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“KNOW EVERYTHING THAT CAN BE KNOWN ABOUT EVERYBODY”:  
THE BIRTH OF THE CREDIT REPORT

JONATHAN WEINBERG\*

I. INTRODUCTION

NOT too long ago, the Equifax credit bureau revealed that hackers had copied from its records the personal information of up to 143 million people—driver’s license and social security numbers, criminal records and medical debt, payment records and rental histories.<sup>1</sup> Consumers struggling to cope with that exposure confronted a reality of the digital age: The large credit bureaus—Equifax, Experian, and Trans-Union—have commodified information about the rest of us, making their money by collecting our data, processing it and selling it to others. They know most of what there is to know about us—those three firms collect 4.5 billion pieces of consumer information every month.<sup>2</sup> They plug that information into shadowy computer algorithms, which generate judgments about our credit-worthiness and financial stability. Those largely-unappealable judgments determine whether we can get credit, and on what terms. And there’s not a lot any of us can do about it—we are not, after all, the credit bureaus’ customers. Rather, we’re the product they’re selling.<sup>3</sup> We are, as one reporter put it, “trapped in Equifax’s vast web of data, with no recourse and no ability to opt out.”<sup>4</sup>

One might be forgiven for thinking that our situation, finding ourselves at the mercy of firms whose business is to sell our information, is a new thing—at the very least a product of the Information Age, post-dating the introduction of credit cards and mainframe computers. In fact, it’s much older than that. The story that has unfolded in our relationship with Equifax echoes the story surrounding the emergence in the mid- to late- nineteenth century of the first credit bureau, the Equifax of its day:

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1. See Stacey Cowley & Tara Siegel Bernard, *As Equifax Amassed Ever More Data, Safety Was a Sales Pitch*, N.Y. TIMES (Sept. 23, 2017), <https://nyti.ms/2jSPZb2> [<https://perma.cc/PC93-CGBU>].

2. See *id.*

3. For an early expression of this oft-repeated thought, see Claire Wolfe, *Little Brother is Watching You: The Menace of Corporate America* (1999), [www.loompanics.com/Articles/LittleBrother.html](http://www.loompanics.com/Articles/LittleBrother.html)

4. Ron Lieber, *Why the Equifax Breach Stings So Bad*, N.Y. TIMES (Sept. 22, 2017), <https://nyti.ms/2jRsnUr> [<https://perma.cc/82YN-ERXE>]; see also Cowley & Bernard, *supra* note 1.

initially known as the Mercantile Agency, it was the corporate predecessor of today's Dun & Bradstreet. In a world in which such things were unknown, the Mercantile Agency sought to establish and maintain a file on every American who might ever seek commercial credit.

The story of the Mercantile Agency—deeply controversial and deeply influential—has lessons for us in understanding Equifax and other data brokers today. It, and its rivals, had a momentous effect on American life. Over the course of a few decades, credit bureaus put in place a new, pervasive, network of social monitoring. That monitoring generated an information product that the credit bureaus sold in the marketplace, and that became a part of the nation's economic infrastructure “next in the rank of importance to railroads and telegraphs.”<sup>5</sup>

In order to make that happen, the credit bureaus had to figure out how to build a modern database system without the help of computers. They struggled to reduce thick narratives and messy life prospects to simple ratings codes. Today, we've largely solved the challenge of building large database systems; the challenge of flattening and reducing rounded human lives so that they fit neatly into those databases, though, is one we're still grappling with.

The credit bureaus raised far-reaching privacy issues, strikingly similar to the ones we face today. Modern privacy law did not yet exist; folks in the nineteenth century did not have the tools or the vocabulary to couch their privacy concerns as legal claims. But they could and did bring defamation lawsuits. Their distress over the commodification of personal information, and their privacy-related fears about the improper dissemination of that information, played out within the defamation case law.

## II. THE EMERGENCE OF THE CREDIT BUREAU

Heading into the mid-nineteenth century, Americans were swelling westward across the continent. The only large cities were on the Atlantic coast.<sup>6</sup> Once or twice a year, retailers from all over the country converged on New York and other Eastern cities to buy merchandise that they could resell at home. Typically, they bought those goods on credit, and paid for them only months later, after the goods were sold.<sup>7</sup> This was the system of

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5. *Trussell v. Scarlett*, 18 F. 214, 219 (C.C.D. Md. 1882).

6. As late as 1830, of the nation's forty largest urban areas, only three (New Orleans, Cincinnati, and Louisville) were outside the territory of the original thirteen colonies. See U.S. BUREAU OF THE CENSUS, *Population of the 90 Urban Places: 1830*, <https://www.census.gov/population/www/documentation/twps0027/tab06.txt> [<https://perma.cc/S427-JERX>].

7. See ROY A. FOULKE, *THE SINEWS OF AMERICAN COMMERCE* 110-14 (1941). Competitive pressures, in turn, required the retailers to extend credit to their customers. As a baker put it in an 1841 letter, “I cannot sell for cash and if I do not trust I cannot sell.” SCOTT SANDAGE, *BORN LOSERS: A HISTORY OF FAILURE IN AMERICA* 106 (2005).

“mercantile credit.” As one 1838 commentator put it, “[t]here are few circumstances connected with the American Union more worthy of remark than the credit system,” enabling “traders of Missouri and Arkansas—of Mississippi and Alabama—of Illinois and Michigan—distant 1,000, 1,500, or 2,000 miles and returning but once in 12 or 18 months,” to supply themselves with goods that they would pay for some months later.<sup>8</sup>

Mercantile credit functioned as venture and startup capital for many stores, workshops, and farms; without it, small western retailers—who themselves sold to their customers on credit—could not have existed. From the 1820s to the 1850s, the typical western retailer operated on one to two years’ credit from businesses back East.<sup>9</sup> In 1858, the Mercantile Agency estimated that more than 150,000 village and country stores owed an average of \$14,500 each to urban jobbers; that aggregate debt amounted to more than half of the nation’s GDP.<sup>10</sup>

How was an eastern merchant to know, though, whether a faraway buyer was reliable? A contemporary store owner offering book credit to a local customer, all within a single community, could make a credit assessment based on his personal knowledge of the borrower, his habits, and his family resources. Benjamin Franklin had spoken to that sort of local knowledge years earlier in explaining that a creditor will gladly extend your loans upon hearing the “sound of your hammer at five in the morning, or eight at night,” but “if he sees you at the billiard-table, or hears your voice in a tavern, when you should be at work, he sends for his money the next day.”<sup>11</sup> No such informal knowledge was available, though, when lender and borrower were a thousand miles apart. For a time, creditors sought to rely on letters of recommendation supplied by the borrower, but those were unreliable and easily abused.<sup>12</sup>

The contemporary understanding was that most borrowers at some point would be unable to pay their debts, and that bankruptcy under then-extant laws would yield little for business creditors. This made it all the more important that merchants have some means of gauging the prospects of their customers.<sup>13</sup> Yet how was this to be done? Some large firms began the practice of dispatching investigators or traveling reporters to learn about their faraway customers, but this was a slow and expensive

8. See FOULKE, *supra* note 7, at 114.

9. See ROWENA OLEGARIO, *THE ENGINE OF ENTERPRISE: CREDIT IN AMERICA* 62 (2016).

10. See *id.*

11. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 49 (Talcott Parsons trans. Scribner 1958) (1904) (quoting Benjamin Franklin), *quoted in* Josh Lauer, *From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America*, 49 *TECH. & CULTURE* 301, 307 (2008).

12. See ROWENA OLEGARIO, *A CULTURE OF CREDIT: EMBEDDING TRUST AND TRANSPARENCY IN AMERICAN BUSINESS* 38-39 (2006); JOSH LAUER, *CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA* 30-31 (2017); FOULKE, *supra* note 7, at 289.

13. See OLEGARIO, *supra* note 9, at 36-37, 72-75.

process.<sup>14</sup> It was sometimes possible for eastern wholesalers to gain information from local postmasters, storekeepers or lawyers, and a few informal blacklists and “spy-books” began to spring up, but they were unsystematic and limited in scope.<sup>15</sup>

It was a businessman and abolitionist named Louis Tappan who set in place a new approach to the problem.<sup>16</sup> When Henry Thoreau visited New York City in the summer of 1841, he happened upon Tappan’s newly-founded Mercantile Agency, and noted his impressions in a letter: Tappan had “invented . . . a new and very important business.” It was “a kind of intelligence office for the whole country, with branches in the principal cities, giving information with regard to the credit and affairs of every man of business in the country.”<sup>17</sup>

#### A. *The Production of Credit Information*

The Mercantile Agency idea was simple and revolutionary: the firm would pull together the local knowledge of every community in the U.S., regarding every business owner in that community, and store it all in a gigantic, centralized, constantly updated file system, available to anyone who paid subscription fees. The first step in the process was the recruiting of unpaid local agents to file reports on business owners in their communities. Most often, they were local lawyers, providing Tappan with information in return for the promise that the lawyer/correspondents could represent eastern creditors bringing debt collection actions against their subjects.<sup>18</sup> One of those correspondents was a young Illinois lawyer

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14. Sheldon Church pioneered credit reporting in the U.S. as a self-employed travelling reporter as early as 1827. See *infra* note 161 and accompanying text.

15. See LAUER, *supra* note 12, at 31; SANDAGE, *supra* note 7, at 107-10.

16. Tappan wasn’t the first entrepreneur to come up with the idea of a broadly-focused, third-party, subscription-based credit reporter. Solo travelling reporters had existed much earlier, see *supra* note 14, and the firm of Griffin, Cleveland, and Campbell had attempted a business much like Tappan’s in the 1830s. Griffin, Cleveland, and Campbell quickly failed, though, and Tappan bought its subscriber list. See JAMES D. NORRIS, *R.G. DUN & CO. 1841-1900: THE DEVELOPMENT OF CREDIT-REPORTING IN THE NINETEENTH CENTURY 10-14* (1978); OLEGARIO, *supra* note 12, at 40. Competitors quickly sprang up after Tappan opened his doors, but only one—founded by John M. Bradstreet—became as successful. That company’s initial name of incorporation appears in various sources as the Improved Mercantile Agency, see JOSEPH W. ERRANT, *THE LAW RELATING TO MERCANTILE AGENCIES* 4 (1889); MOSES KING, *KING’S HANDBOOK OF BOSTON* 290 (4th ed. 1881); the Improved Mercantile and Law Agency for Cities, see OLEGARIO, *supra* note 9, at 65; and Bradstreet’s Improved Commercial Agency, see FOULKE, *supra* note 7, at 297. It was soon renamed Bradstreet & Son, and later the Bradstreet Company. It ultimately merged with the Mercantile Agency (which by then had been purchased by R.G. Dun) to form the modern-day Dun & Bradstreet. See SANDAGE, *supra* note 7, at 121-22.

17. SANDAGE, *supra* note 7, at 99-100. For further discussion of the “intelligence office,” see *infra* note 215 and accompanying text.

18. See Lauer, *supra* note 11, at 308; OLEGARIO, *supra* note 1212, at 49-50, 52, 55.

named Abraham Lincoln.<sup>19</sup> Other correspondents included sheriffs, merchants, postmasters, and bank employees.<sup>20</sup> By 1844 Tappan's firm had over 300 correspondents; by 1846 nearly 700; by the early 1870s, more than 10,000.<sup>21</sup>

The firm encountered some resistance. At the very outset, one New York newspaper challenged the propriety of "the business of a secret inquiry into the private affairs and personal standing of everybody buying goods in New York."<sup>22</sup> Tappan, defending himself via an advertisement in his second year of operations, answered that he was not operating a "system of espionage," but merely extending and systematizing the sorts of inquiries merchants routinely made about persons applying for credit.<sup>23</sup>

And, in important ways, that was right: the task of the local agent was to translate each individual's local reputation, as reflected in community views and derived from the sorts of sources community members had always relied on, into a written document and to send that document to Tappan in New York.<sup>24</sup> An admiring article in the 1851 business press described the Mercantile Agency's reports as designed to state the subject's overall reputation in his local community—"whether he owns property, and is a man of good character—whether he does a legitimate or a speculative business—and whether he is competent, steady, and attentive, or otherwise."<sup>25</sup> To do that, the reporters relied on their personal views, communal gossip, and such information—property, habits, family connections—as was available to them and seemed relevant.<sup>26</sup>

Some contemporary accounts of Mercantile Agency reports emphasized their accumulation of factual detail. Two 1856 press reports, thus, imagined the following as a typical report:

Peter Mullen, \_\_\_\_, \_\_\_\_ Co., Illinois. Has done business in the same store for the last thirty-five years—made some money—owns a lot in Chicago heavily mortgaged—is the oldest of two

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19. See SANDAGE, *supra* note 7, at 156-58.

20. See OLEGARIO, *supra* note 12, at 49-50.

21. See Lauer, *supra* note 11, at 308; see also OLEGARIO, *supra* note 12, at 54, 161. Over time, the firm came to rely increasingly heavily on paid travelling reporters as a supplement to its unpaid correspondents; by the 1890s, "much of the routine reporting and revisions" was done by those employees. See NORRIS, *supra* note 16, at 128-30.

22. *New York Morning Courier* (June 22, 1841) (archive maintained at fultonhistory.com); SANDAGE, *supra* note 7, at 110; OLEGARIO, *supra* note 12, at 58.

23. See OLEGARIO, *supra* note 12, at 57-58; Lauer, *supra* note 11, at 309.

24. See OLEGARIO, *supra* note 13, at 51; SANDAGE, *supra* note 7, at 164.

25. *The Mercantile Agency*, 24 HUNT'S MERCHANT'S MAG. & COM. REV. 46, 48 (Jan. 24, 1851). The author went on to say that Tappan's approach "insures accuracy; for [the Agency's proprietors] deal *in facts*, and not in opinions." *Id.* at 49 (emphasis in original). That judgment, however, was not the whole story. For further discussion, see *infra* notes 28-31 and accompanying text.

26. See Lauer, *supra* note 11, at 309-10.

children—has lately married his second wife—is professionally a Methodist, and enjoys a general reputation for honesty.<sup>27</sup>

The reports, though, commonly included more than a dollop of gossip and subjectivity. An 1860 report on one T.R. Maddox of Jackson County, Alabama, thus, included this notation: “The general opinion here is, that he is in a v[ery] critical [and] embarr[assed] condition, and that there is a strong probability of his *failure*.”<sup>28</sup> Another, 1844, entry ended with this judgment: “Honest & likely man but not attentive to his bus[iness]—is a ‘Singer’ which takes up too much of his time . . . sh[oul]d be watched a little.”<sup>29</sup> A Jackson, Michigan grocer was described as keeping “a very good stock” but “a stranger, not extensively known.”<sup>30</sup> The ledger entry for one Alexander Bateman, a grocer, related that he seemed “close & steady to bus[iness], but don’t think he will succeed, he is unpopular. He is rather of an unhappy disposition.”<sup>31</sup>

As ledger entries updated, they would tell the story of a life: Robert L. Brown, a high-minded Virginia planter, in 1855, was “Rich in prop[erty]: much in debt, a g[oo]d fellow, poor manager, fast liver, slow pay.” Nonetheless, he was “v[ery] good for debts.”<sup>32</sup> Not too long after that entry was written, Brown declared bankruptcy, owing \$50,000. Nonetheless, the Mercantile Agency ledger continued to follow him: he had “moved to Lynchburg, where his wife on the bounty of some of her friends is teaching at a female school.” Subsequent reports provided an updated picture: “I understand that he has no energy & never will make a dollar, I reckon.”<sup>33</sup>

As a business proposition, the point of Tappan’s file system was to give subscribers information relating to two predictive questions: would the individual succeed in business, and thus be able to pay his debts? and did he have the resources suggesting ability to pay his debts if the business failed?<sup>34</sup> To that end, his system came to emphasize what became known as the three “C”s of credit reporting: character, capacity, and capital. “Character” referenced an individual’s personality: Was he hard-working? Responsible? Reliable? Well-liked? Did he drink to excess? Gamble? En-

27. *Id.* at 310.

28. SANDAGE, *supra* note 7, at 111 (emphasis in original); *see also id.* at 153 (“Can’t say that he has failed [and] presume it is not so . . . but we repeat such was the current rumor as utter[e]d by a thousand tongues.”).

29. *Id.* at 119.

30. OLEGARIO, *supra* note 12, at 51.

31. SANDAGE, *supra* note 7, at 111; *see also id.* at 102-03.

32. *Id.* at 146.

33. *Id.*

34. I’m using the male gender pronoun in this paper to refer to the Mercantile Agency’s data subjects, in recognition of the fact that the great majority of nineteenth-century U.S. business owners were men. I don’t want to obscure the fact, though, that there were women business owners throughout this period: About 145,000 women were engaged in business pursuits in 1870, making up about one in ten of all urban businesspeople. Nearly all of those businesses were small and thinly capitalized. *See* OLEGARIO, *supra* note 12, at 108-12.

gage in sexual immorality?<sup>35</sup> Americans in the second half of the nineteenth century saw character as indispensable to credit and business success.<sup>36</sup> The Mercantile Agency thus boasted that its credit reporting “made men take their real character along with them”<sup>37</sup>: They could no longer be libertines and wastrels at home, yet hold themselves out as solid and thrifty when out of town on business. Rather, by virtue of credit reporting, “the character they bear at home” could be seen “wherever they go to do business.”<sup>38</sup>

Beyond those considerations was “capacity,” or business ability, evidenced by an individual’s past business and employment history. “Capital,” finally, covered the property the person had access to, either through his own ownership or through family or business connections.<sup>39</sup> The firm dispatched extensive circulars to its correspondents detailing the sort of information to be included in reports if available.<sup>40</sup>

As the story of Robert L. Brown, above, illustrates, the information in credit reports wasn’t always reliable. Understanding that hard data wasn’t always available, the Mercantile Agency urged its correspondents to provide their “impressions . . . judging from appearances.”<sup>41</sup> The resulting reports, inevitably, were untrustworthy; the information they passed along was sometimes flatly wrong.<sup>42</sup> At best, they constituted “a variable and unsystematic collection of facts, judgments and rumors.”<sup>43</sup> Nonetheless, merchants offering credit believed the reports to be useful, and so Tappan’s firm prospered.<sup>44</sup>

Once reports reached the Mercantile Agency, clerks entered them into its files. Individual entries began with the business proprietor’s name (and sometimes his address), and his line of business. There followed a single paragraph containing reports received about that person, unedited

35. See Lauer, *supra* note 11, at 309-10.

36. See OLEGARIO, *supra* note 12, at 80-107.

37. SANDAGE, *supra* note 7, at 115 (emphasis in original).

38. *Id.*

39. See Lauer, *supra* note 11, at 309-10; OLEGARIO, *supra* note 12, at 82.

40. See, e.g., OLEGARIO, *supra* note 12, at 64.

41. Bruce G. Carruthers & Barry Cohen, *Calculability and Trust: Credit Rating in Nineteenth-Century America* 17 (Sept. 2012) (quoting Letter from Office of the Mercantile Agency to correspondents (Jul. 25, 1872)).

42. See OLEGARIO, *supra* note 12, at 117.

43. Carruthers & Cohen, *supra* note 41, at 24. The modern approach to credit rating foregrounds a debtor’s past payment history as a key predictor of its future credit-worthiness. Nineteenth-century merchants, though, were unwilling to share that information with Tappan or with each other. See Kenneth Lipartito, *The Narrative and the Algorithm: Genres of Credit Reporting from the Nineteenth Century to Today* 15-16 (Jan. 2, 2010); OLEGARIO, *supra* note 12, at 80-81.

44. See Carruthers & Cohen, *supra* note 41, at 51-53. A satisfied 1851 customer, thus explained that “for every dollar I pay for information, I save one hundred,” SANDAGE, *supra* note 7, at 162; credit agencies were thus part of the “system of necessary luminaries for the prosecution of a successful business.” *New York Daily Times* (Nov. 7, 1851), at 1, col. 3).



except for their arrangement in abbreviated language to save space. Updates to a given entry were signified by an intervening small blank space, the date, and a code identifying the correspondent.<sup>45</sup>

Those entries, in turn, were handwritten into ledgers, organized by geographical location, at the Mercantile Agency's New York office. By 1851, according to a journalist's report, that office held more than 100 large ledger books, each with six to seven hundred pages of entries, and each page holding up to 1500 words (in tiny handwriting). More than thirty employees were constantly engaging with the database, "condensing, copying, and giving out reports, carrying on the correspondence, [et]c."<sup>46</sup>

Organizational problems, though, presented themselves immediately: Handwritten in bound books, the reports could not be reorganized on the fly. They had to be updated as new information came in, and they had to accommodate the fact that the same individuals would appear in different locations, with different partners, or in differently-named businesses. Accordingly, the filing system evolved as the system scaled; entries weren't arranged alphabetically or in any other universally-applied manner.<sup>47</sup> New reports might be inserted wherever they would fit.<sup>48</sup> Multiple indexing systems were sometimes found side by side, and entries spanning decades could be found in the same volume. The firm devised a complicated scheme of indexing and cross-referencing, sometimes denoted by pointing fingers drawn in the margins, to connect references that might be scattered across multiple volumes.<sup>49</sup>

The system was further complicated by the Mercantile Agency's establishment of its first branch office (in Boston) in 1843, followed shortly by offices in Philadelphia and Baltimore. These offices were partly or wholly owned by other parties, but contributed a share of their profits to the central firm. A Cincinnati office followed in 1849; ones in Louisville and St. Louis in 1850; and one in New Orleans in 1851.<sup>50</sup> By the start of the Civil War, the agency would have offices in eighteen cities;<sup>51</sup> between the end of the Civil War and the dawn of the twentieth century, it would open branch offices in 120 new cities.<sup>52</sup>

As the agency evolved, so did its personnel and ownership: Tappan withdrew from the firm, in part because his abolitionist activities had cost the company business in the South.<sup>53</sup> Robert Graham Dun took owner-

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45. See Lauer, *supra* note 11, at 310-11.

46. *The Mercantile Agency*, *supra* note 25, at 50; SANDAGE, *supra* note 7, at 101.

47. See Lauer, *supra* note 11, at 311; see also OLEGARIO, *supra* note 12, at 47 (noting the challenges of scaling in this context).

48. See SANDAGE, *supra* note 7, at 131.

49. See Lauer, *supra* note 11, at 311.

50. See Reports of the Four Leading Cases Against the Mercantile Agency for Slander and Libel 187 (1873).

51. See *id.*

52. See NORRIS, *supra* note 16, at 106.

53. See *id.* at 29-35.

ship in 1859 and remained at the helm until 1900; during that period, the Mercantile Agency's parent company was R.G. Dun & Co.<sup>54</sup> The post-1859 entity was called by one or the other name depending on context; in this paper, I'll call it the "Mercantile Agency" for the sake of consistency.

Every time the Mercantile Agency opened a new branch, employees hand-copied a new set of ledgers for that branch corresponding to the existing master set.<sup>55</sup> This presented a huge database replication problem<sup>56</sup>: As new reports came in, how were the branch-office ledgers to be kept in sync with the master set in New York? At the outset, correspondents in the field sent their reports to New York, where employees first transcribed them into bound volumes and then sent copies to the branch offices.<sup>57</sup> Later, the agency developed a system under which each report from a correspondent came in to the nearest local office. That office transcribed the report into the ledgers there, sent a copy to New York, and then sent the original report in succession to each of the branch offices deemed to be interested in it.<sup>58</sup>

This was problematic in multiple ways. It meant that updates were slow to reach the branch offices (and never did reach some of them). The increasing volume of reports meant that hand-copying swallowed up increasing amounts of time and money. Ledgers in constant use became tattered and had to be re-copied, again by hand, in their entirety. Effective indexing and cross-referencing "proved almost impossible."<sup>59</sup>

What saved the company was its adoption of bleeding-edge technology: the mechanical typewriter. The typewriter was first commercially sold in the United States in 1874. The initial model was awkward and lacked such features as lower-case letters; its operator could not see the sheet being typed.<sup>60</sup> Nonetheless, Dun ordered a trial immediately, and distributed typewriters to all branch offices in 1875.<sup>61</sup> Its use in conjunction with carbon paper meant that the Agency could easily generate and distribute multiple copies of reports. Carbon-paper duplicates were made using thin tissue paper; an originating office distributed these "tissue" updates simul-

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54. See FOULKE, *supra* note 7, at 295. Ironically, while Tappan had lost business because of his abolitionism, Dun was pro-slavery and a fierce racist. See OLEGARIO, *supra* note 12, at 60-61.

55. See Lauer, *supra* note 11, at 311.

56. See generally Brian Thomas Storti, *A Primer on Database Replication*, ALPHASIGHTS ENGINEERING (Aug. 11, 2017), <https://m.alphasights.com/a-primer-on-database-replication-381b319cd032> [<https://perma.cc/6VDC-W57L>] (addressing this issue in a networked computing context).

57. See NORRIS, *supra* note 16, at 24; OLEGARIO, *supra* note 12, at 63.

58. See NORRIS, *supra* note 16, at 136.

59. *Id.*

60. See Christopher Keep, *The Introduction of the Sholes & Glidden Type-Writer, 1874*, BRANCH, [http://www.branchcollective.org/?ps\\_articles=christopher-keep-the-introduction-of-the-sholes-glidden-type-writer-1874](http://www.branchcollective.org/?ps_articles=christopher-keep-the-introduction-of-the-sholes-glidden-type-writer-1874) [<https://perma.cc/FX6P-X7PG>] (last visited July 21, 2018).

61. See NORRIS, *supra* note 16, at 136.

taneously to branches designated in a distribution table sent out from New York.<sup>62</sup> Under a new company-wide organizational system, the tissues did not go into the large ledger books; rather, they were pasted onto manila sheets organized by firm and filed by name and location.<sup>63</sup>

These typewritten reports soon became the core of the database, and their production required the agency, even more, to apply “the principles of mass production.”<sup>64</sup> In the Mercantile Agency’s Chicago office, by 1896, database management required the efforts of “a little army of typewriter girls and enough other employees to make a total of 200,”<sup>65</sup> engaged full-time in “copying, compiling, verifying, and filing.”<sup>66</sup> Over time, the firm’s network of clerks, reporters and paid correspondents made it one of the largest private employers in the country.<sup>67</sup>

Through these efforts, the Mercantile Agency achieved something new: the sale of information as a commodity. In England as early as 1776, merchants had banded together into cooperative societies sharing information and trade gossip about frauds and bad debts; no money changed hands except for member dues supporting the service.<sup>68</sup> But this was not that. The credit reporting firm was not a cooperative venture sharing information with members; it was a for-profit one selling information to customers. It separated information about the borrower from the underlying credit transaction, and transformed that information into intellectual property, a commodity to be bought by anyone willing to pay the agency’s

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62. See NORRIS, *supra* note 16, at 136-38; OLEGARIO, *supra* note 12, at 162. It remained the case that not all reports went to all branches; even the New York office declined receipt of certain categories of reports it saw as disconnected from the New York market. See NORRIS, *supra* note 16, at 138.

63. See NORRIS, *supra* note 16, at 138-39.

64. JESSE RAINSFORD SPRAGUE, *THE ROMANCE OF CREDIT* 111 (1943). Sprague was speaking not about typewriters, but about the Tappan company’s foundational idea: producing and selling credit information on a nationwide basis through the medium of a hierarchical firm in which individuals performed specialized functions.

65. The U.S. Census listed 154 “stenographers and typists” in 1870; an estimated 5,000 in 1880; more than 30,000 in 1890; and more than 110,000 in 1900. But while stenographers in 1870 were almost entirely male, this category was more than three-fourths female by 1900. See U.S. BUREAU OF THE CENSUS, *1940 Census: Comparative Occupation Statistics, 1870-1940*, at 112 <https://www2.census.gov/prod/2/decennial/documents/00312147ch2.pdf> [<https://perma.cc/P92U-5RRN>]; U.S. BUREAU OF THE CENSUS, *Twelfth Census: Statistics of Occupations*, at 8 <https://www2.census.gov/library/publications/decennial/1900/occupations/occupations-part-7.pdf> [<https://perma.cc/LU7C-H3BS>]; Donald Hoke, *The Woman and the Typewriter: A Case Study in Technological Innovation and Social Change* 77, <http://www.thebhc.org/sites/default/files/beh/BEHprint/v008/p0076-p0088.pdf> [<https://perma.cc/6VX3-TZ2N>].

66. Lauer, *supra* note 11, at 312 (quoting *The Mercantile Agencies: They Have Grown Indispensable to Business*, CHI. TRIB. Mar. 15, 1896, at 6).

67. See OLEGARIO, *supra* note 12, at 61.

68. See *id.* at 32-34.

prices. Network effects drove it to continual efforts to expand its reach, and economies of scale made that expansion possible.<sup>69</sup>

Scott Sandage reports that the word “information” came to take on a new shade of meaning in the later nineteenth century, referring to authoritative knowledge that could be sold like any other good.<sup>70</sup> That usage reflected the changed nature of economic production in the new economy. Consider an 1879 journalist’s positive report about the Mercantile Agency’s then-rival, the Bradstreet Company<sup>71</sup>: The firm, he reported, had a “great beehive of a business room” in its main office with over a hundred clerks, but even more saliently, it had more than 1200 employees nationwide. Yes, there existed larger firms—“factories, machine shops, and the like”—but “how many private corporations are there which require the services of a thousand brain workers?”<sup>72</sup>

### B. *The Dissemination of Credit Information*

I’ve not yet addressed a crucial set of issues: how was this information in the database to be communicated to subscribers? Indeed, what information would subscribers receive? Initially, the Mercantile Agency provided information to subscribers only orally, and only at one of its offices. The subscriber would present himself at the office—in person or through the agency of a designated “confidential clerk”—and submit a ticket of inquiry identifying the individual regarding whom he sought information. A page boy would retrieve the appropriate ledger. That book would be set down “on the inside of a raised desk,” at “an angle of about 40 or 45 degrees,” so that the subscriber could not see its contents.<sup>73</sup> An employee would then read the relevant ledger entry aloud, allowing the subscriber to take notes.<sup>74</sup>

69. *See id.* at 76-79.

70. *See* SANDAGE, *supra* note 7, at 162.

71. *See supra* note 16.

72. Lauer, *supra* note 11, at 313 (quoting *Business Credits*, PHILA. INQUIRER, Mar. 28, 1879, at 7).

73. Bill of Exceptions, *Beardsley v. Tappan* (C.C.S.D.N.Y. 1849) (testimony of Thomas Lawrence, Jr.), *printed in* REPORTS, *supra* note 50; *see* OLEGARIO, *supra* note 12, at 58; SANDAGE, *supra* note 7, at 161-62.

74. The Mercantile Agency subscriber agreement provided that “the information on the books of the Agency . . . will be read at the office of said Agency to subscribers . . .” *See* REPORTS, *supra* note 50, at 147. Witnesses testifying in early libel cases described the same procedure. *See* Bill of Exceptions, *Beardsley*, 2 F. Cas. 1187 (testimony of David L. Moore) (“[T]he clerk read [the entry] very slowly and distinctly, and I wrote it down carefully with a pencil”), *printed in* REPORTS, *supra* note 50, at 21; *Billings v. Russell*, (Mass. Sup. Jud. Ct. 1855) (merchants “had heard reports read from the books of the office by the defendant’s clerk”), *printed in* REPORTS, *supra* note 50, at 130; *see also* Barry Cohen & Bruce G. Carruthers, *The Risk of Rating: Negotiating Trust and Responsibility in 19th Century Credit Information*, 93 *SOCIÉTÉS CONTEMPORAINES* 39, 45-46 (2014). That policy, though, doesn’t appear to have been consistently adhered to. Cohen and Carruthers report that it was relaxed in the late 1860s. *See id.* at 46 n.5. As early as 1856, a witness in *Ormsby v. Douglass* reported that clerks usually provided him reports in writing. *See* RE-

The entries in the ledger books were unstandardized, and took varying forms.<sup>75</sup> Sometimes they were stenographic and just-the-facts; sometimes they incorporated literary flourishes or even jokes. In one case, a correspondent wrote of Thomas Smythe that the way he spelled his name looked “suspicious”—was he “afraid to acknowledge himself a ‘Smith?’”<sup>76</sup>

Reports might recognize conflicting judgments or bits of information.<sup>77</sup> A person could be described as “indus[trious] & money making, but somewhat inclined to dissipation,” or “steady and honest” but “unless I am mistaken he will make many bad debts.”<sup>78</sup> A report on a Massachusetts shoemaker in a single sentence noted “[m]atters seem to have turned out well, there was a report of [his] doing badly.”<sup>79</sup> As it happens, though, that judgment was premature. An update soon added: “hung himself—cause unknown—many think Embarr[asse]d circumst[ance]s.”<sup>80</sup>

Not only did the ledger entries contain sometimes-inconsistent information evaluating their subjects along incommensurable axes, but the Mercantile Agency stressed that all of that information had to be conveyed to subscribers if they were to make credit decisions properly. In an 1860 circular, thus, the company urged that it would be “injurious” for it to prepare written reports on its data subjects, because the employee preparing the report would be required to edit and condense, privileging some facts and leaving out others.<sup>81</sup> That would be bad, because the ledger entries, updated over the course of a subject’s career, contained “so many points to be considered, that *different minds* would form *different impressions*. Clerks might form an opinion that the subscriber would not.”<sup>82</sup> Accordingly, the subscriber “should have the Records read to him, bringing his *own mind* to bear on the subject.”<sup>83</sup>

No set of ledger entries could possibly have told the entire story of any business person’s character, capacity, and connections. We are all

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PORTS, *supra* note 50, at 153. An 1856 journalist’s account is in accord. See Lauer, *supra* note 11, at 310. By 1881, it appears, at least some Mercantile Agency offices, upon receiving updated information about a business of interest to customers, simply delivered written copies of the new information to those customers’ offices. See *Trussell v. Scarlett*, 18 F. 214, 215 (C.C.D. Md. 1882).

75. See Cohen & Carruthers, *supra* note 74, at 46-47.

76. See SANDAGE, *supra* note 7, at 155-56.

77. See OLEGARIO, *supra* note 12, at 156.

78. SANDAGE, *supra* note 7, at 150, 152.

79. *Id.* at 130.

80. *Id.*

81. See Cohen & Carruthers, *supra* note 74, at 45. This claim wasn’t free from self-interest. The Agency sought to keep its information confidential to avoid free-riding, and it sought to avoid liability for defamation; disseminating written reports undercut both of those goals. See *infra* notes 194-95 and accompanying text. Competitive pressures, nonetheless, led the agency to begin issuing written reports on a regular basis in the 1870s. See Cohen & Carruthers, *supra* note 74, at 59.

82. OLEGARIO, *supra* note 12, at 116.

83. See Cohen & Carruthers, *supra* note 74, at 46 (emphasis in original); OLEGARIO, *supra* note 12, at 116 (emphasis in original).

complicated. Our stories require more than a paragraph or two, and the very act of pulling local gossip out of its initial social context and transcribing it into a ledger book leaves its import unclear and incomplete.<sup>84</sup> Josh Lauer has borrowed the word “textualization” to refer to the credit agencies’ process of reproducing embodied lives in the form of flat disembodied text;<sup>85</sup> any such translation necessarily requires reducing and simplifying, selecting particular facts from the swamp of real-life experience.<sup>86</sup> The Mercantile Agency textualized its data subjects’ lives in order to create disembodied credit evaluations that it could then sell to its customers. At least at the outset, though, its approach seemed to reflect the understanding that lives were messy and could be captured in text only through narrative that might be messy in its turn.<sup>87</sup>

In 1857, though, a competing credit bureau—the Bradstreet Company<sup>88</sup>—introduced a new product that changed the rules of the game. It provided its subscribers with a bound reference book that contained no narrative; instead, its hundred-plus pages included coded credit information in the form of rating keys.<sup>89</sup> The change was momentous. No more did subscribers need to call at a central office to hear a long narrative report; the rating summed the situation up, and it was all contained in the book. The innovation was hugely popular, and pulled hundreds of subscribers from the Mercantile Agency to the Bradstreet camp.<sup>90</sup>

The Mercantile Agency responded negatively to the Bradstreet ratings books. With no facts published to support a firm’s naked ratings, a ratings book subscriber had no way of knowing whether they were sound or based on solid information. Its rival, the Mercantile Agency suspected, sold rat-

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84. See LAUER, *supra* note 12, at 38-39.

85. See Lauer, *supra* note 11, at 310 n.11.

86. See Lipartito, *supra* note 43, at 34-36; SANDAGE, *supra* note 7, at 135.

87. See SANDAGE, *supra* note 7, at 130.

88. See *supra* note 16.

89. See OLEGARIO, *supra* note 12, at 65-67. The Bradstreet codes, at the outset, still referenced the sort of judgments that might have found its way into narrative ratings. In addition to providing an overall rating of A (“Good for any amount required”) through E (“Fair for small lines”), an entry might include one or more of thirty numerically-coded notes such as 12 (“Does not attend very closely to business”), 18 (“Not very good private character”), or 30 (“Rather slow pay”). See *id.* at 66-67; see also Bruce Carruthers & Barry Cohen, *Credit, Classification, and Cognition: Credit Raters in 19th-Century America* (Oct. 20, 2009), at 9-10 (emphasizing the limitations of Bradstreet’s ratings system); Lipartito, *supra* note 43, at 12-13 (characterizing Bradstreet’s ratings as simply shorthand narrative).

90. See OLEGARIO, *supra* note 12, at 67. The Bradstreet Company starting four years earlier had experimented with distributing ratings sheets not bound in books; the sheets listed information including dollar estimates of merchants’ real estate and capital. Those estimates were absent from the later ratings books; the company may have shied from the task of maintaining current estimates sufficiently reliable to publish, and may have become uncomfortable exposing to the public information it considered proprietary. See Carruthers & Cohen, *supra* note 89, at 9-10.

ings to obscure the fact that it had insufficient resources to conduct business properly.<sup>91</sup>

Nonetheless, competitive pressure drove the Mercantile Agency to issue its own 519-page ratings book in 1859.<sup>92</sup> Ratings books in subscribers' hands, of course, could not update themselves, and thus began falling out of date as soon as they were issued. The Bradstreet firm, to take account of new information that became available between editions, sent out periodic notification sheets with new information. The Mercantile Agency, initially, signaled the arrival of new information about data subjects by placing a coded notice in the newspaper. Interested subscribers, seeing the notice, could then go to the agency office to get the news.<sup>93</sup> Later on, it initiated a practice of sending Notices of Invitation to subscribers who had expressed interest in a particular company to visit the office to receive new information about that company.<sup>94</sup>

The Mercantile Agency's 1859 ratings book coded businesses on a one-dimensional scale, with eight steps ranging from A No. 1 ("credit unlimited"), No. 1 ("Unquestioned"), and 1 1/2 ("Strong"), down through 3 ("Fair") to the depths of 3 1/2 and 4, which had no corresponding text. The eight steps were actually twenty, since a rating could have a + or - attached.<sup>95</sup> The agency offered in the ratings book no narrative and no hints explaining why any firm had received the rating it had; if subscribers wanted more information, they needed to seek it out in the firm's ledger entries at the agency offices.<sup>96</sup>

The agency maintained its discomfort with ratings, though. It cautioned, in the prefaces to its 1860s and 1870s ratings books, that ratings—unlike reports—couldn't capture the "numberless circumstances" influencing a credit decision, and couldn't describe businesses in their infinite variety.<sup>97</sup> The ledger books, it emphasized, provided subscribers with the facts that they needed for proper decision; by contrast, the ratings books existed "only as an aid for immediate reference, and where prompt decision is required." Relying on the ratings books as a substitute for the ledger entries, the company continued, doubled a subscriber's risk. Subscribers who engaged in that practice "should not blame the Agency" when things went wrong.<sup>98</sup>

91. See Cohen & Carruthers, *supra* note 89, at 43, 56.

92. See OLEGARIO, *supra* note 12, at 68.

93. See *id.* at 69.

94. See REPORTS, *supra* note 50, at 18-21.

95. The "4" rating, however, was not actually used. See Carruthers & Cohen, *supra* note 89, at 14-15, 20 n.3.

96. See *id.* at 15.

97. See Cohen & Carruthers, *supra* note 74, at 56-57.

98. See *id.*; see also OLEGARIO, *supra* note 12, at 153. The company's message was not always consistent. An (atypical) 1866 advertising circular reprinted reviews of its rating system describing it as allowing the subscriber to see "at a glance" the information in the company's office records, "condensed" into a single code. The suggestion there was that the Agency had done all the hard work relating to the

There was certainly reason for caution when it came to ratings. Ratings were simple, unequivocal, and orderly; they presented themselves as facts.<sup>99</sup> But there was no way for the subscriber to know what had gone into them, nor were they generated according to rule. On the contrary, the process appears to have been both unsystematic and arbitrary.<sup>100</sup> The ledger reports on which the ratings were based consisted of a jumble of ad hoc, subjective, equivocal, and disorganized narrative information of varying reliability and insight.<sup>101</sup> Even such matters as estimates of net worth were subjective and subject to interpretation.<sup>102</sup> So how was the agency usefully to translate that to a single, opaque, code?

The credit bureaus' generation of ratings necessarily suppressed the inconsistency and ambiguity of the ledger reports. Shades of meaning and thick description disappeared; so did consideration of the reliability of particular information sources. There was no room for analysis, say, of whether a firm was more likely to be creditworthy in its relationship with some firms than with others. And there was no indication whether a firm's creditworthiness appeared to be rising or falling over time.<sup>103</sup>

Nonetheless, consumers wanted ratings; as the credit bureaus gained more experience, they began to adjust their ratings formats in an attempt to make them more useful. The Mercantile Agency in 1864 shifted from a one-dimensional to a two-dimensional system, rating companies separately for "pecuniary strength" and "general credit."<sup>104</sup> The idea here was that a business owner could have extensive financial resources but poor character, or sterling character but limited resources; failing to distinguish the two would work injustice.<sup>105</sup> The double-rating scheme turned out to

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credit decision, leaving users free simply to rely on the ratings. See Cohen & Carruthers, *supra* note 74, at 45.

99. See Lauer, *supra* note 11, at 304-05; Carruthers & Cohen, *supra* note 41, at 27.

100. See Carruthers & Cohen, *supra* note 89, at 8.

101. See *id.*

102. See Lipartito, *supra* note 43, at 14. No standardized accounting methodology yet existed; GAAP rules weren't developed until after the stock market crash of 1929. Indeed, professional accountants didn't yet exist. See Carruthers & Cohen, *supra* note 41, at 26 n.31.

103. See Carruthers & Cohen, *supra* note 41, at 28-29.

104. See Carruthers & Cohen, *supra* note 89, at 18-19. The new Mercantile Agency system classed each firm's "pecuniary strength" as falling into one of seven broad bands, starting at A1+ ("\$1,000,000 or over) and progressing through 2 (\$50,000 to \$100,000) down through 3 1/2 (\$5,000 to 10,000"). It classed the firm's "general credit" along a similar seven-step metric, from A1 ("Unlimited") to 3 and 3 1/2 ("Fair"). See *id.*

105. See OLEGARIO, *supra* note 12, at 153. As a practical matter, it would not be wise to make a very large loan to a small firm, even one of impeccable character. Assigning that firm a low rating on a one-dimensional scale, though, would not recognize its proprietor's honesty, reliability, and fine reputation. As Dunn explained in a letter, "[o]ne man possesses of large means may have comparatively poor credit arising from peculiar causes, while, on the contrary, another with small means may have what might be called a disproportionately good credit. One col-



have its own problems, though. Were the two scores independent judgments of capitalization and character, or was “pecuniary strength” an input to the “general credit” bottom line?<sup>106</sup> To address that ambiguity, the agency unveiled yet another ratings scheme in 1882. The new ratings system incorporated not only a 15-step “estimated pecuniary strength” score and an independent high/good/fair/limited score for “general credit,” but an explicit algorithm for combining the two into a single one-dimensional rating.<sup>107</sup>

At the same time as the Agency was searching for ways to manipulate its constituent scores, it was struggling with challenges in calculating those scores. Headquarters personnel appear to have been frustrated by the dual challenges of articulating policies for ratings clerks in the field to follow, and ensuring that clerks in fact adhered to those policies.<sup>108</sup> Headquarters routinely sent out directives to the field admonishing personnel to keep ratings better synced with ledger information, and warning raters against over-reacting to new ledger information and under-scoring small firms. Headquarters insisted to branch managers that they should place a higher priority on the accuracy of their ratings. Problems, however, persisted.<sup>109</sup>

Nor was the Mercantile Agency the only firm facing these challenges. The Bradstreet Company also repeatedly adjusted its ratings methodology. In 1864, it adjusted its initial system to be more granular, with eleven rank-ordered categories but without textual notes; by 1873 it too had made the choice to reflect financial strength separately from credit, albeit in a confusing and less-than-fully-helpful way.<sup>110</sup> In 1882, Bradstreet once again switched to a system similar to its rival’s, in which an algorithm combined independent “Estimated Wealth” and “Credit” scores into a single six-step rating.<sup>111</sup>

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umn of ratings cannot express these peculiarities with sufficient pliancy . . .” Carruthers & Cohen, *supra* note 89, at 17-18 (quoting Letter from R.G. Dunn to Erastus Wiman (Mar. 30, 1864)).

106. The firm took some steps suggesting the latter: It instructed branch managers to “keep the credit markings in close relation to the capital marking,” and forbidding “absurd” rankings that paired weak pecuniary strength with strong general credit. See OLEGARIO, *supra* note 12, at 156-57; NORRIS, *supra* note 16, at 93; see also Carruthers & Cohen, *supra* note 89, at 23. That approach made sense only if one understood the “general credit” ranking to depend in part on capitalization, so that it would be anomalous for a highly-capitalized firm to have low general credit, and impossible for a poorly-capitalized one to have high general credit.

107. See Carruthers & Cohen, *supra* note 89, at 22-25.

108. See generally Jonathan Weinberg, *Bureaucracy as Violence*, 115 MICH. L. REV. 1097, 1106 (2017) (“One of the central challenges for any bureaucracy is how to ensure that line personnel at the bottom implement policy decisions made at the top.”).

109. See Cohen & Carruthers, *supra* note 74, at 50-53, 60; Carruthers & Cohen, *supra* note 41, at 21.

110. See Carruthers & Cohen, *supra* note 89, at 10-13.

111. The Mercantile Agency and Bradstreet approaches worked differently. Under the Mercantile Agency’s algorithm, it was impossible for a firm with over a

In 1864, the Mercantile Agency ratings book had 120,000 entries. In 1870, that number was 430,000; in 1880, it was 760,000; in 1890, it was 1,180,000.<sup>112</sup> Over that time period, we can see the credit agencies making continual adjustments, seeking to find a way successfully to compress the complex story of individuals' and firms' credit-worthiness. Credit ratings were a classification schema, and classification necessarily involves simplification—but how was it to be done? At one point, the Mercantile Agency provided different ratings to different classes of subscribers (so that different ratings were sent to “bankers” than to “manufacturers and jobbers”), on the theory that their credit-evaluation needs were different; later, it dropped that approach.<sup>113</sup> Both major firms made their “pecuniary strength” category more granular as time went on, to meet consumer demand. They didn't make any changes in the broad-brush, more subjective “general credit” category, though, nor did they reveal in the ratings books any of the underlying information that went into that latter calculation.<sup>114</sup>

It's easy to imagine that the story of movement from narrative to numerical representation was one of movement to harder, more scientific data.<sup>115</sup> But when one flattens a rich, factual representation, that necessarily means that one's information becomes more shallow. That can be useful if the shallow information turns out to have strong predictive value. But it's systematically vulnerable in contexts where the particular information one has selected, or one's mechanism for aggregating it, turns out not to have good predictive power.<sup>116</sup> Moreover, if the method for doing the flattening isn't mechanical, then boiling down thick reality into summary form requires an exercise of judgment by some (likely low-level) employee. That poses additional risk, since that judgment can be exercised badly, or—even more saliently—inconsistently from one employee to the next.

One preliminary study, not too long ago, examined Chicago dry goods retailers in 1877, seeking an answer to the \$64,000 question: was there any relationship between a firm's Mercantile Agency ratings and the likelihood of its failure over the next seven years?<sup>117</sup> The authors

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million dollars in capitalization, no matter how bad its credit, to get an overall rating of less than “2.” Under Bradstreet's approach, by contrast, even a very large firm could get the lowest overall rating. This difference, though, may have been more apparent than real: Both firms were more likely to withdraw a listing than to give a large and prominent merchant an egregiously low score for general credit. The two major credit bureaus had in common that less-well capitalized firms were excluded from the higher ratings. *See id.* at 23-26.

112. *See* NORRIS, *supra* note 16, at 110.

113. *See* Cohen & Carruthers, *supra* note 74, at 55.

114. *See* Carruthers & Cohen, *supra* note 89, at 27-29.

115. *See* Lipartito, *supra* note 43, at 1.

116. *See id.* at 35-36.

117. A firm was coded as having failed if it went bankrupt, was sued on its debts, or had to negotiate an extension or settlement of its debts. Relatively few of the firms in the sample turned out to satisfy that criterion—only 16 out of 247. *See* Carruthers & Cohen, *supra* note 43, at 38-40.

found that there was not. Neither “pecuniary strength” nor “general credit” showed any significant correlation with likelihood of short-term failure.<sup>118</sup> A customer solely relying on ratings would be none the wiser in his quest to know which of those firms would pay its debts, and which would default.

Ironically, the authors of the study found other information in the ledgers that *did* show such a correlation. If a firm’s ledger entry noted that it was slow to pay, it turned out to be significantly more likely to fail; so were firms explicitly noted as refusing to provide the agency with a financial statement.<sup>119</sup> The agency thus—had it known what to look for—could have extracted ledger information in such a way as to provide a usefully predictive rating. But the exercise of flattening and simplifying reality, to squeeze it all into a database, turned out to be a difficult one. The Mercantile Agency constructed a massive surveillance apparatus, and by 1886 had added more than a million data subjects to its files. It changed its ratings format repeatedly. But it faced obstacles in reducing its lengthy ledger information to a useful shorthand.<sup>120</sup>

### III. PRIVACY, SURVEILLANCE, AND THE MERCANTILE AGENCY

It won’t be surprising that Tappan’s innovation drew extensive opposition and criticism. Many in the business press welcomed the credit bureaus.<sup>121</sup> By 1886, the Cincinnati Commercial Gazette explained that mercantile agencies were simply a necessity; they were “in keeping with the advanced ideas of the business community, which demands telegraphs, telephones, lightning express trains—in fact everything that will enable them to transact business securely and rapidly.”<sup>122</sup>

But many others did not. The small retailers who were the targets of the credit agencies’ attentions looked on them with deep resentment.<sup>123</sup> Some journalists attacked the credit agencies as establishing a pervasive surveillance of public and private life, an “organized system of espio-

118. *See id.* at 43–44.

119. *See id.* at 44.

120. *See id.* at 48.

121. *See* OLEGARIO, *supra* note 12, at 164–66 (noting an 1870s CHICAGO TIMES article describing credit reporting as “a great service to business interests”); *see, e.g., Mercantile Miscellanies—Commercial Agencies*, HUNT’S MERCHANT’S MAG. & COM. REV., Aug. 1, 1856, at 260 (mercantile agencies are still in their infancy, but ideally will grow to “know everything that *can be known* about everybody in trade”) (emphasis in original); *The Mercantile Agency*, HUNT’S MERCHANT’S MAG. & COM. REV., Jan. 24, 1851, at 46, 48 (describing the Tappan agency in hagiographic terms).

122. *See* JOSEPH W. ERRANT, *THE LAW RELATING TO MERCANTILE AGENCIES* 43 (1889). Positive reactions were especially easy to find after the mid-1880s; before that, negative ones were more common. *See* Carruthers & Cohen, *supra* note 41, at 21–24.

123. *See* Lauer, *supra* note 11, at 322.

nage"<sup>124</sup> from which no home was secure.<sup>125</sup> Even a notable proponent of the credit monitoring system mused that that system, with "inquisitorial functions [that] naturally arouse antagonism," was unique to the United States: "it is paradoxical, the free citizen of the United States is the only one on the face of the globe who tolerates it."<sup>126</sup>

Opponents described credit-related surveillance as humiliating and hostile to human dignity.<sup>127</sup> The credit agencies, they urged, treated nothing as off-limits; nothing was too private or personal. With correspondents collecting local gossip, "[n]eighbor will doubt neighbor & fear will check social intercourse."<sup>128</sup> If business owners didn't conform to their overseers' understanding of good business character and conduct, they would suffer consequences: any slip-up on their parts would be reflected in the credit-bureau books. And there was no escaping it—for ordinary people, mercantile-agency surveillance meant a profound loss of control over their own lives. As an 1853 critic wrote:

Your character . . . is circulated by post and telegraph, east, west, north, south; while you are pursuing the equal tenor of your life, you have become notorious for something. A thousand folios include a page or more about you and your affairs, without your knowledge or your consent. Go where you may to purchase goods, a character has proceeded you, either for your benefit or your destruction.<sup>129</sup>

Moreover, as the data subjects were well aware, the agencies judging them were hardly infallible. An 1853 book of business advice asked: "[W]hat man, whose credit is his bread, does not feel anxious to know whether he has been misrepresented or not?" The system was "fraught with danger." The "life and soul" of the mercantile community—its credit—was subject to the whims of "a few men, self-constituted umpires, and their unknown and irresponsible agents, subject to the errors of ignorance and mistakes of carelessness, with no guaranteed exemption from the influence of private malice, favoritism, bribery or corruption."<sup>130</sup> One

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124. See *id.* (quoting GEORGE G. FOSTER, *NEW YORK NAKED* 119 (New York 1850)).

125. See OLEGARIO, *supra* note 12, at 70.

126. P.R. EARLING, *WHOM TO TRUST: A PRACTICAL TREATISE ON MERCANTILE CREDITS* 302-03 (1890), available at <https://archive.org/details/whomtotrusted-00earlgoog> [<https://perma.cc/5S5X-DDW6>].

127. See OLEGARIO, *supra* note 12, at 56; see also *id.* at 71 (describing an 1869 author's efforts to urge that a retailer's submitting evidence of his finances and character to obtain credit was *not* in fact "mean, cringing or contemptible").

128. *Id.* at 70.

129. *Traits of Trade—Laudable and Iniquitous*, 29 HUNT'S MERCHANTS' MAG. & COM. REV., Jul. 1853, at 50 (quoted in SANDAGE, *supra* note 7, at 184, and Lauer, *supra* note 11, at 320).

130. See Edwin Freedly, *A Practical Treatise on Business: Or How to Get, Save, Spend, Give, Lend, and Bequeath Money: With an Inquiry into the Chances of Success and Causes of Failure in Business* 130-131 (1853) (cited in OLEGARIO, *supra* note 12, at

prominent critic emphasized that a credit bureau's lack of transparency meant that defects in the information it provided would not be easily discovered; as such, it was "an enterprise which *possesses the coercive power of rating every man in the community as its managers or clerks may see fit.*"<sup>131</sup> The poisonous information in a business owner's file, suggested another critic, might come from "an insidious enemy"—but woe betide the person trying to convince the credit bureaucracy to correct its error.<sup>132</sup>

In several states, legislators offered bills to restrain credit-bureau activities. In particular, a Pennsylvania bill would have made it a criminal offense for any credit agency or representative to "knowingly heedlessly or wilfully [sic] exaggerate or misrepresent" information relating to a person engaged in commercial business.<sup>133</sup> A Minnesota bill took a different approach: it prohibited a person's making false statements *to* a credit bureau or its agents relating to "the solvency or insolvency, and amount or valuation of property, the financial condition, or . . . the business ability, moral character, honesty or integrity" of any person or firm in the state.<sup>134</sup> The Mercantile Agency's judgment was that that latter bill "would effectually bar Agency business in that State if passed."<sup>135</sup> The Agency lobbied against both bills, though, and neither was enacted.<sup>136</sup>

The reactions of nineteenth-century observers to the Mercantile Agency mirrored the sort of privacy concerns that activists raise today in response to contemporary data privacy issues. We are painfully aware in our day that major Internet actors, data fusion companies, and indeed credit bureaus have assembled profiles on nearly every adult American. When we conduct our lives on the Internet, we leave snippets of information about our purchases, our browsing habits, and much else for others to

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228 n.125 and in SANDAGE, *supra* note 7, at 154); *see also* Lauer, *supra* note 11, at 314-15.

131. THOMAS MEAGHER, THE COMMERCIAL AGENCY "SYSTEM" OF THE UNITED STATES AND CANADA EXPOSED 25 (1876) (emphasis in original), <https://archive.org/stream/commercialagency00meagiala> [<https://perma.cc/3EDS-EJ3L>].

132. *Traits of Trade*, *supra* note 129, at 52.

133. MEAGHER, *supra* note 131, at 81-82.

134. *See* H. JOURNAL, 29th Sess., at 825 (Minn. 1895).

135. Marc Flandreau & Gabriel Geisler Mesevage, *The Untold History of Transparency: Mercantile Agencies, the Law, and the Lawyers (1851-1916)*, 15 ENTERPRISE & SOC'Y 213, 223 n.34 (2014).

136. *See* OLEGARIO, *supra* note 12, at 170. Other bills were directed at other evils. Bills in the U.S. Congress, Illinois, and North Dakota were directed at firms simultaneously serving as credit bureaus and collection agencies. *See* H.R. 3355, 55th Cong., 1st Sess. (1897); *It Affects Commercial Agencies*, CHI. TRIB., Mar. 7, 1895, at 12; *Aimed at the Agencies*, CHI. TRIB., Mar. 11, 1891, at 6; Lauer, *supra* note 11, at 317 n.64. Bills were introduced in Pennsylvania, Missouri and Ottawa (Canada) to make credit agencies liable to *subscribers* for losses resulting from inaccurate information. *See* Lauer, *supra* note 22, at 317 n.64; OLEGARIO, *supra* note 12, at 170. South Dakota enacted a law requiring mercantile agencies to register with the state before collecting information on state residents, and imposing a 2% tax on income growing out of their activities in the state. *See* State v. Morgan, 48 N.W. 314, 315 (S.D. 1891).

collect and organize: Google and Facebook know more about us than our family members do. Government surveillance is widespread, and government databases—from local license listings to the FBI's Known or Suspected Terrorist file—have proliferated as well.

Privacy advocates, addressing these issues today, have articulated concerns about pervasive surveillance; about our own loss of control in the face of that surveillance; and about the fact that powerful institutions are now making decisions affecting our lives based on impersonal and ill-fitting database entries.<sup>137</sup> All of those are concerns that I referred to in the initial pages of this Article, discussing the Equifax data breach. But none of them are new: All were expressed starting in the 1840s, when members of the American public first began learning to live with the Mercantile Agency.

The underlying problem, indeed, was the same then as now. The privacy problem in the modern age, as Jeffrey Reiman put it more than twenty years ago, isn't that our doors and curtains aren't insufficiently thick; it's the way modern databases "gather[ ] up the pieces" of our lives and make them all "visible from a single point."<sup>138</sup> The collection and aggregation of information about our everyday activities in the public eye can reveal aspects of our identities in a way susceptible to abuse.<sup>139</sup> But that modern problem presented itself in the 1840s, when the Mercantile Agency began compiling its ledgers.

We can put the nineteenth-century credit bureau in broader perspective by looking at it in terms of Michel Foucault's description of the phenomenon he called disciplinary writing. "For a long time," Foucault wrote, "ordinary individuality—the everyday individuality of everybody—remained below the threshold of description . . . [t]o be looked at, observed, described in detail, followed from day to day by an uninterrupted writing, was a privilege," reserved for kings and heroes.<sup>140</sup>

But that, Foucault continued, was no longer the case. Modern institutions embody surveillance that makes ordinary individuals visible at all times. That surveillance situates people in "a network of writing; it engages them in a whole mass of documents that capture and fix them."<sup>141</sup> To accomplish that goal, institutions have had to formulate codes to transcribe the individual features noted by the surveillance; to correlate those

137. See, e.g., FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION ERA* (2004).

138. Jeffrey Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 29 (1995); see also Jonathan Weinberg, *Tracking RFID*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 777, 814 (2007-08).

139. See *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

140. Michel Foucault, *The Means of Correct Training*, in *THE FOUCAULT READER* 189, 203 (Paul Rabinow ed., 1984 (Alan Sheridan, trans., 1977)).

141. *Id.* at 201.

elements within an organized, sortable accumulation of documents; to “integrate individual data into cumulative systems in such a way that . . . an individual could be located in the general register;” and thus ultimately to constitute the individual within the database as “a describable, analyzable object.”<sup>142</sup>

Finally, Foucault emphasized, this process is an instrument of judgment and punishment. It achieves, as Foucault put it, “the subjection of those who are perceived as objects and the objectification of those who are subjected.”<sup>143</sup>

It should hardly be necessary to show how closely this narrative was echoed in the rise of the credit bureau. The credit bureau’s first task was surveillance: it set itself the job of finding out the character, capacity and capital of every individual business owner in the teeming, geographically scattered mass that was the American economy. These firms, for the most part, were individual proprietorships or small partnerships; the information the credit bureau collected was thus information about the personal characteristics and dealings of everyday people. It extended to such matters as the notation in one report that a subject Ohio druggist had become “too well acquainted” with a married woman whose husband had left to join the California Gold Rush.<sup>144</sup> This was an unprecedented thing: “Ordinary Americans had never before inspired big books of their comings, goings, hits, and misses.”<sup>145</sup>

The second component, as I’ve discussed, was the credit bureaus’ development of protocols and technology to situate their reports and ledger information in databases, such that any business proprietor could be “located in the general register,” described, and coded with a rating.

And as for the third component, the key function of the credit bureau, in Foucault’s words, was to “differentiate[ ] and judge[ ]”<sup>146</sup>—with the effect of punishing those business owners who didn’t measure up. Credit bureau ledger entries described some Americans as “A no. 1” and others as “losers”—as “good for nothing”—and on that basis subscribers chose to do business with them or to shun them.<sup>147</sup> This provided a profound incentive for business owners to internalize the credit bureaus’ ratings criteria, and alter their behavior to match those standards. Because a credit bureau would publicize every case in which a merchant failed to pay his debts when due, an 1896 reporter mused, it “might well be termed a bureau for the promotion of honesty.”<sup>148</sup> And indeed, that’s part of what Lewis Tappan had intended. An abolitionist leader and a

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142. *Id.* at 201-02.

143. *Id.* at 197.

144. *See* SANDAGE, *supra* note 7, at 155.

145. *Id.* at 130.

146. FOUCAULT, *supra* note 140, at 197.

147. SANDAGE, *supra* note 7, at 133.

148. Lauer, *supra* note 11, at 312 (citing *The Mercantile Agencies: They Have Grown Indispensable to Business*, CHI. TRIB. 6 (March 15, 1896)); *see also* SANDAGE,

deeply moralistic man,<sup>149</sup> Tappan saw his company as one that would “check[ ] knavery, & purif[y] the mercantile air.”<sup>150</sup> He welcomed the discipline it imposed on traders.<sup>151</sup>

While contemporary critics’ fears of “espionage” sound like modern privacy concerns, those critics did not have the tools or the vocabulary to couch their privacy complaints as legal claims.<sup>152</sup> Warren and Brandeis’s ground-breaking right to privacy article would not be published until 1890,<sup>153</sup> and it would be decades more before any court recognized a privacy-based tort claim based on something other than the reproduction of a plaintiff’s visual likeness.<sup>154</sup> Federal statutory law would not address credit reporting until 1970.<sup>155</sup> Nineteenth-century business proprietors were not positioned to address surveillance as a *legal* harm, or even to think about it in those terms.<sup>156</sup>

But they were positioned to level one straightforward attack against credit bureaus: the common-law defamation suit. To the extent that damaging errors were inevitable in agency operations—and they were—one would expect injured parties to file claims for defamation. This was long before the Supreme Court constitutionalized defamation law in *New York Times v. Sullivan*.<sup>157</sup> In those far-away, pre-1964 times, states followed common-law defamation rules under which speakers faced strict liability for

*supra* note 7, at 163 (citing *The Mercantile Agency System*, 7 THE BANKERS’ MAG. & STAT. 545 (Jan. 1858)).

149. Tappan had “a habit of coming to unfavorable conclusions about men on too *slight* grounds.” See OLEGARIO, *supra* note 12, at 41 (emphasis in original). He fit well, according to his biographer, into “the familiar checklist of the Yankee do-gooder’s grave defects: moral arrogance, obstinacy, cliquish conformity, [and] provincial bigotry.” See *id.* at 40-41 (quoting BERTRAM WYATT-BROWN, LEWIS TAPPAN AND THE EVANGELICAL WAR AGAINST SLAVERY 231, 237 (1997 reprint ed.)).

150. SANDAGE, *supra* note 7, at 148 (quoting a letter Tappan wrote to his nephew).

151. See *id.* at 163.

152. One 1889 lawyer did argue to the New York Court of Appeals that “[t]he name and business of appellant being peculiarly his own private property, [a credit bureau] had no right to voluntarily print and circulate any publication of or concerning his name or business.” *Kingsbury v. The Bradstreet Co.*, 116 N.Y. 211, 213 (N.Y. 1889). Counsel was unable to cite any relevant authority, though, and the claim was foreclosed by relevant precedent. See *infra* notes 208-220 and accompanying text. The Court of Appeals did not bother to respond.

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

154. Or, in one case, the erection of a statue of plaintiff’s decedent. See Benjamin E. Bratman, *Brandeis and Warren’s the Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 638-43 (2002).

155. Fair Credit Reporting Act, Pub. L. 91-508, 84 Stat. 1114 (1970) (codified at 15 U.S.C. §§ 1681-1681x).

156. See generally William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631 (1980-81) (examining the process through which injurious experiences do or don’t come to be seen as the appropriate subjects of legal disputes).

157. 376 U.S. 254 (1964).



defamation unless their speech was privileged. So how did the courts—and the agencies themselves—handle lawsuits against the agencies?<sup>158</sup>

#### IV. THE CREDIT AGENCY IN COURT

##### A. *Setting the Stage*

Let's begin by looking at two early lawsuits, both of which went to trial in 1851. The first of them—*Taylor v. Church*<sup>159</sup>—was brought against Sheldon Church. Church had provided a fore-glimpse of the broadly-focused, subscription-based, centrally-organized Mercantile Agency: as early as 1827, he had initiated a side business of recording credit information on his travels through the South, and passing it along to clients in New York.<sup>160</sup> In the early 1840s, he was hired by a New York merchants' association.<sup>161</sup> The association gave Church the names of some of its member firms' customers, whom he was tasked to investigate; Church sent reports on those names back to the association, where they were printed for distribution to the membership.<sup>162</sup>

In fulfilling those duties, Church wrote to his client in 1846 that one Murdock, a Mississippi businessman, lacked the "essential requisites of a good merchant;" that Murdock's partner Hale was "rather a negative character;" and that their partner Taylor sent out "undesirable, ill assorted odds and ends and unsaleable stock . . . I am told [he] is an *unprincipled* character."<sup>163</sup> The report was printed and distributed to the association's thirty-odd members.<sup>164</sup> Murdock, Hale, and Taylor sued for libel.

It's useful here to review the general outlines of the tort of defamation as it then existed. As a rule, under mid-nineteenth century U.S. law, a person who disseminated false and defamatory material was strictly liable to the person defamed. In some cases, though, a defendant was deemed to have spoken "upon a just occasion,"<sup>165</sup> so that he had legal excuse for the defamatory speech.<sup>166</sup> In a narrow set of circumstances, such as the

158. Some otherwise-exemplary scholarship suggests that after an initial period of uncertainty, the law adopted a rule of privilege that routinely and easily shielded credit bureaus from liability. See, e.g., OLEGARIO, *supra* note 12, at 170; SANDAGE, *supra* note 7, at 184, 315 n.18. The reality, though, is different. See *infra* Section III; Flandreu & Mesevage, *supra* note 135; Cohen & Carruthers, *supra* note 74, at 58; Carruthers & Cohen, *supra* note 41, at 54.

159. 1 E.D. Smith 279 (N.Y. Ct. Common Pleas 1851), *rev'd*, 8 N.Y. 452 (1853).

160. See SPRAGUE, *supra* note 64, at 111.

161. See FOULKE, *supra* note 7, at 332-34.

162. See *Taylor v. Church*, 8 N.Y. 452, 453 (1853).

163. *Id.* at 452.

164. See *id.* at 454.

165. FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 342 (Little, Brown & Co. 1859) (emphasis omitted), <https://books.google.com/books?id=wWcLAAAAYAA>.

166. See THOMAS MCINTYRE COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 209-10 (Callaghan and Company 1st ed. 1879).

offering of judicial testimony, an individual's statements would be absolutely privileged; no liability could attach. In a broader set of contexts, courts found qualified privilege, on the ground that otherwise fear of an honest mistake would cause speakers to self-censor, diserving the public interest.<sup>167</sup> Qualified privilege meant a defendant would be liable only if he had spoken with "express" or "actual" malice—that is, out of wicked, spiteful, or revengeful motives, with the intent to injure.<sup>168</sup>

Qualified privilege could arise in a variety of contexts. An 1845 Supreme Court case had noted that the privilege was available "whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral."<sup>169</sup> For example, privilege covered a negative report of a teacher's character made by a patron of a school to its trustees, or the statements of a person whom a concerned father had hired to learn his son-in-law's true character.<sup>170</sup> It covered cautionary statements spoken in confidence and friendship, and the references given by a householder attesting to the character of a servant he had employed.<sup>171</sup>

It fit well with those principles for a court to hold—in the words of one English judge—that if one business owner asks another in confidence about "the solvency of a third person, whom the inquirer was about to trust," then the response to that inquiry would be protected by privilege.

If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard, for no man would answer an inquiry as to the solvency of another.<sup>172</sup>

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167. See W. BLAKE ODGERS, *THE LAW OF LIBEL AND SLANDER* 181-83 (The Blackstone Publishing Company 1887).

168. See HENRY COLEMAN FOLKARD, *FOLKARD'S STARKIE ON SLANDER AND LIBEL* 48-49, 397 (Banks & Brothers 4th ed. 1877), <https://play.google.com/books/reader?id=U4UsAQAAMAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PP12>; see also ODGERS, *supra* note 167, at 181-82, 204. On some understandings of the law, "malice" was required in all defamation actions, but malice understood in that sense was established by the mere publication of a false and injurious statement, regardless of the speaker's motivations or whether he had believed the statement to be true. Only in cases of qualified privilege did the law require malice in the stronger sense of an intentional wrongful act. See COOLEY, *supra* note 166, at 210-11.

169. *White v. Nicholls*, 44 U.S. 266, 286-87 (1845).

170. See COOLEY, *supra* note 166, at 215 n.4, 216 n.2.

171. See *White*, 44 U.S. at 286-87.

172. *Smith v. Thomas*, 4 Dowling 333, 340-41 (Kings Bench 1835), <http://ia800302.us.archive.org/18/items/reportscasesarg10dowlgoog/reportscasesarg10dowlgoog.pdf> [<https://perma.cc/TE9U-B9J3>]; see also, *Washburn v. Cooke*, 3 Denio. 110, 112-13 (N.Y. Sup. Ct. 1846) (a speaker enjoys privilege "in answering an inquiry concerning the solvency of a tradesman, or banker . . .").

And so Sheldon Church—while not defending his report's accuracy—countered that it had been privileged. While Church had not personally been a fellow-merchant considering whether to trust the Mississippi firm, he was able to argue that he was that inquiring merchant's agent.<sup>173</sup> The New York trial court, though, was concerned. It saw businesses like Church's, selling information about merchants' character and standing, as providing a valuable service so long as they conducted their inquiries properly, and gave out only correct information. But, the court continued, "it is also evident, that if carelessly conducted, or if untrue reports are furnished, even through error or mistake, the consequence to those who are thus misrepresented may be very injurious."<sup>174</sup>

In this case, the court continued, even if privilege would otherwise have been available,<sup>175</sup> the grounds for liability were plain. Church's reports hadn't gone only to the immediately concerned merchant. They had been printed, under his direction, and distributed to all the remaining members of the merchants' association—persons who had no immediate interest in learning about plaintiffs' firm, but simply wanted the reports for possible future reference. Application of privilege when the defamation was circulated so broadly was untenable: It "would produce ruinous effects upon the standing and credit of those referred to, while they themselves were in utter ignorance of the existence of such reports, and unable, therefore, to guard against the effect of them."<sup>176</sup> Accordingly, the court ruled, no privilege was available when publication was made beyond directly interested parties. Indeed, the opinion speculated, privilege might have been lost the moment Church transmitted the report to a printer. The printer was not personally an interested party, the court reasoned, and the mere fact that he had seen the report might have breached the necessary confidentiality.<sup>177</sup>

The trial judge charged the jury that "if a party voluntarily engaged in a system of espionage upon the character and conduct of others for his private gain, communicating the result to third parties for a premium," then he was strictly liable for false statements made to persons who lacked an interest in learning about the individuals whose character he had aspersed.<sup>178</sup> The jury awarded the equivalent of \$175,000 in 2016 dollars.<sup>179</sup> On appeal, the New York Court of Appeals unanimously agreed that Church's statements were unprivileged and defamatory. Notwithstanding

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173. See *Taylor v. Church*, 1 E.D. Smith 279, 288 (N.Y. Ct. Common Pleas 1851), *rev'd*, 8 N.Y. 452 (1853).

174. *Id.* at 283.

175. The court reserved that question. *Id.* at 288.

176. *Id.* at 290.

177. See *id.* at 291.

178. *Taylor v. Church*, 8 N.Y. 452, 456-57 (1853).

179. The award was \$6000. For the conversion, see Morgan Friedman, THE INFLATION CALCULATOR, <https://westegg.com/inflation/> [<https://perma.cc/K3DT-SEKX>] (last visited Apr. 21, 2018).

that holding, it reversed: it held that the trial court had erroneously excluded testimony, possibly relevant to damages, that Church had asked that the printing be done as privately and confidentially as possible.<sup>180</sup>

In light of the considerations canvassed in *Taylor v. Church*, it's easy to see the merits of Tappan's original plan for the Mercantile Agency. Only when a subscriber requested information concerning a particular data subject would an Agency clerk read the file to him orally; no written document authored by the Agency even left its premises.<sup>181</sup> This neatly addressed the problem of dissemination of defamatory reports to persons outside the firm with no legal interest in their content. In addition, it made it more difficult for rivals to appropriate and resell information the Mercantile Agency had collected.<sup>182</sup>

That strategy wasn't good enough, though, in the case of *Beardsley v. Tappan*.<sup>183</sup> John Beardsley ran a store with his brother in Norwalk, Ohio. Initially, his Mercantile Agency write-ups were tolerably good, but then came an 1848 entry reporting that Beardsley's "wife is about to file a bill for divorce & Alimony & that he has put his p[ro]p[er]ty out of his hands . . . if so their store will probably be closed at once."<sup>184</sup> Beardsley complained to Mercantile Agency manager Benjamin Douglass, but the firm's correspondent in Norwalk stuck to his story and Douglass refused any changes. Beardsley sued, and the Agency claimed both that the report was privileged and that it was true.<sup>185</sup>

The trial was sensational, and widely covered in the press. Mary Beardsley, a difficult and possibly unstable partner, had indeed left her husband's house in June 1848 (moving in with her sister around the corner), but as of the time of John's lawsuit five months later she had not in fact filed for divorce. Then, in December, a divorce petition was filed in an Ohio court, purportedly on Mary's behalf; it accused John of adultery with seven women, including a mother-daughter pair; his lawyer's wife; and his sister-in-law.<sup>186</sup> The petition would have appeared to have bol-

180. See *Taylor*, 8 N.Y. at 464.

181. See *supra* notes 73-74 and accompanying text. But see *supra* note 74 (policy not consistently adhered to).

182. See Lipartito, *supra* note 43, at 10; see also OLEGARIO, *supra* note 12, at 67-68 (Douglass in 1858 was reluctant to publish ratings books because of libel and intellectual-property considerations).

183. See REPORTS, *supra* note 50 (reprint of extensive case documents from *Beardsley*). Plaintiff brought suit in 1848, and the jury reached a verdict in his favor in 1851. The court refused rehearing in *Beardsley v. Tappan*, 2 F. Cas. 1187, 1187 (C.C.S.D.N.Y. 1867), and the Supreme Court reversed on other grounds, *Tappan v. Beardsley*, 77 U.S. 427, 434-37 (1870).

184. SANDAGE, *supra* note 7, at 165 (quoting ledger entry). Beardsley's complaint gives the wording slightly differently. See *supra* note 50, at 2-3.

185. See *Beardsley*, 2 Fed. Cas. at 1187-88.

186. See SANDAGE, *supra* note 7, at 175. Sandage cites to the Bill of Exceptions filed in the *Beardsley* case, but I don't see the first divorce petition there; I do see a second petition (filed in March 1849), which cut the number of adulteries to five (but kept the mother-daughter pair). See REPORTS, *supra* note 50, at 58-59.

stered the Agency's case—but it then transpired in the Ohio proceeding that the lawyer who had filed that petition had never met or received any communications from Mary Beardsley, and had instead been hired by a Norwalk man whom he refused to name.<sup>187</sup> Douglass, refusing to identify the Agency's Norwalk correspondent, was jailed for contempt.<sup>188</sup>

Judge Samuel Betts, the veteran of a quarter-century on the federal bench, instructed the jury at the close of testimony that the Agency's report did not fall within the realm of privilege. Judge Betts's starting point was uncontroversial enough: a defendant was covered by privilege when he communicated information, in good faith, to a merchant who sought that information from him for legitimate business purposes. But, the judge continued, Lewis Tappan hadn't limited himself to communicating, man to man, with subscribers who had themselves personally made inquiries. Rather, he had sat at the apex of a mass-production enterprise. Clerks in his employ had transcribed ledger entries concerning Beardsley into the Agency's files, and other clerks had read them out to subscribers—indeed not only to subscribers personally, but to the subscribers' clerks. That was too broad a publication. No privilege would attach, the court said, to “readings to or by persons other than the defendant [that is, Tappan personally] and the merchant actually and personally interested in obtaining information concerning the plaintiffs.”<sup>189</sup> The jury awarded Beardsley \$10,000—the equivalent of almost \$300,000 in today's money.<sup>190</sup>

This was a stunning rejection of Tappan's business model. The key innovation of the Mercantile Agency was its application of the “principles of mass production”<sup>191</sup>: It produced and sold information through the medium of a bureaucratically organized firm, in which different individuals performed different specialized functions. Judge Betts, though, ruled that such a firm couldn't claim protection against defamation liability. Common-law privilege was reserved for personal communications, in an informal realm of social relationships, in which both merchants and tradesmen were operating as individuals, not firms. It did not extend to the bureaucratic systems of market and power that were just then begin-

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187. See REPORTS, *supra* note 50, at 68-72.

188. See SANDAGE, *supra* note 7, at 173. The firm released a testimonial signed by employees, averring with deep irony that Douglass had the right to stand silent because the law “recognize[d] [no] right to coerce an individual into a public exposure of his private business.” See *id.* at 176.

189. REPORTS, *supra* note 50, at 83.

190. See SANDAGE, *supra* note 7, at 179; for the inflation conversion, see *supra* note 179. The *Taylor* court had flirted with a similar ruling, in its discussion of the printer, but had left the matter unresolved. See *supra* note 177 and accompanying text.

191. See *supra* note 64 and accompanying text.

ning to spring up in the new economy.<sup>192</sup> Information, in the court's understanding, could still be shared—but there were limits to the degree to which it could be commoditized.

The Mercantile Agency sought rehearing, and in 1867 U.S. Supreme Court Justice Samuel Nelson, sitting as a district court judge by designation, reaffirmed Judge Betts's ruling. On the one hand, he wrote, merchants had a legitimate interest in looking into the character and standing of customers seeking credit. But "to legalize these establishments in the manner and to the extent used by the defendant, is placing one portion of the mercantile community under an organized system of espionage and inquisition for the benefit of the other, exposed, from the very nature of the organization, to perversion and abuse."<sup>193</sup> If such establishments were to be allowed at all, he continued, Judge Betts' limitation was a reasonable one.<sup>194</sup>

The New York Times, reporting the story, recognized that if Justice Nelson's opinion were affirmed, it would be the end of Tappan's model.

Those immense establishments, with numerous corps of clerks and with long rows of desks on which lay numbers of immense volumes in which could be learned a story, true or false, of any merchant in any part of the country whatever, will probably pass away. . . . They may give place to smaller establishments, in which one man may keep, for the information of those who deal with him, similar knowledge as to the merchants in a section no larger than he can manage by himself.<sup>195</sup>

In 1870, though, 22 years after Beardsley first brought his suit, the U.S. Supreme Court ordered a new trial on unrelated grounds. It had been error, the Court held, to introduce the record of the Ohio divorce hearing in the New York proceeding; Tappan had not been a party to that hearing, and had not been in a position to protect his interests.<sup>196</sup> Beardsley, spent, let the matter drop.

### B. *Limiting the Scope of Privilege*

Not all the judges who encountered the Mercantile Agency in litigation saw it the same way as Judge Betts and Justice Nelson had. While the

192. Cf. 2 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 113-89 (Thomas McCarthy trans. Beacon Press 1984) (1981) (distinguishing between those two spheres of social life).

193. *Beardsley v. Tappan*, 2 Fed. Cas. 1187, 1187 (C.C.S.D.N.Y. 1867).

194. See *id.*; REPORTS, *supra* note 50, at 127 (reprinted in more extensive form).

195. See SANDAGE, *supra* note 7, at 317 n.41 (citing *The Law of Mercantile Agencies*, N.Y. TIMES, Oct. 15, 1867), at 4 col. 4.

196. *Tappan v. Beardsley*, 77 U.S. 427, 434-35 (1870). As in *Taylor*, the problem identified by the appellate court was that the jury, influenced by an unbalanced testimonial record, might have set damages too high.

*Bearidsley* lawsuit was winding its way through the courts, a different body of law was taking shape. In 1854, the Mercantile Agency reported to its customers that a wealthy Maine tannery owner named Horace Billings was on the verge of failure. Billings sued in the Massachusetts courts.<sup>197</sup> The Agency didn't defend the veracity of its report. Indeed, at some point before trial, it destroyed the only copy of the report in its books and substituted an innocuous one.<sup>198</sup> It defended itself on the ground that Billings could not prove it had spoken the words he charged, and that in any event the communication was protected by privilege.

Justice Charles A. Dewey of the Massachusetts Supreme Judicial Court, sitting by designation,<sup>199</sup> instructed the jury on both grounds in a manner favorable to defendants. He didn't reference Judge Betts's concerns. Rather, he explained, the jury should regard defendants as the *agents* and *employees* of the customers they provided with information. Thus privilege was available to each defendant so long as

upon the application of his principal, [he] made inquiries at the proper places, and under proper and reasonable guards to ensure accuracy and privacy as to the information thus obtained, and the information which he thus obtained was repeated bona fide [solely] to his employer . . . for the purpose of governing [the employer's] conduct in his business transactions with the party as to whom the inquiry was made.<sup>200</sup>

A moment's thought should reveal the problem here.<sup>201</sup> Defendants were Edward Russell and Edwin Walters, the proprietors of the Mercantile Agency's Boston office. Under any conventional understanding, they were not the agents—and certainly not the employees—of the Mercantile Agency's clients. Unlike Sheldon Church, they did not work for the firms to which they provided information; they certainly did not take instructions from them. Rather, they sold those firms a pre-packaged intellectual-property product in an arms-length transaction. Saying that Russell and Walters were those firm's employees and agents, under those circumstances, was not so different from saying that because I visit Kroger to buy

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197. See REPORTS, *supra* note 50, at 129 (citing *Billings v. Russell*, 8 Boston L. Rep. 699 (1855)).

198. See *id.* at 131 (citing *Billings*, 8 Boston L. Rep. 699)). According to defendants, the substitution took place before Billings filed suit. See SANDAGE, *supra* note 7, at 159-61.

199. See *Justices of the Supreme Judicial Court*, <http://www.mass.gov/courts/docs/sjc/docs/reporter-of-decisions-sjc-justices-succession-chart.pdf> [<https://perma.cc/3SR3-YE59>] (last visited Apr. 23, 2018). Justice Dewey came from a prominent family; his father had been Daniel Dewey, himself a Justice of the Massachusetts Supreme Judicial Court (and before that a member of the U.S. House of Representatives). See Daniel Dewey, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000293> [<https://perma.cc/S2RP-PXZB>] (last visited Apr. 23, 2018).

200. See REPORTS, *supra* note 50, at 132-33 (citing *Billings*).

201. See OLEGARIO, *supra* note 12, at 72.

its yogurt, the officers of the Kroger Company are my employees and agents. That's not how agency works.

It may be that Justice Dewey was prone to embrace the agency characterization because he found it hard to wrap his mind around the notion that the Mercantile Agency had developed a new sort of business revolving around the sale of an information product. Thirty-five years later, the South Dakota Supreme Court would still resist that framing: "Information [and] intelligence," it would say, are not "subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities."<sup>202</sup> Absent a perception that the Mercantile Agency was selling what we now think of as intellectual property, it was easier for Justice Dewey to characterize what the Agency was doing as, well, agency.<sup>203</sup>

That characterization mattered, though. Even setting aside Judge Betts's concerns, if defendants' speech fell outside the realm of agency, it was not obvious that it fell within any conventional understanding of privilege. The core of the relevant notion of privilege had been that when an individual found himself in a situation where social responsibility, fair dealing, or the bonds of common interest and concern called for him to convey information to another person who needed to know that information, privilege enabled him to do so without fear of liability for honest mistake.<sup>204</sup> A nineteenth-century treatise described this as the case "[w]here circumstances cast upon the defendant the duty of making a communication to a certain other person."<sup>205</sup> It rested on the "legal or moral" duty to speak.<sup>206</sup>

But that didn't seem to be the Mercantile Agency's situation. No duty had been "cast upon" it; it was proactively going out and collecting damaging information that nobody had yet requested.<sup>207</sup> There was more than a little tension between the claim that it had a legal or moral duty to speak, and the fact that it was willing to share its information only with those who

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202. *State v. Morgan*, 48 N.W. 314, 321 (S.D. 1891) (rejecting a dormant commerce clause challenge to a law regulating mercantile agencies); *see supra* note 136 and accompanying text.

203. As late as 1903, the Bradstreet Company still asserted in legal filings that it stood in an agency relationship with its subscribers. *See Minter v. Bradstreet Co.*, 73 S.W. 668, 669 (Mo. 1903); *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 359-61 (Mo. 1893).

204. *See ODGERS*, *supra* note 167, at 196.

205. *See id.* at 197.

206. *See id.* at 182; *see also White v. Nicholls*, 44 U.S. 266, 286-87 (1845).

207. When it received damaging information about a firm in its books, it sent out notices inviting customers that had previously expressed an interest in that firm to visit to learn the latest. *See supra* note 94 and accompanying text. That sort of proactive initiation of contact too was arguably inconsistent with privilege. *See Storey v. Challands*, 8 C. & P. Cas. 234 (Kings Bench 1837), <https://books.google.com/books?id=XGwwAAAIAAJ&pg=PR1>; *see also ODGERS*, *supra* note 167, at 158 ("I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers.").



paid. It was hardly patent, thus, that its statements fell within the realm of privilege. Indeed, the eminent and influential Thomas Cooley would urge in the first edition of his *Treatise on the Law of Torts* (a quarter-century later) that they did not: “[I]f one makes it his business to furnish to others information concerning the character, habits, standing and responsibility of tradesmen, his business is not privileged, and he must justify his reports by the truth.”<sup>208</sup>

In cases in 1868 (*Ormsby v. Douglass*<sup>209</sup>) and 1871 (*Sunderlin v. Bradstreet*<sup>210</sup>), the New York Court of Appeals charted what might initially have appeared to be a middle path. The court—the highest one in the state in which both the Mercantile Agency and the Bradstreet Company were located—began by holding that privilege does extend to a credit agency’s communication of information to a customer with an immediate financial interest in that information. It did so without replicating Justice Dewey’s error. Quite the contrary, the court made plain that “the defendants were in no sense the agents of an association of merchants, or of their [customers].” Instead, “[o]f their own volition, and for their own profit, they established a bureau for collecting and disseminating information as to the character, credit and pecuniary responsibility of merchants and traders throughout the United States.”<sup>211</sup> But that fact without more did not deprive the agencies of privilege.

In the 1868 *Ormsby* case, Judge Woodruff<sup>212</sup> took the position that privilege attached because the differences between the credit bureau model and agency were immaterial. There was no functional difference, he said, between a person’s acting as an agent to collect information on merchants’ behalf and his establishing a business selling information to merchants and receiving his compensation that way.<sup>213</sup> More importantly, perhaps, such a person was doing valuable work:

I cannot concede that in the large population of a crowded city, and in a mercantile community where false representations, fraud, dishonesty and insolvency are easily concealed and but imperfectly known, or known to but few when detected, where it is easy for strangers to practice upon the unwary or unsuspecting, a business is to be characterized as unworthy which aims only to

208. COOLEY, *supra* note 166, at 217.

209. *Ormsby v. Douglass*, 37 N.Y. 477 (1868).

210. *Sunderlin v. Bradstreet*, 46 N.Y. 188 (1871).

211. *Id.* at 191.

212. Justice Woodruff wrote the more extensive of the court’s two serial opinions in *Ormsby*.

213. If one merchant may employ his own private agent to seek and communicate such information . . . there is no legal objection to the combination or union of two or more in the employment of the same agent. And . . . if an agent may act for several, he may make the pursuit of such information his occupation, and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation a compensation therefore. *Ormsby*, 37 N.Y. at 485.

give correct information to those whose interests entitle them to seek it wherever it may be had.<sup>214</sup>

One can see here an implicit reproof to Judge Betts and Justice Nelson: Old limitations on privilege were all very well for the old economy, in which a merchant could learn everything he needed to know through old-fashioned personal and social networks. But in the new, teeming, anonymous city, Judge Woodruff seems to be saying, the forces of fair dealing, honesty and good commercial order need more protection than that.

Three years later, though, in *Sunderlin v. Bradstreet*,<sup>215</sup> Judge Allen was more restrained. A credit bureau, he said, was like an “intelligence office”—which was to say, an employment agency, collecting information about the men and women it was placing with employers.<sup>216</sup> Perhaps because the employment agencies of the time had a sketchy reputation and in any event were oriented towards the laboring classes, Judge Allen felt compelled to add that “it is not intended by this to intimate, that [the credit bureau] is not an entirely lawful and reputable business; or that it is not of general utility, or perhaps, a necessity to the commerce and business of the country.”<sup>217</sup> Was it entitled to privilege, so long as it limited its communications to interested parties? Yes, because under the common law, privilege extended to a good-faith statement made in response to an inquiry from an interested person, and even to a statement volunteered to such a person, if the speaker’s relationship with the recipient made his communicating the information a reasonable duty, or at least a proper activity.<sup>218</sup>

At the same time, Judge Allen continued, a credit bureau enjoys no privilege when it discloses information to persons without an immediate financial interest in that information. That doomed the Bradstreet Company’s case in *Sunderlin*: The defamatory statement there had been published in the weekly notification sheets that the agency had sent to every customer—yet few, if any, of the 10,000 people who had received the notification sheets had any interest in the plaintiffs’ character or financial condition.<sup>219</sup> As in *Taylor v. Church*, such broad dissemination was “official and unauthorized, and therefore, not protected.”<sup>220</sup> Moreover, the fact

214. *Id.* at 486.

215. 46 N.Y. 188 (1871).

216. *See, e.g.*, Laws of the State of New York (114th Sess. 1891), at 175 (listing “pawnbrokers, junkshop keepers, cartmen, hackmen, dealers in second-hand merchandise, intelligence-office keepers, and auctioneers of watches and jewelry” as places to be kept under police scrutiny); *id.* at 369-70, 659-60; CAL. STAT. (12th Sess. 1861) at 412-13; Rev. Ords. of City of St. Louis (1881) at 787-88; HORACE G. WADLIN, UNEMPLOYMENT 81, 106-09, 256-57 (1894); Florence Hunt, “The Intelligence Office,” 4 AM. KITCHEN MAG. #1 (Oct. 1895), at 70, available at <https://books.google.com/books?id=TR1IAAAAYAAJ>.

217. *Sunderlin*, 46 N.Y. at 191.

218. *See id.* at 191-92.

219. *See id.* at 192.

220. *Id.* at 193.

that the communication was made in code was immaterial, because every customer-recipient had a key to the codes.<sup>221</sup> *Sunderlin*, once again, cast a vital element of the credit agencies' business models into doubt: If notifications sheets were unprotected, how were the agencies to keep their subscribers current? And indeed, what about the ratings books that the agencies had been publishing for the past decade? They too were distributed to all subscribers.

For the next quarter-century, courts throughout the U.S. followed *Ormsby* and *Sunderlin*.<sup>222</sup> That was not good news for the credit bureaus. The reported cases that followed uniformly involved challenges to statements in notification sheets and reference books, and the courts uniformly declined to find those statements privileged.

A thoughtful 1882 opinion in *Erber v. Dun*,<sup>223</sup> for example, began on a positive note for defendants by characterizing the position of the lower

221. *See id.*

222. *See* Pollasky v. Minchener, 46 N.W. 5 (Mich. 1890); Mitchell v. Bradstreet Co., 22 S.W. 358 (Mo. 1893); King v. Patterson, 49 N.J.L. 417 (N.J. 1887); Bradstreet v. Gill, 9 S.W. 753 (Tex. 1888); Locke v. Bradstreet Co., 22 F. 771 (D. Minn. 1885); Trussell v. Scarlett, 18 F. 214 (D. Md. 1882); Erber v. Dun, 12 F. 526 (E.D. Ark. 1882); Louis M. Greeley, *What Publications of Commercial Agencies Are Privileged*, 35 AM. L. REG. 681 (1887); *see also* ERRANT, *supra* note 122, at 44; HARRIS W. SLATER, THE LAW RELATING TO MERCANTILE REPORTS 8-9 (1896), [http://scholarship.law.cornell.edu/historical\\_theses/355](http://scholarship.law.cornell.edu/historical_theses/355) [<https://perma.cc/3XKC-L2Z8>] (same). There were outliers. In *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886), the Supreme Court of Georgia saw no basis for privilege in anything credit reporters did: "To slander from hatred or vengeance for wrong is bad enough; to do so by contract for money is infinitely worse." *Id.* at 175. The court ruled broadly that "[i]f one makes it his business to pry into the affairs of another in order to coin money for his investigations and information, he must see to it that he communicate nothing that is false." *See id.*; *see also* Pacific Packing Co. v. Broadstreet, 139 P. 1007 (Idaho 1914). A trial court sent mixed signals in *Commonwealth v. Stacey*, 8 Phila. 617 (Pa. Quar. Sess. 1871), reprinted in REPORTS, *supra* note 50, at 265-312. That case involved a criminal indictment of a Mercantile Agency branch officer for libel. Judge Allison, sending the case to trial, resoundingly affirmed the *Sunderlin* court's approach, explaining:

A business such as that conducted by the defendant, if properly managed, may be of the greatest service to the merchants and business men of the country, but, if carried on with a reckless disregard of the rights of others, may be converted into an evil, against which no man can protect himself; its operations are secret; everything is sent out under the garb of confidence, and thus the poisoned arrows which are launched in darkness, may strike down the purest and most solvent in the land; no business man is safe if this [notification sheet] can be recognized and protected by the law as a privileged communication.

REPORTS, *supra* note 50, at 279.

At the close of testimony, however, Judge Finletter in terse remarks directed the jury to acquit. He noted that the state had proved delivery of only one copy of the notification sheet, and that to an interested recipient. More broadly, though, he appeared to question the understanding of "interest" that was central to the *Sunderlin* holding: "[T]he party receiving this letter, or note, or whatever it may be called, had a right to know, as a member of the business community, all about any other member of the business community in which he traded." *Id.* at 312.

223. 12 F. 526 (E.D. Ark. 1882).

courts in *Beardsley* as out of step with universal understandings about how firms conducted business. The court explained:

Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents; and any rule of law that would deny to them the right to avail themselves of the services of an agent in every department of their business, and for every legitimate purpose connected with it, is unsound.<sup>224</sup>

Turning to the general question of privilege, the court found it “questionable whether it is not pushing the doctrine of privileged communications beyond its legitimate scope” to apply it to credit bureaus’ sale of information to subscribers.<sup>225</sup> But on the strength of *Ormsby* (and in the absence of contrary authority), it granted that point as well. Nonetheless, the court continued, the correctness of the *Sunderlin* rule was too clear for argument: when a credit bureau distributed notification sheets to all subscribers in a given geographic area rather than merely to those with an immediate interest in the information, any incorrect statements in those sheets were void of privilege.<sup>226</sup>

The fact that the *Sunderlin* rule imposed strict defamation liability on the credit bureaus for a tremendously broad range of communications didn’t escape the courts’ attention. The highest court of New Jersey adopted the *Sunderlin* rule in 1887, but by a vote of only 7-5, in *King v. Patterson*.<sup>227</sup> Justice Van Syckel, dissenting, urged that credit agencies were essential to the economy, and that the *Sunderlin* rule would go far to destroy their value. Only the fact that the agencies had managed to keep their communications to subscribers confidential (and thus away from the eyes of injured potential plaintiffs) had so far saved them from a disastrous flood of civil suits and criminal prosecutions. Moreover, he argued, *Sunderlin*’s foundational concept was outmoded.

Business interests are so ramified at this day that large enterprises cannot be successfully conducted without a comprehensive survey of the whole field of industry. . . . In fact, every man who has merchandise to sell is, to some extent, interested in knowing how every man in the country stands in credit.

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224. *Id.* at 535; see also *King v. Patterson*, 49 N.J.L. 417, 428-29, (N.J. 1887) (*Beardsley* approach was “unreasonable” because “[a]gents to collect information, clerks to record it and to communicate it to subscribers . . . and confidential clerks to receive the information [for] subscribers . . . are absolutely necessary to the usefulness, if not the existence, of these institutions.”); *Trussell*, 18 F. at 216 (dismissing Judge Betts’s ruling as “a case decided some years ago,” a product of a time when mercantile agencies were “very little known”).

225. See *Erber*, 12 F. at 536.

226. See *id.* at 538.

227. *King*, 49 N.J.L. at 417. Counsel in that case included Flavel McGee for plaintiff and Philamon Woodruff for defendant. Why don’t lawyers have cool names like that today?

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The rule that a business man may inquire of his friend or his neighbor, as to the responsibility of one who has applied for credit, answered well enough 50 years ago, but it is altogether inadequate to the present requirements of trade and commerce.<sup>228</sup>

That argument did not carry the day in New Jersey, though, and it did not carry the day elsewhere. The Supreme Court of Michigan responded directly three years later: "In [Justice Van Syckels'] desire to keep abreast of the progressive state of society, and the new and varying conditions that may arise in the progress of the age," it wrote, "he has entirely overlooked the rights of the individual . . ." <sup>229</sup> Rather, the Michigan court explained, the Mercantile Agency and its competitors were "secret and inquisitorial agencies" that "possess the power of destroying with falsehood or calumny the credit of any business man in the country, and of bringing him to bankruptcy and ruin. To hold such vast secret inquisitions exempt from liability for false publications . . . would be to sanction the highest injustice."<sup>230</sup>

Even where a credit bureau report was privileged, moreover, that did not mean that the agency would escape liability. The traditional understanding of "malice in fact"—necessary to piece a credit bureau's qualified privilege—had been something like "hatred, ill-will, and a malicious desire to injure."<sup>231</sup> But as early as 1885, some jury instructions in credit-bureau cases allowed the jury to find malice—defeating privilege where applicable—on a showing of mere negligence or recklessness.<sup>232</sup> Instructions often jumbled together language that we would today read as conveying different levels of scienter.<sup>233</sup>

In one case, thus, the court instructed the jury that it could find malice if the credit agency had acted in "the absence of probable cause"—which the court seemed to treat as equivalent to defendant's communicating the information "recklessly," unfairly, "without exercising ordinary care and caution in collecting it," and "without reason to believe its

228. *Id.* at 440-41 (Van Syckels, J., dissenting).

229. *Pollasky v. Minchener*, 46 N.W. 5, 7 (Mich. 1890).

230. *Id.* at 6; *see also* *Hanschke v. Merchants' Credit Bureau*, 256 Mich. 272, 239 N.W. 318 (1931).

231. *Erber v. Dun*, 12 F. 526, 530 (E.D. Ark. 1882); *see supra* note 165 and accompanying text.

232. *See, e.g.,* *Minter v. Bradstreet Co.*, 73 S.W. 668 (Mo. 1903); *Pollasky*, 46 N.W. at 7; *Locke v. Bradstreet Co.*, 22 F. 771 (D. Minn. 1885); *see also* *Greeley, supra* note 236, at 692.

233. A few courts ended up turning away from the *Ormsby/Sunderlin* approach to base credit-bureau liability in negligence without regard to the extent of publication. *See* *Douglass v. Daisley*, 114 F. 628 (1st Cir. 1902); *Giacona v. Bradstreet Co.*, 20 So. 706 (La. 1896); *see also* *Cossette v. Dun*, [1890] 18 S.C.R. 222 (Can.), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13811/index.do> [<https://perma.cc/PDS4-87IY>].

truth.”<sup>234</sup> In another, the Supreme Court of Missouri explained that “neglect, carelessness, and want of due regard for the rights of others” were as bad as willful injury, so that a credit bureau’s officers could be held liable simply because defendants “had good reason to believe that the statements they were making were untrue.”<sup>235</sup>

In sum, through the end of the nineteenth century, it doesn’t appear that the courts understood their role as one of protecting the credit-reporting process from lawsuits. While some judicial opinions spoke to the essential role of credit bureaus in the economy, even more expressed concern about the companies’ “secret and inquisitorial” nature, and the need for law to operate as a restraint. The doctrinal rules I’ve surveyed suggest an ample role for plaintiffs in holding the agencies to account for damaging statements in credit reports. This raises a final question, though. There aren’t *that* many reported cases involving defamation suits against credit bureaus. The Mercantile Agency and the Bradstreet Company were able to thrive notwithstanding the occasional damages payout. What happened? How were they able to defend themselves so well?

#### V. WHY LITIGATION FAILED, OR, WHY EQUIFAX IS WHAT IT IS TODAY

A range of factors helped protect the Mercantile Agency and the Bradstreet Company from liability. First, their lawyers litigated aggressively,<sup>236</sup> and took advantage of restrictive pleading and proof rules baked into the common law of defamation. Plaintiffs, for example, were often tripped up by the need to allege and prove special damages in cases where the challenged statements were deemed not defamatory *per se*.<sup>237</sup>

As Justice Van Syckels noted,<sup>238</sup> credit bureau secrecy played another key role. Mercantile Agency subscriber contracts explicitly forbade sub-

234. *Locke*, 22 F. at 774.

235. *Minter*, 73 S.W. at 683. This late-nineteenth-century shift in the understanding of “actual malice” wasn’t limited to credit-bureau cases. See, e.g., *Ramsey v. Check*, 13 S.E. 775, 775-77 (N.C. 1891) (explaining “actual malice,” and wandering around the landscape of knowing falsity, recklessness, and negligence). The U.S. Supreme Court’s reproduction of that same shift in *New York Times v. Sullivan*, 376 U.S. 254 (1964), has bedeviled generations of law students since then.

236. See *Flandreau & Mesevage*, *supra* note 135, at 240-46.

237. See, e.g., *Pacific Packing Co. v. Bradstreet Co.*, 139 P. 1007, 1008-09 (Idaho 1914); *Woodruff v. Bradstreet*, 22 N.E. 354 (N.Y. 1889). In *Newbold v. J.M. Bradstreet & Son*, 57 Md. 38 (1881), the credit agency had indicated in notification sheets that plaintiff had given a chattel mortgage—that is, that it had transferred conditional ownership of personal property as security for a loan. Plaintiff’s creditors had made the obvious inference, called in their (unsecured) loans, and refused to extend additional credit. The court, however, held that the statement had not been libelous *per se*, and that plaintiff’s proof of damages was therefore insufficient absent testimony from the specific creditors that had shunned it making the causal connection between the credit report and their actions. See *id.* at 53-55.

238. See *supra* note 227 and accompanying text.

scribers to disclose credit bureau reports or ratings to anyone else.<sup>239</sup> Just to underline that point, the Mercantile Agency issued its first ratings volume with a lock and key.<sup>240</sup> This had obvious intellectual-property value; the credit bureaus would have had a harder time recouping their investment if the product they were selling could circulate freely to folks who weren't paying subscribers. But more importantly for our purposes, it made it harder for Mercantile Agency data subjects to find out what the company was saying about them. The Mercantile Agency threatened legal liability against subscribers who had disclosed reports to plaintiffs, or who it feared would supply a link of plaintiff's case-in-chief in court.<sup>241</sup> What plaintiffs didn't know—or couldn't prove—couldn't be the basis for suit.

Both for intellectual-property and for lawsuit-prevention purposes, credit bureau secrecy took the firms' communications out of the public domain, into a more restricted, private realm. Lawsuits take place in the light; but these reports were somewhere else. It's worth noting here that nineteenth-century discovery rules were more restrictive than today's.<sup>242</sup>

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239. See REPORTS, *supra* note 50, at 145.

240. See OLEGARIO, *supra* note 12, at 68.

241. See Flandreau & Mesevage, *supra* note 135, at 242-43. I'm aware of only one instance in which the Mercantile Agency actually brought a claim in court against a subscriber for breach of confidentiality; it was a suit for indemnification, in Canadian court, after the firm had lost a libel judgment. See *An Interesting Case*, MANITOBA FREE PRESS (Feb. 10, 1888), at 1; Barry Cohen, *Constructing an Uncertain Economy: Credit Reporting and Credit Rating in the Nineteenth Century United States*, at 754 (Mar. 2012) (Ph.D. dissertation, Northwestern University). I don't know how that case came out. More broadly, though, because the Agency could obtain plaintiffs' witness lists before trial, the threat of liability provided a significant avenue of pressure on subscribers who might testify that they had seen the damning reports. Although the law of trade secrecy was in its infancy in the nineteenth century, as a general matter courts were willing to enforce contractual promises of confidentiality. See *Tode v. Gross*, 28 N.E. 469 (N.Y. 1891); *Cincinnati Bell Foundry Co. v. Dodds*, 1887 Ohio Misc. Lexis 181 (Ohio Super. Ct. 1887); *Peabody v. Norfolk*, 98 Mass. 452 (1868); *Taylor v. Blanchard*, 95 Mass. 370 (1866); *Vickery v. Welch*, 26 Mass. 523 (1837).

242. There were some cases in which defendants were successful in gaining access to ledger entries. For example, in *Raymond v. Russell*, an 1888 credit-bureau defamation suit litigated in Massachusetts courts, plaintiff not only called defendant as a witness, but had him read from the ledger entries on the stand. See *Selah, the Mystic Word: The Raymond-Russell Suit Continued*, BOSTON DAILY GLOBE (Mar. 9, 1888), at 3. In the *Beardsley* case, the record recites that plaintiff notified defendant it would offer parol evidence of the ledger entries if defendant failed to produce them, and defendant did produce the records at trial. See REPORTS, *supra* note 50, at 10-11. More generally, though, there were considerable obstacles for nineteenth-century defamation plaintiffs seeking court-ordered access to credit-bureau ledgers. It was a challenging matter to get any federal-court discovery before the adoption of the Federal Rules of Civil Procedure in 1938. See *Sinclair Refining v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933); see also Stephen N. Subrin, *Fishing Expedition Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-701 (1998). Discovery in state courts was much more limited than today, even where the state had adopted a version of the Field Code of Civil Procedure (first promulgated in New York in 1848). Many state-court judges were highly skeptical about discovery. Thus, the court in *Stalker v. Gaunt*, 12

Restrictions keeping credit-agency reports from public view, thus, were likely to be effective. Many years after the events of this paper, the Supreme Court would suggest that credit reports belong to a private domain set aside from our communal life: they concern no public issue, a plurality of the Justices said, and are unrelated to debate in the public sphere.<sup>243</sup> But the modern Court took for granted that discovery could bring credit reports into the light, so that even private matters could be the subject of litigation. That wasn't entirely so in the days of the Mercantile Agency.

In part for litigation-related reasons, agencies were reluctant to commit the most damning reports to paper at all. Notification sheets and ratings books, rather than including truly damaging information, might instead contain a "call at office" notation, or a blank rating.<sup>244</sup> It was quickly well-understood that such notations indicated that the subject's

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N.Y. Leg. Obs. 132 (N.Y. 1854), warned that plaintiffs requesting production of books and documents from defendants sought a "delicate, and often dangerous source of evidence"; such discovery, too broadly countenanced, it would open "every merchant's accounts, and every man's private papers, to the inspection of the merely curious." *Id.* at 137; *see also* *Wynn v. Taylor*, 109 Ill. 603 (1903); *Davis v. Dunham*, 13 How Pr. 425 (N.Y. Sup. Ct. 1855) (decrying the "dangerous, vexatious and impertinent meddling with the private business and affairs of another" that excessive discovery would bring (quoting *Brevoort v. Warner*, 8 How. 321 (N.Y. Sup. Ct. 1853)). *But see* *Powers v. Elmendorf*, 4 How. Pr. 60 (N.Y. Sup. Ct. 1849) (articulating a more sympathetic view). Pre-Field Code, requests for discovery were made via a bill in equity. Where the parties had no pre-existing relationship, a court would order document production only if the applicant provided detailed support for his position that the specifically-identified document sought was necessary to his case-in-chief and that the relevant evidence could not be obtained any other way. *See* *Wertheim v. Continental Ry. & Trust Co.*, 15 F. 716 (S.D.N.Y. 1883); *Vieller v. Oppenheim*, 31 Abb. N. Cas. 181 (N.Y. 1894); *Condict v. Wood*, 25 N.J.L. 319 (N.J. 1855); *Copper King of Arizona v. Robert*, 74 A. 292 (N.J. Ch. 1909); *Stalker*, 12 N.Y. Leg. Obs. at 132. Even so, the document production might be delayed until the relevant witness was examined at trial, rather than being available before. *See* *Raub v. Van Horn*, 19 A. 704 (Pa. 1890). Post-Field Code cases carried many of these same limitations forward. *See* SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL §§ 757-59, at 603-04 (1889). More saliently, some courts held that document discovery was not available at all in defamation cases, either because of the limitations of (pre-Code) chancery practice or because production would incriminate defendant in a common-law crime. *See* *Noyes v. Thorpe*, 62 A. 787 (N.H. 1906); *Harper v. Pinkston*, 17 S.E. 161 (N.C. 1893); *Opdyke v. Marble*, 18 Abb. Pr. 266 (N.Y. 1864). *But see* *Kraus v. Sentinel Co.*, 23 N.W. 12 (Wisc. 1885). At least one court, finally, held that individual defendants could not be required to produce the books of the corporation that employed them. *See* *Opdyke*, 18 Abb. Pr. 266 at 266. *But see* THOMPSON, *supra*, § 597, at 747 (criticizing that holding).

243. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985). The Court held that it was permissible for a court to allow the award of presumed and punitive damages in a suit over a negligently false credit report, notwithstanding that the jury had not been asked to find "actual malice" as defined in *Gertz v. Robert Welch*, 418 U.S. 323 (1974). The plurality reasoned that the credit report was akin to commercial speech, and that the confidentiality restrictions on its dissemination further disconnected it from core first amendment debate. *Dun & Bradstreet*, 472 U.S. at 761-63.

244. *See* *Carruthers & Cohen*, *supra* note 89, at 19-21.



credit was problematic (and that subscribers could call at the office to learn exactly in what way it was problematic). Because that was so well understood, this technique wasn't hugely effective in shielding credit agencies from liability.<sup>245</sup> Once again, though, it helped keep damning reports from potential plaintiffs' eyes, and on occasion, it provided a route to a trial-court win.<sup>246</sup>

Finally, the credit agencies' avoidance of legal jeopardy in the late nineteenth century was tied up with their development of ratings books in which the agency's entire store of information about a data subject was boiled down, through opaque and undisclosed means, to a single code no more than two or three characters long. What did a ratings code mean? The *absence* of a code might mean something: Plaintiffs were often successful in suing when an agency left their code blank,<sup>247</sup> or replaced it with a "call at office" listing.<sup>248</sup> In those cases, they argued, the omission implied the worst. But an actual code—an "A" or a "B"—was more opaque. What specific underlying facts did it imply? It was hard to say. Could a defamation plaintiff establish that no facts existed that, when fed into defendant's unknown and undisclosed algorithm, could justify the published rating?

I've found no nineteenth-century reported case in which a plaintiff sued on the basis of a negative code in a ratings book—and that's notwithstanding that, under *Sunderlin*, defendant enjoyed no privilege for those communications. In part, such cases were absent or few because credit agencies substituted some form of "call at office," or a blank listing, for the ratings code where its judgment was most negative. In important part, it may have been because a moderately negative code was deemed not libel *per se*, casting on plaintiff the more challenging job of proving special damages flowing from its less-favorable rating.<sup>249</sup>

Beyond that, though, the absence of such cases reflects the way the credit bureaus' output, over time, became an increasingly abstracted and flattened version of the human stories the Mercantile Agency had started with. As ratings began to resemble impenetrable but obscure scientific judgments, it became harder to make them the basis for suit.

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245. Most courts treated the question whether such a notation was defamatory as a jury matter. *See, e.g.,* Erber v. Dun, 12 F. 526, 531 (E.D. Ark. 1882); Codner v. Central Credit Rating Agency, 161 N.W. 657, 657-58 (Iowa 1917); Bradstreet v. Gill, 9 S.W. 753, 755-756 (Tex. 1888); Commonwealth v. Stacey, 8 Phila. 617 (Pa. Quar. Sess. 1871), reprinted in REPORTS, *supra* note 50; Carruthers & Cohen, *supra* note 89, at 21.

246. *See* Denney v. Northwestern Credit Ass'n, 104 P. 769 (Wash. 1909) (because "call at office" notation was not libel *per se*, the complaint was insufficient absent pleading of the names of people who refused credit or custom); Kingsbury v. Bradstreet, 22 N.E. 365 (N.Y. 1889) ("call at office" notation not shown in trial record to be defamatory).

247. *See* Bradstreet v. Gill, 9 S.W. 753 (Tex. 1888).

248. *See supra* notes 243-245 and accompanying text.

249. *See supra* note 236 and accompanying text.

Reducing thick credit narratives to a single ratings code, in short, played multiple functions. First, it made the ratings books possible—and more generally, it made it possible for the Mercantile Agency and its competitors to sell credit information in a convenient, customer-friendly form. If a company bought credit information in this format, it was buying the ability to make credit decisions quickly, cheaply, and thoughtlessly. It was a far cry from a customer's having to visit the Agency office to receive a lengthy and detailed oral report, or even a written narrative report that would have to be digested and evaluated.

Second, it camouflaged the quality of the agency's data. Whether sources were reliable or not, whether information was recent or stale, whether it was thin or detailed—all of that disappeared behind the inscrutable code. Did a ratings agency have the resources to conduct business legitimately? The codes supplied no clue.

Third, the codes' obscurantism helped shield the companies from liability. The Mercantile Agency continued to allow its subscribers access to narrative reports until well into the twentieth century; subscribers who wanted to dig more deeply were not limited to the ratings codes. But the underlying facts were shielded by both secrecy and privilege.

There's an irony here. The Mercantile Agency and its competitors took us all a first step down the road to a realm of Panopticon-like transparency, in which information about us, in our roles as citizens and consumers, came to be widely available and freely sold in the marketplace. But the Mercantile Agency's pursuit of transparency for us was only made possible by its secrecy when it came to its own operations and files. Had the Agency been as transparent to the public eye as it was causing the rest of us to be, it never could have gotten off the ground.

## VI. PRIVILEGE AND PRIVACY, THEN AND NOW

The story of the Mercantile Agency suggests that Americans in the nineteenth century faced the same privacy issues we do today. By virtue of surveillance of their everyday lives, information about them was stored in centralized databases, held by proprietors essentially unaccountable to them, so that they weren't even in a position to find out what their own files revealed. Yet the information was widely sold on the market, easily available to any business willing to pay. Today, we understand that sense of having our identities thrown open to strangers, about that loss of control; those are our issues.

The nineteenth-century credit bureaus' manipulation of their subjects' information, moreover, wasn't harmless. Out of data subjects' view, database proprietors transformed their personal information to ratings; their business fortunes would rise and fall on whether the ratings were good or bad. We know about that as well. Privacy scholars today address the rise of "black box" algorithms—structures in which governments and corporations decide how to treat each of us by collecting huge amounts of

data and processing that data through opaque, unknowable computer algorithms. Computers processing Big Data, we've discovered, can develop ever more powerful ways to learn from and manipulate that data, in ways increasingly resistant to human interrogation and arguably incomprehensible by human minds.<sup>250</sup>

But that too is not really new. The Mercantile Agency and Bradstreet Company ratings codes were products of the nineteenth century's anticipation of the black-box algorithm. Though they were the triggers of (sometimes catastrophic) action, from the point of view of the data subject, they were the result of the agencies' processing unknown facts through an opaque filter. That's part of what made them so difficult to challenge.

Unlike us, Americans in the nineteenth century didn't have the legal tools or language of privacy to frame their concerns. There was no cause of action for privacy invasion.<sup>251</sup> The lawsuits I've canvassed in this paper didn't vindicate privacy harms. They granted relief only to people who had suffered defamation harms—only to people whose reputations had been damaged by false statements, causing them damage in their business dealings.

And yet the courts' responses to the questions raised in those cases resonate in notable ways with modern privacy thinking. Recall Judge Betts's and Justice Nelson's view that the legal system should favor personal communications embedded in an informal realm of trade relationships, not the sale of information as a commodity by new, impersonal, bureaucratized structures. That concern found its echoes in the *Ormsby/Sunderlin* rule focusing on the scope of information dissemination: the courts denied legal protection when the agencies sold their data to entities that did not have some meaningful real-life relationship with the data subject, either existing or planned. Responding to the commodification of information, the law resisted the transformation of information about a data subject into an object of sale wholly disconnected from the subject's relationships in the real world.

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250. This presents tremendous challenges: how can we ensure that such computer-mediated action conforms to norms of anti-discrimination and fairness? See generally, FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); Robert Brauneis & Ellen Goodman, *Algorithmic Transparency for the Smart City*, YALE J. L. & TECH. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3012499](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012499) [<https://perma.cc/QC5S-8HSN>]; Anupam Chandler, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147 (2017); Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For*, DUKE L. & TECH. REV. (forthcoming), <https://ssrn.com/abstract=2972855> [<https://perma.cc/X9R6-SLSF>]; James Grimmelman & Daniel Westreich, *Incomprehensible Discrimination*, 7 CALIF. L. REV. ONLINE 164 (2017); Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 FLA. L. REV. 181 (2017).

251. See *supra* notes 152-156 and accompanying text.

That the nineteenth-century courts' concern with the commodification of personal information foreshadowed modern thought isn't a hard argument to make. But the courts' concern for scope of disclosure finds echoes in with modern thought as well.<sup>252</sup> Contemporary privacy discourse emphasizes that privacy is contextual. "Privacy is not a discrete commodity, possessed absolutely or not at all."<sup>253</sup> Rather, what's most important is the *scope* of dissemination of data about you. A person may share information with her friends that she doesn't want to share with her employer, or with strangers.<sup>254</sup> Helen Nissenbaum thus describes privacy invasions as violations of norms of information flow: they take place when information about a person is distributed without regard to norms emphasizing such values as free choice, confidentiality, need, entitlement and obligation.<sup>255</sup>

That concern was baked deeply into the nineteenth-century case law. Central to those cases was the idea that there are people to whom your personal information can legitimately flow, and others to whom it should not. Whatever the "system of espionage"<sup>256</sup> the credit bureaus put in place, they crossed a legal line when they crossed that line of legitimate information distribution.

Imagine what modern privacy law might look like if those restrictions had taken better hold a century ago. Imagine those concerns remaining powerful as modern privacy law began to develop in the early twentieth century, informing prohibitions on the dissemination of information rather than merely bounding the scope of privilege. It would still be the case that a firm interacting directly with a consumer, and in the course of that interaction collecting information about her, would be able to store that information in a database and rely on it to guide its further transac-

252. To be sure, that concern fit squarely into the existing law of privilege. Moreover, at least one of the concerns expressed in the case law about broad dissemination of information was specific to defamation law; I'm thinking of the fear that damaging errors could circulate widely, with the subject unable to redress them. See, e.g., *supra* note 176 and accompanying text.

253. *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

254. See Julie Cohen, *What is Privacy For?*, 126 HARV. L. REV. 1904, 1908 (2013).

255. See HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 145-46 (2009). For a fascinating early discussion, see Jeffrey Reiman, *Privacy, Intimacy, and Personhood*, 6 Phil. & Pub. Aff. 26 (1976). Norms of information flow, to be sure, can be an unstable source of privacy rules. As Nissenbaum concedes, putting forward existing informational norms as benchmarks for privacy protection can be conservative in harmful ways when those existing norms are not privacy-protective. See NISSENBAUM, *supra*, at 161-64; see also Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 Stan. Tech. L. Rev. 431, 439 (2016) (relying on context-sensitive privacy norms to generate privacy rules comes close to simply asking whether consumers find a practice "creepy"); Michael D. Birnhack, *A Quest for a Theory of Privacy: Context and Control*, 51(4) JURIMETRICS 447 (2011).

256. *Beardsley v. Tappan*, 2 Fed. Cas. 1187, 1187 (C.C.S.D.N.Y. 1867); *Taylor v. Church*, 8 N.Y. 452, 456-57 (1853).

tions with her. But that firm would face hugely greater restrictions in commodifying and alienating that information, in putting it for sale on the open market. The resulting body of privacy law, one can imagine, would have more closely resembled law in the modern European Union, under which a firm may not disseminate personal information beyond the “specified, explicit and legitimate purposes” for which it was collected.<sup>257</sup>

If modern privacy law had grown up taking seriously the concerns of the nineteenth-century case law about dissemination of information to those without legitimate interest, the function of the data broker would itself have been questionable. As Judge Betts asked, do employees of the data broker themselves have “legitimate interest” in learning damaging information about the strangers whose data they store? But assuming the existence of data brokers, an *Ormsby/Sunderlin* style privacy law would have sharply restrained the commodification of information by restricting their transfer of information to persons without a pre-existing relationship with the data subject.<sup>258</sup>

It’s important to bear in mind, though, two very large caveats. The first is that there’s a big jump from the limited scope of the doctrines discussed in this paper, merely marking the boundaries of privilege, and the potentially sharper prohibitions of modern privacy law. Credit-bureau defendants could win cases even when the case law denied them privilege. The legal development that I am imagining here involves carrying nineteenth-century concerns relating to dissemination of information into a body of privacy law that did not develop until decades later.

Second, this imaginative exercise has so far unmoored the nineteenth-century case law from its historical context. The nineteenth-century decisions were handed down in a newly urbanizing world, in one in which the nature of social and industrial organization was changing. The new credit bureaus were the emissaries and the reflection of a new era—one in which information was not carried in the heads of individuals, but instead was maintained and sold by bureaucratically organized private firms each harnessing “a thousand brain workers.”<sup>259</sup>

The nineteenth-century credit bureau case law reflects a broad judicial ambivalence about these new forms of organization and new social relationships. Could legal rules developed for a world in which business firms were individual persons, and their business relationships were embedded in the framework of the social relationships that governed them as individuals, be translated to the new bureaucratic systems of market and

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257. Council Directive 95/46, art. 6(1)(b), on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 (O.J.) (L 281) (EC).

258. To an American reader, it might be almost unthinkable that the law could put such a restraint in place. In fact, though, the law in force in the European Union today incorporates comparable rules. See *supra* note 256 and accompanying text.

259. See *supra* note 72 and accompanying text.

power? Would doing so invite “perversion and abuse”<sup>260</sup> from the new, more powerful business entities? And how should the law respond to the challenges to business trust posed in the anonymous modern city, where social mechanisms no longer worked to restrain fraud and deception?

Judge Betts’s ruling in *Beardsley* can be seen as a pushback against not just the credit bureau, but against the new, bureaucratically organized business firm writ large. It almost reflects a yearning for simpler days of personal relationships. Against that we see Justice Van Syckel’s response, dissenting in *King v. Patterson: the Ormsby/Sunderlin* distinction, he wrote, “answered well enough fifty years ago,” but it was a bad fit for the nature of business in the new modern age.<sup>261</sup>

By the time modern privacy law got off the ground in the twentieth century,<sup>262</sup> that late-nineteenth-century battle over new forms of business organization was done, and judges resistant to the new forms had lost. The legal efforts to restrain the credit bureaus lost the force lent by their initial historical moment. It’s not surprising, perhaps, that they failed to bear more fruit in the twentieth century. In our contemporary data privacy landscape we see no restriction on alienation, no restriction on commodification, no legal incentive to data proprietors to limit dissemination to persons who are “interested.” Quite the contrary, information about you—your purchases, your characteristics, your propensities—is routinely sold by data brokers to entities with no connection to you at all. The concerns of Judge Betts and others have been left behind.

## VII. CONCLUSION

The nineteenth-century credit bureau was a marvel of engineering. It created an early, computer-free, version of the database system, maintaining and updating files—in the case of the Mercantile Agency—on well over a million people by 1890. Essaying to reduce the thick narratives in individual files to quick opaque ratings, it struggled with issues that still challenge us. And it gave rise to privacy concerns closely paralleling the ones we face today.

Notwithstanding widespread concern about the new credit bureau privacy threat, the lawyers and judges of the period didn’t have the vocabulary or the tools to articulate privacy-related legal claims. Instead, privacy issues ending up finding their way into the law of credit bureaus only in the context of defamation lawsuits. The defamation case law of the period displays apprehension about the commoditization of information, and about the untrammelled distribution of information about individuals, that resonates with modern privacy thinking. In the end, though—much like the law of today, perhaps—it didn’t meaningfully address the privacy challenges the credit bureaus posed.

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260. See *supra* note 192 and accompanying text.

261. See *supra* notes 227 and accompanying text.

262. See *supra* notes 152-156 and accompanying text.

