresh in a new place. At the same time, the ability to move beyond the reach of one's reputation created opportunities for all manner of fraud – bigamy seems to have been a popular method of jettisoning an unwanted earlier identity – and the laws that protected the reputation of the respectable could in these circumstances be used to reveal the serious moral breaches of the unrespectable. Friedman also alludes occasionally to a fundamental change in the very concept of privacy. Whereas in the nineteenth century, maintaining control over personal information was a matter of reputation management, in the twentieth century it became more a matter of individual dignity and autonomy.

The book tells its main story clearly, entertainingly, and persuasively. If there is a weakness, it lies mainly in Friedman's inability to find a clear place in the story for his secondary themes. It would be nice to know more, for example, about recent changes in social conceptions of privacy and whether the law might be made to accommodate such changes. Friedman also asserts repeatedly, but without much explanation, that changing social and legal treatment of privacy are linked to changing conceptions of democracy, or at least of what constitutes the main source of threats to democracy. Unfortunately, this intriguing thesis is never developed.

GUARDING LIFE'S DARK SECRETS is likely to be of greatest interest to legal scholars and political scientists who take an historical approach to the evolution of legal and political norms, who study the legal and judicial protection of privacy, or whose work examines the interaction of legal and social forces.